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**EXAMINING THE EFFECTIVENESS OF PROTECTION ORDERS AS PROVIDED  
FOR IN THE PREVENTION OF DOMESTIC VIOLENCE ACT (NO. 5 of 2006) IN  
MALAWI - A CASE STUDY OF BLANTYRE DISTRICT**

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**BY**

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in Women's Law, Southern and Eastern African Regional Centre for Women's Law,  
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## **ABSTRACT**

Malawi passed the Prevention of Domestic Violence Act (PDVA) in 2006 with the objective of eliminating domestic violence and providing effective legal remedies to victims of domestic violence. One of the remedies provided for in the Act is protection orders. Although the law is available for use by victims, they have found that accessing and enforcing it have proved to be challenging. As a result of the interlocking oppressions that they face, women have had problems utilising the law to their benefit. The objective of this study was to examine whether protection orders are affective remedies to protect victims of domestic violence. The study was carried out in Blantyre, Malawi. The methodological framework was informed by the understanding that experiences of victims of domestic violence exist in society where structures that enforce the available law are highly patriarchal. The grounded women's law, dung beetle and human rights based approaches were employed to highlight the lived realities of women. The research revealed that due to women's lack of knowledge of the existence of the law, their economic dependence on their male partners who are the perpetrators of domestic violence, the legal plurality of the Malawi legal system, the lack of training for service providers and the lack of enforcement mechanisms act together to impede the effectiveness of protection orders. Finally, action points have been suggested to help make protection orders work more effectively which include sensitization meetings, training of service providers, women empowerment programmes, provision of enforcement mechanisms, counselling, community committees and use of mediation.

## **Declaration**

I declare that this research paper, 'Examining the effectiveness of Protection Orders as provided for in the Prevention of Domestic Violence Act (No. 5 Of 2006) - A case study of Blantyre District' is my own work and it has not been submitted to any other higher learning institution for the award of certificates or any other form of assessment.

Signed:.....

Thokozani Agnes Nyirenda

Date 11-04-14

***Dedication***

*To Marie-Jose Ucindami and Marceline Thandaza Patemba,  
WISHING YOU A GLORIOUS FUTURE!!!*

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To God, I experienced your faithfulness and Grace. To You be all the Honour and Glory!

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## **Abbreviations**

AIDS	Acquired Immune Deficiency Syndrome
ARV	Anti-retroviral
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
MDG	Millennium Development Goal
MK	Malawi Kwacha
NGO	Non-Governmental Organization
PDVA	Prevention of Domestic Violence Act
US\$	American Dollar
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
VSU	Victim Support Unit
WLSA	Women and Law in Southern Africa

## **List of international treaties**

African Charter on Human and Peoples' Rights (African Charter), 27 June 1981, CAB/ LEG / 67/3. Rev. 5, 211. L.M 58 (1982), Adopted in Banjul, The Gambia

Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW), December 18 1979, 1249 U.N.T.S 13

International Covenant on Civil and Political Rights

Millennium Development Goals

SADC Protocol on Gender and Development

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women's Protocol), (2003/2005)

Universal Declaration of Human Rights (1948)

## **List of declarations**

Beijing Declaration and Platform for Action of the Fourth World Conference on Women adopted in Beijing, China, 1995

Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N.GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993)

Solemn Declaration on Gender Equality in Africa

## **List of national legislation**

The Malawi Constitution, 2004

The Prevention of Domestic Violence Act (No.5 of 2006)

Gender Equality Act, 2012

## **List of national policies**

National Gender Policy

## **List of cases**

*De Souza Ribeiro v France* (Application No. 22689/07) (Eur.Ct. H.R. December 13 2012)

*A.T. v Hungary* (Communication No2/2003) views adopted 26 January 2005, Report of the Committee on the Elimination of Discrimination against Women, GAOR, sixtieth session, suppl.no.38(A/60/38), pp. 27-39

*Goekce v Austria* Communication No 5/ 2005/UN DOC, CEDAW,C/39/D/5/2005

*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2004 (2) BCLR 133 (SCA)

*Dawood and another v Minister of Home Affairs* (CCT35/99) [2000] ZACC8

*S and K Steel Furniture Company Ltd v Attorney General (Ministry of Education) and another* [2004] MLR 305 (HC)



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## **Executive summary**

This paper summarizes the findings of research that took place in Blantyre, Malawi, whose objective was to examine the effectiveness of protection orders as provided for by the Prevention of Domestic Violence Act (No.5 of 2006) known as the PDVA. Different research methodological approaches and data collection methods were used for gathering the data and the paper includes:

1. **A review of the literature** on concepts like domestic violence, protection orders, and effective remedies that draws out the key debates and highlights the causes of domestic violence against women as a male dominance problem is discussed. Different feminist theories that are relevant to domestic violence against women were analysed.
2. **A review of the relevant Malawian legislation and policies** that highlights progress on the fight to eliminate domestic violence against women and which recognises domestic violence as a violation of human right was analysed. The findings from the review of the legislation which include the Constitution reveal that domestic violence against women is a violation of human rights of women. The international obligation that the government has in promoting, respecting and fulfilling human rights seems to be compromised in as far as protecting human rights of women who are victims of domestic violence is concerned.
3. **A summary of the findings from the study** with victims of domestic violence, key informants and community members was collected between the months of October 2013 to February 2014 and analysis of the said data was an ongoing process. The findings indicate that in as much as there is legislation which includes the Constitution, the Prevention of Domestic Violence Act 2006 (PDVA), the Gender Equality Act, accessibility of the available laws and implementation of the same is a big challenge to victims of domestic violence. Not much progress has been made in eliminating domestic violence against women and the enforcement of provisions in the Act especially the offering of an legal effective remedy to victims of domestic violence is yet to be achieved. On the whole, however, findings revealed that due to

lack of knowledge about the existing laws on the prevention of domestic violence women do not make use of the laws to in order to protect themselves from abuse. Due to the existence of the plurality of legal systems in Malawi and other normative orders women are compelled to use the *ankhoswe* (marriage advocates) to resolve violence in marriages. However this system has not benefited them much because the structures are patriarchal in nature and reinforces women oppression. Lack of training by service providers has hampered the effectiveness of protection orders as service providers lack the capacity to enforce the law. Due to cultural conditioning of abuse, victims, perpetrators and service providers have trivialized abuse which has discouraged victims from reporting abuse to the police. Women fear losing economic support from the perpetrators once they report abuse and as a result they have preferred to suffer in silence. Lack of enforcement mechanisms as provided for by the Act has contributed to the ineffectiveness of the law. Women who managed to get protection orders have had difficulties enforcing them due to the lack of enforcement officers. Women are not a homogenous group. The multiple intersectionalities which impact upon women which include their education levels, economic status, geographical position, class and age, have all had an effect on the effectiveness or otherwise of the law. The findings also reveal the importance of the multi-sectoral approach in trying to make the law work effectively for victims of domestic violence.

These areas are synthesized to draw out key lessons of relevance to key stakeholders in the justice system, law reform institutions and policy makers to enable them to critically consider how best victims of domestic violence can effectively benefit from the laws and policies that are in place.

The paper therefore suggests action points which include:

- (1) Sensitization campaigns on the available laws aimed at all Malawian citizens and service providers.
- (2) Tailor-made training for all service providers.
- (3) Availability of enforcement officers to ensure compliance with court orders and the Act.
- (4) Provision of counselling structures and personnel that are neutral to provide services to victims and perpetrators.

- (5) Creation of community committees to help women have easy access to remedies in domestic violence especially those in rural areas who may have problems accessing the courts.
- (6) Make use of mediation to provide an environment which allows parties to settle their disputes.
- (7) The paper has also shown areas for further research which might be undertaken in the future.

The paper is accompanied by a sample of a protection order form and sample of a granted protection order.

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## **CHAPTER ONE**

### **1.0 INTRODUCTION AND BACKGROUND TO THE STUDY**

#### **1.1 Introduction**

Malawi enacted a law to protect victims of domestic violence in December 2006. The aim of the Act as outlined under section 3 ‘is to ensure the commitment of the State to eliminate gender based violence occurring within a domestic relationship and to provide for effective legal remedies and other social services to persons affected by domestic violence.’ Elimination of gender based violence entails that domestic violence is abolished in Malawi and victims of domestic violence are no longer subjected to violence. The second limb of the objective is to provide effective legal remedies and social services to victims of domestic violence. Effective remedy includes the availability, accessibility and enforceability of remedies to ensure the protection of victims. It must be appreciated that Malawi has enacted laws to that effect and in the said laws remedies have been provided for. Such remedies include protection orders, tenancy orders, occupation orders, counselling and alternative dispute resolution. The paper will focus on protection orders as one of the remedies that have been provided for in the Act. The effectiveness of protection orders in terms of accessibility and enforceability is the area under discussion in this paper.

In May 2007, I attended a Judges’ Workshop organized by the Ministry of Women and Child Development then in conjunction with Women and Law in Southern Africa (WLSA) on Domestic Violence Initiatives in Malawi. The objective of the workshop was to sensitize judges on the Prevention of Domestic Violence Act (No. 5 of 2006) which is referred in this paper to as the PDVA. At that time the workshop did not make much sense to me having been used to the idea that wife battering is part and parcel of the marriage package. From my experiential data, women have been raised to persevere in marriage. I have observed that wedding songs, bridal shower messages are all about marriage involving perseverance and marriage problems not being for public consumption. The Prevention of Domestic Violence Act also received a lot of criticism from members of Parliament and the public at large arguing that Malawi is copying western phenomenon. Despite having friends who were going through abuse in their marriages I never advised any of them to make use of the protection orders and yet I had an idea about this law. All these years the PDVA was non-existent to me.



It was not until December 2012 that the subject of domestic violence surfaced in my life and my pastor asked me and three other church elders to help a lady who was experiencing domestic violence in her marriage. The lady reported to the church that she was suffering a great deal of abuse at the hands of her husband. Although she first reported the abuse to church, the church did not help her promptly. In response, she decided to go to court to get a protection order, and by the time we had started discussing the matter she had already obtained a protection order from the court. When she mentioned the protection order, I was taken back to the PDVA. Her story raised my curiosity about whether protection orders actually work to protect victims of domestic violence, its most common victims being women. Looking back at the criticisms against the law, the cultural practice of not discussing marriage problems in public and the cultural conditioning of abuse I became interested in knowing whether the law is actually working for and protecting women. Hence, I settled on the topic of examining the effectiveness of protection orders as provided for in the Prevention of Domestic Violence Act (No. 5 of 2006).

## **1.2 Research problem**

Despite having a law in place to eliminate gender based violence in the domestic arena, women continue to be subjected to domestic violence. The Act has provided for remedies to protect victims of domestic violence from abuse. Such remedies include protection orders, tenancy orders, occupation orders, counselling and alternative dispute resolution. However, the remedies that have been provided for in the Act are hardly brought to the attention of victims of domestic violence. I had opted to do research on protection orders having observed that tenancy orders and occupation orders are also granted within a protection order. Although the law provides for effective legal remedies, access to and the implementation of them remains a challenge for victims of domestic violence. Many victims of domestic violence do not even know that they can get protection orders from the courts, and where some have managed to obtain a court order they have not been effectively enforced. The fact that protection orders are granted to people in intimate relationships and who often live under the same roof, victims have been reluctant to enforce the order against their spouses fearing that the order will separate them further rather than bring them closer together.

### **1.3 Justification for the research**

Since December 2006 when the Act was enacted, the literature that I have come across on domestic violence does not indicate that grounded research has been conducted to determine the extent of the effectiveness of protection orders in the Prevention of Domestic Violence Act. The Women's Legal Resource Centre conducted research in Zomba and Balaka Districts to examine how gender related laws are being implemented by stakeholders but not specifically on the effectiveness of protection orders. The law was enacted to benefit victims of domestic violence. It is imperative that the voices of the victims be heard to evaluate whether the law has improved the legal and social position of victims of domestic violence. The research will also help to give feedback to the stakeholders involved in the law reform process to get an idea of the strengths and weaknesses of the law. Through the research findings service providers, like court personnel and police officers, will receive feedback as to whether as a result of their involvement in enforcing the law victims of domestic violence are actually being assisted. The findings of the research will also bridge the knowledge gap that exists regarding the effectiveness of protection orders.

### **1.4 Study objectives**

The objectives of the study include the following:

1. To examine whether protection orders are an effective remedy for women victims suffering from domestic violence.
2. To examine whether women fail to obtain protection orders for fear of losing their spouse's economic support.
3. To examine whether protection orders treat women as a homogeneous group.
4. To examine whether women are aware that they can obtain protection orders against other forms of abuse apart from physical abuse.
5. To explore whether protection orders should be accompanied by other non-legal remedies in order to make them an effective remedy for victims of domestic violence.

### **1.5 Research assumptions**

1. Protection orders are not an effective remedy for women victims suffering from domestic violence.

2. Women fail to obtain protection orders for fear of losing their spouse's economic support.
3. Protection orders treat women as a homogeneous group.
4. Women are not aware that they can obtain protection orders against other forms of abuse apart from physical abuse.
5. In order to make protection orders an effective remedy for victims of domestic violence they must be accompanied by other non-legal remedies.

### **1.6 Research questions**

1. Are protection orders an effective remedy for women victims suffering from domestic violence?
2. Do women fail to obtain protection orders for fear of losing their spouse's economic support?
3. Do protection orders treat women as a homogeneous group?
4. Are women aware that they can obtain protection orders against other forms of abuse apart from physical abuse?
5. In order to make protection orders an effective remedy for victims of domestic violence do they need to be accompanied by other non-legal remedies?

### **1.7 Outline of chapters**

The paper contains five chapters. The first chapter outlines the introduction to the study and the basis of the research. It discusses the research problem, the justification for the research and the objectives of the study. It also outlines the study's assumptions and research questions. The second chapter covers the conceptual and theoretical framework where an overview of domestic violence, protection orders and the meaning of the right to an effective remedy are discussed. The chapter continues to discuss the feminist theories that apply to domestic violence. It also discusses the national legislation on domestic violence which includes an analysis of the Constitution, the Prevention of Domestic Violence Act, the Gender Equality Act and the available national gender policy. In the third chapter there is a discussion of the methodological approaches that informed the research and methods of data collection. The findings of the research are discussed in the fourth chapter. The last chapter discusses the recommendations and final conclusion of the paper.

## **1.8 Conclusion**

The above chapter has laid down the foundation of the research. It has outlined the research problem, the justification for the research, the objectives of the research, the assumptions and research questions. The next chapter will analyse the conceptual and theoretical framework and national legislation that is available on the subject matter.

## **CHAPTER TWO**

### **2.0 CONCEPTUAL AND THEORETICAL FRAMEWORK**

#### **2.1 Introduction**

This chapter will interrogate the main concepts that underlie the discussion of this paper. It will discuss the concepts like domestic violence, protection orders and effective remedy and I will also discuss the feminist theories that are relevant to the topic of domestic violence. The chapter will also examine the national legislation and policies that are in existence in Malawi in the spirit of eliminating gender based violence taking place within the domestic relationship.

#### **2.2 Conceptual framework**

There are some concepts which are crucial and need to be discussed on the subject of the effectiveness of protection orders.

##### ***2.2.1 Overview of domestic violence***

Protection orders emanate from the fact that there is domestic violence. They were introduced to curb and prevent further abuse in intimate relationships; hence, it is paramount that I discuss the subject of domestic violence. There is a great deal of literature on domestic violence. Gender based violence has been defined differently from domestic violence. The main difference is that the former encompasses both private and public violence while the latter is restricted to the private arena. However the effect they both have on victims is the same. Gender based violence has been defined as:

‘all acts perpetrated against women, men, girls and boys on the basis of their sex which cause or could cause them physical, sexual, psychological, emotional or economic harm, including the threat to take such acts, or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed or other forms of conflict.’<sup>1</sup>

Domestic violence has been defined in different ways. Domestic violence is a complex pattern of behaviours that may include, in addition to physical acts of violence, sexual abuse

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<sup>1</sup> Article 2 of the SADC Protocol.

and emotional abuse ([Hegarty, et al., 2000](#)). The PDVA has defined domestic violence in its own way:

‘Domestic violence means any criminal offence arising out of physical, sexual, emotional, or psychological, social, economic or financial abuse committed by a person against another person within a domestic relationship.’<sup>2</sup>

While other definitions are wide and include any other forms of personal relationship, including past relationships (WLSA Swaziland, 2001), Malawi has restricted its definition to subsisting domestic relationships.<sup>3</sup> Therefore, sadly women who are abused by their former spouses cannot invoke the protection of PDVA although such cases are not uncommon in Malawi. For example, one female victim, M., said:

‘I divorced my husband and moved out of the house because of the abuse that he had put me through, but he still comes to my house against my will. He sometimes comes into the shower forcing me to have sex with him and yet he married another wife.’

The Act does not provide protection to people who have divorced their spouses and who continue to suffer abuse at their hands. Faced with such a situation, Magistrate L. said:

‘I sent back a man where his ex-wife was abusing him, threatening that she will kill his new wife and their baby because the Act does not cover him. They are not within a domestic relationship with the perpetrator and I had to refer him to police.’

The most widespread form of gender based violence is physical abuse of a woman by a present or former intimate male partner (Johnson, 2004). The PDVA has, however, closed its eyes to abuse by former partners. Unlike stranger abuse, domestic violence is not a once off violence, it is repetitive and it escalates if victims seek help from the justice system (Flatters, 2006).

Apart from restricting the definition to a subsisting relationship, the Act has also qualifies the abuse and requires it to be criminal in nature. If the abuse is not criminal the victim cannot

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<sup>2</sup> Section 2(d) of the PDVA.

<sup>3</sup> ‘Domestic relationship’ in relation to domestic violence, means the relationship between persons who are family members and share a household residence or are dependent on each other socially or financially, and includes the relationship where - (a) the applicant and the respondent are husband and wife.

invoke the Act. However, in practice the courts do not refuse to help victims because the nature of the abuse fails to meet the required standard. Having realized this weakness, the Law Commission has, in its review, considered widening the definition by removing from it this criminal aspect.

‘A 2005 study by the World Health Organization (WHO) reported that intimate partner abuse is the most prevalent yet relatively hidden and ignored form of violence in women’s lives’ (Burril, 2010).

Forty-one per cent of women in Malawi experience physical or sexual violence. An estimated 2.4 million children are growing up in violent homes, witnessing domestic violence and experiencing its negative effects (Government of Malawi, 2011). In Malawi, violence against women is also prevalent. Results of the first nationally representative sample focusing on intimate partner violence found an overall prevalence rate of 49% (Pelser *et al.*, 2005). While there is a high rate of abuse the reporting of it is not high. Women fear reporting abuse because of the disgrace that they may suffer as a result. Some are discouraged by family members and friends who say that marriage issues are not for public consumption.

Violence against women is recognised in the United Nations Declaration on the Elimination of Violence<sup>4</sup> as a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. Historically women were regarded as minors and deserved chastisement or discipline to correct them (Copelon, 1994). Due to the state’s policies of non-interference and non-intervention in family matters this situation led to widespread domestic violence because the state structures encourage, tolerate, or consistently fail to remedy it (Burril, 2010). This is true in the Malawian scenario where state actors sometimes deliberately refuse to provide any remedy to victims of domestic violence on the pretext that it is a family matter and this in turn sends a message to the society that domestic violence is tolerated.

‘The literature written on domestic abuse contains many references to the theory that domestic or partner violence is partially the result of the

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<sup>4</sup> Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N.GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993).

perpetrator's frustration at being unable to 'control' either his life or that of his victim. Control is a core concept in understanding the dynamics of intimate violence' (Tarr, 2003: 160).

One of the reasons why victims of domestic violence fail to leave their abusive relationship is that their lives are controlled by the perpetrator who may instil the fear in them that it would be more dangerous for them to leave than to continue staying with the abuser (Tarr, 2003).

Domestic violence is a violation of one's human right to dignity,<sup>5</sup> right to non-discrimination,<sup>6</sup> right to economic activity,<sup>7</sup> and right to be protected from cruelty and exploitation.<sup>8</sup> One victim said that she was being beaten and pulled in the corridor by her husband in the presence of her children. While another respondent said that her husband was throwing her clothes outside the house. Such behaviour by the perpetrator towards the victim is humiliating and violates the dignity of the victim. Discrimination against women has been condemned internationally, regionally and nationally. In the case of *De Souza Ribeiro v France*<sup>9</sup> it affirmed the fundamental principle that 'non-discrimination and the right of equality are *jus cogens* applicable to all. Women are being abused on the basis of their sex and yet the Constitution prohibits discrimination on the basis of sex.'

Domestic violence affects one's self esteem such that women who are abused by their partners do not value their worth as human beings. Many women fail to take part in community development projects as they lack the confidence to face the outside world and this may be often be due to the fact that their abusive male partners control and restrict what they as their victims are permitted to do. One respondent I found at Blantyre VSU said that her husband had denied her the right to engage in economic activity and yet he did not provide for her and the children. Domestic violence affects other rights that one is supposed to enjoy like the right to own property,<sup>10</sup> to freedom of association,<sup>11</sup> to liberty,<sup>12</sup> to development<sup>13</sup> and event the right to life<sup>14</sup> as some victims have died at the hands of their

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<sup>5</sup> Section 19 of the Malawi Constitution.

<sup>6</sup> Section 20 of the Malawi Constitution.

<sup>7</sup> Section 29 of the Malawi Constitution.

<sup>8</sup> Section 22(2) of the Malawi Constitution.

<sup>9</sup> Application No. 22689/07 (Eur.Ct. H.R. December 13 2012).

<sup>10</sup> Section 28 of the Malawi Constitution.

<sup>11</sup> Section 32 of the Malawi Constitution.

<sup>12</sup> Section 18 of the Malawi Constitution.

<sup>13</sup> Section 30 of the Malawi Constitution.

<sup>14</sup> Section 16 of the Malawi Constitution.



intimate partners. Despite all this, however, the effects of domestic violence on the lives of women have not been taken seriously by either our society or our government who should ensure it is eliminated as provided for in the PDVA.

### **2.2.2 Overview of protection orders**

Protection orders are legal interventions designed to reduce the risk of future threats or harm by a person who is determined to pose a threat to another (Benitez *et al.*, 2010). The efficacy of protection orders has been criticized by a good number of scholars. One of the authors is Magorokosho who assessed the efficacy of protection orders in Zimbabwe in 2010. However the author did not apply her mind to whether victims of domestic violence failed to make use of protection orders for fear of being ostracized by family members. Neither did the author discuss the possibility that women victims might fail to obtain protection orders because of the interlocking oppressions under which they labour, including those arising out of issues such as marital status, class, geographical area, education, etc. The author did not examine whether victims use protection orders against physical as opposed to any other form of abuse. Another author is Artz (2005) who discussed the bridges and barriers in connexion with Domestic Violence Act in the Republic of South Africa. Her analysis focused on the purpose of the provisions in the Act, how the Act intended to work and the day to day operation of the law in the criminal justice system after five years of its operation. Her paper outlined the challenges that the Act has faced and the use of protection orders. While her findings are similar to those emanating from this study concerning the use of protection orders, the intricacies of the challenges that victims of domestic violence face in Malawi are different from those of the South African scenario, and therefore some of her findings may not apply to victims of domestic violence in Malawi. Therefore there was a need to conduct research to obtain data from the lived realities of women in Malawi. In other words that knowledge gap in the Malawi context made it imperative for scholarly literature to be made available on the effectiveness of protection orders.

The legal pluralism that governs many women in Malawi has also affected the implementation of the law. There are many factors that hamper the effectiveness of protection orders in Malawi. For example, the form that one completes is in English. For the majority of women who do not understand English this might be a hindrance to them. The accessibility of the forms in terms of costs is yet another challenge to victims. The magistrates and court clerk at Chief Resident Magistrates Court said that a person has to pay MK500 (US\$1.10) for

court fees and MK700 (US\$1.54) for the service of a court document. Many victims are failing to pay for such court and service fees.

As a result of the failure of victims to pay court fees, court clerks have resorted to assisting poor women to process court documents without payment of court fees as required by the law under section 32(1) of the Courts Act.

A protection order is an interim order<sup>15</sup> and does not specify the date on which it will expire. It is valid until it is discharged.<sup>16</sup> In practice magistrates have been granting protection orders for 14 day periods although the law does not provide for such orders. The order is supposed to be open-ended until it is varied or vacated.<sup>17</sup> The law provides for a period of 14 days for tenancy and occupation orders but not for protection orders. Until I conducted this research I had also been under the impression that a protection order subsisted for 14 days. The fact is that there is a lack of interest on the part of many of us (i.e., judicial officers) to read and understand what the law actually says.

Despite this however protection orders do help to protect women in the sense that they are instant remedies that victims get from the court.

Protection orders also empower victims of domestic violence since they shift the power dynamics of control from the perpetrator to the victim.

‘Psychological research indicates that one of the most significant benefits of seeking and obtaining an protection order is that the woman feels empowered because she has successfully initiated the action’ (Tarr, 2003: 159).

If problems on the use of protection orders are addressed, as suggested in chapter five, protection orders might be an effective tool by means of which women may be empowered to triumph over male dominance in their lives.

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<sup>15</sup> Section 6(2) of the PDVA.

<sup>16</sup> Section 6(4) and (5) of the PDVA.

<sup>17</sup> Section 10 of the PDVA.

### 2.2.3 Overview of effective remedy

For women to enjoy their rights there must be a way of enforcing the same when there is violation of the right. There must be a remedy which is accessible and the remedy must effectively address the violation. The Malawi Constitution provides that every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law.<sup>18</sup> ‘Effective remedy’ has been defined to include the accessibility of the remedy,<sup>19</sup> i.e., access to the courts, access to legal aid, availability of remedies at the courts and in the laws, knowledge about the existing laws and enforcement of the laws, training of service providers to effectively implement the laws, availability of resources to protect, fulfil and uphold the laws. The case at present is that a protection order does not offer an effective remedy to victims of domestic violence because many of the abovementioned elements which are required in order to make it an effective remedy are lacking or not adequately satisfied. This provision of the Constitution has to be interrogated in relation to protection orders in order to determine whether victims of domestic violence are accessing an effective remedy as provided for by the Constitution.

The remedy should be enforceable. If the remedy cannot be enforced it does not help to put the applicant in the position that she was in before her right was violated.<sup>20</sup> Lack of enforcement officers has rendered the right to an effective remedy in cases of domestic violence a sham. The fate of the affected individual must be monitored by government machinery.<sup>21</sup> The right to an effective remedy entails monitoring every step that the applicant takes to enforce her right to the very end where one has successfully been assisted. Another element is whether the remedy is affordable to women. The court fees that applicants are required to pay obstruct many victims, especially rural women, from accessing the remedy that has been provided for in the PDVA.

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<sup>18</sup> Section 41(3).

<sup>19</sup> *De Souza Ribeiro v France* (Application No. 22689/07) (Eur.Ct. H.R. December 13 2012).

<sup>20</sup> *S and K Steel Furniture Company Ltd v Attorney-General (Ministry of Education) and another* [2004] MLR 305 (HC).

<sup>21</sup> *De Souza Ribeiro v France* (Application No. 22689/07) (Eur.Ct. H.R. December 13 2012).

## **2.3 Feminist theoretical framework**

From a feminist perspective, domestic violence is about male dominance and control over women. Men use violence to oppress women and I will examine some of the feminist theories that interrogate women's oppression in the domestic sphere.

### ***2.3.1 Liberal feminist theory***

The coming into force of the Prevention of Domestic Violence Act is informed by the liberal feminists who advocate for equality between men and women in all spheres of life through law reform. Liberal feminism insists on law reform to bring equality between men and women. They 'focus on changing the public rather than the private realm' (Saulnier, 2000) and yet most abuse against women takes place in the private sphere. Liberal feminists contend that the law should apply equally without distinction to all people in society and this is to be done without regard to the similarities or differences which people have (Tong, 1989). This argument however does not consider that women and men are different and does not consider that law is male (Barnett, 1998). Liberal theory also fails to address how equality can be achieved, especially considering the fact that the structures and actors that have been entrusted with the obligation of using the law to protect women from abuse are themselves highly patriarchal in nature. In other words, the men who entrust themselves to protect women through the law are, ironically, the very same men who abuse those women in private. In other words, it is naïve to expect men who abuse women in private to act as their protectors in public. Substantive equality cannot be achieved unless society's structures are transformed. This calls for positive intervention by the government in order to ensure that vulnerable members of society, in this case women, enjoy their fair share of equality. Equality should go beyond legislation. Liberal theory has not achieved much in bringing about equality between men and women, especially in protecting women from domestic abuse.

### ***2.3.2 Radical feminist theory***

Radical feminist theory argues that the law alone is not enough to achieve equality between men and women because the structures that enforce the laws are patriarchal in nature. Some radical feminists hold the view that women's oppression is so entrenched in society particularly in state institutions and they propose a re-structuring of the state institutions so that the rights of women can be realized (Tong, 1989). Formal equality is not enough; it is

substantive equality which must be pursued. This is true especially in domestic violence cases where it has been discovered that although the PDVA has been made law in order to protect women, the fact is it has failed to do so as women face so many obstacles when it comes to enforcing the law. So, while laws are passed to protect women, they have not benefited from such well-intentioned protection. In other words, while formal equality exists on paper between men and women (i.e., female victims may turn to the PDVA for protection against their male abusers) this is not borne out by the lived realities of women on the ground.

### ***2.3.3 Existentialist feminist theory***

The core argument of existentialist feminism is that women are oppressed because they are regarded as the 'other'. They are the other because man is superior to a woman and he is the one who is fit to rule and make decisions. She is defined and differentiated with reference to a man and not herself. Woman is socially constructed in relation to, and inferior to, the superior man (Barnett, 1998). The law and society are gendered. By this de Beauvoir means that the construction of society, of language, thought religion and of the family all rests on the assumption that the world is male (Barnett, 1998). The gender difference is explained almost entirely by male dominance and the subordination of women, a condition which many women unconsciously also support. Domestic violence has been accepted by many women because the patriarchal society has validated it. So, for example, women in a group discussion at Chileka said that at if a wife is not beaten by her spouse it means he does not love her. So, while wife battering is demeaning to women, it is the case that both women and the society in which they live have authenticated it.

### ***2.3.4 Relational feminist theory***

According to relational feminist theory women's lives are relational rather than autonomous. They value relationships and will do anything to protect their relationships (West, 1987). For example, women often remain in abusive relationships not only to please their relatives but also to protect their children who would suffer, usually economically, if they left their spouses. One of the respondents who went through abuse in her marriage but could not leave her husband because she was not earning much to support her relatives said:

'I was forced to stay with an abusive husband because my parents were economically benefiting from him and they were afraid that if I leave the man he will not continue supporting them anymore so I had no choice but to stay for their sake.' (However, when she could not take it anymore she left.)

Women would rather withdraw cases of domestic violence to avoid damaging their relationships with family members. The legal aid lawyer whom I interviewed said that after getting a protection order for one of the victims of domestic violence they failed to enforce it against the abuser because apparently family members of the victim had advised against it. She forgot about all the pain that she underwent for the sole purpose of staying a member of the family.

### **2.3.5 *Dominance theory***

Male dominance over women combined with abuse is one way of wielding control over women. Control is essential to understanding the dynamics of intimate violence (Tarr, 2003) in that some women fail to leave abusive relationships because their perpetrator is in control of their lives. Patriarchy defines what amounts to violence which means that women do not see emotional or economical abuse as being worth reporting to the police. Most women said that they can live with other forms of abuse because patriarchy has trivialized them.

The literature written on domestic abuse contains many references to the theory that domestic or partner violence is partially the result of the perpetrator's frustration at being unable to 'control' either his life or that of his victim (Tarr, 2003: 160).

The issue in domestic violence is about power, control and dominance of males over females. That is one of the reasons why many victims of domestic violence are women.

### **2.3.6 *Africana feminism theory***

This theory challenges the relevance and applicability of western feminism to Africa. It questions whether protection orders can work effectively for women in Africa. When the PDVA was enacted it received a lot of criticism because the public questioned the efficacy of the law and its relevance in the Malawian context. Africana feminism advocates for anti-essentialism, where issues of class, race, etc., ought to be interrogated. Women are not a homogenous group. Protection orders are not a one-size-fits-all remedy. The interlocking oppressions of different victims of domestic violence have to be considered. This also brings in the issues of universality of human rights and cultural relativism. Universal acceptance of human rights does not mean they have to be applied uniformly worldwide (Banda, 2003). In

as much as protection orders intend to promote the human rights for women, they should be contextualised in order for them to be effective.

The feminist theories discussed above have provided a theoretical framework for the findings that will be discussed in chapter four. It will be shown that the findings of the study are linked to the theories and will help to explain why protection orders might not be effective in their protection of victims of domestic violence. It will be discussed through the findings that the feminist theories have indeed impacted on the implementation of the laws in as far as victims of domestic violence are concerned. It will reveal the challenges women are facing when they try to implement the law in a patriarchal society.

## **2.4 National legislation framework**

It is important that the provisions of the national law be examined before resorting to any other law on the subject. The first point of call was the Constitution.

### **2.4.1 *The Constitution***

The Malawi Constitution has provisions which provide for non-discrimination, equality, human dignity and it also provides for the condemnation of domestic violence. I will examine each provision in detail.

#### **(a) Section 13(a) - Gender equality**

The provision provides for gender equality<sup>22</sup> under the principles of national policy. The section advocates for the implementation of the principle of non-discrimination and the implementation of policies that address domestic violence. Although this provision may not be enforced by victims of domestic violence because it is not a right per se, the courts have been encouraged to have regard to principles of national policy when interpreting the Constitution.<sup>23</sup> From the reading of this provision one can interpret that the intention of

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<sup>22</sup> The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals -

- (a) Gender Equality of 2010. To obtain gender equality through -
  - (i) full participation of women in all spheres of Malawian society on the basis of equal opportunities with men;
  - (ii) the implementation of the principles of non-discrimination and such other measures as may be required; and
  - (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.

<sup>23</sup> Section 14 of the Malawi Constitution.

Parliament was to do away with domestic violence although the provision is vague as the word ‘addressing’ may mean anything. The provision ought to have come out clearly in condemning domestic violence. However this ambiguity has been addressed by other provisions in the Constitution and shall be discussed later in this paper.

**(b) Section 19 - Right to human dignity**

Domestic violence affects one’s right to human dignity.<sup>24</sup> As a result of domestic violence women are subjected to cruelty and inhuman and degrading treatment. Although the section focuses heavily on the cruelty and the inhuman and degrading treatment inflicted by the state on an individual but not in the private arena, the effect it has on someone’s life is the same. In the case of *Dawood and another v Minister of Home Affairs*<sup>25</sup> the court held that:

‘Dignity is the basis of all other human rights. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.’

If women are exposed to personal suffering and indignity such treatment amounts to a violation of their human dignity. It is interesting to note that while men may desire to be protected from degrading treatment in public, women experience such treatment and worse in private because domestic violence is repetitive and is committed by people who are close to and claim to be in love with them. The protection of the right to human dignity should not apply solely in the public sphere because one does not cease to be a human being simply by being in or moving into the private arena. Depending on its severity and the circumstances giving rise to state responsibility, domestic violence constitutes torture or cruel or inhuman and degrading treatment under the ICCPR (Banda, 2005). Domestic violence should be frowned upon by society just like torture because its effects are devastating for the women who suffer its consequences.

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<sup>24</sup> (1) The dignity of all persons shall be inviolable.  
(2) In any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.  
(3) No person shall be subject to torture of any kind or to cruel, inhuman or degrading treatment or punishment.

<sup>25</sup> (CCT 35/99) [2000] ZACC 8, para 35.



**(c) Section 20 – Non-discrimination**

The right to equality and non-discrimination have been guaranteed in the Constitution.<sup>26</sup> The section prohibits discrimination among other things on the basis of sex. Non-discrimination is at the heart of CEDAW and other international human rights instruments.<sup>27</sup> This was echoed in the case of *Goekce v Austria*:<sup>28</sup>

‘Discrimination under the Convention is not restricted to action by or on behalf of the Government and under general international law and specific human rights covenants states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation.’

Women’s oppression has resulted from discrimination. They are subjected to domestic violence because of their gender. This provision calls for equality between men and women in all spheres and effective protection should be guaranteed to all victims of domestic violence regardless of their status. However implementation of this provision is yet to be fully carried out.

**(d) Section 22 - Right to family**

The family has been guaranteed protection by the state and the society and no member of the family should be subjected to cruelty and exploitation. Although all family members have a Constitutional right to be protected from abuse, women, however, are not fully protected by the state and society in the same way as men in so far as domestic violence is concerned. Women are subjected to cruelty and exploitation by their male partners within the family where they are supposed to be protected. The government machinery reinforces cruelty by failing to help victims of domestic violence.

‘Often police and judges have refused to intervene, treated the situation lightly, or acted as if the batterer and the victim were equally responsible, thus sending signals of legitimization to the abuser or blame to the victim...[T]he

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<sup>26</sup> (1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.

<sup>27</sup> Article 2 of UDHR. Article 2 of ICCPR.

<sup>28</sup> Communication No 5 /2005 views adopted 6 August 2007, Report of the Committee on the Elimination of Discrimination against Women, GAOR, sixty second session, suppl. No. 38 (A/62/38), pp. 433-454.

criminal justice system was designed when domestic violence was considered off limits to state intervention.<sup>29</sup>

Society has also legitimized domestic violence. The *ankhoswe* way of resolving disputes trivializes the abuse that women go through.

**(e) Section 24 - Rights of women**

Women have equal protection under the law and should not be discriminated against on the basis of gender; they have the right to acquire property, to associate with others freely and legislation should be passed to eliminate practices that discriminate against women like violence, harassment and sexual abuse. This provision acknowledges that violence discriminates against women. Women should therefore be protected by the law from domestic violence as provided in the Constitution. There is a need to move from formal equality to substantive equality.

**(f) Section 37 - Access to information**

The Constitution provides for access to information held by the government or its organs by all. This right is crucial to victims of domestic violence as it will be shown in chapter four how the lack of information by victims of domestic violence has affected them in their search of justice. Many women are not aware about the existing laws that can provide them with protection against abuse.

**(g) Section 41(3) - Right to effective remedy**

The right to an effective remedy by a court of law has been guaranteed in the Constitution. It entails access to available remedies and due diligence in protecting victims of domestic violence by non-state actors, a subject discussed in the case of *A.T. v Hungary*.<sup>30</sup> Victims of domestic violence in Malawi ought to enjoy this right as well. The question which arises is whether victims are accessing protection orders and whether they are being effectively implemented so as to benefit victims of domestic violence.

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<sup>29</sup> 'Developments- Domestic Violence' (1993) 106 part 2 Harvard Law Review 1498 at 1552.

<sup>30</sup> (Communication No 2/2003) views adopted 26 January 2005, Report of the Committee on the Elimination of Discrimination against Women, GAOR, sixtieth session, suppl.no.38 (A/60/38), pp. 27-39.

#### **2.4.2 Prevention of Domestic Violence Act (PDVA)**

The coming into force of the PDVA received mixed reactions from the public. While, according to the print media, it was hailed by the women's movement in the country as landmark legislation in the lives of women, men, on the other hand, criticized it as a totally western concept which is out of place in the Malawian context.

‘The purpose of the Act is to ensure the commitment of the State to eliminate gender-based violence occurring within a domestic relationship, and to provide for effective legal remedies and other social services to persons affected by domestic violence.’<sup>31</sup>

The Act protects victims who are in a domestic relationship with their abusive partner. The Act defines domestic relationship in a narrow way.<sup>32</sup> The definition is not inclusive as it omits other victims from the protection of the law. Women and girls who are in a relationship with a man which does not exceed 12 months cannot enforce the PDVA in order to protect them from abuse that they might be facing in the domestic arena. Yet section 20 of the Constitution prohibits discrimination on the basis of ‘other status’ which includes marital status. Although the Act includes a wide range of abuse, in practice, women seek protection orders against physical more than any other form of abuse and this shall be discussed later in this paper.

The Act also requires that the abuse must be of criminal nature.<sup>33</sup> Where the abuse falls short of this qualification the victim is not protected. Malawian law does not criminalize marital rape and yet PDVA recognises sexual abuse as an offence.<sup>34</sup> Therefore, women who are sexually abused by their spouses cannot enforce the Act. One respondent said:

‘My husband sexually abused me and yet he knew he was HIV positive. I was infected and I am now taking ARVs.’

Because marital rape is not an offence it means that if sexual abuse takes place within a domestic setting, the Act will only protect those victims who have suffered sexual abuse which is also of a criminal nature, e.g., rape or defilement. So, e.g., the Act would protect

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<sup>31</sup> Section 3 of the PDVA.

<sup>32</sup> Section 2 of the PDVA.

<sup>33</sup> Section 2 of the PDVA.

<sup>34</sup> Section 2 of the PDVA.

girls who are defiled or raped by the relatives with whom they live but if the wives of those relatives were subjected to the same abuse it would not protect them.

Although the Act requires that victims of domestic violence have access to social services<sup>35</sup> there are no structures in place that offer the kinds of social services that have been outlined in the Act, such as counselling.<sup>36</sup> This has contributed to the ineffectiveness of protection orders because some women might want to have access to social services once they obtain protection orders, such as access to shelters, but such services are not available.

### **2.4.3 Gender Equality Act, 2012**

It was argued earlier that liberal feminist theory influences law reforms to achieve equality and its focus is more on the public than the private arena. The Gender Equality Act is a good example of how attempts are made to achieve this objective. The Act focuses more on achieving equality in the public sphere. It fails to recognise that domestic violence is about male dominance over women and that domestic violence aims at domesticating women further in the private domain so that they fail to perform well in the public sphere. The reasoning is as follows. Once women are subjected to abuse their self-esteem suffers causing them to feel incapable of being a success in the public sphere. My argument is that the personal is political and that once the private sphere has been conquered, in the sense that women and men achieve equality with each other in the home, that equality might also be reflected in the public sphere. The fact that the Gender Equality Act fails to advance women's struggle for equality in the private sphere means that it fails to compliment the PDVA. The Act could have considered the weaknesses of the PDVA and remedied them.

### **2.4.4 National Gender Policy**

The 2000-2005 National Gender Policy expired and the new policy of 2008 is still in draft form although some parts of it are being implemented. The National Gender Policy of 2000-2005 did not have thematic areas on gender based and women empowerment. The draft copy has incorporated such areas. One of the objectives is to orient law enforcers, traditional leaders, religious leaders and the public on laws and policies on gender based violence. Although there is no specific mention of domestic violence, which is the common form of abuse that women face, the policy focuses mainly on gender based violence in the public

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<sup>35</sup> Section 3 of the PDVA.

<sup>36</sup> Section 52 of the PDVA.

sector. Fortunately, gender based violence has a wide meaning and includes violence in the domestic arena.

#### ***2.4.5 The Millennium Development Goals***

The Millennium Development Goals (MDGs) document, which is not legally binding on states, has attained the status of national recognition which is more than can be said of the Human Rights Instruments which Malawi has ratified. The observance it enjoys at national level on development issues is so great that it ranks as a source of authority almost as high as national legislation. MDG 3 covers the areas of gender equality and women empowerment. Although the MDG does not specifically refer to domestic violence as one of the targeted areas of concern, the fact is that human rights instruments have taken cognizance of the fact that domestic violence is an issue of discrimination against women and they call for equality of men and women. The discussion of gender equality and women empowerment cannot be concluded without dealing with issue of domestic violence.

### **2.5 Conclusion**

This chapter has endeavoured to discuss the concepts that underlie the discussion of this paper. It has also discussed relevant legislation which has been made law in an effort to combat domestic violence in Malawi. It has also shown that there are gaps between the laws of Malawi and the standards set out in international human rights instruments. It has also noted that currently Malawi does not have a gender policy. The next chapter will discuss the methodological approaches and methods of data collection that informed this research.

## CHAPTER THREE

### 3.0 THE RESEARCH VOYAGE

#### 3.1 Introduction

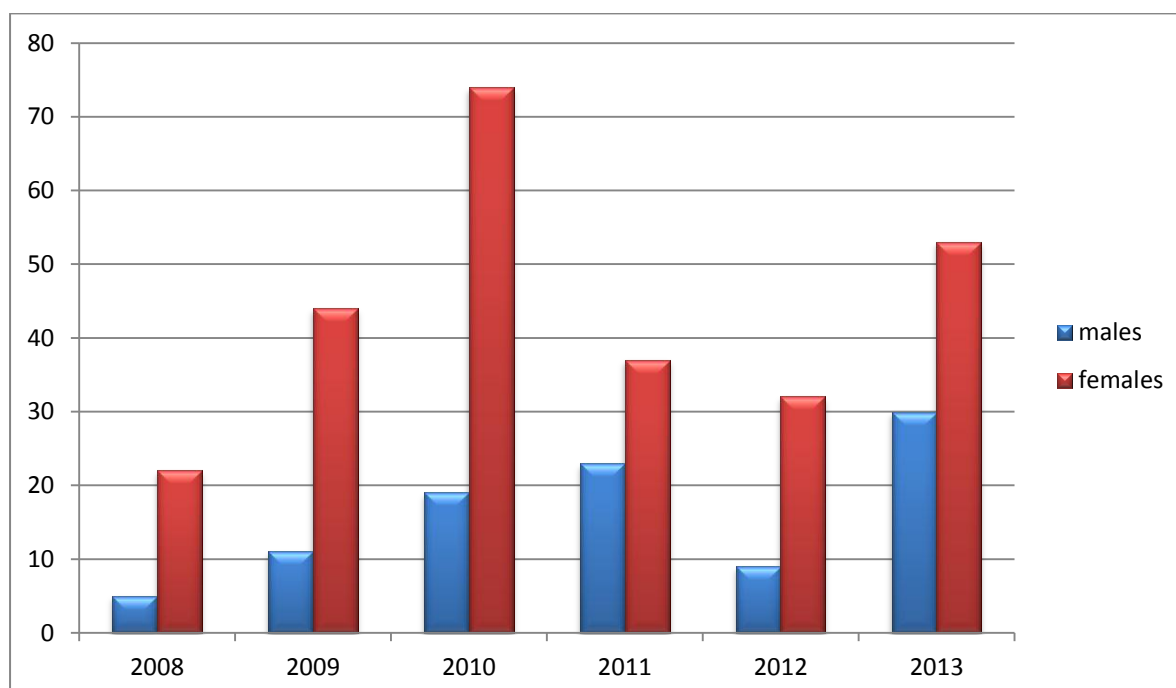
In order to carry out this research a number of methodologies were used to bring out the required information about the lived realities of the victims of domestic violence. This chapter discusses methodological approaches and data collection methods that informed the research.

#### 3.2 Methodological approaches

##### 3.2.1 Women's law approach

Women were my main target of the research due to the nature of my topic. My assumption was that women are more vulnerable to domestic violence than men. This was indeed true as court records revealed that there were more female applicants for protection orders than males, as shown in the table below.

**Figure 1: Gender of applicants for protection orders**



Observing the court register, I noticed that most male applicants were suing fellow men and not their wives. The court clerk made it clear to me that many male applicants were bringing action against their male relatives in cases of family disputes using PDVA because the remedy is an instant one. There were more wives than husbands who applied for protection orders against their spouses.

The methodology I adopted was the women's law approach which involved starting with an examination of the actual women's lived realities. This methodology relies on empirical data which is collected on the ground and which focuses on women's lived realities and experiences and which form the starting point of the analysis of the position of women in law and society (Bentzon *et al.*, 1998). This approach entails identifying the gaps between the law on paper and their application in practice to the lived realities of women. Women's law is a legal discipline which explores the reality of women's lives and from that perspective interrogates and investigates the law (Bentzon *et al.*, 1998). The approach helped me to interact with women in such a way that I could appreciate how data, theory and the lived realities of women were constantly engaging with each other (Bentzon *et al.*, 1998). Through this process I was able to respond to data as it I collected it. For instance one of my assumptions was challenged by the data. Initially I had thought that women fail to get protection orders because they fear being ostracized by family members. As I was collecting data it was discovered that the biggest challenge to women failing to obtain protection orders was that many of them depended on their spouses for economic support and they therefore felt that it was difficult for them to bite the hand that feeds them. Even when it came to payment for court documents they needed money and had to ask their abuser for it. This approach helped me appreciate how the law has not been of much help to women because of other interlocking oppressions under which they live.

This approach also made me realize just how important it is to hear women's as well as men's on issues that affect both of them. Had I not used this approach I might not have considered asking women to find out if the protection orders they obtained were effective. I could have omitted them and simply asked the relevant government officials who may have not had the experience in how the laws were working in the lives of women and I could have ended up drawing a wrong conclusion. I remember having been involved in drafting a certain piece of legislation where we just sat in a hotel and compared the draft copy with other existing pieces of legislation from other jurisdictions and ended up copying the example from

Kenya without involving the parties who were likely to be affected by that piece of legislation.

The women's law approach did not just help me collect data but it also brought illumination in my professional life as to why it is important to start with the lived realities of people if it is the intention of law makers to improve their lives.

### **3.2.2 *The dung beetle approach***

The approach entails a process in which data is collected and then sieved and analysed in line with the study's assumptions. As one does the research, issues arise and one needs to go back to get information on these until a conclusion is reached. Through this process I noted the challenges that women face in using protection orders and this led me to interrogate the actors in the justice system sector in order to determine how they fulfil their role in implementing the PDVA.

‘The dung beetle method...is a grounded research process in which the researcher collects data, sifts and analyses it, considers the implications of her findings, determines what to collect next to meet her needs, and continues the collection and analysis cycle. Through this process new methodologies, perspectives are hatched’ (Bentzon, 1998:18).

Using this approach a new methodology was indeed hatched. I had realized that many women were not aware of protection orders and it was difficult to ask about their effectiveness when they did not even know about their existence. I therefore used the legal literacy method to inform them about protection orders and then asked them if they would use them and in their opinion how effective they could be.

In some instances, victims of domestic violence said that when they report abuse to the police they are not assisted effectively as some of them are sent back to discuss the matter at home; others are forced to withdraw their cases because their perpetrators discuss the matters with the police officers who are often males and they decide between them that the matter be referred to *ankhoswe* (marriage advocates) to resolve their issues because the system favours them; while other victims are ridiculed by police officers who accuse them of having exaggerated the abuse against them because they do not bear the scars that prove that they have been abused. This discourages women from reporting abuse to the police. Even when



they have a court order it is difficult to enforce it against the perpetrator and some women do not know what to do when there is non-compliance with the court order. Taking the dung beetle approach, I then approached the police officers some of whom confirmed that there are indeed times when women are sent back to resolve the matter in the spirit of reconciling the parties. As police officers they are not mandated to dissolve marriages. Some police officers who have not been trained in domestic violence are not sensitive on how to handle victims of domestic violence. Approaching the actors in the court system, they confirmed that the enforcement of court orders is a challenge for many victims. There are no enforcement officers in place as provided for by the Act to ensure compliance with the Act. The NGOs said that the challenge many women face is lack of enforcement officers and lack of economic empowerment for women which has also discouraged many women from invoking protection orders. This approach made me go through the analysis circle. I was then able to analyse the lived realities of women and how the actors and structure impede women's access to justice and the exercise of their human rights. It was also through this process when I had visited one of the actors that I was informed that the review process was a technical one and they were already at the end of the process. It was as a result of applying this process that I was able to change my last assumption which advocated for women involvement in the review process of the Act.

### ***3.2.3 Human rights approach***

This method was employed to examine the compliance of human rights knowing that the spirit of human rights' provisions is to fill the gap in the form of inequalities that exist in today's society. It requires that there be action and grounded realism of the promises that the Malawi government has made to the international community on the protection and respect of human rights for women.

‘This approach looks to fulfil the rights of people, rather than the needs of beneficiaries. There is a critical distinction: A need not fulfilled leads to dissatisfaction. In contrast, a right that is not respected leads to a violation, and its redress or reparation can be legally and legitimately claimed’ (Kanthambi, 2010: 17).

Malawi has signed a number of international treaties which advocate for equality between men and women and non-discrimination of women which includes CEDAW, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, (‘the

Women's Protocol') and the SADC Protocol on Gender and Development (the SADC Protocol). CEDAW requires that state parties should condemn discrimination against women in all its forms and take appropriate measures to eliminate discrimination against women,<sup>37</sup> enact and effectively implement appropriate legislative or regulatory measures and commit itself to modify the social and cultural patterns in view of achieving elimination of harmful cultural and traditional practices which are based on the idea of superiority and inferiority of either sexes.<sup>38</sup> Based on the experiences of women, they continue to suffer from domestic violence at the hands of their partners on the basis of their gender without accessing their right to an effective remedy. This is contrary to section 20 of the Constitution on the right to non-discrimination. The government's obligation is to effectively implement the law it enacted. The obligation entails that the state should promote, protect and fulfil its obligation to allow all citizens to enjoy all their human rights. They create obligations for duty holders to act and enable rights holders to exercise the rights to which they are entitled (Goonesekere, 2000). The government machinery should jealously guard the enjoyment of rights of vulnerable women of their right to dignity and non-discrimination which has persisted over centuries. This approach was instrumental in helping me to analyse the extent to which the government is implementing its obligations under the international instruments it has signed.

#### **3.2.4 Which law to use?**

Malawi justice system is pluralist. It is governed by different legal systems and every functioning society has its own legal system which might be different from that of other societies. Legal pluralism is generally defined as a situation in which two or more legal systems co-exist in the same field (WLSA, 2000). In as much as the law provides for protection orders to protect women in domestic violence, customary law has its own way of resolving family disputes. Customary law advocates for marriage issues to be resolved within the family (WLSA, 2000). Women have been asked to withdraw their complaints from the police and refer them back to the family for the *ankhoswe* to resolve them, unless the dispute involves divorce which is a court matter. In a pluralist society not only are state and customary law under scrutiny but so also are the operations of other normative orders which affect women's access to justice. Both family members and religious leaders have discouraged victims of domestic violence from rushing to court with family disputes or to seek divorce. As a result, women are not sure which law to use as they also desire to receive

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<sup>37</sup> Article 2 of CEDAW.

<sup>38</sup> Article 2 of the Women's Protocol.

approval from both their families and the society in which they live because they want to have a sense of belonging to their society. However at the end of the day many women resort to customary law because that is what governs their everyday lives.

This approach helped me appreciate why protection orders might not effectively work for women in domestic violence because of the multiple systems of law, that is, statute law, customary law and other normative orders, which all affect their lives. Therefore, a remedy provided under the legal centralist theory may not prove to be an effective remedy. It will be shown in chapter four of this paper that victims of domestic violence are having problems in effectively enforcing protection orders as provided under the law. The statute law cannot apply uniformly to all victims of domestic violence as women are not a homogenous group. Using legal centralism will show that focusing on the law alone as final intervention in trying to protect women in domestic violence may not be effective. There is a need to employ a multi-faceted approach.

### **3.3 Methods of data collection**

Different methods of data collection were employed. Each target group had its own method of data collection. One method of data collection was not appropriate as I had a diversity of respondents. Key informants were selected for their involvement in reforming, implementing and enforcing the PDVA. Victims were selected using the court register and the community members were selected based on their availability and were traced through a friend. NGOs were selected based on their involvement in women's issues which focus on gender based violence.

#### ***3.3.1 In-depth interview***

For the key informants like police officers, magistrates and officials from government departments I devised an in-depth interview method to retrieve as much detailed information as possible. It provided me with an opportunity to interview informants in their spaces which gave them an opportunity to speak freely. Below is a photograph of one of the clerks that was interviewed in her office.

**Figure 2: Photograph of a court clerk interviewing a client at the Chief Resident Magistrate’s Court in Blantyre**



It also allowed me to spend quality time with the respondent. This method of data collection was also used for victims of domestic violence who had obtained a protection order. These respondents were very crucial to my study as I was able to get first hand information as to whether protection orders worked for them or not. As such it was vital that I spend quality time with each one of them. This also provided a favourable environment for women to speak because I had found them in their spaces. Most of them kept on saying that it was their first time they had ever talked to anyone about what they had gone through and one respondent kept on crying as she was narrating her story. If victims had been interviewed in a focus group discussion, some of them could have felt embarrassed. For most female victims the study was a healing process.

### ***3.3.2 Focus group discussion***

Focus group discussion was another data collection method that was employed. Two focus group discussions were conducted. One group discussion was conducted in the urban area in the township of Ndirande, as seen from the photograph below.

**Figure 3: Photograph of a focus group discussion in Ndirande township, Blantyre**



In the above group, there were 25 respondents in total and were all females between the ages of 30 to 50 years old. In the first group discussion, some women were very embarrassed when talking about their experiences of domestic violence because there were other women who laughed at them. However there were some courageous women who did not care about comments from other women. To them it was like water under the bridge as they had moved on with their lives.

The second one was conducted in the rural area at Chileka, Traditional Authority Kunthembe in Standi village. There were 43 respondents in total, 28 females and 15 males within between the ages of 30 to 70 years old. This group provided valuable evidence for study as it comprised not only males and females but also four male chiefs. This made the combination of participants with men in positions of power helpful for the study to build up a multi-faceted perceive of the social dynamics and the various versions of local norms and practices (Stewart *et al.*, 1998). The age ranges of the participants' spiced up the discussions because I was able to appreciate the diverse views of different age groups. One interesting

thing about this group was that women were able to argue and challenge the chiefs' views, a practice which is very uncommon in Malawi. Women would usually keep quite out of respect for their chiefs, but this was not the case with the second group discussion. Women were free to air their views which went against the culture that in public it is normally only men who speak.

In neither group discussion did the respondents know about protection orders. However they showed their knowledge about domestic violence. I decided to conduct legal literacy research about protection orders by teaching the respondents about the process of getting protection orders and how they work for victims of domestic violence. After the explanation I inquired from the respondents if they would use protection orders. There was a mixed reaction, especially from the second group discussion, as most people's first reaction was that it was a bad law because many marriages would break up. However after a lengthy discussion and thinking about the matter, some people, especially middle aged women, said they would invoke protection orders to save their lives. On the other hand, middle aged men said they would not use the law for fear of being publicly embarrassed by the fact that they would have to admit that they were being abused by their wife and they said that they would rather marry another wife. The elderly men did not comment much on protection orders but condemned domestic violence in strong terms. This was an eye opener for many respondents and both groups begged me to return to repeat the exercise by conducting a similar legal literacy session on human rights issues.

During this process I was also involved in giving legal advice to one of the participants who had problems with her uncle in a land dispute. I helped her to get a legal aid lawyer who assisted her. This research method was doubly beneficial in that I obtained information which I needed for academic purposes and at the same time I helped women to get legal advice and sensitize them about their rights.

### ***3.3.3 Collective individual interviews***

This method was not planned in my research design, but while I was in the field interviewing the key informants that I had arranged to meet I found that other people joined in. This was common in VSU departments because in all the VSU offices that were visited officers were sharing one office, so it was easy for other officers to join in an interview. This process

enriched the interview as I was able to get information from officers with different experiences in the field of domestic violence.

A total number of 108 respondents were interviewed, 75 females and 33 males as shown from tables below. The tables also show the location where the interviews took place.

**Table 1: Showing the number of respondents interviewed**

CATEGORY	NUMBER OF RESPONDENTS	FEMALE	MALE
Victims	12	10	2
Court Clerks	2	1	1
Magistrates	6	5	1
Law Commission	1	0	1
Practicing Lawyers	3	0	3
Community members	68	53	15
Police officers	7	2	5
NGO's	4	3	1
One Stop Centre	2	0	2
Ministry of Gender	2	1	1
Perpetrator	1	0	1
TOTAL	108	75	33

Unstructured interviews were used to explore not only the issues I had identified but also those beyond them and that additional information was useful and enriched the research. Questions were formulated in an open ended manner to let the respondents talk freely and explain the issues in their own time and in their own words rather than asking them closed questions which would demand simply 'yes' or 'no' answers. Through this approach I was referred to other institutions which were not initially in my research design. This was because respondents were given leeway.

### **3.3.4 Desk research**

Desk research was used to get statistics on the use of protection orders. It was also used to get information from court records and VSU documents. It was through court records that I was able to get the names and contact details of the victims so that I could call them. The court records also revealed that male victims also access protection orders. But the records did not record the nature of abuse so I could not categorize which forms of abuse were prevalent. The same was true with records from the VSU. The categorization of data was a problem.

### **3.3.5 Observations**

This method of data collection was conducted alongside focus group discussions. As I was conducting interviews I also observed the body language of the participants. Using this method I was able to observe from the first group discussion that some women were not free to speak about their family issues in public. After noticing their reticence, I explained to the group the importance of talking about domestic violence in public and told them that it would challenge the cult rural belief that domestic violence is a private matter. I also said that if people talk about domestic violence in public it would receive public attention. After that the women in the group managed to open up and narrated their experiences.

### **3.3.6 Emerging issues**

There were some emerging issues which arose in the process of the research. One of the issues was that of sexual abuse as provided for under the Act. Women who are sexually abused by their spouses are not protected by the law as the law does not recognise marital rape. One respondent said that she was sexually abused by her husband and contracted HIV AIDS.

Another emerging issue was that of the lack of knowledge about how protection orders work and that victims do not know what to do where there is non-compliance of a protection order. Women had no idea that non-compliance with a court order is an offence.

A further emerging issue was that women do not go back to court to obtain a final order. Once they make their application and get an interim order they rarely go back to court so that it can either be confirmed or dismissed and as a result cases are left in a pending or unresolved state.

Due to lack of time these emerging issues were not explored further. These could be areas for further research in the future.

### **3.3.7 Limitations of the study**

One of the findings was related to the age of victims. It was discovered that women in certain age groups have not accessed protection orders. But the study did not interrogate why this is the case.



Many respondents did not suggest any way to make protection orders work effectively. This was because many people have not used them so it was difficult for them to appreciate the gaps in the law and to suggest ways of making them work effectively.

### **3.4 Conclusion**

This chapter focused on methodologies and methods of data collection that were employed in this research. The chapter showed how the methodological approaches that were used complemented each other and aimed at collecting the best available evidence for the study which was triangulated for the purpose of verifying it as far as possible. In the next chapter I will discuss the main findings of the research and show whether protection orders are an effective remedy for victims of domestic violence in Malawi.

## CHAPTER FOUR

### 4.0 EFFECTIVENESS OF PROTECTION ORDERS

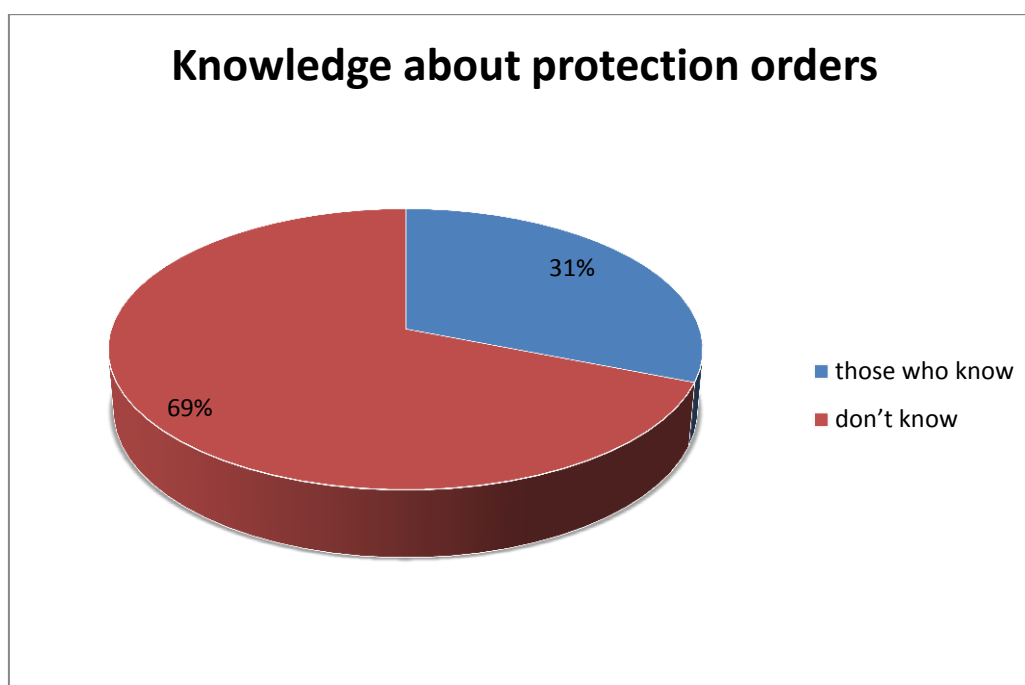
#### 4.1 Introduction

My main objective was to examine whether protection orders are an effective remedy for victims of domestic violence. This chapter will discuss the findings in response to the assumptions that I had as to whether protection orders are an effective remedy for victims of domestic violence. It also discusses some of the challenges that women face when they seek to enforce the law.

#### 4.2 Lack of knowledge about protection orders

It was discovered that most of the respondents showed ignorance about the existence of protection orders in the PDVA. The pie chart below shows the number of respondents who have knowledge about the existence of protection orders and those who do not.

**Figure 4: A pie chart showing knowledge of protection orders**



It should be quickly pointed out that most of the people who showed knowledge about protection orders were service providers such as police officers, magistrates, NGOs and other

government officials, with the exception of one male victim who said he knew about the existence of protection orders because he had read about them somewhere. But the rest of the respondents did not know about protection orders.

When they first approached court, women who eventually got protection orders did not know about them. They only got to know about them when they went to court to obtain a summons for divorce. It was then that they were informed about protection orders. One female victim (whom I will call respondent A.) said:

*'Ndinabwera ku court kuti ndidzatenge chikalata chothesera banja ndiye nditawafotokozera a court nkhanza zomwe ndikudutsamo ndipamene anandiuza kuti nditenge protection order.'*

(Meaning, 'I came to court to get a summons for divorce after explaining to the court clerk the nature of abuse that I went through it is when she advised me to get a protection order as well.')

Some women learnt about protection orders when they were in the process of seeking help from friends who either referred them to a lawyer or NGOs who deal with women's issues like WLSA. Apart from victims, there were also many other respondents who had never accessed protection orders and they did not know about the law until I told them about them which was an exercise in legal literacy for them.

Some court clerks knew something about protection orders and found that the research process opened their eyes to other dimensions about them. There were others who were completely ignorant about protection orders. One male court clerk from one of the rural courts said that:

*'I do not know about protection orders. Every time I encounter a domestic violence case I go to the magistrate to seek guidance.'*

Even though many police officers know about domestic violence few of them are familiar with protection orders and they rarely advise victims of domestic violence to go to court to get a protection order. One male police officer admitted that he had never advised any victim of domestic violence to go to court to get a protection order. He said he only referred them to court to get a divorce summons. Even in their sensitization campaigns they do not talk about protection orders. Police officer, M., said:

‘We do not often talk about protection orders because in that way we will be contradicting the message of domestic violence, and we will be encouraging perpetrators to continue with the abuse because they will know that there is remedy to domestic violence; what we want is people to stop the abuse.’

From the above statement, it is clear that the police officers focus more on the perpetrator’s than the victim’s rights. It does not follow that if people are told about domestic violence they will stop committing it. Desisting from perpetrating domestic violence is more of a process than an event. Women will continue to be victims of violence and as such they should have access to information to enforce their rights and seek a remedy. The police officer also explained that even though they have been holding sensitization campaigns the majority of people who attend such campaigns are women, which means that the message against the evils of domestic violence is not reaching the perpetrators. So, women continue to suffer from domestic violence, not knowing what remedy to invoke.

WLSA confirmed that the law is not known by the people. Most women are not aware about the existence or provisions of the PDVA. While WLSA has conducted sensitization campaigns, they focus of what domestic violence is and not on the remedies for it under the Act. This was also confirmed by Ministry of Gender, the custodian of the PVDA, that people do not know about protection orders and the available remedies under the PDVA. The reason given for this was put down to the lack of resources. Lack of resources at Ministry of Gender was also raised as one of the areas of concern by CEDAW in its Concluding Observation for Malawi in the report that was submitted in 2010. However, since then nothing has been done to address this concern, and, as a result, women’s rights continue to be violated without seeking redress. The spirit of PDVA is to eliminate domestic violence and provide an effective legal remedy to its victims. If sensitization campaigns overlook the legal remedies which have been provided for in the Act (which include protection orders), then the Act has missed its target. From my observation, the enactment of PDVA went ahead of the people’s lived realities. The people are not following the Act because it does not fit their lived realities. While the Act has provided remedies to victims of domestic violence, the society is dealing with causes and evils of domestic violence and yet that is not the main purpose of the Act. While the Act is victim-centred, society is perpetrator-centred. This is why the women’s law approach is celebrated because it prioritizes the lived realities of women and men.

The Malawi Constitution provides that every person has a right to access information so far as that information is required for the exercise of her right.<sup>39</sup> Women do not have access to information on the availability and use of protection orders. This knowledge gap has contributed to the ineffectiveness of protection orders as women do not make use of the same. Malawi has a duty to educate, teach, promote and publicize the respect of rights by its citizens.<sup>40</sup> Article 2(2) of the Women's Protocol provides:

‘States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.’

The Oxford Student Dictionary defines teaching to mean ‘to successfully make someone change their ideas, methods of work, when they have had them for a long time.’ Someone has to be made to think and act differently. The superiority of men and inferiority of women has been in existence for centuries and it cannot be changed through a one day workshop; it has to be done over a series of meetings. People have to be trained over a period of time to have an in-depth knowledge on how to respect women's rights. The government has to make a deliberate effort to honour its international obligations towards women. One official from the Ministry of Gender said:

‘There is need to incorporate domestic violence lessons in school curricular from primary level so that the future generation is taught that domestic violence is a violation of human rights.’

This approach can help to instil values in children especially boys so that as they can grow up to condemn such behaviour. This effort has to be combined with the effort of eliminating harmful cultural practices and traditional practices which oppress women.<sup>41</sup> The Beijing Declaration and Platform for Action of the Fourth World Conference on Women adopted in Beijing, China, 1995 is to the effect that women should be provided with access to mechanisms of justice and just and effective remedies for the harm that they suffer and should be informed of their rights to seek redress through such mechanisms.

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<sup>39</sup> Section 37 of the Constitution.

<sup>40</sup> Article 25 of the African Charter.

<sup>41</sup> Article 2(2) of the Women's Protocol.

Laws are of limited use if women do not know they exist or cannot take advantage of them (Johnson, 2004). State parties are required to establish mechanisms and accessible services for effective information.<sup>42</sup> Such mechanisms and services should be women-friendly taking into considerations the poor literacy levels of many women.

‘Due to economic, religious, social and cultural constraints, women’s legal literacy and consciousness about their rights is generally low in developing countries, particularly among rural women’ (Johnson, 2004).

This is the biggest challenge to many women and it is therefore important that women should be sought out in their own spaces so that they have easy and effective access to information. Lack of knowledge about protection orders by most victims of domestic violence has resulted in their ineffectiveness as only a few people have access to the law and are able to make use of it.

The lack of knowledge about protection orders has also been exacerbated due to the lack of involvement of women when the law was being formulated. None of the victims of domestic violence or members of the community who were interviewed in this study participated in the formulation of the PDVA. WLSA was a key NGO involved in the formulation of the law and they said that they used women’s lived realities to inform the formulation of the law. If women were indeed consulted during the formulation of the PDVA, it may be that only a very few women participated in the process. Where were women consulted? Were they invited to hotels to air their views? If so, what target group of women were considered suitable to be invited to such hotels? What types of women were invited to such consultative meetings? How inclusive was the process? From my observation, many consultative meetings in Malawi are held in hotels or lodges which many women may not be able to attend due to their interlocking oppressions including their low level literacy levels and the fact that they are primary care givers to family members, which mean that they would have problems leaving their villages to attend such meetings. Due to lack of women’s participation in law reform processes, many laws are formulated without having regard to the needs of women.

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<sup>42</sup> Article 4(f) of the Women’s Protocol.

### 4.3 Use of informal dispute resolution mechanisms

Legal plurality has had an effect on women's choice of which system to use to secure effective remedies for the abuse that they face in marriages. In Malawi, the spouses to almost every marriage, both customary and statutory, have *ankhoswe* (marriage advocates), who are often male members of the family. They are witnesses to the marriage celebration and in addition to being involved in contracting marriages, the *ankhoswe* are also expected to mediate between the spouses in cases of matrimonial disputes including acts of violence that women suffer at the hands of their husbands (WLSA, 2000). Whenever women face abuse in their marriages, the first point of call is the *ankhoswe*. The *ankhoswe* can be easily accessed and women do not pay fees to access them as compared to the formal justice system. These people are known to both parties which means that women do not feel shy about talking to them about their marriage issues. Due to lack of knowledge on the existence of protection orders, women use this existing social structure to resolve domestic violence. All the women in the study who ever used a protection order admitted that they first went to *ankhoswe* to seek justice and when they failed to resolve the matter, they then resorted to seeking help from 'the outside'.

'For many years marriage issues have been treated as private issues. Domestic violence has been generally understood as a private issue, on the grounds of an idealized image of the home as a place of safety and security away from government involvement' (Burril, 2010: 257).

This mentality has led to the trend against bringing marriage problems into the public domain. When women have decided to bring marriage issues into the public domain, many men have resisted and preferred to use the *ankhoswe* as they make decisions that are more beneficial to them than women. The system under which they operate upholds men's interests and it does not impose sanctions to deter them from further abuse (WLSA Swaziland, 2001). A male police officer triangulated this position and said that many women have withdrawn cases from the VSU because they have been forced to do so by their male spouses who have determined that the matter should be resolved by the *ankhoswe*. Women use *ankhoswe* for fear of the shame they suffer and hostility they face from the society for taking marriage issues into public domain. Many victims have been advised by the *ankhoswe* to persevere in marriage. A female victim, respondent, P., said:

‘I reported the abuse to the *ankhoswe* who was the brother of the perpetrator but he did not see anything wrong with it. He accused me for making noise over petty issues. Apparently he was also beating his wife.’

Many marriage advocates are men and they continue to enforce patriarchal values according to which men are regarded as superior and women inferior. Under this system there is no notion of equality and women continue to be discriminated against.

‘Some women complained about the inherent injustices in the system brought about by entrenched sexist attitudes by the *ankhoswe* who adhere to the misguided philosophy that ‘a man is the head of the family’ (WLSA, 2000: 29).

One male police officer said that he has problems with the way *ankhoswe* handle domestic violence cases. He said with concern:

‘The *ankhoswe* are the ones who reinforce abusive behaviour in many marriages. When they are dealing with disputes in marriages, they do not look at the facts before them but they look at the bread winner who often is a man and side with him. I am dealing with a case where a lady is tired with the abusive behaviour of her husband. Every time she reports the abuse, the *ankhoswe* does not condemn the behaviour of the man but tells the lady to persevere. The lady decided to leave the house and carried her belongings she has been accused of theft and was arrested.’

As members of society, the *ankhoswe* have a constitutional obligation to resolve disputes in such a way as to ensure that each member of the family enjoys full and equal respect of the law and is protected from neglect, cruelty or exploitation.<sup>43</sup> The *ankhoswe* should execute their mandate of protecting the family in such a way that all its members, including women and men, are treated equally and not discriminated against on their grounds of their sex. Article 5(a) of CEDAW is to the effect that state parties should modify social and cultural patterns and practices based on the idea of superiority and inferiority of sexes. Measures should be adopted that prohibit the exploitation and/or degradation of women.<sup>44</sup> The supremacy of the Constitution demands that every law that is inconsistent with any provision of the Constitution be declared invalid to the extent of its inconsistency.<sup>45</sup> While observing and preserving the role of customary law, there is a need to enforce strict compliance with the

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<sup>43</sup> Section 22 of the Constitution.

<sup>44</sup> Article 3(3) of the Women’s Protocol.

<sup>45</sup> Section 5 of the Constitution.



principles of the Constitution by the people when they exercise their powers. Customary law has to be in line with the Constitutional provisions. Equality between men and women ought to be upheld in dealing with disputes in a family because it is their constitutional right. The *ankhoswe* should endeavour to provide an effective remedy not only against the perpetrators but most importantly in favour of the victims whose rights have been violated. Respondent C. said:

‘There is need that the *ankhoswe* should be trained in human rights issues because they are in the forefront violating the same.’

She also said that it was high time that women should also be *ankhoswe* to protect the interests of women.

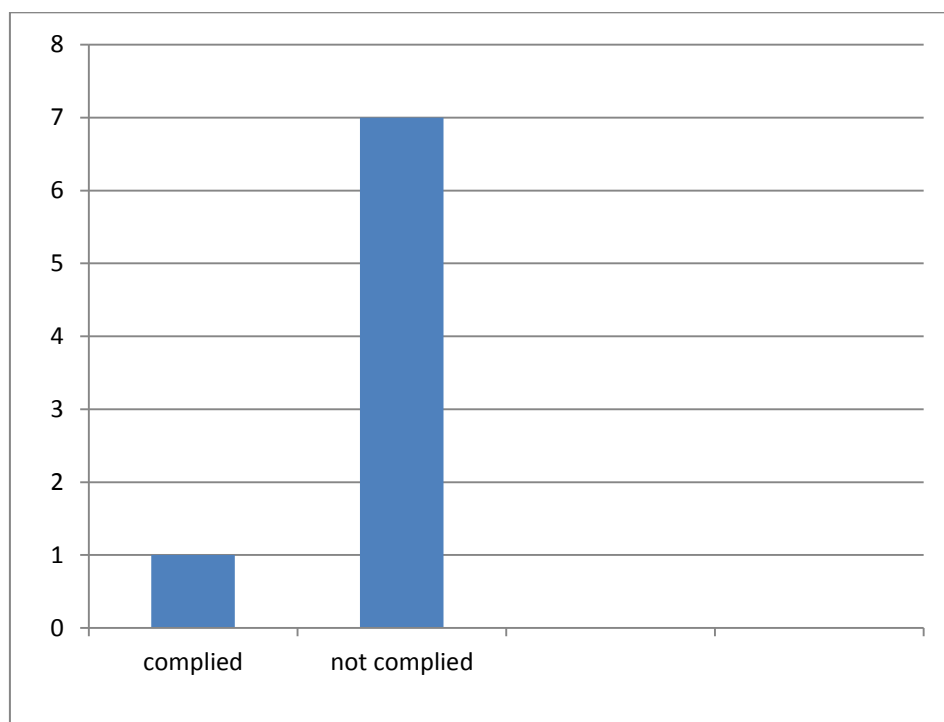
The *ankhoswe* play a crucial role in dispute resolution in marriages. It is important that they undergo human rights training because they provide services to the society. The idea that women should be involved as *ankhoswe* does not automatically mean that they will protect women’s interests. Currently there are already a few women who are *ankhoswe* and from my observation they are the gate keepers who protect the interests of men. Regard should be had to the fact that many women have internalized abuse of women in marriage as normal behaviour. However if they can be properly trained in the human rights of women, they might help to change and protect many women from abuse.

#### **4.4 Non-compliance with court orders**

Although the non-compliance with court orders was not one of my assumptions, I had to respond to the data that I was collecting and this is one of the issues that emerged. One of the problems that was raised by women who used protection orders was the fact that there was high rate of non-compliance of the court order by perpetrators. The majority of the respondents who got a protection order from the court said that the perpetrator did not comply with the court order. The diagram below shows levels of compliance with court orders.

The respondent whose order was complied with said that after getting the order she moved out of the matrimonial house to stay with her parents so it was difficult for the perpetrator to follow her. In the sense, there was technical compliance.

**Figure 5: Diagram showing extent of compliance with court orders**



Respondent P., whose order was not complied with, said that:

‘I was with the court official who went with me to serve the order on my husband. He refused to sign on the court order and the abuse accelerated. I went back to police but the police did not help me even though I had a court order. I did not know that his refusal to obey court order was an offence otherwise I could have gone back to court. I did not know what to do next. However because I knew my rights I stood my ground and told him that if he doesn’t want me, he should go to court and divorce me. He finally stopped the physical abuse and I have managed to tame the other forms of abuse.’

One contributing factor to the high rate of non-compliance with court orders is due to cultural practices which reinforce domestic violence in marriages. Many men are used to the idea that wife battering is normal and as earlier on discussed men want to continue dominating and controlling women. The PDVA challenges the traditional way of handling disputes in marriages which has existed for years, hence men’s resistance to it. The absence of sensitization campaigns on protection orders has also contributed to men’s ignorance of the law and this has led to their lack of respect for the law because they do not know that there is a law which protects women from abuse.

‘When a woman applies for a protection order she shifts the dynamics of power, dominance, and control which provides her with psychological benefits. Most significantly, the protection order alters the pattern of power, dominance and control’ (Tarr, 2003: 169).

The reaction by most men to protection orders is one way of trying to guard the patriarchal system in which men control women. In the patriarchal system men safeguard the power of controlling women which they have enjoyed for years. Women were at higher risk for non-compliance with the protection order if they did not want to end the relationship or were ambivalent about it (Goldfarb, 2008).

The research findings also reveal that in order to continue controlling women’s lives, men might stop one form of abuse and resort to another. For example, respondent A. said that:

*‘Ndinabwera ku court kudzatenga chikalata kuti ndikalowe mmnyumba momwe amuna anga anandithamangitsa. Nyumba andisiyira koma achotsa chilichonse kuphatikiza zovala zanga ndi chakudya.’*

(Meaning, ‘I came to court to get a protection order so that I should be allowed in the matrimonial home. He has given me the house but he has taken everything from the house including my clothes and food.’)

The creation of other forms of abuse is common where the victim has decided to continue staying with the perpetrator. Some respondents said that it is not easy for a piece of paper to change the abusive behaviour of a perpetrator. It exacerbates the abuse because the perpetrator feels like he is losing power. As earlier on discussed, abuse is about control and dominance. Respondent M. said:

‘Even when I had moved out of the house he was still following me to my house where I had moved. Though physical abuse had stopped but he was abusing me sexually in the presence of the children.’

The respondent blamed herself for giving up pursuing the enforcement of the court order. She was economically dependent on him and it was difficult to completely cut him out of her life as she still needed his support. On the other hand, she said she was also missing her husband and the perpetrator noted that weakness and took advantage of it.

One practising male lawyer said:

‘The protection orders are unique in the sense that they regulate people’s lives that are intimately connected. It is difficult for ‘mini injunctions’ to work in love relationships.’

Women sometimes have return to court more than once because the perpetrator resorts to a different form of abuse in reaction to the protection order that was originally granted. For example, respondent A. kept on going back to court because every time she got a court order, the perpetrator reacted to it in a different way. It was found that one way of solving this problem was that magistrates were giving protection orders which prohibit the abuser from resorting to other foreseeable forms of abuse which might be provoked in reaction to the protection order. However, one female magistrate said:

‘It will tantamount to abuse of court powers if the court were to order that perpetrators should stop committing an abuse which in the first place was not committed and was not the subject matter when the applicant was making her application.’

This finding questions the efficacy of the remedies that are provided in the Act. The intention of the Act is to provide an effective legal remedy to victims of domestic violence. Even the Constitution provides for a right to an effective remedy. Women should not be forced ending up spending their life going up and down to court repeatedly seeking protection from an abuser who is able to undermine her constitutional right to an effective remedy. It goes without saying that it would be very frustrating and would severely compromise her primary care giving role to family members, especially children. For example, every time she came to court, Respondent A. had to bring her two children with her because she had no one to leave them with.

**Figure 6: Photograph showing Respondent A with one of her sons at the court**



Something ought to be done to assist women from being forced repeatedly to go to court for protection. As a result of such obstacles women have often given up pursuing further legal remedies. They do so because they are unable to spend extra money on transport and paying for court documents. In other words, they have become victims of the feminization of poverty. And all the while society and family members might be ridiculing her for bringing ‘private’ issues into the public. One respondent said that one has to be ‘crazy’ to go through the whole court process because it is not easy. One female respondent from an NGO said:

‘Lack of support for most women to go through the court system is a challenge. I understand women when they give up. It is because sometimes the justice system does frustrate them.’

The law should be able to provide a remedy to a victim of domestic violence. The High Court of Malawi ruled that ‘as I understand it, where you are owed money the effective remedy is that you should be paid back.’<sup>46</sup> Therefore, it follows that in cases of domestic violence

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<sup>46</sup> *S and K Steel Furniture Company Ltd v Attorney-General (Ministry of Education) and another* [2004] MLR 305 (HC).

where women suffer abuse, the effective remedy is for the abuse to stop and not to take another form. The dignity of the victim should be restored. The victim should be provided with an environment which is safe.

#### **4.5 Lack of training for service providers**

One of the factors that have led to the ineffectiveness of protection orders is lack of training for service providers. One court clerk said that he did not know how to deal with cases of domestic violence. Instead he advised women to get a summons for divorce. While waiting for divorce proceedings women continue to be subjected to abuse. If the Act is to achieve its purpose it is crucial for court clerks to be well versed in protection orders and the PDVA as they are the first point of call when victims come to court. Victims will continue to face challenges accessing protection orders if magistrates but no court clerks are trained in domestic violence issues. The magistrates were trained in domestic violence but most of them said it was not an in-depth training. One male magistrate said:

‘I have attended workshops, but I learnt is not what I do here. Intricacies about how to go about in the application of the law is what is missing in such workshops. There is need for tailor made training that suits magistrates.’

It was also observed during the research that it is lay magistrates who deal with most cases of domestic violence. There are two categories of magistrates in Malawi. There are lay magistrates and professional magistrates. Lay magistrates are those who joined the judiciary mainly as court clerks and with the passage of time they are promoted and become magistrates. They are inducted into the magistracy after attending a course of one year on how to handle cases. Professional magistrates are trained lawyers. Professional magistrates are not in the majority. Most cases are handled by lay magistrates unless they lack jurisdiction. As a result of their lack of training lay magistrates may lack adequate skills for interpreting and applying the PDVA. One female magistrate said:

‘The law should be revised to include property grabbing as an offence under PDVA because the way it is now we fail to help victims of property grabbing.’

Section 2 of the PDVA defines domestic relationship. It provides that:

“domestic relationship”, in relation to domestic violence, means the relationship between persons who are family members and share a household residence or are dependent on each other socially or financially, and includes the relationship where—

- (a) the applicant and the respondent are husband and wife;
- (b) a person has a child in common with the respondent and that person is being subjected or is likely to be subjected to domestic violence by the respondent;
- (c) one is a parent and the other is his or her child or dependant; and
- (d) the applicant and the respondent are or have been in a visiting relationship for a period exceeding twelve months;’

It is well known that most families in Malawi are extended families. The extended family includes a married couple, single parents and their immediate children and all dependants and relatives (WLSA, 2000). The definition of domestic relationship is inclusive and it includes people who depend on each other socially. Often people who grab property are dependants or relatives of the deceased and if the court is to analyse this provision through a gender lens, it will be noted that victims of property grabbing are protected by the PDVA.

Lack of training is not only a problem in the judiciary. The police also shared the same view that while some police officers have been trained in handling domestic violence cases, especially those in the VSU department, some have not been so trained and this has had an effect on how they treat victims of domestic violence. One male police officer said:

‘People lodge their complaints at the reception and they meet with police officers who have not been trained in domestic violence. As a result they send women back alleging that domestic violence is a private matter.’

Unless the training is holistic targeting all service providers in the administration of protection orders, the effectiveness of protection orders will continue to be compromised.

Article 24 of the SADC Protocol on Gender and Development is to the effect that state parties should promote and provide gender training to service providers involved in gender based

violence including the police and the judiciary to enable them provide effective services to victims of domestic violence. It must be appreciated that government and NGOs are putting much effort into training service providers in gender based violence but it will be more effective if all service providers are trained, as the current training is leaving out some members (such as court clerks) who are crucial in providing effective service to victims of domestic violence.

#### **4.6 Lack of enforcement mechanisms**

If a person can successfully get a court order in their favour but cannot enforce it, the whole process of litigation is futile. Some women are able to access court orders to protect them from abuse but their enforcement of them has proven to be a challenge for the majority of them. The PDVA provides for enforcement officers whose duties include providing victims of domestic violence with proper treatment and ensuring the proper administration and enforcement of the Act. They are also under obligation to advise the responsible Minister if the Act is being implemented effectively.<sup>47</sup> But in reality the enforcement officers are yet to be appointed. One official from Ministry of Gender said that they are currently using social welfare officers as enforcement officers. However not one of the women who got a protection order ever used the enforcement officers to enforce their court orders. None of the court officials is even aware that women can be referred to social welfare officers to deal with issues of domestic violence when they are having problems with the enforcement of court orders. One official from an NGO said:

‘There are no gender officers or enforcement officers to specifically deal with issues of domestic violence as it is the case with social welfare officers. If indeed the Ministry of Gender is using social welfare officers as enforcement officers there is need for training to orient them in gender issues.’

Enforcement officers would ease the burden that women face when they try to enforce their court orders. Currently the court officials, who serve these and other court documents, do not follow up to find out whether or not the order was complied with because it is not within their mandate to do so. Some women have failed to use court officials to serve court orders on their abusers as they cannot afford to pay the court fees for service. Respondent C. said:

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<sup>47</sup> Section 32 of the PDVA.



‘When I got a court order I did not know how to serve it on my husband. I was so afraid that he might beat me again until one day when he caused a fracas at home I called police officers and I told them that I have a court order and they served it on him.’

If they were appointed under the PDVA enforcement officers would help to follow up on such cases and collect data as to how many orders are effectively enforced. Currently there is no such information to help the Ministry monitor and evaluate the effectiveness of the law and how it is working in the lives of women.

Section 41(3) of the Constitution provides for right to effective remedy. If victims of domestic violence fail to enforce orders that have been granted by court then the right to effective remedy is not upheld. Article 2(1)(b) of the Women’s Protocol is to the effect that state parties should enact and effectively implement legislation to curb all forms of discrimination against women. Having the PDVA in place is not enough to satisfy this provision. What is needed is the effective implementation of the Act. It is the effective enforcement of their protection orders which is the immediate and greatest challenge faced by victims of domestic violence. In other words, the lack of enforcement mechanisms is an impediment to the enjoyment of human rights by victims of domestic violence.

#### **4.7 Trivialization of abuse**

Another assumption that I had was that women prefer getting protection orders in physical abuse than in any other form of abuse. The assumption was premised on the basis that people trivialize other forms of abuse.

‘Cultural conditioning can both trivialize and justify violence against women, with the result that victims of violence become the targets of unpunishable and therefore implicitly endorsed violence’ (Mayersfeld, 2010: 100).

Malawi culture teaches women to persevere in marriage. Because of such cultural approval of abuse, women have also inadvertently approved the same. The Act provides that a court shall not refuse to grant an order under this Act merely on the grounds only that a single act of domestic violence has been committed by the respondent.<sup>48</sup> Although the law is proactive in providing protection to victims of domestic violence in cases of single act of domestic violence, women have taken a different view. While the law condemns all types of abuse, in

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<sup>48</sup> Section 46(a) of the PDVA.

reality it is difficult to get protection against other forms of abuse like verbal or psychological abuse because people do not consider such abuses as being as serious as physical abuse.

‘Focusing on power and control can counter the tendency of the courts to focus on specifiable incidents of physical violence (usually meaning injury), which often trivializes the severity of abuse relationships in which little or no physical injury occurs, yet the abuse is profound, severe, and extensive’ (Tarr, 2003:168).

According to the views expressed by those of the focus group discussion that I had in Kunthembwe Village in Chileka, many women said that not every act of domestic violence should warrant the application for a protection order. It must be a serious abuse. One man in the group said:

*‘Osamangonena zilizonse ku police pokhapokha ngati mzamayi wavulazidwa zenizeni kuti akutulu ka magazi ndiye zingakhale zomveka kupita ku police.’*  
(Meaning, ‘It should not be just any abuse that should be reported to police. Unless where a woman has been seriously injured and blood is oozing then it is understandable to go and report to police.’)

The rest of the people in the group agreed with him including the women. They were of the view that if every abuse is reported to police and protection order is granted willy-nilly then marriages will not survive. Police officers have the same attitude that violence must be serious enough to warrant their intervention. A mere slap is not enough. Respondent C. said:

‘When I went to report to police about the physical abuse that I went through, police officers asked me to show them a scar. I did not have one and yet I was beaten by my husband and they accused me of exaggerating the abuse.’

If police officers are of the view that women are exaggerating domestic violence, the prudent thing to be done is to investigate the matter but not to dismiss their complaint outright. Because women are regarded as the ‘other’, their pain is not appreciated. In the General Recommendation No. 19<sup>49</sup> the CEDAW Committee recommended that:

‘The state party can, in addition to being responsible for the acts or omission of its own agents and officials, be held legally responsible for its failure to act

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<sup>49</sup> Committee on Elimination of Discrimination against Women, General Recommendation No 19 (1992) violence against women UN doc, HRI/GEN/1/Rev.9 (vol.11) pp.331-336 paras. 8-9.

with due diligence to prevent, investigate, punish and remedy private acts of private persons.’

One perpetrator said:

‘Abuse has to be serious. It has to be an abuse which puts the life of the victim in serious danger, in such cases the victim can get a protection order.’

However even where victims have evidence to show the seriousness of the offence police officers have been reluctant to help victims. Respondent P. said:

‘I had photos with me for the injuries that I had sustained during the abuse by my husband and asked the police officers to arrest him but they refused. I went back home frustrated. After all most police officers beat their wives so it is not an issue to them.’

The failure by the state to respect and uphold the rights of women has resulted in law enforcers and judicial officers viewing domestic violence as a petty offence and as a family matter. The ineffectiveness of the criminal justice to deal with domestic violence intensifies the subordination and vulnerability of victims. The view of categorizing the degree of seriousness of abuse as the trigger to warrant public intervention is widely held. Police officers will usually only respond when the abuse is serious.

‘We must find out in the case of domestic violence if he is presently harming her or if no danger exists at present. We receive a number of other calls as well. For instance, there may be a housebreaking in progress, which needs to take priority. That is why it is so important when we receive information from the radio control that it be detailed. Based on what they tell us we use our discretion to determine what is of utmost priority. If they tell us that there is a serious domestic violence incident where the woman is bleeding and thrown out of the house, that will be important to respond to. But if they simply say “domestic violence”, that is not necessarily enough information for us to prioritise’ (Artz 2005:221).

The attitude of trivializing abuse is hampering on the fight against domestic violence because victims, perpetrators, and the society and law enforcement personnel are of the view that domestic violence has to be a serious one for victims to get a remedy.

‘In other words, entrenched cultural attitudes cannot be changed by legislative fiat. To be effective, legal reforms must purposefully seek to change this

language of acceptance into language of rejection and disapproval of domestic violence' (Davies, 1994: 1154).

This attitude has to be analysed using human rights standards. Domestic violence is a violation of human rights. It goes to the violation of one's right to dignity, non-discrimination and equality and security of a person. It is a human right to be free from torture and cruelty. In the case of *Carmichele v Minister of Safety and Security*,<sup>50</sup> the Constitutional Court held that:

'The police is one of the primary agencies of the state responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crimes.'

Under the Malawi Constitution the right to equality, freedom from cruelty and inhuman degrading treatment are non-derogable rights. The state has to ensure there is respect of these rights. It has an obligation to deal with people's attitude of trivializing domestic violence and guarantee that women enjoy their rights.

#### **4.8 Societal value of a married woman**

Because women fear that once they bring marriage issues into the public arena they risk losing their spouses, they have decided to suffer in silence. Respondents from a focus group discussion in Standi village said that a married woman is valued more in a society than a single woman. Some women define their self image in terms of their relationship with others (Davies, 1994). Women have been raised to believe that marriage is about perseverance. Because of the cultural conditioning that trivializes domestic violence (Mayersfeld, 2010), women have accepted living in abusive relationships even when there is eminent danger to their lives. I remember when I was a magistrate I handled a divorce case where the lady was beaten by her husband and she had a big cut on her leg as a result of the violence and all her clothes were burnt but she vehemently refused to divorce her abuser because her parents advised her that marriage is about perseverance. All what she wanted was to remain in the marriage because divorce would bring her family members into disrepute. Women would rather stay in abusive relationship as long as their image is protected in the society. This

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<sup>50</sup> 2001 (4) SA 938 (CC); 2004 (2) BCLR 133 (SCA).

confirms the ‘otherness’ of women because they are defined in relation to the superior man and not themselves.

#### **4.9 Women not a homogeneous group**

The legal systems and policies that impose a one-size-fits-all approach do women a psychological disservice (Tarr, 2003). Women are not a homogeneous group. Women’s positioning in society emanates from interlocking factors as opposed to one single explanation (Tsanga, 2011). The research findings revealed some interlocking oppressions that women face which affect the effectiveness of protection orders. It is trite to say that women’s experiences of violence vary and that different women have different needs and expectations of the legal process. Yet policy makers face the dilemma of how to develop policies and programs that are responsive to difference (Stubbs, 2008) There are so many factors that have contributed to women’s failure to access protection orders due to their interlocking oppressions.

##### **4.9.1 Economic status**

It was revealed during the research that many women are reluctant to use protection orders due to their economic dependence on the perpetrator. Most women who used protection orders are the ones who manage to support themselves economically. Women who can support themselves economically are more likely to get a protection order compared with those who are not working. A woman who is abused by someone who provides her with financial support may be reluctant to obtain a protection order (Tarr, 2003). Food, care for the children, fees for the children are more important to her than her own safety. Women being relational human beings would rather please family members at the expense of their own joy (West, 1987). In other words, the lack of financial independence is for most women a challenge preventing them from accessing protection orders. They are reluctant to invoke them for fear of losing the economic benefit they receive from their abuser. Respondent M. said:

‘In as much as I was working but I was not earning more money to support my children. So it was difficult for me to enforce the order which I had obtained because I had to consider the welfare of my children.’

The economic abuse that some women suffer has led to their poverty and made them economically dependent on their spouses. Patriarchy is rooted in economics. Men have largely owned the means of production. There would be no economic differences between men and women if it were not for the sex difference between them (Tong, 1989). One female respondent said:

‘My husband has been refusing me to engage in economic activity and yet he does not provide for me and the children.’

The respondent indicated that she has been reporting his abuse of her to the police but the police officers did not advise her that it is an economic abuse and she could be protected by the PDVA.

Men’s control over women’s lives is to ensure women’s total dependence on them. Although the Constitution provides for the right to economic activity,<sup>51</sup> and women’s right to acquire property,<sup>52</sup> enjoyment of the said right by many women has been compromised. Women face economic abuse and as a result have problems accessing remedies that protect them. Due to economic challenges many women find it hard to access protection orders.

#### **4.9.2 Geographical position**

It was also observed that women who live in the rural areas where most of them do not work have challenges accessing protection orders. The focus group discussion which I had in the rural area revealed that because most women depend on men for economic support for their daily survival it is a challenge for them to have to ask money from the perpetrator for transport to go to court to get a protection order against that same perpetrator. Many women in the rural areas are not as engaged as urban women in economic activities and therefore they cannot afford to pay court fees for court documents or to pay the expensive transport costs of travelling long distances to and from courts in the rural areas. So while rural women would like to access protection orders, they face challenges. One respondent from an NGO said:

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<sup>51</sup> Section 29 of the Constitution: ‘Every person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi.’

<sup>52</sup> Section 24(1): ‘Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right—to acquire and maintain rights in property, independently or in association with others, regardless of their marital status.’

‘Economic empowerment of women is crucial if women are to use protection orders. This is the biggest challenge for many women but particularly rural women.’

Rural women face more challenges than urban women in relation to the use of protection orders. One police officer from a rural police station said:

‘Many women fail to report marriage abuse to police because of family pressure. Most rural women get married whilst still young; their parents control their marriages and are discouraged to get a protection order because culturally marriage issues are resolved by *ankhoswe*.’

Section 29 of the Constitution provides for one’s right to participate in their culture. Women in the rural areas are cobwebbed in cultural practices. It is a challenge for rural women to rise above cultural practices that forbid them to bring into the open the abuse they are suffering behind closed doors in order to enforce statute law. Cultural practices which oppress and discriminate against women ought to be constitutionally challenged. Article 14 of CEDAW is to the effect that state parties shall take into account the particular problems faced by rural women. Rural women face a lot of challenges which the government ought to address if rural women are to enjoy their right to dignity like any other victim. Article 17 of SADC calls for state parties to ensure women benefit equally from economic opportunities, and the eradication of occupational segregation and all forms of employment discrimination.<sup>53</sup> One female respondent from a focus group discussion held in Standi village suggested:

*‘Ife azimayi sitingakwanitse kupita ku court kuti tikathandizidwe pa nkhani ya nkha za m’banja chifukwa chosowa chithandizo chandalama. Tikhoza kuthandizidwa ngati mu mudzi mwathu muno muthakhala komiti ya anthu odalilika kuti tizikawauza za nkha za zimene tikukumana nazo.’*

(Meaning, ‘Many women cannot afford to go to court to get a protection order because of financial problems. It is important that at village level we should have a committee comprising of trusted people where we can go and report about domestic violence.’)

The tailor made mechanism suggested above may complement the efforts made under the PDVA whose objective is to eliminate domestic violence. If the committees can provide effective remedy to victims of domestic violence at village level, it will be to the advantage

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<sup>53</sup> Article 19(2)(b) of SADC.

of women who may not be able to afford to go to court due to lack of finance. The Act has provided for counselling as a non-legal remedy to which victims of domestic violence may be referred. The suggested committees can also offer counselling services to victims of domestic violence as long as committee members are properly trained.

The group also suggested that counselling would help to resolve domestic violence cases. Although some members said they would enforce protection orders, the majority of the members were somewhat sceptical about using court orders to resolve family issues.

#### **4.9.3 Age**

Age is another factor that affects women's access to protection orders. It was discovered that most women who got protection orders were between the ages of 27 and 40 years old. There was no data that was collected to show whether domestic violence only affected women who fell into this age range. But the findings showed that women below 25 years of age and above 40 years of age are not utilizing protection orders. Respondent P. made the suggestion that women above 40 years old might reason that they are part of a couple growing old together who are increasingly interested in protecting the investment that they have made together. As they grow together they become more understanding towards each other and know how to handle each other. They also think of the children that they have brought up together so even when they face abuse they would rather persevere and continue living together. That could be a contributing factor as to why many women might not consider invoking a protection order.

In the case of women who marry when they are young, it is usual for their marriages to be controlled by their parents as indicated earlier. This has resulted in their failure to make independent decisions as to whether or not to invoke statute law when they face abuse from their husbands.

It was also discovered that the marriages of the many women who got protection orders did not subsist (as shown in the diagram below). The majority of the respondents who got protection orders divorced their spouses. The majority, who divorced their spouses, did the same after getting protection order while some of them instituted divorce proceedings before getting a protection order. Of those who divorced their spouses, it was the victims who initiated the divorce proceedings and not the perpetrator. The question that arises is whether protection orders are a cause of divorce.



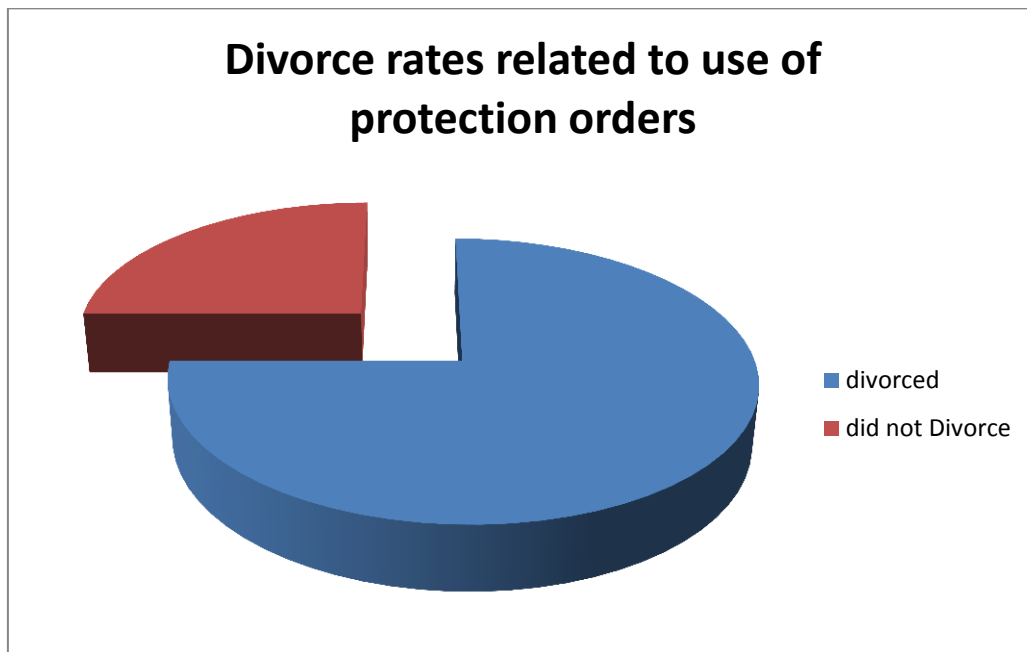
Police office C said:

‘Many women who reported abuse at police, there was adverse reaction from their spouses. If good counselling is not provided men divorce their spouses. So far we have been employing counselling to help victims and it has assisted a lot though we have not received formal training.’

Many men dislike marriage issues being publicly exposed. Even in cases where women have obtained a protection order, the moment a victim brings marriage issues to the VSU men react negatively to the event. Some of them ask the victim to withdraw the matter and go to *ankhoswe* while some chase their spouses out of the matrimonial home. One female respondent said:

‘When I reported the matter to one of the NGOs my husband chased me from the house and told me to get married to the NGO.’

**Figure 7: A pie chart showing divorce rates related to use of protection orders**



One practising lawyer complained that he was receiving threats from the perpetrator accusing him that he is going out with his wife. Such challenges discourage women from accessing and enforcing protection orders. The Chief Magistrate said:

‘In as much as the law is yet to achieve its objective but we are not where we used to be in terms of protecting victims of domestic violence, progress has been made. In the years to come we will be somewhere and there is need to employ multifaceted approach to deal with domestic violence.’

Some respondents noted the gaps that are undermining the effectiveness of protection orders.

Respondent C. said:

‘The law is good but the challenge is that police officers do not respect human rights of women.’

There is therefore a need to train police officers and other service providers. One magistrate hailed the effectiveness of counselling in helping victims of domestic violence and the police had the same view. The challenge is lack of independent counsellors who can offer such services. Because many victims had not used the law it was a challenge for them to see the gaps in the law and suggest better ways of making protection orders work effectively. Improving the economic empowerment of women was suggested as one way of improving the effectiveness of protection orders for women because most of them fail to access such orders as a result of their dependence on the abuser they intend to take to court.

All in all women have different interlocking oppressions that obstruct them from making full use of the law and policy makers should take that into consideration so that all women are protected.

#### **4.10 Conclusion**

The chapter discussed the main findings of the research. It has endeavoured to illustrate that protection orders might not be effective for many women as there are many contributing factors that undermine their effectiveness. However if such impediments are addressed there is a likelihood that protection orders will work to the advantage of victims of domestic violence. Is there a better way of making protection orders work effectively to achieve their intended objective?

## **CHAPTER FIVE**

### **5.0 A BETTER WAY OF MAKING PROTECTION ORDERS WORK EFFECTIVELY**

#### **5.1 Introduction**

Protection orders provide a remedy to victims of domestic violence. The law is supportive but the effectiveness of the remedy as envisaged in the Act is yet to materialize. The law alone even with its pluralist accommodations falls far short of providing an answer to the challenges (Tsanga, 2011). The exit assumption was to the effect that there should be non-legal remedies accompanying protection orders in order to make them effective. As revealed by the discussion in the previous chapter there is a need to have a multi-faceted approach to make protection orders work effectively as the written law on its own is not effective.

#### **5.2 Sensitization campaigns**

The biggest challenge that has made protection orders ineffective results from the lack of knowledge about their existence both on the part of the victim who needs to initiate their enforcement and the perpetrator who is required comply with them. If people do not know about the law women will continue to suffer and yet the law is there to protect them. Until the law is taken to and accepted by the people, it will never be used effectively. Lack of knowledge by service providers, like the court clerks and police officers, also render the law ineffective.

#### **Action points**

There is a need to conduct sensitization campaigns for all citizens so that both victims and perpetrators are made aware of the law. Literacy levels of women should be taken into consideration in order to come up with strategies that will help to reach out to women at their grass root levels.

The campaigns should also specifically sensitize people to the available remedies in domestic violence cases. Rather than focusing on the evils of domestic violence it should also empower victims of domestic violence to get remedies where their rights have been violated.

Teaching people to respect human rights should be done over a period of time rather than at one day workshops because domestic violence is deeply rooted in people's culture and one day campaigns may not be very helpful.

Domestic violence lessons should be included in the school syllabus so that children may learn from a tender age that domestic violence is a violation of human rights.

### **5.3 Training of service providers**

It has been noted that some training of service providers has been conducted. However, it has targeted people at the highest organisation levels and omitted crucial service providers at the lower grass roots levels who come into more frequent, earlier and long term contact with victims and perpetrators of domestic violence. Many court clerks have not been trained and yet they are the first point of call when it comes to commencement of court proceedings. Women have been wrongly advised or referred back to police because a court clerk does not know how to handle domestic violence cases. Training that has been conducted have not met the needs of service providers as most training has been conducted by and large without considering the specific needs of each institution in the justice system.

#### **Action points**

There is a need to provide tailor-made, in-depth training to address the inadequacies of service providers in the justice delivery system. The training should involve everyone in the system as the result of leaving out some people has severely undermined the enforcement of protection orders.

Training should be an ongoing process because two days workshops fail to effectively impart knowledge to service providers.

The *ankhoswe* should also be trained how to deal properly with domestic violence complaints as they are crucial in providing advice to couples. It is vital that they should also be trained in respecting human rights of women when dealing with family disputes.

## **5.4 Women's empowerment**

Economic hardships featured prominently as one of the biggest challenges for victims of domestic violence when it comes to accessing and enforcing the law. Both rural and urban victims faced this challenge. Women continue to live with abusive partners because they want to continue receiving economic support from them. Poverty and domestic violence are tied together (Davies, 1994). For the law to be accessed and enforced it is imperative that women are economically empowered. However it does not mean that economic empowerment will automatically increase the number of women who will apply for protection orders but it might help to reduce levels of women's dependence on men. Increasing the economic and educational empowerment of women might put them on a par with men. It was revealed that the majority of the women who got protection orders were those who were employed.

### **Action points**

The economic empowerment of women should be supported especially through businesses especially in the rural areas.

Education should be provided to women. The more educated women are, the more they will challenge the patriarchal system and its dominance over women.

## **5.5 Availability of enforcement mechanisms**

Women who have successfully secured protection orders from the court have failed to enjoy the protection of the law due to the lack of enforcement mechanisms. Although the Act provides for the appointment of enforcement officers to ensure the effective implementation of the Act and to keep the Minister informed this has not yet been achieved. There is no coordination between stakeholders as to the current implementation of protection orders. Where there is non-compliance with a court order police officers refuse to arrest the perpetrator for contempt of court.

### **Action points**

There is a need for a concerted effort among stakeholders to uphold and implement the law for the benefit of victims of domestic violence.

There is a need to have well trained enforcement officers in place to ensure the effective implementation of the Act.

## **5.6 Counselling**

From the research findings, many women complained that as it stands the law is not helping victims of domestic violence. Respondent T. argued that a piece of paper cannot change someone's behaviour overnight. Abuse is a behaviour which might have developed over a period of time and it usually takes time to be successfully terminated. Counselling was suggested by many respondents as one way of making protection orders work effectively. Section 52<sup>54</sup> of the Act provides for counselling and research has been conducted in this area.<sup>55</sup> Many women do not want their marriages to end; they simply want the abuse to stop. Although the Act is clear on counselling the research showed that none of the magistrates included counselling in their orders. So far it is the police in the VSU and magistrates who at their own volition provide counselling to victims of domestic violence. The Act mentions that marriage advocates, religious leaders and chiefs should provide counselling to victims of domestic violence. The structures that have been mentioned in the Act are patriarchal in nature and reinforce male superiority. I have already discussed the problems that women face when they involve marriage advocates. They face the same challenges when matters go before religious leaders who, from my experiential data, emphasise the submission of women.<sup>56</sup> As for chiefs, women said they cannot be visited empty-handed and most women said they cannot afford such expenses.

### **Action points**

There is a need to have structures that will provide professional counselling to which the courts can refer victims of domestic violence to receive effective counselling.

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<sup>54</sup> The court may, on making an order under this Act, recommend either or both parties to participate in counselling of such a nature as the court may specify, including counselling by marriage advocate relations, religious leaders and chiefs.

<sup>55</sup> Kanthambi, A.M. (2010). 'More than advice!': An analysis of the implementation of counselling as an effective remedy for women complainants of domestic violence as provided for by the Prevention of Domestic Violence Act, 2006, in Malawi Dissertation, submitted in partial fulfilment for the Masters Degree in Women's Law, University of Zimbabwe. Unpublished.

<sup>56</sup> Ephesians 5 vs. 22-23.

The courts should be proactive in making orders for counselling rather than just giving a protection order alone because a protection order on its own may not be an effective remedy to some women who do not want to divorce their spouses.

### **5.7 Community committees**

Many women, especially in the rural areas, expressed concern that they may not be able to access protection orders due poverty in that they cannot afford transport and court fees. The Ministry of Gender official indicated that they had committees at grass root level but they had died out because of the lack of sustainability as they were donor projects. As compared to other abovementioned non-legal strategies calculated to make protection orders work more effectively, this strategy could be an alternative to obtaining a protection order. The goal is that women should be protected from all forms of abuse that they are facing. The respondents said that there is a need to take a leaf out of the book of other committees which are working in the rural areas.

#### **Action points**

Women and men of integrity should be appointed to serve in such meetings to deal with domestic violence issues.

People who may be appointed may have not been exposed to human rights training. It will be appropriate that such committees be trained in human rights and gender issues to effectively carry out their mandate.

### **5.8 Mediation**

One of the magistrates said that the adversarial system of adjudicating over court matters may not be in favour of family cases. Unlike court proceedings, mediation gives the opportunity to both parties to resolve the matter amicably. While court proceedings focus more on the past mistakes made by the perpetrator, mediation focuses on the future conduct of the parties. It does not focus on who is wrong and right but focuses on reaching a solution that will be in the interests of both parties.

‘Improved response to domestic violence cases demands new techniques as well as improved applications of existing ones, and mediation is often mentioned as an important new remedy’ (Bethel, 1982: 15).

The Act provides for alternative dispute resolution as one way of resolving domestic violence cases. It can be done at the instance of the parties or the court on its own motion.<sup>57</sup> However this option has not been utilized fully by the parties or the courts. The reason could be due to the lack of knowledge on the same. This option works better for parties who are willing to resolve their marriage disputes and continue with their marriage.

### **Action points**

There is a need to have mediation mechanisms in place to help victims of domestic violence settle their disputes in an environment that promotes reconciliation for parties who do not want to divorce their spouses.

There is a need for judicial activism to refer parties for mediation if it is in their interests.

The people handling mediation should be well trained in gender issues to avoid reinforcing patriarchal principles of male domination during mediation sessions.

## **5.9 Areas for further research**

There are some areas which arose during my research but I did not dig deeper into them as they need further research. Such areas include sexual abuse and the effect of HIV AIDS on victims of domestic violence and the problem of the law which does not recognise marital rape as a crime. What is the remedy for such victims?

The Act provides for counselling to be provided by marriage counsellors, chiefs and religious leaders. These are patriarchal structures. And this paper has shown that using marriage advocates in domestic violence cases has not benefited women. Currently there are no formal counselling structures where victims can go. Are women not going to be victimized further?

## **5.10 Conclusion**

The paper has endeavoured to outline what triggered the research on this subject matter. It has articulated that although the law provides protection to victims of domestic violence, accessibility and implementation of the Act is a big challenge to many victims of domestic

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<sup>57</sup> Section 8(1) of the PDVA.



violence. The said challenges have been outlined in this paper which include lack of knowledge about the law by the majority of the people which has made it difficult for victims to access the said law; lack of training of service providers to effectively implement the law; non-respect or contempt for court orders; use of informal dispute resolution mechanisms due to the cultural way of resolving marriage disputes as compared to use of formal system; the numerous interlocking oppressions that affect many women and cause them to fail to invoke the law for their benefit, fear of ostracism by family members and society if they expose family issues in the public. All these factors have contributed to the ineffectiveness of protection orders.

However the paper has also shown that protection orders on their own may not work effectively and there is a need therefore for the orders to be accompanied by other non-legal remedies. If non-legal remedies are incorporated this will help improve the efficiency of protection orders and improve the lives of victims of domestic violence in Malawi.

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## Appendices

### Appendix 1: Form 1: Blank application for protection order/interim protection order under sections 5 and 6

In the ..... Court at .....  
No..... of 20.....

Between

A. B. Applicant

and

C. D. Respondent

I,.....

(Name of Applicant) of

.....  
(Address)

hereby apply under section 5/6 of the Prevention of Domestic Violence Act for a protection order/interim protection order to be made by the court against

.....  
(Name of Respondent)

who is .....

(Specify relationship to named Respondent)

and who resides at

.....  
(Specify address of Respondent)

in respect of the following conduct. ....

(Specify dates, times, place and details of alleged conduct)

.....  
Applicant

Dated this ..... day of .....

**Appendix 2: Form 2: Blank protection order/ interim protection order**

In the ..... Court at .....

No..... of 20.....

Between

A. B. Applicant

and

C. D. Respondent

The Court having heard an application made by

.....

(Name of Applicant)

in respect of the conduct or threatened conduct of

.....

(Name of Respondent)

towards

.....

(Name of person to be protected)

NOW THIS COURT ORDERS that for the period from the ..... day of

....., to the ..... day of .....

YOU

.....

(Name of Respondent)

1. Shall not engage in the following conduct:

.....

(Specify conduct)

2. Shall not engage in any conduct that constitutes an offence under this Act.

3. Shall comply with the following prohibitions and conditions:

(Specify prohibitions and conditions imposed and any period or periods for which they may be imposed if different from the period of the Protection/Interim Protection Order).

If you the said

..... fail to

(Name of Respondent)

comply with any of the terms of this Order you shall be liable to imprisonment and/or a fine pursuant to section 31 of the Act.

.....


Registrar/Magistrate

Dated this ..... day of .....



**Appendix 3: Example of completed Form 2 protection order**

The matter has been transferred to H/W NGB. Since divorce proceedings are also here.



REPUBLIC OF MALAWI  
FORM 2  
PROTECTION ORDER / INTERIM ORDER  
(Under section 5 and 6 of the prevention of Domestic Violence Act)

CHIEF RESIDENT MAGISTRATE  
CASH OFFICE - PAID - 2-  
01 NOV 2013  
PRIVATE B.G 524  
BLANTYRE

In the S.G.M Court at BLANTYRE  
 No. 70 of 12  
 Between Quilith Chotchis Mochi (Applicant)  
 And Alex Mochi (Respondent)


The court having heard an application made by Quilith Chotchis Mochi (Name of Applicant)  
 In respect of the conducted conduct of Alex Mochi (Name of Respondent)  
 Towards Quilith Chotchis Mochi (Name of person to be protected)

NOW THIS COURT ORDERS that for the period from the 01 November of 2013 until the matter is concluded, you Alex Mochi (Name of Respondent)

1. Shall not ~~engage in~~ the following conduct: enter the matrimonial house until the matter is concluded. (Specify conduct)
2. Shall not engage in any conduct that constitutes an offence under this Act.
3. Shall comply with the following prohibitions and conditions: You should stop calling our wife from matrimonial home. You should stop calling our wife by using phone. You should surrender car keys reg no BL3210 and you must bring the keys at Blantyre court on Monday to the morning.

If you, the said Alex Mochi fail to comply with any of terms of this Order you shall be liable to imprisonment and / or fine pursuant to section 30 of the Act.

Dated this 1<sup>st</sup> day of Nov 2013



MAGISTRATE

Signed by:  
With NGWIRE W.  
4-11-13 NG051  
Service Served by: Ketwanda