APPROPRIATE DISPUTE RESOLUTION FOR WOMEN MARRIED UNDER CUSTOMARY LAW IN MALAWI, WITH SPECIAL REFERENCE TO MARITAL VIOLENCE

By

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DECLARATIONS

General Declaration

This is my research dissertation presented to the University of Cape Town for the approval of the Senate in fulfilment of the requirements of the Master of Laws degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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DEDICATION

To my parents

Harvey and Florence Msokera

As a peacemaker the lawyer has a superior opportunity of being a good man.
There will still be business enough.

~Abraham Lincoln~

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To God be all the praise and glory for sustaining me with health, wisdom and knowledge throughout my studies.

ABSTRACT

As a dispute resolution service provider, the justice system ought to provide effective legal remedies to address the justice needs of people. Apart from having the capacity to provide the legal remedies, the system has to be accessible as well. In marital violence disputes, one of the general interests of both the State and the affected individual spouses is to prevent further abuse. Courts offer this remedy, among others, by imposing restraining orders, which are backed up by punitive threats. On the other hand, facilitative mechanisms of dispute resolution such as mediation do not have the power to impose punishment on contemptuous parties. However, facilitative dispute resolution processes encourage joint problem solving, which is desirable in maintaining a workable relationship between spouses. This research argues that in order to ensure optimum access to justice in marital violence disputes there is a need for a dispute resolution system that offers facilitative and advisory mechanisms of dispute resolution alongside court processes. However, in Malawi, rural citizens face the barriers of language and use of English law-orientated procedures when accessing courts. Furthermore, some customary law practices and statutory law provisions encourage the view that mediation in marital violence disputes precludes concurrent access to court remedies. This research explores the challenges which this current approach to marriage dispute resolution poses to women married under customary law. It answers the question whether the justice system, with its English law-orientated procedures and the tenet of mandatory mediation or reconciliation, offers appropriate and effective mechanisms of resolving marital violence disputes to women married under customary law.

LIST OF ABBREVIATIONS

ADR	Appropriate Dispute Resolution
IBAHRI	International Bar Association's Human Rights Institute
MHRC	Malawi Human Rights Commission
MPS	Malawi Police Service
NTAC	National Traditional Appeal Court
UN	United Nations
UNAIDS	United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
VSU	Victims Support Unit

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CHAPTER 1: INTRODUCTION

1.1 Background to the Study

Family is recognised by law in Malawi as a fundamental unit of society.[1] An essential feature of the family unit is the institution of marriage. Since marriages create interconnections between families, they in turn become the building blocks of society.[2] On that basis, the constitution mandates the state and society at large to protect this institution.[3]

However, marriage or family disputes are inevitable. A regime of dispute resolution to facilitate reconciliation of couples and dissolution of marriages is necessary. Such a family dispute resolution system has to balance the interests of all stakeholders in the family unit. On the one hand, there is need to protect the marriage institution from disintegration.[4] In situations where there are children, the state has interest to protect the children's welfare.[5] On the other hand, these interests have to be counter balanced with those of individual spouses seeking redress from consequences of marriage breakdown. Therefore, the justice system needs to provide appropriate methods of dispute resolution that are capable of balancing these interests.

Currently, through statutory obligation, non-court dispute resolution mechanisms are placed to precede courts' hearing of divorce petitions.[6] Courts can entertain petitions only if they are satisfied that the parties to the marriage in question have taken all practical steps to save the marriage.[7] This approach is not new in Malawian family law as it has its roots in customary law.[8]

This study explores the challenges which the current set-up of marriage dispute resolution poses to women married under customary law. It examines whether the customary family law dispute resolution regime and the current statutory requirements promote the rights of women married under customary law to access justice in the context of marital violence disputes.

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[1] S 22(1) of Malawi Republican Constitution, 1994.
[2] *NyaNg'ambi v Mkandawire* Civil Appeal Case No. 68 of 1981 NTAC (Unreported).
[3] S 22(1) of the Constitution.
[4] S 59(1)(a) of the Marriage, Divorce and Family Relations Act No. 5 of 2015.
[5] S 59(1)(c)(ii) of the Marriage, Divorce and Family Relations Act.
[6] S 59(1)(b) of the Marriage, Divorce and Family Relations Act.
[7] Ibid.
[8] *NyaLongwe v Lungu* Civil Appeal Case No. 25 of 1977 NTAC (Unreported).

1.2 Problem Statement

There are four types of marriages recognised in Malawi. These are civil marriages, customary marriages, religious marriages, and marriages by repute or permanent cohabitation.[9] However, the majority of people contract their marriages under customary law.[10]

The court system is largely inaccessible for the majority of rural people because of financial, geographical, and procedural barriers.[11] Customary procedural and institutional mechanisms of dispute resolution, on the other hand, are said to be easily accessible to many.[12] This should also be considered in light of the possible establishment of local courts under the Local Courts Act.[13] The expectation is that the local courts will increase access to justice by applying customary law through procedures which are familiar to rural people.[14] This is in contrast with the procedure, influenced by English law ideologies, that is used in magistrate courts.[15]

Nonetheless, cultural systems from which customary law derives its operational bases are platforms that potentially promote violations of human rights against vulnerable groups including women.[16] It is likely that the same procedural customary law dispute resolution mechanisms which are readily accessible in terms of distance, cost and language may be an

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[9] S 13(1) of the Marriage, Divorce and Family Relations Act; S 22(4) of the Constitution.

[10] In 2001, the High Court estimated that over 95% of marriages are contracted under customary law (*Jamal v Jamal* (Matrimonial Case No. 1 of 1989) [2001] MWHC 45 (01 October 2001) available at http://www.malawilii.org/mw/judgment/high-court-general-division/2001/45/, accessed on 6 October 2016; L Mwambene *The impact of the Bill of Rights on African customary family laws: A study of women's rights in Malawi with some reference to developments in South Arica* unpublished LLD (UWC) (2009) xiv; Malawi Nation, 'Divorce Rate Rise' available at http://mwnation.com/divorce-rate-rise/, accessed on 24 February 2016).

[11] W Schärf et al *Access to Justice for the Poor of Malawi? An Appraisal of access to Justice provided to the poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums* (2002) 9–18.

[12] Schärf op cit note 11 at 39.

[13] Local courts (which were referred to as traditional courts) existed prior to the year 1994. These courts functioned across the country including in the rural areas. In April 2011, Parliament passed the Local Courts Bill which provides for the re-introduction of 'traditional courts'. The President, however, did not assent to the Act. Instead he referred it to the Malawi Law Commission for review. See Encyclopedia of Nations 'Malawi Judicial System' available at: www.nationsencyclopedia.com/Africa/Malawi-JUDICIAL-SYSTEM.html, accessed on 6 October 2016; see also IBAHRI *Rule of Law in Malawi: The Road to Recovery* (2012), available at http://webcache.googleusercontent.com/search?q=cache:VObVdj4lkAsJ:www.ibanet.org/Document/Default.aspx%3FDocumentUid%3DC9872074-1DF6-47E7-B2AA-728144009382+&cd=1&hl=en&ct=clnk, accessed on 25 February 2016.

[14] Report of the Law Commission on the Review of the Traditional Courts Act (2007) 7 available at http://www.lawcom.mw/docs/Report_on_the_Review_of_the_Traditional_Courts_Act.pdf, accessed on 13 December 2016.

[15] Malawi, which was a British Protectorate, inherited laws influenced by English ideologies. The Courts Act, which provides for civil procedure, was enacted in 1958 when the country was still under British rule.

[16] Schärf et al op cit note 11 at 39.

obstacle to accessibility of substantive justice.[17] For example, mandatory mediation, conciliation, or other means of non-court dispute resolution before a divorce petition can be granted may not be suitable in all cases.[18] One type of potential cases unsuitable for mediation is matters involving marital violence.[19]

Unlike courts, mediators do not have enforcement mechanisms to compel parties to comply with what has been agreed or resolved.[20] Yet spouses victimised by violence need a court's determinative and coercive power to protect them from their abusive partners. Mandating conciliation in such cases delays access to suitable courts' remedies that effectively address the problem. This may amount to breach of one's right to access an effective remedy by a court of law.[21]

Therefore, there is a need to explore the acceptable scope, application and limits within which the current system of family dispute resolution can operate in tandem with the Constitution and other legislation.[22] This research does that by, firstly, investigating whether both statutory law and customary law provide a set of criteria for allocating disputes to appropriate institutions. Secondly, it looks at factors which qualify and disqualify customary marriage institutions of dispute resolution to handle violence disputes.

1.3 Scope of the Study

From a broad perspective, the research borders the legal framework of family law dispute resolution. From this general standpoint, the study is narrowed down to investigate how the methods of customary law dispute resolution impacts on the accessibility of legal remedies for women in matrilineal societies. These remedies are limited to those addressing physical and sexual marital violence.

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[17] Ibid.

[18] FEA Sander & L Rozdeiczer 'Selecting an Appropriate Dispute Resolution Procedure: Detailed Analysis and Simplified Solution' in in ML Moffitt & RC Bordone (eds) *The Handbook of Dispute Resolution* (2005) 386–404.

[19] See LG Lerman 'Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women' (1984) *7 Harvard Women's Law J*ournal 57; R Field 'Using the Feminist Critique of Mediation to Explore "The Good, The Bad and The Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) *20(5) Australian Journal of Family Law* 45–78.

[20] JR Seul 'Litigation as a Dispute Resolution Alternative' in ML Moffitt & RC Bordone (eds) *The Handbook of Dispute Resolution* (2005) 35–353.

[21] S 41(2) and 41(3) of the Constitution provide the right to access justice in form of access to courts of law and effective legal remedies respectively.

[22] Other legislation includes the Marriage, Divorce and Family Relations Act and the Prevention of Domestic Violence Act 5 of 2006.

The focus on marital violence is informed by statistical indicators in other studies that show at least constancy in prevalence levels of violence against women in the domestic setting.[23] Lack of prevalence reduction in this area is irrespective of the passing into law of the Prevention of Domestic Violence Act in 2006. This research intends to offer possible explanations and solutions to this problem by using the analytical tools of dispute resolution theories.

The observations and results of this research are based on marriages formed under the matrilineal system of customary law as opposed to the patrilineal system. This is the case because there is sufficient literature written on customary law that describes institutions of dispute resolution under the matrilineal system. This suits the methodology of desk research adopted for this study, bearing in mind time and space limitations.

Of particular importance to this research is the institution of *ankhoswe.* Generally, the title a*nkhoswe* is given to an adult relative, especially a senior brother or maternal uncle of each spouse.[24] The *ankhoswe*'s primary duty is to resolve disputes in marriages by reconciling the parties whenever possible.[25] The institution of *ankhoswe* is also mandatorily required for validity of customary marriages.[26] Based on that reason, its accessibility and usage is relatively high compared to other institutions of dispute resolution in customary law marriages. It is on this basis that this research focuses its attention on the mechanisms of dispute resolution applied by the *ankhoswe*.

Mostly, the *ankhoswe* employ the mechanisms of mediation to resolve disputes between spouses.[27] In some cases, their role can be arbitrative in nature.[28] Whenever used in this study, the term '*ankhoswe* dispute resolution' is meant to refer to all the dispute resolution

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[23] See M Mellish et al *Gender-based Violence in Malawi: A Literature Review to Inform the National Response* (2015) available at https://www.healthpolicyproject.com/pubs/436_FINALHPPMalawiGBVLiteratureReview.pdf, accessed on 8 February 2017; National Statistical Office et al *Gender Based Violence Baseline Survey Report* (2012).

[24] The title '*Ankhoswe'* is the plural form of '*nkhoswe'*. It is also used to refer to an individual as a form of respect. See LJ Chimango 'Woman without Ankhoswe in Malawi' (1977) 15 *ALS* 54–55; *Chilakolako v Chilakolako* [1978–80] 9 MLR 355; BP Wanda 'Customary Family Law in Malawi: Adherence to Tradition and Adaptability to Change' (1988) 20:27 *The Journal of Legal Pluralism and Unofficial Law* 126–128.

[25] Chilakolako supra note 24.

[26] *Mbewe v Nyirenda* Civil Appeal No. 49 of 2003 HC (Mzuzu Registry) (Unreported).

[27] Courts usually use terms such as 'mediate' or 'mediation', 'conciliation', and 'reconcile' or 'reconciliation' in reference to the role of *ankhoswe* in dispute resolution (see *Chilakolako* supra note 24; *NyaLongwe* supra note 8).

[28] In *Nyang'ambi* supra note 2, it was stated that the *ankhoswe* have powers to penalise a spouse at fault. However, the court did not provide further clarifications on this point.

roles assumed by the *ankhoswe*. Similarly, the terms '*ankhoswe* mediation' and '*ankhoswe* arbitration' are used to refer to the mediation and arbitration roles of *ankhoswe* respectively.

The study appreciates that the dispute resolution duty of *ankhoswe* is not only relevant to disputes in marriages formed under customary law.[29] For instance, some couples who contract civil marriages choose to include the institution of *ankhoswe* in their marriages as well.[30] In other scenarios, the parties may have originally contracted their marriages under customary law and later had them converted to civil marriages.[31] Although in such situations the *ankhoswe* may not be legally essential, they still continue to help with resolving disputes in the marriage.[32] Legal principles concerning the role of *ankhoswe* outlined in such cases are also applicable in customary law marriages. These cases will be referred to in this study notwithstanding the focus on customary law marriages.

1.4 Research Question

The main question this study seeks to answer is:

Do women married under customary law have access to effective means of dispute resolution to remedy marital violence?

1.4.1 Specific Questions

To answer the main question, the research is guided by the following specific questions:

a) Are dispute resolution mechanisms under customary family law regulated to handle disputes based on the justice needs of the parties?

b) Is a single mechanism or legal system of dispute resolution sufficient to provide access to justice for women in marital violence?

c) Does *ankhoswe* dispute resolution stand as a potential obstacle for women to access courts of law?

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[29] The High Court in several matters has recognised the mediatory role of *ankhoswe* even in non-customary marriages. See *Msindo v Msindo* Civil Case 67 of 2006 (Principal Registry) available at http://old.malawilii.org/mw/judgment/high-court-general-division/2006/15, accessed on 11 May 2016; *Chilakolako* supra note 24.

[30] In *Chilakolako* supra note 24, the parties were married in terms of the Marriage Act 3 of 1902. However, they decided to have marriage advocates (*ankhoswe*) according to customary law.

[31] *Msindo v Msindo* Civil Case 67 of 2006 (Principal Registry) available at http://old.malawilii.org/mw/judgment/high-court-general-division/2006/15, accessed on 11 May 2016. Note that converting a customary marriage into a civil marriage is possible if the customary marriage in question is not polygamous as a matter of fact, see *Kandoje v Mtengelenji* 1964–66 ALR Mal 558.

[32] *Chilakolako* supra note 24.

d) Is *ankhoswe* dispute resolution a hindrance for women attempting to access legal remedies which effectively address the problem of marital violence?

1.5 Hypothesis

The hypothesis of the study is that women married under customary law do not have adequate access to effective means of dispute resolution to remedy marital violence.

1.6 Justification of Study

There has been significant research which has looked at substantive customary family law in the light of the Constitution, especially the Bill of Rights.[33] However, there has not been much research devoted to assessing the procedural rules of dispute resolution in customary family law. There is a need to have the methods of customary law dispute resolution tested for compatibility with constitutional norms and other legislation. With that aim, this research investigates how effective customary law dispute resolution is in promoting the right of married women to access effective legal remedies in marital violence disputes.

1.7 Literature Review

Legal scholarship in customary family law in Malawi has been mainly focused on appraising substantive rules of formalities and validity of marriages.[34] This has also been the case with the institution of *ankhoswe*. Commentators had for long questioned the legalistic customary rule that a marriage without *ankhoswe* was invalid.[35] The criticism centred on the adverse effects which the rigidity of this rule produced. If there were no *ankhoswe* in the marriage, parties were blocked from accessing matrimonial legal remedies they sought.[36]

To address this, the law created another type of marriage, which does not involve *ankhoswe*, known as 'marriage by repute' or 'permanent cohabitation'.[37] Under this form of marriage, a

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[33] Mwambene (2009) op cit note 10; L Mwambene *Reconciling African customary law with women's rights in Malawi: The proposed Marriage, Divorce and Family Relations Bill* (2007) 1 *Malawi Law Journal* 113; K Besendahl 'Negotiating Marriage on the Eve of Human Rights' (2004) 8(1) *African Sociological Review* 11–30.

[34] FA *Mwale Family and Succession Law in Malawi (2012);* DS Koyana et al *Customary Marriage Systems in Malawi and South Africa* (2007); JO Ibik *Restatement of African Law: Malawi: 1. The Law of Marriage and Divorce* (1970).

[35] For a historical discussion of law reform on marriages without *ankhoswe* see *Mbewe v Nyirenda* Civil Appeal No. 49 of 2003 HC (Mzuzu Registry) (Unreported); see also Chimango op cit note 24; Wanda op cit note 24; M Chigawa *Customary law and social development: de jure marriages vis-à-vis de facto marriages at customary law in Malawi* (1987) (Unpublished).

[36] Ibid.

[37] Supra note 9.

union which lasts for at least five years is a valid marriage if it satisfies certain prescribed conditions.[38]

Consequently, the creation of a separate type of marriage has reserved customary marriages, their formalities, and their institutions.[39] Under customary law the institution of *ankhoswe* is still relevant. It is also central to the resolution of disputes in customary law marriages. To this effect, the High Court held that the primary purpose of marriage advocates (*ankhoswe*) is to resolve differences in the marriage and to reconcile the parties if possible.[40]

Although this is the case, much of the legal literature has focused only on critical analysis of the role of *ankhoswe* with regard to the validity of marriages. This research seeks to fill the gap by taking the question further and looking at the role of *ankhoswe* in dispute resolution, which is their key role. It uses the theory of appropriate dispute resolution to appraise the efficacy of the family law justice system in providing legal remedies to end marital violence against women married under customary law.

In addition, this research builds on the works which have looked at customary family law generally and its interface with human rights.[41] This research adds to this body of knowledge by concentrating its attention on how customary family dispute resolution affects women's rights to access justice.

1.8 Methodology

This study is a product of desk research. It has drawn its primary sources from case law and statutes. The National Traditional Appeal Court (NTAC) decisions inform the study on the practice of matrimonial dispute resolution by the traditional court system.

In addition, High Court decisions have been used to draw a complete picture of the current jurisprudence of customary family law dispute resolution. This is significant because the traditional court system which had NTAC as its final appellate court was phased out in 1994.[42] Instead of the traditional courts, presently it is the magistrates' courts which handle

[38] S 13 of the Marriage, Divorce and Family Relations Act.
[39] S 26 of the Marriage, Divorce and Family Relations Act.
[40] *Chilakolako* supra note 24.
[41] Mwambene (2009) op cit note 10.
[42] See note 13 on the abolition of the traditional courts in 1994 and their pending re-establishment under the Local Courts Act No 9 of 2011.

customary law marriage disputes. The High Court in turn exercises appellate jurisdiction on the magistrates' courts.[43]

This research has also taken advantage of the fact that the role of *ankhoswe* in resolving disputes has been discussed by the High Court in some non-customary law marriage proceedings.[44] These cases add to the understanding of how the High Court defines and appreciates the function of *ankhoswe* in general.

The major legislation which has been consulted in this project is the Constitution, the Marriage, Divorce and Family Relations Act, and the Prevention of Domestic Violence Act.

There are a number of secondary sources such as journal articles and textbooks which the study has made use of in order to understand the historical context of customary law dispute resolution. The research also makes use of literature from journal articles and textbooks in the field of dispute resolution theory. With the aid of these sources, chapter 2 discusses the models of access to justice and appropriate dispute resolution. These concepts provide a comparative ground on which the research tests the theoretical appropriateness of the current structure of customary family law dispute resolution.

There are limitations to the methodology adopted in this study. One of them is that this research may not reflect the actual practises of 'living customary law'[45] obtaining in practice right now. This is because the study is not based on data from field research. However, this is mitigated by the fact that there exist stable principles in customary law which inform the changing rules. This research centres on these principles as opposed to the rules which change from time to time. In the end, the principles are compared with the prevailing circumstances of modern society in order to establish their present relevance and application.

1.9 Outline

The study has six chapters. In chapter 2 the discussion focuses on the theoretical methods of dispute resolution and their interface with the right to access courts of law and legal remedies.

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[43] According to section 110(4) of the Constitution, appeals from subordinate courts (which include magistrates' courts) lie to the High Court.

[44] *Chilakolako* supra note 24; see also *Msindo* supra note 31.

[45] Living customary law is the law made up of present customs and practices regarded as binding by people of a particular ethnicity. See C Himonga & C Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning (2000) 117 *South African Law J*ournal 318–331; see also Besendahl op cit note 33 at 14. Refer to 3.4.2 for further discussion on living customary law.

This interface is appraised in the light of the feminist critique on private dispute resolution and violence against women.

Chapter 3 discusses dispute resolution in the context of customary law. It explores how the current court system and its conceptualisation of substantive customary law has an impact on dispute resolution and accessibility of courts and legal remedies.

Chapter 4 outlines the legal framework of marital violence and its remedies in Malawi. In chapter 5, the analysis shifts to the various features of *ankhoswe* dispute resolution. These features include neutrality and impartiality; confidentiality; and enforceability of agreements. These are examined to answer the question whether the *ankhoswe* have the capacity to handle marital violence disputes efficiently and effectively.

The discussion is closed in chapter 6 with a summary of main observations, followed by specific recommendations for improving women's access to courts and remedies addressing marital violence.

CHAPTER 2: ACCESS TO JUSTICE THROUGH THE LENS OF APPROPRIATE DISPUTE RESOLUTION

2.1 Introduction

In law, rules of procedure are provided as a means of accessing remedial correction of legal wrongs. In order to give equal advantage to all people, the procedure needs to be fair and available to all without discrimination. Procedural fairness is important in ensuring and affirming the equality of every person to access justice in form of legal remedies.[46]

This chapter seeks to reflect on how family dispute resolution mechanisms fit in this equation of access to justice especially for women. This is done by examining the conceptual and theoretical frameworks of access to justice and appropriate dispute resolution. In addition, the discussion employs the feminist critique in appraising private dispute resolution on marital violence disputes.

2.2 Conceptual and Theoretical Framework for Access to Justice

2.2.1 Modelling Access to Justice

Access to justice refers to the ability of every person in society without discrimination to access the processes and institutions of enforcing existing rights or laws to obtain appropriate remedies.[47] This definition implies the availability of laws, institutions and remedies.

These three elements are the basic features used in modelling access to justice as conceptualised in this research. They are termed as normative protection, institutional capacity to provide effective remedies, and legal empowerment to seek and obtain remedies.[48]

Normative protection refers to the availability or existence of legal remedies in the 'letter' of the law.[49] These remedies are provided in statutes or through customary law. Additionally,

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[46] S 41(1) of the Constitution.

[47] L Schetzer & J Henderson *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW* (2002) 7 available at http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf, accessed on 2 September 2016.

[48] UNDP *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-based Approach to Access to Justice* (2005) 6 – 7; See also R Sudarshan 'Rule of Law and Access to Justice: Perspectives from UNDP Experience' (2003) 2 available at https://www.un.org/ruleoflaw/files/Rule%20of%20Law%20and%20Access%20to%20Justice_Perspectives%20from%20UNDP%20experience1.doc, accessed on 2 September 2016.

[49] Ibid.

the law provides the procedure and institutions through which the remedies are obtained. If access to justice is to be achieved, both the stipulated remedies and the institutions established by the law have to be available as a matter of practical fact.

In this study, chapter 3 outlines the normative framework of customary family law dispute resolution. On the other hand, chapter 4 discusses the legal framework of marital violence and remedies available to remedy it.

The other link in this model focuses on the capacity to provide effective remedies by the established institutions.[50] At this level, the emphasis shifts from merely having the institutions in place to having effective operations running in the institutions.[51] As the institutions are different, each has to be equipped with a capacity to handle the type of grievances for which it is able to offer effective remedies. This is why the discussion in chapter 5 addresses the question as to whether the institution of *ankhoswe* has the capacity to resolve marital violence disputes.

The aim behind building the capacity of these institutions of justice delivery is to improve their efficiency and accessibility. The institutions are of no use if the people they intend to assist fail to access them. In order to have a complete and effective justice system, the users have to be empowered to seek and obtain the available remedies.[52] This forms the third level of accessing justice in this model.

At this level, deliberate effort is necessary to assist especially vulnerable groups such as women in accessing the institutions and remedies addressing legal wrongs.[53] Such efforts include provision of legal awareness and legal aid. It is on this basis that this study analyses whether in customary family law dispute resolution there are enough safeguards to empower women to access legal remedies in disputes involving violence.

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[50] Ibid.

[51] See I Meene & B Rooij *Access to Justice and Legal Empowernment: Making the Poor in Legal Development Co-operation* (2008) 12; see also Sudarshan op cit note 48 at 2.

[52] UNDP op cit note 48 at 6 –7.

[53] Ibid.

2.3 Conceptual and Theoretical Framework of Appropriate Dispute Resolution (ADR)

2.3.1 Conflict and Dispute Resolution

Sometimes, conflict resolution and dispute resolution are terms which are used interchangeably.[54] Strictly, though, these terms can be assigned separate meanings. A conflict can refer to the "underlying set of events, facts and relationships forming the backdrop of a dispute".[55] A dispute, on the other hand, is usually an extracted event from a conflict expressed in legal, social or psychological terms to create a basis of interpreting the conflict.[56]

In a court setting, in order to resolve the dispute, the court refers to the legal rights of the disputants. At times, this process overlooks the actual causes of the conflict which may exist outside what is legally relevant. For example, the court may, through the lens of the law, be able to apportion blame to the losing party and confirm the position of the winning party. Yet it may not be able to resolve the miscommunication of parties due to emotional and psychological dysfunction. Although the legal dispute may be resolved in court, the conflict remains unsettled.

With this understanding of the difference between conflicts and disputes, the idea of access to justice being limited to accessing a court of law cannot be sustained. The court procedure only provides a means of reducing the conflict into a court legal dispute.[57] The problem is thereby defined within the narrow campus of what the court system recognises as legally relevant. As a result, the remedies that can be sought are mostly restricted to the law.

In the legal system, however, it is not only the court system which redefines a conflict into what is legally relevant. Parties in other settings may not define their dispute in the same legal language recognised by the court. This does not mean that their dispute is non-legal. Customary dispute resolution with its institutions has its own procedures and laws of defining what constitutes a legal dispute. What may seem, through a western-designed state court system, to be a non-legal dispute may well be a legal dispute in customary law.

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[54] ML Moffitt & RC Bordone 'Perspectives on Dispute Resolution: An Introduction' in ML Moffitt & RC Bordone (eds) *The Handbook of Dispute Resolution* (2005) 1.

[55] A Nylund 'Access to Justice: Is ADR a Help or Hindrance?' in L Ervo & A Nylund (eds) *The Future of Civil Litigation – Access to Courts and Court-annexed Mediation in the Nordic Countries* (2014) 328.

[56] Ibid.

[57] Ibid.

The idea of 'deep legal pluralism'[58] helps to provide a theoretical framework for considering dispute resolution procedures outside the confines of state dispute resolution processes. It recognises various types of legal orders or systems in a particular society without classifying some as superior to others.[59] This should be contrasted with 'state law pluralism', which aligns different types of 'laws' or 'legal systems' in a single hierarchical setup.[60] For example, under the Traditional Courts Act, customary law was subordinate to statutory law.[61] In the context of dispute resolution, this means that non-state or informal dispute management procedures were subject to state law.

However, this study adopts the understanding of deep legal pluralism. It views customary law institutions of dispute resolution and statutory institutions as equally legitimate. It further argues that these two systems apart from being equally legitimate should operate to complement each other to offer appropriate dispute resolution. In this regard, accessing customary law institutions such as that of the *ankhoswe* by a disputing couple should be considered in principle as also accessing a valid legal forum, such as a court. The fact that the approach in these forums differs in terms of procedures, claims, and goals for resolving disputes does not make either of the two systems less legal.

Both the court and such customary law institutions are the creations of the law for dispute resolution. Both are meant to give disputants an opportunity to access justice. Just as a day in court on its own does not imply access to justice, a session of conciliation with *ankhoswe* does not mean automatic access to justice. The answer to the question as to whether a person has access to justice depends on whether his/her justice needs have been met successfully. This will always have to be measured with the quality of remedies a party has been able to access to resolve a particular dispute.

Both statutory law and customary law court litigation may be suitable to provide remedies in matrimonial disputes where there is less chance for reconciliation. An estranged divorced couple may need the final word of a judge in distributing their jointly owned property. Matters which require legal compulsion to ensure compliance also fall within the ambit of the

[58] Albeit noting the difference between deep legal pluralism and state law pluralism, this research does not provide an in-depth analysis of legal pluralism. However, in chapter 3 there is a discussion of some aspects of legal pluralism in terms of living customary law and official customary law.
[59] V Niekerk 'Legal Pluralism' in Bekker et al (eds) *Introduction to legal pluralism in South Africa* (2006) 5–14.
[60] Ibid.
[61] S 12(d) of the Traditional Courts Act 8 of 1962.

court to provide remedies. For example, the state has an interest to punish offenders who physically abuse their spouses.

However, these remedies are not the only justice needs sought by disputing couples. In other cases, married couples seek to protect and promote an ongoing relationship with each other and their children. In such matters, their justice needs are met with relational justice.

2.3.2 The Place of Relational Justice in Family Dispute Resolution

The satisfaction by a disputant that justice has happened "through cooperative behaviour, agreement, negotiation or dialogue among actors in a [conflict] situation"[62] is referred to as relational justice. It works on the principle of identifying and accommodating the interests of all parties in a conflict.[63] The role of the third party in achieving relational justice is to increase the capacity of the parties to balance self-interest against the interests of others.[64]

These interests are determined by the parties themselves through a joint analysis of the conflict. The philosophy behind relational justice is that legal positions and demands are mere outward expressions of deeper needs and interests.[65] Instead of dividing the parties as winners and losers of a legal battle, relational justice seeks to maintain the relational ties of the parties by concentrating on joint problem solving.[66]

Therefore, relational justice is vital when dealing with conflicts where the parties need to maintain coexistence. In marriages, where after the dispute is resolved the couple is to live closely together, this type of win-win mechanism is important. Even in cases where the marriage has irretrievably broken down and divorce is certain, relational justice has a place in resolving such disputes. This is because the parties may have children who will require their parents' joint cooperation in meeting their needs after divorce.[67]

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[62] P Casanovas & M Poblet 'Concepts and Fields of Relational Justice' in P Casanovas et al (eds) *Computable Models of the Law: Languages, Dialogue, Games, Ontologies* (2008) 323–342.

[63] Dispute resolution mechanisms which focus on balancing parties' interests are sometimes referred to as problem solving methods. This approach was popularised by the concept of principled negotiation by Roger Fisher and William Ury (see R Fisher & W. Ury *Getting to YES: Negotiating Agreement Without Giving In* (1981)).

[64] J Burnside & M Schluter *Relational Justice: A Reform Dynamic for the Criminal Justice System* (1994) 7.

[65] Fisher & Ury op cit note 63 at 23 - 31

[66] D Gauvreau 'Mediation versus Litigation: Examining Differences in Outcomes Amongst Children of Divorce' (2012) *University of Western Ontario Paper presented to Family Law Alternative Resolution* 10 available at https://www.riverdalemediation.com/wp-content/uploads/2009/07/Gauvreau-Mediation-vs-litigation.pdf, accessed on 3 September 2016.

[67] Ibid.

On the other hand, litigation which is based on competitive or distributive justice is criticised for disempowering and alienating parties, thereby escalating the conflict.[68] As a result, this adversarial approach to family dispute resolution brings unjust consequences upon other background victims of the conflict like children.[69]

There is a need for a system of family dispute resolution which recognises that justice needs vary from one dispute to another. The appropriateness of a dispute resolution mechanism should be measured against its capacity to meet specific justice needs of the parties. It is significant, then, to understand how different methods of dispute resolution relate to different types of justice.

2.3.3 Categories of Dispute Resolution Mechanisms

One of the ways of classifying dispute resolution processes is based on the presence and the role of a third party assisting the disputants.[70] Within this classification there are two major stems: third-party processes and non-third-party processes.[71] In the latter, parties settle their dispute without involving a third party. Negotiation falls into this category of dispute resolution.

There is a further categorisation of dispute resolution mechanisms which require the presence of a third party. There are three major processes identified as making up this category. These are determinative, advisory and facilitative processes.[72] In determinative processes, a third party investigates a dispute and makes a decision as to its resolution. This decision, in most cases, is enforceable through court procedure. Examples of such processes include arbitration and litigation.

As to advisory processes, third parties are involved to give advice after examining the facts of the dispute.[73] Furthermore, their role may extend to giving advice on possible and desirable outcomes.[74] Evaluative and therapeutic mediation are examples in this category.[75]

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[68] Nylund op cit note 55 at 328.
[69] Gauvreau op cit note 66 at 4.
[70] Nylund op cit note 55 at 329.
[71] Ibid.
[72] Nylund op cit note 55 at 328; LA Ojelabi 'Improving Access to Justice Through Alternative Dispute Resolution: the Role of Community Legal Centres in Victoria, Australia' (2010) *Research Report, Faculty of Law and Management, La Trobe University* 13–14.
[73] Ibid.
[74] Ojelabi op cit note 72 at 13–14.
[75] Refer to the discussion under 2.4.1 on the differences between evaluative, therapeutic and facilitative mediation.

Facilitative mediation is an example of the last category of third-party dispute resolution, known as facilitative processes. Here, third parties are involved to help bridge the communication gap between or among parties in conflict.[76] The aim is to get parties into meaningful dialogue so that they can find their own solutions to the dispute.

Facilitative and advisory processes are suitable where the disputants' needs are more focused on relational justice. These methods are appropriate where parties want to preserve an ongoing relationship or where they are interested in terminating the relationship amicably.[77] This is what makes these processes apposite in marriage disputes. They are used to preserve family ties which in some cases do not involve only parents, but children as well.

In contrast, determinative processes such as litigation set spouses against each other.[78] Instead of cultivating cooperation, they encourage polarised thinking. Such adversarial dispute resolution in turn erodes meaningful communication between the parties. Nevertheless, the necessity of determinative processes cannot be completely ruled out in family dispute resolution. In cases where the marriage has evidently broken down, binding determinations by a third party are necessary. Because of its finality and coercive nature, litigation should be employed where there is threat to life or limb.[79] In such cases, insistence for mediation may be a way of hindering or delaying access to justice.[80]

Therefore, understanding the suitability of one process of dispute resolution over another in a particular dispute is necessary to improve access to justice.[81] Methods of dispute resolution should be used with an appreciation of their appropriateness to resolve disputes only in certain matters. A family dispute resolution system based on this principle will acknowledge that not all cases are appropriate for resolution in one process.

2.3.4 Appropriate Dispute Resolution

Historically, the abbreviation ADR had been coined to represent 'Alternative Dispute Resolution'.[82] This term has been subjected to criticisms for a number of reasons. One of

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[76] KK Kovach 'Mediation' in ML Moffitt & RC Bordone (eds) *The Handbook of Dispute Resolution* (2005) 304.
[77] Ibid.
[78] MJ Schoffer 'Bringing Children to the Mediation Table: Defining a Child's Best Interest in Divorce Mediation' (2005) 43(2) *Family Court Review* 323 at 326.
[79] See the discussion on the feminist critique under paragraph 2.4.2.
[80] Seul op cit note 20 at 346.
[81] Nylund op cit note 55 at 337.
[82] D Spencer *Essential Dispute Resolution* (2002) 24.

them is that the word 'alternative' fails to encompass the interrelations between various methods of dispute resolution as a harmonious system.[83] It portrays mechanisms of dispute resolution as mutually exclusive. The picture which the word 'alternative' paints is that at a given time one has to use one method of dispute resolution to the exclusion of other methods. This is not true because in practice some parties who are litigating before a civil court continue to negotiate or mediate their disputes.

Instead of 'Alternative Dispute Resolution', this research adopts the concept of 'Appropriate Dispute Resolution'.[84] In this vein, ADR is conceptualised as a comprehensive term covering all processes of dispute or conflict management.[85] It is a range of various procedures for solving disputes. In this range, some of the processes are effective when used to resolve only a certain category of disputes.[86] Thus, no one method of dispute resolution on its own is a solution for achieving efficiency in accessing justice.[87]

In 'Appropriate Dispute Resolution', the goal shifts from merely providing 'alternatives' to offering of multi processes of dispute resolution to optimise access to justice.[88] Therefore, ADR is undermined when disputants are restricted to one particular process. Aligning processes in a procedural strand for disputants to try one method before the other may have a similar effect.

For instance, in many jurisdictions, mediation as a general rule is mandatory before a civil matter can be litigated.[89] By mandating mediation the idea of appropriate dispute resolution can lose meaning as the system assumes that mediation is appropriate in all such cases. Reducing ADR to a concept of finding an alternative to litigation, and when such alternative is always compulsory mediation, destroys the value and efficacy of other methods of dispute resolution.

Appropriate Dispute Resolution presumes that parties are able to select the process which best matches their needs based on the type of dispute in question. This creates the need for the disputants to have information on the processes available, together with their advantages

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[83] Spencer op cit note 82 at 24; See also M Moffitt 'Three Things To Be Against ("Settlement" Not Included)' (2009) 78 *Fordham L. Rev.* 1204–1224.
[84] Ojelabi op cit note 72 at 13; Moffit op cit note 83; Spencer op cit note 82.
[85] Ojelabi op cit note 72 at 13.
[86] DW Nelson '*Which Way to True Justice?—Appropriate Dispute Resolution (ADR) and Adversarial Legalism*' (2004) 83 *Nebraska Law Review* 167–178.
[87] Nylund op cit note 55 at 327.
[88] Ibid at 328.
[89] Malawi has a mandatory mediation scheme under the Courts (Mandatory Mediation) Rules of 2004.

and disadvantages.[90] The lack of such information handicaps the parties from being able to choose an appropriate mechanism of dispute resolution. Such ignorance contributes to inequality in accessing the justice system.

2.4 The Realm of Family Dispute Resolution and the Feminist Critique

The question as to which family dispute resolution mechanisms are appropriate for women has attracted a lot of feminist scholarship.[91] This section provides the criticism that feminism levels against non-court family dispute resolution processes. Before surveying the feminist critique, the discussion examines mediation processes involved in family dispute resolution. These are compared with the methods used by the *ankhoswe.*

2.4.1 Models of Family Mediation

Mediation is defined as "the intervention into a dispute or negotiation by an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute"[92].

Family mediation can be facilitative, evaluative or therapeutic. In facilitative mediation, the aim is at managing the settlement process to help the disputants make decisions about their interests in the dispute.[93] The mediator is expected help the parties to use effective means of communication in the process of mediation.[94] The main objective of facilitative mediation is to refocus the parties' attention from their opposed demands to their needs and interests. This is why it is also known as interest based or problem solving mediation.[95]

Owing to minimal intervention by the mediator on the substance and results of mediation, there is a likelihood of dedication to the settlement reached through facilitative mediation because it is a reflection of the wishes of the parties.[96] This in turn means that there is less need for external monitoring to enforce the agreement. This minimal intervention comes with disadvantages as well. Facilitative mediation loses the opportunity of bringing in the

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[90] Nylund op cit note 55 at 337; Seul op cit note 20 at 344 –350.

[91] See Lerman op cit note 19; Field op cit note 19; KT Bartlett 'Feminism and Family Law' (1999) 33 *Family Law Quarterly* 475.

[92] C Moore *The Mediation Process: Practical Strategies for Resolving Conflict* (1986) 14.

[93] M Brandon & T Stodulka 'A Comparative Analysis of the Practice of Mediation and Conciliation in Family Dispute Resolution in Australia: How Practitioners Practice across both Processes' (2008) 8*(1) QUT Law Review* 195.

[94] L Boulle & A Rycroft *Mediation: Principles Process Practice* (1996) 26–28.

[95] Ibid.

[96] Ibid.

objective voice of a third party in the content of the agreement. Since the decision-making process on the content of settlement lies with the parties, they may well make decisions which ignore other affected persons such as children.

There is also danger of perpetuating power imbalances in facilitative mediation.[97] The ability of an abused wife to contribute objectively to the content of the settlement may be jeopardised by the fear of re-experiencing violence after the mediation session. This problem is compounded where the wife is largely dependent on the husband economically.

Evaluative mediation, however, goes beyond managing the process. It differs from facilitative mediation in that evaluative mediators give advice both on the process and the results of the dispute.[98] As a result of this role, the mediator runs the risk of being perceived as interfering with the parties' autonomy to work out their own preferred solutions.

As for therapeutic mediation, its aim is to deal with the underlying causes of the couple's dispute.[99] Mostly mediators who provide this form of mediation have expertise in counselling. The role of such mediators is to improve the relationship of the disputants by diagnosing and treating their relationship problems.[100] With this interest in restoring relationships, therapeutic mediation is also known as reconciliation or transformative mediation.[101]

Lastly, it should be noted that some of the mediation processes may involve, directly or indirectly, contributing to the terms of any agreement made. However, this does not extend to making determinative decisions as it does in adjudicative processes.

2.4.2 The Model of *Ankhoswe* Dispute Resolution

In customary family law, it may not be possible to assign a single model of mediation to the work of *ankhoswe*. Like other mediators, the *ankhoswe* use a combined range of models of mediation depending on the circumstances. Their role includes providing counselling and

[97] JA Chowdhury *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses* (2012) 96.
[98] Boulle & Rycroft op cit note 94 at 26–28.
[99] Ibid.
[100] Ibid.
[101] Ibid.

advice to the couple.[102] The goal of *ankhoswe* mediation is similar to that of therapeutic mediation. Their aims and efforts are centred on reconciling the parties.[103]

The role of *ankhosw*e to reconcile married couples in conflict can be taken to negative extremes at times. Influenced by cultural beliefs which advocate that marriage must be persevered with, women are encouraged to endure very difficult situations, including violence.[104] In other traditions a husband's physical violence against his wife is justified on the basis of disciplining her.[105] The likelihood of exerting pressure on a victimised wife to persevere is high where the *ankhoswe* accept as valid such cultural beliefs. Some view these beliefs as the position of customary law.[106]

However, there is always the danger of confusing prevalent cultural practices with customary law. Customary law is concerned with what the people of a particular ethnicity in a specific time period regard as binding practices.[107] It constantly adapts to changing socio-economic circumstances.[108] As old customary norms came into contact with religious norms, socio-economic changes and constitutional imperatives, they produced customary law that is binding today.[109] Given the current legal framework, it could be misplaced to hold the view that customary law still considers it legal for men to discipline their wives by beating them.[110]

In other scenarios, the *ankhoswe* seem to have some arbitrative powers. They are said to have powers to make authoritative directions which include penalising the spouse at fault.[111] The possibilities of how the *ankhoswe* were able to maintain a position of influence in the past in enforcing their awards are discussed in chapter 5.

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[102] The *ankhoswe* are also engaged in giving traditional therapeutic counselling. In *Nkono v Nkono* Civil Case No. 810 of 1980 (Unreported), the *ankhoswe* gave the parties traditional medicines to resolve their dispute arising from childlessness.

[103] *Chilakolako* supra note 24.

[104] NC Hayes ' "Marriage Is Perseverance": Structural Violence, Culture, and AIDS in Malawi' (2016) 58(1) *Anthropologica* 100–101; see also LM Chepuka *Perceptions, Experiences and Health Sector Responses to Intimate Partner Violence in Malawi: The Centrality of Context* unpublished PhD (University of Liverpool) (2013) 207.

[105] UN Press Release 'Malawi's Legal Structure Must Be Harmonized With International Standards, Say Experts On Women's Anti-Discrimination Committee' available at http://www.un.org/press/en/2006/wom1560.doc.htm, accessed on 9 December 2016.

[106] UN Press Release supra note 105.

[107] Himonga & Bosch op cit note 45 at 319.

[108] A Armstrong 'Internalising International Women's Rights Norms' in P Nherere & M D'Engelbronner-Kolff, (eds.) (1993) *The Institutionalisation of Human Rights in Southern Africa*, Oslo, Norwegian Institute of Human Rights 55–70.

[109] Himonga & Bosch op cit note 45 at 319.

[110] See the discussion on 4.2 on the legal framework of marital violence.

[111] *Nyang'ambi* supra note 2.

Currently, some general factors which compel parties to comply with the advice of *ankhoswe* include social pressure.[112] A wife may also observe the directions of the *ankhoswe*, fearing that disobedience may give her husband a ground for dissolving the marriage.[113] Similarly, a party who is at fault for the irretrievable breakdown of the marriage at customary law is liable to compensate the other.[114] Disobedience to *ankhoswe* may be taken into account as one of the factors in establishing that fault.

2.4.3 The Feminist Critique

Unlike mediation and *ankhoswe* dispute resolution, litigation coercively intervenes to regulate the conduct of individuals.[115] It has the ability to compel the wrongdoer to comply with orders and directions of the court. This is done irrespective of his or her unwillingness to co-operate with court procedure.

The question of what gives the state the legitimacy to intervene coercively on the conduct of its citizens has given rise to various thought systems. In response to this question, liberalism came up with the public/private dichotomy.[116] This dichotomy proposes that the state's realm of conduct regulation is public life as opposed to private life.[117] Intervention in the private realm should be exercised over free and equal adult individuals only with their consent. Since the marriage institution represents a private contractual agreement between two adult persons, the state is asked to act with restraint towards it.[118]

This divide, however, influences the state's discriminatory intervention on conduct suppressive to women in families.[119] For example, by minimising intervention in the family sphere, the state fails to end the oppression of women which happens behind closed doors.

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[112] See Schärf et al op cit note 11 at 42.

[113] *Malewezi v Malewezi* Civil Appeal Case No. 19 of 2007 available at http://old.malawilii.org/mw/judgment/high-court-general-division/2009/37, accessed on 5 September 2016, where one of the Appellant's grounds for divorce was that the Respondent was not taking advice from him and from the marriage advocates *(ankhoswe)* who had on numerous occasions intervened in their marriage problems.

[114] Chauwa v Chauwa Civil Appeal Case No. 26 of 1980 NTAC (Unreported).

[115] Seul op cit note 20 at 346.

[116] JMA Castro *Human Rights and the Critiques of the Public-Private Distinction* (2010) 15–33.

[117] H Shamir 'The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State' (2014) 15(1) *Theoretical Inquiries in Law* 4; M Freeman 'Austin Lecture: The Private and the Public' in D Morgan & G Douglas (eds) *Constituting Families: A Study in Governance* (1994) 23.

[118] Shamir op cit note 117 at 4–5.

[119] D Lavi 'Divorce Involving Domestic Violence: Is Med-Arb Likely to be the Solution?' (2014) 14 *Pepperdine Dispute Resolution Law Journal* 113.

This non-intervention of the state in the private sphere is, in turn, regarded as 'patriarchal conspiracy' to cover the crimes of men against women.[120]

The feminist demand is to eliminate this wall between the private and the public. This process is calculated to enlarge the social and legal latitude in protecting women. In reconstructing the family as a public sphere, the aim is to expose private oppression of women to public criticism. Therefore, the state is called upon to be actively involved in the regulation of family conduct and the application of justice to disputes arising out of it.[121]

It is on this theoretical basis that the private nature of non-court family dispute resolution has also been at the centre of criticism by the feminist thought. Family mediation is condemned for lack of power to cut off marital violence against women.[122] In cases involving physical abuse, the violent party is protected, through non-court dispute resolution, from public scrutiny and legal sanctions.[123] Ironically, if the same violence occurred between strangers, the dispute is subjected to public trial in criminal proceedings.

In addition, private justice fails in curbing violence against women because it lacks legal compulsion and precedent.[124] The unavailability of punitive threats to back resolutions reached in mediation or reconciliation leaves women vulnerable to further abuse. Similarly, the deterring effect of legal precedents is lost when dispute resolution is transferred from the hands of the court into the confidentiality of non-court processes.

The other challenge of private dispute resolution as perceived by feminism is that through it, women are socialised to accept violence as what is to be expected. This has been explained through the theory of 'learned helplessness'.[125] Having endured repeated incidents of marital violence, women are psychologically prepared to accept abusive behaviour as normal. Promises made by the husband after each repeated incident of abuse condition victims of marital violence to hope for positive behavioural change.

In mediation, these promises are reinforced as genuine. The victimised wife is made to endure violence with hope that her spouse will change. As the violence becomes more frequently repeated in various marriages, women gradually become conditioned to treat

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[120] Ibid.
[121] Bartlett op cit note 91 at 494–499.
[122] Lerman op cit note 19 at 71–97.
[123] Ibid.
[124] Ibid.
[125] L Walker *The Battered Woman* (1979) 42–54; Lerman op cit note 19 at 64;

cases of life-threatening marital violence as normal cases for settlement through non-coercive dispute resolution.

2.4.4 In Search of a Balance

The concerns raised by the feminist ideology are not without responses. The first of them is that non-court mechanisms do not make court processes inaccessible.[126] For instance, in jurisdictions where mandatory mediation is practiced, parties are not necessarily obligated to reach an agreement through mediation. The mandate is that they should go for mediation before litigation.

The second response is that a party using a non-court dispute resolution method may simultaneously access the court process.[127] A victim of marital violence can apply for a protection order and still opt for a non-court process at the same time.

These suggested answers to the feminists' critique on private dispute resolution should be considered in the context of a particular jurisdiction. In systems where mediation is mandatory, parties incur costs if they bypass mediation. During the traditional courts regime, neglect to take a matter before *ankhoswe* was used as evidence against the veracity of such party's claims.[128] In order to satisfy the procedure of undergoing mediation before trial a disputant may be forced to participate in an inappropriate dispute resolution process.[129]

Moreover, if non-court processes are mandated without screening, they hinder violence victims from accessing courts' remedies in time. In other cases, disputants accept ineffective settlements due to ignorance. This makes it necessary for the justice system to have a screening mechanism of appropriateness beyond party autonomy.[130] Through screening, disputes with relational justice demands should be directed to facilitative and advisory mechanisms. The courts should, however, retain matters where there is a need for determinative and coercive powers to be employed to safeguard compliance and to protect women from violence.

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[126] Lerman op cit note 19 at 64;
[127] Lavi op cit note 119 at 24.
[128] Kamwendo v Kamwendo Civil Appeal case No. 154 of 1978 NTAC (Unreported); *Lahana v Mkwanda* Civil Appeal Case No. 56 of 1981 NTAC (Unreported). Both cases are discussed in Wanda op cit note 24 at 127.
[129] Nylund op cit note 55 at 341.
[130] See F Sander 'The Multi-door Courthouse: Settling Disputes in Year 2000' (1976) *3 Barrister* 18–21 and 40 –42.

2.5 Conclusion

Viewed broadly, access to justice is not limited to accessing courts. Different demands for justice require different modes of dispute resolution. Customary family law dispute resolution in itself is neither a bar nor an open door for married women suffering violence to access remedies. The issue of whether *ankhoswe* mediation is an appropriate mode of dispute resolution has to do with the context in terms of the type of cases the system can handle and how it relates with other justice systems like the courts. This is examined in detail in Chapters 4 and 5. The next chapter sets up the framework of conceptualising family dispute resolution in the context of customary law.

CHAPTER 3: APPROPRIATE DISPUTE RESOLUTION IN THE CONTEXT OF CUSTOMARY LAW

3.1 Introduction

The concept of ADR, as noted in chapter 2, involves the provision of various processes for resolving disputes. The understanding is that one method of dispute resolution cannot provide access to justice for resolving all types of matters. It was further observed that ADR as 'Appropriate Dispute Resolution' is undermined when disputants are restricted to one particular process.

This chapter argues that ADR under customary law is incomplete because parties are provided with a court system which is far removed from their cultural context. This situation is caused by the absence of traditional courts. As a result of the absence of these courts, parties are forced to redirect their disputes which are suitable for courts' resolution to other forums of dispute resolution such as the *ankhoswe*.

The chapter also looks at the effect of conceptualising customary law as either 'official customary law' or 'living customary law' on women's rights. It argues that, unlike official customary law, the concept of living customary law equips dispute resolution with a better environment to deal with marital violence.

3.2 Institutions of Family Dispute Resolution

Couples married under customary law can access various institutions to resolve their disputes. Some of these institutions include the *ankhoswe*, traditional authorities (chiefs), religious authorities, the Police Service, and the courts. There is also provision for the establishment of a Family Counselling Panel under the Marriage, Divorce and Family Relations Act.[131] If established, the Panel's obligation will be to prevent and to address, through counselling, cases of family misconduct.[132]

The Malawi Police Service offers counselling to couples through the department of Victim's Support Unit (VSU).[133] The VSU mediates with the aim to reconcile couples in disputes

[131] S 111 of the Marriage, Divorce and Family Relations Act.
[132] Ibid.
[133] MPS & MHRC *Guidelines for the Support and Care of Victims of Gender Based Violence, HIV And AIDS Related Abuses, and other Human Rights Violations* (Undated), available at http://www.mwfountainoflife.org/files/9713/9395/3428/VSU_guidelines.doc, accessed on 13 December 2016.

which are misdemeanours.[134] Criminal charges are supposed to be instituted where the dispute involves serious forms of violence.[135]

Ordinarily, parties consult religious authorities when *ankhoswe* dispute resolution has failed. However, the *ankhoswe* and chiefs are dominant methods of customary law marriage dispute resolution especially in rural areas.[136] They are easily accessible because people are acquainted with their practices and procedures.[137] The chiefs are also within easy reach in terms of distance.[138] This is not the case with the courts. The magistrates' courts which are courts of first instance are largely inaccessible due to long distance and use of unfamiliar procedures.[139]

3.3 The Relationship between Litigation and Other Methods of Dispute Resolution

ADR requires parties' participation in choosing a process which best matches their needs according to the type of dispute in question. In reality, not all people have the knowledge of how various methods of dispute resolution work. This makes it necessary for the state to make available information on the processes of dispute resolution and their advantages and disadvantages.

Parties are then enabled to make informed choices by making evaluations to find effective means of resolving their dispute. The decision whether to continue with mediation or proceed to court, or to use both processes, requires comparison.[140] Disputants make calculations on whether the law as applied in litigation will yield better results than a settlement reached through mediation.[141]

In customary family law, it can be expected that parties proceed to court if they perceive that court justice is better than the *ankhoswe* settlement. In other words, where the advantages of pursuing trial are minimal, parties are likely to stick with the *ankhoswe* settlement or engage with another process perceived as better than court proceedings.

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[134] Ibid at 42.
[135] S 39 of the Prevention of Domestic Violence Act.
[136] Schärf op cit note 11.
[137] Ibid.
[138] Ibid.
[139] Report of the Law Commission on the Review of the Traditional Courts Act (2007) 7 available at http://www.lawcom.mw/docs/Report_on_the_Review_of_the_Traditional_Courts_Act.pdf, accessed on 13 December 2016.
[140] A Stitt *Mediation: A Practical Guide* (2004) 9.
[141] Ibid.

Arguably, perceptions of court's justice are affected by the type of law which the courts are applying. In the particular case of women in customary law marriages, their choice to access courts may depend on whether the customary family law being applied in those courts promotes their welfare. It is therefore significant that we look at some of the general principles of customary law which are applied in the court system in Malawi.

3.4 General Principles of Customary Law

3.4.1 Customary Law in Space and Time

Customary law is conceptualised in terms of its geographical application and validity in time. The General Interpretations Act defines it as "the customary law applicable in the area concerned".[142] The understanding is that customary law differs from one area to another across the country.

However, customary law cannot be confined to space only. Its validity in terms of time is equally important as customary law changes with passage of time. This is the reason why the Courts Act provides that customary law should be treated as a question of fact for purposes of proof.[143] Courts are enjoined to admit the evidence of experts and persons whom they consider to be conversant with the customary law of that time.[144]

This notwithstanding, there is also provision for the courts to refer to comparable case law in determining the applicable customary law.[145] Section 64 of the Courts Act provides that "a court may judicially note any decisions of its own or of any superior court" in "determining the customary law applicable in a like case". Within the context of this provision, lower courts make reference to the decisions of superior courts as a source of customary law.[146] This, though, has the potential of creating time validity problems of the customary law being applied.

The issue is, should the provision be interpreted as creating the common law doctrine of precedent? Binding lower courts to apply the customary law established by superior courts implies limiting the capacity of the former to implement changes in customary law. Instead of giving effect to the customary law obtaining directly from principles rooted in social practice,

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[142] S 2 of the General Interpretation Act No. 36 of 1966.
[143] S 64 of the Courts Act Cap 3:02 Laws of Malawi.
[144] Ibid.
[145] Ibid.
[146] Ibid.

lower courts may be forced to comply with binding precedent. This, in turn, creates a rigid system of customary law which is unresponsive to societal changes.

The High Court in interpreting this provision in *Kishindo v Kishindo*[147] held that "under … section 64 of the Courts Act[148], customary law has to be established by evidence and the High Court and the Supreme Court will create a binding precedent on customary law".[149] Yet, in the same case, the court stated the function of courts in customary law matters as one of establishing the "customary law exigent at a given point in time".[150]

Binding precedent puts courts of first instance under an obligation to apply coded rules of customary law until such a time as the High Court shall create new precedent. Unfortunately, only a few customary law marriage matters proceed on appeal to the High Court. This affects the application of society's changed rules of customary law because the old 'court-created' rules remain valid as well.

This application of customary law, codified through case law or legislation, fails to reflect current social-economic circumstances. It disables women from fully enforcing and enjoying their rights because in applying the rules derived from old customary law, courts are stuck to standards which were largely influenced by patriarchal values. The discussion in the next section briefly looks at this point by comparing the concept of official customary law with that of living customary law.

3.4.2 Official Customary Law and Living Customary Law

The codified version of customary law is referred to as official customary law.[151] Its sources include statutes, case law, and government documents. This type of customary law has a number of drawbacks. As already pointed out, patriarchal dominance has had its hand on it.[152] Traditional and other African leaders, who were predominantly male, interpreted customary law to suit patriarchal ideas.[153] Coupled with the common law system of precedent, these ideas entrenched male domination principles in official customary law.[154]

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[147] Civil Case No. 397 of 2013, available at http://www.malawilii.org/mw/judgment/high-court-general-division/2014/2/, accessed on 7 December 2016.
[148] Supra note 143.
[149] Supra note 147.
[150] Ibid.
[151] E Grant 'Human Rights, Cultural Diversity and Customary Law in South Africa' (2006) 50(1) *Journal of African Law* 13.
[152] See F Banda *Women, Law and Human Rights: An African Perspective* (2005) 17–19; see also Grant op cit note 151 at 13–17; Besendahl op cit note 33 at 14.
[153] Grant op cit note 151 at 13–17.

Secondly, the origin of official customary law is associated with colonialism.[155] In the eyes of colonial rulers, customary law was regarded as inferior.[156] It was subjected to common law principles and jurisprudence. Through this exercise, what remains on the official documents as customary law is but a creation of colonialism and not the actual norms derived from the practices of the people.[157]

On the other hand, living customary law is the law made up of present customs and practices regarded as binding by people of a particular ethnicity.[158] To use the words of the High Court in *Kishindo*,[159] it is the "customary law exigent at a given point in time".[160] It is derived from what people do and believe they ought to do as opposed to what the officials of the state law consider they should do or believe.[161]

Contrary to the rigidity of official customary law, living customary law is flexible and dynamic.[162] It constantly adapts to respond to changes in the economy, religion and the Constitution.[163] Owing to this adaptability, living customary law has greater potential to accommodate women's rights than official customary law.[164] For this reason, living customary law is better placed to resonate with the ideals of the Constitution and it can easily be used to eradicate violence against women.

Therefore, in looking at ADR in customary law, it is significant to give effect to what living customary law is. One of the measures of judging the appropriateness of customary law dispute resolution in marital violence disputes is its validity in time. The question of time requires not only a comparative investigation of the past and present rules of customary law. It further demands a comprehensive analysis of how customary law can effectively apply in modern social context.

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[154] Ibid.
[155] See Grant op cit note 151 at 13–17; see also Besendahl op cit note 33 at 14.
[156] See Grant op cit note 151 at 13–17.
[157] Ibid.
[158] Himonga & Bosch op cit note 45 at 319.
[159] Supra note 147.
[160] Ibid.
[161] Himonga & Bosch op cit note 45 at 319.
[162] Ibid at 319 – 328.
[163] A Armstrong 'Internalising International Women's Rights Norms' in P Nherere & M D'Engelbronner-Kolff, (eds.) (1993) *The Institutionalisation of Human Rights in Southern Africa*, Oslo, Norwegian Institute of Human Rights 55–70; Himonga & Bosch op cit note 45 at 319.
[164] Himonga & Bosch op cit note 45 at 319–328.

One way of achieving this is to understand the rationale behind the old rules of customary law. The idea is to identify the general principle which informed the rules.[165] As society undergoes changes, the rules are to be applied to give effect to the aims and purposes of the overarching principle.[166]

Regarding *ankhoswe,* the following questions can be asked to uncover living customary law: What interests were the *ankhoswe* supposed to protect? Are those interests constitutional? Is it possible to protect the same interests by using the old rules of customary law? Are there changes in society which make the old rules of customary law ineffective? In what ways can those interests be protected effectively in modern society?

These questions are explored in chapter 5 to establish whether *ankhoswe* dispute resolution has the capacity to provide effective remedies in marital violence disputes. In the next section the discussion looks at how the lack of implementation of constitutional provisions regarding the right to culture contributes to inefficiency in customary law dispute resolution.

3.5 The Cultural Aspect of Customary Law Dispute Resolution

Delivery of services to meet a particular need should be motivated by demand. As a service, dispute resolution is not an exception to this principle. Statistically, the largest population of Malawians contract their marriages under customary law.[167] Provisions of customary law dispute resolution ought to match this fact. Unfortunately, this is not the case in practice because of the absence of a court system that is dominantly customary law orientated. This not only undermines the right of rural people to access justice but it also breaches the Constitution's provisions which advocate for an open and culturally diverse society.

3.5.1 The Right to Participate in the Cultural Life of One's Choice

In the application and development of customary law the Constitution is the primary reference point. It is necessary to look at how this supreme law outlines the basic framework upon which a system of appropriate dispute resolution in customary family law can operate.

The Constitution mandates the state to develop policies and pass laws aimed at promoting non-adversarial means of settling disputes.[168] It recognises negotiation, good offices,

[165] Ibid at 326.
[166] Ibid.
[167] Supra note 10.
[168] S 13(l) of the Constitution.

mediation, conciliation, and arbitration as mechanisms of peaceful settlement of disputes.[169] It further provides for both the establishment of the court system[170] and the right of every person to access such courts for final settlement of legal issues.[171]

Recognising the presence of cultural diversity, the Constitution provides for the right of every person to participate in the cultural life of one's choice.[172] This right provides justification for the establishment and development of customary law dispute resolution institutions.[173] Thus, these institutions enable people married under customary law to resolve their disputes within their cultural setting. To this effect, provision in the constitution for the establishment of traditional/local courts within the judiciary reflects this principle.[174]

Despite Parliament passing the Local Courts Act in the year 2011, there is currently no local court operating in Malawi. The legislation was not assented to by the Presidency.[175] This poses challenges to the administration of customary law justice. For example, magistrates' courts, which assume the roles intended to be played by the local courts, were designed to administer a type of justice influenced by English law.[176]

Unlike the procedure used in magistrates' courts, customary law forums are inquisitorial.[177] The role of the chief is not that of a disinterested, passive third party. The chief takes a proactive role in managing the trial by freely asking questions of participants without being perceived as biased.[178] This runs in contradiction to the common law adversarial procedure which is used in the courts of Malawi.

Furthermore, the levels of formality in terms of paperwork, the use of English language by judicial officers, and the use of adversarial procedure challenges the claim that magistrates' courts apply customary law.[179] The current situation begs the question whether magistrates' courts have customary law jurisdiction to handle customary law marriage disputes. Although statutory provisions may confer on them power to administer customary law, it may be that customary law does not recognise them as valid forums of dispute resolution. As such, many

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[169] Ibid.
[170] See Chapter IX of the Constitution.
[171] S 41(2) of the Constitution.
[172] S 26 of the Constitution.
[173] TW Bennett *Customary Law in South Africa* (2004) 84; see also Grant op cit note 151 at 5.
[174] S 110(3) of the Constitution.
[175] Supra note 10.
[176] Supra note 15.
[177] Schärf et al op cit note 11 at 40.
[178] Ibid at 47.
[179] Traditional Courts Report op cit note 14 at 7.

rural people seek justice before chiefs and other forums instead of the courts. In turn, this perpetuates a trend of privatising justice from state regulation since couples direct their marital violence disputes to non-state forums.

The appropriateness of the *ankhoswe* dispute resolution should also be considered in this light. The choice to submit before *ankhoswe* all manner of disputes may not be a direct indication of approbation of the system by the parties. It may be the result of having an incomplete customary law dispute resolution system which leaves people with no practical option but to seek redress from *ankhoswe* and the chiefs. It is not surprising that the special Commission on the Review of Traditional Courts Act conceded that the absence of local courts has contributed to the denial of access to justice.[180]

3.5.2 The Right to Access Courts and Remedies within the Diversity of Cultures

Providing access to justice to a culturally diverse society requires giving equal attention to the practices of dispute resolution of different cultures. Customary law mechanisms of dispute resolution and the adversarial procedure prevailing in the magistrates' courts represent two cultural conceptualisations of handling disputes. By providing only one cultural system of dispute resolution, the state fails, as a duty bearer, to provide a level ground where people of all cultures should enjoy their right to access justice.[181]

As a social service, dispute resolution happens within a cultural context. It serves people who speak a particular language and conceptualise justice in a specific way. The current court system in Malawi does not reflect this basic fact. People especially from rural areas find its procedures complex.[182] Its English law-orientated mechanisms are an obstruction for disputants married under customary law to access courts' remedial action against marital violence. This is because the individualistic conceptualisation of justice in western culture is opposed to the community-orientated type of justice reflected in customary law.[183] For instance, the parties in a customary law forum may not be restricted to the wife and husband. Other relatives are incorporated in the dispute resolution process, not only as witnesses but as important stakeholders who give their input to find a solution to the dispute.[184]

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[180] Ibid at 7–14.
[181] Grant op cit note 151 at 5; Bennett op cit note 173 at 84.
[182] Ibid.
[183] Schärf op cit note 11 at 40.
[184] Ibid.

Therefore, parties who are culturally orientated to participate in a court process based on customary law adjudication find the procedure in magistrates' courts alienating. The absence of support and intervention from relatives and the community in settling the dispute is likely to be disappointing to rural people who cannot afford the western version of having legal support such as legal representation. As such, the only realistic option for customary law-orientated disputants is to take their matters for resolution before the chiefs and the *ankhoswe*, where the procedure suits their expectations. The problem is that these forums are not equipped with enforcement mechanism to check marital violence effectively.[185]

In order to uphold and respect the right of women to access justice, the state has to restructure the court system to suit cultural context. This can be done by re-establishing the local courts as provided under the Constitution and the Local Courts Act. To fulfil their purpose, the procedure in these courts will have to be simplified to make it easy for rural citizens to access them. Although such courts will have to reflect the customary law-procedures of resolving disputes, they need not be passive in dealing with marital violence. The presiding court officers can be trained to take a proactive role in making available various remedies to resolve disputes effectively.

3.6 Conclusion

Courts are established to serve people and primarily to address local challenges. A court which has the capacity to provide legal remedies but is inaccessible is of no use to society. Yet to an extent this is the position of the court system in Malawi, as it hinders people's access to courts' remedies with colonial procedures and language. Alienated from magistrates' courts, women married under customary law are compelled to seek remedies from friendlier institutions which lack the capacity to handle marital violence. This brings in a note of discord in the constitutional harmony of the principles of access to justice, cultural diversity, and non-discrimination.

In addition, official customary law limits the capacity of magistrates to invoke and apply updated rules of living customary law. Stuck within the rigidity of codified rules, these courts are prone to restate colonial and patriarchal principles that do not support the welfare of women.

There is an urgent need, then, to reconstruct the court system by reintroducing local courts to improve access to effective legal remedies. Applying living customary law in those courts

[185] See the discussion under 5.5.

will likely increase the flexibility of presiding officers to protect women's interests. This may in turn improve women's perception of court justice. Instead of being forced to choose *ankhoswe* mediation because of failure to access courts' remedies, the *ankhoswe* may be employed to complement those remedies. This conceptualisation of dispute resolution as a system of complementary efforts when dealing with marital violence brings efficiency. The next chapter examines this argument in detail.

CHAPTER 4: MARITAL VIOLENCE, REMEDIES AND DISPUTE RESOLUTION

4.1 Introduction

The model of access to justice discussed in chapter 2 places the existence of a legal framework as the basic starting point. The expectation is that the law provides for the rights and remedies before people can claim them. In addition, the same law must provide for the institutions through which people can seek redress for breach of their rights. This chapter outlines some of the legal remedies that are available to address physical and sexual marital violence.

It was also noted in chapter 2 that in a legal system which embraces a plurality of dispute resolution mechanisms, there is need for screening. The justice system must allocate disputes to ADR institutions according to their appropriateness in providing effective remedies. In this chapter, the focus is also on establishing whether the law in Malawi provides for a framework to ensure that women who are physically and sexually abused by their husbands are channelled to the appropriate forums of dispute resolution.

4.2 Legal Framework of Marital Violence and Remedies

Within the context of family law, violence can refer to various actions or inactions that cause harm to health and wellbeing of a person. This research focuses on marital violence. In other words, the study is looking at violence within the marriage setting, thus, between husbands and wives. From this viewpoint, marital violence is defined as any abusive conduct between husbands and wives that inflicts physical, physiological, or sexual harm to those in that relationship.[186]

The idea of marital violence is different from the broader concept of family or domestic violence. The latter includes other players like children. The understanding is that marital violence is a subunit of domestic violence. Hence, the relationship between a husband and wife among others qualifies as a domestic relationship within which domestic violence can be committed.[187]

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[186] See EG Krug et al (eds) *World Report on Violence and Health* (2002) 89 for a comparable definition (of intimate partner violence.

[187] S 2 of the Prevention of Domestic Violence Act.

From an international human rights perspective, Malawi has committed itself to eliminate violence against women.[188] This commitment is evident in its domestic legislation dealing with marital and domestic violence. There are various remedies which these laws prescribe to spouses victimised by marital violence. The Prevention of Domestic Violence Act[189] and the Marriage, Divorce and Family Relations Act[190] are the major legislation which outline these remedies and the procedure through which they can be obtained.[191] The remedies that form part of this research are: obtaining a protection order; achieving behavioural change through counselling and other ADR mechanisms; judicial separation; and divorce.

4.2.1 The Prevention of Domestic Violence Act

The Prevention of Domestic Violence Act aims at preventing domestic violence from occurring and offering protection to persons affected by it.[192] Domestic violence refers to "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."[193]

In this research, emphasis is on physical and sexual violence. The former includes "any act or omission which causes or is intended to cause physical injury or reasonable apprehension of physical injury".[194] Sexual abuse, on the other hand, means "sexual contact of any kind that is made by force or threat".[195] It also encompasses the commission of or attempt to commit sexual offences.[196]

Under the Act, the law empowers victimised spouses to apply for an order of the court protecting them from potential or further violence.[197] This remedy can be obtained as an interim or absolute relief.[198] If granted, the court has power to impose on the respondent various directions of restraint or specific performance.[199] For instance, the court can order the

[188] As a member of UN General Assembly Malawi is part of the voice behind the Declaration on the Elimination of Violence against Women (1993).
[189] Supra note 22.
[190] Supra note 4.
[191] In 2006 the Prevention of Domestic Violence Act became operational as a specific piece of legislation aimed at prevention of domestic violence and protecting persons affected by domestic violence.
[192] The Preamble to the Prevention of Domestic Violence Act.
[193] S 2 of the Prevention of Domestic Violence Act.
[194] Ibid.
[195] Ibid.
[196] Ibid.
[197] S 5 of the Prevention of Domestic Violence Act.
[198] Ss 6 and 21 of the Prevention of Domestic Violence Act.
[199] S 5 of the Prevention of Domestic Violence Act.

respondent to pay a fine for any further violent conduct perpetrated against the applicant.[200] The respondent can also be restrained from occupying or staying in a specified household or residential area.[201] In exercising these powers, the court has wide discretion to order the respondent to comply with any other condition which the court deems necessary for the effective protection of the applicant.[202]

The application for protection order can be heard and granted irrespective of the existence of other proceedings.[203] Therefore, a victimised spouse can apply for a protection order alongside proceedings of divorce or judicial separation. In the same spirit, the court can order that the parties receive family counselling in addition to the protection order.[204] Consent is required from the applicant where the court makes this order on its own volition.[205] Otherwise, the court cannot impose the order of counselling unless it is applied for by the applicant.[206]

The orders of the court under this Act are backed up by an enforcement mechanism. The court is empowered to impose a fine of up to MK500 000 where a person fails to comply with its orders or directions.[207] Similarly, under the Courts Act, contempt of court is punishable by fine and imprisonment depending on circumstances.[208]

4.2.2 The Marriage, Divorce and Family Relations Act

Under the Marriage, Divorce and Family Relations Act, the only ground for divorce is irretrievable breakdown of marriage.[209] This ground can be proved by adducing evidence before the court which demonstrates that the marriage has irretrievably broken down because of the conduct of the respondent. One of the types of conduct which can be used as evidence to prove this condition is cruelty.[210]

However, the Act does not define cruelty. This research adopts the comprehensive definition of cruelty provided in civil marriage case law before the enactment of the Act because it

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[200] S 5(a)(i) and 30 of the Prevention of Domestic Violence Act.
[201] S 5(a)(ii), (iii) of the Prevention of Domestic Violence Act.
[202] S 5(b)(v) of the Prevention of Domestic Violence Act.
[203] S 9 of the Prevention of Domestic Violence Act.
[204] S 39(2), (3)(a) of the Prevention of Domestic Violence Act.
[205] Ibid.
[206] S 5(b)(x) of the Prevention of Domestic Violence Act; MK500 000 was equivalent to about US$690 on 7 February 2017.
[207] S 30 of the Prevention of Domestic Violence Act.
[208] S 54 of the Courts Act.
[209] S 61(1) of the Marriage, Divorce and Family Relations Act.
[210] S 64(d) of the Marriage, Divorce and Family Relations Act.

covers all the aspects of marital violence under this study.[211] Thus, cruelty was understood as any conduct which causes or has potential to cause danger to life, limb, or health.[212] The conduct constituting cruelty included acts which cause economic, mental, physical, and sexual harm.[213]

Not all 'trying and tiresome' conduct established cruelty.[214] In terms of physical harm, the court had to be satisfied that the respondent had inflicted serious bodily injury or apprehension of it upon the petitioner.[215] There was reluctance to accept slight injuries as constituting cruelty.[216] If the injuries were not severe, courts would infer cruelty only where the acts of violence were repetitive.[217] Therefore, as a matter of general principle, if there was only a single incident of violence, it had to be gross to be accepted as cruelty.

As to sexual abuse, courts could not accept adultery on its own as a form of cruelty.[218] For it to amount to cruelty, special circumstances had to be proved.[219] This position, however, is far removed from the reality of present society. With the HIV/AIDS pandemic in Malawi, it can hardly be denied that a single act of adultery is sufficient to give rise to reasonable apprehension of danger to one's health and life.[220]

On the other hand, the traditional courts did not approach the issue of cruelty by surrounding it with definitions or legal tests. It appears that matters were taken from a common-sense point of view. On top of acts of physical violence, traditional courts were ready to assign the term 'cruelty' where a man contracted a polygamous marriage without consulting his first wife.[221]

Notwithstanding the position on consent in contracting a polygamous marriage, the traditional courts did not regard adultery as a serious breach of marital commitment. In one case, the court took the view that at customary law, parties often forgive each other for

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[211] *Kamlangila v Kamlangila* (1965–68) 4 ALR (Mal) 301.
[212] *Malinki v Malinki* (1975–77) 8 ALR (Mal) 14 at 146.
[213] *Kamlangila v Kamlangila* (1965–68) 4 ALR (Mal) 301.
[214] Panjwani v Panjwani and others [1997] 1 MLR 142 at 152.
[215] Hayter v Hayter and another [1991] 14 MLR 94 at 102–103.
[216] Ibid.
[217] Ibid.
[218] *Nyangulu v Nyangulu* [1981–83] 10 M.L.R.433.
[219] Ibid.
[220] It is estimated that 1 000 000 Malawians were living with HIV in 2013 and 48 000 Malawians died from HIV-related illnesses in the same year; see UNAIDS *The Gap Report* (2014) A57 available at http://www.unaids.org/en/resources/campaigns/2014/2014gapreport/gapreport, accessed on 13 December 2016.
[221] *Wasili v Wasili* Civil Appeal Case No. 86 of 1979 NTAC (Unreported); *Zinyemba v Zinyemba* Civil Appeal Case No. 38 of 1985 NTAC (Unreported).

adultery and that they rarely adduce it as a ground for divorce.[222] In comparing the remedies available under customary law and statutory law, the same court held that "[a]dultery, which is considered a ground for dissolving the marriage under the Marriage Act, is a matter of compensation at customary law".[223]

Whether that was a true reflection of customary law as it was then is debatable. It is unlikely that such views form part of modern/living customary family law. Due to low levels of risk associated with adultery, customary law, then, may not have assigned danger to sexual irresponsibility. Presently, adultery is life threatening. The same principle behind the rule that unconsented polygamy is cruelty should extend the meaning of cruelty to the irresponsibility of a husband exposing his wife to sexually transmitted diseases, including HIV/AIDS.

Another point to note from the Marriage, Divorce and Family Relations Act is the recognition of the right of a spouse to deny sexual intercourse on certain grounds.[224] For example, a spouse can exercise this right because of poor health, post-natal recuperation and reasonable respect for custom.[225] The Act does not specify remedies which can be sought where intercourse under these circumstances is forced on a spouse. However, before the enactment of the Act, a customary marriage could be dissolved on such grounds. In *Moffat v Moffat*[226], divorce was granted by a magistrates' court where the wife gave evidence of forced sexual intercourse while menstruating and when she was asleep.

Outside the marriage relationship, incidences of unconsented sex amount to rape.[227] For married couples, these incidents do not constitute rape except where the parties are on judicial separation.[228] Therefore, unless the spouses are on judicial separation, husbands cannot be prosecuted for raping their wives. Viewed from this perspective, judicial separation is a remedy which can protect women from apprehended acts of sexual violence.

It is the right of all women to have access to all these remedies.[229] Both statutory law and customary law create room for various kinds of dispute resolution processes to facilitate the

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[222] *NyaNg'ambi* supra note 2.
[223] Ibid.
[224] S 48(7) of the Marriage, Divorce and Family Relations Act.
[225] Ibid.
[226] Civil Case No. 10 of 2007 (Unreported).
[227] S 132 of the Penal Code Cap 7:01 Laws of Malawi.
[228] S 62 of the Marriage, Divorce and Family Relations Act.
[229] S 41 of the Constitution provides for the equality of all persons before the law, the right to access courts of law and the right to access effective legal remedies.

procedure of claiming the remedies.[230] Yet private dispute resolution, if unregulated, is capable of laying obstacles in front of the 'doors' of the court. The concept of ADR provides a way of using several modes of dispute resolution concurrently with court process.

4.3 ADR, Marital Violence and Remedies

Appropriate Dispute Resolution requires the state to regulate the multiplicity of mechanisms of dispute resolution to ensure that courts are always open for every female person to enforce and realise her rights. The discussion in this section looks at the availability of such regulation to ensure access to courts and legal remedies for women victimised by violence in customary marriages.

4.3.1 Provision for Non-Court Processes of Dispute Resolution

As observed in chapter 2, the abbreviation 'ADR' in dispute resolution is sometimes used to stand for the term 'Alternative Dispute Resolution'.[231] This concept is reflected in various regimes which embrace different processes for resolving disputes in the justice system. This, in some provisions, is the case with the legislation which deals with marital violence in Malawi.

The first provision to note is section 8 of the Prevention of Domestic Violence Act. The heading of this section reads as follows: "Court may make a direction for alternative dispute resolution". Under this section, an applicant or respondent can apply to the court to suspend the proceedings of obtaining a protection order. This application can be granted if both parties agree to undergo an 'alternative' dispute resolution process.[232]

What is striking with this provision is that it treats the proceedings of hearing the application of a protection order as mutually exclusive to referring the parties to another process of dispute resolution. In this regard, the application of referring the matter to mediation or counselling can be made only before the issuing of a protection order.[233] If such reference is made, the proceedings of granting the protection order are suspended.[234]

There is danger that this procedure can be abused by the violent spouse. For the purposes of delaying or escaping litigation, the respondent may repeatedly resort to stay the proceedings,

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[230] S 13(l) of the Constitution.
[231] Spencer op cit note 82 at 24.
[232] S 8(1) of the Prevention of Domestic Violence Act.
[233] Ibid.
[234] Ibid.

pending further counselling process. To avoid this, the Act prohibits the court from suspending the proceedings of granting a protection order for more than once.[235] Implicit in this prohibition is a recognition of the risk of referring parties in a marital violence dispute to mediation or counselling at the expense of the court's proceedings. Still more, one wonders why the Act allows the risk of violence even if it is only once.

The fact that this provision can be invoked only with the consent of the victimised party does not justify its rigidity. It is an underestimation of power imbalances which exist between women victims of marital violence and their husbands to suggest that consent from the victim is enough for the state to suspend her protection. Additionally, the provision overlooks the victim's levels of mental disturbance and vulnerability to manipulation during mediation. It would have been more appropriate for the provision to leave room for courts to assess each matter and exercise their discretion accordingly. As will be noted in the next section and in chapter 5, it is not impossible for courts to allow the issuance of a protection order and counselling to run concurrently.

A similar provision under the same Act is section 39. This section gives the court power to suspend the granting of a protection order on condition that the parties agree to receive professional counselling. Unlike section 8, this provision can be invoked by the court on its own volition. In applying it, the court has to be satisfied of the following conditions: that the incident was not a repeated conduct of violence; that there are circumstances which make it desirable to preserve the family unit; that the violent conduct is not grave; and that the applicant has consented that the matter be referred to counselling.[236]

As opposed to these two provisions, under section 52, the Act embraces the concept of 'Appropriate Dispute Resolution'. This provision is significant to customary law dispute resolution as it directly and specifically makes reference to *ankhoswe*[237] and chiefs. It allows the court to recommend counselling to the parties.[238] The wording of the provision does not tie the hands of the court to choose between granting a protection order and referring the matter to another process of dispute resolution. In addition to granting the relief of a protection order, the court can refer the parties to pursue mediation.

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[235] S 8(3) of the Prevention of Domestic Violence Act.
[236] S 39(2) of the Prevention of Domestic Violence Act.
[237] Under this provision the *ankhoswe* are referred to as 'marriage advocate relations'.
[238] S 52 of the Prevention of Domestic Violence Act.

4.3.2 Alternative or Complementary Efforts?

The 'alternative' conceptualisation of ADR in dealing with violence is inconvenient. As already observed, the word 'alternative' is undesirable. It restricts parties to one method of dispute resolution to the exclusion of others. In practice, this is ineffective when dealing with marital violence.

The challenge is that in disputes of marital violence, there is, at times, the need to employ several processes of dispute resolution. For instance, there could be scenarios where the wife is desirous of keeping her marriage. At the same time, she may be at real risk of suffering more violent acts from her husband. If the court suspends the granting of a protection order to save the marriage by referring her to *ankhoswe*, it fails to protect her from the likelihood of other acts of violence. Similarly, in such situations, there is danger on the part of the court of escalating the conflict if it follows the adversarial procedure of issuing the protection order without advising the parties to seek counselling or other means of resolving the dispute.

The problem in disputes of marital violence where there is room to save the marriage is not finding one perfect process to resolve the dispute. To deal 'appropriately' with the dispute may require engaging several processes. Therefore, the victim should not be prevented from seeking help from the court regardless of whether she has already participated in *ankhoswe* mediation or other ADR processes.

The court can also deal with this problem by offering mediation. This approach is in tandem with customary law procedure as was used by traditional courts in divorce matters.[239] This, however, would require that judicial officers are trained to offer facilitative and advisory forms of dispute resolution. Thus, on top of referring parties to *ankhoswe* mediation, the court would also offer counselling to the parties.[240] This has the advantage of removing adversarial tones from the court proceedings. Orders which can be imposed in that environment might be less likely to be interpreted negatively than those issued with adversarial procedure.

To an extent, the Marriage, Divorce and Family Relations Act encourages this approach. Under it, the court has the responsibility of minimising distress to the parties throughout the procedure of dissolving their marriage.[241] The Act cautions courts to avoid escalating conflict by avoiding questions which can lead to further wreckage of the relationship between the

[239] *NyaLongwe* supra note 8.
[240] Ibid.
[241] S 59(1)(c)(i) of the Marriage, Divorce and Family Relations Act.

spouses.[242] Instead, the court is encouraged to handle the matter in a way calculated to help the couple maintain a workable relationship.[243]

Therefore, the goal of ADR in marital violence disputes needs to shift from merely providing 'alternatives' to offering multiple processes of dispute resolution in order to optimise access to justice. This is significant especially in cases where women need protection from marital violence and at the same time do not want to lose the opportunity for reconciliation. This balance cannot be achieved if mediation is mandated to run on the condition of excluding court process.

4.4 The Legal Framework of Mandatory Mediation in Customary Law Marriages

4.4.1 General Principles in Resolving Matrimonial Disputes

The aim of ADR in family law is to provide appropriate methods of dispute resolution that are capable of balancing the interests of all stakeholders in the family unit. Methods which encourage reconciliation assist in protecting the family unit from disintegration. In making sure that couples stay together, the state fulfils part of its duty to protect the welfare of children. In pursuing these ends, the individual interests of the spouses seeking redress from consequences of marriage breakdown should not be ignored.

The Marriage, Divorce and Family Relations Act provides general principles aimed at helping courts to balance these interests when handling marriage disputes.[244] The stipulated principles apply to all types of marriages, including customary law marriages. The first principle echoes the words of the Constitution by enjoining the court to take into consideration that the institution of marriage is to be protected.[245] Both the Constitution and the Act do not provide further details on what this protection entails.

In the eyes of customary law this protection could be interpreted to mean that the court will have to be slow in granting petitions of divorce or judicial separation. This reasoning can be traced from the NTAC case of *NyaNg'ambi v Mkandawire.*[246] In support of a protectionist approach to the marriage institution, the National Traditional Appeal Court made the following remarks:

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[242] S 59(1)(c)(ii) of the Marriage, Divorce and Family Relations Act.
[243] Ibid.
[244] S 59 of the Marriage, Divorce and Family Relations Act.
[245] S 59(1)(a) of the Marriage, Divorce and Family Relations Act; S 22(1) of the Constitution.
[246] Supra note 2.

> '[Marriage] creates a mutual joy and cohesion between families, and clans which are the bulwark of the society, community and the nation. It is for this reason that dissolution of the marriage is made more difficult by our custom. Our custom requires that before a marriage is dissolved the spouses must have allowed the advocates from both sides to discuss the matter.'[247]

From this quotation, it is clear that the office of the *ankhoswe* is central to protecting the institution of marriage from divorce. What is not clear is the extent of the discretion and jurisdiction which the *ankhoswe* can exercise in protecting the marriage institution. The question is: are all disputes worthy of the procedure of making dissolution of marriage difficult by subjecting the parties to mandatory counselling and conciliation efforts?

The Act provides that, "the parties to a marriage which may have broken down are to take all practical steps, whether by counselling or otherwise, to save the marriage"[248]. The Commission on the Review of Laws on Marriage and Divorce interprets this provision with a tone of mandatory obligation.[249] It suggests that under this provision, "a couple shall be required to go for mediation".[250] Furthermore, the Commission viewed this provision as one requiring evidence of attempts to restore the marriage to be adduced before the court can dissolve it.[251]

Although such mandatory obligations can be constructed from this provision, the same should not be interpreted without exceptions. The exceptions can be read from the phrase 'practical steps'. The word 'practical' can be understood to mean useful, appropriate, sensible, and likely to be effective.[252] Thus, the provision can be construed as requiring parties to take steps towards saving their marriage where such available steps are practical. In other words, the court should not demand steps to be taken where the available non-court processes aimed at saving the marriage are ineffective. Whether the sought-after-processes are appropriate or effective in a particular case will have to depend on the type and nature of reasons behind the petition for divorce or separation.

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[247] *Nyang'ambi* supra note 2.
[248] S 60 (1)(b) of the Marriage, Divorce and Family Relations Act.
[249] Report of the Law Commission on the Review of Laws on Marriage and Divorce (2006) 86 available on http://www.lawcom.mw/docs/Report_on_the_review_of_Marriage_and_Divorce_Act.pdf, accessed on 13 December 2016.
[250] Ibid.
[251] Ibid.
[252] 'Practical' definition 2 Microsoft *Encarta Dictionaries* (2009).

There are other principles under the Act that give further room for exceptional circumstances to mandatory mediation. For example, the Act requires courts to dissolve marriages "with minimum distress to the parties and to any affected children".[253] In addition, the courts are asked to facilitate the whole process of divorce "without costs being unreasonably incurred".[254].

These factors should call for a balance between mandatory mediation, counselling or conciliation, and avoiding unnecessary distress and costs. Mediation, conciliation and counselling may help to reduce costs by avoiding litigation. Yet these processes can also increase costs where the parties proceed with trial after failing to reach a settlement.[255] In customary law marriages, where the *ankhoswe* stay far away from the residential home of the couple, money for transport and time delays can be costly as well. This means that if parties are mandated to use other mechanisms of dispute resolution without assessing each case on its own merit, the procedure can also compound costs instead of reducing them.

Making the procedure more costly hinders access to court remedies. Having already spent time, money and other resources in mandatory conciliation, a party may not be willing to use any further dispute resolution mechanism.[256] This may result from a fear of escalating the emotional distress that accompanies the tension of matrimonial disputes. This distress is multiplied in cases involving violence. Recognising this, the Marriage, Divorce and Family Relations Act puts responsibility on the court to remove any risk of violence to any of the parties and to children.[257] However, as stated before, the private nature of non-court processes poses a challenge to efforts of removing violence. Therefore, it is necessary that the decision by courts to recommend other dispute resolution processes should be made only when such processes are appropriate and effective to curb the violence.

The likelihood of further abuse to women as a result of unavailability of legal compulsion to back resolutions reached in mediation must not be ignored. There is also a broader picture of violence which should not be overlooked. The interest of protecting a particular marriage or family should be balanced with the interest of the state in eliminating all forms of violence against women. By delegating the handling of violent marriage disputes to private forums,

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[253] S 59 (1)(c)(i) of the Marriage, Divorce and Family Relations Act.
[254] S 59 (1)(c)(iii) of the Marriage, Divorce and Family Relations Act.
[255] H Genn 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24(1) *Yale Journal of Law & the Humanities* 405.
[256] Nylund op cit note 55 at 341.
[257] S 59 (1)(d) of the Marriage, Divorce and Family Relations Act.

the deterring effect of judicial pronouncements is lost. This confidentiality of justice compromises the state's effort in removing the culture of violence by men against women.

Conclusively, there is a need to balance mandatory efforts put in place to save a marriage and other competing interests. To strike this balance, the system of family law dispute resolution should emphasise allocation of disputes to forums based on appropriateness.

4.4.2 Applicability of Courts (Mandatory) Mediation Rules to Customary Law Marriage Disputes

Under the Courts (Mandatory) Mediation Rules, all parties in civil matters are obligated to submit their disputes to mediation before the commencement of trial.[258] As an exception, the rules do not apply to proceedings concerning the interpretation or application of the Constitution.[259] Other proceedings excluded from mandatory mediation include matters concerning the liberty of an individual and judicial review.[260]

The exclusion of these proceedings is an example of screening matters out of the jurisdiction of mediation. Thus, the law deems it inappropriate for matters dealing with liberty of persons, interpretation of the Constitution, and judicial review to undergo mandatory mediation. These may be styled as 'non-negotiable', as parties are free to directly approach the court without the need of mediation.

These exceptions notwithstanding, the provisions of the Courts (Mandatory) Mediation Rules apply in all civil matters.[261] As previously observed, the mandatory requirement of mediation has been further reflected in the Marriage, Divorce and Family Relations Act. Unlike the Courts (Mandatory) Mediation Rules, the Marriage, Divorce and Family Relations Act does not expressly provide for exceptional circumstances exempted from mandatory mediation, counselling or conciliation.

There are therefore no screening provisions exempting certain marriage disputes from mediation in the Act. Similarly, under customary family law, the jurisdictional limits of *ankhoswe* are not clear. What this means is that the only statutory screening provisions from which reference can be made are those under the Courts (Mandatory) Mediation Rules.

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[258] Rule 4 of Courts (Mandatory) Mediation Rules.
[259] Ibid.
[260] Ibid.
[261] See Rule 2 of Courts (Mandatory) Mediation Rules.

However, the wording and demands of the Rules bring doubt as to whether they are applicable in customary law marriage disputes. For example, the Rules require that mediators, except where parties agree otherwise, should be chosen from a list maintained by the High Court Registrar.[262] This should be contrasted with the office of the *ankhoswe* in customary law which operates by default without need for registration.

Another provision in the Rules which challenges the practice of *ankhoswe* mediation is the obligation on mediators to file written reports with the court.[263] This is in contradiction with the nature of customary law which hinges on oral tradition.[264] As will be shown in the next chapter, in customary law practice, the *ankhoswe* are required to give an oral explanation to the court on what transpired during mediation.[265]

Contrary to customary law's *ankhoswe* mediation practice, the Rules also prohibit mediators from being witnesses if the dispute proceeds to court for trial.[266] In addition, the Rules do not allow a party to mediation to rely on statements made at the mediation session as evidence in court proceedings.[267] This also disagrees with customary law practice, which allows parties to adduce statements made during mediation as evidence.[268]

Therefore, it would be a fair conclusion to state that the Courts (Mandatory) Mediation Rules are applicable to all civil disputes under statutory and common law. One has to refer to living customary law to establish the rules which govern the relationship between trial and other dispute resolution processes. Chapter 5 discusses this relationship by answering the question whether customary law empowers *ankhoswe* dispute resolution with a capacity to effectively adjudicate over marital violence disputes.

4.5 Conclusion

Arguably, marital violence should have been screened out from the application of the Courts (Mandatory) Mediation Rules. An abused party should voluntarily choose to mediate after being protected by the court. Yet there is a danger that the drafting of the Rules and the legislation on marital violence can be interpreted to mean that an abused party should seek mediation before being protected by the court. This illogical arrangement of procedure does

[262] Rule 9(1), (2) of Courts (Mandatory) Mediation Rules.
[263] Rules 9(4) and 18 of Courts (Mandatory) Mediation Rules.
[264] Himonga & Bosch op cit note 45 at 336.
[265] Wanda op cit note 24 at 127–128.
[266] Rule 15(2)(b)(ii) of Courts (Mandatory) Mediation Rules.
[267] Rule 15(2)(c) of Courts (Mandatory) Mediation Rules.
[268] Wanda op cit note 24 at 127–128; *Chilakolako* supra note 24; *Nkono* supra note 102.

not only underestimate the harm marital violence brings upon the individual victim, but also neglects the danger that marital violence poses on children.

In most cases, marital violence requires urgent attention to protect the victimised party. This sense of urgency is lost when courts leave victims of marital violence in the hands of mediators who cannot provide them with enforceable legal remedies. This is what the law does when it creates room for conceptualising ADR as a system of alternatives. It is also this philosophy in the form of mandatory mediation which legitimises the delay of granting protection to women abused by their husbands. Sadly, these elements are traceable in the statutes which outline the remedies addressing marital violence. Fortunately, statutory law imposes neither mandatory mediation nor 'alternative dispute resolution' on customary law dispute resolution.

CHAPTER 5: APPROPRIATENESS OF *ANKHOSWE* DISPUTE RESOLUTION

5.1 Introduction

As has been observed in the previous chapters, every legal system needs effective processes of dispute resolution in order to deal with marital violence. The state would fail in its responsibility as a duty bearer to protect women from violence if the justice system used ineffective mechanisms to remedy marital violence. Concerning *ankhoswe* dispute resolution, the primary question is whether the *ankhoswe* mediation is effective enough to handle marital violence disputes?

This chapter offers an analysis of certain aspects of *ankhoswe* dispute resolution to answer that question. These aspects are: neutrality and impartiality; confidentiality; and enforceability of agreements. The main argument is that *ankhoswe* mediation lacks impartiality and coercive powers to protect women from marital violence. It is observed, however, that the principles of confidentiality in *ankhoswe* mediation are more suitable to customary law dispute resolution than are the corresponding principles of statutory law mediation.

5.2 The Institution of *Ankhoswe*

In matrilineal ethnic groups, the rightful candidate for the *nkhoswe* was traced through the mother. The mother's brothers were the ones entitled to take this position.[269] The eldest of them would assume a leadership role in exercising authority over his sisters.[270] This authority extended to looking after the wellbeing of the sisters' children.[271] The children together with their mother were referred to as his *mbumba.*[272] Hence, the *nkhoswe* also took the title of *mwini mbumba* (which literally means 'owner of the clan').[273] This tradition is still in practice in most matrilineal rural areas.[274]

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[269] Ibik op cit note 34 at 181–183; Chimango op cit note 24 at 54.

[270] MM Mtika & HV Doctor 'Matriliny, Patriliny, and Wealth Flow Variations in Rural Malawi' (2002) 6(2) *African Sociological Review* 73; Ibik op cit note 34 at 181–18.

[271] Ibid.

[272] Ibid.

[273] Ibid.

[274] B Matinga *"What's mine?" Rural women's Experiences Around Property Rights in the Context of Dissolved Marriages in Matrilineal Societies: A Case Study of Muluwila village in Kuntumanje Area, Zomba District, Malawi* unpublished PhD (Stellenbosch) (2015) 67–71.

From the standpoint of the children, the *mwini mbumba* is their maternal uncle or senior brother.[275] In celebrating a customary marriage, it was the *mwini mbumba's* (or his brothers') responsibility to validate the marriage by assuming his role as *nkhoswe.*[276] Due to this arrangement, it was in exceptional circumstances where the *nkhoswe* could be a woman. The eldest maternal aunt to the spouse would only take over the *nkhoswe* role where there was no male available.[277]

5.2.1 The Principle behind the Dispute Resolution Function of *Ankhoswe*

The title *ankhoswe* is translated to various English phrases like 'marriage advocates', 'marriage counsellors', 'marriage witnesses', and 'marriage guardians'.[278] These various renderings are not a result of inaccurate translation but an indication of the different roles the *ankhoswe* play. In his role as *mwini mbumba*, the *nkhoswe* is responsible for ensuring that his sister's children have access to economic resources including land for cultivation.[279] He has further interests in arranging marriages of his *mbumba* after which he acts as their mediator.[280] This is to the extent that in cases where the marriage of the *mbumba* had children, traditional courts were reluctant to issue divorce prior to *ankhoswe* mediation taking place.[281]

A theme of promoting and advocating for the welfare of women and children runs through all these duties of the *ankhoswe*. To this end, customary law employed the means of *ankhoswe* mediation to shield marriages from ending in divorce. The benefits of this protectionist approach to the marriage institution can be appreciated by looking at the implications of divorce to women and children before the advent of legislative laws. For example, based on tradition, after divorce the wife had no right to claim for maintenance for both the children and herself.[282]

Although the institution of *ankhoswe* played this important role in the lives of married women, it had its setbacks as well. The mediation process was prone to abuse. The wife

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[275] Chimango op cit note 24 at 54; Ibik op cit note 34 at 181–183; Mtika & Doctor op cit note 270 at 73.
[276] Ibik op cit note 34 at 181–183; S Roberts 'Matrilineal Family Law and Custom in Malawi: A Comparison of Two Systems' (1964) 8 *Journal of African Law* 80.
[277] Mtika & Doctor op cit note 270 at 73.
[278] Chimango op cit note 24 at 54–61; Besendahl op cit note 33 at 11–30; *Chingolo v Chingolo* Matrimonial Case Number 62 of 2009 available at http://www.malawilii.org/mw/judgment/high-court-general-division/2014/486/, accessed on 5 September 2016.
[279] Ibid.
[280] Ibid.
[281] *NyaLongwe* supra note 8.
[282] Mwambene (2009) op cit note 10 at 30.

would be encouraged to endure all kinds of difficulties in the name of saving the marriage. This could be done to maintain the services of the husband to the clan of his wife. For instance, the husband was required to provide bride services to his parents in law which included building a house and cultivating a garden.[283] The right to inherit children and family wealth after the husband's death also lay with the maternal clan.[284]

With these advantages in mind, the *nkhoswe* would encourage his sister to stay in an abusive marriage. In turn, the whole process promoted viewing women as a source of human capital and economic gains for the matrilineage.[285] Therefore, although on the surface, the institution of *ankhoswe* may be regarded as one of protecting the welfare of women and children, it has patriarchal interests as well. Having established themselves as protectors of their sisters' welfare, the *ankhoswe* have an influence on the decision-making of women in marriages.[286] This relationship creates dependence of women on male kinsmen.[287]

However, by subjecting the institution of *ankhoswe* to the Constitution, the discriminatory and patriarchal tones of the system can be filtered out through legal reform. At the same time, the principle of protecting the welfare of women and children can be maintained. This principle in the modern context extends to protecting women from marital violence.

5.2.2 The function of *ankhoswe* and the dynamics of modern society

The application of the concept of *mwini mbumba* in modern society is contentious. The current legal setup favours the nuclear construction of a family. In order to validate a marriage of a person between the ages of 16 and 18, the Constitution requires parental or guardian consent.[288] In addition, inheritance law now recognises only children and the surviving spouse as constituting immediate family members.[289]

Urbanisation, has also posed a challenge to the extended family setup. As couples move to cities for purposes of work or in search of better social services, the extended family links are geographically broken. In such circumstances, sticking to rigid references to traditions that require physical presence of blood relations becomes costly and inconvenient.

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[283] Y Oheneba-Sakyi & BK Takyi *African Families at the Turn of the 21st Century* (2006) 233.
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] S 22(7) of the Constitution.
[289] S 3 of the Deceased Estates (Wills, Inheritance and Protection) Act No. 14 of 2011.

The traditional court system responded to some of these circumstances. In *Mwangobola v Mwangobola*[290], the husband challenged the validity of the marriage on the ground of legitimacy of *ankhoswe.* He argued that the marriage was invalid because his *ankhoswe* was not his relative. In fact, he claimed that both *ankhoswe* were the relatives of the wife. The court dismissed the argument and held that under customary law anybody can properly be *ankhoswe* to a marriage.

Part of the reasoning of the court was that situations occur where the parties' actual relations are far and a party could not furnish proper marriage advocates. It was held that "at customary law such an impasse was resolved by the guardian or even the party's close friends assuming the functions of a marriage advocate."[291] The court, therefore, found that there were proper *ankhoswe* to the marriage. It refused to strictly limit the office of the *ankhoswe* to qualifications of blood relations.

The relevance of involving *ankhoswe* for purposes of offering consent to the marriage seems diluted to the extent that the court could accept friends of a spouse to act as marriage advocates. While this may be understood as constituting an exception to the general rule, it also demonstrates the flexibility and adaptability of customary law. Whichever construction is followed, what is evident is that traditional courts looked at the qualification to the office of *ankhoswe* from a practical point of view.

However, when the institution of *ankhoswe* is detached from its blood ties, the dispute resolution aspect also becomes affected. In recognising the need to 'accept anybody' as qualifying to the office of the *ankhoswe* in certain circumstances, there is also a need to realise that not everybody can handle marital violence disputes. Similarly, disputes which were previously appropriate for *ankhoswe* to resolve may not have remained as such due to the changes in society. Some of the changes have had an impact on the neutrality and impartiality of the *ankhoswe* when resolving marriage disputes.

5.3 Neutrality and Impartiality

Mediator neutrality and impartiality refers to the principle that mediators should not favour one party over another.[292] Some literature differentiate neutrality and impartiality. The latter is defined as the ability of a mediator not to be biased towards or against any of the disputants

[290] Civil Appeal Case No. 4of 1980 NTAC (unreported).
[291] Ibid.
[292] KK Kovach 'Mediation' in ML Moffitt & RC Bordone (eds) *The Handbook of Dispute Resolution* (2005) 311.

during mediation; whilst the former is defined as the requirement that the mediator should be a disinterested party to the content and outcome of the dispute.[293] In this regard, neutrality would mean that the mediator should be an outsider with no interest in the matter.[294] On the other hand, impartiality would mean that the outsider should handle the mediation process without showing bias towards one party.[295]

Based on this distinction, the question is whether the *ankhoswe* can be said to be neutral mediators. This question is prompted by the fact that, mostly, the *ankhoswe* are relatives of the parties. Being in that position they have interest in the outcome of mediation. However, a close look into the structure of dispute resolution at customary law shows differences between how western and most African civilizations understand the concept of neutrality. The definitions of neutrality and impartiality above reflects the western conceptualisation.

Traditionally, the structure of communities in Malawi is knit together by close ties of extended family responsibilities.[296] At each level of society, leadership roles are held based on affiliation to extended families and clans.[297] In these communities, the expectation is that heads of families, clans and tribal elders, who command the respect of the family, clan or tribe, will advise people during a dispute.[298]

In this context couples may regard outsiders as illegitimate to facilitate mediation. Instead, they would want to have their close relatives to act as mediators. In other words, what matters is not that the mediation should be facilitated by an outsider. Instead, what is important to them is that the process and actual settlement should be fair.[299]

In any type of mediation, regardless of different conceptualisation of neutrality and impartiality, the mediators' own life experiences, education, cultural background and beliefs have an impact on the outcome of the settlement.[300] Although the role of mediators does not

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[293] R Field 'Neutrality and power: myths and reality' (2000) 3(1) ADR Bulletin 16–19; see also Spencer op cit note 82 at 101.
[294] Field op cit note 293 at 16.
[295] Ibid.
[296] Ibik op cit note 34 at 181–183.
[297] Ibid.
[298] Spencer op cit note 82 at 100–101 makes similar observations on the mediation characteristics of the Australian Aborigines; see also D Spencer 'Mediating in Aboriginal communities' (1996–97) *CDRJ* 245.
[299] Ibid.
[300] Field op cit note 19 at 21–23.

extend to the making of determinative decisions, the process can still be used to indirectly influence the agreement between the parties.[301]

With room to use their role to shape the course of deliberations the *ankhoswe* can as well impact on the final outcome of disputes. Such influence can be driven by personal, traditional and community values. Success in preventing and ending marital violence through *ankhoswe* mediation partly depends on the type of value system the *ankhoswe* subscribes to.

We should anticipate unfavourable results of mediation to women if the marriage beliefs of the *ankhoswe* are predominantly patriarchal. For example, the *ankhoswe* who believe in the tradition that marriage must be persevered are likely to encourage women to endure marital violence.[302] The results could be worse in cultures where a husband's physical violence against his wife is justified on the basis of disciplining her.[303] As a result of these cultural beliefs, instead of correcting power imbalances in customary law marriages, the *ankhoswe* act as agents of legitimising violence.

The neutrality and impartiality of *ankhoswe* should also be assessed in terms of the relationship between the *ankhoswe* and the couples. In this circumstance, the relationship should be viewed comprehensively to include social and financial aspects. In cases where the *ankhoswe* financially depend on the husband their objectivity is compromised. The situation is complicated where the wife is also financially dependent on the husband.

Women's capacity to effectively negotiate in mediation is negatively affected when they are financially more vulnerable than their husbands.[304] This vulnerability can be checked where the third party resolving the dispute is independent. However, when the *ankhoswe* are also financially dependent on the husband, they are likely to fail in rectifying the existing power imbalances between the spouses.

The ability of the husband in such mediations to manipulate the outcome of the negotiations is high. He may deliberately intimidate to end or prolong the mediation discussion if the wife refuses to bow down to his demands.[305] This can coerce women into accepting unjust or ineffective compromises that can hardly put a stop to marital violence.[306]

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[301] Ibid.
[302] Hayes op cit note 104 at 100–101; see also Chepuka op cit note 104 at 207.
[303] UN Press Release supra note 105.
[304] Field op cit note 19 at 14–17.
[305] Ibid.
[306] Ibid.

This can be illustrated by the facts of the High Court appeal case of *Gomani v Chitenje*[307]**.** The marriage, in this matter was polygamous. The husband subjected the first wife to physical violence for four years having neglected her for the other wife. The violence had continued irrespective of involving the *ankhoswe* to mediate. The injuries on the victim were extreme to the extent that she lost some of her teeth. At one time she had fainted because of being beaten. She endured all these difficulties because she could not leave the matrimonial home as she had nowhere to go.[308]

Thus, economic power imbalances, have the capacity of rendering the efforts of *ankhoswe* mediation ineffective. This can change where the courts are involved and women are aware of their legal entitlements. For instance, if the courts had supervised the dispute in the *Gomani case*[309], the wife would have been able to apply for a protection order and claim maintenance at the same time. The social and financial security which the court would have provided would have helped her to be self-determinative during mediation and afterwards.

Allowing the court to handle the financial and violence aspects of the dispute can also help to guard the neutrality and impartiality of the *ankhoswe* from being exploited by the abusive husband.

5.4 Confidentiality

Generally, confidentiality in mediation restricts the mediator and the disputants from revealing the content of the mediation to non-parties.[310] Most mediations are regulated by confidentiality clauses which allow disclosure of information to others only with the consent of all the disputants. The disadvantages of this private nature of dispute resolution to marital violence, as perceived by feminism, were outlined in chapter 2.

There is another dimension of confidentiality which needs to be discussed. It is the common law principle of 'without prejudice'. In the context of mediation, this principle implies that, if parties go to trial, they are prohibited, for evidential purposes, from making reference to statements made during mediation.[311] This means that if an admission is made during mediation, the court cannot admit it to form part of the evidence of the party relying on it.[312]

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[307] Civil Appeal No. 47 of 2005, available at http://www.malawilii.org/mw/judgment/high-court-general-division/2009/35/, accessed on 9 December 2016.
[308] Ibid.
[309] Ibid.
[310] Rule 15 of the Courts (Mandatory) Mediation Rules; see also Stitt op cit note 140 at 58.
[311] Stitt op cit note 140 at 58–59.
[312] Ibid.

Due to this principle, most 'Agreements to Mediate' contain a clause excluding the mediator from the duty to be called as a witness.[313]

Confidentiality is a critical element of mediation. It permits and encourages parties to discuss matters freely. Under the atmosphere of confidentiality, parties feel more secure to share interests and to rethink their positions.[314] In other words, confidentiality seeks to prevent mediation from being used as a forum to fish out evidence from the opponent party for litigation purposes.[315]

As already stated, there are also difficulties emanating from secrecy in mediation. From a marital violence point of view, confidentiality breeds injustice. Disputants can misuse the process to manipulate and take advantage of each other in the absence of intervention by the courts.[316]

Unlike mediation provided under statute or common law, the principle of 'without prejudice' does not exist under customary law. To the contrary, *ankhoswe* have a duty to testify before courts.[317] They provide the court with information on the number and type of disputes they handled, what happened in mediation and whether they managed to successfully bring the parties together.[318] Similarly, parties are allowed to refer to what was said during *ankhoswe* mediation to prove a fact.[319]

This aspect of *ankhoswe* mediation is beneficial to women in marital violence cases. It relieves victimised women from the impossibility of proving their case where the acts of violence were done in secrecy. However, the challenge comes in where each *nkhoswe* decides to give favourable evidence in support of his/her kin. In the case of *Nkono v Nkono*[320], both parties and their witnesses gave evidence on what happened during the mediation session. Still, the High Court failed to ascertain the evidence in favour of either party because it was conflicting. Therefore, the court is likely to use evidence from mediation where both *ankhoswe* corroborate the version of one of the parties.

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[313] See Rule 15(2)(c) of Courts (Mandatory) Mediation Rules; see also Stitt op cit note 140 at 58–59.
[314] A Rycroft 'Legal review of the mandatory mediation process in South Africa' (2016) 1 *Mediation Theory and Practice* 79–93.
[315] Spencer op cit note 82 at 87.
[316] Kovach op cit note 292 at 312–313.
[317] Wanda op cit note 24 at 127–128.
[318] *Chilakolako* supra note 24; see also *Nkono* supra note 102.
[319] Ibid.
[320] Supra note 102.

It is also significant to note that the fact that there is no restriction for the parties or *ankhoswe* to testify based on the contents of mediation does not rectify all confidentiality challenges. For example, the *ankhoswe* mediation has no mechanism of making 'public' the settlement agreement. The settlement, which is orally agreed, cannot be enforced through court order. The parties, therefore, have no legal support to make good their promises.

5.5 Enforceability of Agreements

In other types of mediation, settlements can be enforced in court in form of consent orders. In reference to *ankhoswe* mediation, there is no mechanism which allows the oral agreements to be enforced through court order. In the past, it was once suggested by a traditional court that the *ankhoswe* have power to penalise a spouse who is at fault.[321] Beyond that there is hardly literature which has explained how this was done.

From a historical perspective, it can be imagined that the *ankhoswe* were able to exercise arbitrative powers due to their position as *mwini mbumba*. It may not be difficult to appreciate that the *ankhoswe* were authoritative as they were in control economically. For instance, as earlier noted, the *mwini mbumba* had control over allocation of land to his kin.[322] This gave him a position of power and control towards the spouses.

With the coming in of the cash economy, ownership of resources has changed in modern societies. The *mwini mbumba* no longer has an automatic position of influence and affluence. To the contrary, for most couples who stay in urban areas but have their *ankhoswe* back in the villages, the *ankhoswe* are often the dependents of the husband. In such circumstances, the *ankhoswe* can hardly exert independent influence on the husband.

This should also be considered with the understanding that the role of *ankhoswe* can be played by a total stranger or a mere friend of a spouse.[323] Indeed, it is hard to picture how, after a conciliation session, a friend can impose sanctions to enforce his directions.

Generally, therefore, the *ankhoswe* dispute resolution lacks internal enforcement mechanisms. There is also no provision which allows settlement agreements facilitated by the *ankhoswe* to be enforced by the court. This leaves the institution of *ankhoswe* without coercive powers to combat marital violence.

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[321] *Nyang'ambi* supra note 2.
[322] Ibik op cit note 34 at 181–183; Mtika & Doctor op cit note 270 at 73.
[323] *Mwangobola* supra note 288.

Consequently, *ankhoswe* mediation practiced to the exclusion of court's supervision has potential of exposing victims of marital violence to a system which cannot effectively protect them. On top of that, it carries the risk of engendering learned helplessness in women. These risks are reflected in some recent cases post the traditional court system. The facts in *Gomani case*[324] demonstrates the results of a victimised wife who became 'helpless' because of using *ankhoswe* mediation to the exclusion of court's supervision**.**

Another example is the case of *Magombo v Magombo*.[325] In this matter the husband continued to physically abuse his wife irrespective of her efforts to refer disputes to the *ankhoswe*, the church and traditional authorities. The husband and his *nkhoswe* managed to frustrate conciliation efforts by absconding mediation. He would further physically chase away people who came to reconcile him with his wife. Having been victimised, the wife felt 'helpless' and left to live in the village without going to court.

These instances illustrate the misfortune of conceptualising *ankhoswe* dispute resolution as an alternative path to courts' remedies when dealing with marital violence. Although maintaining a marriage relationship requires counselling; protecting women from marital violence goes beyond giving couples advice. As such, it is unattainable to achieve both goals of maintaining the marriage relationship and ending violence by using *ankhoswe* mediation to the exclusion of the courts.

The court is better placed with its sanctioning powers to protect abused women from further assaults by their husbands. This is not to suggest that the orders of the court cannot be disobeyed. Instead, the proposition is that the system of the court has the ability of following up on acts of contempt. In punishing these acts, the aim goes beyond protecting a single victimised woman to providing a legal environment which is intolerant of marital violence. This legal environment is significant as it informs living customary law. Through courts' public decisions, the general public is made aware of the current position of the law towards marital violence.

5.6 Conclusion

In rural areas the *ankhoswe* dispute resolution remains an important institution for mediating marriage disputes. Unlike formal state institutions, the *ankhoswe* are within easy reach in these areas. On top of helping couples to achieve desirable behavioural changes, the

[324] Supra note 290.

[325] Civil Appeal Case No. 23 of 2002 available at http://www.malawilii.org/mw/judgment/high-court-general-division/2002/37/, accessed on 14 December 2016.

a*nkhoswe* make it easier for women to prove violence in court. Through the flexibility of customary law women are enabled to prove secret acts of violence which were admitted during mediation. Thus, these positive traits of *ankhoswe* dispute resolution can be used to complement court processes.

While the *ankhoswe* institution is still necessary for counselling and conciliation of disputing spouses, it lacks coercive powers to protect women from marital violence. Legal and socio-economic changes surrounding the family institution in matrilineal societies have left the *ankhoswe* with less capacity to protect women from marital violence. Financial vulnerability of both the *ankhoswe* and the women they are supposed to protect compromises their independence and impartiality.

Owing to these limitations, the *ankhoswe* mediation should neither be obligatory nor made to run exclusively of court process. The a*nkhoswe* institution should only be one of the many options available to offer women solutions that complement courts' legal remedies.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion and Main Observations

The aim of this research was to find out whether women married under customary law have access to effective means of dispute resolution to remedy marital violence. The general observation this research has made is that although the law provides for marital violence remedies, women, especially from rural areas, do not have adequate access to them. Therefore, the hypothesis of the study holds true.

Factors which contribute to denying these women access to justice include the use of complex procedures which do not suit the cultural context of rural Malawians. The hindrance for women in accessing court remedies is not necessarily because the *ankhoswe* dispute resolution on its own diverts women's attention from the courts. To the contrary, there is a high possibility that the current court system with its inaccessible procedures repels women in need of its remedies. Therefore, it is necessary to reconstruct the court system in order for it to incorporate customary law processes of dispute resolution for easy accessibility. At the same time, it is important to maintain the compulsory nature of court orders in order to prevent further abuse against women.

There is also a lack of statutory regulation to define and delimit the jurisdiction of private dispute resolution, which includes *ankhoswe* mediation. The absence of this regulation allows the *ankhoswe* to resolve disputes of marital violence when their capacity is inadequate. This situation is partly attributable to the misconception of ADR as 'Alternative Dispute Resolution'. Since private forums of dispute resolution are regarded as 'alternative institutions' to the courts, parties, without proper assessment of their justice needs, are referred to them.

Moreover, conceptualising ADR as a system of 'alternatives' presumes that one mechanism or institution of dispute resolution is sufficient, at a given point in time, to provide access to justice for women in marital violence. Yet the research has observed in chapter 4 that, often in a single marital violence dispute, there is the need to employ several modes of dispute resolution to address different justice needs of the parties.

It has been further noticed that it would be more appropriate to reconceptualise the justice system in Malawi as a provider of 'appropriate dispute resolution' instead of 'alternative dispute resolution'. In this regard, various mechanisms of dispute resolution should be

applied to complement each other, thereby providing optimum protection to victims of marital violence.

The conclusion made in chapter 5 is that the *ankhoswe* dispute resolution is unsuitable in cases where women, without accessing courts, approach the *ankhoswe* to resolve marital violence. This is because the *ankhoswe* cannot provide the required protection and security available and accessible through court process. Without the courts' legal compulsion to enforce resolutions reached during *ankhoswe* mediation, women remain exposed to further abuse. In addition, living customary law is misinformed because courts lose the opportunity of making judicial pronouncements to condemn violence against women. In the end, the state's effort to eliminate the culture of violence by men against women is highly compromised.

6.2 Recommendations

There is a need to make changes to the current system of dispute resolution for the purpose of improving provision of appropriate dispute resolution to women married under customary law. The recommendations to that effect are outlined below.

6.2.1 Make Mediation (Including *Ankhoswe* Dispute Resolution) a Voluntary Process in Cases of Marital Violence

Mandatory mediation has some policy advantages. For example, the state has an interest in protecting children from the adverse effects of divorce. Hence, minor differences between parents which can be easily resolved through counselling should be mandated to undergo mediation.

However, mandatory mediation has the risk of delaying justice and making courts inaccessible. When marital violence victims approach the court they seek remedies which, mostly, only the court can provide. Therefore, it is ineffective to force a victim of marital violence to pursue mediation before accessing courts' remedies. On this basis, the law and the courts should not make mediation (including *ankhoswe* mediation) a mandatory process in cases of marital violence.

6.2.2 Encourage victims of marital violence to seek court's remedies concurrently with mediation

The law and courts should not restrict parties to one method of dispute resolution. The court offers remedies that provide protection to the victim. Yet other mechanisms such as

counselling may be necessary to achieve long-term behavioural changes. As such, where there is room to salvage the marriage, courts should encourage victims of marital violence to seek court's remedies concurrently with mediation.

6.2.3 Provide Enforcement Mechanism for *Ankhoswe* Mediation Settlements

In proceedings of a protection order, the court can turn a consent order made by the parties into its own order.[326] This provision should be amended to make room for settlements made through *ankhoswe* mediation to be enforceable through court process. In this regard, the law should require parties in marital violence disputes to register their settlements with the courts in form of consent orders. The *ankhoswe* should be employed to witness the authenticity of such agreements.

6.2.4 Assent to the Local Courts Act for Local Courts to Start Operating

The other recommendations cannot be effective without an accessible court system. In order to protect women fully against marital violence through appropriate dispute resolution, there is an urgent need to establish local courts. The presidency needs to assent to the Local Courts Act so that local courts can start operating.

Through the adoption of familiar procedures and languages in the local courts, women married under customary law can be empowered to access remedies easily that effectively address marital violence. There is a further need to redesign these courts in order to offer various processes of dispute resolution based on the justice needs of parties. In line with customary law practices, they should be organised to provide both mediation and adjudication so that the court can easily monitor compliance to its orders.

6.2.5 Provide Training to Judicial officers on Appropriate Dispute Resolution and Mechanisms of Customary Law Dispute Resolution

Combining the use of various modes of dispute resolution requires special knowledge, tact and skill. The same is true whenever judicial officers are required to complement dictates of customary law with statutory law provisions. There is a need to provide training to judicial officers on the basic conceptualisation of customary law and how it can be applied in line with constitutional imperatives and to complement other legislation. Similarly, judicial officers need to have the basic skills of conducting mediation. By acquiring such knowledge through training and practice, they would also be better placed to exercise their discretion

[326] S 51 of the Prevention of Domestic Violence Act.

efficiently in screening disputes and allocating them to appropriate modes of dispute resolution.

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