

Malawi Violence Against Women and Girls Prevention and Response Programme

Economic Violence Faced by Women Due to the Non-Payment of Child Maintenance Orders – A Need for Urgent Reform

March 2021

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1. Background

Lack of enforcement of child maintenance orders is currently one of the most prevalent and systemic challenges in accessing justice for many adolescent girls and women who are mothers. For starters, and as shall be elaborated upon in this article, the Courts often do not have the resources to effectively track defaulters. Secondly, a good number of defaulters work in the informal sector where it is not easy to attach an order to their salaries (e.g. through a bank or employer) to extract funds from the source of income in order to settle a maintenance claim. Thus, abusive former partners often use failures of child maintenance enforcement 'as a weapon in post-separation control and economic abuse'.¹ Unfortunately, research on economic violence largely focuses on cohabiting couples, but there is limited 'detailed explorations of women's longer-term experiences after separation'.² There is also 'limited gendered analysis of child support related economic abuse'.³ Nonetheless, economic abuse is 'a widespread element of intimate partner violence'.⁴ Failures to effectively enforce child maintenance orders normalises the potential for post-separation economic abuse. This research therefore intends to unpack the intersectionality between intimate partner violence and child support as an important, yet often overlooked prognosis. More pragmatically, this research responds to a call made to the Technical Legal Advisor (TLA) by the Malawi Judiciary to undertake an analysis of best practices so as to inform the better enforcement of child maintenance orders by the Courts – both as an end in itself but also as a means to lessen the prevalence of economic violence on women who often shoulder the primary responsibility of child care.

2. Defining child maintenance

According to section 23 (4) of the Republic of Malawi Constitution, children have the right to be maintained by their parents. Child maintenance can be defined as any payment that a noncustodial parent makes as a contribution to the costs of raising her or his child.⁵ This means that 'parents have a legal responsibility to provide financially for their children even if they no longer live with them'.⁶ It is also trite expectation that 'the legal duty to support a minor child belongs to both parents, even if the custodial parent is capable of caring for the child single-handedly'.⁷ In essence, the responsibility for maintaining a 'child is not based on marriage and partnership but rather on parental obligation towards the child'.⁸

Child maintenance is awarded in order to provide for the 'child's basic needs and to allow the child to share in the standard of living of both parents'⁹ in accordance with their abilities. In such cases, the parent expected to pay maintenance will usually be the biological parent of the child, but one does not have to be biologically related to the child to be considered a parent. Primary guardians can therefore be expected to provide maintenance to a child under their care. The concept of guardianship arises where one becomes a primary caregiver to a minor child or children in the event where the parents are no longer able to maintain responsibility for them. The underlying principle thus entrenches that 'every child has the right to be adequately provided for and that child maintenance is the right of the child'.¹⁰ Parents (or

¹ Marisa Bate 'My ex is using the child maintenance system to continue to abuse me' (2020)

² Kristin Natalier 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) *Feminist Legal Studies* volume 26, pages121–140

³ Kristin Natalier 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) *Feminist Legal Studies* volume 26, pages121–140

⁴ Kristin Natalier 'State Facilitated Economic Abuse: A Structural Analysis of Men Deliberately Withholding Child Support' (2018) *Feminist Legal Studies* volume 26, pages121–140

⁵ <https://legal-dictionary.thefreedictionary.com/Child+maintenance>

⁶ 'Children and the law' available at <https://rightsofwomen.org.uk/get-information/family-law/children-law-child-maintenance/>

⁷ <https://legal-dictionary.thefreedictionary.com/Child+maintenance>

⁸ Mia Harkovita (2011) Child maintenance and child poverty: A comparative analysis available at https://www.researchgate.net/publication/233665642_Child_maintenance_and_child_poverty_A_comparative_analysis

⁹ <https://legal-dictionary.thefreedictionary.com/Child+maintenance>

¹⁰ Mia Hakovirta, Heikki Hillamo, Children's Rights and Parents' Responsibilities: Child Maintenance Policies in Finland Vol 14, Issue 4, 2012

legal guardians) are therefore under a legal obligation to support their children 'even if they are separated or divorced or have never lived as a couple'.¹¹

3. Delineating the problem

Though the law in Malawi (particularly the Constitution of Malawi and the Child Care Protection and Justice Act No. 22 of 2010) provides for the right to 'reasonable maintenance from parents' for their children, anecdotal evidence shows that usually once couples separate/divorce, there are challenges in the provision of reasonable maintenance for the children. Largely due to patriarchal norms that place child-care responsibilities predominantly on women, non-payment of maintenance towards children is mostly perpetuated by fathers. Though social norms dictate that men should be 'providers' for their families, the formative research conducted by Tithetse Nkhanza reveals that the expectation and social consequences for not providing for their families is often minimised for men as compared for women. Therefore, a lot of women often hold primary physical custody of their children in the event of a separation from their male partner or spouse. Unfortunately, upon separation, the father often tends to relinquish or reduce his maintenance obligations towards his children. Common cases include the following scenarios:

- A relationship (resulting in the birth of a child) that subsequently breaks down and the male partner refuses to provide any form of maintenance towards the child.
- A relationship that breaks down once the male partner is made aware that his female partner is pregnant, resulting in the male partner denying responsibility of the pregnancy and withholding any support to the child upon birth.
- A couple who are married and have children. However, they separate or divorce and the male partner refuses to provide maintenance for the children or provides such maintenance irregularly (or minimally in spite of evident ability to provide more).
- A male spouse who leaves the country to pursue greener pastures in a neighbouring country and gradually (or abruptly) curtails any provision of maintenance to the immediate family back home (including the children).

In such instances, the spouse or person seeking maintenance has sometimes sought intervention from the Court to compel the other party to provide child maintenance. Once the Court is satisfied with the evidence before it, the Court proceeds to make an order of maintenance against the 'resisting' party¹². However, anecdotal evidence shows that there are very low levels of compliance with such orders and various capacity challenges with respect to follow up mechanisms. It is now a common occurrence where the party (against whom the order is made) often continues to default such payment, irrespective of the existence of a court order. In such instances of default, the court often does not have the resources to effectively track the defaulters. A judicial officer in Blantyre lamented, 'the women end up spending more money and acquiring debts trying to track down the man for maintenance. When the woman complains to the court, we issue summons for the man to appear before the court but in many cases, it is difficult to track them. The men are able to evade us simply by moving from one area to another'.¹³ A visit to the Child Justice Court confirms the magistrate's perspective, as a random interface with women at the Court confirms that they have visited the Court in excess of 5 times just to follow up on non-compliance of maintenance orders.¹⁴ Secondly, a good number of defaulters work in the informal sector where it is not easy to attach an order to their salaries or through a bank to extract funds from their source of income in order to settle the maintenance claim.

Thus, these systemic failures increase child poverty rates, propel long-term dependence on the sporadic and limited government assistance (such as the social cash transfer programme), and perpetuate the "feminisation of poverty"¹⁵ as

¹¹ Mia Harkovita (2011) Child maintenance and child poverty: A comparative analysis available at

https://www.researchgate.net/publication/233665642_Child_maintenance_and_child_poverty_A_comparative_analysis

¹² Child maintenance orders ordinarily cover a periodic lump sum payment to meet the day to day essential needs of the children such education, clothing and food.

¹³ High Court Judge. Blantyre High Court, March 2020

¹⁴ Observation visit made by Tithetse Nkhanza TLA, January 2020

¹⁵ <https://legal-dictionary.thefreedictionary.com/Child+maintenance>

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women largely have to bear the brunt of fending for themselves and their children. Approximately 63% of children live in poverty.¹⁶ The impact of such challenges is that they can propagate economic hardships in families for future generations.¹⁷ The lack of payment of child maintenance not only unfairly deprives a child of access to a good standard of living (as would have been the case were they receiving reasonable maintenance from both parents) but it also adversely affects a child's psycho-social well-being. Many studies indicate that the interests of children in a post-separation situation are generally best served when children can maintain continuing and frequent contact with the non-resident parent and that parent pays child maintenance.¹⁸

4. Withholding child support as a form of intimate partner violence and how this disproportionately impacts women and adolescent girls

The challenge in the enforcement of child maintenance has become more relevant with the growing number of divorces and the increased prevalence of single-parent families – particularly female headed households. Another report further notes that about 56% of children under the age of 15 were not co-resident with both parents.¹⁹ It is well documented that single parents (particularly single female parents) and children living in such environments have a high likelihood of poverty. As family patterns in Malawi continue to evolve, with an increase in separations and divorces, a growing number of children live in 'blended families' or with only one parent.²⁰ A study confirms that single families are on the increase, while nuclear and extended families are gradually decreasing in Malawi.²¹ Clark and Brauner-Otto (2015) estimated that more than one-third of first unions end in divorce within 20 years of marriage.²²

To demonstrate the trend and how it disproportionately impacts women, the 2000 Demographic and Health Survey (DHS) data shows that there was little noticeable change in rates for male headed households between the year 2000 and 2010. On the other hand, female headed households increased between 2000 and 2010, from 16% to 21% for urban, and then 28% to 30% for rural. Furthermore, the Malawi 2016 Integrated Household Survey by NSO shows that female headed households are poorer than male headed households. In addition, an overwhelming majority of single-headed families in Malawi are headed by a woman. A research report revealed that 'Malawi has one of the highest rates of single families, within the Sub-Saharan Africa region, especially among women, with a rate as high as 61% by the time a woman reaches 45 years of age'.²³

Thus, the failure to collect and enforce child maintenance payments disproportionately affects women, by increasing their burden as they care for their families.²⁴ Other reported negative outcomes also include poor health outcomes among women, including increased mental health issues (i.e. stress and depression).²⁵

In addition, child maintenance avoidance is a form of psychological violence²⁶ and economical violence to both the mother and the child. The failure to collect and enforce child maintenance also permits perpetrators of economic abuse to

¹⁶ UNICEF <https://www.unicef.org/malawi/situation-children-and-women-malawi>

¹⁷ (McLanahan and Percheski, 2008; Al-Krenawi and Graham, 2006).

¹⁸ Mia Harkovita (2011) Child maintenance and child poverty: A comparative analysis. Available from:

https://www.researchgate.net/publication/233665642_Child_maintenance_and_child_poverty_A_comparative_analysis [accessed Feb 18 2021].

¹⁹ Sadson Harawa 'levels, trends and determinants of family structure in Malawi'

²⁰ Sadson Harawa 'levels, trends and determinants of family structure in Malawi'

²¹ Sadson Harawa 'levels, trends and determinants of family structure in Malawi'

²² Clark S, Brauner-Otto S. Divorce in sub-Saharan Africa: Are unions becoming less stable? Population and Development Review. 2015;41:583–605. [Google Scholar]

²³ Sadson Harawa 'Levels, trends and determinants of family structure in Malawi'

²⁴ <https://dpqlaw.co.uk/dpg-instructed-to-challenge-failures-of-the-child-maintenance-service/#:~:text=The%20failure%20to%20collect%20and%20hold%20control%20over%20their%20victims.>

²⁵ As above

²⁶ Committee on Equality and Non-Discrimination Rapporteur: Ms Gisela Wurm, Austria, Socialists, Democrats and Greens group 'Gender equality and child maintenance' (7 December 2017)

<http://www.assembly.coe.int/LifeRay/EGA/pdf/TextesProvisoires/2017/20170712-GenderEqualityChildMaintenance-EN.pdf>

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continue to hold control over the mother and the children.²⁷ Thus, withholding of child maintenance is as much an issue of power and control. A study notes that financial control in this situation makes the mother more likely to return to an abuser due to fear of retaliation or inability to meet basic needs of her children.²⁸ Financial instability is one of the primary reasons victims return to their abuser.²⁹ Research further indicates that ensuring 'child support payments can be a critical source of financial stability' for survivors of gender based violence (GBV),³⁰ and it has a unique role in reducing the risk of violence and helping survivors achieve economic independence.

It has also been established that the manner in which the amount of the payment is determined and the consequences of the possible non-compliance by payers affects women disproportionately.³¹ As a consequence, child maintenance regulations and functioning should be considered as relevant not only to family life in general and to the well-being of children, but also specifically to gender equality.

5. Reasons for non-compliance with maintenance orders

In a public inquiry undertaken by the Malawi Human Rights Commission³², various reasons were provided during focus group discussions as to why people (primarily men) neglect to provide child maintenance, even in instances in which there is an existing court order for maintenance. The main causes were identified as follows:

- Participants noted that in many cases when men get divorced and marry another woman, they tend to devote most of their attention and focus to the new family and they neglect their children from the previous marriage.
- It was also observed that in some cases, men simply refuse or neglect to provide maintenance out of sheer irresponsibility and entrenchment of negative masculinity norms that detach men from parenting obligations.
- Participants also bemoaned the lack of effective enforcement mechanisms for maintenance orders including the inability to sanction defaulters. Thus, most men take advantage of this weak system. In many instances, simple logistical challenges derail the ability of courts to enforce maintenance orders (e.g. lack of transport to follow up with the respondent). The Malawi Human Rights Commission's research further indicates that even where non-compliance of a maintenance order is referred back to the court, in most cases, courts have not been very helpful. The research cites the case of *Chabwera vs. Chabwera*³³ where a man was ordered to be paying MK20,000 per month as maintenance for his 7 year old child. The maintenance order was issued in 2011. Despite the affected woman complaining to the court several times about the former husband's non-compliance with the order, no money for child maintenance had been paid in terms of the order.
- Withholding child maintenance was also highlighted by participants as a mechanism to attain power and control over the woman, especially in instances in which it was the woman who initiated the separation or divorce.
- A significant number of participants cited corruption as a major problem in the judiciary, especially among court clerks (though some allegations were also made in relation to magistrates). Participants indicated that men sometimes pay clerks to misplace files or misalign court dates so that the women complainants are not able to secure a hearing date for their maintenance claims (or related complaints).

²⁷ <https://dpqlaw.co.uk/dpg-instructed-to-challenge-failures-of-the-child-maintenance-service/#:~:text=The%20failure%20to%20collect%20and,hold%20control%20over%20their%20victims.>

²⁸ Colorado General Assembly, Legislative Declaration, Colo. Rev. Stat. § 13-14-100.2 available at <https://www.ncsl.org/research/human-services/child-support-and-domestic-violence.aspx>

²⁹ As above. Also see the Tithetse Nkhanza Formative Research

³⁰ Child Support and Domestic Violence available at <https://www.ncsl.org/research/human-services/child-support-and-domestic-violence.aspx>

³¹ Committee on Equality and Non-Discrimination Rapporteur: Ms Gisela Wurm, Austria, Socialists, Democrats and Greens group 'Gender equality and child maintenance' (7December 2017)

<http://www.assembly.coe.int/LifeRay/EGA/pdf/TextesProvisoires/2017/20170712-GenderEqualityChildMaintenance-EN.pdf>

³² Malawi Human Rights Commission 'Report on the public inquiry on the right to access child maintenance' (2013)

³³ Miscellaneous Application No.41 of 2012

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- Participants also bemoaned the failure by courts to recognise non-payment of child maintenance as a serious anomaly, as well as a crime. Participants lamented that courts are quick to enforce orders relating to breach of contracts between private parties (including seizing property, making a finding of contempt of court etc). However, there is less proactiveness on issues of child maintenance.

Another emerging issue is the challenge around the enforcement of cross-border maintenance orders. In one case handled by the Technical Legal Advisor, the male fled and was no longer traceable to comply with the maintenance order.³⁴ In another case³⁵, the man had gone to South Africa to search for greener pastures, and eventually stopped supporting his wife and children who remained in Malawi. So irrespective of attaining a successful judgment for the complainant, it did not translate into actual justice for the women and the children.

Engagements that the TLA held with other justice stakeholders has also shown that young married men who have left the country to pursue greener pastures in South Africa eventually end up abandoning their young families in Malawi. Though the Marriage Divorce and Family Relations Act No 4 of 2015 provides for cross-border enforcement of maintenance and in spite of a reciprocal enforcement of maintenance orders with South Africa that exists³⁶, none of these options serve as an effective avenue to seek relief for the deserted women and their children. This is largely due to the fact that the men who travel to South Africa end up overstaying beyond their permit and therefore evading South African authorities by working in the informal sector. This means that even through engagement with the South African courts and police to enforce a maintenance order, it is rarely effective as the non-compliant spouse cannot be tracked.

6. The law on maintenance in Malawi

The Constitution: Section 9 of the Constitution entrusts the judiciary with the responsibility of interpreting, protecting and enforcing the Constitution and all laws in Malawi in an independent and impartial manner with regard only to legally relevant facts and the prescriptions of law. This means that courts in Malawi are empowered to interpret and enforce all relevant legislation providing for enforcement of maintenance orders.

In relation to child maintenance, the Constitution explicitly provides for the right of a child to be maintained by his or her parents or guardians under Section 23(4). It reads:

All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and, in addition, all children, and particularly orphans, children with disabilities and other children in situations of disadvantage shall be entitled to live in safety and security and, where appropriate, to State assistance.

This therefore entails that the right to maintenance is a constitutional and justiciable right, and its specific provision in the Constitution enshrines its importance in the human rights jurisprudence.

The Child Care Protection and Justice Act (CCPJA): Section 9(1) of the CCPJA provides that:

Where a parent³⁷ or any other person who is legally liable to maintain a child or to contribute towards the maintenance of the child, neglects to maintain the child or to make the contribution, [an appropriate person] may apply against such person to the child justice court for a maintenance order of the child.³⁸

Section 10 of the CCPJA further provides that the following factors have to be taken into account when a court is making a Maintenance Order:

³⁴ Valentine Niyigena v Aimable Habiyakale Matrimonial Cause No 1 of 2019.

³⁵ Triza Thompson v Richard Smart Civil case number 310 of 2015

³⁶ Reciprocal enforcement of maintenance orders act, 1963 (act 80 of 1963)

³⁷ Section 2 of the CCPJA simply states that “parent” includes an adoptive parent, foster parent or any person acting in whatever way as parent.”

³⁸ An appropriate person under the CCPJA includes but is not limited to (a) the child; (b) the parent of the child; (c) the guardian of the child; (d) relatives of the child; (e) a social welfare officer; (f) a police officer; (g) a teacher; and (h) a health officer.

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- a) The income and wealth of both parents of the child or of the person legally liable to maintain the child;
- b) Any impairment in the earning capacity of the person with a duty to maintain the child;
- c) The financial responsibility of the person with respect to the maintenance of other children;³⁹
- d) The cost of living in the area where the child resides;
- e) The rights of the child under this Act; and
- f) Any other matter, which the child justice court may consider relevant.

Section 18 of the CCPJA requires that Maintenance orders should be enforced within thirty (30) days after the order has been made, but further provides that a Child Justice Court may, in appropriate circumstances, make an order for a longer period. This provision is essential in ensuring timely settlement of maintenance orders and clearly demonstrates that timeliness is a critical component in ensuring that maintenance orders are effective.

The CCJPA makes failure to comply with an Order for Child maintenance created under the Act a criminal offence. Section 22(1) of the CCPJA provides that:

A person who, being liable to maintain a child under a maintenance order, fails to maintain the child in respect of food, clothing, health, basic education and reasonable shelter, commits an offence and:

- a) *On first conviction shall be liable to pay the maintenance order;*
- b) *On the second or every subsequent conviction for continuous failure to maintain the child, shall be liable to imprisonment for one year.*

The Court is empowered, under Section 13 of the CCPJA, to make an attachment Order on the earnings, salary or property of the person liable to pay child maintenance. Section 13(2) provides that such an Order is mandatory in cases where the person liable fails to pay child maintenance as ordered.

7. Literature review from other jurisdictions on the enforcement of maintenance orders

7.1. The United States of America

- **Wage withholding:** A primary means of collecting outstanding child maintenance is through wage withholding. This requires that the employer of the respondent sends a percentage of the respondent's pay-checks to the state or county, which then forwards it to the custodial parent. However, enforcement against self-employed, or those whose employment is unknown, poses a challenge to collection of maintenance orders. In such cases, states sometimes rely on the custodial parent's knowledge of the respondent's income and on tax returns to pursue enforcement.
- **Garnishee proceedings⁴⁰:** Garnishment is also sometimes utilised, particularly when the respondent is expected to receive a lump-sum payment.

³⁹ This provision under the CCPJA resonates with the High Court's previous jurisprudence under the Affiliation Act in the pre-1994 Constitution era. In *Tyesi v. Nthala*, 8 MLR 302, the High Court held that in calculating maintenance payable by the putative father under a Maintenance Order, the court has to consider the father's financial obligations towards not only the claimant child, but also the remaining dependants, and the mother's means.

⁴⁰ Garnishee proceeding otherwise known as 'garnishment' is a judicial process of execution or enforcement of monetary judgment whereby money belonging to a judgment debtor, in the hands or possession of a third party known as the 'Garnishee' is attached or seized.

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- **Interception of tax return:** Interception of the respondent's federal tax return is another enforcement tool that is utilised. In the first seven years after implementing a pilot of this requirement, \$1.8 billion was collected as child maintenance dues. As of the early 2000s, federal law now requires every state to have legislation for intercepting the tax returns of non-compliant respondents and applying them to child support.
- **Through deceased estates:** If a parent who owes child support dies, the child maintenance claim can be made from the deceased parent's estate. In *L.W.K. v E.R.C.*, 735 N.E.2d 329 (Mass 2000) in the Supreme Judicial Court of Massachusetts, a father was required by a court to pay \$100 per month in child support for his minor daughter until the daughter turned 18. The father subsequently disinherited the daughter in his will. He died five months after he executed the will. The court ruled that the child was entitled to receive child support payments from the father's estate until she turned 18.
- **Restriction on respondent's property:** Other enforcement methods include placing a restriction on the respondent's property so that it cannot be sold without clearing the maintenance claim.
- **Adding interest to any overdue maintenance claim:** At times, interest is added to unpaid child support in order to motivate the respondent to pay off the maintenance claim.
- **Name and shame:** Some states have taken the high-profile approach of publicly issuing "Wanted" posters depicting perpetual non-compliant respondents.
- **Revoking benefits:** Other states have revoked state-issued fishing, hunting, and even driver's licenses as punishment for nonpayment of child maintenance.
- **Prosecution:** Prosecution may proceed on a misdemeanor or felony level, depending on the circumstances. In addition, federal prosecution may occur for a parent who crosses a state line to avoid paying support.
- **Contempt of court charges:** A non-compliant respondent may face contempt of court charges and civil penalties. Criminal sanctions can include a prison sentence or a fine, but these punishments are used sparingly and for repeat violations.

7.2. United Kingdom

- **Attachment orders:** In this case, the respondent's employer regularly takes money from the debtor's income but evidently one can only apply for this order if the respondent is in regular paid work.
- **Enforcing maintenance orders in different countries:** Reciprocal Enforcement of Maintenance Orders (REMO) is an international agreement between different countries that can help recover child maintenance from a parent living overseas.⁴¹ Therefore, if someone is owed money for maintenance (called arrears of maintenance) and the debtor is residing abroad, one may be able to enforce the order in the other country provided that country reciprocates with the United Kingdom.⁴² A REMO can also help a parent living abroad claim maintenance from the parent living in the UK.
- **A warrant of control:** A warrant of control allows a bailiff to visit the respondent's home or business. The bailiff will try to either collect the money the respondent owes on maintenance, or take goods to sell at auction.⁴³
- **A third-party debt order, or a charging order:** A third party debt order freezes money in the respondent's bank or building society account. The court may then order payment of the available funds to the complainant straight from

⁴¹ Reciprocal Enforcement of Maintenance Orders (REMOs) <https://www.nidirect.gov.uk/articles/reciprocal-enforcement-maintenance-orders-remos>

⁴² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897377/ex327-eng.pdf

⁴³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897377/ex327-eng.pdf

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the respondent's account. A charging order prevents the respondent from selling their home or land until they have paid the money they owe the complainant.⁴⁴

- **A judgment summons:** With a judgment summons, the respondent could be sent to prison if they do not pay the maintenance claim they owe. The judge will only send the respondent to prison if the complainant can prove that the respondent has or has had the means to pay the sum and refuses or neglects to pay it.

7.3. South Africa

- **Attachment order:** Where the non-compliant respondent is employed and fails to pay maintenance, the court can make an order to get the maintenance directly from their employer.⁴⁵
- **Writ of execution:** Upon an application by the complainant, a writ of execution against the property which belongs to the defaulting parent can be obtained. The sheriff will therefore attach property which belongs to the defaulting parent and sell the attached property in execution in order for the outstanding maintenance to be settled.⁴⁶
- **Payment of outstanding maintenance with interest:** Upon obtaining a court order, the defaulting parent may have the outstanding maintenance amount attached, stating that a certain amount is owed, and is to be paid on a certain date together with interest thereon.⁴⁷
- **Initiating criminal proceedings:** If the non-respondent party does not obey the order of the court to pay maintenance, the court sends a notice summoning the respondent to court where they must provide reasons for non-payment. If there is no good reason, the court will order payment of the outstanding maintenance claim, failing which the respondent is sent to prison.⁴⁸
- **Reciprocal agreements with foreign countries on enforcing maintenance orders:** South Africa has reciprocal enforcement agreements with various countries including Malawi for effecting maintenance orders extra-territorially. The following documentation are required in respect of the proclaimed countries and territories:
 - Four certified copies of the provisional court order.
 - An affidavit by the complainant or an officer of the court as to the amount of arrears due under the order.
 - The deposition affidavit or evidence of the complainant.
 - Birth certificate of the child or children.
 - The marriage certificate (if applicable).
 - A photograph and description of the defendant.
 - Physical residential and or working address of the defendant.
- **Time bound:** Maintenance orders are expected to be paid within 10 days from the date on which the relevant amount became due.⁴⁹ Failing which, the complainant can make an application for enforcement and any of the abovementioned appropriate remedies can be provided.

⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/897377/ex327-eng.pdf

⁴⁵ <https://www.westerncape.gov.za/service/enforcing-maintenance-order>

⁴⁶ <https://www.vermeulenlaw.co.za/how-to-enforce-a-maintenance-order/>

⁴⁷ <https://www.vermeulenlaw.co.za/how-to-enforce-a-maintenance-order/>

⁴⁸ <https://www.westerncape.gov.za/service/enforcing-maintenance-order>

⁴⁹ Section 26(2)(a) of the Maintenance Act

7.4. Botswana

- **Garnishee order against future orders:** Where a party fails to abide by the order for maintenance, a garnishee order may be granted against the future earnings in respect of maintenance not yet due (monthly maintenance fee) or maintenance arrears or both.
- **Initiating criminal proceedings:** Failure to pay maintenance may result in the Clerk of the court issuing a notice under Section 3 of the Maintenance Orders Enforcement Act that any outstanding arrears must be paid within 14 days. If at the lapse of 14 days the maintenance arrears remain unpaid, then the Clerk of court will issue a certificate in terms of Section 4 of the Maintenance Orders Enforcement Act and the complainant will submit it to the nearest police station. Once the certificate has been submitted to the Police, the Police will conduct investigations regarding the alleged failure to comply with court orders and register a criminal case against the defaulter accordingly. Failure to comply with court orders attracts imprisonment of up to a year and the defaulter will be ordered to pay outstanding arrears.
- **Availability of specialised maintenance courts⁵⁰:** This is a court that provides for the determination of paternity of children born out of wedlock and provides for the granting of orders for the maintenance of such children. These courts are mainly situated at Gaborone and Francistown in Botswana. The presence of specialised maintenance courts ensures that there is focused attention on issues of maintenance. However, where specialised courts are not present, any Magistrate in any of the magistrate courts across Botswana may hear an application for maintenance. If the complainant is unable to prepare his or her own documents, the Clerk of Court assists to draft the documents for free.

7.5. Kenya

- **Issuing orders to recover the arrears:** The court may grant orders that any arrears in respect of any maintenance payment be paid forthwith, or by installments or within such other period as shall be specified by the court.
- **Attachment of the respondent's property or salary:** This is done by the court issuing a warrant for distress on the respondent's property. This can be done immediately or until such time as the court may direct, or on such conditions as the court may deem fit. The court can also order the attachment of the respondent's earnings including any pension payable to the defaulter if the court is satisfied that:
 - i) The failure to make payment was due to the willful refusal or culpable neglect of the respondent; and
 - ii) The respondent is gainfully employed or is engaged in some business enterprise or owns property from which he derives an income.

However, the court shall not (unless special circumstances exist) make an order for the attachment of the respondent's earnings in an amount which shall exceed more than 45% of the respondent's annual income in any period of twelve months.

- **Prevent the respondents from selling or transferring their assets:** The court can order the detention, attachment, preservation or inspection of any property of the respondent. It can further authorise any such person, as the court may deem fit, to enter upon any land or building in which the respondent has an interest (whether in the possession or control of the respondent or not). The court can further set aside any disposition of any property belonging to the respondent from which any income has occurred. The court can also make orders for the re-sale of the said property to any person and may direct the proceeds of such sale to be applied to the settlement of any arrears of maintenance claims, as well as to the payment of future maintenance monies for the child concerned. In addition, the court can restrain - by way of an injunction - the disposition, wastage or damage of any property belonging to the respondent.

⁵⁰ https://www.justice.gov.bw/sites/default/files/maintenance_court.pdf

- **Commit the respondent to jail:** This is where non-payment of maintenance orders is treated as contempt of court, and the violating parent risks jail term on the same. The court shall have power, in this instance, to issue a warrant committing the respondent to imprisonment for a period of no less than five days nor more than four weeks. Prior to committing the respondent to prison, the court first needs to be satisfied that the respondent has persistently and willfully refused or neglected to make payment of all or any part of the monies ordered to be paid under a maintenance order without reasonable cause; and that an order for attachment of earning would not be appropriate.

8. Considerations for Malawi in effecting maintenance orders

8.1. Proposed mechanisms for enforcing maintenance orders for non-compliant respondents who are in formal employment

- Enforcement of attachment orders by the court in relation to a non-compliant respondent should be regularly effected, especially in instances in which there is evidence that the respondent has the ability and means to pay the maintenance claim but neglects to do. This would be in alignment with Section 13 of the CCPJA. Since many of the women seeking enforcement of child maintenance orders rarely have legal representation, the court can be more proactive (in instances where there is perpetual disregard of maintenance orders) in issuing attachment orders that would bind the liable person's employer or bank to remit the amount specified in the order either directly to the child, the child's custodian or to the court. In addition, attachment orders can also be made against property of the respondent.
- Contempt of court proceedings should be effected by the court in instances where there is wanton and continuous disregard of a court maintenance order. Criminal sanctions can include a prison sentence or a fine (which can be paid to the benefit of the complainant).
- In relation to the concern of court clerks being bribed to delay cases or 'misplace files', there is need to strengthen safe and effective platforms for channelling complaints to the court by court users (including through the provision of a toll free line).

8.2. Proposed mechanisms for enforcing maintenance orders for non-compliant respondents who are in informal income generating activities

- *Attach orders to the respondent's property or business:* Attachment orders can be made in relation to the property or business dealings of the respondent.
- *Seizing funds for maintenance through mobile money transactions:* A lot of Malawians in the informal sector rely on mobile money transactions to send or collect funds. Discussions between the judiciary and mobile money operators can be held in order to explore options where funds can be automatically seized (for remittance to the court and subsequently to the complainant) once the respondent attempts to utilise such services for monetary transactions.
- *Tracking defaulters through sim card registration:* Since sim card registration is now a mandatory requirement, this is an avenue that be used to track defaulters' whereabouts, particularly in instances where they evade any contact with the court or the complainant. Though specific locations cannot be attained, mobile operators can help pinpoint an area of location. Local police authorities⁵¹ can then be alerted for further investigation to track the respondent.
- *Tracking defaulters through registration processes of key national documents:* The Judiciary can explore linkages with key registration processes that various Malawians periodically undertake. These can include registration and renewal processes relating to national ID, passports, and driving licenses. In the event of perpetual default of maintenance payments by the respondent, such information needs to be passed along to the relevant institutions. Thereafter, two

⁵¹ It must be borne in mind that Sections 153 (3) of the Constitution provides that Malawi Police Service shall be subject to the direction of the courts and shall be bound by the orders of such courts.

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options can ensue. Firstly, the relevant authorities can withhold the registration or renewal processes pending further directives from the Court. Or the relevant authorities can promptly alert the Court/police of the respondent's presence (in the event that he evaded all contact with the court or the complainant and her children).

- *Property seizures:* Utilising court marshals or sheriffs to physically go to the non-compliant respondent's home or business to execute the order, including through seizure of property.
- *Withholding travel abroad:* The respondent's details can be shared with immigration authorities so that any attempt to travel abroad is intercepted (either through road or air).
- *Creating a database of non-compliant respondents:* Details of non-compliant respondents who have evaded any contact with the Court must be shared with security agencies so that it is included in the police databases of 'wanted criminals' or 'people wanted for investigation.'

9. Detailing the next steps for reform

- The TLA envisages convening a brainstorming session with key justice stakeholders who hold a role in matters of child maintenance (i.e. the Judiciary- including the Child Justice Court, the Sheriff Department, the Ministry of Gender including the Gender, Child and Social Welfare Departments, the Ministry of Home Affairs (including the Immigration Department, the Police - particularly the Victim Support Unit), the Malawi Human Rights Commission, Law Commission, child rights experts, the Ministry of Justice and traditional leaders) in order to deliberate upon the abovementioned proposed mechanisms for ensuring the effective enforcement of maintenance orders, as well as anticipated challenges and mitigation strategies for addressing the identified challenges.
- For proposed mechanisms on ensuring the effective implementation of maintenance orders which are not currently provided for under the law, applicable regulations or practice directions can be drafted (as an addendum to the Child Care Protection and Justice Act) and presented to the Office of the Chief Justice for endorsement.
- Deliberations can also be held with private actors (e.g. mobile money operators) on how best to effect attachment orders for mobile monetary transactions for non-compliant respondents who are not formally employed.