



**Strathmore University**  
**Law School**

**Gender And Sovereignty: A Critical Analysis of the Criminalization of Coercive  
Control in Kenya**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

By

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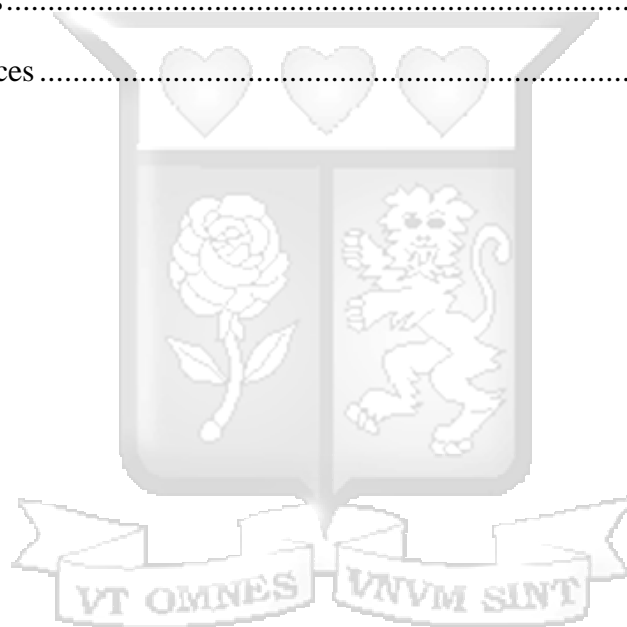
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I would also like to express my gratitude to my family and friends for their encouragement and support during this demanding yet rewarding endeavor.



## Declaration

I, **KAPERRE SHARLENE DZAME**, do hereby declare that this is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



Signed: .....

Date 28 February 2024

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed: .....

[**Cecil Abungu**]

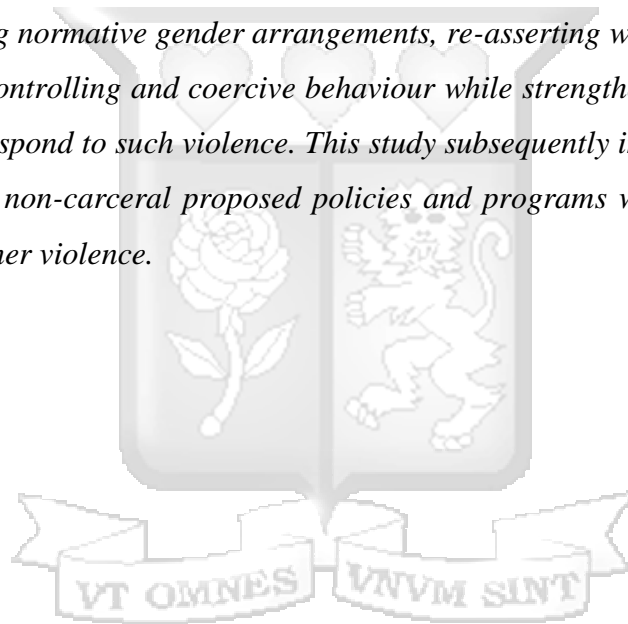
## Dedication

*To all Women*



## Abstract

*Intimate partner violence has been recognized as the most predominant form of violence committed by men against women. In efforts to address violence against women, one of the approaches in the conceptualization of domestic violence is the coercive control model which recognizes physical violence and non-physical forms of abuse as components of coercive control. The aim of this model is to address the legislative gap with regard to non-physical forms of violence while reconciling the disjuncture in the dynamics of control and gender which enables the continued subordination of women in intimate partner relationships. As such, proponents of this model call for the criminalization of coercive control. Through qualitative and quantitative research, drawing comparatives from the jurisdictions which have adopted the offence, this research establishes that an incorporation of the offence of coercive control within Section 3 of the Protection Against Domestic Violence Act would only serve to exacerbate the existing normative gender arrangements, re-asserting women to be blamed for their experiences of controlling and coercive behaviour while strengthening the power of the patriarchal state to respond to such violence. This study subsequently invites further research on the practicality of non-carceral proposed policies and programs which could effectively address intimate partner violence.*



## **List of Abbreviations**

CCB Controlling and Coercive Behaviour

PDVA Protection Against Domestic Violence Act

VAWA Violence Against Women Act



## List of Cases

*C.K (A child) through Ripples International as her guardian and next friend) and 11 others v Commissioner of the Police/Inspector General of the National Police Service and 3 Others* (2013) eKLR.

*State v Truphena Ndonga Aswani* (2021) eKLR.



## **List of Legal Instruments**

## **International**

Rome Statute of the International Criminal Court, no. 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

Declaration on the Elimination of Violence Against Women, 20 Decemeber 1993, 48/104.

## **Foreign Acts of Parliament**

England; Section 76, Serious Crime Act (2015).

Scotland; Section 1, Domestic Abuse (Scotland) Act (2018).

Ireland; Section 39, Domestic Violence Act (2018).

## **Kenyan**

Constitution of Kenya (2010).

Protection Against Domestic Violence Act (Act No. 2 of 2015).

National Gender and Equality Commission Act, (Act No. 15 of 2011).



# 1.0 INTRODUCTION

## 1.1 Background

In the quest to strengthen countries' criminal justice response to domestic violence, there has been a recent move to incorporate a distinct offence of coercive control. Presently, there are few countries which have criminalized coercive control in their domestic violence legislations: England (in 2015), Scotland (in 2018) and Ireland (in 2018).<sup>1</sup> However, The efficacy of the incorporation of coercive control in these jurisdiction's domestic violence legislations is yet to be determined.<sup>2</sup>

According to England legislation, coercive behavior is defined as an act or a pattern of acts of assault, threats, intimidation and other abuse which is used to harm, punish or frighten the victim.<sup>3</sup> On the other hand, controlling behavior is defined to be a range of acts designed to make a person subordinate by isolating them from sources of support, exploiting their resources and depriving them of the means needed for independence, resistance and escape.<sup>4</sup> These definitions of coercive and controlling behavior form the framework to understand the definition of domestic violence adopted by England which incorporates coercive control. It defines domestic violence as any incident or pattern of incidents of controlling, coercive, threatening behavior, violence or abuse.<sup>5</sup>

For many women in Kenya, domestic abuse has been and still is a common reality.<sup>6</sup> Government data on domestic abuse from the Kenya Demographic and Health Survey in 2014 show that, 39% of women and 9% of men claimed having experienced physical abuse, while

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<sup>1</sup> England; Section 76, *Serious Crime Act* (2015), Ireland; Section 39, *Domestic Violence Act* (Act No. 6 of 2018), Scotland; Section 1, *Domestic Abuse (Scotland) Act* (2018).

<sup>2</sup> Walkate S and Fitz-Gibbon K, 'Why criminalise coercive control? The complicity of the criminal law in punishing women through furthering the power of the state' 10(4) *international Journal for crime, justice and social democracy*, 2021, 1.

<sup>3</sup> The author relies on the definitions provided by England because of the three countries which have criminalized coercive control in their domestic violence laws, it is the only one that provides distinct definitions of the two concepts; coercive behavior and controlling behavior. See, Home office, *Controlling and coercive behavior in an intimate or family relationship: Statutory guidance framework*, 2015, 3-4.

<sup>4</sup> Home office, *Controlling and coercive behavior in an intimate or family relationship: Statutory guidance framework*, 2015, 3-4.

<sup>5</sup> Section 76, *Serious Crime Act* (2015).

<sup>6</sup> Kenya National Bureau of Statistics, *Kenya demographic and health survey 2014*, 291- 322. See generally, Memiah P and Mu T *et al*, 'The prevalence of intimate partner violence, associated risk factors and other moderating effects: Findings from the Kenya National Health Demographic Survey' 00(0) *Journal of Interpersonal Violence*, 2018.

21% of men and 39% of women reported emotional abuse. Furthermore, 26% of women and 15% of men reported to have been victims of verbal abuse.<sup>7</sup> These statistics demonstrate that both physical abuse as well as non-physical abuse constitute significant aspects of domestic violence.

Prior to 2015, there was no legislation that recognized and criminalized domestic violence in the country. The Protection Against Domestic Violence Act (*hereinafter referred to as 'the PDVA'*), therefore marked a turning point in safeguarding victims of domestic violence.<sup>8</sup> Section 3(1) of the PDVA outlines a definition of domestic violence that encompasses vast forms of abuse which entail both physical as well as non-physical forms of abuse such as harassment, intimidation, economic, verbal, emotional and psychological abuse. It does not however list coercive control as one of the forms of abuse that constitute domestic violence.<sup>9</sup> Nonetheless, the PDVA further provides in Section 3(4) that any single act listed may amount to abuse as well as a number of acts which form a pattern of behavior.<sup>10</sup>

These interpretations align with the assertions made by coercive control theory proponent Evan Stark, who argues that men can subvert women's autonomy by using coercive control to extend their dominance across time and social space. Therefore, coercive control plays a crucial role in how we conceptualize the pervasive effects of a variety of actions on the lives of women.<sup>11</sup> Therefore, coercive control plays a crucial role in how we conceptualize the pervasive effects of a variety of activities on the lives of women.<sup>12</sup> Violence against women has been and continues to be expressed within the categories of gender.<sup>13</sup> Although the PDVA does not define gender, the term gender is defined in the National Gender and Equality Commission Bill as 'the social definition of women and men among different communities and cultures, ages and during different periods in history'.<sup>14</sup> This definition is consistent with that provided in the Rome Statute which describes gender as 'two sexes, male and female, within the context

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<sup>7</sup> Regrettably, the most recent national statistics on domestic violence are from the year 2014. See, Kenya National Bureau of Statistics, *Kenya demographic and health survey 2014*, 306 -307.

<sup>8</sup> *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>9</sup> Section 3, *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>10</sup> Section 3 (4), *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>11</sup> See Generally, Stark E, *Coercive control: How men entrap women in personal life*, Oxford University Press, 2007.

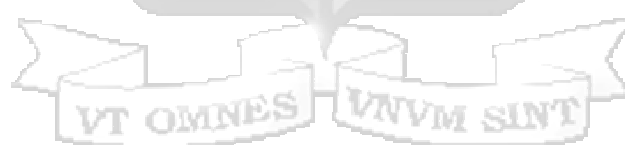
<sup>12</sup> Walkate S and Fitz-Gibbon K, 'Why criminalise coercive control? The complicity of the criminal law in punishing women through furthering the power of the state' 10(4) *international Journal for crime, justice and social democracy*, 2021, 103.

<sup>13</sup> Kapur R, 'Gender, Sovereignty and the rise of a sexual security regime in international law and postcolonial India' 14(2) *Melbourne Journal of international law*, 2013.

<sup>14</sup> Section 2, *National Gender and Equality Commission Act*, (Act No. 15 of 2011).

of society'.<sup>15</sup> According to a critique of feminist involvement in the drafting of the Rome Statute, the resulting consensus was dedicated to a structuralist conception of male dominance and female subjugation,<sup>16</sup> where sexual assault was seen as a component of a larger masculine war against women.<sup>17</sup> However, despite being advocated by feminists, gender violence was not incorporated into the Rome Statute.<sup>18</sup>

In addition to framing violence against women within gender categories, there has also been a maintained ongoing state appeal as the primary guarantor of women's rights. In turn, state intervention has taken the form of criminal justice procedures and severe sanctions, as has been the case in the jurisdictions which have criminalized coercive control.<sup>19</sup> However, this ongoing state appeal as the primary guarantor of women's rights ignores the fact that power is not distributed evenly. That is, it does not operate in a hierarchical approach. Rather, it also operates in terms of domination, subjugation and subject constitution.<sup>20</sup> This framing of gender issues with a carceral vision perpetuates the narrative of women as invariable victims in need of rescue, saving and protection, with men as the perpetrators, closing down the possibilities of change within the current structures of gender and sexuality existing gender.<sup>21</sup> Instead of empowering the woman who should be the main subjects of concern, it reinforces the state's regulatory framework and increases its monitoring of women's rights..<sup>22</sup> This further illustrates how an established regulatory system can fail to address the reason for its establishment, which in this case is the exploitation of and violence against women.<sup>23</sup>



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<sup>15</sup> Article 7(3), Rome Statute of the International Criminal Court, no. 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

<sup>16</sup> Janet Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law' (1) 30 *Michigan Journal of International Law*, 2008.

<sup>17</sup> Halley examined the representations of rape by feminists in the prosecution and adjudication of cases in the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Tribunal of Rwanda ('ICTR'): Janet Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict' (78) 9 *Melbourne Journal of International Law*, 2008, 100.

<sup>18</sup> Article 7(1)(h), *Rome Statute*.

<sup>19</sup> England; Section 76, *Serious Crime Act* (2015), Ireland; Section 39, *Domestic Violence Act* (Act No. 6 of 2018), Scotland; Section 1, *Domestic Abuse (Scotland) Act* (2018).

<sup>20</sup> Kapur R, 'Gender, Sovereignty and the rise of a sexual security regime in international law and postcolonial India', 4.

<sup>21</sup> Kapur R, 'Gender, Sovereignty and the rise of a sexual security regime in international law and postcolonial India', 19.

<sup>22</sup> Kapur R, 'Gender, Sovereignty and the rise of a sexual security regime in international law and postcolonial India', 26.

<sup>23</sup> Walkate S and Fitz-Gibbon K, 'Why criminalise coercive control? The complicity of the criminal law in punishing women through furthering the power of the state', 9.

## 1.2 Problem Statement

Current criminal law tends to focus on distinct incidents of physical violence, obscuring experiences of domestic abuse through a pattern of controlling and coercive behaviour. This has necessitated the recent move by countries to enact a law that criminalizes coercive control. Section 3 of the Protection Against Domestic Violence Act of Kenya fails to include coercive control in its definition of domestic violence. This study seeks to investigate whether the criminalization of the offence of coercive control within Section 3 of the Protection Against Domestic Violence Act of Kenya would merely serve to reinstate the normative gender arrangements while furthering the regulatory apparatus of the patriarchal state.

## 1.3 Research Objectives

1. To determine the gendered nature of the offence of coercive control.
2. To analyze whether the criminalization of coercive control challenges the existing patriarchal norms in the jurisdictions which have adopted the offence.
3. To determine whether incorporating coercive control within Section 3 of the Protection Against Domestic Violence Act of Kenya could potentially address Intimate Partner Violence.

## 1.4 Research Questions

1. To what extent is the offence of coercive control gendered?
2. To what extent does the criminalization of coercive control challenge the existing patriarchal norms in the jurisdictions which have criminalized the offence?
3. To what extent does the incorporation of the offence of coercive control in Section 3 of the Protection Against Domestic Violence Act of Kenya address Intimate Partner Violence?

## 1.5 Hypothesis

An understanding of coercive control as a pattern of controlling and coercive behaviour which enables male perpetrators to extend their dominance over women, subverting their autonomy, reveals the gendered nature of the offence. State intervention through the criminalization of coercive control merely serves to reinstate this patriarchal gender arrangement, furthering the exclusion of women who it intends to protect. Therefore, the criminalization of coercive control within Section 3 of the Protection Against Domestic Violence Act of Kenya would serve to reinstate the normative gender arrangements, reasserting women as victims to be blamed for their experiences of controlling and coercive behaviour, while strengthening the power of the patriarchal state to respond to such violence.

### **1.6 Justification Of The Study**

This research is of relevance as it seeks to enhance Kenya's criminal justice response to domestic violence cases. Research has been conducted arguing that the Protection Against Domestic Violence Act, fails to list coercive control as one of the forms of domestic violence, and as such there should be amendment to enable the courts to criminalize the offence.<sup>24</sup> This study provides a unique addition by arguing against the criminalization of coercive control within the Kenyan context on grounds that it would result in the further exclusion of women, contrary to the legal intention of the offence.

This contribution to the existing body of literature attempts to assist the Kenyan courts in developing a comprehensive legal framework in the criminalization of domestic violence cases. It is also useful to lawmakers as it provides a significant contribution towards the development of responsive policies and institutional services when it comes to domestic violence. This study is also beneficial to other researchers working on critical responses to domestic violence.

### **1.7 Theoretical Framework: The Feminist Legal Theory**

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<sup>24</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019.

This study is limited to the theoretical perspectives of the Feminist Legal theory and Abolitionist Feminism. The author takes cognizance of the possibility of drastically different findings outside the scope of this framework.

The Feminist Legal Theory emerged in the 1970s along with the development of the Critical Legal Study.<sup>25</sup> Elizabeth Cady Stanton is credited as the guiding force behind the theory of legal feminism.<sup>26</sup> This theory explores the consequences of the enactment of laws on women. It considers inequality caused by the perspective that law is neutral or objective. This assumption that the law is neutral or objective, is rooted in legal positivism.<sup>27</sup> However, feminists argue against this claiming that it results in the legitimization of *inter alia* gender inequality in society. They oppose the neutrality and objectivity of law on grounds that laws are made from a patriarchal perspective subsequently, resulting in protecting men more than women. This school of thought contends that in order to prevent laws that are perceived as impartial and objective but actually discriminate against and inflict injustice on women, legal studies should be grounded in the experiences of women.<sup>28</sup>

The numerous feminist schools of thought are inextricably linked to feminist legal theory. This theory develops a feminist analysis approach to examine broad issues across several legal specialties.<sup>29</sup> One of the legal study methods in the theory, grounded on the exclusionary experiences of women, is '*Asking the Woman Question*', introduced by Katherine Bartlett.<sup>30</sup> This approach entails evaluating a social practices' or rule's gender implications. It demonstrates how, rather than reflecting women's innate qualities, the status of women reflects the institutional arrangement and organization of society. This method necessitates the need to analyze laws beneath their surface, insisting on an application that does not implicitly maintain the subjugation of women.

'*Asking the Woman Question*' as it relates specifically to the law, looks at the ways in which it ignores the experiences and ideals that appear more typical of women than of males, whatever

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<sup>25</sup> Hartano R and Sulistiyo A, 'Feminist Perspective towards the legal theory on Fisher-Women's legal identity', 13(4) *Fiat Justisia*, 2019, 230.

<sup>26</sup> Thomas T, 'The long history of feminist legal theory', in Brake D, Chamallas M and Williams V, *The Oxford Handbook of Feminism and the Law in the United States*, Oxford University Press, 2021, 2.

<sup>27</sup> Hartano R and Sulistiyo A, 'Feminist Perspective towards the legal theory on Fisher-Women's legal identity', 350.

<sup>28</sup> Hartano R and Sulistiyo A, 'Feminist Perspective towards the legal theory on Fisher-Women's legal identity', 351.

<sup>29</sup> Hartano R and Sulistiyo A, 'Feminist Perspective towards the legal theory on Fisher-Women's legal identity', 351. Note that legal methods are the basic tools which lawyers and legal scholars adopt. See, Bartlett K, 'Feminist legal methods', 103(4) *Harvard Law Review*, 1989, 829.

<sup>30</sup> Bartlett K, 'Feminist legal methods', 837.

the reason may be, or the extent to which existing legal standards and concepts may be disadvantageous to women.<sup>31</sup> This approach establishes a relationship to legal substance, creating consequences where the law is not gender neutral. It does not require decisions to favour women but rather requires decision makers to specifically consider the interests and concerns, which may otherwise be and historically have been overlooked.<sup>32</sup> The bias in this method therefore lies in determining a type of bias which is disadvantageous to those who otherwise benefit from the law. Feminists argue that this constitutes good/proper bias.<sup>33</sup> The Feminist Legal Theory is instructive to this research as it is the framework that underpins the analysis of coercive control within the ambit of the overarching research question. This theory will constitute the premise upon which the gendered nature of the law criminalizing coercive control will be determined. *'Asking the Woman Question'* also entails a consideration of whether the criminal justice response is designed to effectively address the experiences of women of CCB. Abolitionist feminism which constitutes one of the perspectives of the wider feminist legal theory is instructive in assessing this.<sup>34</sup>

Abolitionists argue that the criminal justice system significantly fails victims. According to this school of thought, as opposed to being led by the victims, the processes involved in criminal justice reduces victims to witnesses at best. Their victimization is the tool that is used to achieve a guilty verdict. As a result, these processes not only ignore the victim but also blames them when it comes to cases involving sexual victimization, as it is the victim who must prove such victimization.<sup>35</sup> Consequently, in adversarial systems, the victims are left unheard, misunderstood and re-victimised.<sup>36</sup> The strain of feminism directly in tension with Abolitionism is Carceral Feminism. The Carceral Feminism framework advocates for criminal justice solutions to address violence against women. The assumptions underpinning this theory is that; (1) there is a need to seriously address male violence against women, and; (2) that the criminal justice system is an effective method to address such violence. The rationale of this school of thought is that through arguing for longer prison sentences and more police and prison intervention, perpetrators are prevented from committing future violence while others are

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<sup>31</sup> Bartlett K, 'Feminist legal methods', 837.

<sup>32</sup> Bartlett K, 'Feminist legal methods', 846.

<sup>33</sup> Bartlett K, 'Feminist legal methods', 847.

<sup>34</sup> See generally, Eisenstein, *Abolitionist Sociolism Feminism: Radicalizing the next Revolution*, Monthly Review Press, New York, 2019.

<sup>35</sup> See, Te Uepu Hapai I te Ora, *Transforming our criminal justice systems*, *Maori Law Review*, 2019. See also, Lamusse T, 'Feminist prison abolitionism' in Gibbs A and Glimour F, *Women, crime and justice in context*, Routledge, New York, 2022, 242.

<sup>36</sup> Lamusse T, 'Feminist prison abolitionism', 242.

deterred.<sup>37</sup> Abolitionist argue against this approach as an increase in punitive legislation fails to increase women's freedom from patriarchal violence. According to a study by Beth Richie, there is a lack of reliable evidence on the connection between changes in the prevalence of violence against women in underprivileged communities and new specialized laws, legal processes and mandated protocols.<sup>38</sup> These understandings within the framework of the Feminist Legal theory will also form the backdrop against which this study will analyze the extent to which the existing patriarchal norms in jurisdictions which have criminalized the of coercive control are challenged. Lastly, it will also inform the conclusion arrived at in determining whether the criminalization of coercive control in Section 3 of the PDVA would serve to address intimate partner violence.

## 1.8 Literature Review

Legal scholarship on coercive control primarily derives from the perspectives of the few jurisdictions which have specifically criminalized the offence.<sup>39</sup> Current literature on the criminalization of coercive control reveals two themes; On one hand the proponents of the criminalization of the offence argue for an increase in domestic laws to reflect the offence. However, those opposed argue that this ultimately serves to fail the victims who the offence intends to protect. Although there is a surfeit of research on domestic violence in Kenya, the same is not true for coercive control.

### 1.8.1 The Power of the Law in the Criminalization of Coercive Control

#### *i. The Extent to which the Protection Against Domestic Violence Act of Kenya Criminalizes Coercive Control*

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<sup>37</sup> Lamusse T, 'Feminist prison abolitionism', 246-247.

<sup>38</sup> See, Richie B, *Arrested justice: Black women, violence and America's prison nation*, New York university Press, 2012, 83. See also, Lamusse T, 'Feminist prison abolitionism', 247.

<sup>39</sup> England; Section 76, *Serious Crime Act* (2015), Ireland; Section 39, *Domestic Violence Act* (Act No. 6 of 2018), Scotland; and Section 1, *Domestic Abuse (Scotland) Act* (2018).

The author uses 'specifically criminalized' because although other jurisdictions such as ours have legislation that provide for various elements that can be deemed to constitute controlling and coercive behavior such as psychological abuse, there jurisdictions are the only ones that expressly criminalize the offence of coercive control.

Currently, scholarship on coercive control in Kenya is limited to the findings of one researcher, Wabia Karugu. Wabia contextualizes the matter to Kenya and subsequently argues that the PDVA does not capture the constitutive elements of coercive control. She arrives at this conclusion by analysing the PDVA against England's legislation on coercive control, the Serious Crime Act.<sup>40</sup> In doing so, she concludes that although the PDVA contains provisions which may lead one to insinuate that it captures the components of controlling and coercive behaviour, there is the need for a clearly identifiable provision on coercive control.<sup>41</sup> She proposes that Section 3 of the PDVA should be amended to include coercive control as one of the listed forms of abuse in the definition of domestic violence.<sup>42</sup> In doing so, she recommends an incorporation of the exact provision of Section 76 of the Serious Crime Act of the United Kingdom into Kenya's PDVA.<sup>43</sup> Contrastingly, this research considers the adverse unintended consequences of the criminalization of coercive control on the subjects of law who the offence intends to protect.

## *ii. Proponents of the Criminalization of Coercive Control in Other Jurisdictions*

Wabia's argument is similar to that of the proponents of the criminalization of coercive control who argue for an increase in criminal laws to include coercive control,<sup>44</sup> stating that this would create a comprehensive framework to address intimate partner abuse.<sup>45</sup> These scholars such as Jane Wangmann further provide that one of the main justifications for implementing legislation on coercive control is that existing criminal laws tend to focus heavily on physical forms of violence.<sup>46</sup> As a result non-physical forms of violence that afford ongoing control fail to be addressed.<sup>47</sup> As such, scholars such as Arnold Gretchen argue that through the incorporation

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<sup>40</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019.

<sup>41</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019, 37-41.

<sup>42</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019, 57.

<sup>43</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019, 57-59.

<sup>44</sup> Stark E, 'The 'coercive control' framework: Making the law work for women' in McMahon M and McGorrrery P, *Criminalising coercive control: Family violence and the criminal law*, Springer, New York, 2020, 42 -43.

<sup>45</sup> Stark E, 'The 'coercive control' framework: Making the law work for women', 33.

<sup>46</sup> Wangmann J, 'Coercive control as the context of intimate partner violence: The challenge for the legal system' in McMahon M and McGorrrery P, *Criminalising coercive control: Family violence and the criminal law*, Springer, New York, 2020, 221.

<sup>47</sup> Stark E, 'The 'coercive control' framework: Making the law work for women', 42 -43.

of coercive control in the legislative framework of countries, then non-physical forms of domestic violence such as intimidation, stalking, degradation, isolation of the victim, deprivation, exploitation and regulation, can gain cognizance within the law as a criminal pattern of abusive behaviour.<sup>48</sup> In arguing for the incorporation of coercive control into the criminal laws of Scotland, scholars such as Vanessa Bettinson align themselves with this argument. She states that similar to England, prior to the enactment of the Serious Crime Act, Scotland had no criminal offence of domestic violence/abuse. Furthermore, similarly, the existing offences charged in cases of intimate partner violence focused on single incidents of abuse rather than a pattern of abusive behaviour.<sup>49</sup>

Studies therefore reveal that the scholars arguing in favour of the incorporation of coercive control as a distinct offence have done so proceeding from the problem of a legislative gap to address the various non-physical forms of domestic violence which form a pattern of controlling and coercive behaviour, in the jurisdiction under study. This problem is therefore contextual. Conversely, this research departs from this perspective by arguing that an increase in law through the criminalization of coercive control within the Kenyan context may not be the answer, as it may only serve to further the exclusion of women, the victims of controlling and coercive behaviour.<sup>50</sup>

### **1.8.2 The Limits of the Law in the Criminalization of Coercive Control**

According to Evan Stark where the components of coercive control are present, statutory wording may not even be required, making it an insufficient need for an effective coercive control framework.<sup>51</sup> He states that enacting coercive control entails joining its elements into an offence whose importance as a component of a dominance-based criminal pattern derives from context, as opposed to adding it as a new offensive behavior on top of a number of

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<sup>48</sup> See generally, Arnold G, 'A battered woman's movement perspective on coercive control' 15(1) *Sage Journals*, 2009.

<sup>49</sup> Bettinson V, 'Criminalising Coercive control in domestic violence cases: Should Scotland follow the path of England and Wales' *Criminal Law Review*, 2016.

<sup>50</sup> It is important to note that studies reveal that in relationships characterized by coercive control, victims are almost always female while perpetrators are almost always men. This is the premise that author proceeds with in this research. See, Johnson MP, 'Conflict and control: Gender symmetry and asymmetry in domestic violence' 12(11) *Violence Against Women*, 2006, 1003-1018. See also, Swan S and G Laura *et al*, 'A review of research on women's use of violence with male intimate partners' 23(3) *Violence and Victims*, 2008, 4.

<sup>51</sup> Stark E, 'The 'coercive control' framework: Making the law work for women', 40.

separate offences that are already not enforced.<sup>52</sup> Scholars such as Sandra Walkate align with this, claiming that when it comes to the criminalization of coercive control, more law may not be the answer as it may only further the exclusion of those already excluded. She argues that the criminalization of coercive control falls short conceptually as it misunderstands the law's coercive character, failing to recognize how it negates the autonomy of women.<sup>53</sup> Kristin Anderson further provides that beyond considering gender to be a type of systemic injustice, demonstrating that gendered inequality increases the susceptibility of women is essential in understanding the gender dynamics of coercive control.<sup>54</sup> This research aligns itself with this view by arguing that when it comes to the Kenyan context, the enactment of a distinct offence of coercive control on top of the already unenforced forms of abuse listed in the PDVA, may only result in the further exclusion of women who are the victims of controlling and coercive behaviour.

### **Contribution to Scholarship**

This research provides a unique contribution to the current literature by contextualizing the criminalization of coercive control to the Kenyan context. Current scholarship in Kenya argues that in order to criminalize coercive control, there is a need to address a legislative gap. My research departs from this argument by demonstrating that the criminalization of coercive control within the Kenyan context serves to reinstate the normative gender arrangements, reasserting women as victims to be blamed for their experiences of controlling and coercive behaviour, while strengthening the power of the patriarchal state to respond to such violence.

## **1.9 Research Methodology**

### **1.9.1 Nature of Research and Sources**

The nature of this research shall be both qualitative and quantitative. It shall mostly rely on primary sources such as the Constitution of Kenya, case law and statutes on domestic violence

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<sup>52</sup> Stark E, 'The 'coercive control' framework: Making the law work for women',42.

<sup>53</sup> Walkate S and Fitz-Gibbon K, 'The criminalization of coercive control: the power of the law' 8(4) *International Journal for Crime, Justice and Social Democracy*, 2019, 103.

<sup>54</sup> See generally, Anderson K, 'Gendering coercive control' 15(12) *Violence Against Women*, 2009.

including the Protection Against Domestic Violence Act of Kenya (2015), the Serious Crime Act of England (2015) and the Domestic Abuse Act of Scotland (2018), amongst others. It also relies on secondary sources such as books, chapter in books, journal articles, working papers and reports.

### **1.9.2 Analytical methods**

In general, I intend to arrive at the main findings of my research through a deductive method. This research shall be partly descriptive and partly prescriptive. The descriptive aspects constitute the general understanding of terms such as the offence of coercive control as well as its gendered nature. Through a doctrinal analysis of statute, this study provides an examination of the degree to which the criminalization of coercive control has challenged the existing patriarchal norms within the jurisdictions which have criminalized the offence. In doing so, it will also adopt a comparative analysis between the coercive control laws in the aforementioned 2 jurisdictions. The justification for the legislative comparison on those two countries is premised on the fact that those are the two countries which have passed and operationalized a law on coercive control.

The study is prescriptive insofar as it attempts to decipher whether the inclusion of the offence of coercive control in Section 3 of the PDVA provides fail to address intimate partner violence by furthering the exclusion of women. To discover this, it conducts a critical method analysis drawing comparisons from the foregoing sections of the research to determine that the criminalization of the offence of coercive control within Section 3 of the Protection Against Domestic Violence Act of Kenya reinstates normative gender failing to address intimate partner violence.

### **1.10 Chapter Breakdown**

Chapter 1 is the introductory part of this study. It lays down the background, statement of problem, research objectives, research questions, hypothesis, justification of study, the theoretical framework of the Feminist Legal Theory, literature review and methodology. This

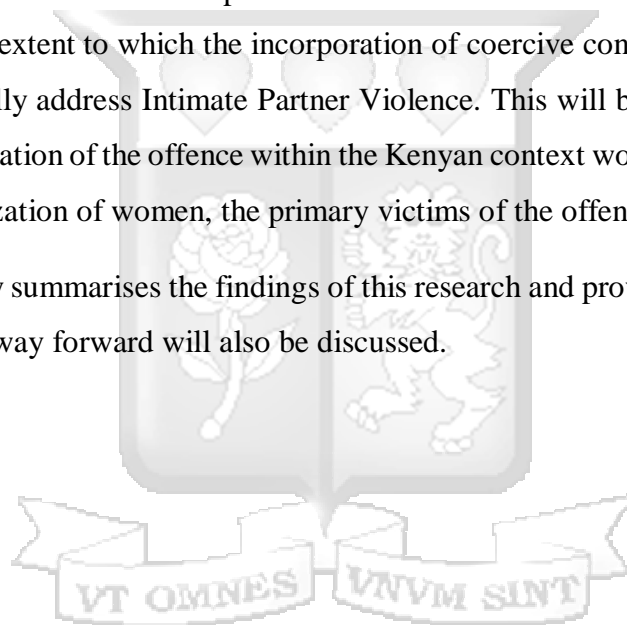
chapter has focused mainly on providing the context that will be the foundation of the analysis in the subsequent chapters.

Chapter 2 will provide an understanding of the gendered nature of offence of coercive control. In doing so, it will demonstrate the power imbalances inherent the underlying dynamics of coercive control and its resultant impact in the in the victimization of women.

Chapter 3 will assess the extent to which the criminalization of coercive control has challenged the existing patriarchal norms in the jurisdictions which have criminalized and operationalized the offence. This will be through an analysis of the role which the various states have played in responding to coercive control.

Chapter 4 of this research will then adopt the conclusions arrived at in chapter 2 and 3 of this research to assess the extent to which the incorporation of coercive control in Section 3 of the PDVA could potentially address Intimate Partner Violence. This will be through determining whether the criminalization of the offence within the Kenyan context would result in the further exclusion and victimization of women, the primary victims of the offence.

Chapter 5 of this study summarises the findings of this research and provides the conclusion of the study. A possible way forward will also be discussed.



## 2.0 THE GENDERED NATURE OF COERCIVE CONTROL

### 2.1 Introduction

This chapter analyses the gendered nature of the offence of coercive control. This is through an analysis of the patriarchal power imbalances and gender inequality inherent in the coercive control model and the resultant impact of this with regard to the perpetual subordination and victimization of women. To achieve this, it provides a conceptual analysis of the coercive control model with reference to the feminist legal theory and adopted legislatures of the offence.

### 2.2 The Conceptualization of Coercive Control

One of the approaches in the conceptualization of domestic violence is coercive control. Discussing whether domestic violence is predominantly caused by men's control over women, whether it is gender symmetrical, or whether it is a combination of the two, are some of the issues raised in debates surrounding the gendering of domestic violence.<sup>55</sup> Scholars such as Archer and Straus contend that because domestic violence is experienced and perpetrated by both sexes, it does not represent gendered uneven power.<sup>56</sup> However, one of the major criticisms of this approach is that it conflicts with the idea of crime as it limits itself to actions only, excluding harms.<sup>57</sup> Studies demonstrate that a man's behavioral actions against a woman is more likely to cause physical harm as opposed to the reverse. For instance, the British Crime Survey found that instances in which a minor act caused physical injury was 49% for female victims and 36% for male victims. On the other hand, when it came to instances in which severe acts resulted in physical injury, the difference was 77% and 56% respectively.<sup>58</sup>

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<sup>55</sup> Walby S and Towers J, 'Untangling the concept of coercive control: Theorizing domestic violence crime' 18(1) *Criminology and Criminal Justice*, 2018, 9.

<sup>56</sup> Archer J, 'Sex differences in aggression between heterosexual partners: a meta-analytic review.' 126(5) *Psychological bulletin*, 2000, 651-680. See also, Straus M, 'Measuring intrafamily conflict and violence' 41(1) *Journal of Marriage and the Family*, 1979, 75-88. See also, Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>57</sup> Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>58</sup> Walby S and Allen J, 'Domestic violence, sexual assault and stalking: Findings from the British Home Survey' London: Home Office, NCJ Number 206705 2004- <https://www.ojp.gov/ncjrs/virtual->

Conversely, scholars such as Schechter and Stark amongst others have advanced the notion that domestic abuse is a form of patriarchal control,<sup>59</sup> demonstrating the intrinsically unequal gender distribution in domestic violence cases.<sup>60</sup> The concept of coercive control was introduced by Schechter who argued that physical violence creates control. She stated that once such violence was deployed there is no need for it to be repeated in order to gain compliance.<sup>61</sup> Evan Stark expands on Schechter's model by arguing that as opposed to being the initial source of control, physical violence is one of the components of coercive control alongside other deployed tactics.<sup>62</sup> In his analysis, he distinguishes physical violence (what he refers to as 'domestic violence') with coercive control, stating that coercive control is not always or even primarily physical violence.<sup>63</sup> As such, he calls for the criminalization of coercive control.<sup>64</sup> In focusing on the motivation of the perpetrator, Stark states that gendered asymmetries are found in the practice of coercive control.<sup>65</sup> This research relies on Evan Stark's conceptualization of coercive control as it is this model that has informed the move to criminalize the offence in various States.<sup>66</sup>

According to Evan Stark coercion is, 'the use of force or threats to compel or dispel a particular response'.<sup>67</sup> Some of the tactics adopted in coercion include violence, intimidation, stalking and degradation, amongst others.<sup>68</sup> On the other hand, he defines control as, 'structural forms of deprivation, exploitation, and command that compel obedience indirectly'. Some of the tactics employed to establish control include isolation of the victim, deprivation, exploitation and regulation.<sup>69</sup> As such, the resultant effects include *inter alia* making an intimate partner A subordinate or dependent on their partner B, isolating A from relatives or other sources of

[library/abstracts/domestic-violence-sexual-assault-and-stalking-findings-british](#) - 28 February 2024. See also, Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>59</sup> Kuennen T, 'Analyzing the impact of coercion on domestic violence victims' 22(1) *Berkeley Journal of Gender, Law & Justice*, 2007, 1-30. See also, Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>60</sup> Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>61</sup> Kuennen T, 'Analyzing the impact of coercion on domestic violence victims', 1-30. See also, Walby S and Towers J, 'Untangling the concept of coercive control', 9.

<sup>62</sup> Stark E, *Coercive control*, 228. See also, Walby S and Towers J, 'Untangling the concept of coercive control', 11-12.

<sup>63</sup> Stark E, *Coercive control*, 228. See also, D Tuerkheimer, 'Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence' 94(4) *Journal of Criminal Law and Criminology*, 2004, 1019-1020. See also, Cowan G, Cowan G, 'A Review of 'Coercive control: How men entrap women in personal life,' by Evan Stark' 8, *Journal of Child Custody*, 2011, 244.

<sup>64</sup> See generally, Stark E, *Coercive control*, 2007.

<sup>65</sup> Walby S and Towers J, 'Untangling the concept of coercive control', 11.

<sup>66</sup> Stark E and Hester M, 'Coercive Control: Update and Review' 25(1) *Violence Against Women*, 2019, 1.

<sup>67</sup> Stark E, 'Looking beyond domestic violence: Policing coercive control' 12 *Journal of Police Crisis Negotiations*, 2012, 207.

<sup>68</sup> Stark E, 'Looking beyond domestic violence', 207 - 210.

<sup>69</sup> Stark E, 'Looking beyond domestic violence', 210 -212.

support, controlling and depriving A of their freedom of action, exploiting A's resources as well as frightening, degrading and punishing them.<sup>70</sup> Coercive control is therefore also concerned with what an intimate partner A keeps their partner B from doing and not only what A does to B.<sup>71</sup> Stark argues that a condition of unfreedom which is experienced as entrapment is subsequently created when coercion and control occur concurrently,<sup>72</sup> resulting in a systematic deprivation of human rights as well as constitutional liberty.<sup>73</sup>

## 2.3 Coercive Control in Criminal Law

The creation of advocacy driven laws on coercive control have span ahead of evidence based research building on or testing the coercive control model of intimate partner abuse. Legal controversy has thus sparked with the criminalization of coercive and controlling behaviour in England (2015), Scotland (2018) and the passage and/or consideration of a similar law in Northern Ireland (2019), Irish Republic (2018) and Tasmania and Australia.<sup>74</sup> An analysis of the legislative provisions is necessary in determining whether the construction of the offence of coercive control addresses its gendered nature.

This study focuses on the Britain and Scotland provisions on coercive control as a comparative analysis. The justification for this is grounded on the fact that these are the two countries with not only clearly defined provisions on coercive control, but they have also operationalized the offence for a longer period. This is significant as coercive control constitutes a course of conduct offence as opposed to an incident based offence,<sup>75</sup> making these jurisdictions the most suitable and appropriate comparative studies.

### 2.3.1 The Offence of Coercive Control and Feminist Legal Theory

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<sup>70</sup> Section 2(4), *Domestic Abuse (Scotland) Act* (2018). See also, Section 76 (4), *Serious Crime Act* (2015).

<sup>71</sup> Home office, *Controlling and coercive behavior in an intimate or family relationship: Statutory guidance framework*, 2015.

<sup>72</sup> Stark E, 'Looking beyond domestic violence', 205.

<sup>73</sup> Cowan G, 'Coercive control: How men entrap women in personal life', 243-246. See generally, Stark E, 'Looking beyond domestic violence', 2012.

<sup>74</sup> Stark E and Hester M, 'Coercive Control' 81-82.

<sup>75</sup> See generally, Stark E, *Coercive control*, 2007.

As aforementioned, the feminist legal theory explores the consequences of the enactment of laws on women.<sup>76</sup> *‘Asking the Woman Question’* as a feminist legal method entails a consideration of the gender implications of laws. Katherine Bartlett provides that *‘Asking the Woman Question’* is a method of critical evaluation that is just as essential to legal analysis as stating and applying the facts to the law. This method assumes that certain aspects of the law may be ‘male’ in a specific sense in addition to being generally non-neutral thereby perpetuating the subordination of women. As such, the purpose of the woman question is to expose those features, how they operate and determine how they can be remedied.<sup>77</sup> Evan Stark provides that due to the limited definition of domestic violence to discrete incidents of physical abuse, the criminal justice system responds to and heavily focuses on physical violence obscuring the experiences of controlling and coercive behaviour on women.<sup>78</sup> In applying this feminist legal method, it can be argued that the focus of domestic violence laws on distinct incidents of physical abuse, fails to consider the experiences of women of controlling and coercive behaviour which results in their continued subordination.

Rather than requiring laws to favour women, *‘Asking the Woman Question’* is essential in uncovering a gender bias which overlooks the interests of women.<sup>79</sup> Evan Stark argues that men have resources to exert control over women not only in the domestic sphere but also in the public space by extending their demands over the role of women. According to him, men’s ability to control women results in continued gender inequality which creates a greater vulnerability among women. As such, he provides that this pattern of controlling and coercive behaviour is what men do to women and not what women do to men. In this sense, men who exert coercive control tenaciously clutch to their sense of masculinity and the privileges of masculinity by subordinating women.<sup>80</sup> Domestic laws with a focus on distinct incidents of abuse therefore obscure this experience creating a gender bias in the law. According to Katherine Bartlett *‘Asking the Woman Question’* calls for decision makers to uncover this bias and arrive at decisions which are justifiable in light of this bias.<sup>81</sup> It is this theoretical framework that will form the lens through which the legislative provisions of coercive control in Britain and Scotland will be analysed in the subsequent sub-sections.

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<sup>76</sup> See generally, Bartlett K, ‘Feminist legal methods’.

<sup>77</sup> Bartlett K, ‘Feminist legal methods’, 837.

<sup>78</sup> Stark E, *Coercive control*, 228. See also, D Tuerkheimer, ‘Recognizing and Remedying the Harm of Battering’, 1019-1020. See also, Cowan G, ‘Coercive control: How men entrap women in personal life’, 244.

<sup>79</sup> Bartlett K, ‘Feminist legal methods’, 846.

<sup>80</sup> Cowan G, ‘Coercive control: How men entrap women in personal life’, 244.

<sup>81</sup> Bartlett K, ‘Feminist legal methods’, 846.

*i. Britain*

In 2015 Britain criminalised the offence of coercive control in Section 76 of its Serious Crime Act (*hereinafter referred to as* ‘Section 76’). This was with the aim of addressing the legislative gap when it comes to controlling and coercive behaviour (*hereinafter referred to as* ‘CCB’) between family members, past partners who are currently living together or intimate partners.<sup>82</sup>

Section 76 provides that: -

- (1) ‘A person (A) commits an offence if-
  - (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
  - (b) At the time of the behaviour, A and B are personally connected,
  - (c) The behaviour has a serious effect on B, and
  - (d) A knows or ought to know that the behaviour will have a serious effect on B.
- (2) A and B are “personally connected” if-
  - (a) A is in an intimate personal relationship with B, or
  - (b) A and B live together and-
    - (i) They are members of the same family, or
    - (ii) They have previously been in an intimate personal relationship with each other.’
- (3) But A does not commit an offence under this section if at the time of the behaviour in question-
  - (a) A has responsibility for B, for the purposes of Part 1 of the Children and Young Persons Act 1933 (see section 17 of that Act), and
  - (b) B is under 16.
- (4) A’s behaviour has a “serious effect” on B if-
  - (a) It causes B to fear, on at least two occasions, that violence will be used against B, or
  - (b) It causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.
- (5) For the purposes of subsection (1)(d), A “ought to know” that which a reasonable person in possession of the same information would know.’<sup>83</sup>

Since the operationalization of Section 76, the number of recorded offences has steadily increased, and statistical analysis reveals the estimated annual number of victims of CCB to

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<sup>82</sup> Stark E and Hester M, ‘Coercive Control’ 82-83.

<sup>83</sup> Section 76, *Serious Crime Act* (2015), England.

range between 572,000 to 744,000.<sup>84</sup> Every year, 93% to 94% of the incidents that are reported include victims who are female.<sup>85</sup> Despite this increase, it is however noted that a majority of CCB are unreported or unrecorded by the police.<sup>86</sup> This was affirmed by a study by Barlow who further examined Actual Bodily Harm (ABH) offences finding that in almost 9 out of 10 of intimate partner cases, there were missed opportunities to employ the CCB offence of Section 76.<sup>87</sup> Evan Stark criticizes and attributes this to the gender neutral wording of Section 76 as well as the fact that it only covers current partners. He and Hester contend that as the crime is primarily committed by men against women, changing it to reflect the gendered aspect of coercive control may make it easier to identify.<sup>88</sup>

Some of the unidentified CCB in Barlow's study were practices of isolation, deprivation, economic abuse, verbal abuse, abuse including 'revenge porn' threats and digital surveillance technology. All of these were disregarded as weak or unverifiable.<sup>89</sup> Moreover, the Solicitor General urged that Section 76 be reserved for situations involving stalking and other types of psychological abuse. This raises the issue of which laws to be applied to continuous instances of violence, intimidation and control.<sup>90</sup> Studies suggest that in operationalizing Section 76, CCB is generally viewed as less serious than physical abuse and separate to physical abuse as opposed to encompassing it.<sup>91</sup> The application of the provision therefore does not wholly address the experiences of women within the coercive control model.

Section 76 also creates a high evidential threshold in its requirement to demonstrate a serious detrimental impact on the victim in addition to proving coercive control, making it impossible



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<sup>84</sup> It should however be noted that this number is subject to considerable uncertainty. See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 16.

<sup>85</sup> Besides the sex of the victims, there is no other information about the characteristics of the victims or the perpetrators of the recorded offence of controlling and coercive behaviour. We can therefore not determine what percentage of the recorded offences constitutes intimate partner abuse as opposed to familial abuse. See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 14.

<sup>86</sup> See, See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 16.

<sup>87</sup> Barlow C *et al*, (2019) 'Putting Coercive Control into Practice: Problems and possibilities', 60(1) *British Journal of Criminology*, 2019, 174.

<sup>88</sup> See, See, Home Office, *Review of the Controlling or Coercive behaviour Offence* Government of the United Kingdom, 2021, 37.

<sup>89</sup> Barlow C *et al*, (2019) 'Putting Coercive Control into Practice', 169.

<sup>90</sup> Wiener C, 'From Social Construct to Legal Paradigm: The New Offence of Controlling or Coercive Behaviour in England and Wales' 2020, In McMahon M and McGorrery P, *Criminalising NonPhysical Family Violence: Coercive Control and Autonomy Crimes*, Singapore: Springer International Press, 159–175.

<sup>91</sup> See, See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 32.

to prosecute without the support of the victim.<sup>92</sup> The focus of the provision is therefore on the victim. Based on data from her qualitative study with judges, Weiner concludes that this condemns resilience in victims in that a higher capability of the victim to withstand controlling and coercive tactics deployed by the perpetrator, lowers their chances to meet the requirement of proving an adverse effect.<sup>93</sup> In this way, it fails to address the continued subordination of women.

## *ii. Scotland*

In 2019, Scotland's law on violence against a partner or ex-partner including CCB came into force.<sup>94</sup> This provision was described by Evan Stark as the 'golden standard' legislation which can serve as a comparative model for other countries looking to criminalise the offence in their jurisdiction.<sup>95</sup> The offence is provided in Section 1 of the Domestic Abuse (Scotland) Act (*hereinafter referred to as 'Section 1'*), which provides that: -

'1 Abusive behaviour towards partner or ex-partner

- (1) A person commits an offence if—
  - (a) the person ("A") engages in a course of behaviour which is abusive of A's partner or ex-partner ("B"), and
  - (b) both of the further conditions are met.
- (2) The further conditions are—
  - (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
  - (b) that either—
    - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
    - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
- (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

2 What constitutes abusive behaviour

- (1) Subsections (2) to (4) elaborate on section 1(1) as to A's behaviour.
- (2) Behaviour which is abusive of B includes (in particular)—
  - (a) behaviour directed at B that is violent, threatening or intimidating,
  - (b) behaviour directed at B, at a child of B or at another person that either—

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<sup>92</sup> Bettinson V, 'A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania', In McMahon M and McGorrey P, 'Criminalising Coercive Control' *Family Violence and the Criminal Law*, 2020, 197–219.

<sup>93</sup> Wiener C, *Coercive Control and the Criminal Law*, 1<sup>st</sup> ed, Routledge, London, 2023.

<sup>94</sup> Section 1, *Domestic Abuse (Scotland) Act* (2018).

<sup>95</sup> See, Stark E and Hester M, 'Coercive Control' 2019. See also, Cairns, 'The Moorov doctrine and coercive control: Proving a 'course of behaviour' under S.1 of the Domestic Abuse (Scotland) Act 2018' 24(4) *International Journal of Evidence and Proof*, 2020, 396.

- (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
  - (iii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
- (3) The relevant effects are of—
- (a) making B dependent on, or subordinate to, A,
  - (b) isolating B from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring B's day-to-day activities,
  - (d) depriving B of, or restricting B's, freedom of action,
  - (e) frightening, humiliating, degrading or punishing B.<sup>96</sup>

In contrast to England, prior to the enactment of Section 1, the Scottish Executive had adopted a gendered definition of domestic abuse. This was based on the General Recommendation No.9 by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which defined gender violence, thus recognizing domestic violence as both a cause and consequence of the subordination of women which inhibits their rights and freedoms.<sup>97</sup> It is with this background that the amendments bringing forth Section 1 were made. In addition to this, Section 1 of Scotland's Domestic Abuse Act responds to the shortcomings of Section 76 of England's provision by extending its coverage to current and ex-partners, as well as recognizing abusive behaviour directed at a child or any other person with the purpose of controlling or coercing the victim.<sup>98</sup>

Although Section 1 does not make any reference to coercive control, it draws from Stark's coercive control model emphasizing that it is a course of conduct offence which is both physical and psychological, making express reference to intimidation, isolation and control, which are important tactics in Stark's conceptualization.<sup>99</sup> This is a departure from England's Section 76 which led to the erroneous connotation of coercive control with psychological harm which created the risk of abuse constitutive of CCB falling outside the spectrum of the crime.<sup>100</sup> Furthermore, Section 1 makes reference to the perpetrator's reasonable understanding that his behaviour would result in the referenced adverse effects rather than placing the burden of proof

<sup>96</sup> Section 1, *Domestic Abuse (Scotland) Act* (2018).

<sup>97</sup> See, Stark E and Hester M, 'Coercive Control', 2019, 99, Note 5.

<sup>98</sup> Stark E and Hester M, 'Coercive Control' 2019, 82-86.

<sup>99</sup> Cairns, 'The Moorov doctrine and coercive control', 2020, 397. See also, Section 1, *Domestic Abuse (Scotland) Act* (2018).

<sup>100</sup> Burman M and Brooks-Hay O, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' *Criminology & Criminal Justice*, 2018, 67-84.

on the victim,<sup>101</sup> a departure from the contrasting position in Britain's Section 76 provision which created the risk of the further victimization and subordination of women.

It can therefore be argued that Section 1 captures the experiences of women of controlling and coercive behaviour through addressing the various tactics deployed in a bid to curb the continued subordination of women through domestic violence. This offense has been described to be the most radical in the efforts of aligning the criminal justice response with the conceptual understanding of domestic abuse as coercive control.<sup>102</sup> However, it is important to consider governmentalism issues which concern a consideration of the interplay between the form or substance of a particular law and the challenges imposed in its implementation/enforcement.<sup>103</sup> This will be done in the next chapter while determining whether the criminalization of coercive control results in a mere reinstatement of the existing patriarchal norms while reasserting women as victims to be blamed for their experiences.

## 2.4 Conclusion

The very nature of the coercive control model is premised on patriarchal gender asymmetries which enable and maintain a pattern of abusive and controlling behaviour that results in the continued subordination of women. Legal analysis of domestic violence laws with the aim of departing from a focus on distinct incidents of physical abuse therefore requires a framework that wholistically captures the experiences of women of controlling and coercive behaviour while preventing their further victimization. Britain's legislation on coercive control fails to conceptually address this in contrast to Scotland's provision which has been appraised as the golden legislative standard when it comes to the offence of coercive control. Having laid down the framework to understand the gendered nature of the offence of coercive control in this Chapter, Chapter 3 will analyse the extent to which the criminalization of coercive control has challenged the existing patriarchal norms, with regard to state intervention in the implementation of the offence.

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<sup>101</sup> See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 60.

<sup>102</sup> Stark E and Hester M, 'Coercive Control', 2019, 85.

<sup>103</sup> See, Douglas H, 'Do we need a specific domestic violence offence?' 39 *Melbourne University Law Review*, 2015, 434-471. See also, Tolmie J, 'Coercive control: To criminalize or not to criminalize?' *Criminology & Criminal Justice*, 2018, 50-66. See also, Stark E and Hester M, 'Coercive Control', 2019, 86.

## 3.0 COERCIVE CONTROL AND CRIMINAL JUSTICE RESPONSE

### 3.1 Introduction

Chapter 2 has demonstrated the patriarchal gender asymmetries inherent in the understanding of coercive control. Having laid down this conceptual understanding of the offence, this chapter analyses whether its criminalisation subsequently challenges existing patriarchal norms or rather merely reinstates the normative gender arrangements resulting in the further victimization of women. This will be achieved through a consideration of the governmentality issues when it comes to the implementation of the offence in Britain and Scotland, the comparative studies of this research, through the lens of the feminist theoretical framework adopted in this study.

### 3.2 Criminal Justice Response to Coercive Control: To Criminalise or not Criminalise?

Proponents of the criminalisation of coercive control argue that robust legal mechanisms can facilitate the shift of the criminal justice response from victim safety to the accountability of offenders. This they argue, has the potential to bring victim-blaming to an end through promoting empowerment.<sup>104</sup> Critics on the other hand question whether this exceeds the capacity of the 21<sup>st</sup> Century law enforcement. The current incident focused structure of criminal law allows the capturing of the commission of an ‘archetypical crime in a photograph’,<sup>105</sup> as is the case with distinct incidents of physical assault. However, critics such as Tolmie and Douglas contend that replacing this norm by requiring the police and courts to consider a continuing pattern of CCB may be too high an expectation,<sup>106</sup> potentially regressing efforts made in the policing of common partner assault.<sup>107</sup> Tolmie provides that an assessment of the less tangible elements of CCB pushes the criminal justice system’s response out of its comfort

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<sup>104</sup> Stark E and Hester M, ‘Coercive Control’ 86.

<sup>105</sup> Stark E and Hester M, ‘Coercive Control’ 87.

<sup>106</sup> See, Douglas H, ‘Do we need a specific domestic violence offence? 434-471. See also, Tolmie J, ‘Coercive control’ 50-66. See also, Stark E and Hester M, ‘Coercive Control’ 87.

<sup>107</sup> Padfield N, ‘Controlling or coercive behaviour in an intimate or family relationship’ 3 *Criminal Law Review*, 2016, 49-15. See also, Stark E and Hester M, ‘Coercive Control’ 87.

zone, requiring even more evidence based testimony from victims.<sup>108</sup> Such Scholars state that this only serves to increase the challenges that the police and prosecutors face when determining what to charge.<sup>109</sup> However, one of the limitations of this view is that it encourages incrementalism through an exaggeration of the rigidity of the current criminal system, subsequently reinforcing it.<sup>110</sup> To what extent then can the criminal justice system respond to coercive control?

### 3.3 The Role and Impact of the State in the Criminalization of Coercive Control

Evan Stark states that law reform is the first step in providing the police, judiciary and advocacy systems with versatility to address CCB.<sup>111</sup> As has been demonstrated in Chapter 2, a drafted legislative provision that captures the conceptual elements of coercive control more substantially has a greater potential to recognize and address the experiences of women of CCB. However, Evan Stark further provides that due to its historical nature, there is a need for coercive control interventions including case identification, investigation and prosecution to be similarly versatile and capable of penetrating social, institutional and personal space.<sup>112</sup> The Abolitionist Feminism Vis-à-Vis Carceral Feminism theories are instructive in the determination of the extent to which criminal justice interventions to coercive control achieve this. The perspectives of these theories fall within the broader understanding of the Feminist Legal Theory.<sup>113</sup>

#### 3.3.1 Coercive Control Vis-à-Vis Abolitionist Feminism and Carceral Feminism

Carceral Feminism advocates for punitive criminal justice intervention on grounds that this will promote deterrence. This is a similar school of thought which the proponents of the criminalization of coercive control fall under. Abolitionists on the other hand claim that the

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<sup>108</sup> Tolmie J, 'Coercive control' 50-66. See also, Stark E and Hester M, 'Coercive Control' 87.

<sup>109</sup> Stark E and Hester M, 'Coercive Control' 87.

<sup>110</sup> Stark E, *Coercive Control: How men entrap women in personal life*, 2nd ed, Oxford University Press, New York, 2023, 531.

<sup>111</sup> Stark E, *Coercive Control*, 535.

<sup>112</sup> Stark E, *Coercive Control*, 535.

<sup>113</sup> See generally, Eisenstein, *Abolitionist Socialist Feminism: Radicalizing the next Revolution*, Monthly Review Press, New York, 2019.

criminal justice system is inefficient in addressing violence against women. This they argue is because firstly, low rates of conviction and punishment of violence against women undermines the effect of deterrence. Additionally, the very structure of the criminal justice system proves ineffective due to the individualised narrative it perpetuates. Criminal courts assess the degree of individual responsibility of the perpetrators brought before it, imposing punishment on such individuals. This creates the message that violence against women is caused by ‘bad people’ and from this perspective justice involves the punishment of the ‘bad person’. The impact of this is that violence against women as a social problem is blamed on this set of ‘bad people’ who are constructed as a type of individuals with a flawed character.<sup>114</sup>

Aya Gruber provides that the hatred of criminals is rooted on an understanding that they are different from ordinary people and consequently not entitled to sympathy or empathy. According to Gruber, this results in the counter construction of ordinary perpetrators of violence as incapable of such violence.<sup>115</sup> It may be argued that the effect of this counter construction is more nuanced in the context of coercive control. This is because as opposed to discrete incidents of physical assault, the focus is directed to a pattern of CCB which may take the form of non-physical tactics that result in the entrapment of women and are more difficult to identify. Feminist Abolitionist argue that such individualization of blame obscures society from recognizing the structural roots of violence by creating the narrative that justice is achieved once the perpetrator is incarcerated.<sup>116</sup> Abolitionists assert that such punitive measures merely reproduce the violence perpetrated by allowing the problem to persist making criminal justice response ineffective in addressing structural patriarchal violence.<sup>117</sup>

Ti Lamusse argues that instead of focusing on the aforementioned ‘bad individuals’ there is a need to focus on the ‘ordinary men’ who consider themselves entitled over women.<sup>118</sup> Doing this is essential in *‘Asking the Woman Question’* as it will reveal the gender inequality in the institutional arrangement of the criminal justice system which essentially perpetuates the subordination of women. Applying this framework, the subsequent sub-sections will determine whether the criminal justice response to CCB in Britain and Scotland has challenged these

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<sup>114</sup> Lamusse T, ‘Feminist prison abolitionism’, 247-248.

<sup>115</sup> See, Gruber A, ‘Rape, feminism, and the war on crime’ 84(4) *Washington Law Review*, 2009, 640. See also, Lamusse T, ‘Feminist prison abolitionism’, 248

<sup>116</sup> Lamusse T, ‘Feminist prison abolitionism’, 248.

<sup>117</sup> See, Davis Y, *Freedom is a constant struggle: Regurson, Palestine and the foundations of a movemnt*, Chicago, IL: Haymarket Books, 2016, 105. See also, Lamusse T, ‘Feminist prison abolitionism’, 248

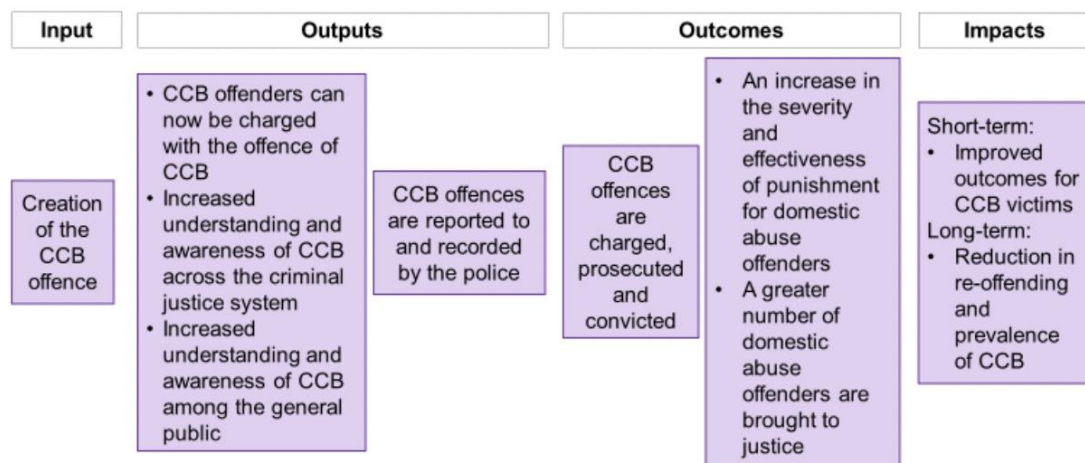
<sup>118</sup> Lamusse T, ‘Feminist prison abolitionism’, 248.

structural patriarchal norms or instead resulted in the further victimization of women. This is fundamental in assessing the effectiveness of the criminal justice system in addressing coercive control because as has been established, the very nature of the coercive control model is rooted in patriarchal gender asymmetries that perpetuate the subordination of women. Therefore, any effective recourse should have the capacity to identify and address this discrimination.

### 3.3.2 Britain: Police Investigations and Prosecution Outcomes in Coercive Control

In the most recent analysis of the CCB offence of Britain,<sup>119</sup> the Home Office in collaboration with policy officials developed a logic model to identify how the expected objective of the offence is to be achieved through assessing the relationship between the policy’s inputs, outputs, outcomes and impacts.<sup>120</sup> See below,

**Figure 1 - Logic model for the CCB offence**



From this logic model, some of the relevant questions to consider are; (1) Whether the CCB offence is being recorded by the police; (2) Whether CCB perpetrators are prosecuted and

<sup>119</sup> In its analysis, the Home Office notes that there are only 4 full years of available data from the data sources due to the limited time frame since the introduction of the offence. See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 8.

It is also instructive to note this in light of the doctrine of non-retroactive application of the law and the nature of the CCB as a course of conduct offence.

<sup>120</sup> See generally, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the united Kingdom, 2021, 9.

convicted; and (3) Whether there has been an improvement in the outcomes for victims of CCB.<sup>121</sup> Through answering these questions, this subsection will assess the effectiveness of the criminalization of coercive control in Britain by determining whether and to what extent it challenges the existing patriarchal normative gender arrangements.

After the investigation of an offence, the police record outcomes. The analysis by the Home Office reveals that less than half of CCB cases were assigned outcomes within 30 days and almost quarter took more than 100 days. This is a longer period of time compared to domestic assault cases which may be more straight forward as well as less time consuming to evidence,<sup>122</sup> affecting the victim's willingness to support the case. The analysis reveals that a lower proportion of CCB offences lead to a charge with majority of the cases being finalised due to evidential difficulties. Maintaining victims on board during the investigations proves difficult. This is because of factors such as the complexity of the relationship between the victim and the perpetrator, especially where they are in a continuing relationship, have children or are emotionally or financially dependent on the perpetrator.<sup>123</sup>

Even where the victim supports further action, a greater proportion of CCB cases compared to domestic abuse related offences are concluded due to lack of sufficient evidence to charge the perpetrator. This reflects the difficulty and time consuming nature in proving a course of conduct as required by the CCB offence compared to violent incidents that police attend to and document. This is because CCB may require evidence of less recent and non-physical abuse which requires sustained reliance and engagement of the victim in the process to successfully prosecute. However, the report of the Home Office reveals that nearly two thirds of victims in such instances do not support further action as compared to those in assault with physical injury. Further evidential challenges are presented through the requirement of the victim to prove a serious effect under Section 76, as discussed in Chapter 2. This makes out of court disposals inappropriate as they are used for low level and first time offenders, leading to a lower proportion of CCB offences being dealt with through such disposals.<sup>124</sup>

Summatively, in the context of Britain, compared to domestic assault cases, there has been a low proportion of reported CCB offences leading to a charge and subsequently prosecutions of

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<sup>121</sup> These have been selected bearing in mind the scope of the overarching research question of this study.

<sup>122</sup> Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 18.

<sup>123</sup> Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 42.

<sup>124</sup> Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 20.

the offence. This counters the claim under Carceral Feminism that criminalization leads to deterrence. The data in the Home Office report reveals that where CCB is robustly evidenced, there have been longer custodial sentences making it an effective tool for justice.<sup>125</sup> However, this does not improve the outcome of the victim with regard to addressing the inherent patriarchal gender discrimination faced by women. As evidenced, there is a heavy reliance on the victims to charge and subsequently prosecute the CCB offence demonstrating how the victimization of these women is what drives the criminal justice system. This only results in their re-victimization and in the same vein, the Home Office reports that there has been no direct evidence of improved outcomes for the victims.<sup>126</sup> Although there has been an increase in the recorded offences of CCB over the years, it is important to consider this in light of the doctrine of non-retroactive application of the law, the nature of CCB as a course of conduct offence and increased awareness which may have improved the capacity of the police to detect the offence.<sup>127</sup> Nonetheless, the criminal justice response to CCB in Britain has resulted in the further victimization of women and failed to recognize and address the structural roots of violence, allowing the problem which the coercive control model aims to solve to persist.

### **3.3.3 Scotland: Police Investigations and Prosecution Outcomes in Coercive Control**

As has been demonstrated in Chapter 2, Scotland's legal provision for the offence of CCB is described as the golden standard as it adopts a gendered understanding of violence and is premised on the coercive control model, capturing all its constitutive elements. Scotland postponed the implementation of Section 1 on CCB for 2 years to enable the police, prosecutors and judiciary to be adequately prepared.<sup>128</sup> Such efforts to improve the criminal justice response to CCB entailed the introduction of a victim Information and Advice (VIA) service and specialised training and guidance for prosecutors. Also, a lead national prosecutor for domestic

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<sup>125</sup> Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 48.

<sup>126</sup> Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 49.

<sup>127</sup> See, Home Office, *Review of the Controlling or Coercive behaviour Offence*, Government of the United Kingdom, 2021, 45-49.

<sup>128</sup> See, Stark E and Hester M, 'Coercive Control' 2019. See also, Cairns, 'The Moorov doctrine and coercive control: Proving a 'course of behaviour' under S.1 of the Domestic Abuse (Scotland) Act 2018', 396.

abuse provided guidance and reviewed the policy and training.<sup>129</sup> With regard to this, Evan stark states that, ‘it is difficult to imagine a clearer national commitment to address the manifestations of sexual inequality in personal life’.<sup>130</sup>

However, Stark importantly notes that aside from crafting a law that suits CCB, to be effective, the law and the law making process must anticipate how the law enforcement and administration of justice can address the scope of the offence in question.<sup>131</sup> There is therefore a need to assess this within the context of Scotland in order to determine whether the criminal justice response to CCB challenges the structural patriarchal norms as envisioned by the coercive control model or instead results in the further victimization of women. This study will adopt a similar threshold as that applied in the context of Britain. It will therefore assess; (1) Whether the CCB offense is being recorded by the police; (2) Whether CCB perpetrators are prosecuted and convicted; and (3) Whether there has been an improvement in the outcomes for victims of CCB.<sup>132</sup>

The aim of Scotland’s offence of CCB is to address the disjuncture that exists within domestic abuse with regard to the dynamics of control, gender inequality as well as the challenges of criminal law to address this due to its limited conception of harm under a violent incident model.<sup>133</sup> Stark appraises the Scotland provision for setting a maximum penalty of 14 years upon conviction as compared to Britain’s 5 year sentence. However, according to Abolitionist Feminists this is inconsequential as it shifts the narrative of justice from structural patriarchal violence which is the objective of the coercive control model.<sup>134</sup> As has been noted, another significant element of Scotland’s Section 1 from Britain’s Section 76 is the shift of the focus of the prosecution to the behaviour of the perpetrator as opposed to the reliance on the victim to effectively prove that they have been injured harmed or distressed.<sup>135</sup> Theoretically this would address the challenge of re-victimization of the women and the evidential difficulties faced by the police in recording outcomes and placing charges, as is the case in Britain.

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<sup>129</sup> Burman M and Brooks-Hay O, ‘Operationalizing Coercive Control: Early insights on the policing of Domestic Abuse (Scotland) Act 2018’ in Douglas H and Gibbon K *et al*, *The criminalization of violence against women: Comparative perspectives*, Oxford University Press, 2024, 321.

<sup>130</sup> Stark E, *Coercive Control*, XXIX.

<sup>131</sup> Stark E, *Coercive Control*, 535.

<sup>132</sup> These have been selected bearing in mind the scope of this research. See generally, Home Office, *Review of the Controlling or Coercive behaviour Offence’ Government of the United Kingdom*, 2021, 9.

<sup>133</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 232.

<sup>134</sup> Stark E, *Coercive Control*, 526.

<sup>135</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 324.

Considering the offence of CCB requires a course of conduct and has been applicable in Scotland from 2019, data on criminal convictions is still in the early stages.<sup>136</sup> In 2023, an interim report produced by the government revealed an increase in the number of convictions of the offence since its operationalisation. This report also acknowledged the continued negative experiences of survivors in *inter alia* the involvement or understanding of procedures. However, this was situated as part of the previously existing challenges and not new issues specific to or resulting from the Act.<sup>137</sup>

Studies on the police approach and outcomes within the Scotland context is limited.<sup>138</sup> This research relies on the study conducted by Michelle Burman, Onna Brooks-Hay and Ruth Friskney on the operation of the offence through a reflection of the implications of policing CCB. This study involved the sampling, inclusion and assessment of officers from the 3 Tiers(T) of Scotland's Police domestic abuse response. These are local response (T1), divisional domestic abuse specialist (T2) and national domestic abuse specialist (T3).<sup>139</sup> It was found that some T1 officers lacked a nuanced understanding of a pattern of abusive CCB necessary to enable an effective response. Contrastingly, T2 and T3 had a clearer understanding of CCB which they had become familiar with during their investigations.<sup>140</sup> The responses in the study indicate that although response officers are still likely to follow an incident based approach (even after the awareness-raising and cultural change training), proactive case reviews conducted by the specialist officers can lead to further investigations. This is stated to be indicative of Scotland's robust policing approach.<sup>141</sup>

When it came to the experiences of the victim-survivors, the officers responses indicated the importance of the interaction between the police and the survivor. The role of T2 and T3 officers were thought to be beneficial as it allowed them to take statements on victim's work, build a rapport with them and direct them to someone who will update them on the progress of the case. This enables the officers to capture more of the victim's experience within the criminal offence but requires time and effort, resulting in longer investigations.<sup>142</sup> Although longer investigations are overallly beneficial to the courts, this may not be the case for the victims. This is because research suggests that the time period taken for criminal offences to progress

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<sup>136</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 329.

<sup>137</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 326.

<sup>138</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 326.

<sup>139</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 330.

<sup>140</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 335.

<sup>141</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 337.

<sup>142</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 339.

through the courts has the potential to significantly impact the victims negatively both materially and emotionally. This is also compounded by the police investigations which engage with the victim's wider life including statements from a wide range of people as well as investigation of social media that can e.g. require the retention of the survivor's phone for a long period.<sup>143</sup>

The study revealed that the focus placed on the victim to determine the harm is therefore contrary to the intention of Scotland's Section 1 on CCB which dictates that the prosecution should focus on the behaviour of the alleged perpetrator.<sup>144</sup> This demonstrates that in practice, the implementation of the CCB offence in Scotland continues the victimization of women. With current data available, it is unclear whether the benefits to the victim through encompassing more of her experiences would outweigh this potential negative consequence. Nonetheless, although Scotland's provision on CCB is conceptually the golden standard, the criminal justice response in the implementation of the offence fails to practically prevent the re-victimization of women. Therefore, although the criminalization of the offence seems to strengthen the state's regulatory apparatus, intensifying the surveillance on women, it does not empower the women who are the objects of concern.

### 3.4 Conclusion

This chapter set out to analyse whether the criminalisation of coercive control in Britain and Scotland has challenged existing patriarchal norms or rather merely reinstated the normative gender arrangements resulting in the further victimization of women. This has been carried out through an analysis of the criminal justice response in police investigations and prosecution outcomes. In doing so, it has demonstrated that in both countries the criminal justice response in the criminalization of the offence has resulted in the re-victimization of the women and failed to address the inherent structural gender inequalities. Chapter 4 will apply the conclusions in this Chapter as well as those in Chapter 2 in the contextualization of the matter in Kenya.

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<sup>143</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 340-341.

<sup>144</sup> Burman M and Brooks-Hay O, *Operationalizing Coercive Control*, 340.

## 4.0 THE CRIMINALISATION OF COERCIVE CONTROL IN KENYA

### 4.1 Introduction

Chapter 2 established the gendered nature of coercive control and the significance of capturing this as well as the substantive elements of CCB within the legislative framework. Chapter 3 then established that in both Britain and Scotland, the criminal justice response to CCB fails to address structural patriarchal violence as contemplated in the coercive control model and instead furthers the victimization of women, the primary objects of concern in the creation of the offence. Adopting these understandings, Chapter 4 will contextualize the matter to Kenya in determining whether an incorporation of the offence of coercive control within the Protection Against Domestic Violence Act of Kenya could potentially address intimate partner violence.

### 4.2 An Assessment of Coercive Control within Kenya's Legislative Framework

#### 4.2.1 Legislative Framework of Domestic Violence in Kenya

The Protection Against Violence Act (*hereinafter referred to as 'the PDVA'*) is a historical legislation as it is the sole Act that addresses and protects all victims of gender based violence including domestic violence.<sup>145</sup> This 2015 Act not only complies with international conventions but also the 2010 Constitution of Kenya (*hereinafter referred to as 'the Constitution'*).<sup>146</sup> Article 10 of the Constitution provides for human dignity, equality, social justice, inclusiveness and non-discrimination as some of the national values and principles of governance.<sup>147</sup> Article 28 states that every person is entitled to have their inherent dignity to be respected and protected,<sup>148</sup> a right violated through coercive control.<sup>149</sup> The Constitution also protects the right to freedom and security of the person which includes the right to not

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<sup>145</sup> Coalition on violence Against Women, Handbook on protection orders in Kenya- <https://covaw.or.ke/wp-content/uploads/2023/08/Hand-Book-on-Protection-orders-in-Kenya.pdf> 3- 26 February 2024, 3.

<sup>146</sup> See generally, *Protection Against Domestic Violence Act* (Act No. 2 of 2015). See also, *Constitution of Kenya* (2010).

<sup>147</sup> Article 10, *Constitution of Kenya* (2010).

<sup>148</sup> Article 28, *Constitution of Kenya* (2010).

<sup>149</sup> Stark E, *Coercive Control*, 65.

arbitrarily deprive the freedom of another, subject one to any form of violence whether physical or psychological or treat anyone in a inhumane or degrading manner.<sup>150</sup> It is worth noting that this freedom from inhumane or degrading treatment is recognized as a non-derogable right.<sup>151</sup> Article 45 further recognizes that parties to a marriage have equal rights before, during and after the marriage is dissolved.<sup>152</sup> These rights are to be protected in Kenya's domestic violence legislation.

The National Policy for Prevention and Response to Gender Based Violence defines domestic violence as a pattern of abusive behaviour which is used by one intimate partner to gain or maintain control over another intimate partner, and this can be in the form of physical, emotional, psychological or economic abuse.<sup>153</sup> It also recognizes that gender based violence is grounded on socially constructed distinctions between men and women based on gender.<sup>154</sup> This is consistent with the Declaration on the Elimination of Violence Against Women which provides violence against women to be a historical manifestation of the power inequalities between men and women that causes male superiority and bias against women.<sup>155</sup> This Declaration defines violence as, 'any act of gender-based violence that results in or is likely to result in physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life',<sup>156</sup> similar to the definition in the National Policy for Prevention and Response to Gender Based Violence.<sup>157</sup> It can therefore be argued that Kenya adopts a gendered definition of domestic violence.

#### **4.2.2 An Analysis of the Elements of Coercive Control within the PDVA**

The PDVA makes no mention of coercion or control. One scholar, Wabia Karugu makes the argument that coercive control should be included within Section 3 of the PDVA as a distinct

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<sup>150</sup> Article 29, *Constitution of Kenya* (2010).

<sup>151</sup> Article 25, Article 29, *Constitution of Kenya* (2010).

<sup>152</sup> Article 45, Article 29, *Constitution of Kenya* (2010).

<sup>153</sup> Ministry of Devolution and Planning, *National policy for Prevention and Response to Gender Based Violence*, November 2014, 16.

<sup>154</sup> Ministry of Devolution and Planning, *National policy for Prevention and Response to Gender Based Violence*, November 2014, 9.

<sup>155</sup> Preamble, *Declaration on the Elimination of Violence Against Women*, 20 Decemeber 1993, 48/104.

<sup>156</sup> Article 1, *Declaration on the Elimination of Violence Against Women*, 20 Decemeber 1993, 48/104.

<sup>157</sup> Ministry of Devolution and Planning, *National policy for Prevention and Response to Gender Based Violence*, November 2014, 12.

form of violence, thereby creating it as an offence.<sup>158</sup> In advancing the concept of coercive control, Evan Stark that legislative language is not a sufficient condition for an effective coercive control framework and it may not even be essential where the elements of coercive control are present.<sup>159</sup> According to Stark, the primary elements of coercive control are intimidation, isolation and control. Through intimidation, men deny women respect and autonomy inducing fear. Control as an element of CCB denies women access to resources. Isolation on the other hand prevents the social connection of women and the support of family or friends.<sup>160</sup> It is therefore necessary to analyse the provisions of the PDVA in order to determine whether the Act captures the constitutive elements of coercive control.

The PDVA defines violence to mean abuse which includes *inter alia*, economic abuse, emotional or psychological abuse, harassment, intimidation, physical abuse, sexual abuse, stalking, verbal abuse or any conduct that harms or may cause imminent harm to the safety, health, or well-being of the person.<sup>161</sup> Economic abuse is understood to mean the unreasonable deprivation of economic or financial resources which the victim is entitled to or requires. Emotional, verbal and psychological abuse is defined as a pattern of degrading or humiliating conduct towards the victim including repeated insults and threats to cause emotional pain.<sup>162</sup> The PDVA provides that behaviour may be considered psychological abuse even though it does not involve actual or threatened physical or sexual abuse.<sup>163</sup> Harassment within the Act refers to engaging in a pattern of conduct that induces fear of imminent harm including watching, repeated contact or attempts to contact the victim as well as delivering or causing the delivery of offensive or abusive documents or objects to the victim. Intimidation on the other hand includes uttering or conveying a threat or causing the victim to receive a threat which includes a fear of imminent harm to them. Physical abuse within the Act refers to a threat or a threatened act of physical violence on the victim while stalking refers to pursuing or accosting the victim.<sup>164</sup> In a study on the experiences of women victimized by domestic

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<sup>158</sup> Karugu W, 'Legislating coercive control in Kenya: A study of the protection against domestic violence Act' published LLB dissertation, Strathmore University, 2019.

<sup>159</sup> Stark E, 'The 'coercive control' framework: Making the law work for women', 40.

<sup>160</sup> Cowan G, 'A Review of ' Coercive control: How men entrap women in personal life,' by Evan Stark', 243.

<sup>161</sup> Section 3(1), *Protection Against Domestic Violence Act* (Act No. 2 of 2015). \

<sup>162</sup> Section 2, *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>163</sup> Section 3(5), *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>164</sup> Section 2, *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

violence, social isolation was recognized as a technique adopted by perpetrators to maintain control over the victim.<sup>165</sup> However, this element is not captured in the PDVA.

The PDVA further states that a single act of violence may amount to abuse as well as a number of acts which form a pattern of abusive behaviour, even though a consideration of some or all of the acts may appear to be minor or trivial.<sup>166</sup> Domestic violence within the Act is then understood as violence against a person or threat of violence by another individual with whom the person is or has been in a domestic relationship.<sup>167</sup> The PDVA states that a person is deemed to be in a domestic relationship with another if the two are married, have previously been married, live in the same household, have been in a marriage which has been dissolved or declared null, are family members, engaged to get married, have a child together or a close personal relationship with each other.<sup>168</sup>

#### **4.2.3 The Drawbacks of the PDVA in the Conceptualization of Coercive Control**

Similar to Scotland, the PDVA adopts a gendered understanding of domestic violence which is significant because coercive control is gendered. Although the PDVA fails to expressly mention coercive control, its provisions capture various non-physical as well as physical forms of violence which may form a pattern of abusive behaviour similar to the Britain and Scotland provisions, highlighting the course of conduct nature of the offence of CCB. As a departure from Scotland's Section 1, the PDVA does not outline the relevant effects of the various forms of violence such as subordination, isolation, the regulation of the victim's day to day activities as well as the deprivation of the victim's freedom of action. The Act merely refers to the inducement of fear or imminent harm on the victim. However, this threshold of the effects of abusive behaviour within the coercive control model are not clearly outlined. This is important as coercive control is not only concerned with what the perpetrator does to the victim but also what the perpetrator keeps the victim from doing. Highlighting this is necessary to capture the condition of unfreedom experienced as entrapment which resulting in the systematic deprivation of human rights and maintains the continued subordination of women.

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<sup>165</sup> Muchane G, 'Experiences of women victimized by domestic violence' published, Jamk University of Applied Sciences, Rajakatu, 2011, 10.

<sup>166</sup> Section 3(4), *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>167</sup> Section 3(2), *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

<sup>168</sup> Section 3(4), *Protection Against Domestic Violence Act* (Act No. 2 of 2015).

Additionally, the PDVA does not provide for the perpetrator's reasonable understanding that their behaviour would result in the aforementioned adverse effects, a contrast to Scotland's Section 1. This shift of the burden of proof is necessary to prevent the re-victimization of women in the criminalization of coercive control.

It can therefore be argued that the PDVA does not capture the offence of coercive control and therefore fails to address the exclusionary experiences of women as advocated by the Feminist legal theory. Nonetheless, in judicial interpretation, the courts have referred to coercion, dominance, power and control as elements of domestic violence. This was the case in *State v Truphena Ndonga Aswani* where these elements were considered to be mitigating factors in the defendant's defense to the murder of her husband following a series of domestic violence meted against her. The defendant was defined as a 'butchered, battered and dehumanized woman who had no voice' and was subsequently sentenced to a non-custodial sentence of one day which lasted to the end of the court session.<sup>169</sup> This case is illustrative in demonstrating that the focus of criminal justice on individualised blame is ineffective in addressing the wider societal problem of structural patriarchal violence. The question that is therefore raised is whether the criminalisation of coercive control within the Kenyan context could potentially address this. The analysis of the criminal justice response to CCB in Britain and Scotland in Chapter 3 reveals that the criminalization of the offence in these countries has resulted in the re-victimization of women and failed to address the structural gender inequalities contrary to the objective contemplated in the coercive control model. A similar analysis is therefore necessary to establish whether the criminalisation of the offence within the Kenyan context could potentially result in a similar outcome.

### **4.3 Coercive Control and Kenya's Criminal Justice Response**

Evan Stark provides that the more common and obvious forms of control include tactics such as the monitoring of time and money, amongst others. However, institutional impediments, cultural biases and economic disparities which have not yet been included into the harm model aggravate individual deprivations in vulnerable communities, such as those with women of color. This creates a further social entrapment.<sup>170</sup> In African communities, domestic and

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<sup>169</sup> *State v Truphena Ndonga Aswani* (2021) eKLR.

<sup>170</sup> Stark E and Hester M, 'Coercive Control' 88.

intimate partner violence is deeply rooted and culturally accepted. In fact, in some patriarchal communities such as in the Kenyan context, the socialization process has led women to believe, accept and justify male dominance and the exertion of power through intimate partner violence.<sup>171</sup> Despite the established policies and institutions that protect the rights of women, intimate partner violence against women in Kenya remains high.<sup>172</sup> One of the reasons for this is the patriarchal culture in Kenya which not only contributes to the gender inequality and continued subordination of women, but with cultural beliefs, a social climate that tolerates violence against women is also created.<sup>173</sup> This contributes to a cultural stigma of domestic violence which blames women who speak up for their experiences of such violence. Due to social pressure, victims are silenced and forced to remain in abusive relationships.<sup>174</sup> Therefore in *'Asking the Woman Question'* to determine the extent to which domestic violence laws address the experiences of women within the Kenyan context, there is a need to address an additional exacerbated social entrapment.

#### **4.3.1 Patriarchy and the Criminal Justice Response to Violence against Women in Kenya**

The criminal justice response to domestic violence in Kenya has been noted to increase the challenges faced. For instance, reports suggests that in some rural communities, male perpetrators who are reported by their wives to the police are able to circumvent justice through bribes.<sup>175</sup> Such women living in poverty are economically dependent on men and have limited access to formal institutions which they can potentially seek redress from.<sup>176</sup> Nonetheless, these formal institutions have failed to provide adequate protection to women. Rather than providing support to the victims, the police underestimate the violence, dismiss some appeals for help and have been seen to prioritize the privacy of the marriage unit over the women's rights to

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<sup>171</sup> Owiti E, 'Intimate partner violence against women in Kenya' African Economic Research Consortium, Research Paper 365, 2019, 2-3- <https://publication.aercafricalibrary.org/server/api/core/bitstreams/515044d6-97bd-4ab2-bd55-fba6c2ceb5ec/content> - May 2019.

<sup>172</sup> Noor U, 'Domestic violence against women in urban informal settlements of Nairobi a critical literature review' 2(3) *Journal of Gender Related Studies*, 2021, 21.

<sup>173</sup> 11-12

<sup>174</sup> Noor U, 'Domestic violence against women in urban informal settlements of Nairobi a critical literature review' 25.

<sup>175</sup> Gillum T and Doucette M *et al*, 'Exploring Kenyan Women's Perceptions of Intimate Partner Violence' 33(13) *Journal on Interpersonal Violence*, 2016, 9.

<sup>176</sup> Noor U, 'Domestic violence against women in urban informal settlements of Nairobi a critical literature review' 23.

freedom from assault or fear of the same. Instead of acting as law enforcers they take the role of a mediator between the perpetrator and the victim, emphasizing peace keeping. This dismissive approach of police officers discourages women from seeking redress and further compounds the social tolerance of gender-based violence.<sup>177</sup>

Even where the police take further action, their role has been seen to aggravate the dispensation of justice and furthered the victimization of women. For instance, in the case of *C.K and others v Commissioner of the Police/Inspector General of the National Police Service and Others* the Court noted the failure of the police to conduct proper and professional investigations through requests for money, conducting humiliating interrogations, refusing to investigate, gather physical evidence to be brought to court, make arrests and even record complaints. For instance, in the case of a 15 year old who was defiled by her neighbor, the police publicly interrogated the victim resulting in her humiliation and inhumane treatment, only to unlawfully conclude that they will not interrogate or arrest the perpetrator until the baby conceived from the defilement was born.<sup>178</sup> Such women are not only revictimized but also find it extremely difficult to prove the abuse they have experienced to law enforcers as well as the judiciary.<sup>179</sup> Since the burden of proof is vested upon them this makes it exceedingly difficult for victims to obtain justice. It is therefore evident that within the patriarchal Kenyan state, the structural criminal justice institutions in place to respond to domestic violence merely serve to further the power of the patriarchal state to the detriment of the victims. Given this conundrum, a reflection of the impact of the criminalization of coercive control within such a society is fundamental.

#### **4.3.2 Impact of Criminal Justice Response to Coercive Control in Kenya**

As discussed, when it came to Britain and Scotland, the aim of enacting a law on coercive control was not only to address a legislative gap with regard to non-physical forms of violence resulting from the limited conception of harm to physical violence, but also to address the disjuncture in the dynamics of control and gender inequality. As demonstrated in this Chapter, Kenya adopts a gendered understanding of domestic violence recognizing the inherent

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<sup>177</sup> Noor U, 'Domestic violence against women in urban informal settlements of Nairobi a critical literature review' 25.

<sup>178</sup> *C.K (A child) through Ripples International as her guardian and next friend) and 11 others v Commissioner of the Police/Inspector General of the National Police Service and 3 Others* (2023) eKLR.

<sup>179</sup> Noor U, 'Domestic violence against women in urban informal settlements of Nairobi a critical literature review' 25.

patriarchal power inequalities between men and women which enables the continued domination over and subsequent abuse on women. Non-physical gender-based violence has been noted to be a tenacious issue within the country, compromising social norms, attitudes and stereotypes.<sup>180</sup> The PDVA provides for both physical as well as non-physical form of violence which may constitute a pattern of abusive behaviour. Despite this, the criminalization of violence against women has been based on a violent incident approach which focuses on distinct incidents of assault. This approach has entailed enjoining other forms of violence such as economic and psychological abuse amongst others to create a clear picture of the relationship between the perpetrator and victim and perhaps serve as a mitigating factor in the defense of the victim in instances where they may have retaliated physically.<sup>181</sup> Although the PDVA fails to mention coercion or control, reference has been made by Kenyan Courts in determining domestic violence cases. Despite this, the Act lacks essential elements in the coercive control model as has been established through comparative analysis with Scotland's Section 1. We can therefore not assume the existence of an interpretation framework of coercive control within the Kenyan context.

The aim of the CCB offence is to increase the effectiveness of punishment for domestic abuse offenders through bringing a great number of them to justice with the impact of improving the outcomes for victims. This is similar to the claim by Carceral Feminists that the effective prosecution of perpetrators of abuse against women promotes deterrence. Despite the existence of better enforcement mechanisms in Scotland, this has not been the case. Instead, women have remained re-victimised in the prosecution process with no evidence of better outcomes for them. The criminal justice response in Scotland has also failed to address the continued subordination of women in intimate partner relationships which results in their unfreedom/entrapment. In contrast, the Kenyan enforcement mechanisms have promoted the social tolerance of violence against women failing to address physical and sexual violence. This has been the case when it comes to the implementation of the PDVA through a violent incident model despite the Act seemingly alluding to a control framework. This has created the social entrapment of victims of domestic abuse with the societal and institutional frameworks not only re-victimizing but also blaming such victims for their experiences, as violence against women is normalized and justified.

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<sup>180</sup> See generally, Chepkoech B and Fedha L *et al*, ' Social Attitudes and non-physical violence: A predictor to social-economic development of rural women in Moiben sub-county, Kenya' 4(4) *International Journal of Research in Education and Social Sciences*, 2021.

<sup>181</sup> See, *State v Truphena Ndonga Aswani* (2021) eKLR.

Abolitionist Feminists proffer political reasons for abolition grounded on intersectionality of struggles rather than identity. In this context, intersectional feminism is understood as the liberalization political project of individuals who are oppressed and exploited while considering the interrelationship of structures such as heteropatriarchy and capitalism.<sup>182</sup> Therefore, we cannot demand for the criminalization of CCB to address the entrapment of women in intimate partner violence without remedying this social entrapment experienced within the Kenyan context first. Considering the current role and attitude of Kenyan enforcement agencies such as the police, the offence of CCB would only increase the patriarchal state's regulatory power over the rights of women which will only compound their victimization, rather than empower them. Nonetheless, this study has demonstrated that although the offence of CCB is conceptually aimed at wholistically addressing the experiences of women of coercive control, the criminalization of the offence in both Britain (where the drafted legislation is considered inadequate) and Scotland (where the drafted legislation is considered the golden standard) has failed to address the inherent structural gender inequalities. In light of the above, should there even be a consideration of criminalizing the offence within the Kenyan context? This research claims that there should not as this would only serve to reinstate and exacerbate the normative gender arrangements, reasserting women as victims to be blamed for their experiences of controlling and coercive behaviour, while strengthening the power of the patriarchal state to respond to such violence.

#### **4.4 Conclusion**

The aim of this Chapter was to analyze whether the incorporation of coercive control within Section 3 of the Protection Against Domestic Violence Act of Kenya could potentially address Intimate Partner Violence. To address this, it has conducted an analysis of Kenya's criminal justice response to domestic violence in the implementation of the PDVA. The institutional attitude, structure and approach within the Kenyan context has been assessed as against that of Britain and Scotland to conclude that the criminalization of CCB would not improve the outcomes for victims of domestic violence or empower them.

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<sup>182</sup> Lamusse T, 'Feminist prison abolitionism', 242.

## **5.0 CONCLUSION**

### **5.1 Introduction**

This chapter provides the findings this dissertation. It will provide the conclusion to the underlying research question of each of the chapters and thereafter provide a possible way forward in addressing the main research question of the study.

### **5.2 Summary of Findings**

Chapter two of this research establishes the conceptual understanding of coercive control within domestic violence. It demonstrates that the aim of criminalizing coercive control is not only to address a legislative gap with regard to non-physical forms of violence resulting from the limited conception of harm to physical violence, but also to address the disjuncture in the dynamics of control and gender inequality. This chapter analyzes the offence of CCB in Britain and Scotland against this understanding, concluding that Britain's legislation fails to conceptually address this primary aim in contrast to Scotland's provision which is appraised to be the golden legislative standard.

Chapter three analyses the criminal justice response to CCB in Britain and Scotland with a particular focus on the police investigations and prosecution outcomes. The chapter establishes that both states have failed to protect the primary objects of concern, the victims of domestic violence. This is despite the creation of an offence which captures all these constitutive elements of coercive control, in the context of Scotland. Contrary to the objective of the coercive control model, the criminalization of the offence has merely served to increase the state's regulatory power while re-victimizing the abused women and failing to challenge existing patriarchal norms.

Chapter 4 contextualizes the problem to Kenya. The chapter analyzes the legislative provisions and criminal justice response to domestic violence. The project finds that in Kenya, victims of domestic violence firstly experience social entrapment as the structural criminal justice institutions in place to respond to domestic violence function to the detriment of the victims following a social tolerance of physical and sexual abuse against women. In answering the main research question, the chapter concludes that demanding for an offence of coercive control within such a framework would only serve to reinstate and exacerbate the normative gender arrangements. This is because it will further re-assert women as victims to be blamed

for their experiences of controlling and coercive behaviour while reinforcing the power of the patriarchal state to respond to such violence. The study concludes that not only is the criminalization of coercive control ineffective, but it is also inappropriate within the Kenyan context.

## 5.2 Recommendations

This study aligns itself with scholarship against the criminalization of coercive control, arguing that this is effective in addressing the root cause of intimate partner violence requires a dismantling of the inherent structural patriarchal violence, especially within the Kenyan context. Therefore, as opposed to focusing on a reactive criminal justice approach to violence against women, perhaps we can imagine and divert funds to developing a non-carceral approach.

This can be through a non-carceral Violence Against Women Act (VAWA) which can promote funding and the promotion of policies designed to prevent intimate partner violence, as suggested by Leigh Goodmark. The VAWA can promote intervention programs with violent men and encourage the sensitization of intimate partner violence through various projects. The funds can address economic stressors which may contribute to intimate partner violence causing victims to be entrapped in violent relationships. It could also create and supplement emergency funds to meet the immediate needs of a victim who is leaving a coercively controlling relationship. For example, housing, food, transportation, microfinance programs to start a small business or education costs. This Act can also reimagine first responders to intimate partner violence. As opposed to the police who have not also proved to be inadequate but also propagate the problem, a different mechanism which focuses on victim safety can be developed. The Act can also advocate for a restorative justice model and through this promote policies which allow victims to obtain justice outside of the formal justice systems. Such a model will focus on harms as opposed to crimes and provide support to both victims and perpetrators of intimate partner violence during, before and after the process hence improving the outcome on victims.<sup>183</sup> These recommendations are abstract, inviting an opportunity for further research on how the proposed policies and programs could practically look like and be

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<sup>183</sup> Goodmark L, 'Reimagining VAWA: Why criminalization is a failed policy and what a non-carceral VAWA could look like' 27(1) *Violence Against Women*, 2020, 92-96.

applied within the Kenyan context. To achieve this, co-operation is required between all sectors of government and civil society in Kenya.<sup>184</sup>

## 5.4 Conclusion

This study argues against the criminalization of coercive control in Section 3 of the PDVA of Kenya as this will only serve to further victimize women through a re-assertion of the inherent patriarchal gender arrangements and the reinforcement of the state's regulatory powers over the rights of women.



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<sup>184</sup> Memiah P and Mu T *et al*, 'The prevalence of intimate partner violence, associated risk factors and other moderating effects', 16.

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