

# CHAPTER 2

## ACCESS TO JUSTICE OF CHILDREN WITH DISABILITIES IN DEFILEMENT CASES IN MALAWI

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### Summary

*The sexual abuse of children with disabilities is a serious problem in society requiring responses tailored to meet their unique needs. In most cases such abuses remain unreported and, if reported, the children face many challenges to access justice within the criminal justice system. This article aims at examining in detail the legal treatment of cases involving children with disabilities in defilement offences in Malawi. The article will attempt to answer the question of whether Malawi respects the rights to access justice of children with disabilities, provided for in various international instruments as well as in local statutes, including article 13 of the CRPD and section 41 of Constitution of Malawi. The right to access justice refers to the ability of people to seek and obtain a remedy through formal and informal justice institutions, and in conformity with human rights standards. The article analyses the ability of children with disabilities in defilement offences to seek and obtain a remedy through formal institutions of justice. The article further analyses the legal and social barriers available to children with disabilities in defilement cases to access the formal systems and structures of the law. In so doing, the article examines four components of the right to access justice as areas of focus, namely, access to information; legal representation; a child's ability to participate in legal proceedings; and the availability of appropriate training of relevant professionals in the field of criminal justice. It is argued that, achieving access to justice for children with disabilities requires comprehensive social and legal support, as well as a constant analysis of legal structures in place that make it more difficult for children with disabilities in defilement cases to be empowered by the law.*

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# 1 Introduction

Although sexual abuse of children is outlawed in almost all countries with severe criminal penalties, it persists as a significant global problem violating the fundamental human rights of children.<sup>1</sup> The abuse takes different forms, including defilement, also known as statutory rape, a common sexual offence in Malawi. Defilement is defined as having sexual intercourse with a girl below the age of 16 or a person suffering from a mental disability with or without her consent.<sup>2</sup> The seriousness of the offence cannot be overemphasised as it is committed against children who are among the most vulnerable persons in society. The threat of contracting HIV and other sexually-transmitted diseases makes the offence even more damaging to young children, and its negative effect is more pronounced in children with disabilities.<sup>3</sup> Other studies have revealed that children with disabilities are at greater risk to suffer sexual abuse and other forms of abuse that negatively impact their enjoyment of human rights on an equal basis with other children.<sup>4</sup> Further, studies have shown that there has been an increase in sexual abuse cases against children in sub-Saharan Africa.<sup>5</sup> For instance, according to World Vision Malawi, the sexual abuse and exploitation of women and children have continued to rise to unprecedented numbers posing challenges to the protection, well-being, survival and development of children.<sup>6</sup> Although there are currently no studies in Malawi providing substantial information on or quantifying the additional vulnerability to sexual abuse of children with disabilities,

- 1 UNICEF 'Sexual violence against children' (2015) [http://www.unicef.org/protection/57929\\_58006.html](http://www.unicef.org/protection/57929_58006.html) (accessed 2 March 2016); Centres for Disease Control and Prevention 'Prevalence of sexual violence against children and use of social services – Seven countries, 2007-2013' (2015) 64 *Morbidity and Mortality Weekly Report* 565-569; M Stoltenborgh et al 'A global perspective on child sexual abuse: Meta-analysis of prevalence around the world' (2011) 16 *Child Maltreat* 79-101.
- 2 Secs 138 & 139 Penal Code Act 22 of 1929 (amended 2010). See also *Republic v Goliati* [1971-72] African Law Reports (Malawi Series) 251, where the court established that a child of 13 years was incapable of giving consent to sexual activity. See also *Republic v William John* Criminal Cause 13 of 2009 affirming this position. Defilement differs from rape as provided in the law in the sense that defilement occurs when a person performs an unlawful sexual act on a girl who is incapable of consenting to the act (ie below 16 years of age or with a mental disability), while rape is committed by a person who has sexual intercourse with a girl or woman capable of consenting (ie older than 16 years) without her consent.
- 3 See generally M Higgins & J Swain *Disability and child sexual abuse: Lessons from survivors' narratives for effective protection, prevention and treatment* (2010); I Hershkowitz et al 'Victimization of children with disabilities' (2007) 77 *American Journal of Orthopsychiatry* 629-635.
- 4 African Child Policy Forum (ACFP) *Children with disabilities in Africa: Challenges and opportunities* (2011).
- 5 K Lelor 'Child sexual abuse in sub-Saharan Africa: Child protection Implications for development policy makers and practitioners' (2005) in Development Research Briefings 3, Centre for Development Studies, University College of Dublin, <http://arrow.dit.ie/cgi/viewcontent.cgi?article=1001&context=aaaschslrep> (accessed 8 February 2017).
- 6 World Vision Malawi 'Children's rights in Malawi' (2010) [http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/WVI\\_WorldVisionInternational.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/session9/MW/WVI_WorldVisionInternational.pdf) (accessed 9 February 2017).

elsewhere studies have revealed a strong association between disability and child maltreatment.<sup>7</sup> This indicates that children with disabilities are significantly more likely to experience abuse than their peers who are not disabled.<sup>8</sup> This can be attributed to a number of reasons, including the myth that sexual intercourse with a girl with a disability cures HIV and AIDS.<sup>9</sup> A report by the Malawi Human Rights Commission revealed that there was a belief in some quarters that men who are HIV positive or suffering from AIDS will get cured if they sleep with a young girl or a girl with a disability.<sup>10</sup> Such myths have threatened the lives of children with disabilities as they are more likely to be sexually abused due to their vulnerable state.<sup>11</sup> States need to take measures to ensure the full and equal enjoyment of all human rights and fundamental freedoms by children with disabilities. One such measure is to strengthen the capacity of the criminal justice system to facilitate the right to access justice for victims with disabilities in defilement cases. Children's access to justice, as defined by United Nations (UN), is 'the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the Convention on the Rights of the Child)'.<sup>12</sup> The Economic and Social Council's Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide good practices, standards and principles relevant for effective criminal justice for children with disabilities in defilement cases.<sup>13</sup> These guidelines require that both legal and social support must be established to enhance the role of child victims in the justice process.

The article examines the legal and social supports that are in place to assist disabled victims of defilement offences in accessing justice before courts of law. The article begins by delimiting the scope of the study and the methodological approach undertaken after this brief introduction. This is followed by an overview of the legal framework protecting children from sexual abuse in Malawi. The international standards and guidelines on access to justice are then explained and, using four main identified areas in ensuring access to justice for children with disabilities in defilement cases,

- 7 See L Jones *et al* 'Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies' (2012) 380 *Lancet* 899-907; EM Lund & J Vaughn-Jensen 'Victimisation of children with disabilities' (2012) 380 *Lancet* 867-869.
- 8 K Stalker & K McArthur 'Child abuse, child protection and disabled children: A review of recent research in child abuse review' (2012) 21 24-40.
- 9 F Kisanga 'Child sexual abuse in urban Tanzania: Possibilities and barriers for prevention' unpublished PhD thesis, University of Umea, 2012 6.
- 10 Malawi Human Rights Commission 'Malawi human rights 2015 Report' <https://www.state.gov/documents/organization/252913.pdf> (accessed 9 February 2017).
- 11 H Brown 'Sexual abuse of children with disabilities' in Council of Europe *Protecting children from sexual violence – A comprehensive approach* (2011)103-117.
- 12 UN Common Approach on Justice for Children (2008) 4 [https://www.essex.ac.uk/armadcon/story\\_id/UNCOMMON.pdf](https://www.essex.ac.uk/armadcon/story_id/UNCOMMON.pdf) (accessed 20 September 2008).
- 13 UN Economic and Social Council (ECOSOC) *UN Economic and Social Council 2005/20: Guidelines on justice in matters involving child victims and witnesses of crime*, 22 July 2005, E/RES/2005/20, <http://www.refworld.org/docid/468922c92.html> (accessed 8 August 2017).

the findings from interviews are discussed and analysed. The last section concludes and makes recommendations.

## 2 Objectives and methodology

The main objective of the article is to examine access to justice for children with disabilities as victims of defilement offences on issues pertaining to access to information, legal representation, a child's ability to participate in legal proceedings and the availability of appropriate training of relevant professionals in the justice field. The rationale was to uncover barriers affecting access to justice in the criminal justice system of children with disabilities. The article employed a human rights-based approach as its methodology.

A human rights approach involves asking what human rights aspects are affected by the issue under examination.<sup>14</sup> This approach assisted in determining whether the Malawian Constitution and other legislation in Malawi are in line with international standards prescribed in human rights instruments in protecting children with disabilities from sexual abuse. The approach, therefore, assisted in assessing whether the Malawian government is fulfilling its duty under international human rights law to promote and protect the rights of children with disabilities. It also looks at the duties and responsibilities of duty bearers and assesses whether they have the knowledge, authority and resources to enforce the law.

The article used various methods of obtaining information, which mainly involved a documentation review. The main method used was desk review, which involved the reading of materials relating to the topic of study, such as court records, international law instruments, books, court decisions, statutes and journal articles, among others. The desk review was supplemented with individual interviews and observations. A total of 21 interviews were conducted using face-to-face interaction. Key informants, who included officials in various institutions directly involved with the prosecution of defilement offences against children with disabilities, such as police prosecutors and judicial officers, among others, were also targeted.

The interviews were conducted at two magistrate's courts in the Blantyre district of Malawi, specifically at the Blantyre Magistrate's Court and at the Soche Child Justice Court. Blantyre Magistrate's Court was selected as it is the centre of all magistrate's courts in the southern region of Malawi; it has more magistrates and is well resourced compared to other

14 See generally P Uvin 'From the right to development to the rights-based approach: How "human rights" entered development' (2007) 17 *Development in Practice* 597; P Gready 'Rights-based approaches to development: What is the value-added?' (2008) 18 *Development in Practice* 735.

magistrate's courts in the region. The Soche Child Justice Court was chosen because of its specialisation in children's cases. Before conducting the interviews, consent was sought from officials of the two courts and other organisations visited who granted permission to interview relevant respondents to the research. Further, consent was also sought from each respondent interviewed and the respondents were assured that the information obtained was only for academic purposes.

### **3 The offence of defilement**

The Malawian Constitution,<sup>15</sup> as supreme law of the land, has guaranteed children protection against sexual abuse by protecting them against any treatment that is likely to be harmful to their health, or to their physical, mental or spiritual or social development.<sup>16</sup> The defilement of children with disabilities forms part of sexual abuse and, therefore, may be categorised as treatment that is harmful to the wellbeing of a girl child. The Constitution has also specifically provided for the right to equality and prohibition of discrimination on the basis of disability in section 20. Further protection against the sexual abuse of children with disabilities can be found in section 24 of the Constitution, which provides for the rights of women, including the right not to be discriminated against on the basis of gender and status. It requires legislation to be passed to eliminate customs and practices that discriminate against women, particularly practices that, among other things, promote or perpetuate sexual abuse. Malawi also passed the Gender Equality Act in 2013, which legislates against discrimination on the basis of sex and prohibits a person from treating another person less favourably than he or she would treat a person of his or her own sex.<sup>17</sup> This is partly in response to the fact that most victims of sexual abuse in Malawi are women and girls and the fact that cultural beliefs, practices and stereotypes contribute to the prevalence of such offences.<sup>18</sup>

The Penal Code in Malawi provides for the offence of defilement of girls in two provisions. The first is section 138 of the Code, which defines the general offence of defilement as applying to any person who unlawfully has carnal knowledge of a girl under the age of 16. This provision applies to all girls, including those with disabilities. The offence carries a maximum penalty of 14 years' imprisonment. The Code also proscribes defilement specifically as regards women and girls with mental disabilities in section 139. The section provides that a person who has or attempts to have sex with a female 'idiot or imbecile' commits the offence of defilement of an idiot or imbecile. The maximum penalty for this offence,

15 Republic of Malawi Constitution Act 20 of 1994.

16 Sec 23(4)(c) Malawian Constitution.

17 This is also provided for in sec 20(1) of the Constitution.

18 World Vision Malawi (n 6 above) 3.

similarly, is 14 years' imprisonment. This section, according to Justice Mzikamanda in *Kanyinji v Republic*, is meant to 'protect mentally deranged girls or women'.<sup>19</sup> The terms 'idiot' and 'imbecile', although linked with psychology and intelligence with an IQ test, should be replaced with more appropriate terms as they are debasing and derogatory.<sup>20</sup> The naming of a person as an imbecile or idiot gives a negative perception of the victim and it takes away from the seriousness of the offence. The law should best refer to persons with such disabilities as persons with intellectual disabilities as opposed to names that promote stigma and discrimination.

Further, by treating girls with mental disabilities separately from those without disabilities and other types of disabilities, it may be argued that section 139 of the Penal Code is discriminatory. As indicated above, both sections on defilement provide for the same penalty for the offences. Therefore, there seems to be no good reason to have a separate section to protect children with mental disabilities other than to stigmatise them by calling them imbeciles and idiots. This negative perception in the law is shared by some personnel in the justice system. Some personnel have no understanding of issues relating to disability and usually have a negative perception of people with mental disabilities, labelling them as 'people of unsound mind' or people who are 'insane' and who should be placed in their own category and not be treated as equals with others.<sup>21</sup>

In my years of service, I have never come across cases of children with disabilities. What I have dealt with is defilement of imbeciles but that is not a disability; such persons are just insane.

A perception such as the one above further victimises children with disabilities and it is essential that the law should not encourage such negative attitudes, as these attitudes may result in the unequal treatment of children with disabilities, especially mental disabilities, and children without disabilities. The former would thus be disadvantaged as they would not be accorded special attention and treatment before the law to enjoy equal protection as guaranteed in article 5 of the of the Convention on the Rights of Persons with Disabilities (CRPD).<sup>22</sup>

In addition, sections 138 and 139 can be faulted for failing to protect male children with disabilities from defilement offences. The sections

19 [2008] MWHC 237 241. See also *Republic v Peter Jasi* Confirmation Case 1026 of 1994; *Republic v Andreyo William* Confirmation Case 565 of 1994.

20 M Rapley *The social construction of intellectual disability* (2004) 32; MJ Tassé 'What's in a name?' (2013) 51 *Intellectual and Developmental Disabilities* 113-116. See also generally L Salvador-Carulla et al 'Intellectual developmental disorders: Towards a new name, definition and framework for "mental retardation/intellectual disability" in ICD-11' (2011) 10 *World Psychiatry* 175-180.

21 Police prosecutor at the Child Justice Court.

22 Convention of the Rights of Persons with Disabilities GA Res. 61/611, adopted on 13 December 2006, entered into force on 3 May 2008, which states that all persons are equal before the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

specifically mention the offence of defilement against girls, excluding boys from the protection of the provisions. This is a serious omission as boys with disabilities are also much more vulnerable to sexual abuse by adults. Other countries in the region have changed the defilement offence and made it gender-neutral so that both girls and boys are protected.<sup>23</sup>

#### **4 Conceptualising access to justice of children with disabilities as victims of the offence of defilement**

Access to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights.<sup>24</sup> As a concept, access to justice for children with disabilities requires the legal empowerment of the children to be able to obtain a just and timely remedy for violations of their rights.<sup>25</sup> Access to justice guarantees the speedy and fair administration of justice accompanied by appropriate support for children with disabilities as victims of the offences through, among other things, access to relevant information, legal and other services for counselling and social assistance/support and the right to participate in criminal trials where relevant and appropriate.<sup>26</sup> Article 13 of the CRPD provides for the rights of access to justice of persons with disabilities. The article provides that states shall ensure effective access to justice for persons with disabilities on an equal basis with others, which shall include the provision of procedural and age-appropriate accommodations to ensure the effective participation of persons with disabilities in legal proceedings.<sup>27</sup>

The Malawian Constitution has also provided for the right to access justice for its citizens, and stipulates in section 41 that every person shall have a right of access to any court of law for final settlement of legal issues and a right to an effective remedy by a court of law for acts violating his or her rights and freedoms as granted by the Constitution. Malawi passed a Disability Act in 2012 that has translated almost all the rights provided in the CRPD into local context. It is surprising to note that the Disability Act has not legislated on the right to access justice. This is a serious omission given the difficulties people with disabilities have in accessing justice at all levels.

23 See, generally, J Thompson *Rape sentencing study: Statutory sentencing for rape, defilement and sexual assault in East, Central and Southern Africa* (2012).

24 UN Office of the High Commissioner for Human Rights (OHCHR) 'Access to Justice for Children'. Report of the UN High Commissioner for Human Rights (2013) 3 UN General Assembly, A/HRC/25/35.

25 See UN Common Approach on Justice for Children (n 12 above) 4. Legal empowerment involves strengthening their capacity to exercise their rights, either as individuals or as members of a community.

26 OHCHR (n 24 above) 3-4.

27 Art 13 CRPD.

The complexity of the justice system requires that children, especially children with disabilities who are also victims of defilement, be accorded special guarantees or reasonable accommodation to ensure access to justice. Reasonable accommodation has been defined in article 2 of the CRPD as

necessary and appropriate modification and adjustment not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

The obligation of reasonable accommodation entails that persons or entities need to make certain modifications or adjustments to allow persons with disabilities to fully participate in the relevant sphere of life.<sup>28</sup> In terms of the right of access to justice of children with disabilities in defilement cases, four main aspects that would require reasonable accommodation may be isolated in the criminal justice system, namely, access to information; legal representation; a child's participation in proceedings; and training of personnel.<sup>29</sup>

#### **4.1 Access to court facilities and information**

Article 9 of the CRPD focuses on accessibility and stipulates that state parties shall take appropriate measures to ensure that persons with disabilities have access on an equal basis with others, among other things, to buildings and other indoor and outdoor facilities.<sup>30</sup> Further, under article 4 state parties have an obligation to provide accessible information to persons with disabilities about mobility aids, devices and technologies. This right is provided for at the national level in section 8 of the Malawi Disability Act, which states that the government shall ensure the attainment of a barrier-free environment that enables persons with disabilities to have access to public buildings. The state is also mandated to develop sign language as a national language, among others. However, the research noted that children with disabilities who are victims of defilement offences have challenges in accessing justice in the courts of law in a number of areas, as follows:

##### **4.1.1 Access to legal information**

The provision of legal information poses another barrier for children with disabilities in accessing justice. The two courts that were under study had

28 European Commission 'Reasonable Accommodation for Disable People in Employment' (2016) [http://ec.europa.eu/justice/discrimination/files/reasonable\\_accommodation\\_in\\_employment\\_final2\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/reasonable_accommodation_in_employment_final2_en.pdf) (accessed 22 December 2016).

29 These aspects are drawn from the good practices established by the OHCHR. See OHCHR (n 24 above) paras 18-53.

30 Sec 9(1)(a) CRPD.



no translated legal materials suitable for different types of disabilities. Further, the lack of legal materials was compounded by an absence of legal personnel trained to work with children with disabilities. Prosecutors reported that this problem was much more evident when working with children with intellectual disabilities. The prosecutors reported that in cases where the only available witness is the victim with an intellectual disability, such cases often end in acquittal. This is so because it is difficult for prosecutors to get information from the child whom they have no expertise to work with. This leads to insufficient information being tendered before the court, which cannot reach the standard required in criminal offences of convicting an accused person beyond a reasonable doubt.<sup>31</sup>

Children with visual and speech disabilities are also affected due to communication challenges. Neither the Blantyre Magistrate's Court nor the Child Justice Court has trained personnel to assist in interacting with children with visual and speech disabilities. These courts also have no trained staff knowledgeable in sign language interpretation, and it is difficult to communicate with children who have a disability in relation to speech. Prosecutors reported that in such cases they consult with organisations working with persons with disabilities or relatives of the child with a disability to help them with communication. However, one magistrate said that this approach had its own challenges:<sup>32</sup>

When we have cases of children with a speech disability, we most of the times rely on their guardians to help us with communication. However, we are not always sure that what the guardian is communicating to the court is what the child is really saying. This compromises the course of justice. An ideal situation would have been our own court interpreters communicating with the child and the court but that is not happening at the moment as we have no trained court interpreters in that area.

Further, neither of the two courts has any legal information translated into braille, and one may conclude that children with visual disabilities are denied access to legal information that may be helpful in their case. From the above, therefore, it is very clear that the state has not respected its obligation under the CRPD to provide information, communication and other services<sup>33</sup> such as signage in braille and forms of live assistance and intermediaries, including guides, readers, professional sign language interpreters, to facilitate accessibility to court buildings for persons with disabilities to ensure proper communication and their access to information.<sup>34</sup> Such neglect has robbed children with disabilities of their rights to access courts of law and, more importantly, of their rights to

31 Information from a female prosecutor at Blantyre magistrate's court.

32 A magistrate at the Child Justice Court.

33 Art 9(1)(b) CRPD.

34 See also art 21 of the CRPD.

access an effective remedy before courts of law as provided in section 41 of the Malawian Constitution.

#### 4.1.2 *Physical access*

First, mere physical access to the court building poses a challenge to children with disabilities. For example, it was reported at the Blantyre Magistrate's Court that persons with disabilities, especially children, find it difficult to access the court building as it was not built with disabled persons in mind. The building has a number of storeys, and it was reported that in cases where a person with a physical disability was involved, the court had to move to the ground floor and if it could not be moved, the disabled person had to be carried to the upper floors.<sup>35</sup>

Though this is a new building, it was not built having regard of persons with disabilities. There is a lift that does not work so if there is a person with a disability, the court has to move to the ground floors or the person must be carried on someone's back to the upper floors.

This is a violation of article 9 of the CRPD and has an impact on other rights of persons with disabilities. Among other things, such a challenge in physical access has the potential of discouraging defilement victims with disabilities from pursuing the matter. It also takes away the dignity of the person who is physically challenged who has to be carried to access the buildings of the court. It should be noted that the Federation of Disability Organisations in Malawi (FEDOMA) also did an access audit of the Blantyre Magistrate's Court and found that the court building was not disability-friendly.<sup>36</sup>

In the case of *Esthe Muller v DoJCD and Department of Public Works*, a wheel chair-bound trial lawyer brought a case against the South African government as she could not access court house buildings. South Africa conceded that the failure to provide proper access was a form of unfair discrimination and committed to rendering the court buildings accessible.<sup>37</sup>

The above shows that the Malawian government has failed to ensure physical access to courts of law for persons with disabilities, in particular children who are victims in defilement cases. The state can be taken to task for its failure to honour obligations under the CRPD, as was done in the case of *Esthe Muller* above.

35 Clerk at Blantyre Magistrate's Court.

36 Information from a project officer at The Federation of Disability Organisations in Malawi (FEDOMA).

37 J Lord et al 'Prospects and practices for CRPD implementation in Africa (2013) 1 *African Disability Rights Yearbook* 111.

## **4.2 Legal representation**

In all criminal offences in Malawi, the state is considered the aggrieved party: All criminal cases are prosecuted by the state through the office of the Director of Public Prosecutions (DPP) and the Malawi police service. Private practitioners can only prosecute criminal offences after obtaining consent from the DPP.<sup>38</sup> In defilement cases relating to children with disabilities, it was discovered that it was mostly police prosecutors who handled these cases in the magistrate's court. All the prosecutors interviewed stated that they had never received any training in relation to the prosecution of cases involving children with disabilities. Most of them reported having challenges in relating with the victims, and said that their lack of expertise affected the outcome of these cases. Article 7 of the CRPD directs state parties to consider the best interests of the child in all actions involving children with disabilities,<sup>39</sup> and to have no specialised or trained prosecutors or lawyers to assist these children in legal proceedings does not constitute acting in the best interests of children with disabilities. This is so because the complexity of the justice system makes it difficult for children to access justice. Children are often unaware of their rights and the existence of legal services. Therefore, access to justice for children, especially those with disabilities, depends on the support provided by their parents or legal representatives. The absence of legal aid to children with disabilities can expose them to multiple forms of stigmatisation and discrimination. Children with disabilities need access to appropriate free or subsidised legal assistance to effectively engage with the legal system.<sup>40</sup>

Section 72 of the Child Care, Protection and Justice Act<sup>41</sup> provides that a local government authority shall keep a register of children with disabilities within its area of jurisdiction and give assistance to these children whenever possible in order to enable the children to grow up with dignity among other children and to develop their potential and self-reliance. This article argues that allowing children with disabilities to be represented by prosecutors who are not specialists in disability law or rights is not in conformity with section 72 of the Act and other laws protecting the rights of children with disabilities.

## **4.3 Children's participation in legal proceedings**

Article 12 of the CRPD provides for the rights of persons with disabilities to recognition everywhere as persons before the law. State parties are mandated to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. This includes the provision

38 Sec 76 Criminal Procedure and Evidence Code, Cap 08:01 of Laws of Malawi.

39 Art 7(3) CRPD.

40 See generally OHCHR (n 24 above).

41 Act 22 of 2010.

of appropriate measures that persons with disabilities may require in exercising their legal capacity. Article 7(3) states that states shall ensure that children with disabilities have the right to express their views freely on all matters affecting them and that their views should be given weight in accordance with their age and maturity on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise this right. Further, section 23(1) of the Malawian Constitution provides that children, regardless of the circumstances of their birth, are entitled to equal treatment before the law.

Children's participation in court proceedings is an empowering experience especially if they are mature.<sup>42</sup> It affirms their dignity by being treated as individuals and also affirms their equality in society and under the law.<sup>43</sup> It may also be essential to ensure that justice is served as their testimony may provide the necessary evidence to secure a conviction. However, there are many concerns about child participation in court, especially when the child has a disability, as the court environment by its nature is hostile and unfavourable to children.<sup>44</sup> It may involve long waiting periods, and the content of the proceedings in sexual offences by nature is traumatising and uncomfortable.<sup>45</sup> The court, therefore, has a duty to provide the necessary support and means of participation to children with disabilities in defilement cases so as to ensure effective access to justice. As vulnerable witnesses, there must be special measures and other reasonable accommodations according to the personal needs of the child.<sup>46</sup> It is necessary that the court and all criminal justice staff be provided with guidance on how particular impairments and disabilities can manifest themselves in court proceedings if effective access to justice is to be guaranteed.<sup>47</sup>

The interviews revealed that children with disabilities rarely take part in the proceedings of their cases, whether as victims or offenders. It also revealed that there were no support, adjustments or aids necessary to ensure such participation. Such support would include the necessary professional experts to assist with the particular disability the child has and ensure effective participation. The required adjustments may include modes of speaking and methods of communication. The court had no such

42 See generally I Ross et al 'Child participation in court' <http://www.law.umich.edu/centersandprograms/pcl/ljohnsonworkshop/Documents/Child%20Participation%20in%20Court.pdf> (accessed 19 September 2015).

43 See ECOSOC (n 13 above).

44 Ross (n 42 above) 9-10.

45 See H Firth et al 'Psychopathology of sexual abuse in young people with intellectual disability' (2001) 45 *Journal of Intellectual Disability Research* 244-252; S Gail et al 'Testifying in a criminal court: Emotional effect on child sexual assault victim' (1992) 57 *Monographs of the Society for Research in Child Development* 1-159.

46 J Talbot 'Fair access to justice? Support for vulnerable defendants in the criminal courts' (2012) Prison Reform Trust Briefing Paper, <http://www.prisonreformtrust.org.uk/portals/0/documents/fairaccesstojustice.pdf> (accessed 19 September 2015).

47 Talbot (n 46 above) 4.

special measures to assist children with disabilities or any person with disabilities who needed to participate in proceedings.

As noted above, a few cases do go through the system, but among these few, the main barrier to their participation is the communication difficulty, resulting in them being viewed as unreliable, not credible or not capable of giving evidence. One prosecutor explained this challenge as follows:

Taking a statement from a child with mental disability for instance is difficult. They keep repeating themselves and are sometimes incoherent. If this is the case, we rather choose not to put them in the witness's box but tender their statement recorded at the police station as evidence and rely on other witnesses to testify in court.

The choice not to use the child in such a trial may be influenced by considerations such as that, as a witness the repetitiveness may require patience on the part of the judge to hear the full testimony from the child, and also the time factor. If both are in short supply, this may work to the disadvantage of the prosecution's case. As will be elaborated further below, the judicial officers are not conversant with the needs of persons with disabilities, let alone their rights. Reasonable accommodation is not a principle one can rely on in such matters.

Further, the incoherence may undermine the prosecution's case as the child may be perceived as an unreliable witness due to a lack of appreciation of the disability and its effects on the child. This was confirmed by one of the senior magistrates interviewed, who stated:

Persons with disabilities are treated as normal people when they testify in a criminal trial. If the disability is regarding mental capacity, unless there is evidence other than of that witness, there is no way proof beyond reasonable doubt can be attained. This is because during testimony, such a witness may change the story many times and not present credible evidence.

In another interview, a court clerk at a specialised court for children also revealed the difficulty in communication where children with disabilities are involved in court proceedings, stating:

It is difficult when a child with a disability has to appear in court and has no guardian or relative escorting them ... We had a 16 year-old girl, who was both deaf and mute in the court one time but had no guardian with her. With no sign language interpreter, the case was only able to continue because the girl was able to read and write. A clerk would write down a question for her to respond by writing back the answer. Otherwise we would have not continued with the case because we have no means to support children with disabilities. But where there is support from the family, it makes it easy. On one occasion a boy with a physical and mental disability and also suffering from epilepsy accused of rape was able to speak and defend himself with the help and

support of his father. He was however found guilty and convicted of the offence.

This reliance on family members is generally discouraged if justice is to be served as their own knowledge and opinion may influence the communication. It is preferable when necessary professionals are available to support the children and necessary aids and technology are also available to ensure reasonable accommodation.

All these factors amount to a violation of the rights of children with disabilities to meaningfully participate in the administration of justice. It is absolutely necessary that courts make provision for special measures for children with disabilities so that they can contribute equally to the administration of criminal justice. The special measures will reduce the stresses associated with the court environment and provide a means for the child to give his or her best evidence. In countries like the United Kingdom, there are not only routine or systematic procedures in place for identifying the particular support needs of such witnesses, but statutes have also been adopted to provide the necessary legal guarantees.<sup>48</sup>

## 6 Training of personnel

Article 13(2) of the CRPD provides that state parties shall promote appropriate training for those working in the field of administration of justice, such as the police, in order to ensure effective access to justice for persons with disabilities. According to article 4 of the CRPD, state parties have an obligation to promote the training of professionals and staff working with persons with disabilities.

The lack of knowledge was overwhelming in the justice system, from senior to junior officers. 'What laws? I am not aware of any laws on disability rights.' This was the response given when the acting lead magistrate was asked what laws on disability were made available to magistrates in the courts of Malawi. Not only is there a lack of knowledge of laws on disability rights, but also a lack of knowledge on how to work with children or adults with disabilities and a lack of knowledge of the legal concerns faced by persons with disabilities.

For instance, the study conducted found that persons working with children with disabilities in defilement offences, such as magistrates, prosecutors and parents, have no access to information on disability, in general, and specifically on laws and rights of children with disabilities.<sup>49</sup>

48 The Youth Justice and Criminal Evidence Act 1999 defines such witnesses as vulnerable and provides for special measures for assistance or adjustments.

49 Principal Magistrate at Blantyre Magistrate's Court.

At this court we treat all cases equally. Justice sees no face. Children with disabilities are subjected to the same laws applicable to all other children. I am not aware that there is a Disability Act in Malawi, if I have never seen the Act and am not aware of these developments what more of a magistrate in the villages.

Statements such as the above clearly indicate that legal personnel in the justice system who should have been on the forefront protecting the rights of children with disabilities have no access to information on disability to enable them to adjudicate matters in a fair manner.

Further, it was revealed that none of the court clerks, police prosecutors and victim support unit officers had received any training whatsoever on these matters. Very few magistrates had been trained in disability rights. Such a gap in legal knowledge on disability rights and law can adversely affect the legal protection of the human rights of children with disabilities.<sup>50</sup> However, it is to be noted that the Faculty of Law at the University of Malawi, which trains most of the professional magistrates, has recently introduced a module in disability rights as a component of the Human Rights course in the year 2012.

## **7 Conclusion**

The article discussed access to justice as it relates to children with disabilities in defilement offences. It has been found that the criminal justice system is lacking in terms of facilitating the enjoyment of this right by children with disabilities. Among other things, the courts are not accessible due to a lack of accessible structures, legal information, communication, participation in the proceedings by child victims, and the lack of training of personnel in the system. For access to justice of children with disabilities to be achieved, the courts have to become more open, flexible and responsive to children with disabilities. Malawi is also duty bound to protect and promote the rights of children with disabilities, as it has ratified the CRPD, which provides for access to justice for persons with disabilities.

50 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 281-319.