

ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES IN MALAWI: EXPLORING CHALLENGES AND POSSIBILITIES IN THE CRIMINAL JUSTICE SYSTEM

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Summary

This paper interrogates the right of access to justice for persons with disabilities in Malawi. It begins by noting that, from a normative perspective, significant progress has been made in terms of securing the rights of persons with disabilities. This progress is reflected in Malawi's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) and the adoption of the Disability Act. The paper acknowledges that access to justice is a fundamental right for persons with disabilities since it can facilitate their enjoyment of other rights. After presenting the legal, institutional and policy framework that deals with persons with disabilities, the paper examines selected provisions in Malawi's criminal procedure law and assesses their compatibility with the principles underlying the CRPD and the Disability Act. Amongst other things, the paper establishes that, the language employed by the criminal law is demeaning of persons with disabilities and that the procedures guiding criminal trials do not possess inbuilt avenues for facilitating reasonable accommodation. The paper recommends that an audit of all statutes in the criminal justice system be undertaken in order to inform legislative reforms or initiatives of reasonable accommodation. The paper also advocates for continuous disability-rights training for all actors in the criminal justice system and the domestication of the CRPD together with the ratification of its Optional Protocol.

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1 Background

The predicament of persons with disabilities in Malawi remains dire. According to the Government of Malawi:¹

Persons with disabilities ... face numerous challenges that result in their exclusion from the mainstream of society, making it difficult for them to access their fundamental social, political and economic rights. Many make their way through life impoverished, abandoned, uneducated, malnourished, discriminated against, neglected and vulnerable. For them, life is a daily struggle to survive. Whether they live in urban centres or in rural areas, they share these common problems.

Like in many other countries, there is a close relationship between poverty and disability in Malawi.² Generally, poverty can cause disability and disability exacerbates the effects of poverty. Persons with disabilities and their families, therefore, tend to experience deeper levels of poverty than the population at large.³ In a country like Malawi, where the government has conceded that poverty is deep and severe, this has profound implications for the enjoyment of human rights by persons with disabilities. Deep levels of poverty in turn entail inconsistent progress in the implementation of pro-disability rights interventions.⁴

The above notwithstanding, the legal landscape for persons with disabilities in Malawi has experienced significant changes over the past ten years. Two developments stand out. First, on 27 August 2009 Malawi ratified the Convention on the Rights of Persons with Disabilities (CRPD).⁵ Second, in 2012, Malawi passed the Disability Act after over eight years of procrastination.⁶ These developments remain pivotal in the realisation of the rights of persons with disabilities.⁷ The monumentality of

1 Government of Malawi *National policy on equalisation of opportunities for persons with disabilities* (2006) 8.

2 Government of Malawi (n 1) 13.

3 Open Society Initiative for Southern Africa *Status of disability rights in Southern Africa* (2012) 12; J Nyanda 'Confronting the double marginalisation of girls with disabilities: Practical challenges for the realisation of the right to education for girls with disabilities under the Disability Act of Malawi' (2015) 3 *African Disability Rights Yearbook* 112.

4 R Lang *Disability policy audit in Namibia, Swaziland, Malawi and Mozambique: Final report* (2008) 91.

5 UN Treaty Collection, CRPD https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-15&chapter=4&lang=en (accessed 16 August 2017). Malawi has neither signed nor acceded to the Optional Protocol to the CRPD.

6 E Chilemba 'Promoting disability rights in Malawi' <http://www.osisa.org/law/blog/promoting-disability-rights-malawi> (accessed 16 August 2017).

7 Disability terminology is often highly contested. Some of the commonly used terms are: 'people with disabilities'; 'disabled people'; 'people with impairments'; and more specific terms like 'visually impaired people'; and 'people with intellectual disabilities'. The varying terms, however, are often reflective of the differing perspectives about disability – E Iriarte et al 'Disability and human rights: Global perspectives' in E Iriarte, R McConkey & R Gilligan (eds) *Disability and human rights: Global perspectives* (2016) 8.

these developments, notwithstanding, their practical impact is, largely, yet to be seen.

From an international perspective, the CRPD remains the primary instrument in so far as rights of persons with disabilities are concerned. In articles 12 and 13, the CRPD provides for a mutually reinforcing web of rights that are meant to guarantee equal recognition before the law and access to justice for persons with disabilities. The underlying theme in the two articles is that persons with disabilities should enjoy legal capacity on an equal basis with others in all aspects of life and also that they should have effective access to justice. In order for persons with disabilities to enjoy the right to effective access to justice, states are required to provide procedural and age-appropriate accommodations that can facilitate their effective participation in the justice system. From a standard setting perspective, it is also important to acknowledge the adoption by the African Union of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities. This Protocol, however, is not in force yet.⁸

In respect of the domestic perspective, Malawian law is not oblivious to persons with disabilities. For example, the Constitution of the Republic of Malawi (the Constitution) expressly lists disability as one of the grounds on which discrimination is prohibited.⁹ Further, in section 13(g), the Constitution enjoins the state to take progressive steps to enhance the dignity and quality of life of persons with disabilities. Additionally, the Disability Act includes wide-ranging protections for persons with disabilities and is, arguably, an avenue through which the protections in the CRPD and the Constitution find detailed legislative expression. Specifically, in relation to the criminal justice system, although some significant reforms have been made to the Criminal Procedure and Evidence Code

a lot of measures still need to be in place to ensure that persons with disabilities have the support they need to ensure they can effectively access justice at all stages of the legal process.¹⁰

8 This Protocol was adopted on 29 January 2018. To date it has garnered six signatures, but zero ratifications – <https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20PERSONS%20WITH%20DISABILITIES%20IN%20AFRICA%20%281%29.pdf> (accessed 10 April 2020).

9 Sec 20(1), Constitution of the Republic of Malawi.

10 Government of the Republic of Malawi 'Combined initial and second report to the Committee on the Rights of Persons with Disabilities' <http://disabilityrightsfund.org/resources/malawi-state-report-crpd/> (accessed 4 March 2020) para 79.

Flynn and Lawson have noted that while access to justice, as a topic of study, has received considerable attention, its disability-related dimensions have attracted little attention.¹¹ Access to justice, however, is a fundamental human right of significant concern to persons with disabilities.¹² Persons with disabilities, whether as victims of crime, accused persons, or even as witnesses are always at risk of having their rights undermined in the justice system.¹³

Perhaps as a manifestation of global trends, there have been very few studies in Malawi that are disability specific, for example, by interrogating the government's implementation of disability policies.¹⁴ Although some studies have been undertaken covering rights of persons with disabilities, no study to date has specifically interrogated access to justice for persons with disabilities in Malawi from the perspective of the criminal justice system.¹⁵ It should also be noted that Malawi's Disability Act does not include a specific guarantee on access to justice for persons with disabilities. This, however, must not be read to imply that persons with disabilities do not have the right to access justice in Malawi. This is because the Constitution guarantees 'every person' the right to access justice and legal remedies.¹⁶ Additionally, the interdependence, indivisibility and interrelatedness of human rights entail that other human rights recognised in the Disability Act can be used to facilitate access to justice for persons with disabilities. Nevertheless, the absence of an explicit provision on access to justice, in a law specifically meant to deal with rights of persons with disabilities, is an odd occurrence.

This paper interrogates the right of access to justice by persons with disabilities within the criminal justice system in Malawi. Specifically, the

- 11 E Flynn & A Lawson 'Disability and access to justice in the European Union: Implications of the United Nations Convention on the Rights of Persons with Disabilities' (2013) 4 *European Yearbook of Disability Law* 7 at 7-8.
- 12 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities, and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 287.
- 13 Australian Human Rights Commission 'Equal before the law: Towards disability justice strategies' <http://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 24 August 2017).
- 14 Government of Malawi (n 10) para 7. The 2008 national census was the first time in Malawi's history that questions relating to disability were included, see, National Statistical Office '2008 population and housing census' http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=106&Itemid=6 (accessed 23 August 2017). The 2018 national census also included a disability component, see, http://www.nsomalawi.mw/index.php?option=com_content%26view%3Darticle%26id%3D226:2018-malawi-population-and-housing-census%26catid%E2%80%89%3D%E2%80%898:reports%26Itemid%E2%80%89%3D%E2%80%896 (accessed 29 February 2020).
- 15 See, for example, A Munthali *A situation analysis of persons with disabilities in Malawi* (2011) 7. As for a study on access to justice for persons with disabilities, but specific to children with disabilities and in relation to the crime of defilement, see B Malunga, NR Kanyongolo & N Mbano-Mweso 'Access to justice of children with disabilities in defilement cases in Malawi' (2017) 5 *African Disability Rights Yearbook* 25' <http://www.adry.up.ac.za/index.php/section-a-articles-2017/bernadette-malunga-ngeyi-ruth-kanyongolo-ngcimezile-mbano-mweso> (accessed 6 March 2020).
- 16 Sec 41, Constitution of the Republic of Malawi.

paper analyses the procedural and substantive guarantees contained, primarily, but not exclusively, in the Criminal Procedure and Evidence Code (CPEC)¹⁷ and the Penal Code¹⁸ to determine how these contribute to either enhancing or inhibiting the right of access to justice by persons with disabilities. This is achieved by isolating provisions from both the CPEC, the PC, and other applicable laws, and analysing them as against the guarantees in the CRPD, the Disability Act and the Constitution. Subsequent to the analysis, the paper makes recommendations for improving Malawi's criminal justice system in terms of compliance with the rights of persons with disabilities.

The first part of the paper contextualises the discussion by providing a general background to the situation of persons with disabilities in Malawi and some of the applicable legal standards both internationally and domestically. The second part provides an overview of the legal, policy and institutional framework that applies to persons with disabilities in Malawi. The third part explores the right of access to justice in so far as it applies to persons with disabilities and unpacks its key elements. The fourth part explores the right of access to justice for persons with disabilities within the context of Malawi's criminal justice system. The challenges and possible opportunities for persons with disabilities in Malawi's criminal justice system are also discussed in this part of the paper. The penultimate section of the paper makes some proposals for improving access to justice for persons with disabilities in Malawi. The last part of the paper is the conclusion.

2 Persons with disabilities and the legal, policy and institutional framework in Malawi

It is apposite to begin by conceding that disability is part of the human condition.¹⁹ Nevertheless, disability is a complex, dynamic, multi-dimensional and contested concept.²⁰ The identification of the role of social and physical barriers in disability has led to the transition from an individual, medical perspective to a structural, social perspective of disability.²¹ The transition to a social perspective of disability has been described as the shift from a 'medical model' to a 'social model' in which people are viewed as being disabled by society rather than by their bodies.²² Although the medical model and the social model are often

17 Chapter 8:01, Laws of Malawi. Under sec 6(2) of the CPEC all criminal offences under any written law in Malawi must be tried under the procedures established in the CPEC unless there is a law which establishes otherwise.

18 Chapter 7:01, Laws of Malawi.

19 WHO and World Bank *World report on disability* http://www.who.int/disabilities/world_report/2011/report.pdf (accessed 16 August 2017).

20 E Iriarte 'Models of disability' in Iriarte, McConkey & Gilligan (n 7) 11.

21 WHO and World Bank (n 19).

22 As above.

presented as being dichotomous, disability is neither purely medical nor social.²³ Persons with disabilities often experience challenges arising from their health condition as well as their social environment. A balanced approach is, therefore, necessary in order to give appropriate weight to the different aspects of disability.

Article 1 of the CRPD states that

persons with disabilities include those who have long term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.²⁴

This statement is a reminder that ‘persons with disabilities’ is a broad term which covers a wide range of individuals who have different types and degrees of functional impairment as well as different ages, genders, ethnicities, cultures, languages and a full range of other characteristics.²⁵ The description of ‘disability’ in article 1 of the CRPD, which reiterates the exhortation in paragraph (e) of the Preamble to the CRPD, confirms the shift to the social model of disability. Under this model, the direct link between impairment and disability is broken by the introduction of ‘various barriers’, referring to the social, environmental and attitudinal factors which in their interaction with the impairment cause disability.²⁶ Although the adoption of the CRPD confirms that the discourse on disability has moved to the social model, it seems to be the case that in Malawi ‘most people still consider disability as a charity issue’.²⁷ This entails that there is still a lot of effort that must be expended to entrench the social model of disability in Malawi.

It is important to recall that the CRPD does not create new rights.²⁸ It simply articulates how existing human rights are equally applicable to persons with disabilities.²⁹ Further, since Malawi is dualist, in terms of the applicability of treaties, a domestication statute will be required before the CRPD is directly applicable in the country.³⁰ The non-domestication of the CRPD, however, does not mean that the CRPD is irrelevant. Malawi remains bound to uphold the purposes of the CRPD under the principle of

23 As above.

24 Sec 2 of the Disability Act adopts, wholesale, this ‘definition’ of disability for purposes of understanding disability in Malawi.

25 Flynn & Lawson (n 11) 8.

26 Iriarte (n 7) 12 and W Waliuya ‘Protecting the rights of persons with disabilities: A perspective from Zambia’ <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/11.pdf> (accessed 25 August 2017).

27 Government of Malawi (n 10) para 6.1.

28 Open Society Initiative for Southern Africa (n 3) 10.

29 J Lord & M Stein ‘Prospects and practices for CRPD implementation in Africa’ (2013) *African Disability Rights Yearbook* 100.

30 Sec 211, Constitution of the Republic of Malawi. See, T Hansen ‘Implementation of international human rights standards through the national courts in Malawi’ (2002) 46 *Journal of African Law* 31.

pacta sunt servanda – the general principle of international law that requires parties to honour agreements they voluntarily enter into.³¹ In the same spirit, Malawian courts can also have regard to provisions of the CRPD in interpreting constitutional rights.³²

As earlier alluded to, the Constitution is the first repository for rights of persons with disabilities in Malawi. The Constitution remains particularly relevant since it establishes itself as the supreme law of the land and this entails that all laws, policies and acts of government are valid only to the extent of their compatibility with it.³³ The Constitution also expressly proscribes discrimination on the ground of disability and authorises the government to adopt legislation or measures meant to address inequalities in the country.³⁴ The Constitution is particularly relevant for persons with disabilities since it guarantees rights to ‘every person’ or ‘all persons’. The diction used by the Constitution leaves no doubt that the human rights that it guarantees are meant for the benefit of everyone including persons with disabilities.

Further, section 13(g) of the Constitution directs that the state must actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at enhancing the dignity and quality of life of persons with disabilities. This ought to be achieved, amongst other things, by providing adequate and suitable access to public places, fair opportunities in employment and the fullest possible participation in all spheres of Malawian society.³⁵ The adoption of the National Policy on Equalisation of Opportunities for Persons with Disabilities (the Equalisation Policy) in 2006 and the passing of the Disability Act can, therefore, be seen as part fulfilment of the stipulations in section 13(g) of the Constitution.

The Equalisation Policy was developed in order to promote the ‘rights of people with disabilities to enable them to play a full and participatory role in society’.³⁶ The aim of the Equalisation Policy is that people with disabilities must access the same fundamental rights and responsibilities as any other Malawian citizen. The Equalisation Policy identifies several areas in which persons with disabilities face significant challenges and where interventions must be targeted. Amongst the areas identified are the

31 Art 26, Vienna Convention on the Law of Treaties <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> (accessed 7 September 2017).

32 Sec 11, Constitution of the Republic of Malawi.

33 See, secs 4 and 5, Constitution of the Republic of Malawi.

34 Sec 20, Constitution of the Republic of Malawi.

35 Although sec 13(g) is part of the principles of national policy, courts in Malawi are enjoined, under sec 14 of the Constitution, to have regard to sec 13 in interpreting and applying any of the provisions of the Constitution.

36 Government of Malawi (n 1) 9. Another relevant policy would be the Special Needs Education Policy which was developed to guide the approach in respect of education for persons with disabilities.

following: health care; HIV/AIDS; employment; concerns pertaining to women and children; and the political process.³⁷ Apart from a general reference to the need to deal with exclusion, marginalisation and vulnerability, the Equalisation Policy never addressed itself to the specific challenges that persons with disabilities face when accessing justice in the country.

The Disability Act (the Act) contains provisions that are specific to the needs of persons with disabilities and its definition of 'disability' mirrors the CRPD. Importantly, the Act moves away from the medical or welfare model of disability that is contained in the Handicapped Persons Act and espouses the social model of disability.³⁸ In section 3 of the Act, the government is mandated to adopt policies and legislation on the equalisation of opportunities for person with disabilities in order to promote and protect the rights of persons with disabilities and also to fully include them in all aspects of life so as to enhance their dignity and well-being. The Act provides for a range of rights including the right to healthcare services,³⁹ the prohibition of discrimination in healthcare and rehabilitation services,⁴⁰ the right to education on the basis of equal opportunity and inclusivity,⁴¹ and the right to work and employment.⁴² As earlier alluded to, the Act does not have any provisions directly focusing on the right of access to justice for persons with disabilities.

A survey of the policy, legal and institutional framework indicates that there have been some positive developments in relation to rights of persons with disabilities. Nevertheless, and in common with many sub-Saharan countries, persons with disabilities in Malawi continue to encounter high levels of exclusion, marginalisation and discrimination.⁴³ It is also striking to note that in all the recent developments in Malawi that affect persons with disabilities, nothing has specifically been targeted at improving their access to justice.

For purposes of the present paper, it is important to acknowledge that different people with varying disabilities will experience different challenges in their access to justice. Additionally, various intersecting factors also condition the manner in which persons with disabilities enjoy their right to access justice and these include age, gender, ethnicity and the form of disability.⁴⁴

37 Government of Malawi (n 1) 14-16.

38 Chapter 33:02, Laws of Malawi. It is ironic that the Handicapped Persons Act was not repealed with the adoption of the Disability Act.

39 Sec 6, Disability Act.

40 Sec 7, Disability Act.

41 Sec 10, Disability Act.

42 Sec 12, Disability Act.

43 Lang (n 4) 75.

44 Flynn & Lawson (n 11) 8.

While this paper will make general conclusions about access to justice and persons with disabilities, this is not in any way to suggest that persons with disabilities in Malawi form a homogenous group.⁴⁵ The paper must simply be understood as suggesting that there are some common challenges that affect persons with disabilities in Malawi in so far as their right to access justice is concerned.⁴⁶ The next section of the paper discusses, at a general level, access to justice for persons with disabilities.

3 Understanding access to justice for persons with disabilities

The expression 'access to justice' marries two intellectually loaded concepts, 'access' and 'justice'. Because of the 'marriage' that the expression creates, a full understanding requires equal focus on both 'access' and 'justice'. Fein suggests that 'access to justice' has come to signify the many efforts made by a range of stakeholders to address the needs of historically disadvantaged populations in relation to the justice system.⁴⁷ The focus on 'historically disadvantaged populations', while perhaps being justifiable, has been criticised for narrowing the full meaning of access to justice.⁴⁸ It is fair, therefore, to understand access to justice as a broad concept 'encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice'.⁴⁹ In the context of the present paper, it is important to bear in mind that access to justice is a fundamental right in itself and also an essential prerequisite for the protection and promotion of other rights.⁵⁰

Bahdi has identified three distinct, but interlinked components of access to justice and these are substantive, procedural and symbolic.⁵¹ While not without its limitations, especially when applied to disability-related access to justice, Bahdi's formulation provides a useful starting

45 This paper is fully aware of the fact that generalisations about disability can be misleading and where appropriate its conclusions will be qualified to limit their applicability to particular disabilities.

46 It is also useful to point out that in spite of the diversity of disabilities, persons with disabilities share a common history of stigma, discrimination and segregation the world over – Lord & Stein (n 29).

47 DE Fein 'Access to justice: A call for progress' (2017) 39 *Western New England Law Review* 211 at 212.

48 Cf R Sandefur 'Introduction: Access to justice: Classical approaches and new directions' in R Sandefur (ed) *Access to justice* (2009) ix.

49 Ortoleva (n 12) 284.

50 OHCHR 'Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities' https://www.google.mw/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKÉwjxgMHy7YboAhXJyYUKHax3CVkQFjABegQIDBAF&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FDisability%2FA_HRC_37_25.docx&usg=AOvVaw3zYy3xVLP2yE-vHxjq_cN8 (accessed 1 March 2020).

51 R Bahdi 'Background paper on women's access to justice in the MENA region' http://www.uwindsor.ca/law/rbahdi/sites/uwindsor.ca.law.rbahdi/files/womens_access_to_justice_in_mena-bahdi_en.pdf (accessed 17 August 2017).

point for understanding access to justice for persons with disabilities.⁵² First, the substantive component ‘concerns itself with the substance or content of the legal rules and principles which shape decisions made in favour or against those who seek a remedy or a dispute settlement’.⁵³ This component requires the ‘development of laws and policies which promote substantive equality and stresses that this cannot usually be achieved without the involvement of the disadvantaged group’.⁵⁴ Applied to persons with disabilities, this means that attempts to design laws and policies for persons with disabilities are bound to fail unless they deliberately seek to accommodate their participation.

Second, the procedural component of access to justice refers to the:⁵⁵

types of institutions where one might bring a claim, the rules that govern the complaint and conduct of the parties once the complaint is brought within a particular institution, the particular mandate of a given institution and the factors – outside of the substantive law itself – which influence the nature and quality of the encounter

For persons with disabilities, procedural access to justice requires that attention must be given to the removal of the barriers that prevent them from bringing claims and also those that hinder their effective participation in proceedings meant to enforce rights.⁵⁶

Third, the symbolic component of access to justice ‘steps outside of doctrinal law and asks to what extent a particular legal regime promotes citizens’ belonging and empowerment’.⁵⁷ The symbolic component consists of a society in which, due in part at least to its laws and justice system, disadvantaged individuals are fully included and empowered to participate as equal citizens.⁵⁸ In relation to persons with disabilities, the symbolic component of access to justice involves consideration of what ‘justice’ actually entails for them outside of the narrow confines of the legal system to incorporate the political, social and cultural activities which further their participation and recognition as equal citizens.

In practice, persons with disabilities have often been denied access to fair and equal treatment before courts, tribunals, law enforcement officials, prison systems and other bodies that make up the justice system.⁵⁹ Numerous barriers prevent them from accessing justice on the same footing with others.⁶⁰ These include, amongst others, laws denying

52 Flynn & Lawson (n 11) 13.

53 As above.

54 Flynn & Lawson (n 11) 14.

55 Bahdi (n 51).

56 Flynn & Lawson (n 11) 15-16.

57 Bahdi (n 51).

58 Flynn & Lawson (n 11) 16.

59 Ortoleva (n 12) 284.

60 Flynn & Lawson (n 11) 9.

persons with disabilities legal standing, inadequate information or advice, insufficient resources, inaccessible architectural design, inaccessible information or communication methods and inadequate protection from victimisation. Such barriers limit not only the ability of persons with disabilities to use the justice system, but also their ability to contribute to the justice system, specifically, and to society, generally.⁶¹

The above notwithstanding, international human rights law recognises the right of access to justice in several instruments that predate the CRPD.⁶² For example, article 8 of the Universal Declaration of Human Rights (UDHR) provides that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’. The International Covenant on Civil and Political Rights (ICCPR) in article 14 provides that ‘all persons shall be equal before the courts and tribunals’. Article 14(2)(f) of the ICCPR states that, with respect to criminal proceedings, every person has the right ‘to have the free assistance of an interpreter if he cannot understand or speak the language used in court’.⁶³ Further, in article 16 the ICCPR provides that ‘everyone shall have the right to recognition everywhere as a person before the law’ which entails that legal capacity is an inherent attribute of all human beings.

The CRPD, however, is the first international human-rights instrument that specifically enshrines a right of access to justice for persons with disabilities.⁶⁴ In doing so, the CRPD has expanded the classical notions of access to justice and emphasised the fact that access to justice entails not only removing barriers to ensure access to legal proceedings

to seek and obtain appropriate remedies on an equal basis with others, but also the promotion of the active involvement and participation of persons with disabilities in the administration of justice’.⁶⁵

The manner in which access to justice has been recognised, in many international instruments, demonstrates that it is a right that must never be understood in isolation. Access to justice must be understood together with other human rights like the right to a fair hearing, the right to equality and the prohibition of discrimination, amongst other rights. Specifically in relation to the CRPD, this means that access to justice for persons with disabilities must always be understood together with the other rights in the

61 Ortoleva (n 12) 284.

62 See also, art 7 of the African Charter on Human and Peoples’ Rights, Malawi ratified this instrument on 17 November 1989 <http://www.achpr.org/instruments/achpr/ratification/> (accessed 7 September 2017).

63 Ortoleva argues that this provision creates a basis for the adoption of reasonable accommodation measures for persons who have hearing impairments or visual impairments to use sign language or braille, respectively, in court proceedings: Ortoleva (n 12) 293.

64 OHCHR (n 50) para 5.

65 OHCHR (n 50) para 12.

CRPD.⁶⁶ This is because access to justice, as conceptualised under the CRPD, is a cross-cutting right that must be interpreted in line with all the principles and obligations underlying the CRPD.⁶⁷

Practically, access to justice for persons with disabilities coalesces around three key components and these are: equality before courts and the right to fair trial; the right to an effective remedy; and participation in the administration of justice.⁶⁸ Each of these three components in turn implicates other demands. First, equality before the courts and fair trial requires that effort be made to ensure that persons with disabilities can physically access institutions critical for the realisation of their rights, but also that they are guaranteed effective access to information and means of communication necessary for them to know and defend their rights. It also requires that provision be made for procedural and age appropriate accommodation within the justice system. Equality before courts and fair trial also demand that persons with disabilities be guaranteed the right to claim justice and stand trial, and to benefit from the presumption of innocence on the same footing as everyone else and be accorded legal aid as appropriate.

Second, the right to an effective remedy for persons with disabilities entails that equal and effective access to justice be guaranteed by, amongst other things, securing the availability and accessibility of complaint mechanisms, investigation bodies and institutions which include judicial bodies that can make authoritative determinations and award reparations. It also encompasses adequate, effective and prompt redress and reparations for harm suffered, and access to relevant information concerning violations and reparations.⁶⁹

Third, participation in the administration of justice requires that persons with disabilities be guaranteed the right to participate directly or indirectly at all stages of proceedings. Direct participation occurs when persons with disabilities are parties to the action while indirect participation is when persons with disabilities take other roles in proceedings, for example, as witnesses, jurors, lawyers or judges. Against this background, it is clear that guaranteeing access to justice for persons with disabilities often requires a serious rethinking of many aspects of the justice system.⁷⁰

The next section of the paper explores Malawi's criminal justice system and highlights some challenges and opportunities in relation to access to justice for persons with disabilities.

66 Flynn & Lawson (n 11) 24.

67 OHCHR (n 50) para 14.

68 OHCHR (n 50) paras 17-61.

69 OHCHR (n 50) para 43.

70 F Gibson 'Article 13 of the Convention on the Rights of Persons with Disabilities – A right to legal aid' (2010) 15 *Australian Journal of Human Rights* 123 at 127.

4 Exploring access to justice challenges and opportunities for persons with disabilities in Malawi's criminal justice system

The criminal justice system refers to the collective of institutions through which a person passes until the allegations against him/her have been processed.⁷¹ The criminal justice system consists of three main components and these are: law enforcement (the police); adjudication (judges, lawyers, prosecutors, magistrates); and correctional facilities (prison officials and probation officers).⁷² A contemporary view of the criminal justice system also includes victims and services available to them as another component.⁷³ The agencies that make up the criminal justice system are independent of each other, but must operate together to ensure the prevalence of the rule of law.

Generally, access to justice for persons with disabilities

raises multidimensional barriers from physical access to courthouses, to ensuring that people with various disabilities are accommodated by materials in alternative formats, making court websites accessible for persons who use assistive technology, and installing listening systems in court houses.⁷⁴

Access to justice for persons with disabilities is both a means as well as an end.⁷⁵ It is a means because it is the vehicle that provides persons with disabilities with an opportunity to realise their rights. It is an end because it can be used to avail individuals with the relevant procedures, institutions and processes that recognise, protect and enforce human rights.

Malawi's criminal justice system, obviously, is quite wide and incorporates many institutions. It is not feasible to conduct an analysis of the entire system within the confines of the present paper. Resultantly, the analysis herein focuses on the roles of the police and the courts. Further, the analysis focuses on the three components of access to justice earlier identified, which are: equality before the courts and the right to fair trial; right to an effective remedy; and participation in the criminal justice system. Each of these will now be addressed individually.

71 USLegal 'Criminal justice system law and legal definition' <https://definitions.uslegal.com/c/criminal-justice-system/> (accessed 17 August 2017).

72 K Daly & R Sarre 'Criminal justice system: Aims and processes' https://www.griffith.edu.au/__data/assets/pdf_file/0011/924878/2017-Daly-and-Sarre-Criminal-Justice-System-FINAL-23-Oct-2016.pdf (accessed 17 August 2017).

73 'What is the criminal justice system' <http://highered.mheducation.com/sites/dl/free/0078026520/953715/Chapter01.pdf>. (accessed 17 August 2017).

74 Lord & Stein (n 29) 110.

75 L Kalaluka 'Towards an effective litigation strategy of disability rights: The Zambia experience' (2013) 1 *African Disability Rights Yearbook* 168.

4.1 Equality before the courts and the right to fair trial

Article 13(1) of the CRPD specifically requires states parties to ‘ensure access to justice for persons with disabilities on an equal basis with others’. This entails that persons with disabilities should be availed all rights and procedural safeguards during pre-trial, trial and post-trial phases of proceedings.⁷⁶ As the examples below demonstrate, persons with disabilities in Malawi face challenges due to lack of accessibility of and access to relevant information and failures to provide procedural accommodation.

For example, once a person has been arrested section 20A of the CPEC requires that the police must promptly inform the person of the fact that he has been arrested and also inform him/her of his/her rights as an arrested person.⁷⁷ If the person arrested is a child, additional safeguards for his/her well-being are provided in section 20D of the CPEC.⁷⁸ In all cases, an arrested person must not be subjected to ‘more restraint than is necessary to prevent’ his/her escape.⁷⁹

One question that immediately emerges with regard to these provisions relates to the mode of communication that must be used in informing an arrested person of the fact of his arrest and his rights. On this point, it is clear that the CPEC has assumed that all arrested persons can be communicated to using the same means of communication. The result is that if the police were faced with a suspect who has both visual and hearing disabilities, they would have no guidance from the CPEC in terms of how to communicate the fact of the arrest and the rights of the arrested person. The provision of sign language, for example, would be dependent on the initiative and goodwill of the arresting officer. While the CRPD and the Disability Act require reasonable accommodation to be extended to any persons with disabilities in the situation just described there is nothing in the CPEC from whence a duty to extend accommodation could be premised. This shortcoming is particularly perilous since the CPEC is the primary statute governing the pre-trial and trial handling of all suspects.

It should also be noted that the police are empowered to search people that they arrest and take over for safekeeping any items in the suspect’s custody other than necessary wearing apparel.⁸⁰ From experience, what this entails is that the police will remove everything from the person of the suspect including belts, shoes, wallets and anything else that they deem could be used to assist escape or could be used in the commission of other

76 OHCHR (n 50) para 18.

77 Sec 42, Constitution of the Republic of Malawi.

78 Further safeguards when arresting a child can be found in sec 90 of the Child Care, Protection and Justice Act 22 of 2010.

79 Sec 23, CPEC.

80 Sec 24, CPEC.

crimes while in custody. In so far as the mode for conducting searches is concerned, a search on a woman must be conducted by a woman and the converse is applicable for men.⁸¹ Searches must, however, be conducted with due regard to decency.

The manner in which the police are empowered to conduct searches, as per the CPEC, offers no guidance in terms of how they must deal with persons with various disabilities. Following the procedure for conducting searches as prescribed by the CPEC, it is possible that persons with disabilities using assistive devices could have the same taken away from them while they are being put under custody. This would leave such persons vulnerable to further violations of their rights.

In so far as equality and fair trial are concerned, it is important to recall that in disability-rights discourse, language and terminology matter significantly. This is because the terms and labels that have been used in connection with persons with disabilities, have in turn tended to colour peoples' perceptions of persons with disabilities and also determining what rights to accord them.⁸² Some of the terms employed in Malawian criminal law, are pejorative, unpleasant and demeaning for persons with disabilities.⁸³ Such language is not in conformity with the CRPD as well as the Disability Act. By way of example, section 139 of the Penal Code provides as follows:

Any person who, knowing a woman or girl to be an **idiot** or **imbecile**, has or attempts to have unlawful carnal knowledge of her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was **an idiot or imbecile**, shall be guilty of a felony and shall be liable to imprisonment for fourteen years. (emphasis provided)

The Merriam-Webster Online Dictionary defines 'imbecile' as 'a fool' or 'idiot' and 'idiot', as 'a person affected with extreme mental retardation'. These meanings are indicative of the connotations that these words have in normal parlance.

While section 139 of the Penal Code may have been aimed at providing protection from sexual abuse for persons with intellectual disabilities, the language used is inexcusable. The language is demeaning to persons with disabilities and also, in its formulation, it is incapable of accommodating differences and diversity among persons with intellectual disabilities. Such language may also negatively influence the manner in

81 Sec 26, CPEC.

82 L Nyirikindi 'A critical analysis of paradigms and rights in disability discourses' (2006) 12 *East African Journal of Peace and Human Rights* 52.

83 Cf P Manatsa 'Are disability laws in Zimbabwe compatible with the provisions of the United Nations Convention on the Rights of Persons with Disabilities (CRPD)?' (2015) 4 *International Journal of Humanities and Social Science Invention* 27.

which other actors deal with persons with disabilities. Such language gives a negative perception of the victim while at the same time diminishing the seriousness of the offence.⁸⁴

It should also be noted that under section 11, the Penal Code stipulates that every person is presumed to be of 'sound mind' until the contrary is proved. Section 12 of the Penal Code permits the defence of 'insanity' for persons suffering from diminished responsibility. Further, section 214A of the Penal Code, dealing with diminished responsibility for murder and manslaughter, provides as follows:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such **abnormality of mind**, whether arising from a condition of **arrested or retarded development of mind** or other inherent cause induced by disease or injury, as has substantially impaired his mental responsibility for his acts in doing or being a party to the killing. [emphasis provided]

The observations made in respect of section 139 above are equally applicable to sections 11, 12 and 214A of the Penal Code. Terms such as 'abnormality of mind', 'arrested development of mind' and 'insanity' are not consistent with the social model of disability which Malawi embraced by passing the Disability Act and ratifying the CRPD. These terms are loaded with prejudice about disability and may compromise the perceptions and actions of actors dealing with persons with disabilities in the criminal justice system.⁸⁵

Perhaps the most glaring omission with regard to the provisions regulating the manner in which police officers must deal with persons with disabilities during and subsequent to arrest is the absence of provisions requiring the police to facilitate access to support services for persons with disabilities. Admittedly, the diversity of disability necessitates different support services. However, in all cases involving persons with disabilities it is important that the police facilitate access to support services to enable persons with disabilities to be dealt with in a manner that respects their rights.⁸⁶ It is hard to imagine, by way of example, how the police can conduct a human-rights compliant interview of a person with intellectual or psychosocial disability without extending necessary support services to such a person. The absence of any law on this point entails that persons

84 Malunga, Kanyongolo & Mbanu-Mweso (n 15).

85 Other provisions that highlight the same problem include sec 211 of the CPEC which refers to a witness who is 'unable to speak' as 'a dumb witness' and sec 32(4) which refers to 'mental infirmity' as a condition that police officers must consider before releasing a suspect with a caution.

86 Australian Human Rights Commission (n 13) 18.

with disabilities are not guaranteed access to support services when dealing with the police.⁸⁷

All the above notwithstanding, it must be conceded that the rather bland provisions governing the conduct of searches, for example, are capable of being employed to preserve the rights of persons with disabilities. For example, a creative interpretation of section 23(3) and 23(4) of the CPEC supports the conclusion that any search should proceed only if reasonably required and, under section 26 of the CPEC, any search must be conducted 'with strict regard to decency'. Such an interpretation, coupled with proper training for law enforcement officers, would ensure that the conduct of searches upholds the rights of persons with disabilities. The challenge with the current situation, however, is its unpredictability. Whether rights of persons with disabilities are respected during a search, for example, depends on the conduct of the police officer on the scene and not because of clear prescription of law.

Overall, the interaction between the police, whether as investigators or prosecutors, and persons with disabilities in Malawi is complicated by the fact that the Malawi Police Service (MPS) does not have standardised procedures for dealing with persons with disabilities.⁸⁸ There is no mandatory training in disability rights both during recruitment as well as after recruitment. The treatment of persons with disabilities who come into conflict with the law, therefore, remains largely dependent on the competences and skills of the officer on the ground.

4.2 The right to an effective remedy

Equal and effective access to justice remains critical to persons with disabilities. This includes available and accessible complaint mechanisms, investigative bodies and institutions, including independent judicial bodies capable of determining and awarding reparations; and adequate, effective and prompt redress and reparation for harm suffered. Equal and effective access to justice also covers access to relevant information concerning violations and mechanisms for reparations.

In relation to the right to an effective remedy, it should be recalled that the first engagement that one has with the criminal justice system is often through contact with the police as a victim, suspect or witness. For many people, this is often a novel experience. Aside from the novelty of the first

87 For example, under sec 32A(4)(d), CPEC, a police officer may, upon effecting an arrest, caution the suspect and release him/her. One of the conditions that the police officer may consider in determining whether to release the suspect or not is the 'mental infirmity' of the suspect. While the language of the provision is certainly archaic, it is an example of a provision that can be utilised to accommodate persons by diverting them from the mainstream criminal justice system depending on the allegation against them.

88 Author interview with Deputy Commissioner of the Malawi Police Service Police, M Kaluba, 7 September 2017.

time engagement, persons with disabilities face additional challenges when dealing with the police.⁸⁹ For example, disability is a major risk factor when assessing vulnerability to torture, cruel, inhuman or degrading treatment or other forms of abuse.⁹⁰ Persons with disabilities are thus more exposed to violations of their rights when they come into contact with the police than members of the larger population.

In respect of the above, several points can be noted. First, and as earlier pointed out, an arrest in Malawi must follow section 20 of the CPEC. While section 20 of the CPEC requires an officer to actually touch or confine the person to be arrested, force can only be used if the suspect resists and it must be commensurate to the exigency. If a person is charged with a criminal offence arising out of a lawful arrest in which force was used, a court determining whether the necessary degree of force was used may have regard to the gravity of the offence which was being allegedly committed by the person and the circumstances of the offence. Further, under section 28 of the CPEC a police officer may, without warrant, arrest a person whom he finds loitering in any highway or place during the night who he suspects has committed a felony or is about to commit a felony.⁹¹ The power to arrest without a warrant extends to cover any person considered to be a vagabond or habitual thief or a person who fails to give a satisfactory account of himself/herself.⁹²

At first glance these provisions seem neutral and without any particular implications for persons with disabilities. Close scrutiny, however, reveals some of the challenges that persons with disabilities may encounter when the law is applied to them. By way of example, while a standard arrest requires 'touching and confinement', this may not be very straightforward where the person to be arrested has severe walking disability and is confined to a wheelchair. Further, the provisions on making an arrest offer no guidance on how a police officer must, for example, deal with persons having intellectual and psychosocial disabilities. If, by way of illustration, a person suffering from psychosocial disabilities being arrested is deemed to be resisting arrest, force is likely to be used on him/her. There is nothing in the law that guides the police to factor in disability-related concerns when effecting arrests.

89 Australian Human Rights Commission (n 12) 18.

90 Report of the Office of the High Commissioner for Human Rights 'Expert seminar on freedom from torture and ill-treatment and persons with disabilities' (11 December 2007) <http://www2.ohchr.org/english/issues/disability/docs/torture/seminartorturereportfinal.doc> (accessed 22 August 2017).

91 Sec 28(f), CPEC. There is also the possibility that this provision may be used to target persons with intellectual disabilities who are not under care and wander in the streets.

92 Sec 29, CPEC. The power to arrest persons considered to be vagabonds, habitual thieves or those that fail to give a satisfactory account of themselves must now be understood in the light of the decision in *Mayeso Gwanda v The State* Constitutional Cause 5 of 2015, where the High Court found sec 184(1)(c) of the CPEC to be unconstitutional.

The absence of explicit guidance on how to handle persons with disabilities during arrest, entails that the arresting officer is left with discretion to improvise in dealing with persons with disabilities. This can bring about contradictory results depending on whether the officer involved is well versed in disability rights or not. On the one hand, this could be an opportunity if the officer is familiar with protocols for dealing with persons with disability. On the other hand, in the case of an officer unfamiliar with disability rights, this poses challenges for persons with disabilities and may lead to violation of rights.

Second, procedures incidental to the commencement of criminal proceedings also deserve mention. For example, under section 85 of the CPEC 'every summons' issued by a court 'shall be in writing, in duplicate, signed and sealed' by an officer of the court. The summons must also contain a statement of the offence with which the person is charged and the particulars thereof. In terms of service of summons, section 87 of the CPEC directs that summons must be served personally by a police officer, an officer of the court or other public servant and a person receiving the summons is required to acknowledge service by signing the duplicate of the summons. Failure to attend court after a summons has been issued exposes the person summoned to a fine. Additionally, in preparing a charge sheet, section 126 of the CPEC directs that every charge must contain a statement of the offences alleged together with particulars of the offence. The detailed rules for framing charges are contained in section 128 of the CPEC and these emphasise the need to use precise language when preparing charges. By way of illustration, section 128(a)(ii) provides that the statement of offence shall be 'short and shall describe the offence in ordinary language' while section 128(a)(iii) provides that 'after the statement of offence, particulars of such offence shall be set out in ordinary language'.

The commencement of criminal proceedings is notable for its emphasis on writing and the use of 'ordinary language'. This emphasis, if applied rigidly, may result in marginalisation of persons with disabilities within the criminal justice system. While the CPEC has not defined what is meant by 'ordinary language', practically, this refers to English. Admittedly, the use of English in Malawian courts affects not only persons with disabilities, but also many Malawians who are not conversant with the language.⁹³ Nevertheless, for persons with disabilities this is a further burden considering the other disadvantages that they have to endure.

The procedure for framing of charges, it is argued, has made no provision for accommodating the various disabilities that accused persons may have. The assumption seems to be that crafting charges in 'ordinary language' is sufficient to ensure effective communication to everyone.

93 The general disadvantage arising from using English is, for the population at large, mitigated by translation of court proceedings into local languages.

There is no statutory requirement directing that charge sheets and summons be prepared in formats that accommodate the needs of persons with disabilities. Additionally, the service of summons is also straight-jacketed and makes no accommodation, for example, for service on persons with visual disabilities or other disabilities that may make reading a challenge. Nevertheless, if a person with disabilities fails to attend court upon being summoned, he/she may be condemned to pay a fine. It is ironic that a sanction can be imposed even when non-compliance with the summons may be for reasons that are structurally embedded in the criminal justice system itself.

4.3 Participation in the criminal justice system

Under the CRPD, for persons with disabilities to have access to justice on an equal basis with others, they must be able to participate directly or indirectly at all stages of proceedings.⁹⁴ Direct participation refers to those instances where a person with disability acts as a claimant or defendant or in any other capacity as a party to the proceedings. Indirect participation refers to other roles that contribute to the administration of justice such as a witness, expert, juror or judge.

There are several provisions relating to the conduct of criminal trials that raise red flags for persons with disabilities. For example, section 138 of the CPEC allows a court to proceed with a trial or committal proceedings even where the accused does not understand the proceedings as long as he/she is not insane. 'Insanity', it seems, is the only condition that would necessitate stopping proceedings and adopting a different procedure.⁹⁵ It defies reason why a court would proceed with a trial even when the accused does not understand proceedings. This provision is also oblivious to the fact that there is a range of disabilities that may challenge a person from following a trial conducted in the traditional manner and not just 'insanity'. Effective participation by persons with disabilities in judicial proceedings requires that a trial should only proceed when the accused can confirm that he/she is following the proceedings.

Further, section 163 of the CPEC provides for the manner in which evidence must be recorded during a trial. According to this section, all evidence must be 'in writing in the language of the court' or in the presence a presiding officer under his direction and superintendence. Under section 164 of the CPEC, if the evidence is given in a language that is not understood by the accused, it must be interpreted into a language that can be understood by him/her. Additionally, section 211 of the CPEC allows a witness who is 'unable to speak' to give his/her evidence in any manner in which he can make it intelligible by writing or signs. Upon the

94 OHCHR (n 50) para 54.

95 As to the procedure for dealing with 'insane' accused persons, see secs 134-136, CPEC.

conclusion of a trial, an accused person is also entitled to a copy of the court's judgment 'in a language he understands'.⁹⁶

From the perspective of participation in the criminal justice system by persons with disabilities, three things can be noted. First, the language of the court in Malawi is English and all court records are prepared in English.⁹⁷ There is no provision to record the evidence or translate a judgment into, for example, braille or any other medium. Second, section 211 of the CPEC, though supposedly directed at 'dumb witnesses', can be utilised to accommodate witnesses who have a speech disability by permitting them to employ, for example, sign language in giving their evidence. Third, the law requires that evidence must be translated into a language that can be understood by an accused person and that a copy of the judgment, upon request, should be given to an accused person in a language that he/she understands. Since the law has not limited the language into which a judgment or evidence must be transcribed, under a broad interpretation of these provisions, courts are at liberty to facilitate translation of a judgment or the court record into braille or other forms of communication accessible to persons with disabilities. However, the failure to have the above suggested measures of accommodation embedded in the law entails that persons with disabilities would be hard pressed to demand such accommodation where the court is not amenable to providing them.

It should also be noted that jury service in Malawi exempts persons with 'mental infirmity'.⁹⁸ The CPEC has not defined 'mental infirmity' but, as earlier pointed out, this type of language is demeaning. It is also language that is very woolly and incapable of accommodating a diversity of intellectual disabilities. It overgeneralises lack of legal capacity for persons with intellectual disabilities. It presumes, rather broadly, that persons with intellectual disabilities are completely incapable of making intelligible decisions.

4.4 A repository of opportunity?

Under section 93 of the CPEC, the Chief Justice is empowered to make rules for the better conduct of all criminal proceedings in Malawi. Further, under section 367 the Chief Justice may, by notice published in the Gazette, prescribe forms that are to be used in criminal proceedings in Malawi. Two points can be noted here. First, the Chief Justice can utilise section 93 to adopt rules that can transform the CPEC into a disability

⁹⁶ Sec 141, CPEC.

⁹⁷ Shorthand notes and electronic records may be made of proceedings at trial, sec 365, CPEC and a copy thereof may be given to any person affected by the judgment, sec 366, CPEC. This mode of capturing proceedings still excludes many persons with disabilities especially those with visual and hearing impairments.

⁹⁸ Sec 296(k), CPEC.

rights-compliant code. Second, all the prescribed forms under the CPEC are in English and there is no obligation to ‘translate’ them into a format that can be accessible to various persons with disabilities. Nevertheless, utilising the power under section 93, the Chief Justice can remedy this shortfall by prescribing forms that accommodate various disabilities. There is, therefore, embedded within the CPEC opportunity for making Malawi’s criminal procedure more aligned with principles in the CRPD and Disability Act.

In so far as the Penal Code is concerned, section 3 can be used to generate disability rights compliant interpretations of the criminal law. Section 3 provides that the Penal Code ‘[s]hall be interpreted in accordance with the principles of legal interpretation that – take full account of the principles and provisions enshrined in the Constitution’. While this provision does not give the court *carte blanche*, it is a provision that can be utilised to deduce disability compliant interpretations of the penal law. Crucially, the Constitution is very emphatic on human rights. By constantly factoring its stipulations into the interpretation of all criminal law, therefore, courts can, even without legislative intervention, ensure that the criminal law is applied in a manner that fully accords with the rights of persons with disabilities. Similarly, from a procedural perspective, section 3 of the CPEC is relevant and can be used to enhance access to justice for persons with disabilities. Section 3 stipulates that the principle that substantive justice should be done without undue regard for technicality shall at all times be adhered to in applying the CPEC. This provision can be used to lessen the hardship that some provisions of the CPEC may impose on persons with disabilities by allowing courts to focus on substantive justice rather than technical procedural aspects.

The penultimate part of this paper presents some recommendations following from the analysis conducted herein.

5 Ensuring access to justice for persons with disabilities in Malawi: Proposals on the way forward

The major challenges in Malawi’s criminal justice system, so far as persons with disabilities are concerned, stem largely from the fact that the key statutes undergirding the system predate the CRPD, the Disability Act and the Constitution. Resultantly, these statutes were not explicitly crafted to accommodate rights of persons with disabilities. In line with article 4(1)(b) of the CRPD, therefore, the obligation on Malawi is to either modify these laws or adopt new laws to make the criminal justice system compliant with the rights of persons with disabilities.

In so far as, for example, the language employed in some of the statutes is not compliant with the principles in the CRPD, the Disability Act and the Constitution, such situations require amendment of the law. In other instances, however, and pending the adoption of the necessary amendments, courts can adopt creative interpretations of existing laws to support the rights of persons with disabilities. Addressing the deficiencies in the criminal justice system by way of interpretation requires a concession that the ratification of the CRPD and the adoption of the Disability Act have created a need to realign all laws in Malawi in line with the rights of persons with disabilities. Crucially, it also presupposes the presence of competent criminal justice sector personnel in all the relevant agencies to undertake this task.

To illustrate the above, section 139 of the CPEC requires a court to pronounce the substance of every judgment in court in the presence of the accused person and upon request to read the entire judgment in court. While this section has not made provision for accommodating persons with hearing disabilities, a court, relying on the CRPD, the Disability Act and the Constitution, can nevertheless proceed to provide sign language interpretation in delivering its judgment. Additionally, under section 99 of the Child Care, Protection and Justice Act, a preliminary inquiry must be held in respect of any child suspected of being responsible for a crime before plea is taken. Even though this section does not refer to disability, it is sufficiently broad to allow a child justice court to accommodate disability related issues in processing a suspected child offender. In the main, therefore, barring the amendment to key statutes in the criminal justice system, courts applying the principle of reasonable accommodation can still make substantial progress in realising the rights of persons with disabilities. Against this background, this section of the paper presents some proposals for improving Malawi's criminal justice system in order to align it with the rights of persons with disabilities.

5.1 The need for a thorough audit of all laws in the criminal justice system

The social model of disability requires a holistic understanding of persons with disabilities and their right to access justice. In Malawi, and specifically in relation to the criminal justice system, a thorough disability rights-focused audit of all laws having a bearing on the criminal justice system is a must. The audit must identify all laws that negatively affect the rights of persons with disabilities. Such an audit would form the basis on which recommendations for either repeal of laws or for further training of criminal justice actors can be conducted. In line with the principle of full and effective participation, such an audit must involve persons with disabilities and their representative organisations so that the ways in which the various laws affect persons with disabilities can be properly articulated and factored into the audit.

5.2 Amendment of non-compliant laws

The examples discussed earlier, from the CPEC and the Penal Code, confirm that the language used by Malawi's criminal law is, in certain aspects, archaic and not consonant with the rights of persons with disabilities. To rectify this situation, there is need to amend all such statutes to make them compliant with the CRPD, the Disability Act and the Constitution. To ensure that rights of persons with disabilities are fully accommodated in this process, however, it is important to precede the amendment of laws by the audit that has earlier been referred to. For the avoidance of doubt, amendment of laws must not simply target the language in the laws, but also the procedures that do not accommodate the rights of persons with disabilities.

5.3 Disability rights training for criminal justice system actors

According to a recent study, the dearth of knowledge about disability rights within the justice sector in Malawi is pervasive and overwhelming.⁹⁹ This emphasises the need for appropriate training of all actors in the justice sector. Police officers, magistrates, lawyers, judges and court clerks all require training on disability rights. In the case of police officers, for example, they must be trained in, amongst other things, how to process persons with various disabilities during investigations and when conducting arrests. Magistrates and judges must be trained on the way in which courtroom procedures can uphold rights of persons with disabilities. Clerical staff working with the courts must also be trained to deal with persons with disabilities in a manner that respects their rights.¹⁰⁰ Lawyers must also be trained on the specific nuances involved in litigating disability rights cases. Overall, therefore, all programmes designed to strengthen the criminal justice system must include a disability component.¹⁰¹

5.4 Domestication of the CRPD

It is commendable that Malawi ratified the CRPD. However, considering the dualist nature of its legal system, it is important that steps be taken to domesticate the CRPD. Domestication would be the clearest indication of Malawi's commitment to uphold the CRPD. Domestication would also provide Malawi with an opportunity to reflect on disability issues that are

99 Malunga, Kanyongolo & Mbanu-Mweso (n 15).

100 Currently, court clerks and interpreters in Malawi are not specifically trained to deal with persons with disabilities. For example, if there is need for sign language translation a decision must be made to find a translator but the judiciary does not have such translators – Author interview with former Registrar of the High Court and Supreme Court of Malawi, Joseph Chigona, 24 August 2017. Translation of records into braille also would require outsourcing.

101 Ortoleva (n 12) 315.

specific to Malawi and hence requiring concerted local effort.¹⁰² To bring full meaning to the domestication, it would also be important for Malawi to ratify the Optional Protocol to the CRPD. Ratification of the Optional Protocol would enhance available avenues for potential litigants in relation to rights under the CRPD by adding the Committee on the Rights of Persons with Disability to the possible fora that one could approach. Further, and in tandem with domestication of the CRPD, it is also important for the government to support programmes designed to generate public awareness about the CRPD. Specifically in relation to access to justice, domestication would enhance clarity about the access to justice for persons with disabilities seeing as the Disability Act does not have an explicit provision on the same.

5.5 Legal education

Members of the legal profession remain key in facilitating access to justice for persons with disabilities, but they may have no understanding or may lack the skills necessary to interact with people who have disabilities.¹⁰³ Generally, lawyers receive no formal training in law school for dealing with persons with disabilities. Institutions training lawyers, therefore, must have dedicated courses dealing with disability rights in order for lawyers to properly fulfil their role in facilitating access to justice for persons with disabilities. In this connection, therefore, the fact that the University of Malawi, which remains the sole local institution for training lawyers, has over the past eight years been teaching disability rights as part of its human rights curriculum is commendable.¹⁰⁴

Systematic training of legal professionals in disability rights can create a cadre of legal professionals capacitated to deal with various disability rights issues. While the training of legal professionals is important, to improve access to justice for persons with disabilities, it is also important to take steps that can increase the enrolment of persons with disabilities in institutions that train legal professionals. On this score, the University of Malawi has, historically, not done very well.¹⁰⁵ It still lacks facilities for ably supporting persons with, for example, visual or hearing disabilities. The result is that it has graduated a negligible number of persons with visual and hearing disabilities. In order to improve this situation, the University of Malawi needs to systematically dismantle the barriers that have traditionally prohibited persons with disabilities from training as

102 Cf Kaluluka (n 75) 182.

103 Gibson (n 70) 128.

104 'Championing disability rights: The law school programme' <https://www.cc.ac.mw/news/championing-disability-rights-the-law-school-program-19-02-2016> (accessed 10 April 2020).

105 E Kamchedzera 'Access and equity for students with disabilities at the University of Malawi: The case of Chancellor College' in T Halvorsen, H Ibsen & VRP M'kumbuzi (eds) *Knowledge for a sustainable world: A southern African-Nordic contribution* (2015) 71-92.

lawyers. This would also require that serious attention be paid to schemes of reasonable accommodation that could assist learners with disabilities when they enrol with the University. The fact here is that law schools are vehicles for potential change with respect to disability rights and it is important that this potential must be harnessed.

6 Conclusion

Although Malawi ratified the CRPD and adopted the Disability Act, this by itself has not led to an amelioration of the rights of persons with disabilities. Clearly, therefore, ratification of international instruments and adoption of policies and statutes will count for nothing unless deliberate effort is expended in implementing the policies and laws.

In terms of the criminal justice system and access to justice for persons with disabilities in Malawi, this paper has demonstrated that there are several areas requiring improvement if the rights of persons with disabilities are to be fully realised. In some instances, all that is required is the implementation of reasonable accommodation measures through creative interpretation of the existing laws while in other instances, amendment of the laws may be necessary. However, to proceed systematically with either the amendments or reasonable accommodation measures, it is important to conduct a full audit of the laws having a bearing on the criminal justice system so that the problematic areas are identified and isolated. Further, it is also important to conduct disability rights training for all actors in the criminal justice system and to include disability rights training as part of the curricula in law schools. Finally, it remains very important for Malawi to domesticate the CRPD and ratify the Optional Protocol. Considering the breadth of the criminal justice sector in Malawi, the analysis in this paper has simply been indicative of the issues and possible solutions.