



**REPORT ON ACCESS AUDIT OF COURTS IN LILONGWE:  
JUSTICE FOR PERSONS WITH DISABILITIES**

December 9, 2016  
**Disability Consulting Services**  
MARGARET WAZAKILI (PhD)

## **ACKNOWLEDGEMENT**

This access audit was made possible by funding from the Disability Rights Fund and Disabled Women in Africa, which commissioned the study extends sincere gratitude to the organisation. Many thanks to the Justice System for granting permission to assess the selected courts around Lilongwe. Most importantly, we appreciate the time and information that participants provided for this study.

### Disclaimer

“This document was produced with funding from the Disability Rights Fund. Statements of fact and opinion in the present report are those of the respective authors and contributors and not of the Disability Rights Fund. DRF does not make any representation, express or implied, in respect of the accuracy of the material in this “report/proposal/brief/document” and cannot accept any legal responsibility or liability for any conclusions, assumptions, errors or omissions that may be made.”

**DISABILITY  
RIGHTS  
FUND**

## **ACRONYMS**

CBR	Community-Based Rehabilitation
CRPD	Convention of the Rights of Persons with Disabilities
DIWA	Disabled Women in Africa
DRF	Disability Rights Fund
NDA	National Disability Authority
PAFOD	Pan African Federation of Disabled
PAFWC	Passion for Women and Children
PWD	Persons with Disabilities
RAC	Rights Advice Centre
TA	Traditional Authority
VSU	Victim Support Unit
WHO	World Health Organisation

## **EXECUTIVE SUMMARY**

Persons with physical, sensory, psychosocial and intellectual disabilities have limited access to justice due to factors, ranging from misperceptions and age-old discrimination towards people with disabilities. Some groups are more vulnerable than others, but the entire population experiences one form of challenge or another. This monitoring and evaluation exercise was commissioned by Disabled Women in Africa and the main aim was to examine the accessibility of the court environment, for people with disabilities to access justice.

Multiple qualitative data collection methods were utilised, gathering information from multiple sources. These included document reviews, observations, key informant and individual interviews. Gender balance was ensured in the sample that comprised people with disabilities, Magistrates and Prosecutors. A total of 15 participants took part in the study. All interviews were tape recorded and transcribed verbatim. Participants signed consent forms or gave verbal consent if they were unable to read or write or they use Braille. They were also provided information sheets about the study and those who could not read, were told in detail what the study was about. An access audit checklist was utilised to assess the inside and outside of court premises.

In spite of a conducive international and national disability policy environment, this study has found that the court premises have varying levels of physical inaccessibility for wheelchair users and the blind. Barriers include lack of ramps, handrails, rough terrain outside the court, lack of disability parking space, inaccessible toilets, in terms of door handles that are too high for a wheelchair user and lack of circulation space within the toilets. All the court buildings are old and one is actually dilapidated without even toilet facilities for staff and clients. Furthermore, most people with disabilities who need court services are not able to access these due to long distances or lack of communication in Sign Language. Even those that have come in contact with the justice system, they are not entirely satisfied with the service because of lack of legal representation and reasonable accommodation in court proceedings. Most participants in this study could not mention specific rights of persons with disabilities. Personnel from the justice system have not received training on disability matters except a one-week introduction to Sign Language. To this end, they still use derogatory terms to refer to persons with disabilities.

If access to justice is to be achieved for this population, there is a need to empower the whole justice system with information on current trends in the disability sector. Similarly, people with disabilities need to know their rights and how to demand or claim these.

<b>ACKNOWLEDGEMENT</b> .....	1
<b>ACRONYMS</b> .....	2
<b>EXECUTIVE SUMMARY</b> .....	3
<b>1. INTRODUCTION</b> .....	6
<b>2. BACKGROUND</b> .....	6
2.1 Universal designs .....	9
<b>3. MAIN OBJECTIVE</b> .....	9
<b>4. SPECIFIC OBJECTIVES</b> .....	10
<b>5. METHODOLOGY</b> .....	10
5.1 Setting .....	10
5.2 Study Sample .....	10
5.3 Data Collection .....	10
5.3.1 Document Reviews .....	10
5.3.2 Observations .....	11
5.3.3 Key informant interviews .....	11
5.3.4 Individual interviews .....	11
5.3.5 Case study .....	11
5.4 Data analysis .....	11
<b>6. ETHICAL CONSIDERATIONS</b> .....	11
<b>7. LIMITATIONS OF THE STUDY</b> .....	12
<b>8. FINDINGS</b> .....	12
8.1 Introduction .....	12
8.2 Rights of Persons with Disabilities .....	13
8.3 Barriers to justice .....	14
8.4 Opportunities .....	15
8.5 Challenges .....	16
8.6 Justice .....	17
8.6.1 Legal representation .....	18
8.6.2 Reasonable Accommodation .....	19
8.6.3 Personal experience .....	19
8.7 CASE STUDY .....	20
<b>9. RECOMMENDATIONS</b> .....	21
<b>10. Conclusion</b> .....	22
<b>REFERENCES</b> .....	24

**APPENDIX 1** ..... 25

## **1. INTRODUCTION**

Persons with physical, sensory, psychosocial and intellectual disabilities have limited access to justice due to several factors, including misperceptions and age-old discrimination against these specific disability groups. Although it is known that persons with disabilities (PWD) may interact with the courts of law as offenders, victims or witnesses, little is known about their experiences of the justice system. Similarly, the extent to which personnel around the courts is conversant with issues of disability, in the context of exercising impartiality in the delivery of justice towards PWDs has not been widely documented in Malawi. Through Disabled Women in Africa's (DIWA) project aimed at increasing the reporting of incidents of exploitation, violence and abuse, many persons with disabilities are now reporting such cases to police. This monitoring and evaluation exercise has thus, been commissioned to identify the actual and perceived obstacles to accessing justice for people with disabilities in selected courts around Lilongwe.

## **2. BACKGROUND**

Disabled Women in Africa (DIWA) is an independent organisation of disabled women that was formed as a subcommittee of the Pan African Federation of disabled (PAFOD) in 2002. Although DIWA's name and vision appear to be gender biased, the organisation works with both men and women, boys and girls with disabilities. In addition, DIWA works with two coalition partners, namely, Passion for Women and Children (PAWOC) and the Rights Advice Centre (RAC) to achieve its goals through research, information sharing, networking, fostering partnerships and capacity development. It is through the work of these partners that gaps within the justice system in relation to disability, have been revealed.

The World Health Organisation (2001) defines disability as an umbrella term that covers impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations (WHO, 2001). Disability is thus not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a person's body and features of the society in which he or she lives. Overcoming the difficulties faced by people with disabilities requires interventions to remove environmental and social barriers. In the context of this study, we explored the interaction between people with disabilities and the justice system, including the court environment.

The National Disability Authority (2002) defines an access audit as an exercise that rates an existing building against given criteria for usability and accessibility. It involves not only the issue of ready movement to and around the building, but also the use by people with sensory or intellectual disabilities, of the services, which the building provides. International and national policy frameworks advocate for non-discrimination of person with disabilities, upholding this group's right to participate fully within society and in the justice system. To this effect, a built environment and reasonable accommodations as outlined in the Convention on the Rights of Persons

with Disabilities (CRPD) (2006), play an important role in achieving access for persons with disabilities. Furthermore, the CRPD sets out what countries should do to ensure that people with disabilities have the same rights as everyone else, and it states that they:

- i. Are entitled to equal protection and equal benefit of the law
- ii. Have the same legal rights and obligations as people without disability
- iii. Have an equal right to use the law to protect and pursue their interests
- iv. Should enjoy equal and effective access to justice
- v. Must be provided with the adjustments and support they need to enjoy their
- vi. Other human rights if they have had their personal freedom taken away
- vii. Should only have their personal freedom taken away if there is a lawful and proper reason to do so and not just because a person has a disability.

This means that people with disability should be protected by the law, be able to use the law and to participate in all stages of legal processes and procedures on an equal basis with others in the community. Furthermore, in the precepts of Article 13 of the Convention on the Rights of Persons with Disabilities, "Access to Justice" is a wide-ranging concept that includes effective access to the systems, procedures, information, and locations used in the administration of justice.

The Australian Human Rights Commission (2013) has identified 5 key barriers that limit or prevent access to justice for people with disability as summarised below:

*Barrier 1.* Community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disability. This means that people with disability are left without protection and face ongoing violence, or have repeated contact with the criminal justice system because appropriate programs and community support are not available.

*Barrier 2.* People with disability do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.

*Barrier 3.* Negative attitudes and assumptions about people with disability often result in people with disability being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings.

*Barrier 4.* Specialist support, accommodation and programs may not be provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'). Instead, they are often indefinitely detained in prisons or psychiatric facilities without being convicted of a

crime. This situation mainly happens to people with intellectual disability, cognitive impairment and people with psychosocial disability.

*Barrier 5.* Support, adjustments and aids may not be provided to prisoners with disability so that they can meet basic human needs and participate in prison life. They often face inhuman and degrading treatment, torture and harmful prison management practices.

At national level, the Constitution of Malawi is the highest law of the land and has specific provisions pertaining to persons with disabilities as outlined below:

*Section 13:* Principles of national policy provide for enhancing the dignity and quality of life of *persons with disabilities* by providing adequate and suitable access to public places; fair opportunities in employment; and the fullest possible participation in all spheres of the Malawian society.

*Section 13:* All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law, and the best interests and welfare of children shall be the primary consideration in all decisions affecting them. All children shall be entitled to reasonable maintenance from their parents, whether such parents are married, unmarried or divorced, and from their guardians; and in addition, all children, particularly orphans, *children with disabilities* and other children in situations of disadvantage shall live in safety and security and, where appropriate, State assistance.

*Section 20:* Equality: Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, *disability*, property, birth or other status or condition.

In addition, the Disability Act of 2012 states that ‘the government of Malawi will ensure that persons with disabilities have access to the physical environment, transport, information and communication technologies and systems and other facilities and services provided to the public’. One of the ways for achieving this is by developing, promulgating monitoring and implementing universal standards and guidelines for the accessibility of all available facilities and services. Although under review, the National Policy on the Equalisation of Opportunities for Persons with Disabilities of 2006 provides guidelines for implementation of disability services, consistent with the provisions of equality enshrined in the Constitution of the country.

On the technical side, the code of practice of the ‘Malawi Standard’ relates to principle human abilities that should be considered when designing, constructing and managing the built environment Malawi Standard, (2016). When fully implemented, the stated ‘Standard’ should benefit all people, including those with hearing, visual, mobility and cognitive disabilities. Those with invisible impairments (such as allergies, low strength, stamina and dexterity) as well as people with diversities in age and stature (including frail persons) should profit.

In the light of a range of such policy obligations, making the courts more accessible is a compelling goal on many fronts. The National Disability Authority (2002) argues that the issue is not only about justice, but it is also about fostering good business and social sense through inclusive development. In addition to the development of a more inclusive and equal society, an accessible environment offers the following advantages:

- More people with disabilities can enter the premises/courts and use the services;
- Accessibility improves overall safety of buildings/courts, which has a direct impact on the number of accidents taking place and therefore the cost of insurance premiums;

An accessible environment gives greater customer and staff satisfaction and can improve public perception and recognition of the justice system National Disability Authority (2002). People with disabilities, particularly those with intellectual, psychosocial, hearing or speech impairment, are often vulnerable to different forms of injustice, such as attitudinal and societal. They also lack adequate information on how to respond to such occurrences. Consequently, it is difficult for them to access justice for a variety of reasons, including difficulties in making themselves understood. Police stations and courts of law do not generally have officers who understand sign language. In addition, courts tend to be inaccessible to different disability groups both physically and otherwise. Therefore, it is imperative for organisations and the government to strive and ensure that persons with disabilities are not excluded or marginalized and have access to justice.

## **2.1 Universal designs**

This implies that all public and private building are constructed in such a way that they would be accessible all people without and with physical, sensory, psychosocial and intellectual disabilities. Obviously, the current courts did not benefit from specifications of the 'Malawi Standard' referred to above. These Standards include a range of requirements and recommendations for elements of construction, assemblies, components and fittings which comprise the built environment. The requirements relate to the constructional aspects of access to buildings, to circulation within buildings, to egress from buildings in the normal course of events and evacuation in the event of an emergency (Malawi Standard, 2016). The Malawi Standard contains provisions with respect to features in the external environment directly concerned with access to a building or group of buildings from the edge of the relevant site boundary or between such groups of buildings within a common site. This access audit was carried out in the context of the objectives outlined below.

## **3. MAIN OBJECTIVE**

The main objective of this study was to examine the accessibility of the court environment, for people with disabilities to access justice.

#### **4. SPECIFIC OBJECTIVES**

1. To determine challenges that persons with disabilities face in accessing justice and
  - a. Establish opportunities within the justice system for persons with disabilities to be treated with fairness.
2. To assess the legal capacity of persons with disabilities to seek justice and
  - a. The 'Magistrates' ability to exercise impartiality when dealing with PWD.
3. To recommend appropriate accommodations for persons with disabilities in the justice system and the Victim Support Unit.

#### **5. METHODOLOGY**

The monitoring and evaluation activities were largely qualitative in design, investigating attitudinal and societal barriers to accessing justice for people with disabilities. The study also involved assessing the built environment, that is, court building premises, using an access audit check-list. This exercise lasted a month, from 08.11.16 to 06.12.16. A key informant interview guide was developed for Magistrates, Prosecutors and other stakeholders; while an individual interview guide was developed to use with people with disabilities. The multiple nature of the data collection methods ensured that the results be rich in depth and breadth.

##### **5.1 Setting**

The study took place at selected courts within Lilongwe District that fall under the jurisdictions of TA Malili, TA Kalolo, TA Tsabango, TA Chitukula and TA Njewa. However, TAs Malili and Kalolo have court buildings situated in their areas from which they hear all cases. While TAs Tsabango and Njewa have no physical court structure in their own areas, and so they use Lilongwe courts for all hearings. Specific Magistrates are assigned to hear cases from these two visiting TAs. Although situated in Lilongwe, TA Chitukula's court conducts all hearings in Dowa District due to its close proximity to the Lilongwe area.

##### **5.2 Study Sample**

A total of 15 participants took part in the study. They comprised 6 (3 males and 3 females) Magistrates, 5 (2 females and 3 males) Prosecutors, 4 persons with disabilities-(2 males and 2 females).

##### **5.3 Data Collection**

Five data collection methods outlined below were used to gather information from multiple sources. All interviews were tape recorded and transcribed word for word.

###### **5.3.1 Document Reviews**

Several documents and literature were reviewed, including international and national policy documents. These include the Convention on the Rights of Persons with

Disabilities, The Constitution of Malawi, the National Policy on Equalisation of Opportunities, the Disability Act of 2012 and literature accessed online.

### **5.3.2 Observations**

A checklist was modified from the standard form obtained from the Federation of Disability Organisations in Malawi (FEDOMA) and used to assess the built environment. Suffice to say that all the five court premises were assessed for:

- a. General accessibility, including the presence of parking bays, arrival areas, entrances, circulation areas, ramps, stairs, handrails, and toilets.
- b. The presence of designated disability car spaces in the car park, position of accessible or inaccessible doors and toilets;
- c. Good or bad practice in relation to management of facilities that the courts have in place; positive accessibility features (e.g. counter loop at reception, signage and good use of lighting and appropriate colours throughout the courts);

### **5.3.3 Key informant interviews**

At each of the five courts, magistrates and prosecutors were identified as key persons around the justice system to participate in interviews. These included at least one Prosecutor and one Magistrate per court.

### **5.3.4 Individual interviews**

Persons with disabilities who had sought justice or those that had come in conflict with the law, participated in individual interviews. These were two men and two women that have experienced the justice system through Malili and Kalolo Magistrates courts.

### **5.3.5 Case study**

The experience of one blind man is presented in a little more detail under results section. We recorded typical interaction of a person with a disability with the justice system.

## **5.4 Data analysis**

A thematic content analysis was used to make sense of the data.

## **6. ETHICAL CONSIDERATIONS**

Permission to conduct the access audit was sought from the Chief Resident Magistrate, the Senior Magistrates and Senior Prosecutors in the five courts around Lilongwe. Participants were provided with information sheets that contained details about the study and everyone with sight signed a consent form prior to the interview. The blind couple and one lady that could not read or write, gave verbal consent. Participants were assured of confidentiality and anonymity, as well as their right to withdraw from the study should they feel uncomfortable at any time.

## **7. LIMITATIONS OF THE STUDY**

Time was limited to do justice to the amount of data collected.

Some people with disabilities who had had contact with the court system could not be reached because of communication barriers. There was no possibility of communicating with them by phone and others live very far from the courts.

## **8. FINDINGS**

### **8.1 Introduction**

*Physical Access:* The main objective of this study was to examine the accessibility of the court environment, for people with disabilities in terms of accessing justice. For this reason, reporting on findings starts off with a brief summary about the findings of the access audit of the physical structures of the courts around Lilongwe. As stated above, these were T.As Malili, Kalolo, Tsabango, Chitukula and Njewa. Details about space-sharing arrangements between some of these courts are reflected under item 5.1 above. Suffice to state here that all court structures were constructed in more or less the same fashion, with big but open style windows that almost look like half walls with pillars between them. While this is great for allowing fresh air into the court-room, it is inappropriate for people with hearing impairment as the open spaces interfere with the acoustics in the room. Court proceedings need to be loud and perhaps with measures in place to minimise any noise from outside, which is bound to destruct people's attention.

None of the court rooms have private rooms for hearing of child-cases, but we were informed that there are specific courts for children only. In addition, all court rooms are inaccessible for wheelchair users and blind clients, in terms of accessing the main pathway and/or entrance into the court. However, the two rooms that serve as First Grade Magistrates court and the one Senior Magistrates Court in Lilongwe have accessible circulation areas but inaccessible docs (Small enclosure in which the accused and the defendant stand during hearings). The Kalolo court is the only one with a ramp and hand rail at one of the main entrances into the court room. Meanwhile, the Nathenje court is the most inaccessible of all, both at the main entrance and inside the court. The circulation space between inbuilt brick-benches is very narrow. All the courts have inaccessible toilets for wheelchair users. Obstacles range from door handles that are too high, narrow entrances into the toilet and definitely lack of circulation areas inside. Notably, the Nathenje court is dilapidated and has neither staff nor clients' toilets. Staff indicated that they have learnt to ensure they do not eat while at work, from morning through to evening, to minimise any need to visit the toilet (See appendices for access audit forms). In summary, this exercise has revealed that the physical structures and premises of selected courts in Lilongwe have limited, and in some instances, no access to persons with different types of disabilities. This is one of the many ways by which the justice system denies this population its right to access court buildings and by implication, denial of justice.

## 8.2 Rights of Persons with Disabilities

It has been demonstrated that persons with disabilities often feel marginalized by society and specifically, by the justice system. Ortoleva (2011) indicates that 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 because they face many barriers. Similarly, Larson (2014) found that no nation has met the challenge of ensuring that persons with disabilities participate fully in the justice systems. This assertion is consistent with the findings of this study, where participants demonstrated limited knowledge about the rights of persons with disabilities, in the context of accessing justice. Below are excerpts from participants regarding human rights, barriers, challenges, opportunities and other factors pertaining to issues of access to justice for this population. The first specific objective of this study was to assess the legal capacity of persons with disabilities in seeking justice. This study has shown that most people with disabilities believe that the rights are the same and equal for those with and without disabilities as indicated below:

**PWD<sup>1</sup>:** The rights of people with disabilities, I think are just the same with those who are able. There should be no difference, because if we differentiate the rights then, somehow we are putting those with disabilities to the other side.

**M:** Any other person's rights before the court of law are equal. Before the court of law everybody is equal. So people with disabilities are not exceptional.

While it is true that the rights of persons with disabilities are the same as everyone else's, failure to articulate the specific disability rights or mentioning the word 'disability' in legal frameworks often leads to complacency. Service providers erroneously assume that people with disabilities will automatically access any service without special considerations. The reality is that although this population has the same needs and aspirations like all human beings, they face many obstacles in accessing services, including the justice system. Precise circumstances to do with impairments, activity and participation limitation (WHO, 2001), prevent them from accessing justice in the same way as everyone else. It is therefore important to know the specific rights as stated below:

**P:** People with disabilities have a right to privacy, a right to be heard, a right to remain silent, even though they are being charged.

It is not enough to know the disability specific rights, people with disabilities need to know when they are treated unfairly and how to seek redress or claim their rights. Similarly, the justice system needs to ensure that these rights are realised for all

---

<sup>1</sup> For the purposes of reporting findings, **PWD** stands for person with a disability; **P** stands for Prosecutor and **M** stands for Magistrate. The specific names of persons and courts have been withheld for anonymity and confidentiality purposes.

disability groups that pass through the courts. Failure to act in this way leads to this population suffering all forms of injustice. When court officials know specific rights pertaining to persons with disabilities, they can determine any omissions or miscarriage of justice. Such knowledge would also come handy in helping them exercise reasonable accommodations during administration of justice to the population under discussion. Knowing exact disability rights is the first step to recognising barriers to justice for people with disabilities.

In the same vein, Section 15 of the Constitution of Malawi (2010) concerning protection of human rights and freedoms, states that any person or group of persons, shall be entitled to the assistance of the courts, the Ombudsman, the Human Rights Commission and other organs of Government to ensure the promotion, protection and the enforcement of those rights and the redress of grievances in respect of those rights. However, this constitutional obligation does not make a distinction between persons with and without disabilities, in spite of common barriers to justice that the population under discussion experiences.

### **8.3 Barriers to justice**

Barriers can be physical, architectural, attitudinal and societal, and are experienced by all disability groups at different times of their lives. In terms of barriers to justice for people with disabilities, these include stereotypes and prejudices, lack of legal capacity and legal representation, lack of accessibility and reasonable accommodations, fear of the justice system, poverty and long distances to courts (Ortoleva, 2011). Such barriers limit the ability of this population to use the justice system and to contribute to the administration of justice to society and to their own communities. Although barriers to justice are common to all disability groups, some are disability-specific. For example, the deaf community experiences communication barriers more than those with physical disabilities or the blind that are affected by inaccessible offices and long distances to courts as indicated by the following participants:

**PWD:** I think most of the courts are in very far places. So travelling to those places is difficult. Most of the courts were built in ancient times, they were not considering those with visual or any other disabilities...

Consistent with above quotation, the results of an access audit of the physical premises of 5 courts around Lilongwe showed that none meets the recommended accessibility standards as indicated in item 8.1 above. The participant above rightly points out that these courts were constructed long before the recommended standards for universal access were formulated. For this reason, it is hoped that construction of all new public buildings would use the Malawi Bureau of Standards guidelines for constructing new and accessible buildings for all persons. Where possible, all renovations of old buildings would also follow similar accessible standards in the best way possible.

**M:** Yes, barriers are there ...it depends on the disability... For example, if a person doesn't see or hear, there is a problem, usually communication breakdown. But in terms of any other disability... there isn't a problem at all.

In this quotation, the Magistrate rightly points out some disability-specific barriers for the blind and deaf clients. However, his claim that other disability types have no problems is misguided, because all disability groups experience one form of obstacle or another in accessing justice. It is common, when exploring issues of disability for people to assume that what they do not know does not exist. Such assumptions can lead to omissions in the delivery of justice.

**P:** For example, some people who are deaf cannot be heard because there may be no interpreters. Sometimes they may be helped wrongly and also convicted wrongly. So there is always miscarriage of justice for them.

This study has established that all the 5 participating courts have no sign language interpreters. Therefore, communication is a major barrier to accessing justice for the deaf community. Similarly, attitudinal and cultural barriers are equally critical in the miscarriage of justice among persons with psychosocial and intellectual disabilities. Participants in this study indicated that they have never attended any training to do with the challenges that different disability groups experience, except for the first ever training on Sign Language that was organised by Disabled Women in Africa and was in progress during data collection for this study.

#### **8.4 Opportunities**

Despite challenges in the justice system, the presence of conducive policies provides opportunities for advancing the delivery of justice to persons with disabilities. For instance, Section 41 of the Constitution of Malawi (2010) regarding access to justice and legal remedies states that every person shall have a right to recognition as a person before the law. Every person shall have the right to access any court of law or any other tribunal with jurisdiction for final settlement of legal issues. Every person shall have the right to an effective remedy by a court of law or tribunal for acts violating the rights and freedoms granted to him or her by this Constitution or any other law. In line with this provision, participants indicated a number of opportunities available to them for upholding the constitutional rights of all persons that come before the law as outlined below.

**M:** Because of this training (Sign Language) we are undergoing, organised by DIWA, I think there will be some assistance to people with disabilities. We will be able to communicate with them properly because in our case, we have the magistrates and even the court clerks who are undergoing this training.

The above quotation shows the importance of training as an opportunity available to court officials. This will bridge the gap and reduce communication barriers in working with the deaf community. The presence of international and national legislation is both an opportunity and constant reminder for the justice system to work fairly, in the interest of people with disabilities.

**P:** In terms of justice, everyone is treated equally. We separate the young and the old because at times the young, when they commit offences they do not even know what they are doing or the implications of their actions. They just know that they have taken, and not actually stolen something. If they are placed together with older people, they may learn bad behaviour. So they are separated, we have juvenile cells and adult courts. Even the police when they are interrogating the child, they should not be in uniform so that the child is not scared.

Considerations made for children as indicated above are another opportunity for the justice system to build, rather than harm children, including those with disabilities. Article 42(g) of the Constitution of Malawi states that if a person is under the age of sixteen years, he/she should be treated in line with the special needs of children, which, include to be imprisoned only as a last resort and for the shortest period of time, consistent with justice and the protection of the person. Thus, existing statutes help court officials to make considerations for children with disabilities who may become victims or come in conflict with the law.

## **8.5 Challenges**

This study also set out to determine challenges that persons with different types of disabilities face in accessing justice. It has been established that they experience unfair encounters at personal level, as victims seeking justice, but also as offenders or witnesses. Specific challenges have to do with not being taken seriously or believed, not able or allowed to tell their side of the story and simply not being heard because of their disability. It may very well be that the despair that comes about because of failure to communicate or to be listened to, compels this community to fight, and come in conflict with the law, out of sheer frustration.

**M:** The challenges they have is communication. Those with visual Impairment need someone to assist them to go to the courts to access justice. For those in wheelchairs, it's also a problem. There are some rooms like in our offices, they don't have spaces for wheelchair users.

As alluded to earlier, communication and physical access are the common challenges that were identified, over and above the cultural beliefs about disability that most people hold. Ignoring the challenges and the needs of this population is problematic as stated below:

**P:** I have never seen any effort to say people with disabilities can be helped. As an example, some of these may have been raped in the villages I have never seen the government provide transport for example, to bring them here because some of them are using wheelchairs or bicycles and cannot reach here. So I have never heard where it was said that the government was planning to help them. This is a problem that is not being tackled by anybody.

**P2:** A woman was raped, she could not walk. Both of her legs were amputated and she was using a wheelchair. So we called her and she said

she had no transport. The community protection officer had brought the issue to court.

In the end, the woman in question did not receive justice and the offender went free because neither the police, the court nor the woman herself had transport. Unavailability of resources also affects the extent to which people with disabilities can access justice. Article 6 of the CRPD adopts a gendered lens-recognizing the multiple and intersecting dimensions of women's lives, while Article 12 requires equal recognition before the law. Article 13 includes the right to access to justice, requiring States to provide procedural and age-appropriate accommodations, to facilitate effective participation. Because women with disabilities have rights under both the CRPD and the Constitution, States Parties have a due diligence obligation to afford them full and fair legal capacity, and access to the justice system. This includes awareness raising about women's rights and how the justice system can provide protection to victims, given that sometimes sexual offenders are close relations.

## 8.6 Justice

The concept of justice is the fifth element under the Social Principle of the Community Based Rehabilitation (CBR) Matrix (WHO, 2004). In spite of the concept being operational in 14 Districts, it has not spread to all districts, including Lilongwe. It would have been nice to evaluate its impact in facilitating provision of information about issues of justice for people with disabilities. Access to justice includes considerations for people with different types of disabilities as crime victims, defendants, suspects and witnesses. The jurors, judges and lawyers are also part and parcel of the process (Leenknecht, 2013). This means that all parties are involved during justice administration and investigation, even consultations with systems outside judicial mechanisms, such as the Victim Support Unit and the Ombudsman. Most disability related cases in this study did not go in favour of the victim with a disability.

**PWD:** Justice was not served fairly especially on the judgment procedures. What they were asking from me (Fine) was more compared to what I earn in a month. Moreover, she took everything from the house as if I was not buying anything. They said that everything should go to my wife and on top of that, I was to pay K740, 000.00 so, it was a bit not fair to me.

The quotation above is from a blind participant, married to a partially sighted woman. While the husband felt that he had not been treated fairly by the justice system, his wife felt that judgment favoured the man. She felt that the court was lenient on the man because of his disability, arguing that he has not changed his habits because the court did not impose an acceptable behaviour as a condition for his release.

**P:** In the case of a 2-year old that was defiled by a person with an intellectual disability, justice was not served for the girl-child. *Asked what should have happened, P responded:* The accused, if he would have been taught sign language, he could have been helped, he was just mumbling

one word that's why he was sent to the hospital. The court could not get what he was saying.

This quote demonstrates the limited knowledge about disabilities among some prosecutors and various members that make up the justice system. Firstly, the team did not weigh the harm done to the two-year old compared to efforts they would have made in finding ways of showing the man with an intellectual disability that he had committed a crime. Secondly, most judicial officers are still using old disability terminology because they are not aware that the country has adopted acceptable terms for referring to persons with disabilities. Thirdly, if the family, community, the doctor, the prosecutor and the magistrate knew something about intellectual disability, they would have asked the court to use the principle of reasonable accommodation to hand-down appropriate punishment for the offender.

**P:** In the case of a woman with bilateral amputation, justice was not served because neither the client nor the justice system had transport to bring her to court. The offender was arrested and discharged because of lack of evidence, even though I kept him in custody for 3 months.

This was a case of a woman with a disability who was raped, but she had no means of transport to appear in courts for the hearing of her own case. Depending on the frequency of such difficulties with transportation, it may very well be that the offenders would work out they can walk free from any case against a person with a disability, and so commit crimes deliberately knowing that there would be no consequences to them. Besides, not all police stations have Victim Support Units for civil cases that can be settled out of court through mediation. Some participants in this study had good experience, while others felt that not all police officers know how to handle cases at this level. Similarly, it was agreed that most persons with disabilities have no access to legal representation.

### **8.6.1 Legal representation**

Another specific objective was to explore Judges'/Magistrates' ability to exercise impartiality when dealing with PWD. Section 42 (a) of the Constitution of Malawi regarding arrest, detention and fair trial provides for every person who is held, including every sentenced prisoner, to have a right to be informed, to be represented by a legal practitioner of his or her choice or, where it is required in the interests of justice, to be provided with legal representation at the expense of the State, and to be informed of these rights. In spite of this provision, the majority of participants in this study have had no training on disability matters and most persons with disabilities are often not represented in court.

**PWD:** I was not represented by any Legal Aid official...

Although in theory, the government provides for Legal Aid to represent those who cannot afford, participants indicated that this department is not only short staffed, but it also takes minimum fees from clients. This in itself is a deterrent for those who cannot afford to pay. In the same light, the concept of reasonable accommodation was not familiar for many.

### 8.6.2 Reasonable Accommodation

Majority of participants did not understand the meaning of the expression 'reasonable accommodation', we had to explain the concept before they would appreciate what we were talking about:

**PWD:** It's when one is asking for justice, then there is need to hear him or her and assist him or her accordingly. In my case, they didn't use reasonable accommodation, because if they had used that, then they would have heard me the first day up to the end. They were some that refused me to say more or ask questions..... So they did not accommodate me.

It is clear that the person with a disability felt that his physical status did not move the court to apply reasonable accommodation and treat him fairly. In this context, such omissions constitute miscarriage of justice. In the context the disability sector, reasonable accommodation includes considerations for child friendly courts. It is also about provision of court proceedings in Braille, assessment of clients to determine their psychosocial or intellectual disability status as well a need for communication in sign language or interpretation of the same.

### 8.6.3 Personal experience

Sections 139 and 155A of the Penal Code (2010) of Malawi refer to persons with intellectual disabilities as idiots or Imbeciles. It was therefore, not surprising that most magistrates and prosecutors in this study were not aware that disability terminology has changed from derogatory to more humane language. This was evidenced by their continued use of very old disability terminology as stated above even though the world has moved on to new and acceptable terms. For example 'the disabled' has been replaced with persons with disabilities; 'idiot or imbecile', has been replaced with a person with an intellectual disability, to mention but these two. Meanwhile, participants reported dealing with cases of communication difficulties, defilement and sexual abuse more than other forms of violence against persons with disabilities.

**M:** Yah, I have had one as a victim who was an '*imbecile*' (person with an intellectual disability)...there was a problem that we could not communicate because he could not speak clearly, but through his parent.

**P:** I remember one who was accused of defiling a girl of 2 years. He was an '*imbecile*' (a person with an intellectual disability). He could no interact well with people. The girl-child was represented by her mother and 10 year older brother who saw the man defile the child. In the end, the court ordered the accused to be taken to the doctor to verify whether he was mentally sound. So the Dr's report confirmed that he was an 'imbecile' and the court just discharged the offender....

As stated above, firstly, the Penal Code needs to be reviewed to use current disability terminology. Secondly, it was clear that court officials have not received appropriate training on disability matters, and so their decisions are not informed by

current thinking on the subject. It is also obvious that Doctors are the only group outside the court system that is often consulted on disability matters; in spite of the fact their own training on the subject is based on the medical, rather than social model of disability. Given this gap in the consultation process, the justice system should be advised to engage disability experts or social scientists who are well placed to explain and advise courts on such matters. In the context of the offender referred to above, he would not have been released without any charges against him if the court had access to information on intellectual or psychosocial disability.

Consistent with the findings of this study, the Australian Human Rights Commission (2013) observes that specialist support, accommodation and programs are often not provided to people with disability when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'). Instead, like the case under discussion, the offender was simply discharged. In other instances he would have been detained in prison indefinitely or at a psychiatric facility without being convicted of any crime. This miscarriage of justice mainly happens to people with intellectual disability, cognitive impairment and psychosocial disability.

## **8.7 CASE STUDY**

This is what happened: I am married and some time there were some disagreements between me and my wife, and she decided to pack up and go to a nearby house where she stayed. I remained alone for one month. I think people advised her to go to court so that I can pay her off and she did just that. So when I went to court, I told them I was not divorcing. But the court officials were asking me to divorce. I said no, I cannot do that because that's not what I was aiming for. We went to the court almost four times. When passing judgment, they asked me to pay K50, 000.00' and at that time I had no money, so they detained me from 8.30 am to 7.30 pm. Then, I asked some people to assist me and I borrowed K50, 000.00 to pay them back K75, 000.00. I paid the court K30, 000.00 at first and they released me.

After a month, they sent me a reminder and I failed to pay. Then they sent someone from Lilongwe to my school under false pretext. She said let us just go together and tell the court that you are failing to pay the money because you are facing other challenges. But when we got to court, what they did was very wrong to me, the woman just said, 'I have come with the man that you wanted.' So they locked me up in the office from 1.30pm to 10.30pm. By that time they were saying that if I do not pay the money I will be sent to Lilongwe. During all this, my wife and I had been discussing about reconciliation so that she should come back home. So I called and told her that I had been found guilty, can she come and bear witness about what we had agreed. She came by 3.00pm, which was good time but they still kept me locked in till 10.30pm when they released me and told me to go with my wife. We walked....because she is partially sighted - up to the main road with lots of challenges. Fortunately, a minibus was coming from Lilongwe and it picked us up to this place.

## **9. RECOMMENDATIONS**

The last specific objective of this study was to recommend appropriate accommodations for persons with disabilities in the justice system, in particular the role of Victim Support Unit (VSU). To this effect, majority of participants felt that the VSU is useful in terms of providing a free mediation service. Some felt that the establishment of this unit sifts a lot of cases that would otherwise have inundated the courts. There is only one magistrate who suggested that placing the VSU at the police station is a conflict of interest. She argued that people are generally afraid of the 'Police' institution and they cannot be free to bring their grievances or indeed to open up freely about issues for fear of victimisation. The following are key recommendations that have emanated from this study.

1. There is a need for this study to be replicated throughout the country, using mixed methods research to reveal the extent of the problem both quantitatively and qualitatively. It is important to roll out disability training in phases to meet the needs of the entire justice system from Clerks through to Judges.
2. The Constitution, the Penal code and any other policy documents that were published before 2009 when Malawi ratified the CRPD, should be reviewed for appropriate disability terminology.
3. In the short term, DIWA should write to the Director of Public Prosecutions and the Chief Justice to draw their attention to the urgency of enforcing use of appropriate disability terminology as the first step in respecting the rights of PWD. In the same vein, DIWA should lobby the courts to ensure that matters of shame involving persons with disabilities should be testified in private.
4. Similarly, a letter should go to the High Command office of the Police to recommend that the Victim support Unit should be relocated away from Police premises, to avert the fear associated with the law enforcement unit.
5. There is a need for renovations of old structures and ensuring that all new structures meet the specifications of the Malawi Bureau of Standards. Likewise, a monitoring system that ensures that all new developments are accessible to persons with different types of disabilities needs to be established.
6. It is critical to train persons with disabilities and court officials about disability rights. Such knowledge would help dispel misperceptions about disability and the justice system.
7. Disability organisations and interested stakeholders need to be empowered to sit in court whenever there is hearing of a case involving a person with a disability to advise the court officials and support the victim or offender with a disability. They need to monitor how people with disabilities are treated in court and guide the process accordingly.

8. As court procedures are going on, someone needs to be typing the information, including the judgment in Braille. It is important for blind clients to be reading what is going on, in case they have missed some of the statements in court.
9. There also needs to be Sign Language interpreters whenever there is a deaf person involved in a court case. Such interpreters should be persons that are very conversant with the language and can be trusted to 'sign' the truth only. The courts need to be seen to implement the laws of the country without modify matters according to personal perceptions.
10. The government should build more rehabilitation centres to offer different kinds of services to persons with disabilities. The current situation presents a challenge because the majority, especially those with intellectual or psychosocial disability, are left to roam the streets alone and they are likely to commit offenses over and over again. Similarly, children with disabilities have no one to speak out for them if their parents do not know the rights of a child.
11. Deliberate effort should be made to ensure a comprehensive and inclusive rights-based approach to people with disabilities in the context of their participation in the larger justice system. All programmes should be accessible, while ensuring that each individual's strengths and capacities are improved.

## **10. Conclusion**

Although the courts are doing their best to meet the justice needs of persons with disabilities, this monitoring and evaluation exercise has revealed limitations of the courts around Lilongwe. These do not cater for access needs of different disability groups. Regarding other justice matters, majority of participants were not able to articulate disability specific rights, except to state that these are similar for persons with and without disabilities. The study has established that the justice system is fraught with physical, attitudinal and societal barriers to justice for every disability type.

In spite of a conducive international and national disability policy environment, this study has found that the court premises have varying levels of physical inaccessibility for wheelchair users and the blind. Barriers include lack of ramps, handrails, rough terrain outside the court, lack of disability parking space, inaccessible toilets, in terms of door handles that are too high for a wheelchair user and lack of circulation space within the toilets. All the court buildings are old and one is actually dilapidated without even toilet facilities for staff and clients. Furthermore, most people with disabilities who need court services are not able to access these due to long distances or lack of communication in Sign Language. Even those that have come in contact with the justice system, they are not entirely satisfied with the service because of lack of legal representation and reasonable accommodation in court proceedings. Personnel from the justice system have not received training on

disability matters except a one-week introduction to Sign Language. To this end, they still use derogatory terms to refer to persons with disabilities.

As stated above, the judicial system would do with regular training on disability matters, ranging from conceptions of disability, to types of disabilities and mitigation measures that are disability-specific. More importantly, it is hoped that the findings of this study will improve access to justice for the target population.

## REFERENCES

Australian Human Rights Commission (2013) Access to justice in the criminal justice system for people with disability. Issue Paper. Accessed online

[Http://www.humanrights.gov.au](http://www.humanrights.gov.au)

Malawi Government. (2010). Constitution of Malawi.

Convention on the Rights of Persons with Disabilities (2006). Article. 13, U.N. Doc. A/RES/61/106.

Malawi Government. (2012). Disability Act.

Larson D.A. (2014). Access to Justice for Persons with Disabilities: An Emerging Strategy. *Laws* 2014, 3, 220–238; doi:10.3390/laws3020220. Online: [www.mdpi.com/journal/laws](http://www.mdpi.com/journal/laws). (Accessed 03.11.16).

Leenknecht (2013) Ensuring access to justice for persons with disabilities in EU law, UN CRPD and beyond. European Disability Forum.

Malawi Standard Board. (2016) Code of practice: Building construction — Accessibility and usability of the built environment. First edition ISO 21542:2011.

National Disability Authority (2002)

Malawi Government. (2006) National Policy on Equalisation of Opportunities for Persons with Disabilities.

Ortoleva, S. (2011). Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System, 17 *ILSA J. Int'l & Comp. L.* 281.

Malawi Government. (2010). Penal Code

WHO. (2001). International Classification of Function, Disability and Health.

WHO. (2004). Community-Based Rehabilitation Matrix.

**APPENDIX 1**



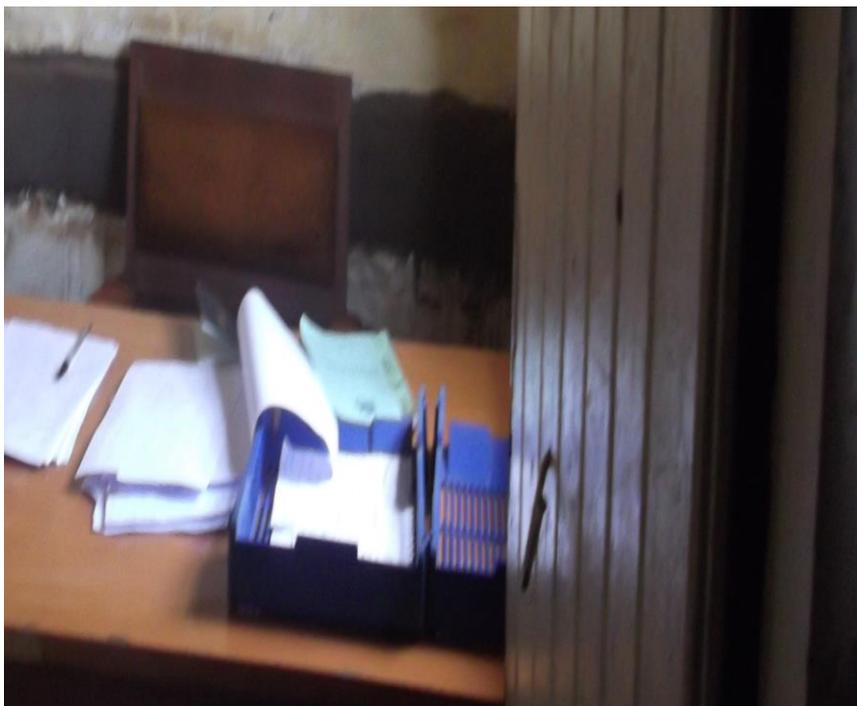
1. Back entrance first court room



2. Back entrance to second court room



3. Back of an old dilapidated court room



4. Chamber



5. Main entrance into a court room



6. Entrance into the registry



7. Entrance into a make-shift urinal room



8. Exhibit room 1



9. Exhibit room 2



10. Entrance into another court room