



CHILD PARTICIPATION AS VICTIMS OR WITNESSES IN CRIMINAL CASES IN MALAWI

National Report for AIMJF's Comparative and Collaborative Research.

La participación de niños como víctimas o testigos en causas penales en Malawi

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

La participation des enfants en tant que victimes ou témoins dans des affaires pénales au Malawi

Rapport national pour la recherche comparative et collaborative de l'AIMJF

Malawian Judiciary

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation as victims or witnesses in criminal cases. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Malawi.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre la participación de niños, niñas y adolescentes como víctimas o testigos en causas penales. El artículo explica los aspectos legales, institucionales y procesales de la participación infantil en el sistema de justicia en Malawi

Résumé : Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur la participation des enfants en tant que victimes ou témoins dans des affaires pénales. L'article explique des aspects légaux, institutionnels et procéduraux de la participation des enfants dans le système de justice au Malawi

Introduction

The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

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The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of how child participation as victims and witnesses in criminal cases is organized worldwide.

This national report is based on a questionnaire prepared by AIMJF.

Questionnaire

1. **Right to be heard**

1.1. Are children presumed to be capable witnesses (or presumed invalid/untrustworthy by reason of their age alone, or similar)?

>Child Care, Protection and Justice Act (CCPJA)

The Act does not explicitly state that children are presumed incapable of being witnesses solely based on their age. Instead, it emphasizes the need to consider the best interests of the child in any legal proceeding.

>Criminal Procedure and Evidence Code (CPEC):

Section 210 of the CPEC allows for the testimony of children. It provides that a child's evidence can be admitted if the court is satisfied that the child is able to understand the questions put to them and can provide rational answers.

1.2. Are there any restrictions to the right to be heard (minimum age, or other criteria)?

>There is no specific minimum age mentioned in either the Child Care Protection and Justice Act or the Criminal Procedure and Evidence Code that restricts a child's right to be heard. However, the child's ability to understand the proceedings and communicate effectively is taken into consideration. The court has the discretion to determine if the child is competent to testify based on their understanding and ability to communicate.



1.3. Are children allowed to refuse to make a statement? If so, in which cases?

>The CCPJA and CPEC do not specifically address the circumstances under which a child can refuse to make a statement. Generally, children, like adults, have the right to refuse to testify in certain situations, especially if the testimony may incriminate them or cause undue harm.

2. Broad perspective of the legal framework and procedure

2.1. Is there a specific legal framework that defines how to treat child victims/witnesses of crime (e.g. special norms in the criminal procedural code, special child code, special victims code, etc)?

> There are some Practice Directions which were issued by the office of the Chief Justice to guide practice when dealing with children as victims and witnesses.

>There is also a Compendium of Laws for the Protection and women from Sexual and Gender Based Violence available to provide an easy reference for all laws available to ensure there is appropriate treatment for children as victims/witnesses.

2.2. Is there any coordination between different role players (such as the police, education, social services, health system) to initiate legal proceedings and coordinate response (evidence collection and intervention), including avoiding multiple interviews of the child? Is there any flowchart in your country to coordinate these interventions? If so, could you please share it?

> The National Child Justice Forum

> Technical Working Groups at National and District levels

>Case management guidelines & case flow charts

2.3. Can you briefly explain what are the major steps of the legal procedure in criminal cases (felonies) with child victims or witnesses involved?

a) Investigation: The Police investigates the alleged crime, collects evidence, and interviews witnesses, including the child if necessary.

b) Arrest: If sufficient evidence is found, the suspect is arrested.



- c) Charging: The prosecutor reviews the evidence and decides whether to file charges and what charges to file.
- d) Preliminary inquiry: Preliminary Inquiry is an Informal hearing where a Probation Officer presents his findings and allows those present to give their views. The main objectives of this inquiry is establish whether the matter should be referred to the Child Justice Court to be dealt with in accordance with the provisions of the CCPJA, provide an opportunity to the prosecutor to assess whether there are sufficient grounds for the matter to proceed to trial and to determine whether the matter should proceed to court, withdrawn.
- e) Trial: If the case goes to trial, both sides present their evidence and witnesses, including child testimony if applicable.
- f) Judgement: The Judge or Magistrate delivers a Judgement based on the evidence presented.
- g) Order : If the defendant is found liable, the Judge/ Magistrate imposes an order.
- h) Appeal: The defendant has the right to appeal the order.

2.4. In which moment(s) can a child be heard in this procedure?

- a) During the Investigation: The child may provide a statement to the police.
- b) Pre-trial Hearings: The child may testify in hearings regarding the admissibility of evidence or competency to testify.
- c) At Trial: The child can be called as a witness to provide testimony under oath.
- d) Sentencing: In some cases, the child's statement might be considered during sentencing, particularly in victim impact statements.

2.5. Does the child have the power to initiate, suspend or terminate the criminal procedure (such as giving consent for the complaint or the possibility to refuse consent or revoke consent)? If so in which cases?

>Criminal proceedings are initiated by the police and the Director of Public Prosecutions (DPP). A child cannot independently initiate these proceedings. The power to consent, refuse consent, or revoke consent in criminal matters rests with the prosecutor, not with a child victim or witness. These guidelines ensure that child victims and witnesses are protected throughout the criminal justice process while also ensuring that justice is served.



3. Preparation for the child participation

3.1. Is there in your country specific child-friendly information material for children as victims or witnesses (e.g. brochure, video etc)? If so can you please share them?

> No specific ones from the courts, but several institutions have some IEC materials on processes including those relating to court processes which include victim/witness issues relating to children. Such IEC platforms include a Television program beamed on the National Television (Malawi Broadcasting Corporation Television) called *The Court*, the various IEC brochures and fliers produced with support from UNICEF and covering various processes relating to protection of children.

3.2. How do children have access to these materials? (e.g. brochure available at police station/court; brochure sent to the child together with summon; witness preparation conducted in court with support of a video, or with support of a special professional; investigator/judge orally explaining in child-friendly language before interview/hearing, or any other?) How long before the interview/hearing does this happen?

> In addition to the television broadcasts some of the material is shared with institutions where children seek various services such as schools, social welfare offices, children's corners health centres and others.

3.3. Is there any assessment of the child conducted before a child is interviewed/heard? If so, what is assessed / for what purpose (e.g. background and circumstances of child; whether the child would be able to speak freely; capacity of child to express him/herself; capacity to participate, if uncertain; capacity to handle interview and possible effects; potential vulnerabilities and special needs, etc)? If so, what is the legal background of their professional conducting this assessment? To which institution does this professional belong? Is there any kind of report produced?

> Normally, every child who is a victim of an offence, especially those that are sexual, physical or emotional in nature, are supposed to undergo an assessment and assistance at the One Stop Centre (OSC) which is a service that brings together health, social welfare, police (including investigation), psychosocial counsellors, and legal services for purposes of coordinating services for SGBV cases, with a special focus on children. When the child seeks services from the OSC, usually accompanied by a responsible adult, they are



provided preliminary information on the services that are available and taken through the interviews based on the issue at hand. Throughout the interviews there are professionally trained officers from all the service institutions and the child is provided the necessary support to ensure that they are voice out their concerns freely and where extreme needs be, they are provided with further counselling. The interviews culminate in a report which becomes part of the investigation documents that are later tendered as evidence in court.

3.4. Is there any kind of contact or evaluation with the parents or legal guardians?

>Contact with parents/guardians is always there as they are allowed to accompany the child throughout the processes (unless there are serious concerns requiring them not to) and they maintain to have custody of the child unless there are risks requiring the child to be taken into safe custody away from home.

3.5. Is the child allowed/invited to visit the facilities where he or she will be heard prior to the interview/hearing?

> No

3.6. Does the child receive any kind of support prior to the interview/hearing (psychological, social, medical, legal)?

> Yes, throughout the processes the child is supposed to be accompanied by a social welfare officer and prior to appearance in court the OSC provides a comprehensive range of services which include health, psychosocial and legal although the legal aspects are usually provided only by police and paralegal officers.

4. Protection and Support

4.1. Is there any risk assessment conducted for the child victim/witness after a crime has been reported? If so, who conducts it? Is there any specific tool? If so, can you share it please?

> The risk assessment is conducted for the child victim through the police, social welfare and medical personnel that are involved at case intake at the OSC.

4.2. In case of identification of risks, what kind of protective measures are available in your country?



> The Prevention of Domestic Violence Act (PDVA) provides for the possibility of protection orders

> Child Care, protection and Justice Act (CCPJA) provides for removal of the child from original habitat to a place of safety or to the custody of an appropriate adult depending on the circumstances.

4.3. What kind of support measures are available for child victims / witnesses of crime (psychosocial, medical, legal) before, during, after the judicial process)

> the orders provided for under the PDVA and CCPJA extend from pre-trial to post-trial period and include any other reasonable measures that the court may deem appropriate and within the law.

4.4. In case of intrafamilial violence, which measures can be / are usually adopted to grant the child's security? Is there any/which kind of support offered to the remaining members of the family? Are there any specific measures in case of child abduction or child kidnapping?

> The protection orders and placement in places of safety apply to ensure the child's security. However, there is minimal support provided to remaining members of the family although they may be considered in such social protection such as Social Cash Transfers and others.

> In terms of kidnapping and abduction, the Child Care, Protection and Justice Act provides for some remedies through prosecution, while the Trafficking in Persons Act (TPA) provides for the broader remedies for related offences.

5. Environment

5.1. In which institution/what kind of environment is the child interviewed/heard in pre-trial/trial phase?

> In pre-trial interviews, the child is interviewed either at police or One Stop Centre where special facilities are provided.

> At trial phase, the child is interviewed either in a specially designed court room using CCTV equipment which keep the child out of the court room but able to communicate with those in the courtroom, or through a one-way screen where the courtroom does not

have CCTV equipment, and in the worst circumstance where the necessary equipment is not available the interviews are done in chambers.

5.2 Is there any specificity in this environment to adapt it for children? (e.g. separate ‘building’ specifically for children; non child- specific building, but separate entrance for children; separate interview/hearing room for children)

5.3. Are there guidelines for the environment where the child is interviewed/heard? (architecture, setting)? If so can you please share it? Can you share a photo of this space?

5.4. Is there a specific waiting area for the child?

5.5. Are there protection measures to avoid direct contact (including visual) between the child and the alleged offender? if so what kind? (e.g. separate entrance, separate waiting area, separate interview/hearing rooms, use of video link, voice or image distortion etc)

> Yes, this is through the CCTV, mobile screens/booths, one-way mirrors and deliberate sitting positions in court when hearing such matters.





5.6. In case identification of the offender is needed, how is this conducted, and where? Identification of the offender is conducted through various methods such as photo lineups, live lineups, or in-person identification. This process usually takes place at a police station or a specialized facility designed to make the child feel safe and comfortable

5.7. If the child lives in a different city in relation to the city where the proceeding is tried, what are the specificities at stake?

>If the child resides in a different city from where the proceedings are held, arrangements are made to ensure the child can participate without undue hardship. This may include providing transportation, and accommodation, or using E-Courts to conduct interviews.

5.8. Is it possible in your country that the interview is conducted virtually (the child and the interviewer are in different places)? In which circumstances? Are any / which special security measures (are) adopted? (circumstances that allow for virtual interviews include the child living far from the court, psychological considerations and where face-to-face interaction may cause trauma to the child.

> The courts have started making use of E-Courts to enhance use of virtual evidence tendering in some matters.

5.9. Must a child appear in court to be interviewed or are recorded investigative interviews admitted as evidence in court? If the child has to appear in court, which circumstances are determinant?

>Common law jurisdictions allow recorded investigative interviews to be admitted as evidence to avoid the trauma of the child appearing in court. However, the child may still need to appear in court under certain circumstances:-

- a) If the defense requests cross-examination and the court deems it necessary.
- b) If the court determines that live testimony is crucial for the case.

When a child does appear in court, measures are often taken to minimize stress, such as testifying behind a screen.

6. Specific legal guarantees for the child



6.1. Does the child have the right to legal assistance? for free? Is this assistance specialized? At what moment does this assistance come in (e.g. already advising whether or not to report a case / during the first interview / only in court / other)

> Yes, the Child Care, Protection and Justice Act provides for free legal assistance at all stages of the legal process although it remains difficult for the state to provide the same due to inadequate numbers of lawyers and paralegals.

6.1.1 What is the role of the legal assistant (representing views of child or best interests of child; advising the child; talking on behalf of the child; ...)?

6.2 Does the child have the right to be accompanied by a support person? If so, what is the role of this person? What is this person entitled to do in support of the child?

> The Child Care, Protection and Justice Act provides for the necessity for a child to be accompanied by a support person throughout the court processes. The support person is responsible for the moral support, assist in the child to understand some issues and with decisions on some issues and others.

6.3. What is the role of parents/legal representative?

> The parents have a role to provide moral support and decision making while the legal representative is to speak on behalf of the child and provide necessary legal guidance.

6.3.1 When are parents/legal representative excluded (e.g. perpetrator, exploitative, intimidating/influencing, non-supportive, conflict of interests...)?

> Parents or legal representatives can be excluded in certain situations, such as when they are:

- a) The perpetrator of abuse or exploitation.
- b) Engaging in intimidating or influencing behaviors that may affect the child's best interests.
- c) Non-supportive or failing to act in the child's best interests.
- d) Involved in conflicts of interest that could compromise their ability to represent the child impartially.

6.3.2. If excluded, is there another legal representative appointed/ if so by whom?

> If a parent or legal representative is excluded, another legal representative is typically appointed to ensure the child's interests are protected. The appointed representative acts in the best interests of the child, ensuring their rights and needs are adequately addressed.

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6.4. What kind of measures are adopted to grant the right to privacy / confidentiality (public excluded / in all cases / in which cases? press statements so that child can not be identified?)

>The child Care, Protection and Justice Act under section ... provides for the confidentiality in matters involving children. In addition to that, the Judiciary adopted standards in proceedings involving children as it has constructed specialized courts for children matters which have all necessary equipment to ensure privacy and confidentiality. When these courts are not available it is standard practice that whenever the court is hearing child related matters, the court sits in chambers.

> in respect of identity, the court records that are meant for the public are initialized to conceal the actual names of the children involved.

6.5. Is the child allowed to plea for cautionary measures?

>Yes, children or their representatives (such as a guardian ad litem) can request cautionary measures to protect the child's well-being. This might include restraining orders, temporary custody changes, or other protective measures. The court will consider these requests, typically evaluating the child's best interests, safety, and welfare.

6.6. Does the child have the right to appeal any decision?

>Children have the right to appeal decisions made by the court. This right is usually exercised through a legal representative or guardian.

7. Interviewing structure and procedure

7.1 Who hears the child victim/witness in the pre-trial phase / who in the trial phase? How often is a child usually heard in total (pre-trial and trial)? Does the law limit the total number of interviews/hearings conducted?

>The Police, Health Personnel, Social Welfare through the coordinated service at the One Stop Centre where the standard practice is to ensure that the number of interview sessions are minimal.

7.2. Is it mandatory that this professional has specific training for child interviews?

>Yes, all the key role players are continuously given training on their roles in serving children in the system.



7.3. Is any kind of interview protocol adopted in your country (pre-trial and/or trial stage)?
If so, which one? If so, could you please share it?

>

7.4. Who is allowed to participate in the interview/hearing? Who is sitting in the same room as the child / who is sitting in another room, if any?

>Pre-trial: The child, his/her parent or appropriate adult, the interviewers (Police, medical personnel, social welfare officer, any other professional required and where circumstances permit, the victim and any other person that may be relevant. In the case of preliminary inquiry, it will be the above listed and an inquiry magistrate.

7.5. Who is addressing the child victim/witness: only the interviewer? cross examination allowed? if only the interviewer, how can other participants ask questions? How is the communication between those who follow the interview and the interviewer? What kind of communication tool is used?

> During court hearing, the cross magistrate, investigator and the accused (or the legal representative where the accused is represented) and cross examination is allowed.

7.6. Is the interviewer allowed not to ask the questions raised by others? Is the interviewer allowed to rephrase the questions raised by others?

7.7. Is the interviews audio and video recorded, if so for what purpose (accuracy of statement, use as evidence in court, use in other courts, other)?

> For some courts, such as the Lilongwe Child Justice Court, which have modern equipment, there is a video recording for purposes of accuracy of statement and court decision making)

7.7.1. In case the recording is admitted as evidence in court: what protection measures can be applied (e.g. image and voice distortion, child heard in a separate room etc)?

When recordings are admitted as evidence in court, several protection measures can be applied to safeguard the child's well-being and privacy:

- a) Image and Voice Distortion: Altering the video to blur the child's face and distorting their voice to prevent identification.
- b) Screens or Partitions: Physical barriers in the courtroom to prevent the child from seeing the accused.

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7.8. How is the quality of the recording? In case of failure in the recording, what are the measures adopted?

How is the quality of recording at Child Justice Court???

IT IS CRUCIAL TO USE HIGH-QUALITY RECORDING EQUIPMENT AND ENSURE THE ENVIRONMENT IS SUITABLE FOR CLEAR AUDIO AND VIDEO CAPTURE .

RE-RECORDING THE TESTIMONY IF FEASIBLE AND IF THE CHILD IS COMFORTABLE.

7.9. If no audio/video recording: is the child allowed to review his or her statements and to correct them? Is the child/legal representative allowed to get a copy of written statement / recording?

If no audio/video recording exists, the child is allowed to review their written statements and make necessary corrections. The child and their legal representative also have the right to obtain copies of the written statements or recordings, ensuring transparency and preparation for court proceedings.

7.10 If there is a special procedure for hearing child victims and witnesses, is it mandatory for the child to participate in such a way or has he/she the right to choose to be heard as any other victim or witness? Are there still adaptations in this case?

>While special procedures are designed to protect the child, it should be considered whether participation in these procedures is mandatory. The child should have the right to choose to be heard in the same manner as other victims or witnesses if they prefer.

Adaptations in Regular Procedures:

- a) Breaks During Testimony: Allowing the child to take breaks as needed.
- b) Support Person: Ensuring the presence of a trusted adult or professional for support.
- c) Child-Friendly Environment: Creating a supportive and less intimidating environment and using a child-friendly questioning style.

These measures help ensure the child's testimony is protected, their rights are upheld, and the legal process supports their needs effectively.

8. Offender's right during or after the interview



8.1. Is the alleged offender allowed to participate in the interview of the child witness? Is his/her defence attorney allowed to participate? Is participation of either of the two mandatory?

> Yes, they are allowed to participate

> In some courts systems in place to ensure that the child is not in direct contact with the offender through CCTV, mobile screens/booths, one way glass/mirrors

> Conducting court sessions in chambers where a child is tendering evidence

8.2. If the offender is not present during the interview, how can he or she make additional questions to the child? How can he or she contradict the child's statements?

9. Parallel proceedings – coordination

9.1. In case of parallel proceedings (such as in family or child protection procedures) based on the same facts, is it clear who has the priority to conduct the interview?

> The Child Care, Protection and Justice Act provides all the steps for case handling and it also provides who is responsible for the interviews.

> One Stop Centre guidelines also enhance the need for a coordinated approach in dealing with children who are victims of sexual and gender based violence.

9.2. Is there any coordination procedure between different courts/authorities? How is the coordination procedure?

We have an electronic case management system where information about cases is accessible to authorized personnel from different courts and authorities.

9.3. If another court/authority has not participated in the interview and needs additional information, is this court/authority allowed to interview the child again? And/or can interviews be shared (who can share with whom)?

> Courts or authorities may need to obtain permission before re-interviewing a child, especially if the initial interview was conducted in a sensitive or traumatizing context. Interviews and other evidence can often be shared between courts and authorities, provided that confidentiality and privacy regulations are respected. Sharing may require consent from the relevant parties, such as legal guardians or the court.

10. Training



10.1. Are judges and magistrates trained to deal with child victims?

> Yes

10.2. Is the content of the training interdisciplinary? Do other professionals also participate in the same training?

> Yes. Usually the trainings include social welfare, police, health and other human rights institutions.

11. Reforms in progress

11.1. Are there reforms in progress in your country regarding child's victim rights, the procedure among others? What is the aim and the main subject of it?