

MALAWI HUMAN RIGHTS COMMISSION



PRESENTATION ON THE WORK OF THE MALAWI HUMAN RIGHTS COMMISSION ON THE DEATH PENALTY

**Presented at the 6th World International Congress on the Death
Penalty**

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1.0 BRIEF BACKGROUND

1.1 THE HUMAN RIGHTS COMMISSION

The Human Rights Commission of Malawi [MHRC] is a constitutional body established under section 129 of the Constitution with the primary function of protecting and investigating human rights violations. Its composition; specific powers, functions and duties; and operational modalities are further provided for in the Human Rights Commission Act [HRCA]. Sections 13 and 14 of the HRCA assign various duties and responsibilities on MHRC which include the provision of human rights information and awareness; provision of opinions on legislation or judicial decisions affecting human rights; recommending necessary actions on any issues affecting human rights etc; promotion of harmonisation of domestic legislation and international human rights instruments; assisting the Government on state party reports etc.

1.2 DEATH PENALTY IN MALAWI

The death penalty remains part of the penal laws of Malawi. Both the Constitution and the Penal Code recognise the applicability of death penalty in certain cases as a lawful and acceptable punishment. Despite this and despite the Courts meting out death sentences in some capital offence cases, no execution of the death penalty has been carried out since 1993. It is generally accepted that Malawi has placed a **de facto** moratorium on the implementation of the death penalty. This means that all the work the MHRC has carried out on the abolition of death penalty has been within the environment of the **de facto** moratorium.

1.3 LEGAL FRAMEWORK

Death penalty is governed by various pieces of legislation at the national level and various international human rights instruments that Malawi is a party to, at the international level. Below is a brief discussion of the most applicable legal instruments to the issue of death penalty in Malawi.

1.3.1 REPUBLICAN CONSTITUTION

Section 16 of the Republican Constitution of Malawi provides for the right to life. It states as follows:

“Every person has a right to life and no person shall be arbitrarily deprived of his or her life: Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of

Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life".

Clearly, section 16 expressly permits the application of the death penalty as a means of punishment in appropriate cases. The issue gets more complicated when section 44(1)(a) of the same Constitution is thrown into the mix. This section provides that there shall be no derogation, restriction or limitation with regard to the right to life. Reading the two provisions, it is clear that the issue of whether or not the imposition of the death penalty amounts to derogation, restriction or limitation to the right to life remains unresolved.

1.3.2 PENAL CODE

The Penal Code (cap. 7:01) of the Laws of Malawi is the primary source of criminal law. Section 25 provides a list of all lawful punishments and includes the death penalty. Some capital offences such as treason and murder carry death as the maximum penalty. Prior to the 2007 Constitutional Court judgment on the constitutionality of the mandatory death penalty, any person found guilty of treason or murder was punishable by death without judicial discretion. The majority of the death row inmates that the MHRC has dealt with in its work are those who were convicted and sentenced to death prior to 2007.

1.3.3 MALAWI INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Malawi has been a State Party to the International Covenant on Civil and Political Rights (ICCPR) since 1993. It also ratified the First Optional Protocol to the ICCPR allowing for the right of individual petition to the UN Human Rights Committee in 1996. However the country has not yet ratified the Second Optional Protocol to the ICCPR on the abolition of the death penalty. Malawi is also a State Party to the African Charter on Human and Peoples' Rights having ratified the same in 1989. It is also a signatory to the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights since 1998. All these international legal instruments contain provisions which recognise and protect the right to life.

2.0 MHRC'S WORK ON ABOLITION OF THE DEATH PENALTY

2.1 NATIONAL CONSTITUTIONAL REVIEW

Between 2006 and 2007, the Law Commission of Malawi carried out a national constitutional review process which culminated into a National Constitutional Review Conference. One of the provisions under review was section 16 of the Constitution aforementioned and the MHRC was asked to make written submissions on its views on the abolition of the death penalty.

In line with its statutory mandate, the Commission made a submission to the Special Law Commission on the Review of the Constitution recommending the abolition of the death penalty. The MHRC reasoned that there was inconsistency between sections 16 and 44(1)(a) of the Constitution. We opined that the imposition of the death penalty is a restriction and a limitation on the right to life.

2.2 ABOLITION OF MANDATORY DEATH PENALTY

In 2007, the MHRC joined the constitutional challenge of the mandatory death penalty in the landmark case of ***Kafantayeni and Others vs. The Attorney General***. The case was commenced by the Malawi Law Society on behalf of the Applicants, who were murder convicts serving the death penalty challenging the constitutionality of the mandatory imposition of the death penalty in capital offences. The MHRC joined the case as Amicus Curia, (Friend of the Court), on the basis of its constitutional and statutory mandate. During the hearing, it provided to the Court the human rights perspectives that needed to be considered in determining the issues which were before it.

The brief focused on the implications of the imposition of the mandatory death sentence on the right to fair trial and the right not to be subjected to torture, cruel, inhuman or degrading treatment and punishment. In its ruling, the court found that the mandatory imposition of the death penalty was unlawful and unconstitutional. The court further ordered that the five applicants needed to be taken back to court for a rehearing of their sentences. This judgment effectively abolished mandatory death sentence in Malawi in all cases. It also automatically created judicial discretion in the determination of appropriate punishment for capital offences.

2.3 REVIEW OF THE PENAL CODE

Prior to the National Constitutional Review, the Law Commission had embarked on the comprehensive review of the Penal Code. Again, provisions which contained the punishment of death came under intense scrutiny and public opinion. The MHRC also provided written submission urging Malawi to abolish the death penalty. Since the issue of death penalty was also contained in the Constitution, MHRC

recommended for the abolition of the mandatory imposition of the death penalty in the event that the constitutional review process was going to retain it.

We cited jurisprudence from comparable jurisdictions at both the national as well as supra-national levels, where courts had consistently held that the imposition of the mandatory death penalty is discriminatory and constitutes arbitrary punishment. It was argued, the mandatory death penalty discriminates against persons who commit capital offences by, among other things, depriving them of the chance to give mitigating factors which are open to the other offences. The only chance they have is to apply to the Head of State to be granted pardon through the prerogative of mercy. The MHRC argued that there is no logical reason why the court should not be given the judicial discretion to have regard to such factors before meting out sentences in these types of offences.

2.4 SUPREME COURT RULING *McLEMONCE YASINI v REPUBLIC*

Following the outlawing of the mandatory death penalty and the resentencing of the Applicants in the Kafantayeni Case, there remained a legal gap of what should happen to other death row inmates who were not part of the case. Rising to this dilemma, in November 2010, the Malawi Supreme Court of Appeal, in the case of ***McLemonce Yasini v Republic***, clarified that the ruling in ***Kafantayeni*** entitled all prisoners previously sentenced to the mandatory death penalty to a new hearing on sentence before the High Court. The Supreme Court further directed that the High Court should rehear mitigating evidence relating to the circumstances of the offence and to the circumstances of the offender must be considered by the Court.

This decision opened up an avenue for the reconsideration of sentences of all prisoners who have been subjected to the mandatory death sentence. At the time of this decision, there were 170 prisoners who were still serving a death sentence or after automatic commutation by the President, whole-life sentence.

2.5 PARTICIPATION IN STATE PARTY REPORTING PROCESSES

Furthermore, MHRC also continues to sustain its advocacy efforts on the abolition of the death penalty through submissions in its reports to various United Nations Treaty Mechanisms, such as the Universal Periodic Review Reports to the UN Human Rights Council and the Report to the UN on the International Covenant on Civil and Political Rights. In all these reports, the MHRC has raised the issue of the continued retention of the death penalty in the Laws of Malawi as a challenge to the enjoyment of relevant human rights. Accordingly, the treaty mechanisms have provided appropriate recommendations to the Government of Malawi on these issues.

2.6 STAKEHOLDER DIALOGUE AND CAPACITY BUILDING

Again, MHRC has held national conferences on the death penalty, the most recent of which was held in 2015. At this conference, delegates adopted the following resolutions:

- delegates while welcoming the de facto moratorium on the death penalty, called upon the Government to institute a de jure moratorium on the application and implementation of the Death Penalty aiming at its full abolition as recommended by the Human Rights Council in 2013;
- delegates rallied support behind amendments to the Penal Code that have resulted in the repeal of the mandatory Death Penalty in Malawi;
- delegates agreed that Malawi should carry forward the process by critically analysing possible options that might be taken in order to completely abolish the death penalty in Malawi; and
- in view of high public support for the retention of the death penalty in Malawi, the conference further agreed that research should be carried out in selected districts focussing on attitudes and opinions of members of the community on the same.

2.7 JUDICIAL COLLOQUIA AND LAWYERS' SEMINARS

MHRC has also organised a series of Judicial Colloquia with Judges of the High Court and Supreme Court of Appeal between 2011 and 2014. It has also held Lawyers' Seminars to address the various salient and novel issues that arose following the abolition of the mandatory death penalty. The subjects covered included jurisprudential developments on the death penalty in different jurisdictions; sentencing guidelines in capital offences at national and international levels; public interest litigation generally; and mental health evaluations and mitigation in capital offences

2.8 THE KAFANTAYENI SENTENCE REHEARING PROJECT

2.8.1 Project Background

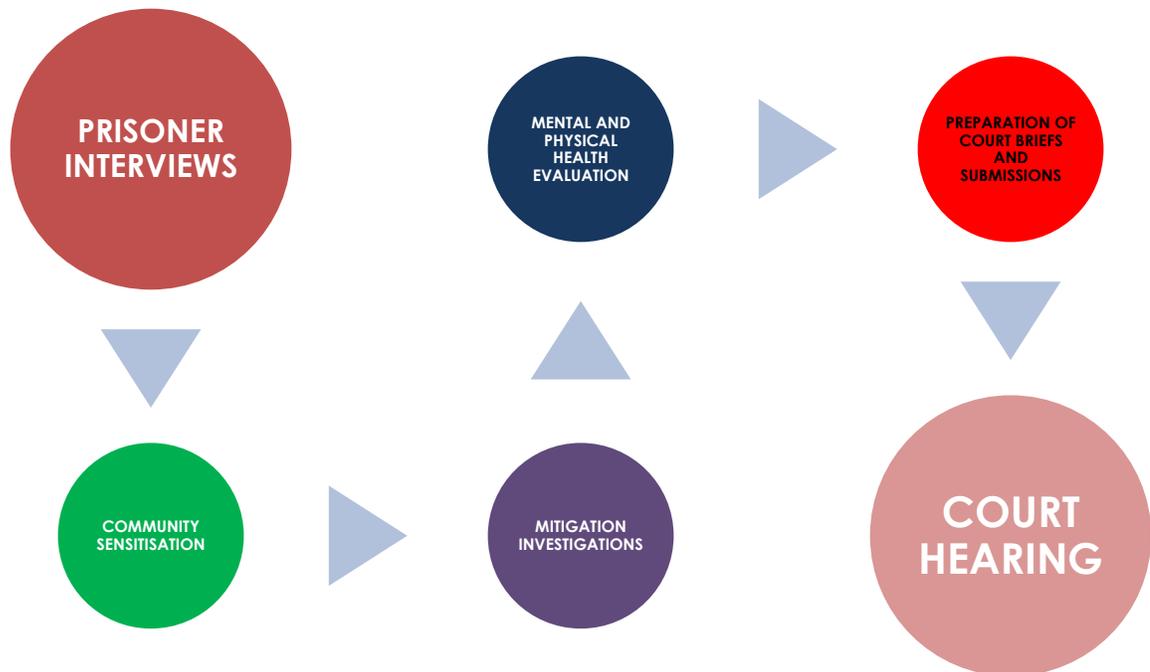
The Kafantayeni Sentence Rehearing Project ('Kafantayeni Project') emanates from the April 2007 decision of the Constitutional Court outlawing mandatory death penalty and the amplification of its application by the Supreme Court of Appeal in the McLemonge Case. The Project is jointly implemented by MHRC, the Office of the Director of Public Prosecutions (DPP), the Legal Aid Bureau (Legal Aid), the Paralegal Advisory Services Institute (PASI), the Centre for Human Rights Education, Advice and Assistance (CHREEA), the Faculty of Law at Chancellor College (Chanco), the Malawi Law Society, Cornell Law School and

the Malawi Prison Service. The sentence rehearing process started in 2015. The project has been extended to 2017. It is envisaged that by 2017 the resentencing process for all the remaining prisoners will be finalised.

2.8.2 The Sentence Rehearing Process

In order to ensure a smooth flow of the legal processes, the Project is structured into six key steps shown in Fig. 1 below. Broadly, we drew up a three-stage prioritisation list to determine which cases to start with. First stage cases included cases of prisoners who were still on death row; prisoners who were very young at the time of the offence; female prisoners; prisoners with severe mental disabilities; the elderly and the infirm prisoners etc. These were to be taken through the first round of cases. The second round of cases dwelled on the moderately complex cases, which required more time to study the facts and the law before being taken to court. The final stage cases were the ones which were very complex and required a lot of time before they can be brought to Court.

Fig. 1: Summary of Steps taken in processing an application for rehearing of the sentences in the Project.



2.8.3 Project Progress to Date

The first sentence rehearing proceedings commenced in February 2015. To date, **90 out of 170** hearings have been fully completed. Of these 90 prisoners:

- **73 prisoners** were immediately released from custody either because the court felt they had been wrongly convicted or they had already served the due sentence;
- **17 prisoners** are still in custody because they were resentenced to a longer term of years which remained unexhausted;
- **13 of the of the 17 prisoners** who have been resentenced to longer terms, will be released by the year 2020; and
- **None** of the prisoners in the Project have been resentenced to death or life imprisonment.

In addition, the Project has generated considerable positive national media coverage, both in relation to specific cases (such as **Byson Khaula's**) as well as provoking discussion about the ongoing relevance of the death penalty in Malawi more generally.

3.0 LESSONS LEARNT

3.1 ADVOCACY AS A PROCESS

Advocacy work is a process and not an event. Achieving social changes on long held practices takes time. It is important therefore to keep in mind that advocacy for abolition of the death penalty is a long term process. It requires a multi-sectoral approach by pulling together all key stakeholders to the debate at all levels.

3.2 COLLABORATE WITH GOVERNMENT

Owing to the keen public interest in capital crimes and the death penalty, it is better for the advocates of the abolition of the death penalty to work collaboratively with the Government instead of confronting it. In convening the 2015 conference, MHRC and the OHCHR gained a lot of Government's buy-in by simply working collaboratively with the Government, especially through the Ministry of Justice and Constitutional Affairs.

3.3 USE STATE PARTY REPORTING OPPORTUNITIES

The role of NHRIs to contribute to state party reporting processes provides an opportunity for NHRIs to engage their Governments and highlight critical human rights issues such as the death penalty and its implications for human rights. MHRC has used this opportunity to consistently make recommendations for the abolition the death penalty.

3.4 USE OF JUDICIAL AVENUES

The abolition of the mandatory death penalty and the rehearing of sentencing proceedings of all death row inmates' cases in Malawi are clear examples of how effective the use of judicial processes can be in law reform. Unlike the traditional law reform procedures which are caught up in political appeasement and public sentimentality, the Courts can decisively and cheaply nullify laws which impinge the full enjoyment of human rights. The failure by the National Constitutional Review Conference in 2007 to resolutely outlaw death penalty or at least the mandatory aspect of it clearly shows how difficult it is to reform laws through popular consensus.

3.5 VICTIM'S FAMILY ENGAGEMENT

One of the most stinging criticisms levelled against the proponents of the abolition of the death penalty is the failure to take into account the views of the victims or their families. Through the Kafantayeni Project, MHRC learnt that engagement with the victim's family as well as community is essential in these processes. This helps the Court to not only focus on mitigating factors but also the aggravating factors. This

also helps to properly gauge if the prisoner would be safe in the event of his early release back to his community.

3.6 LACK OF CAPACITY IN THE CRIMINAL JUSTICE SYSTEM

The Resentencing Project has revealed significant serious capacity challenges clogging the criminal justice delivery system in Malawi. It disclosed the following:

- An appalling court records management systems whereby more than 50% of the 170 case files were missing;
- Juveniles were being sentenced to death contrary to law;
- Inadequate legal assistance from Legal Aid leaves the majority of capital offence prisoners severely underrepresented; and
- Challenges with jury trials, which led to instances of convictions of murder in clear cases of manslaughter or misadventure.

3.7 LACK OF CAPACITY OF THE CORRECTIONAL SERVICES

The Project has also unearthed the glaring lack of capacity by our Prison Services to provide adequate correctional services to the prisoners. Experience shows that some of the released prisoners have not been adequately prepared for release back to their communities. Reformation and rehabilitation programmes face severe funding, human resources and purpose-built facilities. It is a critical lesson therefore that interventions on the abolition of the death penalty must also integrate comprehensive capacity building processes for the different players e.g. correctional institutions, courts, lawyers, paralegals, human rights NGOs and the media.

4.0 CONCLUSION

The experience of the MHRC in the advocacy work for the abolition of the death penalty has generated some tremendous successes as well as monumental failures. The judicial route to law reform is clearly the quickest means to instant results. The speed with which the Kafantayeni Case abolished the mandatory death penalty and how the McLemonge Yasini Case opened up the resentencing of all death row inmates are spectacular examples of the judicial efficiency. Compare this with the resounding defeats the Commission suffered during the National Constitutional Review and the Comprehensive Penal Code Review when all recommendations for the abolition of the death penalty were rejected by the majority of the members of the public. It is therefore very tempting to judicialise the entire process of abolishing the death penalty.

However, it is important to remember that ultimately the debate around the abolition of the death penalty is not about law reform. It is not a discourse that must begin and end in courts. It is not an elitist discourse understood and appreciated only by lawyers, judges, activists, psychiatrists and clinical psychologists. It is a social struggle that challenges our notions of justice. It is a search for a socially acceptable equilibrium of punishment in crimes that threaten the very existence of humanity. In this sense therefore, while resorting to courts have given us immediate results, if there is no popular acceptance at the grass roots level of the rectitude of abolishing the death penalty, this will remain a classical case of victory without success. An informed and consensual abolition of the death penalty remains a key ingredient that would legitimize the law reforms. Consequently, public engagement and popular buy-in are optional factors of the debate but the very essence of people-informed law reforms.