



YOUTH AND SOCIETY

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YOUTH AND SOCIETY (YAS)

Submission on Death Penalty during the Consultative Conference on the Abolition of the Death Penalty in Malawi organized by the Ministry of Justice and Constitutional Affairs of the Republic of Malawi.

27 January 2023, Crossroads Hotel, Lilongwe

1. INTRODUCTION

Youth and Society (YAS) is a frontline human rights and governance watchdog. Our primary mandate is to enhance the promotion, protection and fulfilment of human rights and democratic governance in Malawi in the principal interest of young people and marginalised groups. Founded in 2012, our core work has focused on human rights, anti-corruption and rule of law, democratic governance, youth development, gender, social justice, and fighting inequality.

This Submission is made today, 27 January 2023, to the Ministry of Justice (The Ministry) as a contribution to a public consultation on the abolition of the death penalty in Malawi.

YAS strongly urges the Government of Malawi to demonstrate its commitment to human rights by expunging the death penalty from the country's laws. Malawi has international human rights obligations to respect, protect, promote and fulfil the human rights for everyone within its jurisdiction, without discrimination. These human rights include the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to a fair trial all of which are guaranteed under the Constitution and international law.

Malawi has explicitly accepted obligations in regard to these rights in the international and regional human rights treaties which it has ratified, including the International Covenant on Civil and Political Rights (ICCPR), the First Optional Protocol to the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment, and the Statute of the International Criminal Court — the latter of which specifically commits signatories to abolishing the death penalty from their penal codes, and the African Charter on Human and Peoples' Rights (ACHPR).

2. HISTORY OF THE DEATH PENALTY IN MALAWI

The death penalty was inherited from colonial Nyasaland. When it was introduced, around 1915, it was hoped that it would be a deterrent for a possible uprising following the Chilembwe Uprising which resulted in the execution of at least 36 Malawians. Thus, death penalty was a tool for suppressing the nationalist liberation movement.

When Malawi rewrote its Constitution in 1994, the right to life was guaranteed. Section 16 of the Constitution is authoritative that "Every person has the right to life and no person shall be arbitrarily deprived of his or her life".

As the Ministry is aware, capital punishment was once a mandatory punishment for murder and treason. In 2007, the constitutionality of the mandatory death penalty for capital

111

countries had completely abolished the death penalty by the end of 2022

579

people were executed in 2021 in 18 countries (excluding China) —Up by 20% from 2020. Iran, Egypt and Saudi Arabia accounted for 80% of executions

25

people were on death roll as of May 2022, and later commuted to life sentences in 2022 end.

1992

The year of last known execution in Malawi

offences was questioned in the *Francis Kafantayeni and others v the Attorney General* (Constitutional Case No 12 of 2005; [2007] MWHC). The High Court ruled that it was unconstitutional to make the death penalty mandatory for murder or treason convictions. The ruling allowed judges to have discretion when deciding on sentences for murder convicts or those convicted of treason. In deciding on an appropriate sentence in a case, judges were to consider whether or not the inmate had a significant prior criminal record, mental illness, poverty, drug or alcohol intoxication, old age, youth, trauma, or a "sincere belief in witchcraft" at the time of the crime and/or at sentencing. This was the beginning of the re-sentencing project.

In April 2020, Malawi courts appeared for a moment to have abolished the death penalty after Supreme Court judge in the case *Charles Khoviwa v The Republic* (MSCA Miscellaneous Criminal Appeal No 12 of 2017; [2021] MWSC, 28 April 2021) heard the petition of a convicted murderer, and ruled that the death penalty negates the right to life which is otherwise provided for under the Malawi's constitution. In this judgement the Supreme Court of Appeal held that the right to life was "**the mother of all rights**". The court further held that "**without the right to life, other rights do not exist**" and, therefore, "**the death penalty not only negates; it abolishes the right**". To much surprise, four months later the Supreme Court issued a statement saying the judge had expressed his personal opinion and the death penalty remained applicable.

Current statistics show that no known execution has taken place in Malawi since 1994. However, death sentences continue to be imposed. As of 2021, at least 25 people were on death row.

3. THE INTERNATIONAL TREND TOWARDS ABOLITION OF THE DEATH PENALTY

The year 2020 was marked by a further global decline in the use of the death penalty. Seventy years after the adoption of the Universal Declaration of Human Rights, more countries have moved towards abolition of the death penalty. When the Declaration was adopted in 1948, eight countries had abolished the death penalty for all crimes; today, more than two-thirds (111) of the countries in the world have abolished the death penalty in law or in practice and the numbers continue to grow. Zambia, Equatorial Guinea, Papua New Guinea, and Central African Republic abolished death penalty in 2022.

Through the years, several UN and regional bodies have discussed and adopted instruments to support the call for the worldwide abolition of the death penalty. In **resolution 2857 (XXVI) of 20 December 1971 the UN General Assembly** affirmed the desirability of abolishing the death penalty in all countries. The desirability of abolishing the death penalty was reiterated in **General Assembly resolution 32/61 of 8 December 1977 and - most recently - by the UN Commission on Human Rights in resolution 1998/8 of 3 April 1998**.

In December 2007 and 2008 the **United Nations General Assembly (UNGA) adopted resolutions 62/149 and 63/168**, calling for a moratorium on the use of the death penalty "with a view to abolishing the death penalty."

In 2007 the UN General Assembly adopted its first resolution on a moratorium on the use of the death penalty and 91 countries voted in favour. In 2020, the numbers had

increased with 123 countries voting in favour of eighth UN General Assembly moratorium resolution.

In November 2008, **the African Commission on Human and Peoples' Rights at its 44th Ordinary Session in Abuja**, Nigeria, adopted a resolution calling on state parties to the African Charter on Human and Peoples' Rights to observe a moratorium on the death penalty.

Since then, other regional bodies or civil society coalitions adopted resolutions and declarations advocating for a moratorium on executions as a step towards global abolition of the death penalty.

More countries on the African continent are abolishing the death penalty.

- Rwanda abolished the death penalty in 2007,
- Burundi and Togo in 2009,
- Gabon in 2010,
- Benin in 2012,
- Congo and Madagascar in 2015,
- Guinea in 2016 for ordinary crimes and 2017 for military crimes,
- Burkina Faso in 2018
- Chad in 2020
- Sierra Leone in 2021
- Zambia (2022)
- Equatorial Guinea (2022)
- Papua New Guinea (2022)
- Central African Republic (2022)

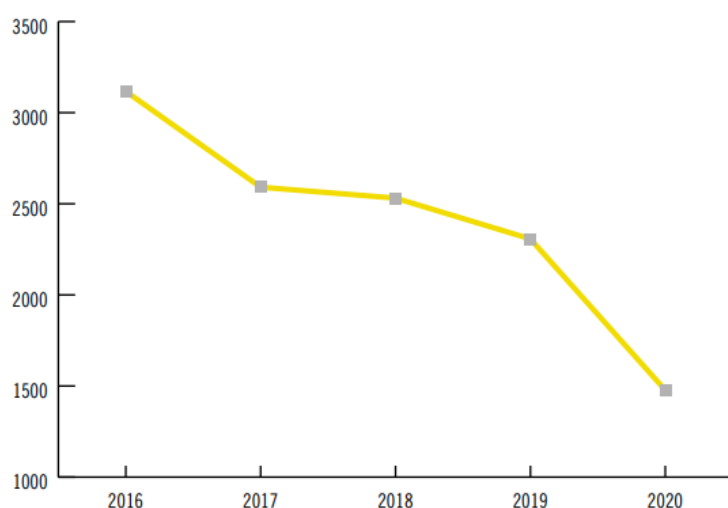
Similarly, **at regional level, executions are increasingly unpopular, with only 4 out of 55 African countries carrying out executions as of 2020.**

4. DEATH SENTENCES HAVE DECLINED

According to the Amnesty International's Death Sentences and Executions Report for 2020, the organisation recorded a significant decrease in the number of new death sentences known to have been imposed globally in 2020 **(at least 1,477), down by 36% compared to 2019 (at least 2,307)** and by 53% on 2016 (at least 3,117)¹. Fewer countries (54) were known to have imposed death sentences in 2020, compared to 2019 (56).

¹ Amnesty International, DEATH SENTENCES AND EXECUTIONS Report 2020, pg 12 <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT5037602021ENGLISH.pdf>

RECORDED GLOBAL DEATH SENTENCES (2016-2020)



Source: Amnesty International

5. REASONS TO ABOLISH THE DEATH PENALTY

1. The death penalty violates the right to life and the prohibition on torture and inhuman or degrading treatment or punishment

The death penalty is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment, rights which are recognized in the Universal Declaration of Human Rights² and other international human rights instruments to which Malawi is a state party.

The UN Committee against Torture has referred to the uncertainty of many people under sentence of death in a country where the death penalty is in the process of being abolished as "amounting to cruel and inhuman treatment in breach of article 16 of the UN Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]". (UN document A/56/44, 17 November 2000, para. 39(g))³.

Many countries internationally have prohibited the death penalty in their constitutions on human rights grounds.⁴ National courts have recognized that the death penalty violates the prohibition against torture, cruel, inhuman or degrading treatment or punishment.

In 1995, the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim Constitution (*Makwanyane and Mcebunu v.*

² The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, recognizes each person's right to life (Article 3). It categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5).

³ Annual report of The United Nations Committee Against Torture, 12/10/2001, https://www2.ohchr.org/english/bodies/cat/docs/Art20/A-67-44_en.pdf

⁴ Amnesty International, *International standards and the death penalty*, 2006. Available at: <http://www.amnesty.org/en/library/info/ACT50/001/2006>

The State (CCT/3/94) [1995] ZACC 3) paragraphs 95, 146). Eight of the 11 judges also found that the death penalty violates the right to life. The judgment had the effect of abolishing the death penalty for murder.

2. Death penalty is not a deterrent to violent crimes

The death penalty does not deter crime. Countries who execute commonly cite the death penalty as a way to deter people from committing crime. This claim has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment.

YAS believes that the consideration of the death penalty as a crime prevention method does not offer a solution to the problem of crime. Crime may be reduced through having better trained and equipped police officers, eradicating poverty and improving education amongst other things.

Scientific studies have consistently shown that there are high crime rates in countries that retain the death penalty e.g. USA. The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted by the United Nations in 1988 and updated in 2002, concluded:

“...it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment”⁵

The United Nations further stated:

“The fact that all the evidence continues to point in the same direction is persuasive a priori evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty”.

In fact, in countries where the death penalty has been abolished, crimes rates have often fallen.

3. It is irreversible, and mistakes happen.

Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated. Since 1973, for example, more than 184 prisoners sent to death row in the USA have later been exonerated or released from death row on grounds of innocence. Others have been executed despite serious doubts about their guilt.

4. It is often used within skewed justice systems.

In many cases recorded by Amnesty International, people were executed after being convicted in grossly unfair trials, on the basis of torture-tainted evidence and with

⁵ Roger Hood, the Death Penalty: A worldwide Perspective, Oxford, Clarendon Press, Third edition, 2002.

inadequate legal representation. In some countries death sentences are imposed as the mandatory punishment for certain offences, meaning that judges are not able to consider the circumstances of the crime or of the defendant before sentencing.

5. It is discriminatory.

The weight of the death penalty is disproportionately carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic or religious minority. This includes having limited access to legal representation, for example, or being at greater disadvantage in their experience of the criminal justice system.

*"The intentional killing of another person is wrong and as Governor, I will not oversee the execution of any individual. Our death penalty system has been, by all measures, a failure. It has discriminated against defendants who are mentally ill, black and brown, or can't afford expensive legal representation. It has provided no public safety benefit or value as a deterrent. It has wasted billions of taxpayer dollars. Most of all, the death penalty is absolute. It's irreversible and irreparable in the event of human error."*⁶ Gavin Newsom, Governor of California, 13 March 2019

6. It is used as a political tool.

The authorities in some countries use the death penalty to punish political opponents.

6. CONCLUSION

For a very long time Malawi has been abolitionist in practice. It is high time Malawi abolishes the death penalty. YAS believes that the stakeholders consultation on the death penalty is an opportunity for Malawi to significantly improve its own human rights record, to mark itself out as a progressive force within the region and to align itself with the global trend towards abolishing the death penalty. Abolition of the death penalty would demonstrate a genuine commitment to protecting the population from an egregious violation of fundamental human rights.

Submitted on behalf of YAS,

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27 January 2023. Crossroads Hotel, Lilongwe, Malawi

The End/

⁶ Amnesty International, Death Sentences and Executions Report, 2019, <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT5018472020ENGLISH.pdf>