

Malawian Traditional Leaders' Perspectives on Capital Punishment:

A Targeted Survey of Traditional Leaders Affected by the Malawi Capital Resentencing Project

2017

**THE PARALEGAL ADVISORY SERVICE INSTITUTE MALAWI
THE CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE**



Cornell Law School

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CORNELL CENTER ON THE DEATH PENALTY

WORLDWIDE is an institute based at Cornell University Law School in the United States of America. The Center combines research, training, litigation, and strategic advocacy to promote international safeguards protecting the rights of persons facing the death penalty and improve the quality of legal representation in countries where resources are scarce. The Center also maintains an online database of detailed information on the application of the death penalty by country at www.deathpenaltyworldwide.org.

THE PARALEGAL ADVISORY SERVICE INSTITUTE

MALAWI was established in May 2000. It is a nationwide initiative, deploying trained paralegals to provide legal education, advice and assistance throughout the criminal justice process, from arrest to appeal. PASI Malawi aims to reach as many people as possible, with a ratio of 1:100 (paralegal:prisoners) per day being common.

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I. Introduction

The Malawi Capital Resentencing Project has assisted more than 150 death-sentenced prisoners in obtaining new sentencing hearings in accordance with the Malawi High Court's decision in *Kafantayeni v. Attorney General of Malawi*. This ground-breaking project brought together a coalition of stakeholders from both the public and private sectors, including lawyers, paralegals, judges, prison officers, professors, state's advocates, mental health workers, and international civil society organizations. The project has touched many lives, most notably those of the prisoners who received reduced sentences under the project. As of June 25, 2017, 121 prisoners formerly sentenced to death have been released back into their communities. They are now facing the challenge of re-integrating into society after many years in prison.

From its inception, the Malawi Capital Resentencing Project has included local communities in its implementation by consulting traditional leaders, educating village residents, and reaching out to family members of both prisoners and crime victims. One of the key objectives of the project was to gather mitigating evidence that would allow judges to make reasoned decisions about the proper punishment in each case. To that end, investigators sought to reconstruct each prisoner's life history leading up to the offence for which he was condemned to death. Traditional leaders played a pivotal role in this process by providing written statements about the prisoner's character, activities and family life before the offence. They also facilitated access to other witnesses, such as family members of the prisoner and of the deceased person. Finally, the assistance of traditional leaders was crucial in ensuring that prisoners were able to reintegrate into society upon their release from prison.

This survey specifically targeted traditional leaders in the home villages of prisoners who had been sentenced to death and who were later released as a result of the Malawi Capital Resentencing Project. As noted below, the survey methodology was primarily qualitative, although some quantitative coding was also conducted. By focusing on traditional leaders, the survey takers were able to gather information about how local communities have been affected by the release of prisoners formerly sentenced to death. The survey also provided an opportunity to evaluate how the views of certain

traditional leaders with respect to the justice system in general, and the death penalty in particular, had been affected by their exposure to the project. Although it was by nature limited in scope, the responses of the survey participants shed new light on the attitudes of traditional leaders regarding capital punishment and provide unique insights into how the death penalty is perceived by those leaders.

II. Background and Context

In 2007, the Malawi High Court struck down the mandatory death penalty in *Kafantayeni v. Attorney General of Malawi* on the grounds that it violated the accused's constitutional rights to a fair trial, access to justice, and protection from inhuman treatment or punishment. The Supreme Court of Appeal agreed with the rationale of *Kafantayeni* in *Jacob v. The Republic*, noting "that offences of murder differ, and will always differ, so greatly from each other that we think it is wrong and unjust that they should attract the same penalty or punishment."

Prior to *Kafantayeni*, every person convicted of murder in Malawi was automatically sentenced to death. Beginning in 2007, however, judges began to consider the circumstances of each offence and of the offender before imposing sentence. After *Kafantayeni*, evidence of an offender's age, good character, difficult upbringing, mental health, and minor role in the offence were just some of the factors that could be considered by Malawian courts as "mitigating factors" that weighed against the imposition of a death sentence (or life imprisonment). As a result, courts began to impose fewer death sentences.

At the same time, there were approximately 190 prisoners who had been sentenced under the now-defunct mandatory death penalty regime. In 2010, in *McLemonge Yasini v. The Republic*, the Malawi Supreme Court of Appeal made clear that those prisoners were entitled to sentence rehearings in the High Courts where they could present mitigating evidence in support of a reduction in sentence. The Malawi Capital Resentencing Project was conceived as a way of ensuring that these prisoners had access to the courts to vindicate their rights under *Kafantayeni* and *Yasini*. The project involved a coalition

of stakeholders, including the Malawi Human Rights Commission (MHRC), Chancellor College, the Legal Aid Bureau, the Director of Public Prosecutions, the Paralegal Advisory Services Institute (PASI), the Centre for Human Rights Education, Advice and Assistance (CHREAA), and the Malawi Law Society. Support for this work has also come from mental health professionals at Zomba Mental Hospital and St. John of God Hospitaller Service, Professor Sandra Babcock (formerly of Northwestern University School of Law, and now at Cornell Law School), the INGO Reprieve, and international volunteer lawyers and students.

The High Courts began to hold sentence rehearings in February 2015. At that time, 23 of those sentenced to death under the mandatory regime were still on death row, while 167 had had their sentences commuted to life in prison without the possibility of early release. As of June 25, 2017, the courts had conducted approximately 152 sentence rehearings. As a result of those hearings, one hundred twenty-one prisoners were released after serving their sentences, and twenty-eight more were sentenced to terms of years.¹ One was sentenced to life imprisonment; none were re-sentenced to death. As of this writing, none have reoffended. Most of those released returned to their home villages, whether permanently or for a short while.

III. Summary

The most striking finding of this survey is that an overwhelming majority of the traditional leaders surveyed believe that the State should not use the death penalty to punish individuals convicted of murder. Only six of the 102 traditional leaders surveyed stated that death was the appropriate penalty for murder. The rest preferred a term of years, life imprisonment with opportunity for early release, or (least frequently of all) life imprisonment with no opportunity for release.

The reasons traditional leaders oppose the death sentence vary. The most common explanation was rooted in the belief that people can change—and that prison is a place for reform. Many noted that rehabilitation is impossible if a prisoner is executed. As one traditional leader noted, “There is no reform in death.”² Many traditional leaders expressed concerns that innocent people could be hanged. They cited the risk that innocent persons could be

convicted based on coerced confessions, false testimony, a poor defense, or because “they fail to express themselves in court.”³

Closely linked to their conviction that prisoners are capable of reform is the notion that returning prisoners benefit the community and their family once released—whether economically, through emotional support, or by serving as a role model to others. One prisoner released through the Capital Resentencing Project became a traditional leader after his release. Commenting on his reintegration into the community, another traditional leader noted that his community had changed for the better “because of the good conduct [the prisoner] is showing after prison. That is why he was given a position of leadership. The community trusts him.”⁴ Traditional leaders also see the death penalty as enormously taxing on the community. Many families did not know whether their loved ones had been executed. For one family, the imposition of the death sentence was so shocking that his mother “mourned him for 2 weeks as if he was already dead.”⁵ Other families became convinced that the prisoner *had* been put to death. In both situations, the imposition of the death sentence alone causes grief.

The survey thus suggests that support for the death penalty among traditional leaders may be much weaker than commonly believed.

IV. Methodology

A. INTERVIEWS

This report is based on surveys of traditional leaders in communities where a former prisoner was released as a result of the Malawi Capital Resentencing Project. Survey questions were framed as neutrally as possible, though some questions asked the participant to reflect on specific issues. For example, certain questions inquired about the welfare of the released prisoner or his readjustment to life in the community. Others elicited opinions about capital punishment, including one multiple choice question, which asked the participant to select the appropriate sentence for murder. The survey was initially drafted in English, then translated into Chichewa and Tumbuka, the two most commonly spoken languages in Malawi. Paralegals from the Paralegal Advisory Services Institute and the Centre for Human Rights Education, Advice and Assistance worked with staff from the Malawi Human Rights Commission to conduct the surveys in Chichewa or Tumbuka, depending on the participant's language capacity.

All interviewers were instructed to ask the questions in the order presented and to adhere to the precise wording of the questions in the survey instrument. At the beginning of the survey, they were informed that they would be asked a number of questions relating to the released prisoner for a project on the Malawi Capital Sentencing Project. Participants were informed that they could stop at any time or refuse to answer questions. Interviewers were instructed to write down the participants' answers word for word where possible. At the end of the interview, participants were expressly asked whether they consented to the use of their answers in a report about traditional leaders' attitudes toward the death penalty. They were further asked whether they preferred to remain anonymous. In early interviews, interviewers obtained oral consent, which they recorded on the survey instrument. Later, interviewers began to obtain written consent for literate participants and tape-recorded consent from illiterate participants. Surveys of village headmen and group village headmen who were unable to give informed consent were excluded from analysis.

After recording the responses, volunteers in Malawi sent the surveys to a team at Cornell Law School. At Cornell, Professor Sandra Babcock and Clinical Teaching Fellow

Madalyn Wasilczuk supervised a team of students from the Cornell International Human Rights Clinic who coded and analyzed the surveys. Professor Babcock, Ms. Wasilczuk, and Sharon Hickey, the Research and Advocacy Director for the Cornell Center on the Death Penalty Worldwide, also analyzed surveys. A copy of the survey instrument is attached as Annex 1 to this report.

B. CHARACTERISTICS OF SAMPLE

This survey was limited to village headmen and group village headmen in communities where prisoners had been released as a result of the Kafantayeni Resentencing Project.⁶ In total, 104 traditional leaders were surveyed, though only 102 provided complete and valid questionnaires. In most cases, it was only possible to interview the village headman or the group village headman, however in three cases, both the village headman and group village headman were surveyed.

C. ANALYSIS

The data were analyzed using qualitative and quantitative analysis. One group of reviewers read the blank survey instrument and proposed themes that it thought would emerge from the data. A second group of reviewers read a sample of the completed surveys and compiled themes that arose from the data. Based on these two lists of themes, a list of codes was created. These are attached in Annex 2. One multiple choice question was analyzed quantitatively.

Using the codes, reviewers read through all survey responses as they were received by the Cornell Law School International Human Rights Clinic. After coding the survey responses, reviewers compiled the coded material and read all material for each code together to test whether these responses supported the proposed themes. Reviewers looked for repeated patterns and new themes that emerged from the data. After checking that proposed themes were consistent with the data, reviewers refined each theme's phrasing, extracted responses illustrative of the range of themes, and determined the frequency of the themes.

When analyzing the multiple-choice question that asked participants to select the appropriate sentence for murder, reviewers tallied the frequency of each multiple-choice answer and tracked the participant's stated reasoning for his or her response. After reporting the frequency, reviewers analyzed the reasoning for common themes.

D. LIMITATIONS

This survey has several key limitations due to its sample size and execution. First, this is a targeted, primarily qualitative survey that is limited in scope. It focuses solely on Malawian traditional leaders who preside over communities in which an individual was convicted and sentenced to death for murder and was subsequently released under the Malawi Capital Resentencing Project. Further, interviewers were not able to ascertain the traditional leaders' attitudes toward the death penalty at the time of the released prisoner's arrest, as the Capital Resentencing Project only began in 2014, and most prisoners were arrested between 1993 and 2003. The interviewers therefore had no way of verifying any self-reported change in opinion on the death penalty between the prisoner's arrest and his release. Another limitation is the assumption of the survey that a participant's reported attitude on the death penalty is consistent with his or her personal views.

Other limitations arose from working in Malawian villages. Though instructed on the proper methods of surveying, the experience and skill of the interviewers varied. Most of the interviewers were paralegals who spoke Chichewa or Tumbuka fluently. In some cases, however, the survey was conducted by a trained international volunteer who posed questions in English that were then translated by a native speaker into Chichewa or Tumbuka. These interpreters were not formally trained in interpretation, which could have created some distortion in the answers. Additionally, a first round of surveys was conducted before standardized Chichewa and Tumbuka translations were available. For those surveys, interpreters translated the questions on the spot to the best of their abilities. For all surveys, the survey responses were interpreted back into written English by the interviewers, which could lead to imperfectly translated answers.

A small number of surveys indicated that respondents' views on the appropriate punishment for murder were nuanced and therefore difficult to capture in a short survey. Some indicated that the appropriate penalty for murder was dependent on the circumstances of the crime. Others voiced general support for the death penalty, but not in the case of the prisoner who was released into their community. In a targeted survey such as this one, it was not possible to carry out a pilot study that would have allowed for analysis and revision of the survey instrument.

Although paralegals attempted to interview each traditional leader privately, at times it was difficult. Some surveys were conducted in the presence of community members or family. One survey conducted in the presence of the released prisoner was excluded. All surveys were conducted after the prisoner was released, but no standard time length between the prisoner's release and the date of the survey was established. Thus, some prisoners had only just returned to their village, while others had returned over a year before the survey was conducted. Indeed, in some cases, the prisoners had not yet returned to the village or had only stayed a short time before moving to another village or city.

In such small communities, relationships between the survey participants and the released prisoners also may have affected the survey results. For instance, some of the traditional leaders were related to the victim or to the released prisoner. In either situation, survey responses could have been colored by the leader's personal stake in the outcome of the case. In addition, leaders of small villages may have been influenced by their relations with the parties. This survey anticipated these relationships and incorporated them into the survey design. For example, the survey asked traditional leaders to comment on the prisoner's reintegration into the community, as well as his family's response to his incarceration and release.

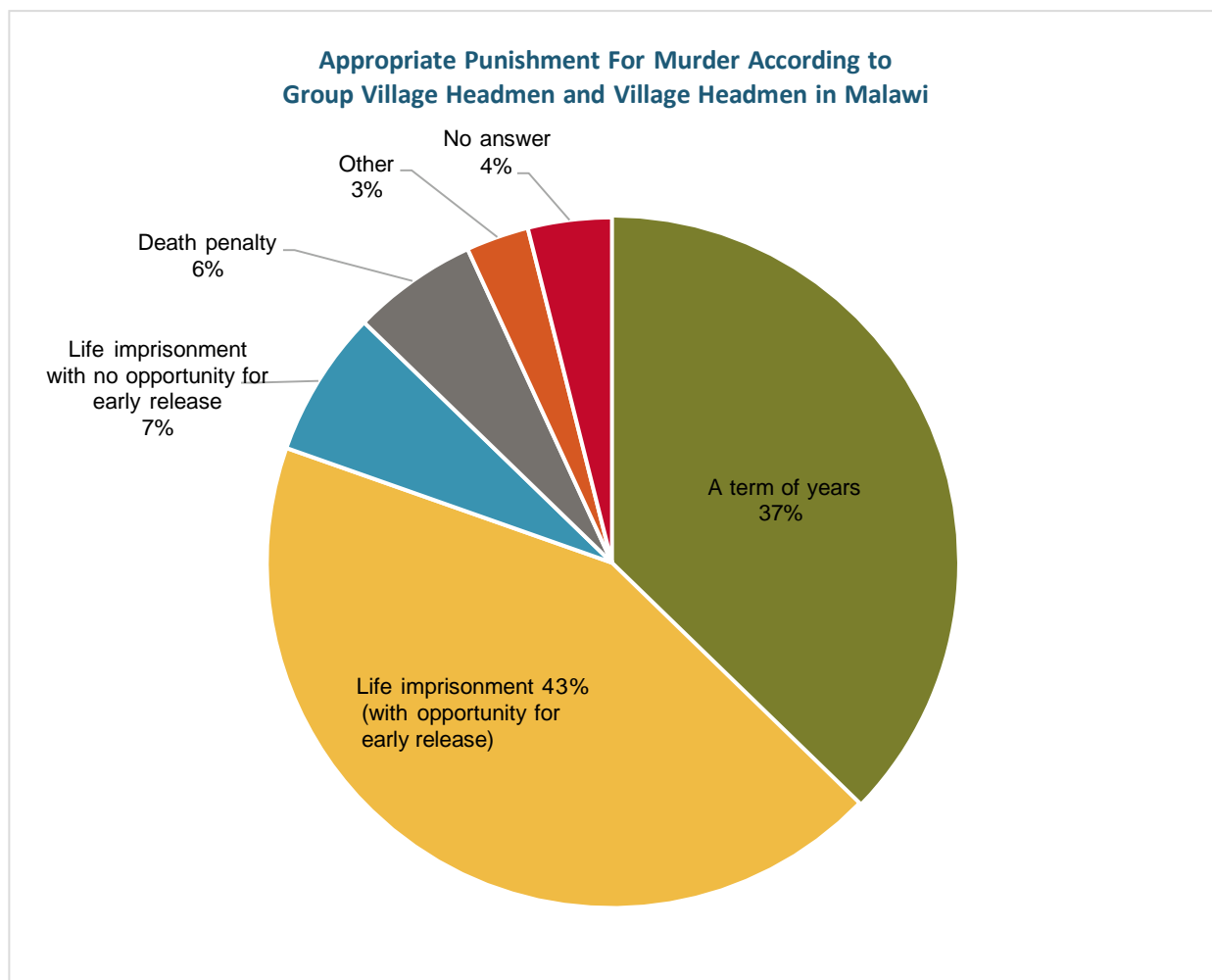
Although all paralegals attempted to survey both the village headman and group village headman, for the most part, only one or the other was surveyed. In cases where both the village headman and group village headman were surveyed, both sets of survey responses were coded separately. Although there were only six surveys (two each for three released prisoners), or 6 percent of valid surveys, having multiple surveys about a particular prisoner could add extra weight to certain themes. In some cases, villages had more than one released prisoner. In those cases, only one survey was conducted and the traditional leader responded based on his or her experience regarding all the released prisoners.

V. Findings

A. QUANTITATIVE RESULTS

As a part of every interview, each interviewee was asked which of the following he or she believed to be the appropriate sentence for one convicted of murder: no punishment; a term of years; life imprisonment (with opportunity for early release); life imprisonment with no opportunity for early release; the death penalty; or other. Only six (6%) of the 102 traditional leaders who completed valid surveys support the death penalty as a punishment for murder.

Thirty-eight (or 37%) answered a term of years, forty-four (43%) answered life imprisonment with an opportunity for early release, and only seven (7%) answered life without an opportunity for early release. Some traditional leaders believed the appropriate punishment varied based on the circumstances of the crime. One traditional leader, for example, stated that those who deliberately kill another should be sentenced to life without opportunity for release, while those who kill unintentionally should be given a term of years.⁷ Regardless of the specifics, however, the overall—and overwhelming—indication of the data is clear: the traditional leaders surveyed do not believe that the death penalty is an appropriate punishment for murder.



B. QUALITATIVE RESULTS: THE DEATH PENALTY, INCARCERATION, AND COMMUNITY VALUES

The following section describes the qualitative results of the survey as they pertain to the impact of the death penalty and incarceration on Malawian community life. The village community plays a central role in Malawian life. It is not surprising, therefore, that when a member of that community is incarcerated and sentenced to death, it has a profound impact on members of that community.

1. Reasons for Opposition to the Death Penalty

The traditional leaders surveyed were, on the whole, firmly against the death penalty. Some expressly stated that the “law should be abolished”⁸ or “reviewed”⁹ to accomplish that goal. The specific reasons for their opposition vary, but the following major themes emerged from their responses and are addressed below: (i) potential for reform; (ii) innocence and wrongful conviction; and (iii) justice and rights.

POTENTIAL FOR REFORM

“I feel the aim of sending someone to prison is not only to punish, but also to send someone to school,” one traditional leader said, when explaining why he believes a term of years is the most appropriate punishment for murder.¹⁰ “The purpose of prison,” he concluded, “is reform.”¹¹ This notion—that the point of prison is reform and that the death sentence makes reform impossible—pervades the results of the Traditional Leaders Survey. It is the most significant factor motivating surveyed traditional leaders in their opposition to the death penalty.

It is obvious why the death sentence makes reform impossible: if someone is executed, there is no opportunity for him to grow, to change, or to better himself. One leader emphasized this, simply stating, “There is no reform in death.”¹² Not only are a great majority of leaders convinced that change is possible; many have seen changes in the prisoners released to their own villages. And although Malawi has not carried out an execution since becoming a democracy in 1994, traditional leaders nevertheless expressed fear that executions remain possible.

Traditional leaders overwhelmingly expressed their belief that even persons convicted of violent offences such as murder are capable of reform. As one observed, “I think people are sent in prison to learn a lesson and reform.

I think that it is appropriate that after they should be released [...] because they would have learn[ed] a lesson and likely [desist] from further offenses.”¹³

Several emphasized that rehabilitation should be the main purpose of incarceration, a belief encapsulated by one leader’s response: “I feel the aim of sending someone to prison is not only to punish, but also to send someone to school so they can change and become a good person in the community.”¹⁴ Some survey respondents summed up their beliefs by saying that everyone deserved a “second chance.”¹⁵ By foreclosing any opportunity for redemption, the death penalty is a “cruel sentence.”¹⁶ Their belief that offenders can become productive members of society leads many to oppose life imprisonment without any possibility of release. One traditional leader explained,

“In my view prison is a place where we expect people to reform; hence if somebody has been given a death sentence or life imprisonment, this defeats the purpose of reforming somebody.”¹⁷

Another stated simply, “[A] dead person cannot reform and the reform will be useless if one remains in prison for life.”¹⁸ Similarly, if a person is only released when he is elderly, an opportunity is lost for the community to benefit from his reformed behavior. “With old age”, one traditional leader explained, “they cannot contribute much to the community.”¹⁹



Family and community members in the village of Mtilosera Pindani, one of the prisoners released through the Malawi Capital Resentencing Project. Photo by Sofia Moro.

Many village leaders offered examples of change in the prisoners released to their villages. Traditional leaders

repeatedly commented on certain improvements in behavior. Many described prisoners as having matured whilst in prison; others described how they had given up drinking,²⁰ or smoking, or both; some said that a released prisoner now spends time with more appropriate company or goes to church far more regularly than before. One traditional leader summed up the effect of imprisonment on a released prisoner as follows:

“[The prisoner] has benefitted from incarceration and release. He is an ambassador of good will. He will refrain from activity that landed him in that trap. The punishment was harsh. His release is for the good of the community. He is a teacher and will relay a message of hope.”²¹

Another noted, “Before he was arrested, he liked business and beer, he liked participation in violent youth groups but after his release he does business only and stopped all other bad practices. He was greatly changed.”²² Regarding another prisoner, a village headman said that his “behaviour shows that prison was training for him. He has come back a changed and unique person because of his experiences.”²³

For some traditional leaders, it was their experience with the released prisoner that changed their views on the death penalty. In the words of one survey respondent:

“I thought [the death penalty] was the only punishment because the law said one who kills the other should also be killed. At this time when I see that [the prisoner] is a changed person this has changed my view on the death sentence.”²⁴

Another observed, “Any person can change over time. I am saying this because [the released prisoner] is now a model in my village, any time I call for a meeting he is always present.”²⁵ One of the traditional leaders surveyed had himself been a prisoner, and explained how his mindset had changed after his release:

“When you are in prison, you ask, ‘Why did I commit this thing? Was I not forgiv[en]?’ You come out of prison thinking that you don’t want to do this again. Further, you are by grace getting out and you want to give back. For myself – I came out and wanted to become a pastor.”²⁶

In short, the traditional leaders surveyed see the experience and purpose of prison as one which makes the convicted into better people, people who are better able to live in community than they had been before. Coupled with this belief is the notion that the death penalty is a waste of human life and potential. “[The d]eath sentence robs families of their members who would’ve contributed positively to development. At the same time, a person is not given a second chance to reform.”²⁷ This provides another basis for village leaders to oppose the death penalty. If the purpose of prison is reform, then the death sentence is not only cruel—it also cuts against the purpose of incarceration itself.

INNOCENCE AND WRONGFUL CONVICTION: AN UNJUST SYSTEM

Most traditional leaders surveyed expressed their conviction that innocent people can be convicted of crimes they did not commit. This belief is intertwined with a frequently expressed concern that the Malawian criminal justice system is incapable of sorting out the innocent from the guilty. Many of those surveyed stated that they could not support the death penalty because of the risk of executing the innocent.

Traditional leaders surveyed articulated this concern in a number of ways. One noted that “the death penalty is not justified . . . because . . . people can just get convicted when they haven’t committed the offence.”²⁸ Still another, after noting the risk of wrongful conviction, stated that “This affect[s] my views on the death sentence because at the end of the day, we may end up executing someone who is innocent.”²⁹ On the whole, the concern that innocent men and women could be executed appears repeatedly throughout the survey results.³⁰

In some cases, traditional leaders’ concern about innocence and wrongful conviction appears motivated by a distrust of the criminal justice system. One traditional leader noted that “[t]here are too many flaws in the

criminal justice system. People know that their loved ones are innocent and cannot convince the police.”³¹ Because of that, he concluded, the death penalty should not be used.³² Another indicated that investigations are not thorough enough to prevent the execution of innocents: “I have a strong feeling about innocent people being executed,” he said, going on to note that “there is a need for a proper investigation before the death penalty is given.”³³ Another noted that “[s]ome people would even be executed just because they were seen with the perpetrator, or that they were friends.”³⁴ Several expressed their belief that people can be wrongly convicted due to the false testimony of witnesses: “[P]eople can testify falsely in court because of hate and vengeance.”³⁵

Traditional leaders are also concerned that many innocent people are convicted because of their inability to mount an adequate defense. “If an innocent person fails to defend himself,” one noted, “he can be found guilty of something he didn’t commit.”³⁶ Eight other survey respondents echoed this theme, emphasizing that innocent persons may fail “to conduct an effective defense.”³⁷ The risk of coerced confessions was also cited by some survey respondents.³⁸ Others noted that persons could be convicted of murder even though they killed another in self-defense³⁹ or by accident.⁴⁰ Others asserted that lack of knowledge of the law⁴¹ or a person’s failure to “express himself”⁴² in court can doom him to wrongful conviction.

Not every traditional leader surveyed expressed concerns about wrongful conviction. A minority of those surveyed stated that they do not believe that innocent people can be convicted of crimes they did not commit.⁴³ Nevertheless, innocence provides one of the strongest motivations for opposition to the death penalty. These views are best summed up by one traditional leader, who noted:

“I have a strong belief that innocent people can be convicted . . . Some people are clever and can talk carefully to the [village headman] or the police. [Other people] blame others when they don’t know what happened. One gets convicted and . . . it may not have been the right person.”⁴⁴

Overall, the survey results relating to innocence and wrongful conviction are in accord with that leader’s sentiments. Convinced that the penal system is unjust, the majority of traditional leaders surveyed cannot condone the death penalty. The risk of executing an innocent man strikes them as far too great. Justice would better be pursued, they believe, through other means of punishment.



Baisong Kaula, a prisoner released through the Malawi Capital Sentencing Project, was wrongly convicted and sentenced to death. Photo by Sofia Moro.

JUSTICE AND RIGHTS

Another significant reason traditional leaders oppose the death penalty is a general sense of justice, linked to the concept of human rights. Some indicated that, because the death penalty disrespects the rights of the individual to such a great degree, it should never be imposed. As one traditional leader put it, life imprisonment with an opportunity for early release should be used rather than the death penalty because “nowadays . . . people have rights.”⁴⁵ The notion that the death penalty is inconsistent with democracy and human rights was echoed by another traditional leader, who noted:

“There’s been a change. [At the time the prisoner was convicted] there were no human rights institutions. Now there are and people now are getting more

information. Yes, my views have changed.”⁴⁶

Another leader observed that the Malawi Constitution enshrines the right to life, and that the death penalty was therefore inappropriate.⁴⁷ One traditional leader, however, firmly believed in capital punishment notwithstanding his recognition that times had changed: “During the one-party era we used to see people being executed after being sentenced to death, but now because of democracy and rights people are being released. But my views have not changed over time.”⁴⁸

For several of those surveyed, their opposition to the death penalty is rooted in their belief that it is a cruel punishment. As one noted, “the death penalty is not a good punishment for a human being.”⁴⁹ Another cited the visceral cruelty of execution, noting it is “very cruel and inhumane” to kill people by hanging.⁵⁰ This is intertwined with a belief in the humanity of those who are subject to execution. As one village headman stated: “I realize that murderers are not all the same,” he says, “and some are very bad but many are not as bad.”⁵¹ That streak of humaneness—the sense that those who commit crimes are people who deserve a second chance—pervades the responses to the survey.

IMPACT OF DEATH PENALTY ON COMMUNITIES

Emotional Harm

Traditional leaders frequently noted the sadness and devastation that surround the death penalty, regardless of whether they believed the prisoner was guilty of the crime. “The whole village was saddened by the news,” one noted. “It came like a funeral message. Everyone was saddened as if someone had died.”⁵² Many noted that the death sentence made the family feel as if the prisoner “had been killed already.”⁵³ At least one village fasted together in mourning: “The village was greatly affected,” its leader said, and “[s]ome [went] three days without taking any meal.”⁵⁴ “The mood was very somber here”, another leader noted.⁵⁵ Several traditional leaders commented on the sense of loss at hearing of the prisoner’s death sentence: “The village was very affected to hear he was put on death row. We felt we had lost two people – the deceased and Mtilosera. We were feeling very sorry and not happy about the death sentence.”⁵⁶ Traditional leaders described villagers as being “saddened,”⁵⁷ “traumatized,”⁵⁸ “upset,”⁵⁹ “worried,”⁶⁰ “devastated,”⁶¹

“in shock,”⁶² “engulfed with much sorrow,”⁶³ “in disbelief,”⁶⁴ “badly affected,”⁶⁵ and “totally depressed.”⁶⁶ One described a pervading sense of despair: “We did not believe that we [were] going to see him again. We lost hope.”⁶⁷ Such mourning contrasts with the joy with which many villages received these prisoners into their community upon their release. A vast majority of traditional leaders—and, according to them, their village communities, as well—were happy to welcome back the released prisoners. “His coming is like he [has] been released from the grave”, one leader stated.⁶⁸

The families of those condemned to death were also deeply affected by the death sentence. Families often responded with anguish and despair to the passing of a death sentence on their loved one. “His mother mourned him for two weeks like he was already dead,”⁶⁹ says one leader. Another noted that “[w]hen they heard he was sentenced to death it was like he had already been killed.”⁷⁰ Many came to believe that their family member had already been executed:

“The family believed he had been executed. Because there was a total blackout of communication, they never thought they would see him again. They conducted a funeral ceremony because they didn’t believe he was alive.”⁷¹

Others were wracked with anxiety, not knowing what fate had befallen the prisoner. “The family was in suspense,” noted one traditional leader, “because they thought the government would tell them when he was executed, but they never heard anything, so they didn’t know whether he was alive.”⁷²

Survey results suggest that this despair was compounded by the frustrations villagers have in their encounters with the justice system, which are compounded by poverty. “They tried to find money to bail him out but failed. They tried get a lawyer but failed,”⁷³ explained one respondent.

Socioeconomic Harm

Beyond the emotional devastation wrought by the imposition of a death sentence, a number of traditional leaders emphasized the socioeconomic harm suffered by both families and the community. For example, several leaders explained that the imposition of the death penalty,

if carried out, would represent a permanent loss of economic productivity to the defendant's family and village. Others expressed a more general concern about the social loss suffered by the community as a result of the prisoner's incarceration. As one leader noted, "[t]he whole community was traumatized when they [learned of the] death sentence, because it was an indication that the population was going down."⁷⁴

The sense that the community is economically devastated by the loss of one of their number to prison and possibly death, appears in many of the surveys. The permanent loss of a community member to a death sentence deprives the community of a source of labor for community development projects as well as home maintenance and economic activities. But the loss goes beyond the material. One village chief noted that "when a prisoner is [incarcerated,] his good ideas that could be used in development are also detained" along with him.⁷⁵

Closely related to this is the notion of how a released prisoner's incarceration and death sentence harms the economic fortunes of the family. Many traditional leaders note that the prisoner was one of the major earners in the family, and without him, his family's life became more difficult. "The family was badly affected in that all the roles he used to play in the community were vacated. His children became a burden for other people,"⁷⁶ one leader noted. He "was the breadwinner," notes another, and without him "his sisters could not do as much to earn a living."⁷⁷ For other families the economic harm was still more acute. One man left children with "no one to look after them" when he was incarcerated, forcing his daughters "to get married very young for financial security."⁷⁸ Another's children "stopped going to school because of lack of support."⁷⁹

2. The Effects of the Malawi Sentencing Project on Village Life

As mentioned above, 120 prisoners have been released back into their communities as a result of the Malawi Capital Sentencing Project. The survey indicates that the prisoners' families joyously welcomed them back into their lives and into their homes. In response to survey questions, traditional leaders described several tangible benefits to both the community and to family members resulting from a prisoner's release. Beyond seeing prison as a place for moral reform and personal rehabilitation, as described above, many traditional leaders also view it as a

place where the incarcerated can obtain useful skills to benefit their villages once they return. Indeed, traditional leaders cited a variety of ways in which released prisoners had already enriched village life. A sampling of those responses follows:

- "He is now the leader of traditional beliefs."⁸⁰
- "He [is] also helping to fix roads and maintaining the village hall . . . as a volunteer."⁸¹
- "[H]e bought us a stretcher which we use at the graveyard."⁸²
- "Whenever we were having community projects, he was taking part in it, like tree planting. He also helped the community maintaining the road."⁸³
- "[H]e [is] involved in village banking."⁸⁴
- "He taught us modern farming, which has benefitted the village."⁸⁵
- "We benefit from his wise ideas and [he] helps us spiritually."⁸⁶
- "He is clearing the graveyard and renovating the boreholes for water pumps."⁸⁷
- "He is participating in village activities gritting roads coming into the village and last year he molded bricks for the primary school."⁸⁸
- "From his smithing and carpentry the community can make money."⁸⁹
- "[He] dug a well for irrigation [and] also taught some women how to mold stoves."⁹⁰
- "He has . . . clear[ed] the road to our village, which was in bad state in the past but now vehicles are able to cross it."⁹¹
- "He grew maize and vegetables from which the community and family members do eat."⁹²
- "[He is] digging dams as well as repairing broken chairs and desks."⁹³

- “He is taking part in the court since his release [as] he was chosen as a counselor for [the] village head[man].”⁹⁴
- “[T]oday we were at the health centre in the village to clear the land for construction and he was there taking part.”⁹⁵

The return of a prisoner, then, brings an injection of vitality to the village in the eyes of the village leaders. From participation in development activities to farming, from piecework to entrepreneurship, a released prisoner contributes something to the economic and social life of the village. As one chief notes, “[life imprisonment with opportunity for early release is the appropriate sentence for murder] simply because when a person is arrested it is a minus to the village because his job or business he was doing stops on his arrest. Once released he continues contributing to the community and family.”⁹⁶



Mtilosera Pindani, a prisoner formerly sentenced to death, is now Group Village Headman. Photo by Sofia Moro.

Once a prisoner is released, he is also able to provide critical support to his family. Prisoners build homes, do piecework, and work in the family garden, contributing whatever they earn to the wellbeing of the family. Many are supporting aging parents. “Abraham has been assisting his mother”, one village leader observed. “He is gardening to make money. . . He brings water from the stream and does cooking and washing. These are things that other men in the village do not do.”⁹⁷ Others take care of children whose parents have died: “[T]hrough his piecework he gets money to feed his parents and the children that his two sisters left behind. There are eight orphaned children total, so he helps care for them.”⁹⁸ One released prisoner is taking care of his disabled brother.⁹⁹ Village leaders see these contributions as an important

function of a released prisoner. Indeed, village leaders believe returnees make contributions even when a prisoner finds him- or herself reliant on the support of his family for necessities like shelter.¹⁰⁰

Traditional leaders also describe released prisoners as contributing to the social fabric of the village through the advisory role they play upon their return from prison. One unexpected outcome of this survey was the extent to which traditional leaders viewed released prisoners as deterring others from a life of crime. Sixty-six traditional leaders commented on how released prisoners have served as role models in their communities—often by advising others to lead a law-abiding life. The released prisoner, as one leader asserted, “can help [people in] the village to refrain from any activity which will land them in prison.”¹⁰¹ Another explained:

“People released can advocate for good behaviour and let people know the evils of prison. This adds strength to the village. A person will be more reliable because of prison. Others won’t commit crimes after seeing the released person.”¹⁰²

Similar sentiments pervaded the survey responses, and were far more common than traditional views of deterrence cited in support of the death penalty; namely, that the death penalty is warranted to deter would-be violent offenders. Nevertheless, six village leaders did feel that the death penalty was appropriate because it “would send a strong signal to the community as a deterrent factor.”¹⁰³

Traditional leaders also described the advisory role that released prisoners played in their own families: “Since his return,” one headman notes, “he has been advising the young ones.”¹⁰⁴ Another observed that “family members depend on [the released prisoner] for advice on family matters.”¹⁰⁵ The family of one released prisoner has “entrusted [him] with a position of the marriage advocate (unkhoswe).”¹⁰⁶ These contributions to village life are difficult to measure, but village leaders nonetheless see them as highly significant in maintaining peace and stability in the community.

The Malawi Capital Sentencing Project also provided crucial information to villages about the prisoner’s fate and the criminal justice process. In several cases,

paralegals working with the Project were the first people to inform family members that their loved one was still alive.¹⁰⁷ Paralegals also provided information about the change in law that allowed for judicial discretion and the presentation of mitigating evidence in capital sentencing. They explained the importance of obtaining information about the prisoner's life experiences prior to the offence and its relevance to the capital sentencing process.¹⁰⁸ Through the community sensitization process, paralegals also prepared villagers for the possibility of the prisoners' release.¹⁰⁹



Paralegal Nelly Nthakomwa conducting community sensitization. Photo by Sofia Moro.

VI. Areas for Further Study

The Traditional Leader Survey gives rise to several questions that merit further study. First, the survey participants' reports of the harms that incarceration inflicts on the community suggest that death sentences and other long-term sentences tear at the fabric of Malawian community life in profound ways. The effects of capital punishment on rural village life may be culturally specific to Malawi—or may find wider resonance in other Sub-Saharan African countries. In the authors' view, this is one of the most important findings of this study, and one that is not replicated in any other public opinion survey conducted in other countries around the world. The loss to the *community* is distinct from the loss to the prisoner's family when a death sentence is imposed. In a very real sense, the village is an extended family. This conclusion—which relies only on the responses to this survey—should be verified by independent study and review of sociological and anthropological literature. Similarly, the overwhelmingly positive reception of released prisoners reported by village leaders distinguishes Malawi from the United States, in which former prisoners are often viewed with distrust and fear. While traditional leaders did report some cases in which villagers were fearful of the released prisoners, they more commonly described scenes of joyful reunion, acceptance, and reconciliation. This raises the question as to whether there are cultural differences in communities' receptiveness to reconciliation. It also challenges the common assumption that the incidence of mob violence in Malawi translates into support for harsh punishments such as the death penalty. In fact, one survey respondent suggested that the death penalty itself was a form of government-sanctioned mob violence, noting that “[w]hen a person has killed someone the government does not recommend mob justice. I think a term of years is an appropriate sentence.”¹¹⁰

Second, very few traditional leaders expressed, as the purpose of punishment, the need to remove an offender from society to keep the community safe. In multiple cases, traditional leaders expressed their conviction that prisoners had been sentenced to death for crimes that were accidental or unintentional.¹¹¹ Given the harm that long-term incarceration inflicts on communities, it is worth exploring whether communities would be better served by

alternatives to incarceration, or whether offenders should be sentenced to shorter prison terms that serve the primary purpose of reforming offenders and teaching them socially useful skills. Further study would be necessary to confirm or refute this point.

Third, six survey respondents described “deterrence” as a reason for their continued support for the death penalty. This may point to the need for additional research on the deterrent effect of the death penalty in Malawi. In the United States, the overwhelming majority of social scientists concur that there is no evidence that the death penalty deters violent crime more than any other severe punishment, such as a lengthy term of incarceration.¹¹²

Fourth, only five survey respondents cited their religious beliefs as a reason to oppose (or support) the death penalty or any other form of punishment. Although many traditional leaders cited the increased importance of religious faith in the lives of released prisoners (for example, “He had a short temper, but now he goes to church; he stopped drinking or smoking Indian hemp”¹¹³; and “He goes to church often a[nd] lives a life that is so exemplary to others”¹¹⁴), most did *not* cite religion as a reason to oppose the death penalty. There are exceptions: for example, one respondent stated, “I consider the [death] sentence to be un-biblical and that “[t]he bible clearly says we have no power to take someone’s life.”¹¹⁵ Another noted that the Bible indicates that people can change.¹¹⁶ One respondent cited the Bible as a reason to support the death penalty, noting that “[e]ven the Bible states that one should not kill.”¹¹⁷ This indicates that a deeper study of religion and its relation to the death penalty in Malawi may be warranted to determine the role that religious faith may play in any larger societal debate about capital punishment. This survey did not expressly ask about faith or religion, but this may be a fruitful area of inquiry in any future public opinion survey.

VII. Conclusion

The results of this survey provide important insights into the views of Malawian traditional leaders regarding the death penalty. While the survey was limited in scope and targeted only a small number of village leaders, it suggests that public opinion in Malawi may not be as strongly in favor of capital punishment as has been assumed.

Nevertheless, the results of this survey lead to several preliminary conclusions. First, traditional leaders strongly believe that most people are capable of reform. Second, they suspect innocent people may be convicted and sentenced to death—and this concern may outweigh other rationales for capital punishment. Third, the imposition of a death sentence is enormously painful for the family members of the condemned prisoner and for their communities. In addition to suffering emotional trauma, communities mourn the loss of a vital source of labor. These three factors lead many traditional leaders to conclude that the death penalty is not the appropriate punishment for murder.

Moreover, the greatest limitation of the survey—that it focuses only on traditional leaders who have received former death row prisoners in their villages—also supports one final conclusion; namely, that a personal encounter with the death penalty can change people’s minds. Time and again traditional leaders noted that they had once thought the death penalty was proper but changed their minds when they witnessed the harm it inflicted upon a member of their community, that person’s family, and the community at large. Similarly, their direct experience with released prisoners who had been transformed by time and incarceration convinced many of them that all people are capable of change. It suggests that personal stories, as much as anything else, may provide the most compelling evidence against capital punishment for those who harbor doubts about the validity of the death penalty in Malawi.

Annex 1: Survey Questions

VILLAGE DEMOGRAPHICS

Name of Village:

Traditional Authority:

Number of people in village:

Name of released prisoner:

BACKGROUND

Name of village headman/group village headman:

Age:

Native language:

Time served as village headman (from [DATE] to [DATE]):

SURVEY QUESTIONS

1. How is the released prisoner adjusting to being back in the village?
2. What role has he played in the community since his release? What activities has he been engaged in?
3. Has he been able to support himself? If not, what do you think could help him begin to make a living?
4. What trades/skills would be useful for him to know in your village?
5. How has his family received him? **[Note to interviewers: the following are possible follow-up questions]:**
 - a) Has he been living with family members?
 - b) Do they seem pleased to have him back in the community?
 - c) Can you tell us anything else about his relationship with his family since his release?
6. Has the prisoner been assisting his family since his release? If so, how?
7. How was his family affected by his incarceration and death sentence? **[Note to interviewers: the natural inclination is to say that the family “was sad.” It may be better to ask how they responded, for example, how they behaved afterwards. This could also be a follow-up question.]**
8. Did you or the prisoner’s family ever believe [NAME] had been executed at any point? If so, how did that affect you and the prisoner’s family?

9. How was the community affected by his death sentence?

a) Was the community aware of the offence and [NAME]'s sentence?

b) How did members of the village feel after he was sentenced to death?

10. [If victim's family is in the same village or a neighboring village]:

How has the victim's family responded to the prisoner's release?

Can you describe the relations between the deceased's family and the prisoner's family?

11. How was the community affected by his release?

a) Has the community had a positive or negative reaction to the prisoner since his release?

[Note to Interviewers: Please inquire about people who knew him prior to/during conviction, as well as those who didn't know him before arrest.]

12. Has there been any discussion in your community about the death penalty?

a) If yes: What has been the nature of that discussion?

13. At the time of the sentencing did you feel the death penalty was a just punishment for murder (as a general matter)?
Did you feel it was an appropriate punishment in the case of [NAME]?

14. Have you noticed any changes in his personality or character between the time he was arrested and the time he was released? Please describe.

15. Have your views of whether the prisoner's death sentence was justified changed over time?

16. Has your experience with [NAME] affected your views on the death penalty? If so, how?

17. [If the prisoner committed the offence]:

Based on your experiences with [NAME], do you believe people can change over time?

Do you believe this is true even with people who commit acts of violence?

18. Do you think that innocent people can be convicted of crimes they didn't commit?

Does this affect your views on the death penalty?

19. Do you think communities can benefit from the release of prisoners? If so, how?

a) Economically?

b) Emotionally?

20. What do you think is the appropriate punishment for murder?

Choose one and explain:

- a) No punishment
- b) A term of years
- c) Life imprisonment (with opportunity for early release)
- d) Life imprisonment with no opportunity for early release
- e) Death penalty
- f) Other: _____

[Note to interviewers: After the interview subject makes a choice, ask the following question]:

Why do you feel this is an appropriate sentence? Do you think that would have been the appropriate sentence in the case of [NAME]?

CONSENT

Would you consent to our using their answers in a report about traditional leaders' attitudes toward the death penalty? Would you be comfortable if we used your name in our report, or would you prefer to remain anonymous? (Please check the appropriate response).

___ Yes, I give my consent to use my answers and my name

___ Yes, I give my consent to use my answers but I would like to remain anonymous

___ No, I do not give my consent to use my answers

Annex 2: Themes Identified by Coding Analysis

- Rehabilitation/reformed prisoners
- Deterrence
- Incapacitation/community safety
- Religious faith: repentance
- Religious faith: stance on death penalty
- Transition to community life: successful
- Transition to community life: economic hardships/unsuccessful
- Benefit of prisoner's release: economic support for community
- Benefit of prisoner's release: support for family
- Effects of incarceration on prisoner's family
- Reuniting family
- Shame on/within family
- Emotional toll on community
- Emotional toll on family
- Lack of awareness about prisoner's fate
- Victims: positive feeling toward prisoner
- Victims: negative feeling toward prisoner
- Victims: neutral feeling toward prisoner
- Justice: case specific
- Justice: in general
- Justice system flaws
- Forgiveness: generally
- Forgiveness: victims of prisoner
- Suffering of prisoner: incarceration
- Suffering of prisoner: after release
- Uncertainty about rightfulness/wrongfulness of death penalty
- Innocence/wrongful conviction
- Failure to take mitigating factors into account
- Human rights
- Prisoner as role model for others

Endnotes

¹ These numbers do not perfectly align because the project has not yet concluded. In certain cases, the courts have not yet handed down judgments. Other judgments are currently being appealed.

² Survey No. 018.

³ Survey No. 022.

⁴ Survey No. 005.

⁵ Survey No. 018.

⁶ Malawi has three different traditional leaders: chiefs, group village headmen, and village headmen. The village is supervised by the village headman and is the smallest administrative unit. At the next level, group village headman oversees several villages. African Health Observatory, World Health Organization, *Malawi Introduction to Country Context*, http://www.who.int/profiles_information/index.php/Malawi:Introduction_to_Country_Context (last visited Apr. 23, 2017).

⁷ Survey No. 008.

⁸ Survey No. 038.

⁹ Survey No. 039.

¹⁰ Survey No. 005.

¹¹ Survey No. 005.

¹² Survey No. 017.

¹³ Survey No. 025.

¹⁴ Survey No. 005.

¹⁵ Survey No. 046, 091, 095.

¹⁶ Survey No. 091.

¹⁷ Survey No. 079.

¹⁸ Survey No. 034.

¹⁹ Survey No. 055.

²⁰ Survey No. 041.

²¹ Survey No. 012.

²² Survey No. 063.

²³ Survey No. 003.

²⁴ Survey No. 051.

²⁵ Survey No. 071.

²⁶ Survey No. 050.

²⁷ Survey No. 046. *See also* Survey No. 103.

²⁸ Survey No. 032.

²⁹ Survey No. 072.

³⁰ *E.g.*, Survey No. 005, 032, 039.

³¹ Survey No. 006.

³² Survey No. 006 (“There are too many flaws in the criminal justice system. People that know their loved ones are innocent cannot convince the police and so it is not a good idea to have the death penalty.”)

³³ Survey No. 003. (“I believed the death penalty was not just. I have a strong feeling about innocent people being executed. There is a need for proper investigation before the death penalty is given.”)

³⁴ Survey No. 029.

³⁵ Survey No. 021. *See also* Survey No. 029, 056, 057, 058, 059, 060, 068, 085.

³⁶ Survey No. 005.

³⁷ *E.g.*, Survey No. 030, 036, 037, 070, 074, 076, 081, 086.

³⁸ Survey No. 022.

³⁹ Survey No. 063.

⁴⁰ *E.g.*, Survey No. 012, 036, 037, 069, 087.

⁴¹ Survey No. 048.

⁴² Survey No. 022, 055, 056, 058, 059, 063, 078.

⁴³ Survey No. 020, 023.

⁴⁴ Survey No. 012.

⁴⁵ Survey No. 015.

⁴⁶ Survey No. 098.

⁴⁷ Survey No. 100.

⁴⁸ Survey No. 081.

⁴⁹ Survey No. 005.

⁵⁰ Survey No. 016.

⁵¹ Survey No. 009.

⁵² Survey No. 012.

⁵³ Survey No. 012.

⁵⁴ Survey No. 030.

⁵⁵ Survey No. 032.

⁵⁶ Survey No. 005. *See also* Survey No. 014, 018, 028.

⁵⁷ Survey No. 018.

⁵⁸ Survey No. 007.

⁵⁹ Survey No. 006.

⁶⁰ Survey No. 002.

⁶¹ Survey No. 012.

⁶² Survey No. 027.

⁶³ Survey No. 039.

⁶⁴ Survey No. 043.

⁶⁵ Survey No. 055.

⁶⁶ Survey No. 072.

⁶⁷ Survey No. 064.

⁶⁸ Survey No. 072.

⁶⁹ Survey No. 018.

⁷⁰ Survey No. 032.

⁷¹ Survey No. 095.

⁷² Survey No. 005.

⁷³ Survey No. 029.

⁷⁴ Survey No. 007.

⁷⁵ Survey No. 028.

⁷⁶ Survey No. 051.

⁷⁷ Survey No. 008.

⁷⁸ Survey No. 009.

⁷⁹ Survey No. 034.

⁸⁰ Survey No. 005.

⁸¹ Survey No. 006.

⁸² Survey No. 042.

⁸³ Survey No. 013.

⁸⁴ Survey No. 015.

⁸⁵ Survey No. 023.

⁸⁶ Survey No. 023.

⁸⁷ Survey No. 018.

⁸⁸ Survey No. 032.

⁸⁹ Survey No. 033.

⁹⁰ Survey No. 030.

⁹¹ Survey No. 039.

⁹² Survey No. 031.

⁹³ Survey No. 037.

⁹⁴ Survey No. 068.

⁹⁵ Survey No. 085.

⁹⁶ Survey No. 101.

⁹⁷ Survey No. 003.

⁹⁸ Survey No. 008.

⁹⁹ Survey No. 018.

¹⁰⁰ As one leader summarized, the economic benefits of a released prisoner run deep, affecting every aspect of the village and family economy:

“The released person [can] participat[e] with more members [of the community]. Community works become easier and less time consuming. The family may reduce expenses that are incurred when visiting someone in prison. For instance, the whole chicken would be slaughtered for him. Now they share it at home. Likewise, transports costs are saved. The release mean more savings.” Survey No. 029.

¹⁰¹ Survey No. 018.

¹⁰² Survey No. 012.

¹⁰³ Survey No. 082. *See also* Survey No. 020, 076, 081, 088, 090.

¹⁰⁴ Survey No. 015.

¹⁰⁵ Survey No. 022.

¹⁰⁶ Survey No. 111.

¹⁰⁷ Survey No. 005, 047, 061.

¹⁰⁸ Survey No. 073.

¹⁰⁹ Survey No. 037.

¹¹⁰ Survey No. 058.

¹¹¹ *E.g.*, Survey Nos. 019, 021, 036, 053, 070, 087.

¹¹² Michael Radelet & Tracey Lacoock, *Do Executions Lower Homicide Rates? The Views of Leading Criminologists*, 99 NORTHWESTERN J. CRIM. L. & CRIMINOLOGY 489 (2009). Although some studies claim to have found a deterrent effect, social scientists have found that their methodology is flawed. *See, e.g.*, COMMITTEE ON LAW AND JUSTICE, NATIONAL RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin & John V. Pepper eds., 2012); Jeffrey Fagan, *Death and Deterrence Redux Science, Law and Causal Reasoning on Capital Punishment*, 4 OH. STATE J. CRIM. L. 255 (2006).

¹¹³ Survey No. 037.

¹¹⁴ Survey No. 033.

¹¹⁵ Survey No. 058.

¹¹⁶ Survey No. 022, 027.

¹¹⁷ Survey No. 101.



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