



Promoting fair and
effective criminal justice

Submission to the United Nations Working Group on the issue of discrimination against women in law and in practice

Response to Questionnaire for a thematic report on women deprived of liberty to the 41st session of the HRC in June 2019

1 October 2018

Penal Reform International (PRI) welcomes the Working Group's call for submissions as input for the forthcoming thematic report on women deprived of liberty. PRI has long advocated for a closer analysis by UN Special Procedures of the human rights of this vulnerable group and applauds the Working Group for its chosen focus.

This submission responds to the Questionnaire of the Working Group, drawing on research and PRI's observations from a number of countries in all regions. Given the relatively little data and research available on women in criminal justice systems there are some countries where there is more information available on. Therefore, it must be stressed that the country examples given in the submission are illustrative.

I. Justice system

1. What are the main causes for women coming into conflict with the law and facing the associated deprivation of liberty, including pre-trial detention? Which are the groups of women who are most vulnerable and why? Please list the types of offenses for which women, or any particular group of women, are typically charged with, including administrative offenses.

a) Main causes for women coming into conflict with the law

Poverty

While marginalised groups are overrepresented in the prison population as a whole, research shows that poverty plays a particular role when it comes to women in conflict with the law. Their backgrounds are typically marked by economic deprivation, violence and household disruption, pointing to longstanding failures of social policies and policies to counter discrimination in society and employment. Women incidentally hold fewer roles of power and influence and are twice as likely as men to live in poverty and recent data suggests that their economic and social position is deteriorating relative to men.¹ The Sierra

¹ Eilís Lawlor, Jeremy Nicholls and Lisa Sanfilippo, The New Economics Foundation, Unlocking Value: How we all benefit from investing in alternatives to prison for women offenders, November 2008, p. 7.

Leone Truth and Reconciliation Commission also noted, that “women’s lack of economic empowerment contributes to their vulnerability and to the ‘feminisation of poverty’.”²

Research shows that a high number of female offenders led single-headed households prior to imprisonment, and economic pressure on them was high, having to raise children with no or little financial support from their partners or husbands. This profile is reflected in the typically high percentage of economic offences for which women are imprisoned.³ For example in a survey of women prisoners in Kyrgyzstan, 30per cent said they were poor or very poor, 41per cent of the women had been sentenced for theft or property offences.⁴

Non-payment of fines and bills have been a common reason for female convictions in Europe. For example, in Ireland, the prison service reported that 80 per cent of female committals to prison in 2014 were for non-payment of fines.⁵ In England and Wales failure to pay a mandatory ‘television licence’, which can lead to prison if they continue to default on payments, accounted for 36 per cent of all prosecutions of women in 2015.⁶ Furthermore, it has been reported that shoplifting (theft) has led to hundreds of women receiving short sentences in the UK.⁷

In Kenya, a study by PRI showed that for the majority of the women serving community sanctions after being held in pre-trial detention, the offending was linked to economic need. Sixty-seven per cent of the women interviewed said they had offended in order to earn a living and to support their families. The women convicted of selling *kangara and chang’aa* (illicit alcoholic drinks) without a licence, gave three reasons for committing the offence. Firstly, brewing is a steady source of income without which they would not be able to support their families. Secondly, most were able to sell the alcohol from their homes which enabled them to take care of their children at the same time. Thirdly, in many cases, they were able to obtain the ingredients for brewing on credit and could pay the supplier upon selling the drinks. The women interviewed who were convicted for removing forest produce under the Forest Act were also driven by economic reasons as they rely on firewood for cooking. The cases of the women convicted for failure to construct toilets also highlight the interplay between poverty and heading a household. The women could not afford to hire workers to construct the toilets and they could not do it by themselves. One commented: “I had no money. Was I to build a toilet or pay school fees?”⁸

Poverty and the inability to access economic resources has ongoing implications for women who are in conflict with the law, as discussed below, in regard to bail, access to legal

² AdvocAid, Women, Debt & Detention: An Exploratory Report on Fraudulent Conversion and the Criminalisation of Debt in Sierra Leone, July 2012, p. 15.

³ Women in Prison in Argentina: Causes, Conditions, and Consequences, Cornell Law School’s Avon Global Center for Women and Justice and International Human Rights Clinic, Ministry of Defence of Argentina and the University of Chicago Law School International Human Rights Clinic, 2013, p2.

⁴ Penal Reform International (PRI), Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan, 2014, p. 13.

⁵ Fiona Gartland, ‘Non-payment of fines reason for 80per cent of female committals’, *The Irish Times*, 27 June 2016, www.irishtimes.com/news/crime-and-law/non-payment-of-fines-reason-for-80-of-female-committals-1.2701713.

⁶ Prison Reform Trust, *Why focus on reducing women’s imprisonment?*, February 2017, p2. A ‘television licence’ is required by law to install or use a TV or watch programmes on an online TV service.

⁷ The Independent, ‘Hundreds of women on ‘incomprehensible’ short sentences for shoplifting, campaigners warn’, 8 July 2018, www.independent.co.uk/news/uk/politics/women-prison-uk-shoplifting-sentence-minor-offences-jail-government-a8434621.html

⁸ Penal Reform International, *Community service and probation for women: A study in Kenya*, 2016, www.penalreform.org/wp-content/uploads/2016/10/Revised-PRI-Kenya-women-prisoners-report-WEB.pdf, p14.

representation. It also means that in legal systems where financial restitution can lead to a reduction in their sentence including avoiding detention, is practically impossible.⁹

Harsh drug policies

Prison statistics show that a higher percentage of women than of men are in prison for drug offences. Worldwide statistics show that drug-related offending is particularly high among women prisoner.

A 2017 UN report highlighted links between poverty, family roles and drug-related offences committed by women, raising concerns at their 'overincarceration' for 'transporting drugs (as mules), having a secondary role in the commission of crimes or performing low-level high-risk tasks, often at the request of their partners'.¹⁰ Other research has indicated that more serious offenders, mainly male, escape imprisonment or have their sentences reduced by entering plea-bargaining deals and providing assistance to the prosecution, which women are usually unable to provide.¹¹ For example, in Argentina a report found that 'The harsh sentences imposed on drug mules – individuals, usually women, who are low on the drug cartels hierarchy who transport small amounts of drugs across borders – have led to an increase in the number of women in prison and length of pre-trial detention.'¹² In the US, too, research has shown that "once in the system, women often have little choice but to accept plea bargains and then face mandatory minimum sentencing laws that restrict judges from mitigating the impact of their sentencing decisions in consideration of their family situations or their obvious need for substance abuse treatment."¹³ It is clear that the number of women in prison in the US has not grown dramatically because of changes in offending, but because of changes in drug enforcement policies and practices.¹⁴

Reoffending rates for drug offences such as use and possession have been linked to the fact that underlying causes of many women's substance use are not addressed in prisons. These causes would be better addressed in the community through non-custodial measures. For example, in the US it was found that: "[A] large proportion of justice-involved women have abused substances or have engaged in criminal behavior while under the influence and/or to support their drug use."¹⁵ More than two-thirds of women in state prisons meet the criteria for drug dependence or abuse, and about half used drugs at the time of the offense for which they were incarcerated.¹⁶ Furthermore, many women use drugs to self-medicate in response to violence and trauma, which can lead to justice system involvement.

Treatment for women in prison is typically inadequate to address their needs. In low to mid-income countries, there is a lack of any specialised service to address underlying causes of

⁹ *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (The Cornell Center on the Death Penalty Worldwide: A report of the Alice Project), September 2018, p8.

¹⁰ UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, *Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding*, 21 August 2017, A/HRC/36/28, para. 13.

¹¹ Special Rapporteur on violence against women, A/68/340 (2013), para. 26.

¹² Cornell Law School's Avon Global Center for Women and Justice and International Human Rights Clinic, Defensoría General de la Nación Argentina and The University of Chicago Law School International Human Rights Clinic, 'Women in Prison in Argentina: Causes, Conditions, and Consequences', (2013) p33.

¹³ Frost, Natasha A.; Greene, Judith; and Pranis, Kevin, "HARD HIT: The Growth in the Imprisonment of Women, 1977-2004," *Institute on Women & Criminal Justice* (New York, NY: Women's Prison Association, May 2006), pp. 23-24.

¹⁴ <http://sentencingproject.org/wp-content/uploads/2015/12/The-Changing-Racial-Dynamics-of-Womens-Incarceration.pdf>

¹⁵ Belenko, Steven, Matthew Hiller, and Leah Hamilton. "Treating Substance Use Disorders in the Criminal Justice System." *Current psychiatry reports* 15.11 (2013): 10.1007/s11920-013-0414-z. PMC. Web. 28 Sept. 2018.

¹⁶ <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf>

substance use, and in high-income countries specialised services may be provided, but they often fail to be gender-specific for women.¹⁷

→ Also see *Foreign national women below*.

Recent reforms to address overincarceration of women for drug-related offences

There have been several recent reforms, namely in Latin America, to address the vulnerability (and over-incarceration) of women offenders. For example, in Costa Rica, the law was amended to provide for women who were convicted of bringing drugs into prison when visiting family members. It allowed for women living in poverty, heads of households or custodians of minor children, older adults or persons with some form of disability to be granted home arrest, supervised release, residence in a halfway house, or electronic monitoring.¹⁸ Furthermore, a new reform in January 2017 provides for the possibility to wipe criminal records in cases where offences were committed in 'situations of vulnerability' which will apply to many cases involving women.¹⁹

Some reforms have been driven by efforts to reduce the impact of drug-related offending on children. The Inter-American Commission on Human Rights (IAHCR) have recommended: '... the incarceration of women who are mothers, pregnant, or have persons at special risk under their care – such as people with disabilities or older persons – should be considered a measure of last resort, and priority should be given to non-custodial measures that would allow them to provide for their dependents.'²⁰ In February 2018 the Brazilian Federal Supreme Court ruled that pregnant women and mothers of children aged 12 and under may be placed on house arrest instead of in preventative detention. Judges are told this is to be the new rule and to deny house arrest, judges must provide grounds and inform the Supreme Court.²¹

Violent offences

The number of women globally who have committed violent crimes is very small. Women are far more likely to be victims than perpetrators. However, when women have been convicted of murder or manslaughter, in a significant number of cases the victim is a male partner or male family member. While domestic and sexual abuse plays a considerable role in women's pathways to imprisonment, this is particularly true in cases where women have killed their abuser.

These offences are committed in a context where in 2012, two thirds of the victims of intimate partner/family-related homicide were female, and almost half of all female victims (47per cent) of homicide were killed by their intimate partner or a family member(s), compared to less than 6 per cent of male homicide victims.²²

¹⁷ Barbara Bloom and Stephanie Covington, *Addressing the Mental Health Needs of Women Offenders*, 2008, <http://stephaniecovington.com/assets/files/FinalAddressingtheMentalHealthNeeds.pdf>.

¹⁸ Organization of American States/OAS Secretariat for Multidimensional Security/ SMS Inter-American Drug Abuse Control Commission - CICAD, *Technical Report on Alternatives to incarceration for Drug-Related Offenses*, 2015, p. 32, Box no. 5.

¹⁹ Washington Office on Latin America, *Eliminating barriers to re-entry: Criminal record reform in Costa Rica*, 2017.

²⁰ <http://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf> para 203

²¹ Human Rights Watch, 'Pregnant Women Will No Longer Await Trial in Brazilian Jails: Supreme Court Ruling a Victory for Law Reform in Brazil', 23 February 2018, www.hrw.org/news/2018/02/23/pregnant-women-will-no-longer-await-trial-braziljails.

²² See UNODC, *Global Study on Homicide*, 2013, www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf.

PRI's research confirmed that a significant proportion of the violent offences committed by women (although very few in absolute terms) were directed against male family members. The reasons given by the women were self-defence and protecting their children.²³ For example, in Kyrgyzstan of the 27 women interviewed who had been convicted of murdering a male family member had experienced abuse by their partners or spouses and just five, or 18 per cent, had previous convictions (it is not known what these were for). This suggests that the large majority had no prior history of offending or of violence. Fifteen of these women (56 per cent) said that they acted out of self-defence or self-protection with three of these women also adding that they acted to protect their children. Over half of these women said that they had experienced domestic abuse and described it as a frequent occurrence. Thirty-seven per cent of these women reported that they had experienced sexual abuse and just under a half of these had experienced this abuse at the hands of their spouse or partner. Over half of these women have either self-harmed or attempted suicide.

A September 2018 report explains that available data indicates that most women on death row (estimated to be at least 500 women globally) have been sentenced to death for the crime of murder. Again many of these crimes involve murders of close family members in a context of gender-based violence.²⁴ Striking similarities among women sentenced to death for such convictions were found: most cases involve long-term abuse and the absence of effective outside help. Economic dependence, fear of losing child custody, widespread societal tolerance of violence against women, and the difficulty and stigma involved in obtaining a divorce exacerbate the effects of marital abuse. Several death-sentenced women in this category, particularly in Iran and Nigeria, had been forcibly married at a young age.²⁵

With few exceptions, criminal justice systems fail women in such cases by ignoring their trauma and the dynamics of domestic violence, as evidenced in the 2016 study PRI and Linklaters LLP on cases where women fatally attack their abusers, *Women who kill in response to domestic violence: how do criminal justice systems respond?*²⁶ In many countries, there is no separate basis in law or mechanisms allowing courts to consider evidence of gender-based violence. Furthermore, courts are not equipped with the right guidance or show a reluctance to take victimization into account.

In the majority of the jurisdictions reviewed, there is no specific legislative basis for a history of abuse to be considered as a mitigating factor and therefore requests for more lenient treatment have been brought within the existing framework of the criminal law. Typically, offenders have sought to couch their pleas for more lenient treatment in terms of existing defences. Attempts by victims of abuse to rely on self-defence, temporary insanity and provocation (where available), have been met with varying degrees of success in different jurisdictions. Thus, in many jurisdictions, existing defences have proved ill-adapted to the situation of a woman suffering from battered woman syndrome or the slow burn reaction.²⁷

Reforms to address violence as a factor in cases where women have killed their abusers

In a small number of the nine jurisdictions considered by PRI and Linklaters' study,²⁸ most

²³ PRI, *Who are women prisoners? Survey results from Kazakhstan and Kyrgyzstan*, 2014, p14.

²⁴ *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (The Cornell Center on the Death Penalty Worldwide: A report of the Alice Project), September 2018, p11.

²⁵ *Ibid*, p11.

²⁶ Penal Reform Intl. and Linklaters LLP, *Women who kill in response to domestic violence: How do criminal justice systems respond?*, p.7, 2016.

²⁷ *Ibid*.

²⁸ *Ibid*.

notably in a number of Australian states, there have been legislative amendments to the criminal law to facilitate more lenient treatment of women who commit violent crimes against their abusers. These amendments take various forms, from introduction of new defences specifically available to victims of abuse (for example, in Queensland, Australia), to the amendment of existing defences so that they are better adapted to dealing with victims of abuse (for example, in Victoria, Australia). While some legal systems have been willing to adapt the existing law or even create new law to deal with victims of abuse, other systems appear reticent to expand beyond the traditionally established parameters. Those legal systems that have adapted have been sympathetic to the view that a violent reaction may be the result of a prolonged period of abuse, rather than one single triggering event.²⁹ However, even in jurisdictions in which helpful precedents exist, the absence of a specific legislative (or quasi-legislative) basis for dealing with a history of abuse in most jurisdictions raises a risk that evidence of abuse is considered or treated inconsistently between cases, particularly in legal systems which do not operate on the basis of the doctrine of precedent.

Offences against sexual morality

In many countries criminal sanctions are used to curb sexual or religious ‘immorality’ through the use/designation of ‘offences’ such as adultery, extramarital sex, sexual misconduct, violations of dress codes or prostitution. Such offences tend to penalise women exclusively or disproportionately even if they are formulated in a gender-neutral way. Some studies also suggest that females charged on moral offences are treated more harshly than males, presumably for having transgressed their gender role.

In a number of jurisdictions, women face charges of adultery even where there is clear indication of rape, and criminal procedures place the burden of proof on the female victim.³⁰ For example, in Pakistan reports indicate a high number of women in prisons accused of or convicted for violating the prohibition against extramarital sex, including after reporting rape or after filing for divorce.³¹

Similarly, in Afghanistan approximately 50 per cent of women in prisons were estimated to have been convicted of moral crimes.³² Rape victims have to undergo ‘virginity tests’ establishing sexual intercourse and may be convicted of adultery if they cannot prove that the act was not consensual. In order to do so and to identify evidence of self-defence, women have to endure forensic examinations. In case of elopement, the women’s freedom also often depends on the result of a ‘virginity test’ proving that she did not have sexual intercourse with the man accompanying her. A failure of proof usually results in prison sentences for running away and adultery.³³

Offences against sexual morality can even attract death sentences, including for instance in Iran and Sudan. Married sex workers and married victims of sex trafficking can also face capital punishment. ‘One Iranian case exemplifies the tragic and absurd consequences of such a system: a woman forced by her abusive husband into prostitution was convicted as an accomplice to murder when one of her male clients killed her husband. She was also

²⁹ *Ibid.*, p7.

³⁰ Report to the UN General Assembly by Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Pathways to, conditions and consequences of incarceration for women, A/68/340, 21 August 2013, paras. 16 and 18

³¹ *Ibid.*, para. 17

³² UNODC, Afghanistan: implementing alternatives to imprisonment, in line with international standards and national legislation, 2008, para. 14; Human Rights Watch, I Had to Run Away: The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan (2012), p. 1.

³³ *Ibid.*, pp. 6, 25 and 40.

sentenced to death by stoning for adultery. The male client, in contrast, was sentenced to a jail term of eight years.³⁴

Imprisonment for non-compliance with release conditions or community-based sanction

In some jurisdictions, people are sent (back) to prison for breach of the terms of their non-custodial sanction or their release conditions, rather than for re-offending.³⁵ Like prison systems, the set-up of conditions and review of any breaches usually fail to take any gender-specific factors for women's cases.

One example is the use of electronic monitoring, or EM, requiring the offender to wear a 'tag' or 'bracelet' so all or some of their movements can be tracked. The curfew hours that are imposed as part of an electronic monitoring-focused condition can be inflexible and therefore set women up to fail, where they are caring for young children or other adults. One study explained that: 'Even though some explanations provided by female offenders for non-compliance are likely to be viewed as acceptable by a court, private EM companies have little discretion when deciding whether to formally breach offenders. The use of discretion is limited to deciding whether or not to take action following a violation and whether the reasons put forward by tagged individuals are acceptable.' The breach is therefore passed onto the courts.³⁶

In the US, where three out of four women under control of the correctional systems are on probation (as an alternative to imprisonment), the conditions are frequently unrealistic for women. For example, bail fees are usually unaffordable for women and failure to pay is often a violation of probation. 'Childcare duties further complicate probation requirements that might require meetings with probation officers, with no extra money to spend on babysitters or reliable fast transportation across town. All of these issues make women particularly vulnerable to being incarcerated not because they commit crimes, but because they ran afoul of one of the burdensome obligations of their probation supervision.'³⁷ The successful outcomes of women released from prison to poor urban neighbourhoods have been found to be disproportionately limited, as aside from lack of family support, resources pose a challenge to them meeting their conditions such as access to reliable transportation.³⁸

➔ *See below for further discussion on issues for women serving non-custodial alternatives to imprisonment.*

³⁴ *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (The Cornell Center on the Death Penalty Worldwide: A report of the Alice Project), September 2018, p13.

³⁵ Michelle S. Phelps and Caitlin Curry, *Supervision in the Community: Probation and Parole*, April 2017, <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-239?print=pdf>.

³⁶ 'Designed for men, but also worn by women', Ella Holdsworth and Anthea Hucklesbury, *Centre for Crime and Justice Studies*, www.crimeandjustice.org.uk/publications/cjm/article/designed-men-also-worn-women.

³⁷ <https://www.prisonpolicy.org/reports/pie2017women.html>

³⁸ Michelle S. Phelps and Caitlin Curry, *Supervision in the Community: Probation and Parole*, April 2017, <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-239?print=pdf>.

b) Vulnerable groups

Women from Indigenous communities and ethnic minorities

Women from Indigenous communities and ethnic minorities face significant disadvantages in the criminal justice system, due to the double discrimination of gender and race, which is usually coupled with poor socio-economic status and education.

The rate of criminalisation and incarceration of Indigenous women is particularly concerning in Canada, Australia and New Zealand. In Canada, women from Aboriginal communities make up in excess of 35 per cent of the female prison population, although only 4.3 per cent of the total Canadian population.³⁹ They are also detained for longer periods and at higher security levels than their non-Aboriginal counterparts.⁴⁰

In Australia, Aboriginal and Torres Strait Islander women comprise 34 per cent of women in prison but only 2 per cent of the adult female Australian population.⁴¹ The UN Special Rapporteur on violence against women visited the country in 2017, which prompted a review of the policy of incarceration for unpaid fines, given the disproportionate impact it has on Aboriginal women.⁴²

Also, in New Zealand, adult indigenous Māori women are disproportionately imprisoned. They comprise 55 per cent of adult women convicted in 2017 but made up 67 per cent of women sentenced to imprisonment - the highest proportion of all.⁴³ Only 15 per cent of New Zealand's population identify as Māori.⁴⁴

Women from ethnic minority groups also face discrimination resulting in disproportionate numbers being imprisoned. For example, in the UK it was reported in 2017 that black women are 25 per cent more likely than white women to receive a custodial sentence.⁴⁵ In Albania, 12.5 per cent of the female prison population belonged to the Roma minority (as reported in 2013);⁴⁶ Roma only represented 0.3 per cent of the country's population in a 2011.⁴⁷ In the US, incarcerated women are 28.6 per cent Black and 14.2 per cent Hispanic.⁴⁸

³⁹ See Statistics Canada website at www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm.

⁴⁰ *Annual report of the Office of the Correctional Investigator, Canada, 2015-2016*, 30 June 2016.

⁴¹ Australian Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017, p12.

⁴² 'End of mission statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against women, its causes and consequences, on her visit to Australia from 13 to 27 February 2017', *Office of the High Commissioner for Human Rights*, February 2017, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21243&LangID=E.

⁴³ New Zealand Law Society, Māori adults 58 per cent of those sentenced to imprisonment, 5 April 2018, www.lawsociety.org.nz/news-and-communications/latest-news/news/mori-adults-58-of-those-sentenced-to-imprisonment.

⁴⁴ Stats NZ, http://archive.stats.govt.nz/browse_for_stats/people_and_communities/maori/maori-population-article-2015.aspx.

⁴⁵ Prison Reform Trust, *Counted Out: Black, Asian and minority ethnic women in the criminal justice system*, 2017.

⁴⁶ Edlira Papavangjeli, PhD Student, Women offenders and their re-integration into the society – gender perspective in the criminal justice system, 2013, p10, available at www.doktoratura.unitir.edu.al/wp-content/uploads/2014/02/Doktoratura-Edlira-Papavangjeli-Instituti-Studimeve-Europiane.pdf

⁴⁷ See information at PAIRS South East Europe at <<http://www.pairs-see.net/page?view=15>> accessed 2 June 2014.

⁴⁸ <https://www.prisonpolicy.org/reports/pie2017women.html>

Foreign national women

There is a large proportion of foreign national women prisoners held in various countries and regions globally, mainly for drug-related offences and breaching immigration laws – many as migrant workers.

For example, in the United Arab Emirates, as of June 2018 there were nine women under sentence of death and all but one were foreign nationals, and most of these (if not all) were migrant workers.⁴⁹ In Hong Kong and Macau, which have the largest proportion of female prisoners globally, the majority of women are foreign nations (accounting for more than half of Hong Kong's 1,773 female prisoners, and nearly 80 per cent of the 193 women in prison in Macau). Most of these women are convicted for either drug trafficking or immigration violations (common among foreign sex workers).⁵⁰

A survey by PRI⁵¹ of women in administrative detention in Jordan's main women's prison in Juweida in 2014 found 121 women (27 per cent of the total female prison population) were foreign nationals awaiting deportation or charged with or convicted of criminal offences. Nearly all of the foreign nationals detained under the Crime Prevention Law were migrant domestic workers. It is estimated that there are currently 70,000 migrant women working as domestic workers in Jordan, of whom 40,000 are registered. Just two per cent of foreign national women had been convicted of an offence and a further seven per cent were in pre-trial detention, almost all for theft offences – none had been charged with or convicted of violent offences. The remaining 89 per cent of foreign national women were held under administrative detention but several also said that they had been accused of theft. A third of women said that they were in detention because they had 'run away' from their employer whilst one woman said she was in administrative detention because of a 'love case'.⁵²

➔ See below under *Administrative Detention* for further information.

In Southeast Asia, the number of foreign national prisoners has rapidly increased during the last few decades due to the surge of migration, trafficking and transnational crime. While there is a lack of disaggregated data, studies indicate that in countries like Malaysia where the violation of immigration laws attracts a prison sentence, more than half of the female prison population are foreign nationals. The immigration offences are minor such as illegal entry to the country, having no passport or working without work permit. The second most common type of offences that imprison foreign national women in the region are drug-related, usually drug trafficking or selling drugs for or with their male partners.⁵³

Evidence shows that the backgrounds and reasons of foreign national women convicted of drug trafficking are complex and thread with violence and vulnerability. For example, a study of Thai women imprisoned on such convictions in Cambodia showed that while 'all of the women can be defined as drug mules because they were carrying drugs across international borders for somebody else [...] None were career criminals, had knowledge of the international drug trade or relationships with established criminal organisations. Their offending was characterised by a lack of control (e.g. some were unaware that they were carrying drugs) and involved varying degrees of exploitation. Pre-arrest, their only contact with the international drug trade was via a usually male intermediary (frequently a romantic

⁴⁹ *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (The Cornell Center on the Death Penalty Worldwide: A report of the Alice Project), September 2018, p10.

⁵⁰ The Guardian, *More women are in Hong Kong's prisons than anywhere else. They should be protected, not criminalised*, 31 August 2017, www.theguardian.com/commentisfree/2017/aug/31/more-women-are-in-hong-kongs-prisons-than-anywhere-else-they-should-be-protected-not-criminalised.

⁵¹ PRI, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014.

⁵² *Ibid.* p13.

⁵³ Chuenurah C., & Park, M.Y. (2016). Women prisoners in Southeast Asia: Their Profiles and Pathways to Prison, *Korean Journal of Correctional Discourse*, 10(3), 75-79.

partner) who supplied them with the drugs (either with or without their consent) and instructions around what they needed to do.⁵⁴

Women with mental health illness

Women who are admitted to prison are more likely than men to suffer from mental health problems,⁵⁵ often as a result of previous domestic violence, physical and sexual abuse. Mental health issues can be a cause of imprisonment. Some women commit crimes as a result of their condition and they may be more likely to be arrested and convicted due to prejudices in the criminal justice system and may be less likely to be granted parole.

Responses to mental health illness of women are usually inadequate and can result in their imprisonment, for lack of understanding or support on behalf of the authorities. The issue is described by the UN Special Rapporteur on Health: 'Special attention should be paid to women, who suffer disproportionately from mental health practices that are based on paternalistic and patriarchal traditions, inappropriate and harmful gender stereotypes, medicalization of women's feelings and behaviour, and coercion. Women who have suffered from violence and inequalities within their families, communities and societies, and who have mental health conditions very often face situations in mental health settings that amount to violence, coercion, humiliation and disrespect for their dignity.'⁵⁶

3. What are the main challenges for women's access to justice, including, for example, the availability and quality of legal representation, the ability to pay for bail, and the existence of gender stereotyping and bias in judicial proceedings?

Economic disempowerment in society means that women in conflict with the law often depend on the ability and willingness of male family members to spend resources for their access to justice. This makes many women vulnerable to being deprived of their liberty, for reasons including their inability to pay for legal representation and bail.

a) Legal representation

It is common for female suspects, defendants and those convicted and imprisoned to face barriers in accessing legal representation. Given the poor backgrounds most come from means they are reliant on free legal aid. Without legal aid the consequences are multiple: there are delays in securing bail and justice, deprivation of liberty is more likely (particularly at the pre-trial stage) and mitigating factors in cases are not taken into account because of inadequate defence.

Where eligibility criteria for legal aid is based on family/household income, women in conflict with the law without access to this income are discriminated against. Furthermore, legal aid schemes may not be applied at all in cases of administrative detention or 'protective custody'. As it is common for women to be stigmatised and abandoned by families, they are often left without any legal representation unless an NGO helps.

⁵⁴ Dr Samantha Jeffries, Chontit Chuenurah, *Vulnerabilities, Victimisation, Romance and Indulgence: Thai Women's Pathways to Prison in Cambodia for International Cross Border Drug Trafficking*, journal article forthcoming, under review. Copy available by request.

⁵⁵ For example, according to a study conducted by the Bureau of Justice Statistics in 2002 and 2004. See UNODC, Handbook on Women and Imprisonment, 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), March 2014, p. 9.

⁵⁶ UNGA, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 28 March 2017, A/HRC/35/21, Para 59.

While it has to be noted that in some countries access to legal representation for women prisoners appeared to be high, for example in the South Caucasus,⁵⁷ most studies point to disadvantages women face in accessing legal representation. For example, while 65per cent of the women offenders surveyed in Albania in 2013 were legally represented in their first judicial hearings by private lawyers, they had to turn to legal aid lawyers later on in the criminal procedure, failing to afford payment. 35per cent of the women offenders could not afford legal counsel from the start and had to rely – where applicable at all – on legal aid lawyers, even though many were dissatisfied with the quality of representation.⁵⁸

For women detained in Jordan, access to legal representation was the most commonly identified support requirement, both in judicial and administrative detention. Women under administrative detention rarely had any access to legal representation.⁵⁹ In India, a 2018 report from the Ministry of Women and Child Development, found that legal aid is hardly available for women; 66.8per cent of the female prison population at the end of 2015 (17,834 in total) were in pre-trial detention.⁶⁰

b) Bail

Similar barriers women face in accessing legal representation can be seen with access to bail, whether it is monetary or other bail obligations, like regular reporting to authorities. These standard bail obligations cannot always be met by women as they may not be allowed to leave home without being accompanied by a male, because transport to the respective police station is not affordable or feasible, or because reporting times would jeopardise caretaking responsibilities, for example conflicting with times at which mothers need to pick up their children from school.⁶¹

In terms of monetary bail, evidence shows that women in prison have lower incomes than male prisons, meaning it is even more difficult for them to afford cash bail. A study found that women who could not make bail (typically set at USD \$10,000) had an annual median income of just USD \$11,071. And among those women, Black women had a median annual income of only \$9,083 (just 20per cent that of a white non-incarcerated man).⁶²

The inability to post bail often leads to pre-trial detention. For example, PRI's study in Kenya showed that 87per cent of the women serving community sanctions interviewed were held in custody prior to conviction. Most of the women were not granted bail and those who were could not meet the monetary bail terms or security required.⁶³

In Pakistan, many women are in pre-trial detention for long periods, even for minor offences and often for longer than the prescribed prison sentence for the offence they are charged with because they are abandoned by their families and are unable to pay bail themselves.

⁵⁷ Penal Reform International (PRI), *Who are women prisoners? Survey results from Armenia and Georgia*, 2013, p. 23.

⁵⁸ Edlira Papavangjeli, PhD Student, *Women offenders and their re-integration into the society – gender perspective in the criminal justice system (Albania)*, 2013, p. 13.

⁵⁹ PRI, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014.

⁶⁰ National Herald, 'Legal aid is hardly available for poor women in India', 10 July 2018, www.nationalheraldindia.com/india/legal-aid-is-hardly-available-for-poor-women-in-india

⁶¹ Penal Reform International, Andrea Huber, *Women in criminal justice systems: the added value of the UN Bangkok Rules*, 2015, p3.

⁶² The median annual income for unincarcerated men was \$39,600, and \$22,704 for unincarcerated women of similar ages: see <https://www.prisonpolicy.org/reports/pie2017women.html>

⁶³ Penal Reform International, *Community service and probation for women: A study in Kenya*, 2016, p15.

This is particularly true in cases involving adultery or narcotics, where even after being proven innocent and acquitted; they carry the stigma of being in jail.⁶⁴

Unable to post bail also puts women in a vulnerable position. For example, a network of trafficking and exploitation has been revealed in the US where vulnerable female prisoners were targeted. Traffickers use fellow prisoners as recruiters and online data to find women awaiting a court date. They then send money to women's commissary accounts (used to buy food, toiletries including tampons and other essentials) and ultimately bail them out, either through cash bonds or via corrupt bondsmen. Once the women are released they are given a choice between working as prostitutes or having their bond rescinded, forcing them to return to jail.⁶⁵

c) Gender stereotyping

Gender stereotyping affects women who come into conflict with the law at every stage.

At the point of contact with law enforcement, their treatment exacerbates the pre-existing vulnerabilities of female suspects – including their typical low levels of education, which means they may not be able to read legal documents or understand legal processes. As law enforcement officers are predominantly male, there is also the (real) threat and fear on behalf of female suspects of abuse.

At trial research suggests that lawyers, legal aid providers and judges lack awareness of gender-specific circumstances and their relevance. Disadvantages in criminal procedures are exacerbated in many cultures by the fact that women are socialised in such a way that they do not speak up for themselves at court, and even less so about their experiences of domestic or sexual violence. Research in Albania, for example, has highlighted that women offenders remain 'silent' in court, reluctant to reveal their personal experiences.⁶⁶

There is clear evidence that at the stage of sentencing, gender bias exists and this is either demonstrated by gendered stereotypes being 'mobilised to establish culpability' or when 'gender is simply ignored.'⁶⁷ As explained in a report on women on death row, there is the tendency of actors in the criminal justice to see women as victims and survivors, rather than as perpetrators of crime and this stereotype can benefit some women who have received reduced sentences. However, '[a]t the same time, women who are seen as violating entrenched norms of gender behavior may be sentenced more harshly. Women tend to receive lesser sentences than men when perceived as victims that conform with their assigned roles in society—the "caring mother," the "naïve girl," or the "hysterical woman." In contrast, women tend to receive harsher sentences when perceived as deviating from those roles—the "femme fatale," the "child murderer," or the "witch."⁶⁸

4. What have been the main drivers for the increasing or decreasing of the female prison population in your country in the past decade? To what extent are non-custodial measures used, in accordance with the United Nations Rules for the

⁶⁴ Law and Justice Commission of Pakistan, *Releasing the Female Accused on Bail*, PKLJC 48, May 2012, <http://commonlii.org/pk/other/PKLJC/reports/48.html>.

⁶⁵ Annie Kelly and Mei-Ling McNamara, The Guardian, 'America's outcasts: the women trapped in a cruel cycle of exploitation', 29 June 2018, www.theguardian.com/global-development/2018/jun/29/americas-outcasts-women-trapped-in-cruel-cycle-of-exploitation?CMP=twi_a-global-development_b-gdndevelopment.

⁶⁶ Edlira Papavangjeli, PhD Student, Women offenders and their re-integration into the society – gender perspective in the criminal justice system, 2013.

⁶⁷ *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (The Cornell Center on the Death Penalty Worldwide: A report of the Alice Project), September 2018, p18.

⁶⁸ Ibid. p6.

Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)?

a) Main drivers for the increase in female prison populations

While there is no extensive global study on the reasons for increases in female prison populations in some regions, and decreases in others, PRI has made the following observations in regard to female imprisonment rates:

- It is noteworthy that the female prison population is increasing at a much faster rate (53 per cent since 2000) compared to male prison population rates (20 per cent in the same period).⁶⁹
- Punitive drug policies have been identified as one leading cause for the growing population of female prisoners: in regions where there have been sharp rises (Americas and Asian regions) there is evidence that harsh drugs laws have been the main contributor to this. See: [A/HRC/39/39, para 46](#).
- In Oceania and some countries in Europe, where female prison populations continue to rise, studies and data point to 'tough on crime' policies being contributing factors: including policies that bring mandatory sentencing, imprisonment for non-payment of fines, etc.

b) Alternatives to imprisonment for women

Lack of gender-specific alternatives to imprisonment for women

The Bangkok Rules call for "gender-sensitive non-custodial measures" (in particular Rules 57, 58, 60, 62), recognising the history of victimisation of women offenders and their caretaking responsibilities including the harmful impact of imprisonment on children. However, PRI has observed that while there is a general recognition of the importance of increase the range and use of alternatives to imprisonment, these rarely are designed or geared towards women. This means that many non-custodial measures and sanctions (including bail and fines, as explained above) overlook the typical characteristics, roles and backgrounds of women offenders.

For example, in an enquiry into alternative sanctions within Council of Europe member states in 2010, only 2 out of 14 responses stated that such alternatives were in place specifically for women offenders in the respective country.⁷⁰

Beyond high-resource, specialised programmes mainly focused on mental health and substance use programmes, commonly seen in western countries, the 'standard' range of alternatives available and employed in the majority of countries fail to benefit women effectively. The shortage of alternatives suitable for women and meeting their needs

⁶⁹ Roy Walmsley, Institute for Criminal Policy Research, *World Female Imprisonment List*, 4th edition, November 2017.

⁷⁰ QCEA, Investigating Alternatives to Imprisonment within Council of Europe Member States (2010), <http://www.qcea.org/wp-content/uploads/2011/06/rprt-alternatives-en-jan-2010.pdf>, pp. 90, 91. 14 responses to a questionnaire were received from Bulgaria, Croatia, Cyprus, Estonia, Finland, Iceland, Luxembourg, Malta, Moldova, Norway, Serbia, Slovenia, Switzerland, and Ukraine. Of these, Moldova and Ukraine reported sanctions aimed specifically at women offenders. Both countries have the facility to release pregnant women or women with young children from prison. If the pregnant woman or mother re-offends when released she may be returned to prison to serve the original or an amended sentence.

deprives them of access to such alternatives. For example, in some cases mothers are more likely to be imprisoned because the alternatives are regarded as unsuitable because of the lack of childcare facilities.⁷¹

With regards to accessing early-release mechanisms, the lack of programmes and rehabilitation opportunities for women hampers their chances. For example, in the US it has been documented that women often do not have the same access to diversion and other programs that can shorten their prison sentence as men.⁷² A report explained that, for instance, Wyoming only recently allowed women to attend an alternative 6-month “boot camp” instead of serving 6-10 years in prison. However, eligible women would need to travel to another state (Florida) because Wyoming’s camp is only open to men.⁷³ It was noted that in the state of Texas, which has the highest number of women than any other US state, there are few educational or vocational programs open to women in its facilities.⁷⁴

→ Also see [A/HRC/39/39, Paras 52, 61-65](#).

Examples of non-custodial alternatives to imprisonment for women

In some countries, women who are pregnant or with children under a certain age are not given prison sentences: this is a result of long-standing legislation in some, and in others due to recent reforms. For example, in Saudi Arabia, in mid-2018 the Ministry of Justice announced such a policy.⁷⁵ In February 2018, the Brazilian Federal Supreme Court decided that pregnant women and mothers with children under the age of 12 who are accused of non-violent crimes will be placed under house arrest instead of in pre-trial detention.⁷⁶ The judgement gave authorities 60 days to apply the order, which will affect at least 4,500 women who are currently detained.⁷⁷

In Georgia, legislation allows for a suspension of the sentence for a pregnant woman up until a year after the pregnancy.⁷⁸ In Armenia, except in case of prison sentences of more than 5 years for serious crimes, pregnant women and women with children under the age of 3 can be exempted from punishment or the punishment can be postponed.⁷⁹

While such policies that reduce women’s imprisonment (particularly when there are children who will be impacted) are welcomed – and are in line with the UN Bangkok Rules – it is worth reflecting that they also signal that the quality for which women should not be deprived of liberty is their connection to motherhood.

⁷¹ Kathleen Marshall, Scotland’s Commissioner for Children and Young People, Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland, 2008, p 4.

⁷² Prison Policy Initiative, ‘The Gender Divide: Tracking Women’s State Prison Growth’, 9 January 2018, https://www.prisonpolicy.org/reports/women_overtime.html

⁷³ Steven Titus and Associates, ‘Titus Recommends Client for Boot Camp, Challenges Wyoming System’, 3 May 2018, <https://www.steventituslaw.com/blog/titus-recommends-client-for-boot-camp/>

⁷⁴ Texas Criminal Justice Coalition, ‘An unsupported Population: The treatment of women in Texas’ criminal justice system’, April 2018.

⁷⁵ Saudi Gazette, ‘No prison sentences for pregnant women’, 3 July 2018

<http://saudigazette.com.sa/article/538107/SAUDI-ARABIA/No-prison-sentences-for-pregnant-women>

⁷⁶ ‘Pregnant Women Will No Longer Await Trial in Brazilian Jails’, *Human Rights Watch*, 23 February 2018, www.hrw.org/news/2018/02/23/pregnant-women-will-no-longer-await-trial-brazilian-jails.

⁷⁷ ‘Pregnant Women and Mothers of Children of Up to 12 Years of Age to Be Placed on House Arrest’, *Folha de S.Paulo*, 21 February 2018, www1.folha.uol.com.br/internacional/en/brazil/2018/02/1957522-pregnant-women-and-mothers-of-children-of-up-to-12-years-of-age-to-be-placed-on-house-arrest.shtml.

⁷⁸ Penal Reform International, Submission to Committee on the Rights of the Child Day of General Discussion, 30 September 2011, <http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/Submissions/PRI.pdf>

⁷⁹ *ibid.*

There have been other efforts to reduce the use of imprisonment of women through an increase in alternatives. In Costa Rica, several reforms have been implemented to address the vulnerability of women offenders. Following a sentencing reform, approved in November 2013, to reduce the imprisonment of women who smuggle drugs into prison,¹ a new reform in January 2017 provides for the possibility to wipe criminal records in cases where offences were committed in 'situations of vulnerability'.²

In Kenya, PRI together with the probation service, developed a new approach to probation and community service for women to increase their use and ensure that women's needs were met under such sanctions. Challenges faced by women in completing their non-custodial order centred around caretaking obligations and socio-economic issues. Most women struggled to pay for transport to attend appointments or their community service placement. These kinds of difficulties tended to be linked to the length and scheduling of the order, which if not managed well could prevent women from securing part-time employment to support their families. Other challenges included stigmatisation, health issues and a lack of support programmes, particularly for economic empowerment and skill building. Based on the UN Bangkok Rules, guidance and training resources were developed, and tools used by probation officers were adapted and tested, with improvements in the gender-sensitive approach of probation officers.⁸⁰

II. Other institutions

- 1. What other institutions outside the justice system exist in your country wherein women and girls are institutionalized on grounds such as care, correction, protection and prevention against potential harms, etc.? Please list the groups of women and girls who are most concerned in each situation.**
- 2. Please explain the decision-making process for the institutionalization of women and girls in each situation, including the role of women and girls themselves in the decision on institutionalization. Please highlight any good practices in terms of enabling women to exercise agency within institutional systems, with due respect to their rights?**

a) Administrative detention of migrant workers

→ *See foreign national women prisoners above*

In Jordan, PRI has documented the imprisonment of migrant domestic workers under administrative detention. The circumstances in which they are detained are complex and varied. NGOs informed PRI that they can be arrested if they leave their employer and their employer registers with the police that they have 'escaped' or reports a theft. The police may also arrest migrant domestic workers if they do not have valid residency papers. The local governor can then issue a decision for detention pending deportation. In these situations, if employers have refused to pay for their return air ticket to their country of origin and they cannot pay for a ticket themselves, their main hope of leaving detention lies with their embassies or with NGOs such as Tamkeen and Adalah who can pay for their return ticket to their home countries. PRI was informed by the prison authorities that all of the foreign national women in the main women's prison were under administrative detention although the survey indicated that one in ten were in pre-trial detention or serving sentences for theft from their employers.⁸¹

⁸⁰ Omar Phoenix Khan, 'Eight things to remember when implementing a gender-sensitive approach to probation', *PRI Blog*, 17 July 2017, www.penalreform.org/blog/eight-things-to-remember-when-implementing-a-gender/.

⁸¹ PRI, *Who are women prisoners? Survey results from Jordan and Tunisia*, 2014, Pp8-9.

b) Administrative detention on the grounds of ‘protection’

In some jurisdictions detention is used on the grounds of ‘protection’ – usually from so-called ‘honour crimes’⁸² from threats of honour crime and for victims of rape. Sometimes the grounds for detaining women in such cases is actually to ensure they will testify against the perpetrator in court.

For example, the UN Special Rapporteur on torture has reported detention of women for their ‘protection’ for up to 14 years because they were at risk of becoming victims of honour crimes.⁸³ Such practices are also reported in Iraq, where “detention centers sometimes end up serving as protective shelters to prevent families from killing women and girls at risk of honor killing.”⁸⁴

In Jordan, women are held in administrative detention under the Crime Prevention Law as a means of ‘protection’ if they are perceived at risk of being harmed by their family, based on a decision by the local governor. This may be because of a perceived moral transgression such as adultery, consensual sex outside of marriage, being seen in the presence of an unrelated male or if they leave their family to live with their boyfriend against the wishes of the family. Women detained can only be released if the governor signs an official release form upon receiving signed assurances from family members that the woman will not be harmed.⁸⁵

Girls also are detained administratively allegedly for their own protection, often as a consequence of non-existent or poorly developed child protection systems.⁸⁶

/End

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¹ Nischa Pieris, *Reducing female incarceration through drug law reform in Costa Rica*, Washington Office on Latin America, 2017.

² Washington Office on Latin America, *Eliminating barriers to re-entry: Criminal record reform in Costa Rica*, 2017.

⁸² See: www.endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html.

⁸³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Mission to Jordan, 5 January 2007, UN-Doc. A/HRC/4/33/Add.3, para. 39. and para. 72 lit. (u).

⁸⁴ Heartland Alliance, *Iraq: Gender-Based Violence Prevention: Legal, Medical and Psychosocial Services*, <http://www.heartlandalliance.org/international/wherewework/project-pages/iraq-gender-based-violence.html>.

⁸⁵ Penal Reform International, *Who are women prisoners? Survey results from Jordan and Tunisia* (unpublished).

⁸⁶ UNICEF, *Administrative detention of children: a global report*, 2011.