

Punitive drug laws: 10 years undermining the Bangkok Rules

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1. Introduction: Reform drug laws to fulfil the Bangkok Rules

On 21 December 2020, ten years elapsed since 193 states adopted the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules', or 'the Rules').² For centuries before that, criminal laws and prison systems had been designed for, and by, men.³ The Bangkok Rules are the first international human rights standards to focus on the specific needs and experiences of women deprived of liberty.⁴

The Bangkok Rules are the minimum set of standards that any country should implement to protect the life, health, and rights of the women it incarcerates, or who are otherwise involved in non-custodial measures. That said, even in the best of conditions a prison is not an appropriate setting to address the reasons for women's involvement in the illegal drug market, or to fulfil the rehabilitative purpose of the justice system. Furthermore, the criminal justice system is inherently tilted against those who lack money and support networks, while drug laws have been shown to target disproportionately people marginalised because of their race, ethnicity, sexual orientation, and gender identity. Because of this, the Bangkok Rules should be interpreted and implemented as part of a broader effort to reduce prison populations worldwide.

The Bangkok Rules are not a binding treaty, and they do not have a direct legal effect on national law. But as a United Nations General Assembly resolution adopted by 193 states, they represent a strong political commitment by all countries in the world to acknowledge, respect, and fulfil the specific needs of women deprived of liberty.^{5,6}

Over the past decades, drug laws were changed to establish disproportionate criminal sanctions for drug offences, thus contributing to an unprecedented surge in the number of women incarcerated across the world. Punitive drug policies such as the disproportionate use of pretrial detention, mandatory minimum prison sentences, and the dearth of harm reduction and evidence-based treatment in prisons, have consistently disregarded women's specific needs and circumstances, as well as the evidenced causes for their involvement in illegal drug markets, including poverty, caretaking responsibilities, coercion, and trauma. In other words, they have undermined the application of the Bangkok Rules.

For advocates across the world, the 10-year anniversary of the Bangkok Rules is an opportunity to remind states that gender equality policies, criminal justice rights and drug laws are not isolated from each other. If states want to implement a genuine agenda for gender equality, they need to review the laws and policies that undermine it – including drug legislation.

This briefing paper provides an overview of the concrete ways in which punitive drug legislation has impacted upon the achievement of the Bangkok Rules, and offers several recommendations to align drug laws with the Bangkok Rules.

Box 1 The Bangkok Rules and LGBTQI+ people: The case of trans women deprived of liberty

One of the main criticisms of the Bangkok Rules is that they focus exclusively on cis heterosexual women, thus failing to recognise the specific needs and circumstances LGBTQI+ women.³ This is specially concerning given that, within the criminal justice system, LGBTQI+ people are particularly vulnerable to the invisibility, discrimination, and abuse that the Bangkok Rules seek to address.

The specific situation of trans women in prison can serve as an example of how gender non-conforming people are differentially impacted by prisons and the criminal justice system. There is a dire need for the Bangkok Rules to be complemented by additional Rules that would address the specific needs and vulnerabilities of LGBTQI+ women.

In a recent study⁸ and a communication to the Inter-American Court of Human Rights,⁹ several Latin American organisations highlighted that trans women deprived of liberty face systemic psychological and physical abuse at the hands of custodial staff and other people deprived of liberty. Trans women have limited access to prevention, treatment and care for sexually transmitted infections such as HIV, syphilis, and Hepatitis B, even though they reported a particularly high prevalence of these diseases. Access to medication for transition – for those wanting it – was also found to be lacking. Furthermore, trans women's ability to choose in what detention facilities they would be allocated depended on the discretion of custodial staff.

Before coming into contact with the criminal justice system, trans women in Latin America are often confronted with various situations of vulnerability in terms of housing, employment in the informal sector, abuse and ill-treatment, and they are targeted by law enforcement. Similar situations were reported by transgender sex workers who use drugs at a workshop conducted in Pattaya, Thailand, in October 2020.¹⁰

In December 2020, some of the organisations behind this study signed the first-ever declaration on the rights of trans women deprived of liberty in Latin America.¹¹ Its main calls focus on the need to prioritise alternatives to incarceration and punishment, and to make sure that authorities recognise and take into account the specific needs of trans women in prison. In doing so, the declaration follows closely the policies and priority areas set in the Bangkok Rules.

Non-custodial measures

RULE 57

'Gender-specific options for **diversionary** measures and pretrial and sentencing **alternatives** shall be developed within Member States' legal systems, taking account of the history of **victimization** of many women offenders and their caretaking responsibilities.'



- Establish **non-custodial measures** for women that take into consideration the causes for their involvement in the illegal drug markets, including: the intersection of poverty and caretaking responsibilities; partner violence; coercion or influence by a male relative or partner; or drug dependence.



RULE 58

'Women offenders shall **not be separated from their families and communities** without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as **diversionary** measures and pretrial and sentencing **alternatives**, shall be implemented wherever appropriate and possible.'



- **Abolish mandatory pretrial detention** for drug offences.
- Abolish laws that exclude people convicted for drug offences from **alternatives to incarceration** before and after sentencing.
- Reform laws that **prioritise or facilitate pretrial detention** for drug offences.
- Provide women charged with drug offences with access to **appropriate legal counsel and support** in pretrial detention hearings.



RULE 60

'Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to **address the most common problems leading to women's contact with the criminal justice system**.'



- **Address the historical underinvestment** in gender-specific support services for women involved in illegal drug activities.



Health-based approach to drug use

RULE 15

'Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural background'



- **Abolish compulsory drug treatment**, within and outside criminal justice systems.
- Ensure access to voluntary, evidence-based and **gender-sensitive drug treatment and harm reduction** services for women deprived of liberty.
- Introduce **women-only drug services** within prisons, addressing the specific causes and forms of drug use amongst women.



RULE 62

'The provision of **gender-sensitive, trauma-informed, women-only substance abuse treatment programmes** in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes'



- Drug treatment offered within non-custodial measures should be strictly **voluntary and unconditional**. Rejection or discontinuation of treatment should not entail punishment or incarceration.
- When introduced in non-custodial measures, treatment should be **evidence-based, gender-sensitive, and trauma-informed**.



Mitigating circumstances

RULE 61

'When sentencing women offenders, courts shall have the power to consider **mitigating factors** such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds.'



- **Abolish mandatory prison terms** for drug offences.
- **Reform laws** that categorise all illegal drug activities as serious offences.
- Allow for the consideration of **mitigating circumstances** in drug cases.
- Introduce **gender-specific mitigating factors** that reflect women's evidenced pathways into illegal drug activities.



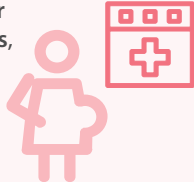
Special consideration of pregnant women, breastfeeding mothers, and mothers with dependent children

RULE 15

'Prison health services shall provide or facilitate **specialized treatment programmes** designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.'



- Ensure access to **drug treatment and harm reduction services** tailored to the needs of pregnant women who use drugs, on a **strictly voluntary basis**.
- Women **must not be criminalised or otherwise punished for using drugs**, including when they are pregnant, breastfeeding, or have dependent children.



RULE 64

'**Non-custodial sentences for pregnant women and women with dependent children shall be preferred** where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account **the best interests of the child or children**, while ensuring that appropriate provision has been made for the care of such children'



- **Reform laws** to ensure that women charged with drug offences who are pregnant, breastfeeding, or have children under their care, have by **default access to non-custodial measures**.
- Incarceration for women in these situations **must be exceptional**.



Supporting women after release from prison

RULE 45

'Prison authorities shall utilize options such as home leave, open prisons, halfway houses and community-based programmes and services to the maximum possible extent for women prisoners, to **ease their transition from prison to liberty**, to **reduce stigma** and to **re-establish their contact with their families** at the earliest possible stage.'



- **Facilitate the transition of women from prison to the community** through gradual de-institutionalisation measures that allow them to obtain a source of **income**, secure **accommodation**, and **restore ties** with their families and communities.



RULE 46

'Prison authorities, in cooperation with probation and/or social welfare services, local community groups and non-governmental organizations, shall design and implement **comprehensive pre- and post-release reintegration programmes** which take into account the gender-specific needs of women'



- **Reform laws and policies that ban people convicted for drug offences**, and people who use drugs, from access to housing and other welfare provisions.
- Create **specific programmes for formerly incarcerated women** that integrate and coordinate services from all branches of government, from criminal justice to housing, employment and health.



Foreign-national women detained for drug offences

RULE 53.1

'Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign-national women prisoners to their home country, especially if they have children in their home country, shall be considered as early as possible during their imprisonment, following the application or informed consent of the woman concerned.'



- Ensure that foreign-national women detained for drug offences have access to **legal counsel and consular assistance** upon detention.
- Offer foreign-national women convicted of drug offences **the possibility to be repatriated** to their home country, if they so wish.
- **Reform laws that envisage the deportation of foreign nationals** that have been convicted for a drug offence, particularly for those with families in the host country.



This visual infographic summary is based on **Punitive drug laws: 10 years undermining the Bangkok Rules**, an advocacy note by the **International Drug Policy Consortium (IDPC)**, **Centro de Estudios Legales y Sociales (CELS)**, **Dejusticia**, **LBH Masyarakat**, **Penal Reform International**, the **Women and Harm Reduction International Network (WHRIN)** and the **Washington Office on Latin America (WOLA)**.

2. Background: The role of drug laws in the incarceration of women

Bangkok Rule 1. Basic Principle.

In order for the principle of non-discrimination embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

In the last decades, the number of women and girls in prison has grown alarmingly, and it is currently at historical records. From 2000 to 2020, the global female prison population increased by 59%,¹² at a much faster rate than the male population, which is estimated to have risen by 20% between 2000 and 2017.¹³ Over this period, the growth has concentrated in countries in the Americas, and in Asia.

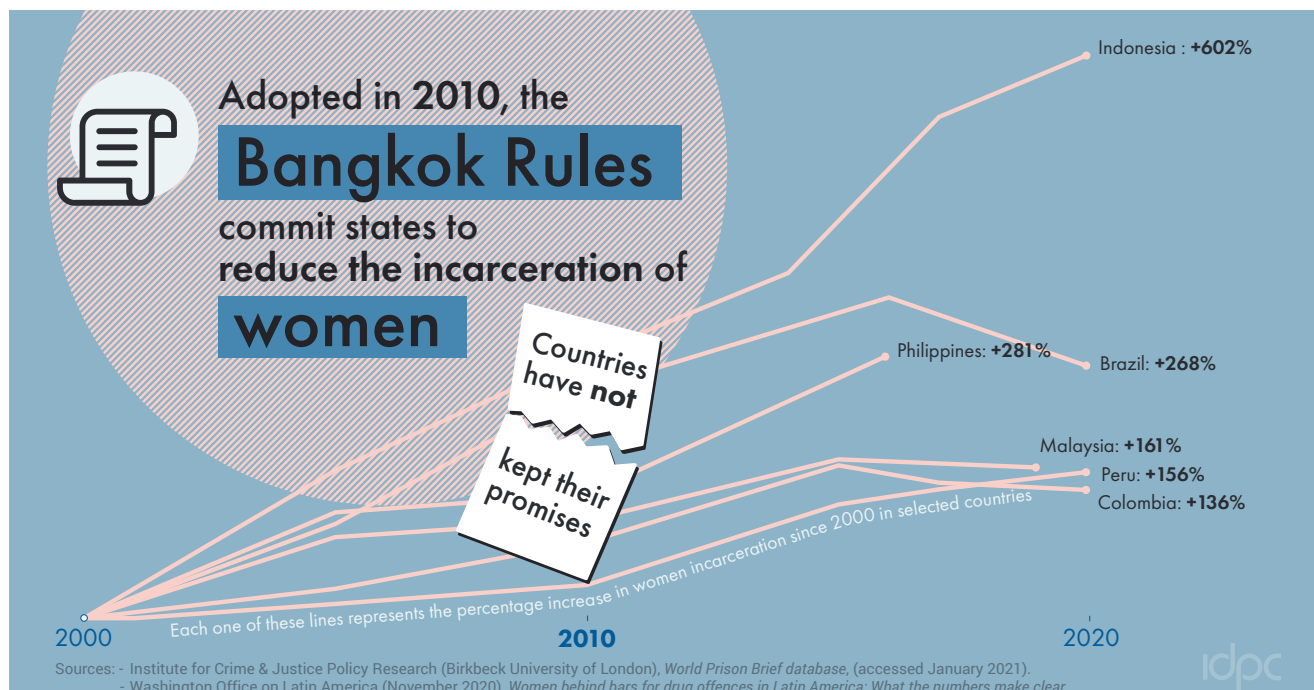
The adoption of the Bangkok Rules did not interrupt this trend, even though the Rules contain important commitments concerning alternatives to incarceration that should have led to the reduction of prison populations. According to Penal Reform International, between 2010 and 2020 the number of incarcerated women and girls rose by 50% in Asia, by 19% in Central and South America, and by 24% in Africa.¹⁴ Notably, it decreased by 29% in Europe.¹⁵

Drug laws play a large role in explaining this evolution. Since the ‘war on drugs’ was escalated in the 1970s, countries across the world have rushed to adopt special drugs legislation with extremely punitive sanctions, and to promote harsh drug control policies.¹⁶ For instance, in

Bolivia, the current drug law was adopted in 1988 – responding to USA pressure¹⁷ – and includes penalties of up to 25 years in prison;¹⁸ in Ecuador, the first punitive law was adopted in 1991, with prison sentences of up to 25 years;¹⁹ in Peru, a law envisaging similar sanctions was also adopted in 1991.²⁰ Indonesia’s current drug laws, which include the death penalty for drug trafficking, were adopted in 1997.²¹ A large array of draconian drug legislation was adopted across African countries during the 1990s and early 2000s.²²

The escalation of criminal penalties for drug offences has had a direct impact on the number of women incarcerated worldwide. Since 1997, the female prison population in Indonesia has multiplied by more than five.²³ In Peru, the number of women in prison more than doubled since 2000, and by 2014 60.6% of women were incarcerated for drug offences.²⁴ In the Philippines, in 2017 59.9% of women sentenced in the Bureau of Corrections had been charged for a drug offence, in comparison to 15.10% of men.²⁵ All in all, in 2018 the UN estimated that a 35% of women in prison worldwide are incarcerated for drug offences, compared to 19% of men.²⁶

Figure 1. Growth of female prison population since 2000, by country. Source: World Prison Brief, Washington Office on Latin America



Box 2 Disseminating the Bangkok Rules amongst women in prison: The experience of Corporación Humanas in Colombia

The Bangkok Rules will only become effective if women deprived of liberty are aware that the Rules exist, and that their governments have committed to abide by them. With this in mind, Corporación Humanas Colombia, a feminist think-tank and political action centre that works on human rights, peace, security, and access to health, has conducted over the last years a series of workshops on the Bangkok Rules with family members of women deprived of liberty, as well as with formerly incarcerated women, with the hope that they will disseminate them within prisons. Corporación Humanas also shared the Bangkok Rules in the Colombian and Latin American conferences of formerly incarcerated women.

‘The first thing that crosses your mind when you read the Bangkok Rules is absolute shock’, says Claudia Cardona, the psychologist at Corporación Humanas Colombia that runs many of these workshops. For many women deprived of liberty, the fact that their government has committed to follow a series of obligations on how they should be treated is completely surprising, and it diverges starkly from their daily reality.

While the Bangkok Rules are disregarded across the board, Claudia Cardona reports that the rules that cause more surprise are those that have a gendered and embodied reality – for instance, the commitments regarding the treatment of pregnant women, free access to sanitary towels, or the prohibition of searches conducted by men officers. Corporación Humanas Colombia tries to address some of these gaps, for instance by facilitating the supply of menstrual cups in prisons.

In 2020, over 7,400 women were held in Colombian prison²⁷ – a figure that represents a 136.5% increase since 2000. Approximately 46% of them are incarcerated for a drug offence. Since the outset of COVID19, their situation has become more dramatic than ever, as the government’s response to the pandemic has been to isolate prisons from the community. External visits have been banned, while public phones to speak with family and friends are severely lacking. In some cases, trials have been adjourned indefinitely, leaving women in pretrial detention in a judicial limbo.



Empty post box/locker at the abandoned women prison in Chang Mai, Thailand, in 2014
Credit: Drburtoni | Flickr Drburtoni | CC BY-NC-ND 2.0

3. How drug policies undermine the Bangkok Rules

3.1. Drug laws undermining the use of non-custodial measures

Bangkok Rule 57

The provisions of the Tokyo Rules shall guide the development and implementation of appropriate responses to women offenders. Gender-specific options for diversionary measures and pretrial and sentencing alternatives shall be developed within Member States' legal systems, taking account of the history of victimization of many women offenders and their caretaking responsibilities.

Bangkok Rule 58

Taking into account the provisions of rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible.

Bangkok Rule 60

Appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women's contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.

The Bangkok Rules comprise a set of 70 rules on the treatment of imprisoned women, both before and after sentencing. They are divided in four blocks; first, rules applicable to all women deprived of liberty; second, rules applicable to women in certain situations or belonging to certain communities, such as pregnant women or indigenous women; third, rules on non-custodial measures; and fourth, rules concerning the need to increase research, evaluation and public awareness on the situation of women in prison.

Drug laws intersect with the Bangkok Rules in many ways. In this briefing, we focus on six key areas of the Bangkok Rules, and we analyse how drugs policies have contributed to, or undermined, their achievement.

By endorsing the Bangkok Rules, states committed to promote diversionary measures and alternatives to incarceration for women, as the Rules provide a gender-sensitive perspective that complements the United Nations Standard Minimum Rules for Non-Custodial Measures (the 'Tokyo Rules').²⁸ However, this goal has been undermined by drug laws that automatically categorise a broad range of drug offences as serious, prioritise pretrial detention, or establish lengthy minimum prison sentences for drug offences. Because drug offences are a major cause for women's involvement with criminal justice, these harsh laws impact women disproportionately.

The rationale behind the commitment to promote alternatives to incarceration is well evidenced. Women are in contact with the criminal justice system because of 'multiple layers of discrimination and deprivation',²⁹ including poverty, lack of education,³⁰ and physical and mental abuse³¹ by partners and relatives. As the United Nations Office on Drugs and Crime (UNODC) recognises,³² prisons are not an appropriate environment to address the factors that draw women into the criminal justice system, from lack of employment to mental health or drug dependence, amongst many others. Furthermore, many women in prison are first-time offenders, or have been convicted for a non-violent offence. Their incarceration is not justified by any conceivable risk they might pose to public health and to other persons. The community is better served by addressing the causes underlying their contact with criminal law outside prison.³³

Most women involved in the illegal drug economies fall squarely in this description. In most cases, women are incarcerated for carrying out low-level drug activities, such as transporting drugs, that are characterised by high risk, high degrees of expendability and replaceability within illegal drug organisations, and very little financial reward.³⁴ Some women become involved in the illegal drug trade as a result of coercion; under the influence of their male partners and family members;³⁵ or to obtain an income for themselves, their children or other dependants.³⁶ In most



Women deprived of liberty at the prison of Támara, Honduras, in 2017.

Credit: Inter-American Commission of Human Rights, Francisco Proner / Farpa | Flickr Cidh | CC BY 2.0

cases, for all their lives they have been excluded from the basic services, protection and support that should be provided by the state.³⁷ These intersecting vulnerabilities are compounded when women are detained and tried in a foreign country.³⁸

Punitive drug legislation has played a major role in excluding women from alternatives to incarceration, in law or in practice, across the world. While in Germany, or in England and Wales, the majority of women convicted for drug offences are given non-custodial penalties, the reality is very different in other jurisdictions.³⁹ In the Philippines,⁴⁰ drug laws explicitly exclude the possibility of alternatives to custodial measures for people convicted for a drug offence, with no regards to the gravity of the action itself. In Mexico, drug offences are automatically categorised as ‘serious’, and therefore are not eligible for any alternative to incarceration. In Indonesia, people sentenced to more than 5 years in prison for a drug offence, which is the case for those involved in drug supply, can only access alternatives to incarceration if authorities grant them the condition of ‘justice collaborators’, which requires that they provide valuable information to law enforcement – something that those involved in the lower echelons of the drug economy are less likely to do. In other jurisdictions, while the possibility of alternatives to prison exists in the law, only an extremely

low number of women convicted for drug offences benefit from them (for instance, 4% in Russia as reported in 2020).⁴¹

The case of pretrial detention

The devastating consequences of excluding drug offences from alternatives to incarceration are especially clear in the case of pretrial detention. Even though pretrial detention is meant to be a precautionary measure, 30% of the global prison population is estimated to be detained on remand.⁴² In many countries that percentage is higher, such as Uruguay (71.2% in 2018), Cambodia (72% in 2018), Argentina (59.4% in 2017), or Brazil (45% in 2016).⁴³ In many countries this is a growing trend - In the USA, the number of people in pretrial detention in jails almost doubled from 1995 to 2016, although the number of people convicted remained stable.⁴⁴

In addition to the actual deprivation of liberty, pretrial detention has a severe impact on the lives of women charged with drug offences, from worse sentencing outcomes to trauma, violence and abuse within prison, separation from family, and loss of employment.⁴⁵

In several countries, drug laws establish mandatory pretrial detention for drug offences – that is the case in Mexico, Guatemala, or the Philippines.⁴⁶ In other jurisdictions, pretrial detention for drug activities is

not mandatory, but it is prioritised by harsh drug laws and policies. In India, drug legislation requires judges to refuse bail for people charged with drug offences unless a clear case of 'not guilty' is made at the outset of the proceedings; in almost all cases, this leads to pretrial detention.⁴⁷ While not mandatory, research has shown that pretrial detention is widely used in practice for people charged with drug offences in Argentina, Chile, Costa Rica, Ecuador and Uruguay.⁴⁸ A survey of 277 women charged with drug offences in Indonesia published by LBH Masyarakat in 2019 showed that none of them had been granted bail.⁴⁹ Pretrial detention periods vary across the world, but national averages can be as high as 211 days in Costa Rica,⁵⁰ or several years in Nigeria⁵¹ or Cambodia.⁵²

Women are disproportionately impacted by the excessive use of pretrial detention for drug offences. According to data collected by WOLA, in many Latin American countries the percentage of incarcerated women in pretrial detention exceeds that of men (59.4% vs 44.3% in Argentina, 53.5% vs 33.8% in Mexico).⁵³ In Cambodia, close to half of the pregnant women or recent mothers in prison are held in pretrial detention.⁵⁴ The majority of women on remand in Southeast Asia are detained for drug offences,⁵⁵ a percentage far higher than for men.⁵⁶

For many women, the criminal justice system's preference for pretrial detention in drug cases is compounded by poverty. Most women charged with a drug offence find themselves without resources, cut off from their families, partners or support networks, with no legal representation, and unable to afford bail.⁵⁷ In many cases, women in pretrial detention are not aware of their right to access bail, or to access legal aid and representation.⁵⁸ In addition to restricting pretrial detention to exceptional cases, states need to address the gendered impact of poverty by providing women who face pretrial detention with appropriate legal counsel and support.

Gender-sensitive non-custodial measures

The fundamental objective of non-custodial measures is to facilitate the social reintegration of a person involved with criminal justice, while avoiding the use of prison.⁵⁹ However, gender-blind non-custodial measures are often inadequate, because they do not address women's pathways to illegal activities, and because poor or marginalised women might be unable to pay fines, post bail, or have access to housing.⁶⁰ In some cases, the conditions set in non-custodial measures are not compatible with women's obligations as caregivers and breadwinners.⁶¹

Despite this, most countries have failed to include 'gender-specific options' for alternatives to incarceration in their legislation, as they committed to do in Bangkok Rule 57. Where gender-sensitive alternatives to incarceration exist, they tend to focus on the traditional roles of women as mothers and caregivers. A recent survey of 18 jurisdictions carried out by the law firm Linklaters for Penal Reform International and IDPC showed that, with the exception of Costa Rica, the only gender-specific elements considered were pregnancy and childcare. Through legal reform or judicial decision, Brazil, Cambodia and Mexico have recently introduced gender-specific provisions that aim to reduce the number of women in prison, but these reforms are yet to result in tangible change.⁶²

While non-custodial measures for mothers and caregivers must be prioritised, gender-sensitive approaches to diversionary measures and alternatives to incarceration should consider the whole range of specific factors that draw women into contact with the illegal drug economy. The Centre for Alternative Sentencing and Employment Services in New York City, for instance, diverts women to services designed to 'address past trauma and reduce behaviours associated with criminal activity' through counselling, psychiatric services, mentoring, and referrals to job training, adult education, drug treatment, legal assistance, or other social services.⁶³

3.2. Drug laws undermining the obligation to consider mitigating circumstances



UN Volunteer gives a literacy course at Kakwangura Prison in Butembo, Democratic Republic of Congo.
Credit: MONUSCO, Jutin Vugu Vugu | Flickr Monusco | CC BY-SA 2.0

Bangkok Rule 61

When sentencing women offenders, courts shall have the power to consider mitigating factors such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds.

With Rule 61, countries committed to provide courts with the power to consider mitigating factors in sentencing women. According to UNODC, gender-specific mitigating factors should include experience of physical or sexual violence or abuse, history of systematic manipulation, background of extreme disadvantage, mental health needs, and drug dependence.⁶⁴ States should also consider introducing mitigating circumstances on the basis of disability, gender identity, and for women belonging to racial and ethnic minorities, including indigenous women.

"A large number of women offenders worldwide are imprisoned for minor drug related offences, often as a result of manipulation, coercion and poverty".

UNODC, Commentary to the Bangkok Rules

Depending on national legislation, the consideration of mitigating circumstances in sentencing can have a wide variety of consequences, from removing criminal

liability altogether for certain actions, to imposing non-custodial sanctions instead of incarceration, or reducing the length of a prison sentence.

However, punitive drug laws consistently undermine the application of this rule. Many drug laws establish high minimum mandatory sentences for low-level drug offences, including for drug possession and use, without considering any mitigating circumstances. For instance, in Myanmar the minimum sentence for any drug offence is five years in prison;⁶⁵ in the Philippines, the normal penalty for a drug offence ranges from 12 to 20 years in prison;⁶⁶ in Peru, minimum penalties envisaged for drug offences can be up to 25 years of prison.⁶⁷ Prison sentences imposed as a result of these laws cannot be reduced in any case, thereby ignoring the particular circumstances and background of the convicted women, even in cases of coercion, domestic abuse or drug dependence.

Minimum prison sentences for drug offences are therefore a major driver of mass incarceration.⁶⁸ They impact particularly communities marginalised on the basis of race and ethnicity,⁶⁹ as well as women, as they tend to be involved in the low-level drug activities that are punished harshly due to mandatory minimums.⁷⁰ Evidence shows that mandatory sentences are not effective at deterring crime – for instance, when the USA state of Rhode Island removed mandatory sentences for drug offences, both the prison population and crime rates fell.⁷¹

In many cases, mandatory minimum sentencing laws only let judges consider the quantity and type of the drugs at stake when deciding on a sentence. Such laws are inherently unfair, as they establish criminal sanctions that are completely disconnected from the particular circumstances and history of each person. They are a simplified, clear-cut response to a complex reality.

The obligation to take into account the personal circumstances of women in sentencing is also undermined by drug laws that automatically exclude people convicted for drug offences from accessing administrative and judicial benefits that could reduce the length of their prison terms, such as early release,⁷² parole, or the right to appeal or to seek pardons.⁷³ A clear example of this has been the arbitrary exclusion, in some jurisdictions, of people convicted for drug offences from release measures adopted to reduce prison overcrowding in the wake of the COVID-19 crisis (see Box 3).

The UN Office of the High Commissioner for Human Rights ('OHCHR') has called for the repeal of mandatory minimum sentences,⁷⁴ and the European Court of Human Rights has stated that they are 'much more likely' to be grossly disproportionate.⁷⁵ At national level, mandatory minimum sentencing regimes have been declared unconstitutional in countries such as India, South Africa, Sri Lanka, or Papua New Guinea.⁷⁶

A gender-sensitive approach to mitigating factors

A survey of 18 jurisdictions carried out by Linklaters for Penal Reform International and IDPC showed that very few legal systems explicitly envisage specific mitigating factors for women.⁷⁷ Where they exist, they tend to focus on circumstances connected to the role of women as mothers and caregivers; this is the case in Germany (for pregnant women),⁷⁸ and Russia (for pregnant women, or women with small children).

A truly gender-sensitive approach to mitigating factors should break away from the formal gender-blindness in sentencing by taking into account the unique

Box 3 Women and prison releases under COVID-19

The unprecedented challenges posed by COVID-19 have led many governments to take exceptional measures to decongest prisons. In a joint statement UNODC, the WHO, the OHCHR and UNAIDS called on governments to 'consider limiting the deprivation of liberty, including pretrial detention, to a measure of last resort, particularly in the case of overcrowding, and to enhance efforts to resort to non-custodial measures' with 'specific consideration given to women and children'.⁷⁹ Furthermore, the UNODC encouraged 'release mechanisms' for 'prisoners for whom COVID-19 poses particular risks, ... including pregnant women, women with dependent children... and those who have been sentenced for minor crimes'.⁸⁰

A study by Harm Reduction International showed that between March and June 2020 109 countries and territories had adopted decongestion measures in an attempt to curb the risk of COVID-19 transmission in prisons. This included early releases, often through sentence commutation, pardons, diversions to home arrest, and release on bail/parole. Disappointingly, at least 28 countries explicitly excluded people incarcerated for drug offences from benefiting from these measures.

Furthermore, women deprived of liberty were only explicitly targeted by decongestion measures in 20% of these countries. Examples of countries having specifically targeted women in their initiatives include the UK, Rwanda and Zimbabwe, which all committed to release women imprisoned with their children.⁸¹ (It is worth noting that, in the UK, by June 2020 only 16 out of the 70 women under consideration had been released).⁸² These measures remain exceptional and far from adequate to address the current prison overload and associated health risks for women deprived of their liberty.

causes and pathways of women into illegal drug activities, and the consequences of their incarceration.⁸³ These should include: a prior history of gender-based violence, involvement in illegal drug activities under coercion or influence of a male partner or relative, a history of drug dependence and/or mental illness, and involvement in illegal drug activities in order to fulfil their caretaking responsibilities.

3.3. Punitive drug laws undermine the provision of gender-sensitive drug treatment in prisons

Bangkok Rule 15

Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Bangkok Rule 62

The provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes.



Distribution of harm reduction equipment
Credit: World Bank Photo Collection | Flickr Worldbank | CC BY-NC-ND 2.0

Drug use is prevalent in prisons. UNODC estimates that one in three people incarcerated worldwide had used drugs while deprived of liberty,⁸⁴ while a large proportion of women who are in contact with the criminal justice system has a history of drug use and, in some cases, of drug dependence.⁸⁵ According to the UN, 50% of incarcerated women, as opposed to 30% of men, are estimated to have experienced drug dependence in the year prior to incarceration.⁸⁶ In countries like Canada, injecting drug use is a frequent, everyday occurrence amongst incarcerated women, often sharing equipment.⁸⁷

Women deprived of liberty are also more vulnerable to health harms, including drug-related harms, than men. Injecting drugs in precarious and unhygienic conditions

may present a high risk of HIV and hepatitis C infection and overdose,⁸⁸ while sharing smoking equipment is particularly risky for the transmission of viruses like COVID-19. Research shows that in some cases there is a strong connection between mental health and drug use amongst women in prison, sometimes due to prior trauma and abuse.⁸⁹ Stigma, structural violence, and internalised feelings of shame associated with breaching patriarchal expectations can, for some women, operate as both drivers of drug use⁹⁰ and barriers to accessing drug services. The provision of gender-sensitive drug dependence treatment and harm reduction services in prisons should therefore be a top priority.

This is recognised both in Bangkok Rules 15 and 62, as well as in the Outcome Document of the 2016 UN

General Assembly Special Session (UNGASS) on drugs, in which states committed to ensure access to interventions aimed at ‘minimizing the adverse public health and social consequences of drug abuse, including medication-assisted therapy programmes, injecting equipment programmes (...)’ in prisons and other custodial settings.⁹¹ States that fail to provide these interventions in prisons violate the right to health of incarcerated people, and in some circumstances, their rights to life and to be free from torture and ill-treatment.⁹² They also violate the principle of equivalence of care, which requires that women in custody receive the same health services than in the community, and the continuity of care between the community and prisons, which is regarded by the WHO as a ‘fundamental component of successful efforts to scale up treatment’.⁹³

However, historically punitive approaches to drug use have meant that harm reduction services are less available in prisons than in the community,⁹⁴ and drug treatment services in prisons are mostly abstinence-based. According to data reported by Harm Reduction International, as of 2020 84 countries globally ran at least one opioid agonist treatment (OAT) programme in the community, while only 59 provided it in at least one prison.⁹⁵ Needle and syringe programmes (NSP) were available in 87 countries in the community, but only 10 countries ran at least one NSP in a prison setting.⁹⁶

Where they exist, harm reduction and drug treatment services in prisons are in most cases available only for men, and are designed, implemented, and evaluated without the participation of women.⁹⁷ This is problematic because women use drugs differently and for different reasons than men, and they face different obstacles in accessing health and drug services. A review of drug treatment services in Southeast Asian prison systems showed that, where drug services have been put in place in the region, they are gender-neutral, and male-focused.⁹⁸

Under Bangkok Rule 15, states committed to offer women in prison the possibility to join evidence-based, voluntary drug treatment and harm reduction services.⁹⁹ These services should be integrated within gender-specific programmes that focus on addressing trauma and mental health, and promoting education, job-seeking services as well as housing after release, amongst others. To address stigma associated to drug use,¹⁰⁰ prisons should establish low threshold, discreet, and flexible outlets.

Notwithstanding states’ obligation to provide these services, it is critical to recall that prison settings are not an optimal space for providing integrated drug treatment and harm reduction services, just as they are not the best environment for providing mental health care and other support services. Prison settings can undermine interventions that seek to address stigma (including self-stigma), as well as other issues associated with drug dependence, such as histories of oppression, exclusion, or partner violence. This underscores the need to provide alternatives to incarceration for women with a history of drug use.

Compulsory drug treatment in non-custodial measures

In Bangkok Rule 62, states committed to provide gender-sensitive, trauma-informed, women-only drug treatment programmes in the community, and within the context of alternatives to incarceration. In that regard, the Bangkok Rules are in clear tension with non-custodial measures that require women to undertake compulsory drug treatment, or in which drug treatment is offered as the only possible alternative to incarceration.

As a form of non-consensual medical intervention, compulsory drug treatment is inherently degrading, and violates the rights to health¹⁰¹ and to bodily integrity. A review of quantitative studies on the effectivity of compulsory drug treatment shows that it does not produce improved outcomes in comparison to voluntary treatment, and that some studies suggest harmful consequences associated with this practice.¹⁰²

For drug treatment to be gender-sensitive and trauma-informed, it needs to be voluntary, and not conditional. Drug treatment that is offered as the only possible alternative to incarceration is not genuinely voluntary; the same goes for treatment that would result in prosecution or incarceration if the client fails to complete it or starts using drugs again.¹⁰³ Non-custodial measures that envisage compulsory or coerced drug treatment vary widely across jurisdictions, from drug courts¹⁰⁴ to suspension of sentence if drug treatment is undertaken.¹⁰⁵ Similarly, the form of treatment will vary from country to country. States such as Sweden,¹⁰⁶ Puerto Rico,¹⁰⁷ Mexico,¹⁰⁸ or Russia¹⁰⁹ provide, or in some instances mandate, people to take abstinence-based programmes, with no option for clients to choose the treatment that best suits their needs. In many cases, the proposed treatment lacks a gender-sensitive approach.¹¹⁰

3.4 Punitive drug laws undermine the provision of gender-sensitive drug treatment in prisons

Bangkok Rule 4

Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services.

Bangkok Rule 15

Prison health services shall provide or facilitate specialized treatment programmes designed for women substance abusers, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.

Bangkok Rule 64

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.



#FreeOurMamas held rally outside Riverside Correctional Facility in Philadelphia, USA, in May 15 2020
Credit: Joe Piette | Flickr joepiette2 | CC BY-NC-SA 2.0

Most women in prison are mothers. According to a survey of eight Latin American countries by the Inter-American Development Bank, 87% of women in prison had children, as opposed to 78% of men.¹¹¹ The rate of incarcerated women with children was 90% in Chile (2015),¹¹² 90% in Colombia (2017), and 70% in Panama.¹¹³ This reality also extends to women detained for drug offences. In Colombia, over 90% of women incarcerated for a drug offence between 2010 and 2014 were mothers.¹¹⁴ The same applies to Thailand, where

in 2014 over 80% of women in prison were incarcerated for drug offences, and over 80% of them were mothers.¹¹⁵ In Spain, in 2013 approximately 70% of women in prison had children, with an average of 2.7 children per woman, doubling the national average of 1.3 children per women.¹¹⁶

A significant proportion of incarcerated women are single mothers, and they were the main caretakers of their children at the moment of detention. For instance, in

Costa Rica, a report from 2012 showed that 93% of women detained for smuggling drugs into prison were single mothers – a reality that led to a gender-sensitive reform of drug laws.¹¹⁷ According to recent research, between 1.5 and 2 million children across Latin America have a father or a mother in prison.¹¹⁸

When the main caretaker is incarcerated, all aspects of a child's life are disrupted, from their relationship with family members and friends, to their place of living.¹¹⁹ This can include traumatic separation, loss of income, or difficulties at school, amongst many other aspects.¹²⁰ The detention of a mother is particularly harmful. In 2010, Brazilian psychologist Claudia Stella concluded that when a father is in prison, most children continue to be cared for by their mothers, but when the mother is incarcerated only 10% of children remain in the care of their fathers.¹²¹ In the UK, it was estimated that 66% of women in prison were mothers of children under eighteen, but only 5% of these children remained in their own home after their mother was sentenced to prison.¹²²

Other harmful aspects of detaining a mother include the permanent separation of children from mothers that are housed in prisons far away from their primary residence, and the fact that an estimated 19,000 young children worldwide live within prisons with their mothers,¹²³ in environments that are clearly unfit to meet their specific needs.

Pregnant women also face a number of specific harms while incarcerated, such as lack of access to critical healthcare services, including prenatal care and information; tailored drug services; additional periods of rest during the day; and limited or no access to clean water, nutritional foods or medication necessary for pregnant and breastfeeding women (e.g. iron supplements, calcium, folic acid, pre-natal vitamins, extra fruit and vegetables).¹²⁴ In some countries, pregnant women can face severe human rights abuses, including being shackled to a bed during prenatal checks and even while giving birth, which has been documented in countries like the USA.¹²⁵

In response to this reality, the Bangkok Rules contain an array of rules across the document, as well as a separate section on women who are pregnant, breastfeeding, or have children in prison (Rules 48 to 52). These are some of the most relevant:

- The commitment to accommodate women deprived of liberty in places of detention close to their homes, taking into account their caretaking responsibilities, and their preferences (Rule 4).
- The commitment to provide specialised drug treatment to pregnant women, and to women with children (Rule 15).

- The prohibition of solitary confinement or the prohibition of family contact for pregnant women, women with infants, and breastfeeding mothers (Rule 22).
- The commitment to prefer alternatives to incarceration for pregnant women, or for women with children under their responsibility, 'with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger' (Rule 64).

Bangkok Rule 64 is also supported by regional and global human rights institutions and instruments, from the Human Rights Council to the African Charter on the Rights and Welfare of the Child.¹²⁶ It must be read in light of article 3 of the Convention of the Right of the Child, which requires that the child's best interests are always considered.¹²⁷

"Prisons are not designed for pregnant women and women with small children. Every effort needs to be made to keep such women out of prison, where possible and appropriate, while taking into account the gravity of the offence committed and the risk posed by the offender to the public".

UNODC. Commentary to the Bangkok Rules

The automatic consideration of any drug offence as a serious crime that poses a general danger to society means that pregnant women, and women with young children under their care, have been incarcerated regardless of the gravity of their involvement in the offence, and their personal circumstances. In countries such as Peru, all people convicted for drug offences – including mothers – are also excluded from prison benefits, including alternatives to incarceration.¹²⁸ Furthermore, a recent study of house arrest in Latin America showed that in countries like Peru, Mexico or Ecuador, alternatives to incarceration like house arrest are only available prior to conviction, but not afterwards.¹²⁹ In Cambodia, where most women are incarcerated for drug offences, children can accompany their mothers in prison until the age of 3; in February 2019, Cambodia's prisons hosted 170 mothers with children, and 51 pregnant women.¹³⁰

There is a general dearth of available information regarding the situation of pregnant, breastfeeding, and women in postpartum situations.¹³¹ This is especially concerning considering the general situation of overcrowding, unsanitary conditions, and abuse in prisons across Latin America and Southeast Asia, which suggests that their needs are, in many cases, not properly addressed.

3.5 Punitive drug laws undermine the provision of gender-sensitive drug treatment in prisons

Bangkok Rule 45

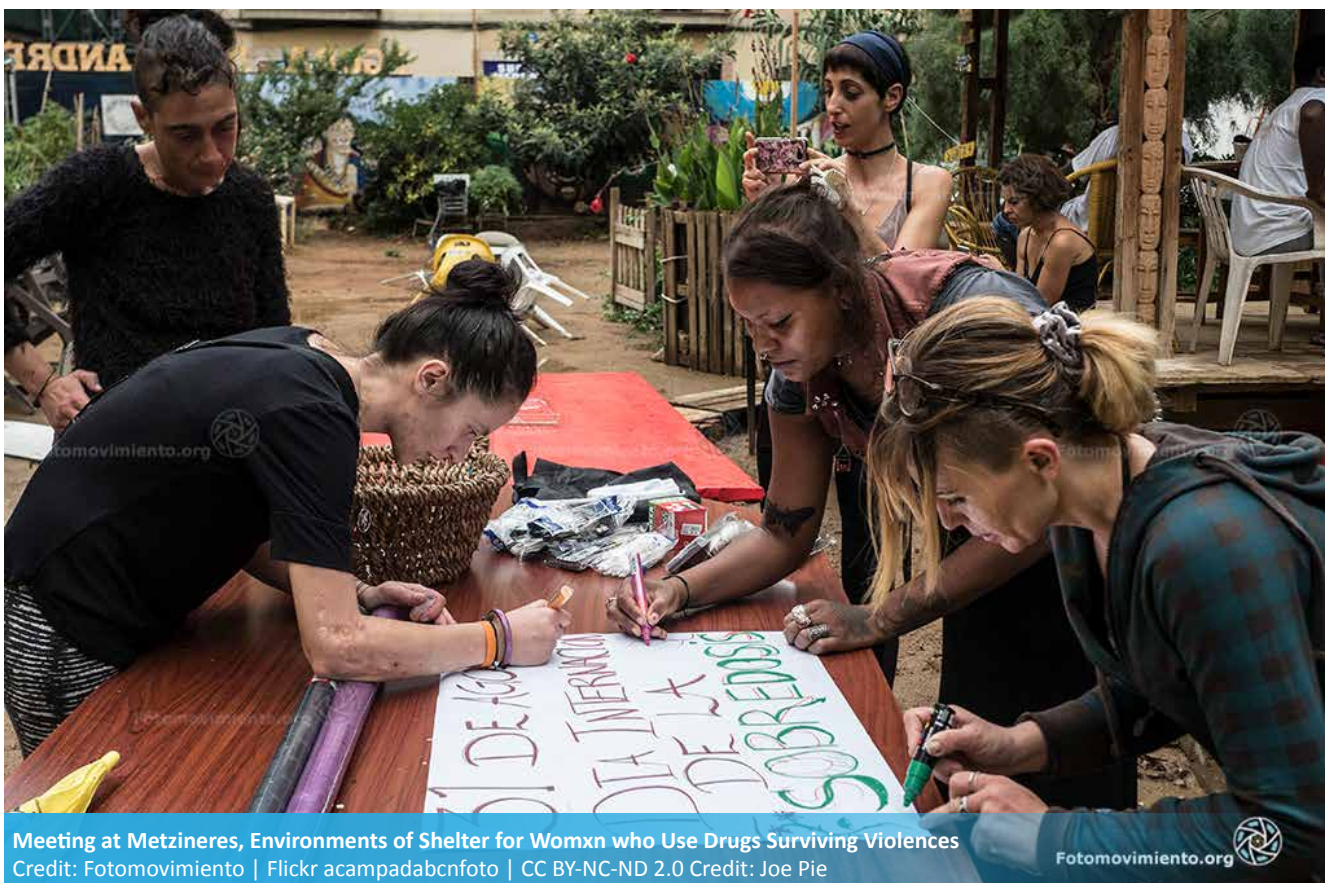
Prison authorities shall utilize options such as home leave, open prisons, halfway houses and community-based programmes and services to the maximum possible extent for women prisoners, to ease their transition from prison to liberty, to reduce stigma and to re-establish their contact with their families at the earliest possible stage.

Bangkok Rule 46

Prison authorities, in cooperation with probation and/or social welfare services, local community groups and non-governmental organizations, shall design and implement comprehensive pre- and post-release re-integration programmes which take into account the gender-specific needs of women.

Bangkok Rule 55

Pre- and post-release services shall be reviewed to ensure that they are appropriate and accessible to indigenous women prisoners and to women prisoners from ethnic and racial groups, in consultation with the relevant groups.



Meeting at Metzineres, Environments of Shelter for Womxn who Use Drugs Surviving Violences
Credit: Fotomovimiento | Flickr acampadabcnfoto | CC BY-NC-ND 2.0 Credit: Joe Pie

Women face significant obstacles to rebuilding their lives upon leaving prison. The vast majority of women deprived of liberty already were living in situations of vulnerability before entering the criminal justice system. Upon their release, these are only exacerbated.¹³² Women convicted for drug offences or with a history of drug use often face additional challenges, due to formal or informal exclusion from social services, and

to the social stigma derived from breaching women's traditional roles.¹³³

Bangkok Rule 45 recognises the importance of providing women with the space to reconnect with their families and communities before they are released.¹³⁴ Gradual de-institutionalisation through home leave, open prisons, and community-based programmes

(Rule 45), as well as through ‘early conditional releases’ (Rule 63), are also useful for ensuring basic welfare and stability in life – such as finding accommodation or employment.

Bangkok Rules 46, 55, and 63 underscore authorities’ obligation to actively provide ‘comprehensive’ and ‘gender-sensitive’ post-release services, which take into account the specific needs of women. These range from the most basic and urgent support, such as providing women with official identification documents (an especially pressing need for women with insecure migration status¹³⁵ and for some trans women¹³⁶), to more complex and long-term services, such as supporting access to housing, education and employment.

Accessing welfare benefits

Laws and policies that ban people convicted for drug offences, or people who use drugs, from accessing welfare benefits, including crucial access to housing, employment or education, undermine the commitments set in the Bangkok Rules.

Lack of safe and stable housing can have a devastating impact on a person’s life; it is a strong predictor of unemployment, of health risks such as higher HIV prevalence; and of risky behaviour such as sharing of drug injecting equipment.¹³⁷ For instance, in the USA Public Housing Authorities excluded people involved in drug activities, including people with a record of drug use, from accessing public housing, both through initial rejection and eviction.¹³⁸ A ban on public housing for people convicted for ‘drug dealing or manufacturing’ offences was imposed in New South Wales, Australia, in 2018.¹³⁹ Beyond these formalised examples, informal exclusion by private landlords and public authorities is likely to exist in many countries.

Looking beyond housing, some countries also restrict access to state support for people convicted for drug offences, or people who use drugs. In several USA states, people convicted for drug offences have limited access to welfare benefits, including financial aid for families and food stamps;¹⁴⁰ this measure has a heightened impact on women, who are the most common beneficiaries of these policies. Drug testing for welfare recipients has also been used in New Zealand, and has been proposed in Australia.¹⁴¹ While these are formalised examples, it is likely that informal exclusion is much broader. At any rate, these discriminatory policies are not compatible with the commitment to provide ‘comprehensive’ support to women convicted for drug offences.

Box 4 Gender-sensitive programmes for social reintegration

Only a few countries have established mechanisms to facilitate the social reintegration of formerly incarcerated women. Costa Rica is a notable exception. In 2014, the country established an inter-institutional network aiming to support formerly incarcerated women, or women who benefited from an alternative to incarceration, with a broad array of health and social services including finding employment and support for childcare.¹⁴² Although this network is now less active than it had been initially, it is an interesting example of how women can be empowered and supported to gain economic independence and take decisions that affect their lives.

In most countries, the lack of government-run community-based programmes has encouraged NGOs and affected groups to fill the gap. In Kenya, the Clean Start programme helps formerly incarcerated women to get back on their feet by providing them life skills, education and vocational training, employment opportunities and peer support.¹⁴³ In Argentina, the NGO ACIFaD supports family members of incarcerated people by facilitating support groups and networks.¹⁴⁴

Overcoming barriers created by criminal records

Finally, criminal records act as a barrier to finding employment, as women released from prison are trapped in a cycle of social exclusion and marginalisation that makes them more vulnerable to engaging in illegal activities than before incarceration.¹⁴⁵ Various positive initiatives – which remain the exception rather than the norm – have focused on reducing barriers to employment created by criminal records. In Costa Rica, for example, Law 9361, passed in January 2017, reformed the court registry to allow for criminal records to be eliminated or reduced for non-violent offenders in situation of vulnerability – a description that fits most women incarcerated for drug offences.¹⁴⁶ Another, more local example is the ‘Ban the box’ or ‘Fair chance’ strategy in the USA, where more than 100 jurisdictions have changed their laws to limit questions about criminal background as part of job application processes.¹⁴⁷

3.6 Drug laws undermining the rights of foreign nationals deprived of liberty



Inside the women section of a prison in Chaingrai province, Thailand
Credit: IDPC

Bangkok Rule 53.1

Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign-national women prisoners to their home country, especially if they have children in their home country, shall be considered as early as possible during their imprisonment, following the application or informed consent of the woman concerned.

Many women convicted for drug offences are incarcerated far away from their country. This is a global phenomenon. For instance, in Malaysia 85% of all women in the death row were foreign nationals, and 90% of them were convicted for a drug offence.¹⁴⁸ In the UK and Portugal, 80% of foreign women in prison had been convicted for a drug offence – twice as much as foreign men.^{149,150} In Spain, a 2016 study found that 72% of all incarcerated woman came from Latin American countries;¹⁵¹ most foreign-national women had been convicted for transporting drugs and they continued to be the main breadwinners for their families even while in prison. A 2011 study in Argentina showed that 90% of foreign-national women incarcerated for a drug offence were drug couriers.¹⁵²

Foreign women incarcerated for drug offences might already reside in the country in which they have been detained, or they might have been visiting it for a short time when they were arrested. In both cases,

they face a number of specific challenges, including insecure migration status; a lack of knowledge or understanding of the laws, criminal justice or language of the country in which they are being held; limited financial means to secure legal counsel or post bail; and no stable housing or job, which may disqualify them from alternatives to incarceration.¹⁵³ Even when they are eligible for bail, foreign nationals are more likely to be imposed pretrial detention, especially if they come from ethnic or racial minorities.¹⁵⁴ According to data released in 2019, in Chile, Colombia, and Peru, 73.3, 50.9, and 42.9% (respectively) of foreign women in prison are in pretrial detention.¹⁵⁵

In some cases, foreign-national women are held far away from their families and support networks, which means that they receive no external help during incarceration. This is particularly challenging in countries where people deprived of liberty rely on relatives for food, clothing and other essential products.

Furthermore, without quality legal counsel it is unlikely that women who have become involved with the illegal drug markets abroad due to human trafficking will be able to evidence their situation. Support services also need to be tailored to the needs of foreign-national women, to address language barriers, the exclusion from many job-training and rehabilitation programmes within prisons,¹⁵⁶ and lack of family visits.

When a foreign person is detained, the Vienna Convention on Consular Relations requires local authorities to inform the consular services of relevant home country, so that they can provide assistance, legal counsel and interpretation. Bangkok Rule 2.1 establishes a similar obligation. However, such assistance is often not provided in time.¹⁵⁷

In the Commentary to the Bangkok Rules, UNODC notes that Rule 53 is particularly important due to the 'disproportionate number of women caught up in international drug trafficking',¹⁵⁸ and especially for those with family and children in their home country.¹⁵⁹ For the children of foreign women in prison, incarceration brings yet another degree of disruption, both when they reside in their home country, far away from their mother's place of detention and with little to no contact with them, or when they live in the host country, where their mother's incarceration will have a broad range of additional negative impacts, including on their migration status, access to education, or health.¹⁶⁰

Bangkok Rule 53 recognises this vulnerability and encourages countries to consider 'the transfer of non-resident foreign national women prisoners to their home country, especially if they have children in their home country... following the application or informed consent of the woman concerned'. For those who choose it, voluntary repatriation is expected to

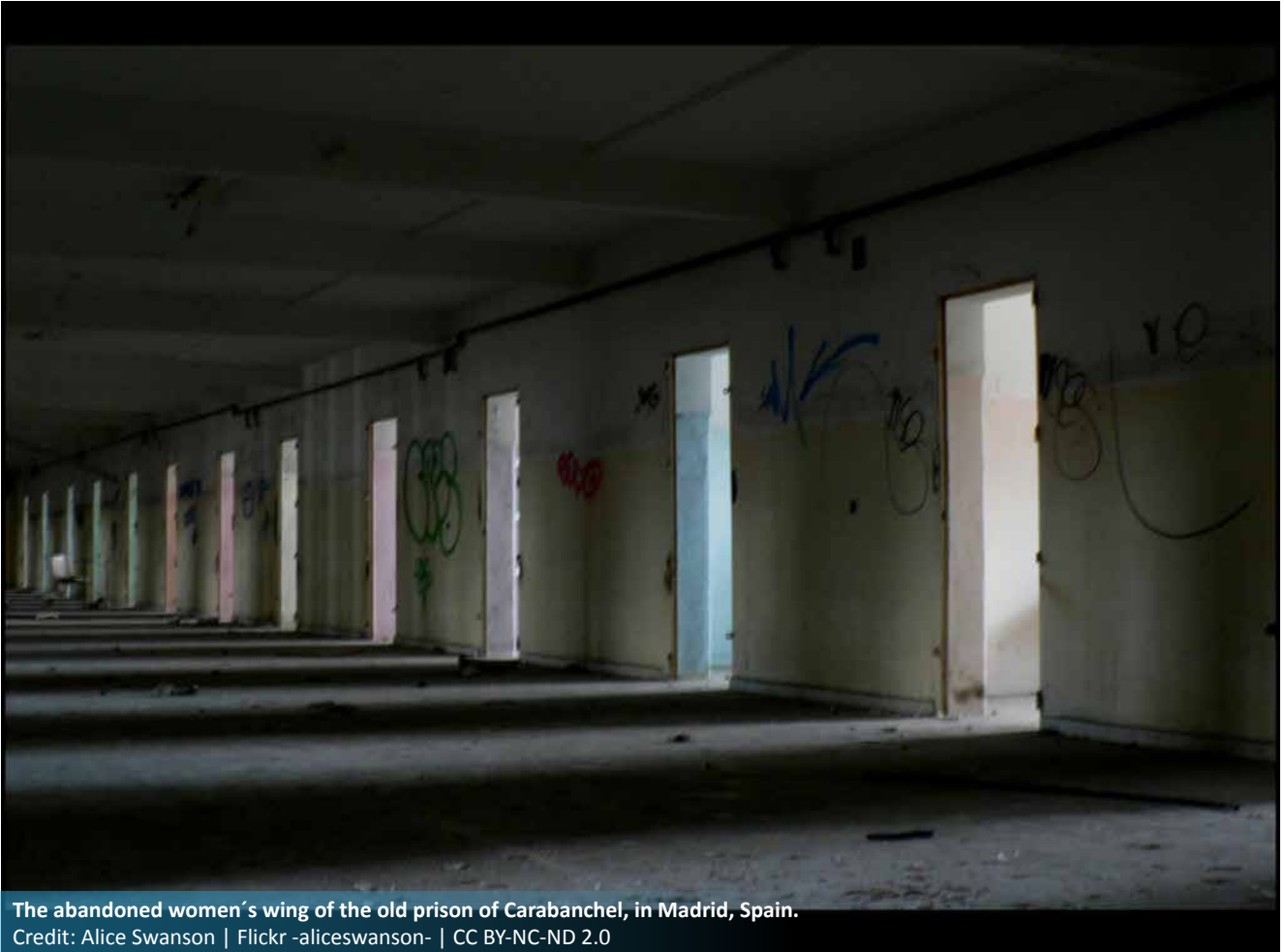
be beneficial in two ways. First, the term and conditions of their prison sentence might be improved in their home country; secondly, they might get closer to their support network, and gain a better understanding of their rights and situation.¹⁶¹

Distinguishing between repatriation and deportation

The UNODC Commentary makes a sharp distinction between repatriation and deportation. While repatriation seeks to reduce the harmful impact of imprisonment, deportation is a punitive measure that complements a prison sentence.¹⁶² Because of this, Bangkok Rule 53 makes it clear that repatriation should be voluntary, and should only take place once the person deprived of liberty is given clear and full information about their right to request a transfer to their home country, and its legal consequences.

However, several countries use deportation as a punishment against foreign nationals convicted for drug offences, even when they are lawful residents. In the USA, the number of people deported for a drug offence rose by 22% from 2007 to 2012, up to a total 260,000 people – both permanent residents and people with irregular migrant status; in the same period, the number of people deported for drug possession rose by 43%.¹⁶³ A survey of 41 foreign women incarcerated in Portugal – at least 30 of them convicted for a drug offence, and several of them permanent residents – found that most of them would face mandatory deportation after serving their time in prison.¹⁶⁴ Deportation is especially disruptive for women who have children, families, and support networks in the host country. In a research paper published in 2020, women who faced deportation from Spain after serving a prison sentence voiced the fear of being cut off from families and children.¹⁶⁵

4. Recommendations: Bringing drug laws in line with the Bangkok Rules



The abandoned women's wing of the old prison of Carabanchel, in Madrid, Spain.
Credit: Alice Swanson | Flickr -aliceswanson- | CC BY-NC-ND 2.0

Ten years after their adoption, states will not deliver on the commitments set in the Bangkok Rules without reforming punitive drug laws. Drawing on the analysis carried out in this briefing, this section presents urgent and longer-term recommendations for policy makers to inform the next decade of the implementation of the Bangkok Rules.

4.1. Urgent recommendations

Our priority recommendations focus on the urgent need to decongest prisons, and to reduce the number of women entering the criminal justice system. The world's overcrowded and under-resourced prisons are simply not able to protect the health and rights of women deprived of liberty. This is especially true at times of COVID-19, but the issue of prison overcrowding pre-dated and will most likely outlive the global pandemic. Furthermore, prisons are not an appropriate or just environment to address the causes for women's involvement in illegal drug activities. Therefore, the Bangkok rules must be interpreted within a broader set of efforts to reduce prison populations worldwide. Measures aimed at curbing the number of women in prison should be prioritised.

Implement Bangkok Rules 57 and 58 on non-custodial measures:

- Address prison overcrowding by immediately releasing all women incarcerated for minor or non-violent drug offences, including but not limited to drug use and possession for personal use, and non-violent drug supply offences committed by women in situations of vulnerability, and ensure adequate support to transition into the community.
- In the context of COVID-19, it is especially urgent to release women with health risks, and women in situation of vulnerability, such as older women, disabled women, pregnant women, women with children, and women responsible for other dependants.¹⁶⁶
- Urgently amend existing laws and policies to ensure that women charged with, indicted for, or convicted of minor or non-violent drug offences are eligible for diversionary measures and alternatives to incarceration and punishment.

Implement Bangkok Rule 15 on providing drug services in prisons:

- Ensure that women who remain in prison during the pandemic have access to strictly voluntary evidence-informed, rights-based, gender-sensitive drug services, including drug dependence treatment, harm reduction and additional support services focusing on addressing past histories of trauma, gender-based violence and mental health.

4.2. Long-term recommendations for policy makers

These recommendations aim to address the systemic issues that have driven the overincarceration of women in the last decades.

Implement Bangkok Rules 57, 58 and 60 on non-custodial measures:

- Review drug laws and policies to ensure that prison is used only as a measure of very last resort. This includes decriminalising drug use and drug possession for personal use. Where criminal penalties for drug offences are retained, ensure more proportionate sentencing.¹⁶⁷
- Eliminate the mandatory or disproportionate use of pretrial detention for drug offences, and repeal laws and policies that exclude people convicted for drug offences from alternatives to incarceration or punishment.
- Improve access to quality legal representation in order to increase the availability of existing diversionary measures and alternatives to punishment and incarceration.
- Ensure that the underlying factors that bring women in contact with the illegal drug economy, such as poverty, marginalisation, coercion, partner violence or caretaking responsibilities, are considered in the implementation of non-custodial measures, during and after sentencing.
- Complement non-custodial measures with gender-sensitive support programmes that address these specific factors. Prioritise and fund programmes that are led by members of affected communities.

Implement Bangkok Rule 61 on mitigating circumstances:

- Reform drug laws and policies to remove mandatory minimum prison sentences for drug offences.
- Reform drug laws and policies to allow for the consideration of mitigating circumstances in sentencing for drug offences, taking into account the role of the person in the illegal drug trade, as well as the

reasons for their involvement.

- Establish gender-sensitive mitigating circumstances that address the main pathways of women's involvement into illegal drug economies, such as a prior history of partner violence, history of trauma, coercion, caretaking responsibilities, and others.

Implement Bangkok Rules 15, 41(b) and 62 on drug services in prisons:

- Ensure access to life-saving harm reduction services in custodial facilities for women, including but not limited to OAT and NSP.
- Ensure access to voluntary, evidence-based, gender-sensitive, trauma-informed drug dependence treatment and social support services for women deprived of liberty who use drugs.
- Train prison personnel to engage positively with existing harm reduction services, to avoid the stigmatisation of women who use such services.¹⁶⁸
- Ensure that drug dependence treatment and other drug services provided in the context of diversion measures and alternatives to incarceration are strictly voluntary and non-conditional. Rejection or discontinuation of treatment should not entail punishment or incarceration.

Implement Bangkok Rules 4, 15, and 64 on pregnant women, breastfeeding women, and women with children:¹⁶⁹

- Amend drug laws and policies to ensure that pregnant women, breastfeeding women, and women with children who are detained, charged with, or convicted of a drug offence have preferential access to non-custodial measures. Prison should be a measure of last resort.
- When extraordinary circumstances do not allow for non-custodial measures, detain women deprived of liberty close to their children and families. States should cover the costs incurred by women incarcerated for speaking with their families, and of travel for prison visits.
- Remove criminal sanctions and other disciplinary measures (e.g. removal of child custody once born, coerced drug treatment) against pregnant women who use drugs. Access to drug treatment and harm reduction services adapted to the specific circumstances of pregnant women should be offered solely on a voluntary basis.
- Recognise the children of incarcerated women as rights-holders, and ensure that all decisions on their housing in prisons are taken with their best interest in mind. When children end up living in prison, states have a heightened duty to ensure their rights to personal development, well-being, health

and education, and that they can maintain contact with the outside world.

Implement Bangkok Rules 45, 46, 55 and 63 on transition into the community:

- Facilitate the transition of women from prison to the community through gradual de-institutionalisation measures that allow them to obtain a source of income, secure accommodation, and restore ties with their families and communities.
- Repeal the laws and policies that ban people convicted of drug offences, and people who use drugs, from accessing housing and other welfare benefits.
- Establish public support mechanisms for women released from prison, from housing and financial support to drug dependence treatment.
- Provide funding and support to community-led organisations that accompany incarcerated and formerly incarcerated women in their transition from prison to community.

Implement Bangkok Rule 63 on foreign nationals:

- Establish mechanisms, including bilateral or multilateral agreements with other countries, to facilitate the voluntary transfer of foreign women deprived of liberty to their home country.
- Remove laws and policies that entail the automatic deportation of women convicted of drug offences. For pregnant women and women with children under their care, deportation decisions should take into account the best interest of the child.

Cross-cutting recommendations:

- Ensure that all women entering the criminal justice system are systematically informed of their human rights as laid out in the Bangkok Rules.
- Adopt an intersectional approach to the implementation and monitoring of the Bangkok Rules, tailoring programmes to the different needs of women involved in the criminal justice system.
- Collect gender-disaggregated data to track the number and profiles of women entering the criminal justice system, the number of women incarcerated, general prison conditions, as well as the number of women having benefited from alternatives to punishment or incarceration. Additional data could be collected on how many women are benefiting from support services, including drug services, offered in prisons and as alternatives to incarceration.

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About this Briefing Paper

This briefing paper provides an overview of the concrete ways in which punitive drug legislation has impacted upon the achievement of the Bangkok Rules since their adoption in 2010, and offers several recommendations to align drug laws and policies with the commitments set out in the Bangkok Rules.

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About IDPC

The International Drug Policy Consortium is a global network of non-government organisations that specialise in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

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