

The unintended negative consequences of the 'war on drugs': mass criminalisation and punitive sentencing policies



'Effective drug control cannot exist without fair criminal justice and successful crime prevention', Yury Fedotov, UNODC Executive Director (2010)

Criminalisation of drug users, excessive levels of imprisonment, and punitive sentencing practices, including mandatory sentencing, the death penalty and enforced 'drug detention centres', are some of the unintended negative consequences of the 50 year 'war on drugs', a policy with direct impact on the vulnerable, poor and socially excluded groups, including ethnic minorities and women.

The enforcement of overly punitive laws for drug offences has not only proven ineffective in curbing the production, trafficking, and consumption of illicit substances, but had many negative consequences, including overloading criminal justice systems, overwhelming the courts, fuelling prison overcrowding and exacerbating health problems. Focusing already limited resources on low-level offenders and drug users has prevented governments from targeting the perpetrators of organised crime who benefit from, and fuel for their financial benefit, the drug addictions of usually poor and marginalised users.

Mass criminalisation

The 'war on drugs' has seen the unwavering application of punitive criminal sanctions for drug offenders, with little differentiation between use and possession, at one end of the scale, and large-scale trafficking with links to organised crime, at the other end. This has given rise to a dramatic increase in the number of persons disproportionately criminalised for small-scale drug offences.¹ In the USA, for example, approximately 40 per cent of all drug arrests in 2005 were for simple possession of marijuana, and in the 1990s marijuana possession arrests accounted for 79 per cent of the growth in drug arrests.² The majority of small-scale drug offenders have no history of violence or high-level drug selling activity.

The UN Office on Drugs and Crime (UNODC) estimates, conservatively, that between 155 and 250 million people worldwide, or 3.5 per cent to 5.7 per cent of 15-64 year olds, have used illicit substances at least once in 2008. Globally, cannabis users comprise the largest number of illicit drug users (129–190 million people). Global lifetime usage figures probably approach one billion.

Sources: UNODC World Drug Report 2010; and *The War on Drugs: Creating crime enriching criminals*, Count the Costs.

No statistical research has been carried out to estimate the number of people charged with a drug-related offence since the 'war on drugs' was declared. However, of the approximate 10 million people who are currently imprisoned globally, it has been estimated that at least one million people are in prison for a drug-related offence. This figure indicates that the number of people criminalised as a consequence of the 50 year 'war on drugs' goes into the millions.

At the same time there is no evidence that punitive enforcement measures significantly deter the use of drugs. As studies suggest deterrence is at best marginal compared to the wider social, cultural and economic factors that drive drug use.³

There is a link between substance abuse and poverty. People who use drugs, or are accused of small-scale drug offences, generally belong to vulnerable, poor and socially excluded groups, and disproportionately represent ethnic and other minority groups. An overwhelming percentage of drug users are struggling with unemployment, poor skills, low income, poor housing, and bad health and family environments.⁴ The undifferentiated criminalisation of drug offences has contributed to marginalisation, discrimination and the transmission of HIV/AIDS and other blood-borne diseases.

¹ Small-scale drug offences are usually taken to encompass both possession for personal use as well as possession for dealing, however there are no clear thresholds on what is considered 'small-scale'. Quantitative thresholds can become overly complex depending on whether you go by weight or by purity. Often 'small-scale' refers to what role and influence the individual plays in the supply chain. This is why judicial discretion is so critical.

² Bryan Stevenson, *Drug Policy, Criminal Justice and Mass Imprisonment*, Working Paper Prepared for the First Meeting of the Global Commission on Drug Policies, Geneva, 24-25 January 2011.

³ *The War on Drugs: Creating crime enriching criminals*, Count the Costs, p. 11.

⁴ Martina Melis and Marie Nougier, *Drug policy and development: How action against illicit drugs impacts on the Millennium Development Goals*, International Drug Policy Consortium, October 2010, p. 10.

Rather than deterring them in future, the criminalisation of drug users drives them further into the cycle of poverty. Once marked with the stigma of a criminal sentence, access to work, housing and education is even further jeopardised, and it drives this group away from health and social services. In many countries, such as Russia and Georgia, a drug conviction or even a positive drug test may result in problems accessing social welfare, public housing and funding for higher education.⁵

The biggest contributing factor in the startling increase in incarceration in the USA is traceable to the arrest and imprisonment of poor people of colour for nonviolent, drug-related offences.

Source: Michelle Alexander, *The Failed Drug War Has Created a Human Rights Nightmare—How Can This Happen in Our Country and Go Virtually Undiscussed?*, 28 April 2011

Criminalisation of women

Although they still number far fewer than their male counterparts, the number of women in prison for drug offences has increased considerably in recent years. Women imprisoned for drug offences are mostly from socially and economically marginalised backgrounds, whose crimes are driven by poverty.⁶

Across 51 European and Central Asian countries, more than 112,500 women are imprisoned, of these, 28 per cent – or 31,400 women – are in prison for drug offences. This represents more than one in four incarcerated women in the region.

Source: Eka Iakobishvili, *Cause for alarm: The Incarceration of Women for Drug Offences in Europe and Central Asia, and the need for Legislative and Sentencing Reform*, Harm Reduction International, 2012.

Often, the offences involving women are non-violent, usually involving small quantities of drugs. In Georgia, for example, quantities for which women spend 7-10 years in prison often do not exceed 0.5mg of heroin.⁷

The UN Committee on the Elimination of Discrimination against Women (CEDAW) has

expressed its concern about the imprisonment of women with petty offending backgrounds, including drug offences. In relation to the United Kingdom, the Committee expressed concern at the number of women 'imprisoned for drug offences or because of the criminalisation of minor infringements, which in some instances seem indicative of women's poverty.'⁸

Research shows that many women convicted of drug offences have histories of sexual and physical abuse, coexisting psychiatric disorders, low self-esteem, low literacy and/or are living with HIV or hepatitis C.⁹ They are unskilled and (often single) mothers, with a lack of familial support. They may also be financially dependent on a male partner involved in the drug trade.¹⁰

Punitive sentencing policies and prison overcrowding

The 'war on drugs' has fuelled a huge expansion of prison populations over the last fifty years, and contributed to the increase in long-term prison sentences. While significant numbers are imprisoned for possession/use alone, far more are imprisoned for small-scale drug-related offences.

The impact of criminalisation and enforcement varies from country to country, with sanctions for users and drug-related offences ranging from formal or informal warnings, fines and treatment referrals, to lengthy prison sentences and the death penalty. However, most of the people in prison for drug offences are there for minor offences, yet they are serving grossly disproportionate sentences.

In Ecuador, for example, where the maximum penalty for homicide is 16 years, a small-scale drug trafficker can end up with a longer sentence than a convicted murderer.¹¹ In Ukraine, the possession of minimal amounts of drugs (from 0.005g) can lead to three years in prison.¹² In Russia, solution traces in a used needle can lead to one and a half years in prison. In Georgia, drug urine tests can lead to imprisonment.¹³ Under the notorious 'three strikes laws' that have become popular in the USA, drug offenders with no history of violence may face mandatory minimum sentences in excess of 25 years in prison. Thousands

5 *Ibid.*, pp. 6-7.

6 Eka Iakobishvili, *Cause for alarm: The Incarceration of Women for Drug Offences in Europe and Central Asia, and the need for Legislative and Sentencing Reform*, Harm Reduction International, 2012, p. 6.

7 *Ibid.*, p. 24.

8 UN document CEDAW/C/UK/3 and Add.1 and 2, and CEDAW/C/UK/4 and Add.1, para. 312, 1999.

9 *Women in prison: incarcerated in a man's world*, Penal Reform International Briefing No. 3, 2008 (1).

10 *Ibid.*

11 *Systems Overload: Drug Laws and Prisons in Latin America*, Transnational Institute and Washington Office on Latin America, 9 December 2010, p. 52.

12 Golichenko, M., and Merkinaite, S., *In breach of international law: Ukrainian drug legislation and the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Discussion Paper, 2011.

13 Otiashvili, D., Kirtadze, I. and Tsertsvadze, V., *How efficient is street drug testing?*, Policy Brief, Alternative Georgia, Tbilisi, 2011.

of low-level drug offenders have been sentenced to life imprisonment with no chance of parole as a result of these sentencing laws.¹⁴ Imposing tougher penalties on low-level drug offenders than on bank robbers, kidnappers and murderers undermines the notion of proportionality and fairness of the law.

There is also an abuse of pre-trial detention for those suspected of drug-related offences. In Bolivia, Brazil, Ecuador, Mexico and Peru pre-trial detention is mandatory for drug offences.¹⁵

Approximate number of people in prison for convicted drug-related offences:

- **USA** 317,176 prisoners: approximately 15 per cent of the prison population.
- **Russia** 89,000 prisoners: approximately 12 per cent of the prison population.
- **Brazil** 125,000 prisoners: approximately 22 per cent of the prison population.
- **Thailand** 100,000 prisoners: approximately 45 per cent of the prison population.
- **Iran** 84,000 prisoners: approximately 40 per cent of the prison population.
- **Indonesia** 52,000 prisoners: approximately 34 per cent of the prison population.

These figures do not even count those on pre-trial detention or under 'administrative detention', constituting deprivation of liberty rather than 'treatment' and often even run by security services.

The scale of the problem is considerable. In the USA (federal prisons), Thailand, Singapore and Iran drug offenders account for about 50 per cent of the prison population; and rates of imprisonment for drug offences are also alarmingly high in many other countries such as China, Mexico and India.

Sources: Open Society Foundations Global Drug Policy Program, and International Centre for Prison Studies.

Persons accused or convicted of drug offences are often denied access to alternative sentences that are available to those accused of other types of offences. In Brazil, the 2006 law prohibits replacement of imprisonment with alternative sentences for drug offences, even though Brazilian law allows alternatives in the case of sentences up to four years for all other offences perpetrated without violence or grave threat, which would be the case for many instances of drug offences.¹⁶

The death penalty for drug offences

To date, 33 countries or territories retain the death penalty for drug related offences.¹⁷ China, Iran, Saudi Arabia, Vietnam, Malaysia and Singapore, and to a lesser extent, Egypt, Indonesia, Kuwait, Pakistan, Syria, Thailand and Yemen issue the majority of death sentences, and have carried out executions for drug-related offences, worldwide.¹⁸ For example, China has carried out mass public executions of drug offenders, using the UN International Anti-Drugs Day on 26 June in recent years.¹⁹ According to Iran Human Rights, since 3 January 2013 Iran has publically executed by hanging at least 40 people convicted of drug offences, including one woman.

The International Covenant on Civil and Political Rights (ICCPR) specifies that in countries which have not abolished the death penalty, the sentence of death may be imposed only for the 'most serious crimes'.²⁰ Interpretation of the phrase 'most serious crimes' has led to restrictions on the number and types of offences for which death sentences can be imposed under international law. It has been interpreted by the UN as meaning 'intentional crimes with lethal or other extremely grave consequences'²¹ and should be 'read restrictively to mean that the death penalty should be quite an exceptional measure'²². In 2012, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions interpreted the 'most serious crimes' threshold as 'only intentional killing'.²³ The weight of international opinion, therefore, indicates that drug offences do not meet this threshold.²⁴

14 *Drug Policy, Criminal Justice and Mass Imprisonment*, supra at n. 2.

15 *Systems Overload: Drug Laws and Prisons in Latin America*, supra at n. 11, p. 6.

16 *Ibid*, p. 35.

17 *The Death Penalty for Drug Offences: Global Overview 2012*, Harm Reduction International, 2012.

18 *The Death Penalty for Drug Offences: Global Overview 2011*, International Harm Reduction Association, 2011.

19 *The Death Penalty for Drug Offences: Global Overview 2010*, International Harm Reduction Association, 2010.

20 See Article 6(2), International Covenant on Civil and Political Rights.

21 Safeguard 1 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by UN ECOSOC resolution 1984/50 of 25 May 1984.

22 General Comment No. 6 on article 6 of the ICCPR, adopted on 27 July 1982, para. 7.

23 UN document A/67/275, 9 August 2012, para. 50.

24 See UN document CCPR/CO/69/KWT, 27 July 2000, para. 13; UN document. CCPR/CO/84/THA, 8 July 2005, para. 14; UN document. A/50/40, 3 October 1995, para. 449; UN document E/CN.4/1997/60, 24 December 1996, para. 91; UN document E/CN.4/2004/7, 29 December 2007, paras. 51-53; press release of the UN High Commissioner for Human Rights, 10 March 2009; letter of the UN Special Rapporteurs on the question of torture and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to the Chairperson of the 52nd Session of the Commission on Narcotic Drugs, 10 December 2008.

Fuelling the global HIV/AIDS epidemic and other health-related risk

'Drug dependency is a health disorder, and drug users need humane and effective treatment – not punishment', Yuri Fedotov, UNODC Executive Director (2010)

Mass imprisonment, as a result of the 'war on drugs', is also contributing to the transmission of HIV/AIDS and other blood-borne diseases. HIV prevalence and AIDS cases behind bars are many times higher than among the general population²⁵, and as many as one-quarter of all HIV-infected Americans are estimated to pass through correctional facilities annually.²⁶ Statistics from the USA are consistent with global trends, with twenty low- to middle-income countries reporting HIV prevalence of greater than 10 per cent among prison inmates.²⁷ Imprisonment has also been identified as a risk factor for acquiring HIV infection in countries in Western and Southern Europe, Russia, Canada, Brazil, Iran and Thailand.²⁸

Criminalising users, as well as criminalising drug treatment and harm reduction activities, has indirectly contributed to the global HIV/AIDS epidemic. Criminal laws banning syringe/needle provision (and possession) create a climate of fear for people who use drugs, driving them away from life-saving HIV prevention and other health services, and encouraging high risk behaviour, such as sharing needles and syringes, which increases the risk of HIV, hepatitis C and other blood-borne infections, and leads them to avoid treatment for addiction.²⁹ In many countries, such as Russia, established opiate

substitution therapy (most commonly methadone, but also buprenorphine) remains illegal.³⁰ Mass imprisonment also drives risk of HIV infection and disease as it has been associated with increased levels of unprotected sex, and by interrupting antiretroviral HIV treatment.

Research conducted in the USA, where ethnic minorities are many times more likely than whites to be imprisoned for drug-related offences, has found that disproportionate imprisonment rates are one of the key reasons for the markedly elevated rates of HIV infection among African Americans.³¹

'Tackling prevention and treatment of drug-use problems should be the first priority, since law enforcement activities will not halt illicit activities if underlying markets remain unaddressed', Yuri Fedotov, UNODC Executive Director (2010)

Drug detention centres

The 'war on drugs' has also led to mass detention of drug users in compulsory 'drug detention centres', in particular in South-East Asia.³² In China for example, the UN Programme on HIV/AIDS estimated that there were approximately 500,000 people undergoing compulsory drug detention in such 'treatment centres' at any one time in China during 2009.³³

While such centres vary in design and operation, reports consistently indicate that they fail to offer adequate physical or mental health treatment. There have been documented cases of forced labour, torture and other human rights abuses in these centres.³⁴

25 Maruschak L, and Beavers R. HIV in prisons, 2007–08, Bureau of Justice Statistics bulletin; and *HIV surveillance – United States, 1981–2008*, MMWR, 2011, 60(21), 689–693.

26 Hammett TM, Harmon MP, and Rhodes W., *The burden of infectious disease among inmates of and releases from US correctional facilities, 1997*, Am J Public Health, 2002, 92(11), 1789–1794.

27 Dolan K, Kite B, Black E, Aceijas C, and Stimson GV., *HIV in prison in low income and middle-income countries*, Lancet Infect Dis, 2007, 7(1): 32–41.

28 Jurgens R, Ball A, and Verster A., *Interventions to reduce HIV transmission related to injecting drug use in prison*, Lancet Infect Dis, 2009, 9(1): 57–66.

29 *The War on Drugs: Undermining international development and security, increasing conflict*, Count the Costs, p. 8.

30 *Ibid*, p. 8.

31 Johnson R, and Raphael S., *The effects of male incarceration dynamics on acquired immune deficiency syndrome infection rates among African American women and men*, J Law Econ, 2009,; 52(2): 251–293; and Adimora AA, Schoenbach VJ, Martinson FE, Donaldson KH, Stancil TR, and Fullilove RE, *Concurrent partnerships among rural African Americans with recently reported heterosexually transmitted HIV infection*, J Acquir Immune Defic Syndr, 2003, 34(4): 423–429.

32 See, Parry J., *Vietnam is urged to close drug detention centres after widespread abuse is discovered*, BMJ, 2011; 343; and Amon J., *Why Vietnamese don't want to go to rehab*, Human Rights Watch, May 2010.

33 Human Rights Watch *'Where Darkness Knows No Limits' Incarceration, Ill-Treatment and Forced Labor as Drug Rehabilitation in China*. 2010, (citing: UNAIDS May 2009 Report, *'AIDS in China: background information on the epidemic and the response'*, unpublished document on file with Human Rights Watch, May 2009, p. 8.)

34 Jurgens R and Csete J. *In the name of treatment: ending abuses in compulsory drug detention centers*, Addiction, 2012, 689–691.

What can parliamentarians do?

Parliamentarians have numerous opportunities to support drug reforms. These can include:

- Reviewing policy and legislation to ensure sentencing is fair and proportionate, and consider decriminalising personal possession or reviewing laws and regulations relating to thresholds and quantities.
- Addressing prison overcrowding and increasing the application of non-custodial measures for drug users and small-scale drug offences.
- Abolishing the death penalty for drug-related offences.
- Abolishing mandatory sentencing for drug-related offences.
- Reducing the use of pre-trial detention, including prohibiting its mandatory use.
- Reviewing legislation to ensure production, trafficking, and consumption of illicit substances are clearly defined.
- Establishing a proportionate and sensitive response to offending by women, including promoting non-custodial sanctions and measures for mothers, with authorities acting always in the best interests of the child.
- Protecting other vulnerable prisoners, including individuals with grave or infectious diseases (HIV/AIDS and drug addiction).
- Abolishing the use of 'drug detention centres', and establishing universal non-compulsory drug treatment and harm reduction facilities for all members of the public, including syringe/needle provision and opiate substitute therapy.
- Providing antiretroviral HIV treatment to prisoners with HIV/AIDS.
- Reviewing the experience of countries that have pursued a decriminalisation policy, such as Portugal, to enable them to formulate evidence-based policies that are appropriate for their own country situation.

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