

3.3

Proportionality of sentencing for drug offences

Key recommendations

- Existing sentencing frameworks for drug offences should be reviewed to ensure proportionality of sentencing, and address the consequences resulting from disproportionate sentencing such as prison overcrowding, and ineffective use of criminal justice resources
- A range of factors should be considered during sentencing to ensure that sentences are proportionate to the culpability and role of the offender, including the consideration of mitigating and aggravating factors, and the harms caused by the offence. In that regard, judges and prosecutors should adopt a gender perspective when imposing penalties and considering alternatives to incarceration
- Sentencing frameworks for drug offences should include sentencing options of no punishment at all (e.g. under decriminalisation of drug use and possession for use), or alternatives to conviction and imprisonment, for minor, non-violent offences
- Mandatory minimum penalties should be eliminated
- The death penalty should be abolished for drug offences, as an ineffective deterrent and a violation of international law.

Introduction

Disproportionate sentencing for drug offences is commonplace, as countries implement drug policies premised upon harsh punishment to deter the illicit supply and use of drugs. Non-violent drug offences involving small quantities of substances, e.g. low-level cultivation, dealing or smuggling, are often punished with harsher penalties than for other offences that cause far more harm, particu-

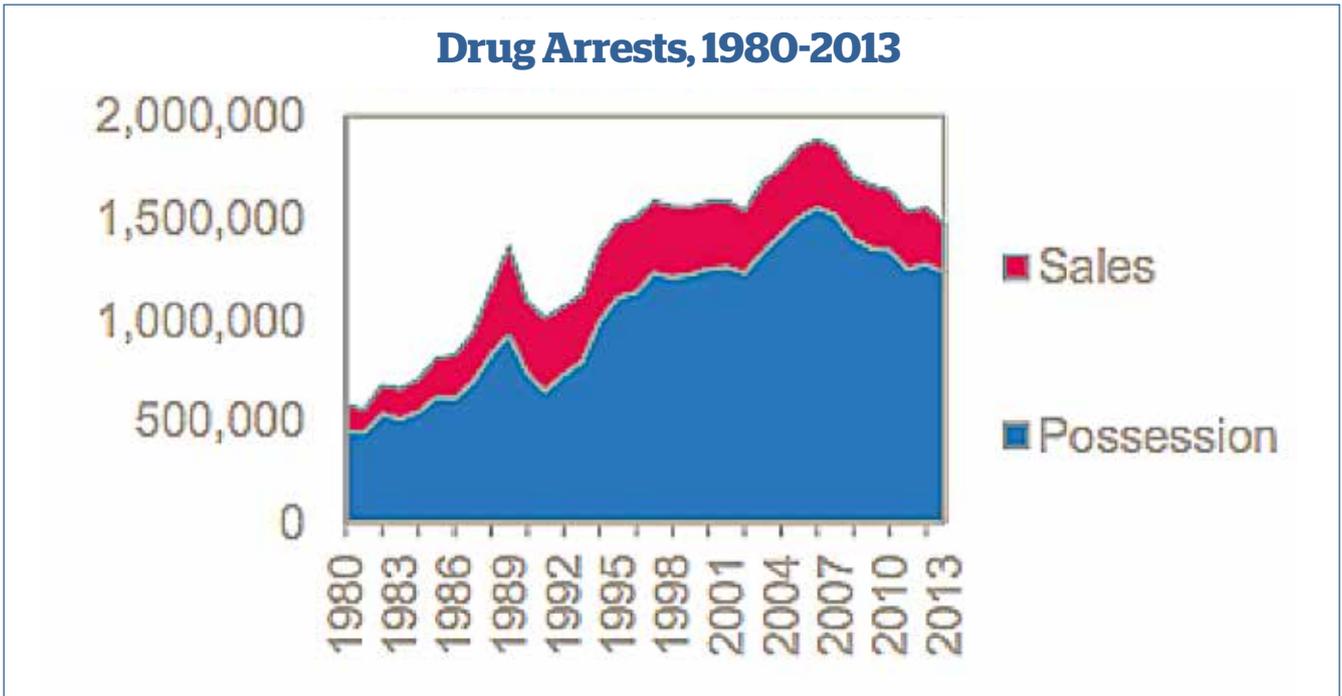
larly violent offences such as murder and rape.⁷⁵ Sentences are often determined solely on the basis of possession and the quantity of drugs involved, without taking into account other factors essential to assessing the extent of harm caused, the culpability and role of the individual (e.g. high, intermediate or low-level role in a drug supply transaction), and mitigating factors such as being a first-time offender, the sole care provider for dependants, and not being involved in violence or connected with organised criminal networks.⁷⁶

In the USA, where over half of the inmates in federal prisons are sentenced with drug offences, 80% of drug arrests made in 2013 were for possession only (see Figure 1).⁷⁷ In addition, the imposition of mandatory minimum penalties for drug offences in the USA restricts the exercise of prosecutorial and judicial discretion and excludes consideration of mitigating factors in individual cases, thereby increasing the likelihood of disproportionately severe sentencing.⁷⁸ In 2011, over 75% of the sentenced offences subject to a mandatory minimum penalty were for drug offences; in 2010, the average sentence imposed for people convicted of a drug offence subject to a mandatory minimum penalty was 11 years.⁷⁹ The high rates of imprisonment for drug offences in other regions of the world, especially of people who use drugs and women, further demonstrate the disproportionate nature of sentencing for drug offences (see Chapter 3.4).⁸⁰

Despite decades of excessively severe punishment for drug offences, there is no evidence of their effectiveness as a deterrent for the illicit use, cultivation, manufacturing and trafficking of drugs. In fact, successive global reports by the United Nations Office on Drugs and Crime (UNODC) contain data predominantly showing expanding and diversifying drug markets in all regions of the world.⁸² Drug policies imposing harsh punishment have not only failed in their objective of deterring drug-related activities, they have resulted in damaging outcomes for public health, human security, and development:

- **Public health** – prisons are a high-risk setting

Figure 1. Drug arrests in the USA, 1980 to 2013⁸¹



Credit: Drug Policy Alliance; Data from the Federal Bureau of Investigation, Uniform Crime Report⁸¹

for the transmission of illnesses such as HIV, viral hepatitis and tuberculosis. HIV infection rates tend to be higher in prisons than in the community as there is very poor coverage of harm reduction services for inmates who use drugs⁸³ (see Chapter 3.6)

- **Human security** – the majority of individuals sentenced with the most severe punishment for drug offences, including the death penalty, do not play a serious or high-level role in drug trafficking operations. They are often poor, vulnerable to exploitation, and engaged in low-level drug trafficking roles.⁸⁴ Their incarceration does not impact upon the scale of the illicit market as they are easily replaced by others. Consequently, significant criminal justice resources (including law enforcement, prosecutors, judges, detention centres and the prison system) are spent on arresting and incarcerating low-level offenders, while people engaged in high-level drug crimes are left largely free to continue their operations and recruitment of low-level actors. Disproportionate sentencing is therefore not only ineffective, it also results in the unbalanced investment of law enforcement and criminal justice resources on minor, low-level drug-related activities, thereby diverting them from targeting serious criminal activity, i.e. violence, corruption, organised crime and money laundering, which pose a greater threat to human security⁸⁵
- **Development** – Incarcerating farmers engaged in illicit cultivation for subsistence purposes and other low-level actors in the drug market merely ex-

acerbates the poverty and insecurity that are the root cause of their involvement in drug markets.⁸⁶

Legislative/policy issues involved

Defining the concept of proportionality

Proportionality is an internationally recognised legal principle, applicable to a government’s response to activities that cause harm to others. It requires the severity of any punishment imposed to be measured in accordance with the harms caused by an offender’s actions, and the culpability and circumstances of the offender. International human rights, crime prevention and criminal justice instruments contribute to setting standards of proportionality.⁸⁷ For example, article 29(2) of the Universal Declaration of Human Rights states that:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The International Covenant on Civil and Political Rights protects many rights relevant to sentencing for drug offences, notably the rights to life, liberty, security of the person, and privacy. In interpreting the application of the Covenant, the Human Rights Committee has found that where a state implements measures to restrict a right protected under

the treaty, it 'must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights'.⁸⁸ The Committee has further explained that measures to restrict rights protected under the Covenant must be the least intrusive measure required for achieving a legitimate aim.⁸⁹

A proportionate sentencing framework for drug offences should therefore primarily target people playing high-level roles in drug supply operations and causing the most harm to communities, such as violence and control over organised criminal activity. Sentencing frameworks should also aim to achieve improved outcomes for development, health, and human security, as well as protection of human rights.

Applying the legal principles of proportionality to sentencing for drug offences

International legal principles of proportionality are seldom applied to sentencing for drug offences, due to the politically driven development of the international drug control system over the past few decades favouring excessively severe measures in response to controlled substances. The UN drug control conventions contain language emphasising the gravity of the world drug problem,⁹⁰ thereby leading to the justification of imposing disproportionately severe sanctions for drug-related offences. For example, the preamble of the 1961 Convention asserts that 'addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind'.

However the stated objective of each of the UN drug conventions is to ensure the 'health and welfare of mankind', by restricting the non-medical use of controlled substances whilst ensuring their availability for medical purposes.⁹¹ Importantly, the conventions do not contain any requirement to criminalise drug use (see Chapter 3.1 for more details) and contain explicit provisions permitting alternatives to conviction or punishment for offences relating to personal use, including possession, purchase and cultivation, and for 'appropriate cases of a minor nature' not relating to personal use (see Chapter 3.4 for more details).⁹² In cases of a minor nature, states are encouraged to implement alternatives to conviction or punishment, such as education, rehabilitation or social reintegration, and where the offender is a person who uses drugs, 'treatment and aftercare'.⁹³ As a result, the conventions recognise the need to establish sentencing frameworks for drug offences that distinguish between:

- consumption and supply offences
- minor and serious offences, and
- different types of substances, in accordance with the potential health harms and therapeutic value of a particular substance.⁹⁴

The concept of proportionality of sentencing becomes essential when considering the application of the death penalty for drug offences. According to the UN Human Rights Committee, drug offences do not meet the threshold of 'most serious crimes' for which the death penalty may apply under Article 6 of the International Covenant on Civil and Political Rights, as they do not amount to intentional killing.⁹⁵ As a result, the imposition of death penalty sentences and executions for drug offences contravene international human rights law. The International Narcotics Control Board (INCB) has encouraged 'those States which retain and continue to impose the death penalty for drug-related offences to consider abolishing the death penalty for such offences'.⁹⁶ However as of 2015, 33 countries retain the death penalty for drug offences, and at least ten countries impose it as a mandatory sentence, with seven countries still actively executing people convicted of drug offences.⁹⁷

Implementation issues involved

A number of countries, as well as the European Union, now recognise the need to address disproportionate penalties and sentencing for drug offences. They have taken steps to ensure more proportionate outcomes, including the consideration of factors indicating the harms caused by an offence and the culpability of the offender, beyond possession alone or the amount of drugs involved.⁹⁸

A proportionate sentencing framework for drug offences should be proportionate within itself, and also in comparison with the sentences for other offences in a criminal justice system.

Systems of penalties are disproportionate in countries where violent offences attract less severe penalties than non-violent drug offences, such as the UK which imposes a 5-year imprisonment starting point for a rape conviction, and a 14-year imprisonment starting point for importing 10,000 ecstasy tablets for commercial gain.⁹⁹

Distinctions should be made between offences related to personal use, and those with intent to supply, to reflect the varying degrees of an offender's culpability and the harms caused to society by their offence.

Box 1 Ecuador puts proportionality at the heart of its criminal code

Ecuador has long been known for its severe punishments against drug traffickers – as well for the high rates of people incarcerated for drug offences in the country – mainly drug mules. Facing a prison crisis, Ecuador issued a pardon for all drug mules incarcerated in 2008.¹⁰⁰ Nevertheless, this one-time pardon did not stem the influx of people entering the criminal justice system, and the incarceration rate increased significantly between 2010 and 2014.¹⁰¹

In an effort to promote more proportionate sentences for drug offences, Ecuador enacted its Comprehensive Organic Criminal Code (COIP, Spanish acronym)¹⁰² in 2014, which re-asserted the decriminalisation of drug use (as per article 364 of Ecuador's Constitution¹⁰³) and introduced proportionate sentences for varying degrees of involvement in drug-related offences – with different penalties for those involved in the low levels of the trafficking chain, and those that have a leading role within the illicit market. COIP also created four categories of trafficking – from minor to large scale, with proportionate sentences in accordance to the quantity and type of substances being trafficked.¹⁰⁴

Following the adoption of COIP, more than 2,000 people were released from prison.¹⁰⁵ However, in September 2015, Ecuador revised the quantities established to differentiate between the levels of trafficking, by lowering them significantly – a political move which is likely to result in yet another increase in the prison population in the country.¹⁰⁶ Nevertheless, Ecuador's reform constitutes an interesting example of how to introduce more proportionate sentencing for drug offences.

- Personal use of drugs, and related possession, cultivation and purchase: alternatives to criminalisation and punishment should be implemented, along with referrals to harm reduction and health options such as evidence-based drug treatment (see Chapter 3.1)
- User-dealer offences, where a person who uses drugs engages in dealing for the primary purpose

of sustaining his or her own drug use: alternatives to conviction, incarceration and punishment should be implemented, along with referrals to harm reduction and drug dependence treatment, in order to address the root causes of the offence (see Chapter 3.4)

- Supply-related offences, including dealing and trafficking (see below).

Distinctions should be made between the different roles and motivations of people involved in supply offences.

- People engaged in subsistence-driven cultivation: those involved in illicit cultivation are mostly subsistence farmers in situation of high vulnerability who grow poppy, coca or cannabis as cash crops in order to buy food, clothes, and access to health and education. They should not be criminalised. Instead, a development-oriented approach should be implemented to offer them opportunities for viable and sustainable livelihoods (see Chapter 4.2)
- Dealers engaged in the small-scale sale of controlled substances within a network of friends, and who obtain limited financial gains – these individuals should be offered alternatives to incarceration to ensure that criminal justice systems and prisons are not overloaded with minor, non-violent cases¹⁰⁷ (see Chapter 3.4)
- Drug couriers or 'mules' are individuals engaged in trafficking offences, usually in the transportation of controlled substances.¹⁰⁸ They usually come from extremely vulnerable social backgrounds, they put their health at serious risk in return for very low pay, and are often coerced or exploited into carrying drugs.¹⁰⁹ For these offenders, severe penalties should not be imposed and alternatives to incarceration should be offered – in particular for women in charge of children or dependents¹¹⁰ (see Chapter 3.4)
- Serious or organised criminals making large-scale profit, and playing a high-level role in a production or trafficking operation, or organised crime network, often using violence and corruption. These individuals should be imposed more severe penalties – keeping in mind the principle of proportionality across the spectrum of criminal offences, as described above.

Mitigating factors should be considered to determine whether a sentence should be reduced.

- The socio-economic circumstances of an offender: disproportionately criminalising people from vulnerable and poor communities exacerbates

Box 2 Costa Rica adopts more proportionate drug laws

In Costa Rica, many activities related to drug production and commercial supply were considered a serious offence punishable with a minimum of eight years of imprisonment. As a result by 2012, 65% of the 780 women incarcerated in the Buen Pastor Institutional Centre were held for drug offences. Of these women, 23.5% (120) were convicted of smuggling drugs into prison, as first-time offenders. Most of them were heads of household, living in poverty and responsible for one or more children whose personal development was seriously affected as a result of the enforced separation from their primary caregiver.

Acknowledging the need for a proportionate and gender-sensitive approach to its sentencing framework for drug offences, Costa Rica amended its drug law (article 77 of Law 8204) in 2013. The penalty for bringing drugs into prisons was reduced from an 8-20 years' imprisonment term to 3-8 years' imprisonment. The sentencing option of alternatives to imprisonment was also introduced, for women who met the following criteria (see Box 3 in Chapter 3.4 for more details):

- living in a situation of poverty
- head of household, in a situation of vulnerability
- responsible for the care of minors, elderly people or people with any kind of disability or dependence
- an elderly person in a situation of vulnerability.

Following the reform, 159 women were released from prison. Costa Rica is now considering expanding its reform to other drug offences. Costa Rica's reform is particularly interesting for Latin America – where prison overcrowding is commonplace, and where a great majority of women are incarcerated for minor, non-violent drug offences.¹¹¹ The reform is also consistent with international standards on the rights and welfare of women, such as the United Nations Rules for the treatment of women prisoners and non-custodial measures for women offenders (also known as the Bangkok Rules). Rule 61 in particular calls for the consideration of mitigating factors including first time offence, low-level crime and caretaking responsibilities.¹¹²



Buen Pastor prison for women in San Jose, Costa Rica

Credit: Jessamine Bartley-Matthews, WOLA

their depressed socio-economic circumstances, prevent them from finding employment post-incarceration, and can have devastating consequences for their dependent children or other family members¹¹³

- The caretaking responsibilities of an offender, especially women who are often the primary caregiver for children and other dependants such as elderly parents or people living with disabilities¹¹⁴
- The motivation for financial gain of the offender: several drug-related activities are not motivated by significant financial gain, as is the case for drug mules
- If it is a first-time offence
- No involvement with organised crime or violence.

Aggravating factors should be considered to determine whether a sentence needs to be enhanced.

- Motivation for significant financial gain
- Involvement of minors
- Involvement in violent activities, corruption and/or money laundering
- Involvement in organised crime.

Key resources

- European Commission (2009), *Report from the Commission on the implementation Framework Decision 2004/7577/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking* (Brussels), COM(2009)69 final [SEC (2009)1661]
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- Washington Office on Latin America, International Drug Policy Consortium, DeJusticia, Inter-American Commission on Women (2016), *Women, drug policy and incarceration: A policymaker's guide for adopting, reviewing and implementing reforms related to women incarcerated for drug offenses*, <http://www.wola.org/commentary/women-drug-policies-and-incarceration-in-the-americas>