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Information note for criminal justice practitioners on non-custodial measures for women offenders

Introduction

This information note aims at raising awareness of criminal justice practitioners on international standards and norms concerning non-custodial measures for women offenders. It is addressed to judges, prosecutors, lawyers, public defenders and others dealing with women in conflict with the law. After highlighting some of the main factors that constitute or contribute to discrimination against women offenders, it provides an overview of the applicable international normative framework and its relationship with domestic law. The focus is on the detailed provisions contained in the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), complementing the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules).

The need for a training tool on the Bangkok Rules for judges and prosecutors was stressed by a number of criminal justice practitioners from countries of the Association of Southeast Asian Nations at an expert group meeting in Bangkok on 19-21 March 2013. Based on the experts' discussion concerning the issues to be covered, the Justice Section of the United Nations Office on Drugs and Crime (UNODC) prepared the present information note, in cooperation with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Thailand Institute of Justice, following an initial draft prepared by Miriam Estrada.

I. Discrimination against women offenders

Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

– Art. 1, UN Convention on the Elimination of All Forms of Discrimination against Women

Discrimination against women is a pervasive problem in all regions of the world. In particular, women in conflict with the law are increasingly affected. Many women experience multiple layers of discrimination and deprivation, which may lead them to become offenders and end up in prison as a result. They are often further discriminated against at various stages and by different parts of the criminal justice system, because their specific needs and characteristics are rarely acknowledged or addressed. Certain groups of women also suffer from multiple forms of discrimination based on their nationality, language, race, ethnic or religious identity, disability, age, or other factors. This problem is aggravated by the fact that the number of women in conflict with the criminal justice system is rising in all regions of the world, often at faster rates than that



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of men. In 2015, an estimated number of 700,000 women and girls were imprisoned globally.

Discrimination in society has an impact on criminal behaviour by women. Offences committed by women are often related to their social and economic disempowerment, lack of access to resources, or experiences of violence. In many countries, typical female offenders are young, unemployed, have low levels of education and have dependent children. They often commit property crimes, such as theft and fraud. Other women commit low-level drug-related offences, often as a result of manipulation, coercion and poverty. Many of them have substance abuse problems or have been used as drug couriers for small sums of money. Many women also face domestic or family violence, which can lead them to commit violent offences against their male partners or other persons who have subjected them to physical, sexual or other forms of abuse.

Criminal laws, policies and procedures often contribute to discrimination against women. Toughening criminal justice policies worldwide has meant that a growing number of women are being imprisoned for petty offences. In some countries tough legislation for drug-related offences has had a significant impact on the numbers of women in prison and the rate of their increase. In certain countries, legislation or its application in practice discriminates against women, who are convicted of crimes such as adultery, prostitution, abortion or witchcraft. Even where provisions appear to be gender neutral, in practice, such charges are brought only or predominantly against women. In addition, women are discriminated against during trial proceedings. In many cases, they are exposed to harmful stereotypes and biases by criminal justice officials, face a heavier burden of proof than men, or are convicted of “moral offences” even when they are victims themselves. Vulnerable and economically disadvantaged women are likely to be detained before trial, due to their inability to afford bail or the services of a lawyer. In many countries the proportion of women held in pre-trial detention is equivalent to, or larger than that of convicted female prisoners.

Discrimination against women offenders and prisoners often continues within the criminal justice system and beyond. Most jurisdictions do not have gender-specific alternatives to pre-trial detention, conviction or imprisonment tailored to meet the specific requirements of women offenders, in order to reduce the gender-specific risks of recidivism. Many women are convicted and imprisoned unnecessarily or unjustifiably, placing a significant burden on their children and families and putting pressure on already scarce public resources. Existing institutions and procedures often ignore that women offenders rarely pose a risk to society and that they have caring responsibilities for their children and families or particular gender-specific or mental health-care needs, especially if they have experienced domestic violence and sexual abuse. Most prisons have been designed for men and fail to meet the basic needs of women prisoners, including their protection from violence. Upon release, many women are further stigmatized, victimized or abandoned by their families.



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The concept of “gender” is generally understood as a socio-cultural category, as opposed to the biological concept of “sex”. Gender refers to social attributes and opportunities associated with being male and female, including socially constructed roles and relationships, personality traits, attitudes, behaviours, values, relative power and influence.

A variety of measures can be taken to address these issues. Different actors have a role to play in ensuring that women offenders are not discriminated against. Prison administrations may adopt gender-sensitive approaches to better address the specific needs and vulnerabilities of women prisoners. Legislators and policy-makers may introduce reforms to decriminalize certain acts or to remove mandatory sentencing and provide the judiciary with discretion so that the circumstances of the offence, vulnerability and caring responsibilities of women offenders can be taken into account. Especially crucial is the role of judges, prosecutors, lawyers or public defenders, who can intervene before women are sent to trial or to prison. They may facilitate women’s access to legal aid, divert women offenders from prosecution, help avoiding excessive pre-trial detention, or ensure that the specific needs and vulnerabilities of women offenders are taken into account during trial and in sentencing.

II. The international normative framework

The international normative framework concerning women offenders is built on the basic principle of non-discrimination. This principle is an integral part of the constitutions and legal systems of many States and has been enshrined in several conventions and other instruments that States have agreed to at the international level. It entails that everyone is entitled to their rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.¹ The principle is closely connected with the principles of equality before the law and equal protection of the law and with the obligation to prohibit by law any discrimination and to guarantee equal and effective protection against discrimination.²

Some instruments elaborate further on the principle and specifically emphasize the equal rights of men and women.³ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines such discrimination and mandates States parties to pursue a policy of eliminating it.⁴ To this end, a range of legislative and other measures are required to prohibit and sanction such discrimination, to ensure that State authorities and institutions do not discriminate against women and that they protect women from discrimination by any other person, organization or enterprise.⁵ It also

¹ See, e.g., Universal Declaration of Human Rights, art. 2; International Covenant on Civil and Political Rights, art. 2(1); International Covenant on Economic, Social and Cultural Rights, art. 2(2); Convention on the Rights of the Child, art. 2(1).

² International Covenant on Civil and Political Rights, art. 26.

³ See, e.g., International Covenant on Civil and Political Rights, art. 3; International Covenant on Economic, Social and Cultural Rights, art. 3.

⁴ Convention on the Elimination of All Forms of Discrimination against Women, art. 2.

⁵ Id., art. 2(b)-(e).



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explicitly mandates States to embody the principle of equality of men and women in their constitutions and to modify or abolish existing penal provisions and other laws, regulations, customs and practices which discriminate against women.⁶

Not every differentiation of treatment constitutes discrimination. Measures to address the gender-specific needs and vulnerabilities of men and women or efforts to diminish or eliminate conditions which cause or help to perpetuate discrimination are an essential part of ensuring equal treatment. The CEDAW explicitly envisages measures that entail differentiation of treatment between women and men but are not considered as discrimination. In addition, it envisages temporary special measures, which are often needed to accelerating women's de facto or substantive equality but should be discontinued when the objectives of equality of opportunity and treatment have been achieved.⁷ It is important to bear in mind that not all measures which potentially are or would be favourable to women are temporary special measures.⁸ For instance, it may be necessary to treat women differently from men in order to protect their maternity⁹ or to provide for their gender-specific needs, as not to do so would lead to or constitute discrimination.

The principle of non-discrimination is also at the heart of international standards and norms concerning non-custodial measures and the conduct of criminal justice officials. The Guidelines on the Role of Prosecutors require prosecutors to carry out their functions impartially and avoid any kind of discrimination.¹⁰ In line with the Basic Principles on the Independence of the Judiciary, judges shall perform their judicial duties without favour, bias or prejudice and must not manifest bias or prejudice towards any person or group on irrelevant grounds.¹¹ Under the Tokyo Rules, States are explicitly required to apply non-custodial measures without any discrimination.¹² The Bangkok Rules reaffirm that providing for the distinctive needs of women offenders in order to accomplish substantial gender equality shall not be regarded as discriminatory.¹³ Both rules have been adopted by the UN General Assembly with the consensus of all Member States. They provide detailed guidance for domestic criminal justice institutions and professionals, and for policy-makers and legislators, while sufficiently allowing flexibility to account for differences among legal systems.

The Bangkok Rules complement existing norms and standards. They do not replace relevant provisions under applicable international conventions, standards and norms. Rather, some of the Bangkok Rules bring further clarity to existing provisions, while others cover new areas.¹⁴ Rules 57 to 66 cover non-custodial sanctions and measures for

⁶ *Id.*, art. 2(a), 2(f)-(g).

⁷ *Id.*, art. 4(1).

⁸ Committee on the Elimination of Discrimination of Women, General recommendation no. 25, para. 26.

⁹ *Id.*, art. 4(2).

¹⁰ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.26, annex, para. 13(a).

¹¹ Bangalore Principles of Judicial Conduct, ECOSOC resolution 2006/23, annex, paras 2.1 and 5.2.

¹² Tokyo Rule 2.2.

¹³ Bangkok Rule 1.

¹⁴ A/Res/65/229, annex, para. 3.



women and juvenile offenders, including on arrest and at the pre-trial, sentencing and post-sentencing stages of the criminal justice process. They complement relevant provisions of the International Covenant on Civil and Political Rights,¹⁵ the CEDAW, the Convention on the Rights of the Child,¹⁶ as well as the Tokyo Rules, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),¹⁷ the Standard Minimum Rules on the Treatment of Prisoners,¹⁸ the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment¹⁹ and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.²⁰

III. Ensuring gender-equality in the implementation of non-custodial measures

The concept of “gender equality” refers to the equal rights, responsibilities and opportunities of women and men. Equality does not mean that women and men will become the same but that women’s and men’s rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women’s issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development. The goal to achieve gender equality and empower all women and girls is one of the UN Sustainable Development Goals that are to be implemented by 2030.

Gender-equality is the ultimate aim of the non-discrimination principle and related legal provisions. Criminal justice practitioners can take a number of measures to contribute towards this purpose in the implementation of non-custodial measures. The following sections focus on steps that can be taken by judges, prosecutors, lawyers or public defenders at different stages of the criminal justice process, even where domestic laws and policies are not yet fully aligned with international norms and standards.

A. Early access to legal aid

Everyone charged with a criminal offence has the right to free legal assistance in criminal proceedings.²¹ Early access is crucial and legal aid should also be provided to persons detained, arrested or suspected of a criminal offence.²² However, women in many countries face structural and cultural barriers to accessing legal aid. They often have

¹⁵ Art. 9(3)

¹⁶ Art. 3(1) and 37(b)

¹⁷ Rules 1.3, 11.1, 13.1, 13.2, 18.1 and 18.2.

¹⁸ Currently under review.

¹⁹ Principle 39.

²⁰ Principle 3 and Guideline 9.

²¹ International Covenant on Civil and Political Rights, art. 14(3)(d).

²² United Nations Principles and Guidelines on Access to Legal Aid, principle 3, para. 20.



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inadequate knowledge of their rights, lack the resources and information about their rights or face obstacles in exercising them.²³ In some cases, women victims of domestic violence or trafficking in persons are treated as suspects or accused in criminal proceedings.

Criminal justice practitioners can contribute to ensuring that the distinctive needs of women are met. Judges, prosecutors and the police have a responsibility to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided with access to legal aid.²⁴ Where possible, female lawyers should be available to represent female defendants, accused and victims.²⁵ In circumstances in which a legal aid means test is applied, legal aid providers can help to ensure that only the income of the woman is used for the purposes of the means test. This is especially important when individual family members are in conflict with each other or do not have equal access to the family income.²⁶

B. Diversion from prosecution

The possibility of diverting alleged offenders from prosecution is an essential element of fair and efficient criminal justice systems. Formal criminal proceedings should be avoided as far as possible,²⁷ in accordance with the principle of minimum intervention.²⁸ Diversion as an alternative to criminal conviction is especially appropriate in cases of minor drug offences.²⁹ Decisions on the diversion of offenders from criminal prosecution are made by the police, prosecutors or other competent agencies,³⁰ based on the criteria established in each legal system, and taking into account the protection of society, crime prevention, the promotion of respect for the law and the rights of victims.³¹

Evidence suggests that diversion is particularly relevant for women offenders. Depriving women with caretaking responsibilities of their liberty has a harmful impact on children and other family members within their care. Many women offenders suffer from trauma of domestic violence or sexual abuse, have mental health-care needs, or are drug and/or alcohol dependent. Diverting these women to a suitable gender appropriate treatment programme would address their needs much more effectively than the harsh environment of prisons, which often does not help but hinder their social reintegration.

Diversionary measures for women offenders should be implemented wherever appropriate and possible.³² Depending on the domestic regulatory framework, the police, prosecutors and courts have different options to divert those women offenders from prosecution who do not pose a risk to the public. Such options may include an absolute or

²³ See UNODC Handbook on Early access to legal aid in criminal justice processes, p. 19.

²⁴ United Nations Principles and Guidelines on Access to Legal Aid, principle 3, para. 23.

²⁵ *Id.*, guideline 9, para. 52(b).

²⁶ *Id.*, guideline 1, para. 49(f).

²⁷ Tokyo Rule 2.5.

²⁸ Tokyo Rule 2.6.

²⁹ See 1988 Convention, art. 3(4)(c)-(d).

³⁰ See Beijing Rule 11.2 for offenders who are girls.

³¹ Tokyo Rule 5.1.

³² Bangkok Rule 58.



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conditional discharge, verbal sanctions, an arbitrated settlement, restitution to the victim or a compensation order, a community service order, victim offender mediation, family group conferences, sentencing circles or another restorative process.³³ If such options entail an obligation on the offender, her consent is required.³⁴ The requirement of informed consent is especially important in cases of violence against women, in which mediation or other restorative justice mechanisms can be detrimental and should be avoided.³⁵ Women with substance abuse problems should be diverted to and supported in accessing gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community.³⁶

The role of gender stereotypes, perceptions and attitudes of criminal justice practitioners

Gender stereotypes are prevalent in societies around the world. Women are often viewed as inherently weaker or more dependent than men and therefore less capable of making responsible decisions. Women whose behaviour does not fit within traditional gender roles frequently face prejudices and biases. Criminal justice practitioners are not immune from these stereotypes and biases. In dealing with women in the criminal justice system or in making decisions on detention or non-custodial measures, they may apply, enforce and perpetuate stereotypes, often unconsciously, or they may fail to challenge stereotyping by other actors in the criminal justice system.

The impact of gender stereotypes on women offenders varies. Women may receive harsher treatment or punishment than men for certain offences, such as child abandonment, prostitution or assault, that violate what is perceived as the “proper” role of women. In homicide cases, men who kill in response to “provocation” may receive more lenient sentences while women who kill in response to abuse and violence may face aggravated penalties. In other cases, paternalistic attitudes, rather than an understanding of the actual situation of women offenders, may influence judges to award lower sentences to women, who are perceived as inherently weaker and more submissive and prone to manipulation than men and thus less responsible for their crimes. While this may be a desirable result and gender stereotypes may not always lead to negative outcomes for women offenders, it is important that judges, prosecutors, lawyers or public defenders are aware of existing stereotypes, perceptions and attitudes that can influence their behaviour. They should be sensitive to gender-specific needs and circumstances and take actions not based on stereotypes but on facts, applicable law and standards of conduct.

C. Avoidance of pre-trial detention

Persons awaiting trial shall not be detained as a general rule.³⁷ Pre-trial detention is a means of last resort and must not last longer than necessary.³⁸ The necessity of detention must be kept under (judicial) review and detainees are entitled to release, although certain

³³ See Basic principles on the use of restorative justice programmes in criminal matters, ECOSOC resolution 2002/12, annex.

³⁴ Tokyo Rule 3.4.

³⁵ See Agreed Conclusions adopted by the Commission on the Status of Women at its 57th session (4–15 March 2013), E/2013/27; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, article 48.

³⁶ Bangkok Rule 62.

³⁷ International Covenant on Civil and Political Rights, art. 9(3).

³⁸ Tokyo Rules 6.1 and 6.2.



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conditions may be imposed in accordance with the law.³⁹ They also have a right to appeal to an independent (judicial) authority against their pre-trial detention.⁴⁰ Alternatives to such detention should be employed as early as possible,⁴¹ and decisions thereon should be based on an assessment of established criteria in respect of both the nature and gravity of the offence and the personality, background of the offender, the purposes of sentencing and the rights of victims.⁴²

Women constitute a part of the growing numbers of prisoners in pretrial detention in many countries. They are more likely to be unable to pay the surety required for bail, due to their economic disadvantage in most societies. A majority of women offenders are illiterate and less aware of their legal rights, thus increasing the likelihood of prolonged periods of detention. Pretrial detention often entails the loss of employment, accommodation or child custody, and its impacts can be more severe for women than men, particularly if the woman is the sole caretaker of the children.

Pre-trial alternatives for women offenders should be implemented wherever appropriate and possible. In particular, they should not be separated from their families and communities without giving due consideration to their backgrounds and family ties.⁴³ In order to take appropriate decisions, judicial authorities need to gather and consider the necessary information, such as reports compiled by social services on the probable impact of the mother's detention on the children and other family members, and the arrangements for the children's care, in the absence of the mother. Prosecutors and judges should ensure that bail amounts are fair, taking into account the economic circumstances of the woman offender. Instead of monetary bail, it may be more appropriate to use other alternatives. Depending on the domestic regulatory framework, such alternatives may include orders to appear in court on a specified day, to remain at a specific address, or to report on a daily or periodic basis to a court, the police or other authority. Further conditions may include a prohibition to engage in particular conduct, to leave or enter specified places or districts, or to meet specified persons. The offender may also be required to surrender passports or other identification papers, or subjected to electronic monitoring or supervision by an agency appointed by the court.

In some countries women are taken into "protective" custody. The reasons for such detention vary and range from protecting a woman from (sexual) violence to ensuring that she will testify against the offender in court. This practice not only victimizes women and puts them at risk of further abuse, but also deters women from reporting rape and sexual abuse, and is therefore ineffective. Although in exceptional cases such custody may be justified for limited periods due to the lack of more appropriate alternatives, detention may not be arbitrary and must follow the procedure established by law,⁴⁴ and be subject to judicial supervision.⁴⁵ Temporary measures involving custody to protect a

³⁹ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, principle 39.

⁴⁰ Tokyo Rule 6.3.

⁴¹ Tokyo Rule 6.2.

⁴² Tokyo Rule 3.2.

⁴³ Bangkok Rule 58.

⁴⁴ ICCPR, article 9(1).

⁴⁵ ICCPR, article 9(4), Bangkok Rule 59.



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woman should only be applied when necessary and expressly requested by the woman concerned and should not be continued against the will of the woman concerned.⁴⁶ Criminal justice practitioners have a responsibility to ensure that such women have access to legal counsel in making such decisions and to refer them to available shelters or other non-custodial means of protection managed by independent bodies, non-governmental organizations or other community services.

D. Trial and sentencing stage

The trial and sentencing stage of criminal proceedings provides an opportunity to apply non-custodial measures. This may include (a combination of) verbal sanctions, such as admonition, reprimand and warning; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day-fines; confiscation or an expropriation order; restitution to the victim or a compensation order; suspended or deferred sentence; probation and judicial supervision; a community service order; house arrest; referral to an attendance centre or any other mode of non-institutional treatment.⁴⁷ Non-custodial alternatives to punishment are especially appropriate in cases of minor drug offences⁴⁸ and other minor non-violent offences.

Decisions on non-custodial measures should be made by the judicial authority, taking into account the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.⁴⁹ This may be facilitated by social inquiry reports, containing social information on the offender that is relevant to the person's pattern of offending and current offences, as well as information and recommendations that are relevant to the sentencing procedure. Such reports should be prepared by a competent, authorized official or agency, and should be factual, objective and unbiased, with any expression of opinion clearly identified.⁵⁰ Mandatory minimum sentences are an important obstacle, as are other legal provisions that remove the judicial discretion that should be exercised in sentencing and other stages of criminal proceedings,⁵¹ and may lead to disproportionate punishment.⁵²

Non-custodial sanctions are especially relevant for women offenders for the reasons outlined above with regard to diversion from prosecution. Sentencing alternatives for women offenders should be implemented wherever appropriate and possible, taking care not to separate them from their families and communities without giving due consideration to their backgrounds and family ties.⁵³ An appropriate sentencing alternative for women with substance abuse problems is their referral to gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the

⁴⁶ Bangkok Rule 59

⁴⁷ Tokyo Rule 8.2.

⁴⁸ See 1988 Convention, art. 3(4)(c)-(d).

⁴⁹ Tokyo Rule 8.1.

⁵⁰ Tokyo Rule 7.1.

⁵¹ Tokyo Rule 3.3.

⁵² See A/55/40, paras 498-528.

⁵³ Bangkok Rule 58.



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community.⁵⁴ A study conducted by UNODC, found that comprehensive programming that acknowledges gender differences, which provides women-only services and gives attention to pre-natal and childcare, parenting skills, relationships, mental health problems and practical needs could improve treatment outcomes.⁵⁵

The specific needs and characteristics of women offenders are also relevant in determining the length of a prison sentence. When sentencing women offenders, courts should 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.⁵⁶ These typical backgrounds also include prior experience of domestic, physical or sexual abuse and violence that are often directly or indirectly related to crimes committed by women.⁵⁷ In line with international standards and norms, claims of self-defence by women who have been victims of violence, particularly in cases of battered woman syndrome, should be taken into account in investigations, prosecutions and sentences against them.⁵⁸

Violence against women as a pathway to offending and imprisonment

Evidence shows that exposure to extreme, traumatic events can cause or contribute to borderline personality disorder, antisocial personality disorder, substance abuse, and symptoms of post-traumatic stress disorder, which are directly relevant to violent behaviour and often lead to imprisonment.⁵⁹ In cases of domestic and intimate partner violence, women may use force against their abuser out of fear for their own safety and security of their children. This is often referred to as “battered woman syndrome”, which is suffered by women who, because of repeated violent acts by an intimate partner, may suffer depression and are unable to take any independent action that would allow them to escape the abuse, including refusing to press charges or to accept offers of support.⁶⁰

In cases of women offenders who are pregnant or have dependent children, non-custodial sentences should be preferred where possible and appropriate.⁶¹ Judges, prosecutors, lawyers and public defenders can contribute to ensuring that courts only consider custodial sentences for pregnant women and women with dependent children when the offence was serious and violent, the woman represented a continuing danger, and after taking into account the best interests of the child or children.⁶² Another option is to suspend or defer sentences of imprisonment in cases of pregnant women or mothers with

⁵⁴ Bangkok Rule 62.

⁵⁵ UNODC Drug Abuse Treatment Toolkit, Substance Abuse Treatment and Care for Women: Case Studies and Lessons Learned, United Nations, New York, 2004, p. 90.

⁵⁶ Bangkok Rule 61.

⁵⁷ Special Rapporteur on Violence against Women, *Pathways to, conditions and consequences of incarceration for women*, A/68/340, 2013, p. 4.

⁵⁸ Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, para. 15(k).

⁵⁹ Artz et al., *Hard Time(s): Women's Pathways to Crime and Incarceration*, University of Cape Town, 2012, p. 141.

⁶⁰ Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice, A/Res/65/228, annex, p. 11.

⁶¹ Bangkok Rule 64.

⁶² Id.



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small children until the child reaches a certain age, to be reviewed at that time, based on pre-established criteria, including the best interests of the child.⁶³ This may include the possibility of cancelling the sentence or reducing it to a non-custodial sanction under certain conditions (e.g. not to commit an offence during that period).

Gender-sensitive sentencing: good practices

Gender-specific mitigating circumstances. In Costa Rica, the drug law (no. 8.204 of 2013) allows judges to impose shorter prison sentences or alternatives to imprisonment for the crime of bringing drugs into prisons, where the offender is a woman who is (a) living in a situation of poverty, (b) head of the household in a situation of vulnerability, (c) responsible of minors, elder people or people with any kind of disability or dependence, or (d) an elder person in a situation of vulnerability. In Armenia, gender-specific mitigating circumstances include caring for a child under 14 years of age or being pregnant at the time of sentencing (Criminal Code, article 62).

Non-custodial sentences for pregnant women or mothers with dependent children. The criminal code of the Russian Federation (article 82) and Armenia (article 78) allow for the deferral or cancellation of prison sentences, with the exception of those women sentenced to over 5 years imprisonment for serious crimes. The maximum age of their dependent children varies from under 3 years (Armenia) to under 14 years (Russian Federation). In Argentina, a new law (no. 26.472 of 2009) allows judged to order that mothers with children under five years or with caring responsibilities for persons with disabilities serve their sentences at home under house arrest.

Suspended sentences in the best interests of the child. In the case of “M v. The State”, the Constitutional Court of South Africa suspended the prison sentence of a mother and sole caregiver of three minor children, considering the negative effects of a mother’s imprisonment on child development (loss of home and community, disruption in school routines and transportation, and potential separation from their siblings) and stressing that the best interests of the child must be considered in proceedings that could have an impact on their lives.

E. Post-sentencing stage

Several measures can be applied after women offenders have been sentenced or imprisoned. Where a suspended sentence is not possible, other ways need to be found to permit women with caretaking responsibilities for children to make arrangements for them prior to or on admission to prison, taking into account the best interests of the children.⁶⁴ Post-sentencing dispositions may include furlough and halfway houses; work or education release; various forms of parole; remission; or pardon.⁶⁵ Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.⁶⁶ Decisions regarding early conditional release (parole) should favourably take into account women prisoners’ caretaking responsibilities, as well as their specific social reintegration needs.⁶⁷ Although the decision on such dispositions is not always taken by the judicial authority, judges, prosecutors, lawyers or public defenders may still

⁶³ See Bangkok Rule 2.2.

⁶⁴ Bangkok Rule 2.2.

⁶⁵ Tokyo Rule 9.2.

⁶⁶ Tokyo Rule 9.4.

⁶⁷ Bangkok Rule 63.



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play an important role when the offender applies for review of such a decision, which shall be subject to review by a judicial or other competent independent authority, except in the case of pardon.⁶⁸

Specific measures are required to protect and support women after their release from prison in order to address victimization, stigmatization, abandonment by their families and other obstacles to their social reintegration. Lawyers, public defenders and other criminal justice officials could contact and collaborate with community services, including probation services, NGOs and other social and psychological support services to ensure ongoing support and protection for women at risk of violence. Legal assistance should be provided as necessary. Judges, prosecutors, lawyers or public defenders also have a role in disseminating information and raising awareness among the public concerning women offenders and the benefits of non-custodial measures, with a view to reducing the stigma faced by these women.

F. Special categories of women offenders

Some women offenders have additional needs and face multiple layers of discrimination and thus deserve particular attention in the application of non-custodial measures. In addition to those mentioned above who are pregnant or have dependent children, this includes foreign nationals and juvenile female offenders. Foreign women are overrepresented in the criminal justice system of many countries, often in connection with punitive approaches towards low-level drug trafficking and/or illegal immigration, and they frequently are victims of human trafficking. Children in general and girls in particular are extremely vulnerable in detention or imprisonment, which is likely to have a very harmful impact on their psychological and intellectual development.

In applying non-custodial measures to foreign national women offenders, judges, prosecutors, lawyers and public defenders should provide maximum protection to victims of trafficking in order to avoid their secondary victimization.⁶⁹ As such, victims of trafficking in persons should not be considered as offenders but should be provided with assistance and protection and may benefit from measures permitting them to remain in the territory of a State.⁷⁰

Child girls alleged offenders (also referred to as juvenile female offenders) should not be deprived of their liberty unlawfully or arbitrarily, and they should only be arrested, detained or imprisoned as a measure of last resort and for the shortest appropriate period of time.⁷¹ There are special rules that take account of the specific needs of children concerning access to legal aid,⁷² diversion from prosecution,⁷³ avoidance of pre-trial

⁶⁸ Tokyo Rule 9.3.

⁶⁹ See Bangkok Rule 66.

⁷⁰ See Articles 6 and 7 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁷¹ Convention on the Rights of the Child, art. 37(b).

⁷² United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, paras. 22, 32, 34-35, 53-54; Beijing Rule 15.

⁷³ Beijing Rule 11.



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detention,⁷⁴ as well as sentencing and post-sentencing alternatives.⁷⁵ Judges, prosecutors, lawyers and public defenders should take into account the gender-based vulnerability of girls alleged offenders in making decisions or otherwise contributing to the application of non-custodial measures.⁷⁶

⁷⁴ Beijing Rule 13.2.

⁷⁵ Beijing Rules 18-19.

⁷⁶ See Bangkok Rule 65.