

GDPO Situation Analysis

May 2014

The Drug Control and Immigration Nexus in the US & the UK

Subject

Punitive sentencing for drug related offences are a documented driver of escalating incarceration rates in Western Europe and North America. Sentencing procedures are often disproportionate and discriminatory in their application and impact, particularly as these relate to women, ethnic minorities and foreign nationals. As part of a new initiative to reduce the US prison population and address inequities in drug-related sentencing, President Obama has instructed the US Justice Department to accelerate commutation processes for non-violent drug offenders.

Significance

The already serious rights issues surrounding the treatment of foreign nationals convicted of drug related offences are being compounded by the introduction of strict deportation regimes in the US, UK and a number of other Western countries. These demonstrate a growing interdependence between drug and immigration control, they threaten to offset the positive moves toward criminal justice reform in the US and they undermine the fundamental rights of prisoners.

Analysis

The 1961 Single Convention on Narcotic Drugs, the 1971 Convention on Psychotropic Substances and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances oblige signatory states to criminalise the possession, manufacture and distribution of controlled drugs, and include sanctions 'that take into account the grave nature' of 'serious' drug related activities.¹ Although the conventions contain a certain degree of flexibility and do not mandate type or length of punishment, severity in sentencing and particularly the use of imprisonment has become a normalised response to drug offences. Moreover, despite existing principles of proportionality regarding drug-related offences,² sentencing infrequently distinguishes between minor violations that pose no physical threat to society and high level engagement in organised crime. Three contemporary trends are of concern to the drug policy reform community and also to national governments seeking to reduce criminal justice costs:

1 International Narcotics Control Board, Report of the International Narcotics Control Board for 2007, (New York: United Nations, 2008) p 6

2 See Chapter 1 'The principle of proportionality and drug-related offences', International Narcotics Control Board, Report of the International Narcotics Control Board for 2007, (New York: United Nations, 2008) pp. 1-61

1. **An escalating prison population:** this has been most pronounced in the US where federal prison numbers have increased 27% to 219,000 over the past decade according to the US Government Accountability Office, equivalent to 25% of the global prison population. Between 1970 and 2005, the US prisoners increased 700%, half of whom are black (1 in every 15 black males over the age of 18, compared with 1 in 36 Hispanics and 1 in 106 white males).
 - US Department of Justice figures show that nearly half of all prisoners (97,472) are incarcerated for drug related offences³ with the use of mandatory minimums driving a surge in convictions. Drug offenders arrested in 2011 faced an average of 74 months imprisonment as opposed to 38.5 months in 1970, and while only 50% of convicted drug offenders were sentenced to prison in 1986, by 2011, this was 90%.
 - In the UK, where the prison population has doubled over the last two decades to 83,842 the second highest figure in Western Europe after Spain, 17% of sentences were drug-related. As shown in Table 1, the number of foreign-national prisoners (predominantly from Poland, Jamaica and the Irish Republic) has increased alongside the rise in overall prison numbers. Figures from 2007 show parity between foreign and UK prisoners in relation to all crimes except drugs related offences, for which 27% of foreign-national male prisoners were sentenced as compared to 14% of English and Welsh prisoners.⁴

Table 1: Prison Population by Nationality, England and Wales⁵

	All	UK	Foreign	Unrecorded nationality	Foreign as proportion of recorded nationality
1995	51,084	46,607	4,089	388	8.1%
1996	55,256	50,682	4,259	315	7.8%
1997	61,467	56,611	4,677	179	7.6%
1998	65,727	60,393	5,133	201	7.8%
1999	64,529	59,074	5,388	67	8.4%
2000	65,194	59,043	5,586	565	8.6%
2001	66,403	58,732	6,926	745	10.5%
2002	71,218	62,553	7,719	946	11.0%
2003	72,286	62,417	8,728	1,141	12.3%
2004	74,488	64,379	8,941	1,168	12.2%
2005	76,190	65,670	9,651	869	12.8%
2006	77,982	66,160	10,879	944	14.1%
2007	79,734	67,767	11,093	874	14.1%
2008	83,194	70,751	11,498	946	14.0%
2009	83,454	71,231	11,350	874	13.7%
2010	85,002	71,016	11,135	2,851	13.6%
2011	85,374	73,030	10,779	1,565	12.9%
2012	86,048	73,238	10,861	1,949	12.9%
Jun-13	83,842	72,179	10,786	877	13.0%

2. **Increase in the number of female prisoners:** between 1984 and 2003, the female prison population in the US, England and Wales, Mexico, Bolivia, Colombia, Kenya, New Zealand, Kyrgyzstan, Cyprus, Estonia, Finland, Greece, the Netherlands and Australia, grew more quickly than male.⁶ In a pattern common among female prison populations, nearly half of female prisoners in the UK surveyed in 2012 committed offences to support someone else's drug use, compared to 22% of male prisoners.⁷

3 M. Sledge 'The Drug War And Mass Incarceration By The Numbers', *Huffington Post*, 04/08/2013 http://www.huffingtonpost.com/2013/04/08/drug-war-mass-incarceration_n_3034310.html

4 M. Bosworth (2011) 'Deportation, detention and foreign-national prisoners in England and Wales', *Citizenship Studies*, 15: 5; <http://www.tandfonline.com/doi/abs/10.1080/13621025.2011.583789#.U06W3vldWa8>

5 UK Ministry of Justice: Prison Population Figures 2013 <https://www.gov.uk/government/publications/prison-population-figures>

6 UNODC (2008) *Handbook for prison managers and policymakers on women and imprisonment* <http://www.unodc.org/documents/justice-and-prison-reform/women-and-imprisonment.pdf>

7 Prison Reform Trust (2012) *No Way Out: A briefing paper on foreign national women in prison in England and Wales*. <http://www.prisonreformtrust.org.uk/Portals/0/Documents/NoWayOut.pdf>

A 2013 report found a doubling of the female prison population in Latin America between 2006 and 2011 to 74,000 prisoners, with the majority incarcerated for drug-related offences. This includes an estimated 75-80% of female prisoners in Ecuador, 64% in Costa Rica, 60% in Brazil and 90% in Argentina.⁸ Similarly a 2012 report on female incarceration in Europe and Central Asia found 28% of female incarcerations were due to drug offences, the highest in Tajikistan (70%) and Latvia (68%).⁹ Women imprisoned for drug offences constituted nearly half of the female prison population in Portugal (47.6%), Estonia (46%), Spain (45.5%), Greece (43.7%), Italy (42.9%) and Sweden (41%).

A disproportionate number of foreign national women are imprisoned for drug related offences in Western countries. In the UK they are the fastest growing prison population representing one in seven of all women in custody and 25% of all untried receptions to custody.¹⁰ Nearly half of the foreign female population were imprisoned for drug offences, compared to 22% of imprisoned British women, with the average sentence for foreign female nationals of 6 years, up to 15 years if there is a guilty finding after a non-guilty plea. Foreign national women are less likely than UK nationals to have committed serious violent or sexual offences or robbery, with only 15% serving sentences for serious crimes compared to 41% of UK nationals.

3. Deportation: a rising prison population has proved costly, with some countries such as the UK and US looking to accelerate deportation of foreign serving and ex-offenders to reduce costs.

- The UK Borders Agency (UKBA) five-year strategy aims to: ‘Consider [...] the most effective use of out of court disposals such as cautions together with immigration powers, to remove low level foreign national offenders as an alternative to prosecution.’¹¹
- Following the 2007 UK Borders Act, all non-EEA citizens sentenced to 12 months custody face mandatory deportation unless their removal breaches international obligations.¹² For EEA citizens, the threshold is 24 months custodial sentence.
- Since 2009, HM Prison Service and private prison companies record citizenship upon arrival through the P-NOMIS system. Details of non-UK citizens must be provided to the UK Border Agency (UKBA) to facilitate deportation processes.
- Since 2010, the Home Office has removed or deported more than 17,000 foreign national offenders with planned changes to the Immigration Bill reducing grounds for appeal.

In the US, where the federal prison budget has increased from \$5 billion in 2008 to \$6.9 billion, in April 2014 President Obama instructed the US Justice Department to detail more expansive criteria for consideration in clemency appeals by non-violent drug offenders. Part of the Federal government’s ‘Smart on Crime’ initiative and in line with the 2011 Fair Sentencing Act, which seeks to address drug sentencing disparities, the new appeals process will be open to prisoners meeting additional conditions including having served at least ten years of a sentence and demonstrated good behaviour while incarcerated.

While this would appear to signal a more lenient turn in draconian US drug sentencing, it runs parallel with a trend of rising deportations for minor drug related offences under the 2008 Secure Communities programme. This national surveillance initiative requires fingerprints gathered by local law enforcement to be transmitted to Immigration and Customs Enforcement (ICE) so that ‘detainers’ can be issued by ICE requesting local authorities to hold individuals for possible later deportation.

8 IDPC (2013) *Briefing Paper - Women, drug offences and penitentiary systems in Latin America* <http://idpc.net/publications/2013/11/idpc-briefing-paper-women-drug-offenses-and-penitentiary-systems-in-latin-america>

9 Eka Lakobishvili (2012) *Cause for Alarm: The Incarceration of Women for Drug Offences in Europe and Central Asia, and the need for Legislative and Sentencing Reform*, <http://www.ihra.net/contents/1188>

10 ‘No Way Out’ Prison Reform Trust *ibid*

11 Cited in ‘No Way Out’ Prison Reform Trust *ibid*

12 Prisoner’s Advice Service (2013) <http://www.prisonersadvice.org.uk/DOCS/INFORMATION/FOREIGNNATIONALS.pdf>

- According to an April report published by the Syracuse University based Transactional Records Access Clearinghouse (TRAC),¹³ 2.3 million people were deported from the US between 2008 and 2013 of which only 12% had committed a serious crime.
- The four most common offences leading to deportation were illegal entry, driving while intoxicated, traffic violations and personal cannabis possession.
- In 2013 6,600 people were deported from the US for personal cannabis possession, with approximately 40,000 people deported each year since 2008 for non-violent drug offences, a cumulative total of nearly a quarter of a million people. As in the UK, foreign nationals applying for citizenship face a double jeopardy in declaring criminal convictions.

Concerns

The situation of foreign drug offenders elicits little public sympathy. However, their detention and deportation raises problematic questions:

1. The escalation of deportation processes is causing serious social harm to families (150,000 US children had a parent deported in 2012, in the UK dependents are automatically deported with carers) and to individuals forcibly removed to countries where they may have no family ties or support infrastructure.
2. Those convicted and deported in relation to drug offences are most usually the least significant and most 'disposable' in the illicit trade. While a quarter of a million US deportations were for non-violent drug offences, only 3% of overall deportations were for high level drug trafficking. In relation to foreign female offenders, the UK Prison Reform Trust notes border enforcement activities focus on 'mules' rather than those arranging illicit drug transfers, with declining arrest rates up the organisational chain.
3. With a focus on fast track removals,¹⁴ authorities are failing to assess the needs and vulnerabilities of foreign offenders, most particularly females convicted of drug related offences. Recommendations such as those contained in Baroness Corston's 2007 UK report¹⁵ emphasise the importance of determining if women have been coerced into the trade and if they are at risk of violence if returned to home countries. This has been weakly implemented 'due to the government's focus on ensuring that "foreign criminals" do not have rights to remain in the country.'¹⁶
4. Incarcerated foreign nationals face ongoing problems of language barriers, a lack of advice and representation and racist attitudes. As a result of the linkage between prison and immigration authorities and the focus on fast track removal, rehabilitative goals are ineffectively applied to foreign nationals.
5. 'Public protection' goals cited by both the UK and US government to justify stricter immigration regimes will not be met if implementation focuses on front line risk takers in the drug trade. Moreover the deportation (from the US) of gang-affiliated youth to Central America has had the documented effect of transnationalising trafficking structures, while at the same time legitimizing repressive 'anti-gang' policies that target migrant and urban youth.

13 Secure Communities and ICE Deportation: A Failed Program? TRAC Series on ICE Deportation. <http://trac.syr.edu/immigration/reports/349/>

14 Prison Reform Trust *ibid*.

15 *The Corston Report: A report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities in the Criminal Justice System*, London: The Home Office. Ministry of Justice (2007) www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf

16 Prison Reform Trust *ibid*.

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