



المجلس الوطني لحقوق الإنسان
ⵎⴰⵔⴻⵎ ⵏ ⵎⴰⵔⴻⵎ ⵏ ⵙⵓⵔ ⵏ ⵓⵎⵎ ⵏ ⵓⵎⵎ ⵏ ⵓⵎⵎ
Conseil national des droits de l'Homme

Alternative Sentences

Contribution to Public Debate Series - No. 5

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INTRODUCTION

1. Pursuant to the second paragraph of Article 25 of Dahir No. 1-11-19 of 25 Rabia I 1432 (1 March 2011) providing for its establishment, the National Council for Human Rights (CNDH) contributes to “strengthening democracy building through the promotion of plural societal dialogue and the development of all appropriate means and mechanisms for this purpose.”

The CNDH also undertakes, and under Section 13 of the Dahir, the review and study of the harmonization «of laws and regulations in force with the international conventions on human rights and international humanitarian law that the Kingdom has ratified or to which it has acceded, as well as in light of the concluding observations and recommendations issued by UN bodies on the reports presented to them by the government.»

And in accordance with Article 24 of the above Dahir, the CNDH submits to the High Court of His Majesty the King “proposals or special and thematic reports on what is likely to contribute to a better protection and a better defense of human rights. «

2. Considering that the implementation of the recommendations of the Charter for the Reform of Justice is a historic opportunity for a reform of the penal system that meets the requirements of «a human rights based approach,» the National Council of Human rights intends to contribute to the public debate on the reform of the penal system by presenting this memorandum, which addresses alternative sentences. The proposals contained in this memorandum essentially reflect the work of two international conferences: the International Conference on Alternative Sentences organized by the National Council for Human Rights in Rabat on October 30, 2013 and the international conference on Criminal Policies and their Impact on Correctional Systems organized by the CNDH on February 4 and 5, 2014 under the high patronage of His Majesty King Mohammed VI and in partnership with the Mohammed VI Foundation for the Reintegration of Prisoners, the international NGO «International Penal Reform» and with support from the Swedish Agency for International Cooperation.

ALTERNATIVES SENTENCES: REFERENCE AND INTERNATIONAL CONTEXT

3. In a 2008 paper, the UN Office against Drugs and Crime (UNODC) noted that “in practice, the overall use of imprisonment is rising throughout the world, while there is little evidence that its increasing use is improving public safety. There are now more than nine million prisoners worldwide and that number is growing.” (Handbook of basic principles and promising practices on Alternatives to Imprisonment, 2008).

Globally, the increase would be between 60 and 75% during the last ten years and in a third of countries in Africa and the Americas (for which data are available), more than half of the inmates are in preventive detention. It is also in these regions that prison overcrowding is the most important (UN, 2010).

4. The Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, April 12-19, 2010) devoted a workshop to strategies and best prevention of prison overcrowding practices. The workshop highlighted the major factors contributing to the increase of prison overcrowding. These factors include:

- Criminal justice policies that give excessive weight to sentences or which effects might not have been properly evaluated;
- The lack of alternatives to imprisonment and lack of policies and guidelines with regard to sentences that encourage the use of non-custodial measures;
- Shortcomings and delays in judicial proceedings;
- Difficulties hindering access to justice for the poor and vulnerable;
- The lack of rehabilitation programs and post-prison support; and
- The poor infrastructure of prisons.

5. For this very reason, the Ouagadougou Declaration on Accelerating Penal and Prison Reform in Africa in 2002 has requested that measures be taken to reduce the prison population and felt that "Criminal justice agencies should work together more closely to make less use of imprisonment. The prison population can only be reduced by a concerted strategy."

6. It should also be pointed out that resolution 25/2013 adopted by the Economic and Social Council on July 25, 2013 the Standard Minimum Rules for the Treatment of Prisoners recommends in paragraph 13 that "Member States continue to endeavor to reduce prison overcrowding and, where appropriate, resort to non-custodial measures as alternatives to pretrial detention, to promote increased access to justice and legal defense mechanisms, to reinforce alternatives to imprisonment and to support rehabilitation and social reintegration programs, in accordance with the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)"

7. The policies pursued have not managed to stem the increase in crime, especially juvenile delinquency, the increasing use of narcotics, etc.

To address the problem of prison overcrowding, Morocco can no longer afford to maintain this high level of imprisonment, either financially or socially.

Prison overcrowding has serious consequences on both detainees and society in terms of preventing recidivism, compromising the chances of reintegration ...

In addition, overcrowding in prisons creates detention conditions that lead to the weakening of the capacity of prison systems to meet the needs of detained people in primary health care, food and accommodations and to provide rehabilitation, education, training and recreation programs.

Due to overcrowding, the prison authorities are less able to effectively manage prisons to meet the reintegration needs of detained persons and to ensure that they are treated in accordance with applicable rules and standards.

Prison overcrowding is often the result of shortcomings in the criminal justice system: ineffective or too long investigations, unfair business management, insufficient resources of the prosecution and court services and lack of provisions for the use of simplified procedures. These dysfunctions contribute to congestion in the courts, to unacceptable delays in investigations and excessively delayed opening of trials, to multiple adjournments and to excessive delays in proceedings and judgments. Therefore, these can be factors that contribute to the lengthening of the duration of pre-trial detention.

8. In this respect, the pressure exerted by society also plays a role. Citizens affected by security and safety problems, or for cultural reasons, may support such legislation and policies, they also may, through the media, exert pressure on judges so that offenders are punished. This also can contribute to prison overcrowding, especially through the increased use of pre-trial detention.

The result is the imprisonment of people who committed minor and non-violent offenses, instead of remaining in the first stage of the criminal justice: warning, fine, suspension or restorative measures.

It is therefore more than ever necessary to review the use of imprisonment, which, however, should be a last resort and only when the person poses a real threat to society.

9. Morocco is in fact one of the countries suffering from overcrowding, one of the consequences of which is the high cost of incarceration.

This fact was corroborated by the report of the National Council for Human Rights (CNDH) «The Prison Crisis: a Shared Responsibility» (October 2012), which highlighted the excessive use of pre-trial detention, slow trials, non-application of legal provisions on parole (Articles 622-632 of the Criminal Procedure Code, CPC), the non-implementation of the conciliation procedure provided for by Article 41 of the CPC, the non-existence of deputy King's prosecutors specialized in juvenile justice (provision yet required by law), non-compliance with Article 134 (albeit incomplete) on persons with mental illness, shortage of psychiatrists and psychologists to ensure medical care for prisoners, non-

deduction of the period of hospitalization occurring during the investigation from the sentence of the convicted in case of partial responsibility, the non-delivery of youth in conflict with the law to their parents, the non-use of measures other than detention, and non-modification or substitution of measures taken towards minors, etc.

The gravity of the situation appears even more clearly when we look at the rate of prisoners in relation to the population size.

In 2011, in Morocco, the number of prisoners was 65 000. This represents two prisoners per 1000 inhabitants (200 prisoners per 100 000 inhabitants).

This very high rate appears even more alarming when compared with other countries that have common points with Morocco in terms of geography and culture. For example, in Algeria, the detainees rate is 110 per 100 000 inhabitants. In Libya, the rate is 173 prisoners per 100 000 inhabitants.

This rate remains equally high when compared with countries where the number of inhabitants is two times higher than in Morocco. In Indonesia, the rate is 38 per 100,000; in Pakistan, the rate is 59 per 100,000; in France, the rate is 95 per 100,000; in Turkey, the rate is 92 per 100,000; in Germany, the rate is 96 per 100,000; in Italy, the rate is 100 per 100,000; and in Mexico and Brazil the rate is 169 per 100,000 (Source: Figures from the Ministry of Justice and Liberties, review of criminal cases No. 2, October 2012 p.119)

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10. For the above reasons, the CNDH notes with concern the data given in the draft budget of the General Delegation of Corrections and Rehabilitation (DGAPR) for 2014:

- A steep increase in the prison population of more than 26% between 2009 and 2013. The population increased from 57,763 to 72,816 (04.11.2013);
- Forty-two per cent (42%) of this population is in custody, and 40.45% of convictions do not exceed one year's imprisonment;
- A prison overcrowding that results in alarming conditions of detention, detrimental to the reintegration and security of all: the alimentation ratio has dropped from 14 to 11 per day for each detainee;
- The staff ratio varies from one officer per 7 detainees at best to one officer per 22 detainees at worst, while international standards recommend a ratio of one officer per three inmates. The average has increased from one officer per 11 detainees to one officer per 12 detainees. This is due to the budget reduction of 800 posts for the fiscal years 2011, 2012 and 2013. The worst is that this budget will be renewed for 2014;
- Despite the construction of new prisons, the area for each detainee did not exceed 2 m², while international norms provide for cells 9 to 10 m² for a prisoner (European Prison Rules).

11. The CNDH points out that the UNODC highlighted in the manual of basic principles and promising practices on alternatives to prison: “The loss of liberty that results from imprisonment is inevitable but, in practice, imprisonment regularly impinges several other human rights as well. In many countries of the world, prisoners are deprived of basic amenities of life. They are often held in grossly overcrowded conditions, poorly clothed and underfed. They are particularly vulnerable to disease and yet are given poor medical treatment. They find it difficult to keep in contact with their children and other family members. Such conditions may literally place the lives of prisoners at risk.”

FOR THE EXPANSION OF THE OFFER OF ALTERNATIVE SENTENCES IN THE CRIMINAL NATIONAL SYSTEM

12. Moreover, the criminal policies of many consolidated democracies incorporate, increasingly, various alternatives to incarceration. Thus, even if imprisonment is the reference in terms of punishment, alternative sentences are increasing, despite the difficulty of their implementation, because they have at least two virtues: the fight against recidivism and the reduction of prison population.

Several tracks have been well explored or are being tested.

13. In fact, even before holding trials, some countries like Belgium have recourse to penal mediation in order to “escape the Criminal inflation” (Jean-Marie Huet, Director of Criminal Affairs and Pardons, Ministry of Justice, France, 2006) and to the strengthening of judicial review as alternatives to detention.

14. During trials, some countries are resorting increasingly to probationary sentences (extension of the scope of suspended sentences with probation, deferment with probation), to community service, financial penalties, etc. This is the case of most countries of the European Union that provide for probation, with conditions specific to each country.

15. Other countries have established the execution of short sentences in a non-custodial environment (Sweden), the gradual adjustment of medium and long term sentences (to avoid the adverse effects of “dry outlets”) or automatic parole (Sweden and Canada).

16. Among the recommendations of several reports and studies, we shall retain notably those concerning the need to promote the use of supervisory measures other than preventive detention and to introduce into the Criminal Code restitution, community service and house arrest ...

17. We must therefore reflect on a general philosophy in the areas of rehabilitation and social reintegration, which would translate into a set of penal measures to avoid or shorten a prison sentence, be it before the trial, or at the time of the sentencing, or after the conviction.

18. Alternative sentences to imprisonment should be prominent among penal responses, especially since they have been, in recent years, frequently raised at the political and legal debates about prison. A range of alternatives to incarceration have in fact demonstrated their effectiveness in many countries.

19. According to figures from the Ministry of Justice and Freedoms, 20% of inmates on remand should not be detained if alternatives to such detention were applied (i.e. conciliation). In terms of raw numbers, this represents 18,000 inmates who should not be incarcerated.

20. If we take into consideration prison sentences that are less than 6 months (which are useless for inmates because no reintegration programs can be applied during this short period), another 3000 detainees are added to the original figure. (Source: Figures from the Ministry of Justice and Liberties, Review of Criminal Cases No. 2, October 2012, page 124).

21. Along the same lines, 15,000 prisoners were sentenced to imprisonment for minor offenses: for example, 78 were convicted for begging and vagrancy, 364 were convicted for illegal immigration, and 1690 were convicted consumption narcotics.

22. Therefore, according to the figures of the Ministry of Justice and Liberties, applying the existing possibilities in terms of alternative sentencing to incarceration means that out of 65000 prisoners, 21000 should have never entered the gates of a prison. About 32% of the prison population.

23. Better yet, the 15,000 detained for minor offenses, mentioned above, are precisely the type of candidates to alternative sentences to imprisonment. Implementing existing opportunities and future prospects in terms of alternatives to imprisonment, 36000 prisoners out of 65000 could have avoided incarceration, which amounts to 55% of the prison population. (Source: figures from the Ministry of Justice and Freedoms, Review of Criminal Cases No. 2, October 2012, p. 125).

24. For these reasons, the CNDH notes with satisfaction that the Charter of the Reform of the Judiciary has advocated the introduction of alternative sentences in the third main

objective, which aims to strengthen judicial protection of rights and freedoms, more specifically in the third sub-objective that promotes the adoption of an effective sentencing policy.

25. Alternatives to imprisonment called «alternative sentences» must progress in the experiences and opinions of everyone. We must understand that these are real penalties, punishing a condemned social behavior; including an element of coercion of the individual, while stating a desire not to exclude him from the community.

26. Therefore, on the occasion of first anniversary of the publication of its report «The prison Crisis: A Shared Responsibility» and as a part of its contribution to the overall process of judicial reform in Morocco, the National Council for Human Rights (CNDH) organized in October 30, 2013 an international symposium on the theme «Alternative Sentences in Morocco, an Emergency, a Necessity.» This meeting helped to develop a number of recommendations.

PROPOSALS AND RECOMMENDATIONS

27. In this capacity, the CNDH points out that any attempt to introduce alternative sentences in our national penal system must be based on the provisions of the second and seventh titles of the Constitution relating respectively to fundamental rights and freedoms, judiciary power, the rights of individuals and the rules of justice processes. Similarly, in order to implement our international and regional commitments, the CNDH recommends to take into consideration, in any move towards the diversification of alternative sentences, the declarative international standard, including various UN rules and documents produced by the various bodies of the Council of Europe with regard to alternative sentences.

The CNDH also points out that the design of legal solutions for alternative sentences must obey the requirements of simplicity and consistency.

28. The CNDH recommends to the Head of government and members of parliament:

a) To consider, in any move towards the diversification of alternative sentences, the international declarative standard including UN Standard Minimum Rules for the Development of Non-Custodial Measures (called the Tokyo rules)¹, the UN Standard Minimum Rules for the Administration of Juvenile justice (called the Beijing Rules)², the UN Rules for the Protection of Juveniles Deprived of their Liberty (called the Havana Rules)³, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁴, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (called the Bangkok Rules)⁵, the UN

Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems⁶, and the UN Basic Principles on the Use of Restorative Justice Programs in Criminal Matters⁷.

b) To take into consideration, given the Partner for Democracy status granted to the Kingdom of Morocco by the Parliamentary Assembly of the Council of Europe in June 2011, the documents produced by the various bodies of the Council of Europe with regard to alternative sentences including the Council of Europe Probation Rules⁸, the European Rules for Juvenile Offenders Subject to Sanctions or Measures⁹, the recommendation on use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse¹⁰, the recommendation on conditional release (parole)¹¹, the recommendation on improving the implementation of the European rules on community sanctions and measures¹², the recommendation concerning mediation in penal matters¹³, the EU recommendation on the European rules on community sanctions and measures¹⁴, the resolution on the practical organization of surveillance, assistance and post-detention¹⁵ aid for sentenced or parolees¹⁶ and the recommendation concerning prison overcrowding and prison population inflation¹⁷.

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c) To introduce at the first title of the Penal Code, an additional chapter for penalties and alternative measures. The CNDH considers that the national penal system will be enhanced by measures that include, but are not limited to:; the day penalty, the citizenship training, community service, the prohibition for a specified period of time to carry out any professional or social activity where the facilities afforded by such an activity were knowingly used to prepare or commit the offense, the prohibition for a specified period of time to appear in certain places or categories of places defined by the court where the offense was committed, the prohibition for a specified period of time to frequent certain sentenced persons specially designated by the court, notably the authors and accomplices of the offense, the prohibition for a specified period of time, to enter into relationships with certain people specially designated by the court, notably the victim of the offense, court mandated therapy, the penalty repair, socio-judicial supervision and placement under fixed or mobile electronic monitoring. These measures may be provided for mainly in cases of petty offenses, and partly in tort matters.

d) To draw on the measures proposed in the above recommendation to:

- Diversify measures of placement under judicial supervision provided for in Article 160 of the Criminal Procedure Code as alternatives to preventive detention;
- Diversify measures of the conciliation procedure provided for in Article 41 of the Code of Criminal Procedure, as an alternative to prosecution;
- To expand the measures of judicial supervision as part of the release procedure provided

for in article 178 of the Criminal Procedure Code;

■ To provide for additional measures for the parole procedure provided for in Articles 622-632 of the Code of Criminal Procedure;

■ To provide for in the criminal procedure code and the public debt collection code alternatives to the execution of imprisonment for debt.

e) To introduce, as part of the introduction of alternative sentences, measures of adjustment of sentences such as parole, suspension and the splitting of sentences.

f) To develop, in the context of the revision of the criminal law, an overall pattern of diversion and decriminalization. This pattern can provide, for example, the revision of Articles 326 and 329 of the Criminal Code respectively on begging and vagrancy, and the provisions of Dahir No. 1-73-282 of Rabia II 28 1394 (May 21, 1974) for the suppression of drug abuse and drug prevention. Alongside this revision, the CNDH recommends the introduction in the penal code of a diverse range of restorative justice programs such as victim-offender mediation, community conferences, peacemaking circles and reparative probation. Similarly, the CNDH proposes to draw on this recommendation to revise the provisions of Book III of the Criminal Procedure Code relating to children in conflict with the law.

g) To provide for in the Criminal Code provisions to allow certain categories of sentenced people in correctional cases to have priority in benefiting from alternative sentences. This should include, in the opinion of the CNDH, minors between 12 and 18 (under section 139 of the Criminal Code), people banned from practicing a profession under Articles 452 and 458 of the Penal Code, accused under Article 506 (§1), 518, 519, 527 and 533 of the Criminal Code, sentenced persons who are over 65 years old at the time when the offense was committed or where forensics establishes that they are suffering from a serious illness, and pregnant women and nursing mothers.

h) To introduce alternative sentences in the various specific texts providing for custodial sentences, including Dahir No. 1-58-376 of November 15, 1958 regulating the right of association as amended and supplemented, Dahir No. 1-58-377 of November 15, 1958 on public gatherings, Act 10-95 on water, Act No. 65.99 forming the Labor code and law No. 15-95 commercial code.

i) To strengthen the legal framework for protecting persons in situations of deprivation of liberty or parole status, amending the law of CNDH to allow it to exercise the powers vested in torture prevention mechanisms under part IV of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment.

29. The CNDH recommends to the Head of the Government in connection to the implementation of the Charter of the Reform of the Judicial System to:

a) Develop a comprehensive and coherent strategy of introducing alternative sentences and to provide public policy measures to expand the supply of treatment and rehabilitation centers for the most vulnerable groups affected by deprivation of freedom. Similarly, the CNDH recommends the development of a plan for strengthening the capacity of legal professionals in the determination and implementation of alternative sentences.

Notes

- 1.** Adopted by General Assembly resolution 45/110 of 14 December 1990.
- 2.** Adopted by General Assembly resolution 40/33 of 29 November 1985.
- 3.** Adopted by General Assembly resolution 45/113 of 14 December 1990.
- 4.** Adopted by General Assembly resolution 43/173 of 9 December 1988.
- 5.** Adopted by the General Assembly in its resolution 65/229 of 21 December 2010.
- 6.** Adopted by the General Assembly in resolution A / C.3 / 67 / L.6 3 October 2012.
- 7.** Adopted by the General Assembly in its resolution 2001/12 of 24 July 2002.
- 8.** CM / Rec (2010) 1
- 9.** Rec (2008) 11
- 10.** Rec (2006) 13
- 11.** Rec (2003) 22
- 12.** Rec (2000) 22
- 13.** (99) 19
- 14.** R (92) 16
- 15.** The term now used is 'post-prison support'
- 16.** Resolution (70) 1
- 17.** R (99) 22

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