

# **SENTENCING BURGLARY, DRUG IMPORTATION AND MURDER**

**EVIDENCE FROM TEN COUNTRIES**

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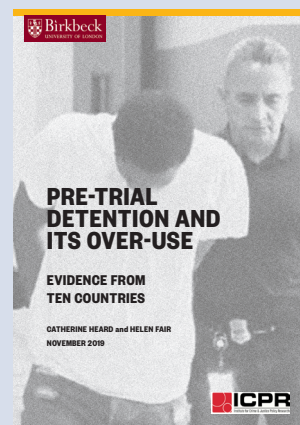
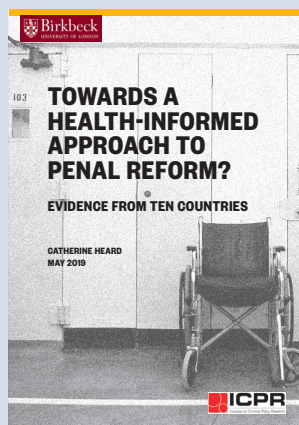
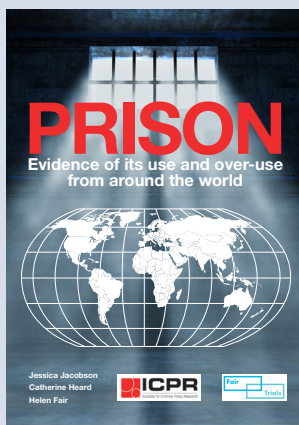
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## PREVIOUS REPORTS UNDER THIS PROJECT



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We are grateful to all the overseas research partners who provided assistance. Our thanks also go to the 70 (anonymous) criminal defence lawyers from the ten jurisdictions who volunteered to be interviewed for the research. We draw extensively on their experience of sentencing and custodial decision-making throughout this report.

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Our research partners:



## SUMMARY

In all countries across the globe, the prison sentence is a primary means by which the state censures and seeks to contain behaviours deemed illegal. States vary widely in terms of *which types of illegal conduct* are deemed to merit custody rather than non-custodial sanctions, and the *lengths of prison terms* imposed for conduct that does cross the custody threshold. Accordingly, people who are convicted in relation to similar conduct may receive widely differing penalties, depending on the country in which they are convicted and sentenced.

This report examines the extent and nature of international disparities in custodial sentencing. It is the fourth in a series of research reports produced under the banner of ICPR's international, comparative project, 'Understanding and reducing the use of imprisonment in ten countries', launched in 2017. The ten jurisdictions which are the focus of this research span all five continents: Kenya, South Africa, Brazil, the USA (and more specifically, New York State), India, Thailand, England and Wales, Hungary, the Netherlands, and Australia (more specifically, New South Wales).

On the basis of legal and policy analysis and interviews with 70 legal practitioners across the ten jurisdictions, the report outlines the sentencing frameworks and probable sentencing outcomes for three hypothetical offences: a **domestic burglary** by a man with previous convictions for similar offences; **drug importation** (400 grams of heroin or cocaine) by a woman from a less developed country; and the **intentional homicide**, involving a knife, of one young man by another. Each offence presents distinct policy challenges for sentencing law and practice, and each offers lessons for reform aimed at curbing the relentless rise in prisoner numbers seen in much of the world in recent decades.

The emerging lessons for sentencing reform, and a series of high-level policy recommendations, are presented with reference to the broad themes of:

- The role of previous convictions in sentencing – rationales and repercussions
- The vexed and persistent problem of short prison sentences
- Drugs policies and the scope for alternatives to harsh sentencing of drug offences
- The meaning and implications of life sentences
- Approaches to the sentencing of murder.

## INTRODUCTION

In all countries across the globe, **the prison sentence** is a primary means by which the state censures and seeks to contain behaviours deemed illegal. States vary in the relative weight they accord to differing purposes of custodial sentencing – purposes which can be broadly categorised as either retributive (focused on the punishment of the offenders for their wrongful actions) or utilitarian (aiming to reduce future offending through, for example, rehabilitation, deterrence or incapacitation). But the differences between states are very much starker when it comes to the *types of illegal conduct* seen as meriting the use of custody rather than other kinds of criminal sentence, and the *length of prison terms* imposed for conduct that does cross the custodial threshold. Accordingly, people who are convicted in relation to similar conduct may receive widely differing penalties, depending on the country in which they are sentenced.

This report considers the extent and nature of international disparities in custodial sentencing, with reference to three types of offence: burglary, drug importation, and intentional homicide. It is the fourth in a series of research reports produced under the banner of ICPR's international, comparative project, 'Understanding and reducing the use of imprisonment in ten countries', launched in 2017.<sup>1</sup> The project aims to advance understanding of the factors driving high imprisonment levels and to devise strategies to curb the unnecessary resort to custody, with a focus on ten countries spanning five continents.<sup>2</sup> The countries are listed in the table below, which also shows the number and proportion of sentenced prisoners in each national prison population:<sup>3</sup>

### Number and proportion of prison population who are sentenced\*

	Total prison population	Total number sentenced	Sentenced prisoners as percentage of prison population
<b>Kenya</b>	53,348	29,796	56%
<b>South Africa</b>	162,875	115,143	71%
<b>Brazil</b>	755,274	525,451	70%
<b>USA</b>	2,094,000	1,604,000	77%
<b>India</b>	478,600	148,113	32%
<b>Thailand</b>	346,170	286,204	83%
<b>England &amp; Wales</b>	79,453	68,065	86%
<b>Hungary</b>	16,551	13,842	84%
<b>Netherlands</b>	10,887	7,703	71%
<b>Australia</b>	43,139	28,929	67%

\* Figures are the most recent available where data for both the prison population total and numbers of sentenced prisoners are available as at the same date. More recent prison population figures for several of these countries are available at [www.prisonstudies.org](http://www.prisonstudies.org)

1 The prior reports were *Prison: Evidence of its use and over-use from around the world* (Jacobson et al, 2017); *Towards A Health-Informed Approach To Penal Reform?* (Heard, 2019); and *Pre-trial Detention and its Over-use* (Heard and Fair, 2019)

2 In selecting the ten countries, we aimed to draw transferable lessons on reducing resort to imprisonment from disparate circumstances and policy approaches. To this end, our selection considered geographic spread, regional or global influence, and diversity in terms of economic prosperity, legal systems, and prison population rates and trends. Availability of criminal justice data and of research and policy partners was another consideration. With respect to the USA and Australia, both federal systems, the research focused on New York State and New South Wales respectively.

3 Data are from World Prison Brief website, hosted and published by the Institute for Crime & Justice Policy Research: [www.prisonstudies.org](http://www.prisonstudies.org). The data were accessed in December 2020.

The purpose of this report is to highlight the vast disparities between the jurisdictions in their approaches to custodial sentencing, and to consider the implications of these disparities for penal reform at global, regional and national levels. To this end, we report here on sentencing policy and practice with respect to three hypothetical offences or ‘vignettes’: a domestic burglary by a man with previous convictions for similar offences; the importation of 400 grams of heroin or cocaine by a woman from a less developed country; and the intentional homicide, involving a knife, of one young man by another.

Each vignette presents distinct policy challenges for sentencing law and practice, and each offers lessons for reform aimed at curbing the relentless rise in prisoner numbers seen in much of the world in recent decades.<sup>4</sup> The evidence highlighted by comparative research of this kind shows that different countries approach similar issues in widely divergent ways, and hence that there are distinct policy choices to be made about how offences of all kinds – including those at the more serious end of the scale – are sentenced, all with different repercussions for prisoner numbers.

The information presented here is from two main sources: an analysis of the legal and policy frameworks which govern the sentencing of offences such as those depicted in the three vignettes; and interviews with 70 criminal defence lawyers across the ten countries about how, in their professional experience, these offences are likely to be sentenced in practice.<sup>5</sup> Over the pages that follow, drawing on both of these sources, we provide an overview of the sentencing frameworks of the ten jurisdictions; we then present the key points of contrast between the countries in their approaches to sentencing each of the three vignettes (more details on which are provided in a separate [Appendix](#)); and finally, we reflect on lessons for penal reform in light of the legal research and defence lawyers’ observations.

## SENTENCING FRAMEWORKS

The sentencing framework of any given jurisdiction comprises the law and guidance which shapes (both custodial and non-custodial) sentence decision-making by the courts. No two of the ten countries covered by the ICPR research are alike in terms of either the *structure* or the *substance* of their sentencing frameworks. Among the key points of differentiation are the following:

- **Statutory provisions:** Statute forms part of the sentencing framework of all ten countries, but differs widely in form, content and effects – for example, variously establishing sentencing ranges within which sentences should be set; mandatory minimum terms for certain offences; maximum terms; and combinations thereof.
- **Case law:** Six of the ten jurisdictions (Kenya, South Africa, the USA, India, England & Wales and Australia) are common law systems, where case law – generally emanating from the appellate courts, and by its nature fluid and evolving – is a feature of the sentencing framework. Although necessarily less prominent, case law also has some pertinence in the civil law jurisdictions – Thailand, Hungary, the Netherlands and, most notably, Brazil.
- **Guidelines:** In three of the jurisdictions there are published, offence-specific sentencing guidelines: the US (both at federal level and in many states), England & Wales, and the Netherlands. Kenyan guidelines address matters of principle but

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<sup>4</sup> See, for example, Coyle et al (2016) and Walmsley (2018).

<sup>5</sup> The legal and policy analyses and the legal practitioner interviews were conducted by the ICPR research team in collaboration with a range of in-country partners including legal and other practitioners, NGOs and researchers. The research was conducted in 2018-19; and the information presented here, and in the [Appendix](#), reflects policy and practice at that time.

not specific offences, and Thai judges utilise unpublished guidelines. The remaining countries do not have a body of guidelines that are distinct from statute or case law.

- **Sentencing principles:** Across the ten countries, principles and purposes of sentencing are articulated with varying degrees of explicitness and defined in a range of ways – although the principle of proportionality is often a significant theme. Similarly, states differ in their identification and definition of factors relating to the offence, the offender or wider society which can be treated as mitigation (i.e. lessening the severity of the sentence) or aggravation (i.e. increasing sentence severity).
- **Sentencer discretion:** Largely reflecting the nature and configuration of the above constituent parts of the sentencing framework, the extent of discretion exercised by sentencers in decision-making varies widely between jurisdictions.

We highlight below each of the ten jurisdictions' major features.

### Kenya

Kenya's [Penal Code](#) specifies maximum sentences for many offences. There is a mandatory death penalty for murder, although this was declared unconstitutional by the Supreme Court in December 2017 and no execution has been carried out since 1987. (Death penalties were still being handed down in 2019, according to Amnesty International.) At the behest of the Supreme Court, a task force led by the Attorney-General was ordered to review death penalty cases, establish a framework for their re-sentencing, formulate parameters for what should constitute life imprisonment and propose amendments to the law to give effect to the Court's 2017 judgment. The task force reported in October 2019 but Parliament has yet to consider its recommendations.

Kenya's Court of Appeal has ruled on various statutory sentencing provisions and their implications for sentencer discretion. [Sentencing Guidelines](#), produced under the auspices of the National Council on the Administration of Justice, provide further (non-offence-specific) guidance on the interpretation and application of sentencing laws. For example, the guidelines stipulate that the starting point in determining a custodial term should be 50% of the maximum term defined in statute, with mitigation and aggravation to be factored in thereafter.

### South Africa

South African sentencers have wide discretion with respect to both type and severity of sentence. There are no sentencing guidelines, and statutory provisions are generally limited in scope. However, in the face of rising crime levels and associated public concerns, the 1997 [Criminal Law Amendment Act](#) created mandatory minimum terms of imprisonment for many serious offences including murder, rape, robbery and some drug and firearms offences. In such cases, courts may pass a lesser term only if there are 'substantial and compelling' reasons for so doing.

Sentencing courts are expected to take into account the principles set out in the 1969 case of *S v Zinn*. These principles, commonly known as the 'triad of Zinn', require that three sets of factors are considered in the determination of sentence: the seriousness of the offence, the personal circumstances of the accused, and the public interest. These factors should be equally weighed, in order to ensure that the sentence is just and equitable.



### Brazil

Sentences in Brazil are determined in accordance with provisions in the [Penal Code](#) and applicable case law (usually derived from appeal court decisions). The Penal Code sets out sentencing ranges for different offences, and a procedure and principles for fixing the sentence within the specified range. Judges are required to provide reasons if they sentence above the mandatory minimum. The process includes consideration of statutory mitigating and aggravating factors, with judges expected to exercise discretion over the adjustment to sentence severity, while adhering to an overarching duty to ensure proportionality. Federal crimes are those with an international element and must be sentenced by federal courts, while all others are sentenced in state courts.

Statutory provisions govern not only the sentence to be applied, but also the initial prison regime (high security, semi-open or open) within which the offender will serve their term, and the rules on progression through the regimes.

### The United States

All US states have their own sentencing systems, many governed by sentencing guidelines which tend to specify the sentence based on offence severity and prior convictions, and permit varying degrees of departure from the specified penalty in atypical cases. New York State, for example, has an especially complex sentencing framework, comprising a series of charts for determining sentence type and length.

Offences in which the federal government has an interest (including international drug importation offences) are heard in the federal courts system rather than in state or local courts. The [Sentencing Reform Act 1984](#) created a new federal sentencing system largely based on [sentencing guidelines](#) produced by the Sentencing Commission, and supplemented by key Supreme Court decisions. Also at the federal level, the latter decades of the 20th century saw rapid expansion of statutory mandatory minimum penalties, especially for drug-related and recidivist offending. Mandatory minimum terms have also long been part of federal and many state sentencing systems, but recent reform efforts have led to the abolition or reduction of some such provisions. Case law requires sentencers to take into account the federal sentencing guidelines but their application is now advisory and no longer mandatory. The court must also consider all the factors set forth in the Federal Sentencing Act, 18 U.S.C. § 3553(a).

Also of much significance in US (federal and state) sentencing is the ubiquitous plea-bargaining system, whereby a defendant pleads guilty and waives their right to trial on the basis of a sentence negotiated with the prosecutor. The sentence recommended by the prosecutor is not automatically passed, but must be approved by the court.



### India

The Indian [Penal Code](#) provides for six types of punishment: death, life imprisonment, imprisonment (rigorous or simple), forfeiture of property, and fines. The Code sets maximum, and sometimes minimum, penalties for specific offences; within these bounds, courts have discretion to determine the sentence, with guidance from case law. The Supreme Court in the 2012 case *Soman v. Kerala* set out the principles to be taken into account in the exercise of sentencing discretion, such as proportionality, deterrence and rehabilitation, and observed that mitigating and aggravating factors should be considered within the proportionality analysis. For some offences the penalty is laid down in offence-specific legislation, such as the Narcotic Drugs and Psychotropic Substances Act 1985, which stipulates minimum sentences for many drug offences.

### Thailand

In Thailand, the [Penal Code](#) sets out a sentencing range – from minimum to maximum penalty – for most offences, with the sentencing options being the death penalty, imprisonment, confinement (in a place other than a prison), fine, or forfeiture of property. The code also includes a classification of mitigating and aggravating factors. Judges have discretion to select the sentence within the stipulated range, but in practice tend to adhere closely to offence-based guidance known as *Yee-Tok*, which is intended to ensure consistency in sentence decision-making. *Yee-Tok* is unpublished and confidential, and exists in different forms for different regions and types of court.

### England & Wales

In England & Wales, offence-specific maximum sentences, and a small number of minimum sentences, are set out in statute. The [Criminal Justice Act 2003](#) delineated statutory purposes of sentencing for the first time, as: punishment, deterrence, rehabilitation, public protection, and reparation. The Act also retained proportionality at the heart of sentencing by making offence seriousness (in terms of harm and culpability) the key consideration in most decisions.

While sentencing legislation generally leaves wide discretion for sentencers, they are required to follow relevant sentencing guidelines unless this is contrary to the interests of justice. Guidelines produced by the arm's length public body the [Sentencing Council](#) are available for most major offences. They detail factors the court should take into account (including aggravation and mitigation), and a step-by-step decision-making process. Guidelines on general sentencing purposes and other thematic issues are also available. Court of Appeal judgements are a further point of reference for sentencers, especially with respect to offences for which there are no Sentencing Council guidelines.

### Hungary

The Hungarian [Criminal Code](#) lays down sentencing ranges for specific offences and sets general principles of sentencing. Among these principles is that punishment should be consistent with offence severity, the offender's culpability and the danger s/he poses, and other aggravating and mitigating factors. Another principle is that in determining a fixed-term prison sentence, the court should treat the median in the applicable sentencing range as the starting point. Judges have discretion to assess relevant aggravation and mitigation, and to increase or decrease the median term accordingly. The Criminal Department of the Curia, the highest judicial authority in Hungary with a remit to ensure uniform application of the law, has provided guidance on the factors relating to offence and offender that might be taken into consideration in sentencing decisions.

### The Netherlands

In the Netherlands, the [Penal Code](#) sets out maximum sentences, and there are no minimum penalties. Determinate prison sentences can range from 1 day to 30 years. The only indeterminate sentence is the (comparatively rarely used) life sentence, which is a whole-life term unless the offender is pardoned. After 25 years of a life term, the Life Sentence Advisory Committee must review the sentence and consider recommending participation in programmes to prepare for release. Judges have recourse to detailed, non-binding [court sentencing guidelines](#) for the more commonly occurring offences. There are also [prosecutorial sentencing guidelines](#), consisting of an overarching framework and over seventy offence-specific guidelines. These are based around statutory starting-point penalties for specific offences and aggravating and mitigating factors and are intended to guide prosecutors' recommendations for sentence.

### Australia

Each state in Australia has its own sentencing legislation, although some offences are governed by federal legislation and state-level sentencing provisions would not apply to such 'Commonwealth offences'. The statutes typically detail purposes and aims of sentencing; aggravation and mitigation; and types of sentences that can be imposed. They provide maximum sentences for most offences, and sometimes minimum penalties. In New South Wales, for example, the [Crimes \(Sentencing Procedure\) Act 1999](#) defines seven purposes of sentencing: punishment, deterrence, protection of communities, rehabilitation, making the offender accountable, denunciation and recognition of harm to victims. Judges have broad discretion within the limits set by statute, with appeal court 'guideline judgements' offering further guidance in some states. Sentencing guidance also exists in some jurisdictions, such as the 'Sentencing Bench Book' in New South Wales. There are no sentencing guidelines for 'Commonwealth offences' – that is, those falling under the remit of the federal government – and courts are guided by statute (principally the [Criminal Code Act 1995](#) and the [Crimes Act 1914](#)) and relevant case law.





## SENTENCING VIGNETTES

This section summarises likely outcomes – based on our legal analysis and interviews with practitioners – for each of the three sentencing ‘vignettes’ which framed this research. This is by necessity an approximation: first, because of the limited scope of the research (around six practitioners were interviewed per jurisdiction); secondly, because it cannot reflect all factors that potentially influence sentence type, length and term served, such as:

- full implications of plea or confession and the operation of plea or charge bargaining
- personal and background factors
- geographic variability in prevalence of the offence in question
- availability of alternatives to custody
- systems relating to regime progression, early release, sentence remission, and parole (which can be significantly determinant on time actually served).

The [Appendix](#) provides more information on how such factors might influence outcomes.

References in the following pages to ‘life sentences’ in relation to Vignettes 2 and 3 do not connote whole life terms or sentences of ‘life without parole’, unless expressly stated. For further discussion of the various types of life sentence, see pages 21-22.

## VIGNETTE 1

**BURGLARY**

P-, a 32-year-old man, broke into a house when the residents were at work, accessing the rear of the house via a back alley and breaking a window to gain entry. He stole jewellery and cash belonging to one of the residents, worth a total of approximately [US\$ 500]. He has several prior convictions for the same type of offence and other similar offences.

**Immediate custody?**

- **NY/USA:** Inevitable
- **Netherlands; NSW/Australia:** Likely, due to prior convictions; might be avoided on basis of personal circumstances & cooperation with services
- **Kenya; S Africa; Brazil; India; Thailand; E&W; Hungary:** Highly likely, due to prior convictions

**Mandatory minimum?**

- **E&W:** 3 years if mandatory minimum applies; otherwise shorter prison term. Small chance of community or suspended sentence
- **Thailand:** 1 year
- **Others:** None

**Likely sentence**

- **Kenya:** 7 years (could be as low as 2)
- **Thailand:** 1-3 years
- **S Africa:** 3 years (could be up to 8 if sentenced in higher court)
- **E&W:** 3 years if mand. minimum applies; otherwise shorter & possibly community or suspended sentence
- **Brazil:** 3-4 years
- **Hungary:** 1-2 years
- **NY/USA:** 5 years (could be as low as 2, depending on plea deal/prosecutor)
- **Netherlands:** 3-5 months if prior convictions recent; otherwise possible non-custodial sentence
- **India:** 3 years
- **NSW/Australia:** Anything up to 4 years; non-custodial community order possible

**Maximum sentence**

- **Kenya, E&W, NSW/Australia:** 14 years
- **India:** 10 years
- **S Africa:** None
- **Hungary:** 3 years
- **Brazil:** 8 years
- **Netherlands:** 6 years
- **NY/USA; Thailand:** 7 years



VIGNETTE 2

## DRUG IMPORT- ATION

K-, a 26-year-old woman, was recruited in her home country of [Nigeria] to transport heroin in return for a cash payment. She had flown to [England] from her home country, carrying the heroin in a hidden compartment in a money belt. The quantity of heroin was 400 grams, or a little under 1 lb.

### Mandatory minimum?

- **Brazil:** 5 years
- **USA (under federal law); India:** 10 years
- **Others:** None

A fine may be imposed additionally to custody in Kenya, S Africa, Brazil, India, Thailand & Australia. In all but Brazil, non-payment would result in extension to custodial term.

### Likely sentence

- **Kenya:** Anywhere from 5-20 years + fine (c. US\$85,000); plus additional 5-7 years if fine not paid
- **S Africa:** Anywhere from 5-25 years + possible fine (max. US\$65,000)
- **Brazil:** 6-7 years + fine (c. US\$3,500)
- **USA:** Depends if sentenced under federal or state laws; and on prosecutor deal offered. From non-custodial with immediate deportation, to 10 years' custody
- **India:** 20 years + fine (at least c. \$1,400)
- **Thailand:** Death penalty or (following confession) life + fine (US\$32,000- \$160,000)
- **E&W:** 3.5-5 years
- **Hungary:** 3-8 years
- **Netherlands:** 3-5 months
- **NSW/Australia:** 3-8 years + possible fine (up to c. US\$700,000)

### Maximum sentence

- **Kenya; E&W; USA:** Life
- **S Africa; Australia (under federal law):** 25 years
- **Brazil; Hungary:** 15 years
- **India:** 20 years 'rigorous' imprisonment (including hard labour)
- **Thailand:** Death penalty, commutable to life
- **Netherlands:** 12 years

VIGNETTE 3

## MURDER

Two 23-year-old friends, L- and J-, got into an argument while drinking together in a bar. Both left the scene, and L- texted a mutual friend to say that he was going to kill J-. The next morning, on leaving his home for work, J- was confronted by L- who had been waiting for him outside his property. L- was armed with a knife, which he used to stab J- fatally in the chest.

### Mandatory sentence?

- **Kenya:** Death penalty, but was declared unconstitutional (as a mandatory penalty) by Supreme Court, and no execution has been carried out since 1987
- **S Africa:** Life imprisonment
- **India:** Death penalty (rarely carried out) or life imprisonment
- **Thailand:** Death penalty (rarely carried out) or 15-20 years' imprisonment
- **Brazil:** Minimum 12 years' imprisonment
- **NY/USA:** Life imprisonment without parole if certain statutory aggravating factors apply; otherwise minimum 15 years
- **E&W:** Life imprisonment
- **Hungary, Netherlands:** No mandatory sentence
- **NSW/Australia:** Life imprisonment if certain statutory aggravating factors apply; otherwise, minimum 20 years without parole

### Likely sentence

- **Kenya:** Life imprisonment; potentially whole life term
- **S Africa:** Life imprisonment; potentially whole life term
- **Brazil:** 14 years (first 5.5 at least in closed regime)
- **NY/USA:** 15-18 years if plea deal; otherwise 25 years-life
- **India:** Life imprisonment
- **Thailand:** Death penalty in absence of confession; otherwise life or lesser term
- **E&W:** Life imprisonment, with starting point for minimum term in custody ('tariff') of 25 years
- **Hungary:** 8-10 years with confession or other mitigation; otherwise up to 20 years-life
- **Netherlands:** Where evidence of treatable mental health problem, 3-12 years followed by indefinite mental health treatment order; otherwise, 10-12 years
- **NSW/Australia:** 20-28 years (possible discount of up to 25% for guilty plea)



### Release provisions (burglary)

- **Kenya:** Full term served; release only by presidential pardon (rare)
- **S Africa:** Can apply for parole after half served unless court specified non-parole period
- **Brazil:** Full term served, but may progress from closed to semi-open regime after one-sixth served
- **NY/USA:** Eligible to apply for parole after 85% served
- **India:** Remission of up to quarter of term for good conduct
- **Thailand:** Remission of up to 5 days per month for good conduct; collective amnesties through royal pardon
- **E&W:** Automatic release at half-way stage; other half to be served in community, on licence
- **Hungary:** Can apply for parole after two-thirds served unless court orders otherwise
- **Netherlands:** Sentence of under one year to be served in full
- **NSW/Australia:** If sentence is 6 months to 3 years, court sets non-parole period after which release is automatic; if sentence is over 3 years, release after non-parole period is at discretion of Parole Authority

### Release provisions (drug importation)

- **Kenya:** Likely to serve full term; presidential pardon rare
- **S Africa:** Can apply for parole after half served (subject to court-ordered non-parole period)
- **Brazil:** Full term; may progress to open conditions
- **NY/USA:** Eligible for parole after 85% served
- **India:** Under Supreme Court ruling, remission of up to a quarter of custodial term can be sought
- **Thailand:** Remission of up to 5 days per month for good conduct
- **E&W:** Automatic release after half served, followed by deportation (potentially, after a quarter served)
- **Hungary:** Can apply for parole after two-thirds served unless court orders otherwise
- **Netherlands:** Sentence of under one year to be served in full
- **NSW/Australia:** Eligible for parole after serving non-parole period specified by court (probably 2.5-4 years)

### Release provisions (murder)

- **Kenya:** No early release except by presidential pardon (only after 5 years if received life/death penalty)
- **S Africa:** Parole possible after 25 years
- **Brazil:** No early release; possible move to 'semi-open' conditions
- **NY/USA:** Parole possible after minimum term; if life sentence, eligible for parole after 22 years
- **India:** Parole possible after 14 years
- **Thailand:** Can earn remission (after 10 years if serving life sentence); collective amnesties through royal pardon
- **E&W:** Eligible for release on life licence after minimum term served
- **Hungary:** If fixed-term sentence, eligible for parole after two-thirds served; if life sentence, eligible after 25 years
- **Netherlands:** If sentence is c. 10 yrs, first third served in maximum security; then may transfer to lower security or release on tag
- **NSW/Australia:** Eligible for parole after non-parole period (set by court; 14-20 years likely)

## IMPLICATIONS FOR REFORM

The overarching aims of the ten-country project – of which the findings presented here form part – are to understand the drivers of prison population trends, and to devise measures for reducing levels of incarceration. Harsher sentencing is an obvious driver of higher levels of imprisonment. As our analysis of the vignette offences shows, harsh sentencing approaches are evident for several of the ten countries, but significant disparities exist among the jurisdictions as to the likely sentence (and release date) for the same conduct. The question thus arises of what lessons can be drawn from our sentencing analysis, and particularly the identified international disparities in approaches to sentencing the vignette offences, for efforts to reduce reliance on custody.

While a strong case can be made for sentencing reform focused explicitly on the goal of achieving parsimony in use of custody and thereby bringing down prisoner numbers, a number of caveats should be taken into account:

- There is no dispute that sentencing policy and practice, insofar as they determine where the custody threshold lies and length of custodial terms imposed, have a direct, large impact on the size of the prison population in any given jurisdiction. Nevertheless, sentencing determines the numbers of individuals entering, and remaining in, prison through its interaction with other criminal justice practices and policies – pertaining to, for example, policing, parole, pre-trial detention, early release and, most broadly, what kinds of behaviours are and are not deemed ‘criminal’.
- Just as sentencing does not operate in isolation from the wider criminal justice system, so too the system is necessarily situated in, and reflective of, its social, political and economic contexts. There are likely to be multiple ways in which these wider contexts reinforce, modify and subvert both the goals and methods of sentencing reform.
- Implementation of sentencing reform poses its own challenges and can have unintended consequences. These are seen, for example, where efforts to expand alternatives to prison sentences lead to ‘net-widening’ and ultimately greater resort to custody when it is imposed as a penalty for breaches of community orders. And the introduction of sentencing guidelines aimed at enhancing consistency and transparency in decision-making may simultaneously have the effect of increasing sentence severity, and thus use of custody, by reducing sentencers’ scope for leniency.

Penal reformers have long grappled with these kinds of practical and contextual constraints, while a large body of sentencing scholarship has explored these and related concerns from a range of theoretical perspectives. Within the confines of the present study, there is a limited extent to which we can advance existing debates. But what our study can do, by virtue of its comparative, offence-based analysis, is demonstrate that while all jurisdictions face *similar sentencing dilemmas*, they make widely different *policy choices* in responding to the dilemmas, with far-reaching implications.

Below, we consider potential policy choices in key areas arising from the vignettes, which offer significant promise for effective sentencing reform. In formulating our recommendations, we have focused on the transferrable lessons to be drawn from our legal research and interviews with defence lawyers in the ten jurisdictions, which were framed around the three vignettes and the sentencing issues they raise (more detail on which can be found in the [Appendix](#)).

## 1. Previous convictions and short sentences

P-, the offender in Vignette 1, is a burglar with several prior convictions for similar offences. This prior offending – especially if recent – is likely to rule out a non-custodial sentence or lengthen the prison term in all ten jurisdictions. In both the Netherlands and New South Wales, however, there is more scope than elsewhere for a non-custodial option, even though custody remains the most likely outcome.

In an exhaustive study of the phenomenon, Frase and Roberts (2019: 1; 2) observe that ‘almost all countries impose harsher sentences upon repeat offenders’, and this applies to ‘the majority of offenders appearing for sentencing’. They identify two main rationales for this practice: first, that repeat offenders deserve harsher punishment on grounds of the *greater culpability* manifest in their failure to respond to earlier sanctions; secondly, that harsher sentences are intended to tackle the *high risk of further re-offending* posed by repeat offenders. Empirical research reveals that sentencers may deem offenders to have ‘run out of road’ if they have previously been subject to a series of non-custodial penalties, and custody now appears to be the only viable option – whether on grounds of principle, utility or simple availability (Hough et al, 2003; Hedderman and Barnes, 2015).

Whatever the rationales, the repercussions of record-enhanced sentencing include the erosion of the principle of proportionality, when criminal history, rather than factors specific to the index offence, becomes the overriding determinant of sentence severity. Another repercussion is the fuelling of prison population growth through the incarceration of vast numbers of prolific, if relatively low-level and usually non-violent, offenders. Even if, as noted above, harsh punishment of repeat offenders is often predicated on the aim of reducing re-offending, the overwhelming evidence is that imprisonment achieves little in this regard, beyond a temporary incapacitative effect. The scope within prison to address problems – like drug dependency – underlying entrenched offending tends to be limited at best.

Notwithstanding these major, troubling repercussions, prospects for dispensing with prior record enhancements are remote. They are a long-established and near-universal feature of sentencing systems, founded – at least in part – on widely accepted notions of offender culpability. Nevertheless, there are policy choices to be made about how enhancements for prior record are defined, determined and applied. Sentencing regimes vary widely in terms of the *kinds* and *circumstances* of prior offending that are deemed relevant, and the *weight* accorded to it. The *mechanisms* by which prior offending is incorporated in sentence decision-making also vary and include, for example, ‘three strikes’ arrangements (as in England & Wales for the Vignette 1 burglary); set formulae for calculating the impact of convictions on sentence (as in many US guidelines); and looser frameworks within which previous convictions are expected to be considered alongside other aggravating factors.

The vexed issue of short custodial sentences is closely bound up with that of enhanced sentencing for criminal record. The problems associated with short prison terms – mostly notably, that they destabilise offenders’ lives while offering little or no prospect of constructive intervention – have long been recognised in many jurisdictions. In 2018, then UK Prisons Minister Rory Stewart approvingly quoted<sup>6</sup> the 1870 Declaration of Principles of the National Prison Association of the United States ‘that repeated short sentences for minor criminals are worse than useless; that, in fact, they rather stimulate than repress transgression’ (para XX). However, short sentences for low level offences which otherwise would not cross the custody threshold are an unavoidable feature of criminal justice systems in which prison holds ‘the unchallenged position ... as a backstop for the perceived failure of other criminal justice measures’ to address persistent offending (Mills, 2019: 11). Beyond this, use of

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6 By way of Twitter: <https://twitter.com/rorystewartuk/status/989569950858858496>



short sentences as a sanction for first-time (low level) offenders is entrenched in many economically less developed jurisdictions with minimal provision for non-custodial alternatives within over-stretched and under-resourced criminal justice systems.

The translation of policy concerns about short sentences into effective reform is challenging. The essential dilemma is the risk that emphasis on the harms of *short* sentences can result in the imposition of *longer* sentences by the courts.<sup>7</sup> Some jurisdictions, including Germany and Scotland, have sought a way out of this impasse by introducing a ‘presumption’ against short sentences, but the impact of such measures is limited where custody is already defined as the ‘last resort’.<sup>8</sup> The problem of short sentences has come into sharper focus since the outbreak of the Covid-19 pandemic: with many countries seeking to rapidly reduce their prisoner numbers, strategies have included deferring or suspending short sentences, or converting them into home detention.<sup>9</sup> Whether in response to the immediate public health crisis or as part of a longer-term reform agenda, wider availability and utilisation of credible, intensive and consistent non-custodial penalties are key to ensuring that the courts impose short prison terms only where this is genuinely the last, and only, resort.

### Reform recommendations: previous convictions and short sentences

- Incorporate within the sentencing framework an explicit, principled commitment to proportionality and minimising the use of custody, which should include specific reference to:
  - the appropriate balance between offence and offender factors in sentence decision-making;
  - the location of the custody threshold: that is, the offence and offender factors that rule out, and rule in, use of custody.
- Prevent disproportionate sentencing of repeat offenders by:
  - narrowing the recency and relevance criteria for treating previous convictions as pertinent to sentence;
  - reducing the weight accorded to previous convictions: for example, by stipulating limits on the aggravation of sentence; or by providing for gradual and limited progressive loss of mitigation for a clean record, in place of cumulative increases in severity for each conviction;
  - ruling out mandatory sentences for repeat offenders.
- Review and enhance the availability, scope and (as appropriate) intensity of non-custodial penalties for low level and repeat offenders, and associated treatment and other measures for tackling underlying causes of entrenched offending behaviour.
- Provide training for sentencers on all of the above.

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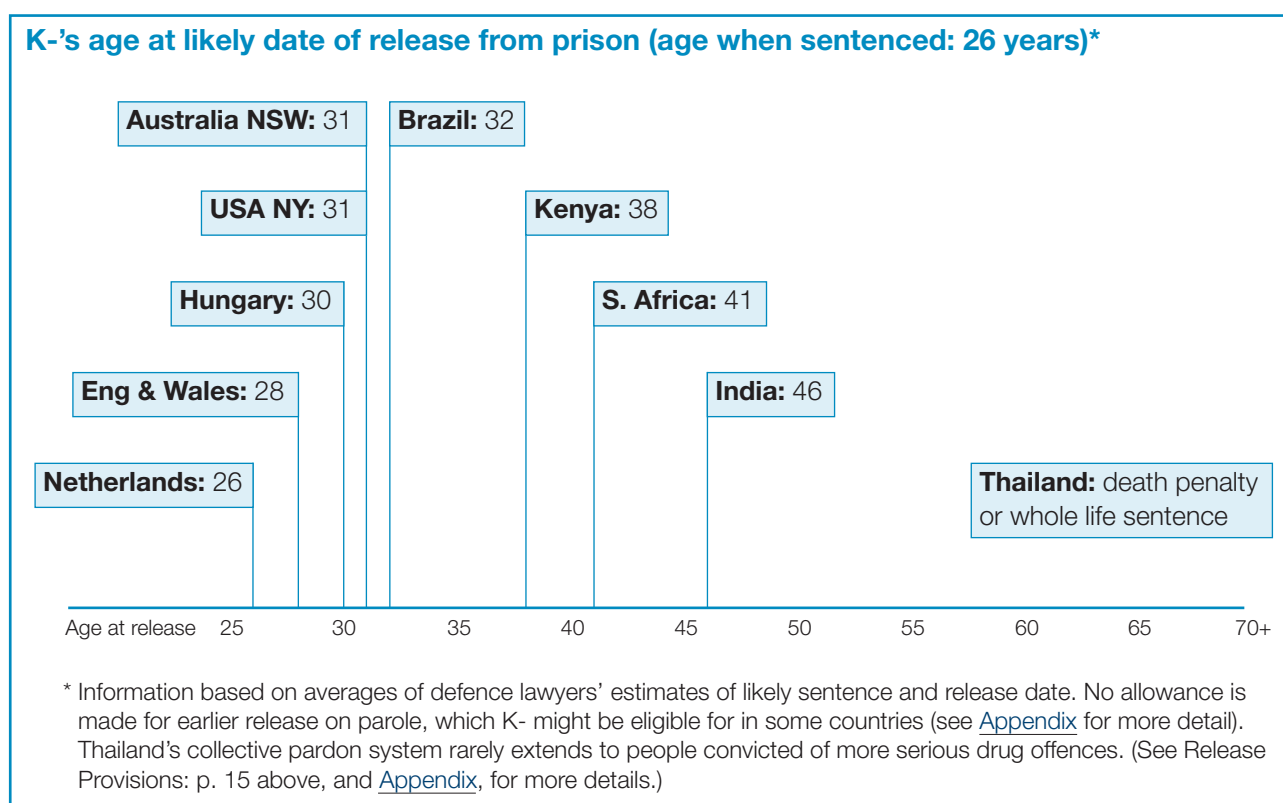
7 As seems to have occurred, for example, in Western Australia after the introduction of a bar on sentences of under six months (Attorney General of Western Australia, 2013).

8 Mills (2019); Scottish Government (2020); Duenkel (2017).

9 EuroPris (2020); Mills (2020); see also <https://www.prisonstudies.org/news/international-news-and-guidance-covid-19-and-prisons>

## 2. Drug offences

Over 2 million of the world's roughly 11 million prisoners are detained in relation to drugs offences (UN System Task Team, 2019). This number includes more than a third of women prisoners worldwide (UNODC, 2019), among whom are many 'drug mules' who – like K- in Vignette 2 – play a minor and easily replaceable part, for little financial gain, within organised criminal networks. Among our ten jurisdictions, approaches to importation offences of the kind depicted in Vignette 2 vary widely, as illustrated by the figure below.



Severe sentences to punish drug offences are a principal weapon in the 'war on drugs' still being waged in many countries, and are justified by policy-makers largely on grounds of deterrence. These policies have failed to contain the growth in either the demand for, or the supply of, drugs or to prevent the harms caused by drug dependency. Many countries' sentencing systems make little distinction between conduct of differing levels of culpability – with, for example, sentences for importation offences often focusing solely on type or quantity of drugs. In some countries, large fines are imposed on drug offenders in addition to lengthy custodial sentences, irrespective of means to pay – and with extra time in prison the usual penalty for non-payment.

Although states have a duty to confront serious drug importation offences and the violence and corruption associated with the drugs trade, this requires a transparent, fair and proportionate criminal justice response. Excessive use of imprisonment for drug-related offences is not an effective deterrent, but places a substantial burden on criminal justice systems. Indiscriminately punitive models of enforcement are especially harmful when concentrated on communities affected by high levels of poverty, unemployment and drug dependency, or on groups more likely to fall prey to exploitation and coercion such as women, children and people with histories of drug misuse.

Harsh sentencing laws are far from the universal response to drug offences and there is growing support for treatment-based interventions, whether within or outside the criminal justice system. Today, decriminalisation and/or comparatively lenient penalties for some conduct are a feature of drugs policy in many parts of the world.

### **Reform recommendations: drug offences**

- The sentencing framework applicable to drug offences should embody the principle of proportionality, distinguishing between:
  - conduct causing greater and lesser harm, with harsher sanctions reserved for cases involving larger quantities, more harmful substances, and larger scale operations; and
  - offenders with greater and lesser culpability, by reference to the role of the offender and the seriousness of offence. Relevant factors will include influence, control, coercion, exploitation and level of (expected) financial gain.
- Mitigating factors and personal circumstances should be reflected in the final sentence; as part of this, sentencers should have flexibility to make non-punitive disposals including treatment-based orders.
- Use of mandatory minimum sentences and life or other forms of indeterminate sentence should be minimised for drug offences.
- To ensure that prison is not used unless the seriousness of the offence justifies it, alternatives to custody – including treatment-based disposals – must be available and properly resourced.
- Fines should not be used in combination with prison sentences; where used in place of custodial sentences, fines should be proportionate to the offence and reflect ability to pay.
- Countries should review existing sentencing guidance, or consider the introduction of guidance, to reduce reliance on custody and to meet the goals of consistency, transparency and proportionality in the sentencing of drug offences.



### 3. Life imprisonment and sentencing for murder

In most of the ten jurisdictions (as in most other countries), L-, who in Vignette 3 commits pre-meditated murder, would be sentenced to life imprisonment, meaning the state has the power to imprison him until death. In some countries, life imprisonment would be the mandatory sentence.

A life sentence can take the form of an ‘irreducible life sentence’, meaning either that there is no possibility of release before death, or that release could only be ordered by a monarch, president or government minister, through the exercise of clemency. This is a sentence of ‘life without parole’ (‘LWOP’). Alternatively, life sentences can take the form of ‘life with parole’ (‘LWP’). People serving LWP sentences can be released, if a parole or other review board approves this, usually after a minimum custodial term has been served. This minimum period is either set by the sentencer, laid down in the statutory sentencing framework, or derived from a combination of the two. After release, the person is usually subject to conditions relating to their conduct, often for the rest of their lives. They may be required to report regularly to supervising authorities, wear a tag, or submit to drug or alcohol tests. Breach of these conditions, or committing a further offence, can trigger a recall to prison.

As of 2014, there were roughly 479,000 people serving formal life sentences – for murder and a multitude of other offences – around the world. In America, around one in seven of the country’s two million-plus prisoners are serving some form of life sentence; and the number of such prisoners exceeds the total prison population of America in the early 1970s (Sentencing Project, 2018). South Africa is another country that has seen a huge rise in the number of prisoners serving some form of life sentence. Globally the number has almost doubled since 2000 (Penal Reform International & University of Nottingham, 2018).

There are 33 countries in the world where the life sentence does not exist. Among countries that do use it, some reserve it for the most heinous offences, while in others it is available for a raft of offences including non-violent ones. Over 20 American states have LWOP provisions for non-violent crimes (Van Zyl Smit & Appleton, 2020). In the Netherlands, a wide range of offences can attract a life sentence, yet the sentence is hardly ever used. Worldwide, the number of offences for which life sentences are available – or mandated – has increased steadily since the 1990s, largely because of politically driven law-and-order arms races. The increase is also a by-product of some countries’ abolition (or reduced use) of the death penalty in line with international and regional human rights standards.<sup>10,11</sup>

Internationally, murder is the offence for which a life sentence is most commonly provided or mandated by law. However, the life sentence is by no means a universal response to murder: there is great disparity across jurisdictions in the likely sentence L- would receive (and how long he would spend in prison). In Brazil, a determinate sentence of at least 12 years applies. In the Netherlands, although the life sentence exists, it would not be imposed on L-, who would be more likely to get a custodial term of 3 to 12 years, followed by an open-ended period of secure psychiatric treatment if he is deemed to have a treatable condition.

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10 Of the ten countries in this project, the death penalty remains on the statute book as the sanction for murder (among other offences) in Kenya (where it was ruled unconstitutional by the Supreme Court in 2017), Thailand and India.

11 The international and regional instruments concerning the abolition of the death penalty include the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Protocol number 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and Protocol no. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Criticism of life sentences centres on proportionality. They are widely seen as inhumane because they prolong to excess the deprivations and pains of incarceration. Their mental health impact is severe, due to the uncertainty or impossibility of release, and the sense of hopelessness experienced by life-sentenced prisoners and their families (Willis & Zaitzow, 2015). The impact is particularly acute at the early stages of the sentence, all the more so for those sentenced to life at a young age (Crewe et al, 2020). A further criticism relates to the over-representation of people from certain racial and ethnic communities who are serving life sentences.

In the context of murder, criticism has largely focused on mandatory life sentences and mandatory minimum tariffs. These are seen as a potential cause of injustice, notably in cases involving self-defence, mercy killings, and accessory liability, and cases where background factors relating to the individual's age, maturity or mental health call for a more lenient sentence. From a different perspective, LWP sentences have come under criticism from the public on the grounds that 'life does not mean life' (Fitz-Gibbon, 2013). The sentencing of murder and other forms of homicide poses particularly difficult challenges, given the exceptionally high levels of harm caused to victims and the bereaved, and the profound public concern felt in relation to these cases.

### **Reform recommendations: life sentences and sentencing for murder**

- Mandatory life sentences for murder and other offences should be avoided: judges should instead have discretion to impose a fixed term sentence of proportionate length, or an indeterminate sentence where necessary on grounds of offence seriousness – always subject to supervision and review.
- Consideration should be given to removal of whole life terms and sentences of life without parole.
- Life sentences should be reserved for cases where the harm caused and the offender's culpability combine to make it a proportionate response. The sentencing framework must allow for aggravating, mitigating and background factors to be weighed and applied by the sentencer in a transparent manner.
- Parole or licence conditions for life sentenced prisoners must be proportionate in length and nature, tailored to the individual and focused on rehabilitation and maintaining public safety rather than a prolongation of punishment and loss of liberty. Recall processes must be fair and proportionate.
- In relation to the sentencing of murder and other homicide offences, the sentencing framework should ensure that proportionality remains the overarching principle guiding the sentencing exercise.
- Enhancing public understanding of, and trust in, life sentences and the sentencing of murder should be an integral part of sentencing reform.

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## Further resources: national sentencing frameworks

### Kenya

- Penal Code  
[https://www.unodc.org/res/cld/document/ken/1930/penal\\_code\\_html/PenalCode81of1948.pdf](https://www.unodc.org/res/cld/document/ken/1930/penal_code_html/PenalCode81of1948.pdf)
- Sentencing Guidelines  
<http://kenyalaw.org/kl/fileadmin/pdfdownloads/SentencingGuidelines.pdf>

### South Africa

- Criminal Law Amendment Act 1997  
<https://www.gov.za/documents/criminal-law-amendment-act>

### Brazil

- Penal Code  
[http://www.planalto.gov.br/ccivil\\_03/Decreto-Lei/Del2848.htm](http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm)

### USA

- US Sentencing Reform Act 1984  
<https://www.congress.gov/bill/98th-congress/house-bill/5773>
- Sentencing Commission guidelines  
<https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated>
- Federal Sentencing Act 18 U.S.C. § 3553(a)  
<https://www.govinfo.gov/content/pkg/USCODE-2011-title18/html/USCODE-2011-title18-partII-chap227.htm>

### India

- Penal Code  
<http://legislative.gov.in/sites/default/files/A1860-45.pdf>

## Thailand

- Penal Code  
[https://www.unodc.org/res/cld/document/tha/criminal-code-as-of-2008\\_html/Thailand\\_Criminal\\_Code.pdf](https://www.unodc.org/res/cld/document/tha/criminal-code-as-of-2008_html/Thailand_Criminal_Code.pdf)
- 'Yee-Tok' sentencing guidance system: for information on its operation, see Yampracha, S. (2016), 'Understanding Thai sentencing culture', unpublished PhD thesis, University of Strathclyde  
<https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.694578>

## England & Wales

- Criminal Justice Act 2003  
<https://www.legislation.gov.uk/ukpga/2003/44/contents>
- Sentencing Council website (all guidelines available online)  
<https://www.sentencingcouncil.org.uk/>

## Hungary

- Criminal Code  
[https://www.legislationline.org/download/id/5619/file/Hungary\\_Criminal\\_Code\\_of\\_2012\\_en.pdf](https://www.legislationline.org/download/id/5619/file/Hungary_Criminal_Code_of_2012_en.pdf)

## Netherlands

- Criminal Code: (unofficial translation)  
[https://www.legislationline.org/download/id/5619/file/Hungary\\_Criminal\\_Code\\_of\\_2012\\_en.pdf](https://www.legislationline.org/download/id/5619/file/Hungary_Criminal_Code_of_2012_en.pdf)
- Court sentencing guidelines  
<https://www.rechtspraak.nl/SiteCollectionDocuments/Orientatiepunten-en-afspraken-LOVS.pdf>
- Prosecutorial sentencing guidelines  
<https://www.om.nl/onderwerpen/beleidsregels>

## Australia

- Crimes Act 1914  
<https://www.legislation.gov.au/Details/C2014C00788>
- Criminal Code Act 1995  
<https://www.legislation.gov.au/Details/C2020C00245>
- Crimes (Sentencing Procedure) Act 1999, New South Wales  
<https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-1999-092#frnt-lt>



## Institute for Crime & Justice Policy Research

The Institute for Crime & Justice Policy Research (ICPR) is based in the Law School of [Birkbeck](#), University of London. ICPR conducts policy-oriented, academically-grounded research on all aspects of the criminal justice system. ICPR's work on this report forms part of the ICPR World Prison Research Programme, a programme of international comparative research on prisons and the use of imprisonment. Further details of ICPR's research are available at <http://www.icpr.org.uk/>

ICPR's book, *Imprisonment Worldwide: The current situation and an alternative future* (Coyle, Fair, Jacobson and Walmsley) was published in June 2016 and is available from Policy Press.

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## World Prison Brief

The World Prison Brief was established by Roy Walmsley and launched in September 2000 by the International Centre for Prison Studies. Since November 2014 the Brief has been hosted and maintained by the Institute for Crime & Justice Policy Research. The data held on the Brief (which is updated on a monthly basis) are largely derived from governmental or other official sources. The data used in this report were accessed from the database in December 2020. The World Prison Brief can be accessed at <http://prisonstudies.org/>