



GENDER ALERT ON COVID-19 AFGHANISTAN

August 20, 2020



Issue XIV: The Impact of COVID-19 on Women and Girls in Prisons and Detention Settings

Following the previous Gender Alerts,¹ UN Women and UNFPA, with contributions from the UNAMA, the International Legal Foundation (ILF) and Human Rights Watch (HRW), issue this 14th alert to continue to highlight the gender specific impacts of COVID-19 in Afghanistan. This alert focuses on the impact of COVID-19 on women and girls in prisons and detention settings, including girls in juvenile rehabilitation centers (JRCs). Specifically, the alert engages stakeholders on how to collectively ensure that the rights of women and girls in prisons and detention settings are protected, including through the provision of essential services, in line with the laws of the Islamic Republic of Afghanistan. It highlights the ways in which women and girls in prisons and detention settings have and will continue to have a distinct experience of COVID-19 and are at increased risk of infection and rights violations.

CONTEXT & EMERGING GENDER IMPACTS

This alert addresses several issues related to the imprisonment and detention of women and girls in Afghanistan, including existing and underlying human rights concerns, as well as emerging risks and trends due to COVID-19. The

COVID-19 crisis exacerbates the pre-existing risks and challenges related to women and girls' imprisonment including domestic violence, child marriage, healthcare access, economic concerns and health and safety risks in prison. Women in conflict with the law are a neglected population and little attention has previously been given to the complicated and intersecting issues at play, all of which are magnified in Afghanistan. Attention to these issues in the context of COVID-19 is essential to ensure that the rights of women and girls, including those in prisons and detention settings or post-release, are respected, protected and fulfilled during the crisis. In addition, the alert dedicates particular attention to the following areas, while also analyzing new challenges due to COVID-19: (1) background on women and girls in prison and detention settings in Afghanistan, including recent efforts towards release; and (2) women's and girls' rights within prisons and detention settings, and upon release – reintegration with dignity. The alert concludes with a set of preliminary recommendations for consideration by national and international stakeholders, including governmental and non-governmental actors, to support proactive measures to improve the protection of women's and girls' rights in prisons and detention settings, and upon release. The alert draws upon

¹Available on UN Women's Regional Website: <https://asiapacific.unwomen.org/en/digital-library/publications/2020/06/gender-alerts-on-covid-19-in-afghanistan-series>.

recent recommendations from the United Nations and other stakeholders, including those highlighted in the Concluding Observations of the Committee on the Elimination of Discrimination Against Women, as well as commitments by the Government of the Islamic Republic of Afghanistan.

Background on Women and Girls in Prison and Detention Settings Afghanistan and the Impact of COVID-19 as an Exacerbating Challenge and Risk

The experiences of individuals in contact with the criminal justice system are not gender neutral. Though women and girls make up a smaller proportion of people in the justice system than men and boys, their pathways and experiences are unique and, without a gender responsive approach, are less likely to be visible or addressed in order to ensure their rights are upheld from the point of initial contact with the justice system, during every stage of their case, and through to their release and reintegration into the community.

Women and girls continue to experience gender specific barriers in the justice system. Within a patriarchal society, structural discrimination perpetuates the marginalization of women and girls, heightening their vulnerability to situations that lead to being in conflict with the law and that violate their rights while in the criminal justice system. Deeply entrenched discriminatory and gender-biased laws, attitudes, norms and practices – including by justice and police officers – actively prevent women from getting justice. Women and girls are often detained on gender-specific offences and widespread gender bias in the justice system prevents them from being treated fairly. For example, women are less likely to be believed than men and more likely to have their experiences as domestic violence survivors discounted. And, women who interact with the judicial system and/or are incarcerated are not only at risk but are often subjected to at least one form of gender-based violence throughout the process. These issues are further exacerbated when women and girls are discriminated against based on multiple and intersecting identities, including ethnicity, class, ability, and others.

Overcoming gender bias in the judicial system that leads to the prosecution and incarceration of women and children

The 2009 Elimination of Violence against Women Law (EVAW Law) remains yet to be adequately implemented and women and girl survivors of violence are often arrested and prosecuted rather than supported. Despite the

existence of this law, women and girls continue to experience arrest, prosecution and conviction for acts that sometimes are not crimes under Afghan law, or should never be crimes according to international human rights law, such as running away from home, deciding independently on whom to marry, sex outside of marriage, being the victim of rape or other forms of sexual violence, or acting in self-defense in the face of domestic violence.

As of 2012,² 95% of girls and 50% of women imprisoned in Afghanistan were accused of the “moral crimes” of “running away” from home or zina (sex outside of marriage).³ Most of the women and girls charged with these crimes were fleeing forced marriage, underage marriage or domestic violence and gender-based violence at the household level. Women and girls charged with so-called “moral crimes” also often include survivors of rape or forced commercial sexual exploitation or trafficking. In addition, since 2015, half of ILF’s female clients who have served prison sentences were those who were convicted of “moral crimes”. Economic hardship caused by COVID-19 may lead to an increase in both forced commercial sexual exploitation and trafficking which, in turn, could lead to an increase in women who could be convicted of moral crimes.

While women and girls are charged and convicted, the abuses and violence they have fled or have experienced are often not investigated meaning that perpetrators of violence against women and girls continue to enjoy significant levels of impunity.⁴ There has been little progress also toward the training needed for judges and judicial officers to overcome bias and structural discrimination in criminal proceedings. As a result, women frequently face further disadvantages in criminal proceedings, an environment that generally treats defendants and defense lawyers unfavourably and is riddled with gender biases and corruption.

High risk of contracting the virus in prison and detention settings for women and their children

It is imperative to underscore the severity of the existing human rights challenges for women and girls in prison and detention settings in Afghanistan prior to the COVID-19 pandemic. Conditions in many women’s prisons and girls’ JRCs are crowded and unsanitary. The pandemic has become an exacerbating factor that, if not carefully and proactively addressed, with sustainable and long-term interventions through a multi-sectoral approach, may mean that there is a very real risk that imprisonment, arrest or conviction could turn into a death sentence for many women and girls.

²The research conducted by Human Rights Watch in 2012 remains the latest available.

³Human Rights Watch (2012). “I had to run away” - The Imprisonment of Women and Girls for “Moral Crimes” in Afghanistan.

⁴Human Rights Watch (2013). Afghanistan: Surge in Women Jailed for ‘Moral Crimes’.

There are particular health-related vulnerability issues for women and girls in places of deprivation of liberty where the risk of infection is high. People living in institutional settings are more likely to contract the virus due to its rapid spread in close-quarter settings. People in prisons experience significant barriers to accessing basic hygiene measures, with diminished guarantee of physical distance, and have limited access to COVID-19-related information. They may also experience higher rates of comorbidities due to poor conditions in prison (sanitation, nutrition), which could contribute to a poorer prognosis and/or more COVID-related complications. For instance, written information may not be understandable due to low literacy rates and, the stigmatization of those suffering from COVID-19 paired with fear of quarantine and isolation measures may also in turn prevent individuals from reporting symptoms and accessing treatment. In addition, there are persistent challenges in accessing testing and health-care, already limited for the general population in Afghanistan, as well as critical personal protective equipment, such as masks, cleaning products and soap. Thus, the impact of COVID-19 on women in prisons and detention settings has become one of the more significant challenges during this period in an already challenging protection context for women and girls' human rights.

In addition, as highlighted in the 10th Gender Alert,⁵ there are distinct risks for imprisoned persons with disabilities who may face heightened risk of contracting COVID-19 due to underlying health conditions, difficulty in enforcing social distancing amongst residents and staff, and abandonment by staff.⁶ However, due to a number of factors, including a lack of documentation of women with disabilities, there is no data available on the percentage of women with disabilities in prisons or detention facilities.

The release of prisoners and detainees to mitigate the spread of COVID-19 in prisons and detention settings

Since the outbreak of COVID-19, the Office of the President has issued three Presidential Decrees that pardoned and commuted the sentences of incarcerated persons in Afghanistan. These decrees were explicitly aimed at mitigating the spread of COVID-19 in prisons and detention facilities. The first, issued in March 2020, saw the release of thousands of prisoners, including women and girls, those with certain medical conditions, those serving certain sentence lengths, and everyone over the age of 55, as long as they were not convicted of crimes disqualified for pardon, crimes under the EVAW Law, or security crimes. The second Presidential Decree, issued in April 2020, expanded the parameters of detainees and prisoners

who could be released to women and girls convicted of intentional murder. On 21 May, a third Presidential Decree further added categories of prisoners who could benefit from sentence commutation and reduction in financial penalties. Importantly, the President's Office also directed the Attorney General's Office to issue guidance on the release of pre-trial detainees. The Attorney General's guidance emphasizes that prosecutors should avoid detaining suspects and accused individuals pre-trial where the law provides for their release. Shortly thereafter, the Supreme Court issued a circular advising Afghanistan's courts to use their discretion to impose bail and release on parole.

Despite these three Presidential decrees and guidance, as of mid-July, only approximately 10,000 prisoners and detainees have been released, out of an estimated total of 41,000 prisoners and detainees. Therefore, concerns related to overcrowding and the spread of COVID-19 in places of incarceration remain. Notably, the number of female prisoners and detainees released appears to be low despite expansive language in the first and second decrees, with about 400 women released. Access to legal aid and lawyers is critical, even post-conviction while in prison, to advocate for their release and to ensure that those who qualify under those decrees are actually released.

The imposition of guarantees or bail is preventing prisoners and detainee releases. Some persons who were eligible for release under the decrees reportedly continue to be detained, at times due to their inability to afford bail. This issue is particularly likely to have impacted women and girls for three reasons: 1) they often do not have access to, or have decision-making roles over their family's finances; 2) they are in situations of poverty and are unable to afford or access the funds required; and 3) if payment is provided by male relatives for a woman or girl, it creates a heightened power dynamic and vulnerability to exploitation.

It is also the case that many women in prisons may feel afraid or unable to leave due to fear of reprisal from the community and household and related safety issues, and lack of access to basic livelihood needs once released, such as simply knowing where their next meal will come from.

Moreover, one category of female prisoners and detainees did not benefit from the three Presidential Decrees, namely women detained for having an alleged link to anti-government elements, such as being family members, especially in relation to the Islamic State - Khorasan province (ISKP). With a large number of ISKP members surrendering since the end of 2019, more than 100 women and their accompanying children continue to be held,

⁵UN Women and the Afghanistan Independent Human Rights Commission

⁶United Nations Human Rights Office of the High Commissioner (2020). COVID-19 and the Rights of Persons with Disabilities: Guidance.

mostly in pre-trial detention in Kabul.

The lack of support for women and girls after release, including for those who may not be able to return to their families, presents another challenge. Reasons for not being able to reintegrate within their families include: 1) they are not married and/or do not have families to return to; 2) family members may be unwilling to accept them due to the stigma associated with their crime or generally being in prison; 3) they choose to not return to families because they fear for their safety. Many women and girls released from places of deprivation of liberty require humanitarian assistance, as well as other critical services such as safe houses and transitional safety nets as they leave prison or detention settings.⁷ When women and their accompanying children are released, there must be service providers who have the resources to help them and are prepared and able to find appropriate spaces to house any who do not have a safe place to return to.

Women's Rights within the Prison System and upon Release – Reintegration with Dignity

Virginity testing and the perpetuation of violence against women

Despite being prohibited under the Penal Code, except in certain circumstances,⁸ the practice of “virginity testing” continues to be routinely used on women and girls suspected of “moral crimes” and survivors of rape. Government-employed medical professionals continue to conduct these exams and supply “findings”,⁹ for use as evidence in criminal proceedings. As noted by the CEDAW Committee in its latest Concluding Observations on Afghanistan, the results of so-called “virginity tests” continue to be used to discredit women in criminal proceedings.¹⁰

Virginity testing, an invasive procedure of no scientific or medical value, is a serious violation of women and girls’ human rights. The practice is a form of sexual violence and violates the right to be free from cruel, inhuman, or degrading treatment or punishment under the International Covenant on Civil and Political Rights and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, both of which have been ratified by Afghanistan. The practice also violates the rights to privacy and physical integrity, as well as the right to the highest attainable standard of health.¹² Moreover, this continuing practice very likely has a chilling effect on women and girls who are survivors of violence, especially on their willingness to report sexual violence, which

contributes to widespread impunity for perpetrators of violence.

Lack of adequate safe spaces to welcome women and children released from prisons and detention settings

As noted above, pursuant to the Presidential Decrees and subsequent guidance intended to mitigate the spread of COVID-19, hundreds of imprisoned women and an unknown number of their children have been released. However, gaps in social protection, stigma and lack of family and community support has meant that many require support at the time of their release. There remains an extremely limited number of places available to welcome them safely and provide services, resources, and support tailored to their needs, including safe shelter, physical and mental healthcare, legal aid, livelihood and vocational training and age-appropriate services for their children.

Some of the released women and their children have been sent to Women Protection Centers (WPCs). However, these shelters are inadequate in number and space across Afghanistan, with only 22 in operation in 20 of the 34 provinces. After spending time in places of detention and/or prison, women may feel reluctant to seek refuge in another institutional setting. The WPCs are also designed specifically for survivors of violence. Problematically, women in conflict with the law, who are often survivors of violence themselves, are often excluded from these shelters and consequently face additional obstacles to receiving needed support from service providers upon their release. In addition to the social stigma women and girls released from prison or detention experience from society at large, their families and communities, they are often also subjected to stigma from precisely the community meant to support them – service providers and other survivors who can fail to recognize the trauma and abuse released women prisoners/detainees have suffered. Although Transitional Houses established specifically for women transitioning out of prison exist, lack of funding and capacity leaves them unable to meet the need for all the women who require their services.

Social Stigma and Rejection

For women and girls deprived of their liberty, it is imperative to ensure that their release does not result in their removal from one dangerous situation to another, in their homes or communities. With COVID-19 related lockdowns and other movement restrictions, domestic and other forms of gender-based violence have dramatical-

⁷S/2020/549.

⁸Penal Code, 2017, Article 640(2).

⁹Human Rights Watch (2017). *Raped, then Assaulted by the Afghan Justice System - Abusive 'Virginity Exams' Re-Traumatize Victims*.

¹⁰See also Footnote 16.

¹¹Concluding Observations, CEDAW Committee (CEDAW/C/AFG/CO/3), para. 23 (g).

¹²WHO, OHCHR, UN Women, *Eliminating Virginity Testing: An Interagency Statement*, 2018 (<https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1>)

ly increased globally and in Afghanistan.¹³ Women and girls released from prisons and detention settings face a heightened risk for experiencing violence and abuse due to social and family stigma given their association with the criminal justice system, as well as other intersecting identities and experiences. It is important to ensure that women and girls are supported when exiting the corrections system and re-entering society, all the more so during situations of crisis, including COVID-19. Holistic support and quality legal representation are necessary to address issue areas that are inextricably linked with how women and girls encounter the justice and corrections system, and their needs for safe reintegration into society.

RECOMMENDATIONS:

The following preliminary recommendations reflect an overall need for national and international stakeholders to ensure coordination, cooperation and commitment to the protection of the rights of women and girls in and outside of prison and detention settings. In follow up to this brief, UN Women will continue to engage with key partners to deepen efforts to advance women's rights overall, including women in prisons and detention facilities. In addition, UN Women will continue to support international and national partners to ensure that these efforts are coordinated, inclusive and gender responsive

National and international actors

National and international actors can contribute to responses that slow the spread of COVID-19 and address underlying abuses that make women and girls in prisons and detention settings particularly vulnerable to the virus by:

COVID-19 Related

1. Releasing and advocating for the immediate release of all women and girls accused or convicted of "moral crimes," such as zina or running away.
2. Releasing and advocating for the immediate release of all women and girls held pretrial, without requiring the payment of cash bail or requiring them to obtain a guarantor, in line with Attorney General Guidance.
3. Releasing all women and girls in prisons and detention facilities who are at particular risk from the virus, have caregiving responsibilities or pose little risk to the community, and removing any obstacles to this release, such as fines or fees or bail requirements. This is in line with the recent report of the United Nations on Respond-

ing to the socio-economic impacts of COVID-19.¹⁴

4. Prioritizing testing for COVID-19 and promoting preventive measures within corrections institutions and places of detention in order to reduce infection risks by addressing overcrowding, implementing physical distancing measures, modifying visiting hours and arrangements, providing and mandating the use of personal and other protective equipment, and improving hygiene conditions.
5. Ensuring that women released from prison and detention settings are included in humanitarian assistance planning and implementation, including women's access to safe houses and transitional safety nets, as well as services including safe accommodation, health care, legal aid, livelihood and vocational training, and age-appropriate services for children, which are critical for women and their children upon their release.

Law and Policy Reform

6. Decriminalizing "moral crimes," in line with CEDAW Committee recommendations.¹⁵
7. Fully and effectively banning "virginity testing" in line with the CEDAW Committee recommendation on the prohibition of so-called 'virginity tests' and the use of their results as evidence in criminal proceedings.¹⁶
8. Ensuring the appointment of quality legal aid representation to all women and girls at the time of arrest.
9. Promoting better recovery by adopting and reinforcing deinstitutionalization strategies to close institutions, including prisons and JRCs, reduce incarceration, and return people to the community, and strengthening support and services, including for persons with disabilities and older persons.¹⁷
10. Providing and advocating for the provision of "mandatory training for judges, prosecutors, the police and other law enforcement officers at the local and provincial levels on the strict application of anti-trafficking legislation, the gender-sensitive treatment of victims and identification, protection and law enforcement strategies."¹⁸
11. Developing and advocating for the development of "standard operating procedure to ensure the early identification of trafficking victims and their referral to the appropriate services"¹⁹ to ensure that women in conflict with the law and women survivors of violence are not prosecuted.
12. Undertaking long term initiatives to provide literacy courses, skill-based training and or cooperative partnerships for women to earn livelihoods within prisons and be equipped with transferable skills upon their release.

¹³See, UN Women, Policy Brief: COVID-19 and Violence Against Women and Girls: Addressing the Shadow Pandemic (2020). See also, UN Women, Gender Alerts on COVID-19 in Afghanistan Series (2020).

¹⁴Secretary-General's Report on the Socio-Economic Impact of COVID-19 ((2020).

¹⁵CEDAW/C/AFG/CO/3, para. 24 (b), reiterating recommendations (CEDAW/C/AFG/CO/1-2, para. 25).

¹⁶CEDAW/C/AFG/CO/3, para. 23 (h), reiterating recommendations from CEDAW/C/AFG/CO/1-2, para. 25).

¹⁷Handicap International Humanity & Inclusion (2020). COVID-19 in humanitarian contexts: no excuses to leave persons with disabilities behind! Evidence from HI's operations in humanitarian settings.

¹⁸CEDAW/C/AFG/CO/3, para. 28 (c).

¹⁹CEDAW/C/AFG/CO/3, para. 28 (b).