Title Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: Prison system progress in adopting the Bangkok Rules.

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Abstract

Purpose : The global spotlight is increasingly shone on the situation of women in the male dominated prison environment. Africa has observed a 24% increase in its female prison population in the past decade. This year is the 10 year anniversary of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) adopted by the General Assembly on 21 December 2010.

Design/methodology/approach: Using a legal realist approach we examine South Africa's progress in adopting the Bangkok Rules. We document the historical evolution of the penal system since colonial times, focused on the development of recognition, protection and promotion of human rights of prisoners, and an assessment of incarcerated women's situation over time.

Findings: The analysis of the human rights treaties, the non-binding international and regional human rights instruments, African court and domestic jurisprudence, and extant academic and policy based literature is cognizant of the evolutionary nature of racial socio-political dimensions in South Africa, and the indeterminate nature of application of historical/existing domestic laws, policies and standards of care when evaluated against the rule of law.

Originality: To date, there has been no legal realist assessment of the situation of women in South Africa's prisons. We incorporate race and gendered intersectionality and move beyond hetero-normative ideologies of incarcerated women and the prohibition of discrimination in South African rights assurance. We acknowledge State policy making processes, and we argue for substantive equality of all women deprived of their liberty in South Africa.

Keywords

Bangkok Rules, Mandela Rules, South Africa, human rights, prisoners, women

It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.

Nelson Mandela

Introduction

On any given day, almost 11 million people globally are detained in prisons or other closed settings (PRI, 2020). Women deprived of their liberty are a minority even though globally the female prison population is growing more rapidly than the male prison population (PRI, 2020). Compared with men, women have distinct gendered pathways into crime and are generally imprisoned for crimes of survival heavily underpinned by poverty (PRI, 2017; 2020). Most have a lower socioeconomic status, many are from racial or ethnic minority backgrounds, and have suffered disproportionally from sexual, domestic, physical and emotional violence (Atabay, 2008; PRI, 2017). The global spotlight is increasingly shone on gender mainstreaming in prisons resulting in international non-binding instruments, United Nations (UN) guidance documents on standards of gender appropriate care for women in the male dominated prison environment, and situation assessments on conditions in female prisons.

Global prison data indicates that Africa has observed a 24% increase in its female prison population in the past decade (PRI, 2020). This year is also the 10 year anniversary of the United Nations (UN) Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the "Bangkok Rules") (UN, 2010) adopted by the General Assembly on 21 December 2010. The Bangkok Rules are soft law principles which lay the foundation for intensified efforts to support women deprived of their liberty (Barberet and Jackson, 2017), and complement the Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), the Standard Minimum Rules for Non-custodial Measures (the "Tokyo Rules") (UN, 1991a), the Basic Principles for the Treatment of Prisoners) (UN General Assembly, 1991b), and the revised Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules") (UN, 2016).

We document the historical evolution of the South African penal system since colonial times, in terms of the development of the recognition, protection and promotion of human rights of prisoners in general and provide a focused assessment of women's situation over time. Using a legal realist approach (Leiter, 2015) the focus is on scrutinising South Africa's progress in adopting the "Bangkok Rules". The analysis of the human rights treaties, the non-binding international and regional human rights instruments, African court and domestic jurisprudence, and extant academic and policy-based literature is cognizant of the evolutionary nature of racial socio-political dimensions in South Africa, and the indeterminate nature of application of historical/existing domestic laws, policies and standards of care when evaluated against the rule of law.

A realist account is developed with an eye on determining whether the changing South African prison system had/has a culture of respect for the rule of law regarding human rights assurance for women in prison (overwhelmingly black African), cognisant of their engendered and racial

vulnerability, the dominant masculinisation of incarceration, and prison system operations in upholding their unique rights. By recognising the inherent tensions of protection versus protectionism of women in the "Bangkok Rules" (Dias-Vieira and Ciuffoletti, 2014), the analysis incorporates race and gendered intersectionality and moves beyond the the hetero-normative ideology of incarcerated women, their fragility and their biological functions, and the prohibition of discrimination in contemporary South African rights assurance. We acknowledge State policy making processes, and how such process and outcomes operate within the prison system itself and by moving beyond this, we argue for greater substantive equality of all women deprived of their liberty in South Africa.

South Africa's Prisons: Colonialism and the Legacies of Apartheid

South Africa's prison system was established in the 19th century during the expansion of colonial rule (Van Zyl Smit, 1992). Prisons are not an institution indigenous to South Africa (Sarkin, 2008). Prisons were used to exert political control and colonial rule (Bunting, 1960; Steinberg, 2005). Punishment as an institution was used by white law makers to legitimise racial superiority and embed a form of social jurisdiction (Gillespie, 2011). Following the 1910 Union of South Africa, the consolidated Prisons and Reformatories Act was enacted in 1911 (Human Rights Watch, 1994). The South African criminal justice system and its subsequent development was underpinned by progressive institutionalization of racial and gender discrimination (Human Rights Watch, 1994; Filippi, 2011; Gillespie, 2011). Apartheid was enforced by legislation by the National Party from 1948 to 1994 (Dissel and Ellise, 2002). Examples include the Population Registration Act (1950); the Natives Abolition of Passes and Coordination of Documents Act (1952) and the Promotion of Bantu Self Government Act (1959) (South African History Online, 2021). Prison conditions especially for African prisoners of both genders were harsh, with the prevailing official attitude that the African prisoner was expendable and unredeemable (Bunting, 1960; Human Rights Watch, 1994). Strict racial, gender and conduct based segregation was employed within prisons, as codified under the 1911 Prisons and Reformatories Act (and the later 1959 Act) (DCS, 2004; Filippi, 2011). The conditions (i.e. diet, sanitation), treatment (i.e. work) and punishment were contingent on skin colour and gender, with punishment for transgressions and the complete inability for African prisoners to lodge any official complaints (Bunting, 1960; Filippi, 2011). All non-white prisoners received harsh treatment (i.e. incessant beatings and verbal abuse), experienced enforced work and torture (Bunting, 1960), sexual violations and lengthy solitary confinement, whilst living in atrocious conditions with primitive sanitation (Filippi, 2011). The 1945 Lansdowne Commission on Penal and Prison Reform was of the view that the Prisons Act had not encouraged reform, but instead was liable for the inequitable harsh prison system. It was critical of its militarised approach and recommended a renewed focus on rehabilitation, particularly for indigent Africans (DCS, 2008). In 1955 a commission inspection reported all was satisfactory (Bunting, 1960).

Although the later Prisons Act of 1959 was cognisant of the UN Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), in terms of incorporating rehabilitation, it omitted critical

features regarding punishment, torture and inhumane treatment. Alex Le Guma illustrated the dire conditions in prisons, and coined the term *'colour bar'* in 1956 (Bunting, 1960);

> *'Non-Europeans get different types of work under different conditions from Europeans, different food, and different sleeping facilities, all of them inferior of course. Cells are packed tight with 40 to 50 convicts—where the weak are condemned to an existence of terror and depravity, young and defenceless men are forced to submit to abnormal relations and are threatened with death or torture if they refuse…..'*

Sonia Bunting documented the dire conditions and ill treatment of African women incarcerated in 1960, far removed from white prisoners (Bunting, 1960). These women (and their children) suffered severely (i.e. beatings, lack of food, sexual violence, denial of menstrual products), with white female prisoners observing;

> *'I saw a wardress whip a pregnant African woman, Miss Troup stated. Miss du Toit said similar incidents were frequent. She also saw a wardress hit a woman in an advanced state of pregnancy and with a baby of about sixteen months on her back.'*

Troup and du Toit observed a prison warden saying; *'Kaffirs [derogatory term for Black South Africans] are nothing better than animals'* (Bunting, 1960). In 1989, the Federation of South African Women (FSAW) reported on continued human rights breaches in female prisons, included beatings, torture, rape, sexual harassment, use of chains as restraints, and the solitary confinement of women (FSAW, 1989).

Prison System Developments post 1994

In 1990 apartheid within the prison system was formally abolished, with transition toward exclusion of all references to race, and the repeal of regulations regarding the outranking of all *'non-white'* staff members by white staff (Dissel and Ellise, 2002; African Criminal Justice Reform, 2005). Subsequent prison legislative amendments included the entitlement of prisoner human rights and reversal of racial segregation of the prison population. The government reconsidered its positionality regarding crime and punishment as well as the treatment of prisoners and conditions of detention (Human Rights Watch, 1994). Prison services became part of the new Department of Correctional Services. The Prisons Act of 1959 was amended to change its name to Correctional Services Act but then the 1959 Act was repealed and replaced by the 1998 Act. The Act was enshrined in the new Constitution of the Republic of South Africa 108 (1996), with Section 35(2) (e) aligned to the 1948 Universal Declaration of Human Rights (UN, 1948), and contained guarantees for the human dignity of prisoners (Dissel and Ellise , 2002). The South African Human Rights Commission observed the intention to develop a new prison system aligned to the new Constitution and with international norms and standards (South African Human Rights Commission, 1998). The death penalty was abolished in 1995 (*The State v Makwanyane and Another*), with the court announcing its role to protect the marginalised including those in conflict with the law or deprived of their liberty (Cameron, 2020).

The African Commission on Human and Peoples' Rights (ACHPR) adopted several regional instruments to extend the rights and protections of people deprived of their liberty, based on the Standard Minimum Rules for the Treatment of Prisoners (UN, 1955), Standard Minimum Rules for Non-custodial Measures (UN, 1991a) and the Basic Principles for the Treatment of Prisoners (UN, 1991b). These were the 1995 Resolution on Prisons in Africa; the 1997 Resolution on the Right to Recourse Procedure and Fair Trial and the 1996 Kampala Declaration on Prison Conditions in Africa. With regard to gender equality, South Africa had ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (UN, 1979) in 1995 without reservations, and was committed to promotion of the human rights of women via the 1995 Beijing Platform of Action (UN, 1995). Also during that timeframe, South Africa ratified the Convention on the Rights of the Child (CRC) (UN, 1989) in 1995, the African Charter on Human and Peoples' Rights (OAU, 1981) in 1996, the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1998 and the African Charter on the Rights and Welfare of the Child (OAU, 1999).

Prisons however continued to operate at severe over-capacity (Steinberg, 2005), despite optimism at the time that high crime rates were caused by apartheid and that in the democratic South Africa, crime rates would fall and crime would be addressed by a fair criminal justice system, imposing more lenient sentences (Van Zyl Smit, 2004). A harsh punitive approach however was adopted with a range of sentence jurisdictions at court levels. The then Commissioner of Correctional Services stated in 1997: *'[t]hey are animals. They must never see the sunlight again'* (Van Zyl Smit, 2004). Legislative changes indicative of this approach included the Criminal Law Amendment Act 105 (1997), Criminal Procedure Amendment Acts (1995, 1997), Correctional Services Act 111 (1998) and the Prevention of Organised Crime Act 121 (1998).

South Africa ratified the International Convention on Civil and Political Rights (ICCPR) (UN General Assembly, 1966a) and the Convention against Torture and other cruel or degrading treatment or punishment (CAT) (UN Commission on Human Rights, 1998) in 1998. In the same year, the Judiciary Inspectorate of Prisons was established. In 2001 the *Jali* Commission was set up in response to fears that the DCS had lost control over the prison system and commenced an investigation into corruption, violence, mal-administration and intimidation in the DCS (van der Berg, 2007). It reported on official corruption, malpractice, the impact of the minimum sentencing regime and high pre-trial rates causing congestion and rights breaches, abuse of staff and prisoners and other offences (Muntingh, 2016). Women's rights were rather ignored in this investigation, with the exception of three instances; prison warden complicity in facilitating illicit sexual activities at the Johannesburg female prison; the sexual harassment of female staff and the violation of rights of a transexual prisoner (van der Berg, 2007).

Evolution of Human and Gendered Rights in South African Prisons: A Gendered Critique

South Africa ratified the Second Optional Protocol for ICCPR (aiming at abolition of the death penalty) in 2002. During the Aughts at the regional levels, a range of additional human rights instruments regarding detention settings were created, with the 2002 Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhumane or Degrading Treatment or Punishment in Africa, the 2002 Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and the 2003 Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa. Gender equality also become increasingly visible; the 2003 African Charter on the Rights of Women in Africa recognising the situation of incarcerated women in Article XXIV (*Special protection of Women in Distress*) mandated States to provide women including pregnant or nursing women in detention with an environment suitable for their condition, and the right to be treated with dignity (African Union, 2003). South Africa ratified the CEDAW Optional Protocol in 2005, which underpinned the 2008 Southern African Development Community (SADC) Protocol on Gender and Development (SADC, 2008). In 2015, it ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN, 1966b), followed by the Optional Protocol of the Convention on Torture (OPT-CAT) (UN, 2003).

Increased consideration of the situation of incarcerated women was observed internationally post 2010, after the adoption of the "Bangkok Rules" by the UN General Assembly. The non-binding normative "Mandela Rules" were subsequently updated in 2016 (UN, 2016). However, whilst international norms and standards exist, and the regional African frameworks identify women as a vulnerable prison group, they offered scant practical features on how minimum standards at the prison level should be achieved. The "Mandela Rules" only refer to women in several instances; regarding cis-normative segregation (*Rule* 11); requirement for special accommodations for pre and post-natal care and treatment of women (*Rule* 28); prohibition of solitary confinement of women (*Rule* 45) and of use of restraints (*Rule* 48); right to conjugal visits (Rule 58); gender regarding prison personnel (*Rule* 74) and the supervision of women only by female staff (*Rule* 81). The non-binding "Bangkok Rules" provide a range of standards particular to women deprived of their liberty and their unique gender specific needs (particularly *Rules* 4, 40-41, 67-70). Whilst they advocate for greater attention to women's rights whilst detained, they are attenuated in focus by their narrow patriarchal view of women as mothers, omit women who do not confirm to cis-normative values (transwomen, lesbian women) and fail to consider aspects of intersectionality (Barberet and Jackson, 2017; Van Hout and Crowley, 2021).

This blinkered lens has filtered into the regional adoption of standards. The 1995 Kampala Declaration is limited in its focus on women; although the Declaration calls for an improvement in the situation of women prisoners, by identifying them as vulnerable (along with the old, disabled, those mentally, physically or terminally ill, foreign nationals, juvenile), it only refers to them requiring particular attention and appropriate treatment of the special needs of women (but omitting any detail on pregnant women) (Sarkin, 2008). The 2008 Robben Island Guidelines mention women twice; with regard to engaging with the Special Rapporteur on the rights of women in Africa, and with regard to

conditions of detention in holding women in appropriate and separate facilities (ACHPR, 2008). In 2004, the South African Government extended an invitation to the ACHPR's Special Rapporteur on Prisons and Conditions of Detention in Africa to visit the country and inspect its detention facilities. The Special Rapporteur completed her inspection, putting forward a range of recommendations that strengthened the requirement to identify women, including the pregnant and nursing as vulnerable in the detention setting (ACHPR, 2012).

The Nexus of Gender, Race and Incarceration

Despite progress in recognising the rights of prisoners in Africa, critique of the South African bail system, its minimum sentencing regime and continued high pre-trial detention continues today (de Ruiter and Hardy, 2018; Cameron, 2020; Van Hout and Chimbga, 2020). In 2021, 238 functioning prisons are operating at 137% capacity. Whilst some prisons have female wings, there are nine female prisons. See Table 1.

Insert Table 1 South African Prison population 2019/2020 **about here.**

Despite prison reforms, the prison population remains racially stratified, and continues to be reflective of the indigent majority (with less than 2% classed as white) (DCS, 2020). Women are a relatively stable minority prison population in the male dominated South African prison system. 7% are white South African females (DCS, 2020). See Table 2.

Insert Table 2. Pre-trial and sentenced female prison population trend from 2014/2015 to 2019/20 **about here**

Conditions are indicative of dated colonial infrastructure, are severely overcrowded and conducive to spread of disease (HIV, TB, COVID-19, leptospirosis) (Sloth-Neilsen and Ehlers, 2005; Dissel, 2016; Nevin and Nagisa-Keehn, 2018; Van Hout and Mhlanga Gunda, 2018). Extreme physical and sexual violence, drugs and gangsterism continues (Steinberg, 2004). Congestion and ill-resourced healthcare for prisoners have underpinned calls for increased use of both parole, and medical parole (Mujuzi, 2011; Maseko, 2017). In 2016, civil society lobbying resulted in a court ruling against the State with a historic order to reduce occupancy of Pollsmoor Correctional Centre from 252% to 150% over a six-month period (*Sonke Gender Justice v Government of South Africa*). The effect was short-lived as occupancy was reduced by redistributing to other detention facilities (Nevin and Nagisa-Keehn, 2018).

There is a dearth of academic literature on the situation of women in African (and South African) prisons (Van Hout and Mhlanga Gunda, 2018; Mhlanga *et al.*, 2019). Their experiences and challenges still do not feature in contemporary South African feminist discourses, let alone in the mainstream societal debates (Hopkins, 2016). There are some small-scale studies on South African

women in the criminal justice systems, but very little is known about the legacies of apartheid still felt in female prisons, despite evidence for continued structural and economic disadvantages experienced by indigent women (Haffejee *et al.*, 2005; du Preez, 2008; Luyt and du Preez, 2010; Artz *et al.*, 2012; Africa, 2015; Artz and Hoffman-Wanderer, 2017). The intersectionality of systemic gender inequality, poverty stratified along gender lines, trauma, gender based violence against women (GBVAW), mental health issues, and marginalisation, prior to incarceration continue to be reflective of their wider positionality in South African society (Haffejee *et al.*, 2005; Community Law Centre, 2007; Artz *et al.*, 2012; Steyn and Booyens, 2018; UNODC, 2019; ARASA, 2019). They have distinct gendered pathways into crime, often heavily underpinned by crimes of survival, with continued gender and race discrimination in prison (du Preez, 2006; Van Hout and Chimbga, 2020; Parry, 2020; Lauwereys, 2021). Many academic critiques of the South African penal system and rights-based commentaries on prisoner human rights since 1994 either ignore women in their entirety, or simply refer to women in the sense of separation of sexes (Bukurura, 2002; de Vos, 2005; Muntingh, 2006). There is one record, where women are omitted, but with one solitary reference to a trans-women placed in a male prison (van der Berg, 2007). They are equally invisible in UN reporting at the country level, despite prisoners as a whole being mentioned in available universal periodic reviews, special procedures (violence against women) and concluding observations (CAT, CESC, CERD, CEDAW, UNHRC) by the UN. These records reflect continued UN concern around GBVAW in the community and the practice of '*Ukuthwala' [traditional cultural practice by which older men abduct young women for purposes of marriage]*, and the "so called" corrective rape of sexual minority women. They ignore the unique vulnerabilities of women in detention settings and exposure to custodial violence (OHCHR, 2019; CESCR, 2017; UNHRC, 2017).

At the policy levels, whilst the White Paper on Corrections in South Africa (African Criminal Justice Reform, 2005) recognised the impact of GBVAW, gender inequality and the inherent power relations between men and women in South Africa, little has changed for indigent South African women in the criminal justice system (Van Hout and Mhlanga Gunda, 2018). The Commission on Gender Equality, established in 1997, reveals no detail on women in detention settings. The current DCS (DCS, 2020) reporting still conveys a dogmatic cis-normative perspective of woman (and the care of women) by only referring to female prisoners regarding segregation by sex (S7 (2)b) and as mothers to be admitted with their infants (S20). Whilst the Correctional Services Act of 1998 does prescribe the obligation to create a gender-sensitive environment in prisons, and South Africa endorses the Bangkok Rules, it falls short in providing concrete guidelines on how to achieve this and implementation is not reflected well on the ground. There are observed gaps in government oversight. Unacceptable overcrowding levels and standards of care (*Sonke Gender Justice v Government of South Africa*) and the level of independence of the JICS have been challenged successfully by Sonke Gender Justice (*Sonke Gender Justice NPC v President of the Republic of South Africa and Others*). The Just Detention Guide (Kleijn *et al.*, 2017), whilst providing detailed assessment criteria for visiting judges regarding

the housing and standards of care, does not refer to either the "Bangkok" or "Tokyo Rules". In 2018, the Judicial Inspectorate for Correctional Services reported that Pollsmoor Correctional Centre was still in violation of the Overcrowding Court Order of 2016 (JICS, 2018) and stated;

> *'What is most alarming, and has not been taken cognisance of, is the large amount of females (732) incarcerated which includes eight infants. The majority of cases that have been reported in the media have focused on the male population, but in this instance the female centre is almost 200% over capacity'.*

The only right that prisoners should be deprived of is their liberty (Safer Spaces, 2021). On the ground, observable breaches in the human rights of women in South African prisons centre on failure to meet minimum standards of care. Whilst they are segregated from men (*Rule* 8a "Mandela Rules"), they live in overcrowded prisons, potentially breaching the right to reasonable accommodation (Steinberg, 2005). The 2005 White Paper stated that whilst women do not experience the extent of congestion as men, they are often incarcerated some distance from their families, despite the Departments obligation to incarcerate close to family, particularly if they are mothers. In practice however, this results in pre-trial detention mixed with sentenced women, and whilst cognisant of the importance of the relationship between mother and child, this is contra *Rule* 26 of the "Bangkok Rules". The average South African prisoner in a communal cell does not have the bare minimum floor space (set by the Committee for the Prevention of Torture at four square meters per person), which could be declared by courts as cruel or degrading (Steinberg, 2005). The 2015 report by Justice Edwin Cameron when visiting Pollsmoor Women's Centre observed an occupancy rate of 300%, with an estimated 65 prisoners per cell (sharing one toilet and one shower). He illustrated the abhorrent conditions for women;

> *'The extent of overcrowding, unsanitary conditions sickness, emaciated physical appearance of the detainees, and overall deplorable living conditions was profoundly disturbing. The remand cell visited was in as poor a condition as the male remand cells. 94 women were crowded into a poorly aerated room. The women shared beds or slept on the floor on thin mattresses. The mattresses were stinking. There was no working toilet, a clogged sink drain and only cold water. They showed us tattered and torn sheets and blankets, which were infested with lice. The cell was also infested with cockroaches.'* (Cameron, 2015)

Little appeared to change in subsequent years, with minimal progress in addressing the basic rights of the living conditions of these women. Academic studies reported on continued overcrowding (including the mixing of juveniles with adults; lack of sufficient floor space; insufficient bathrooms) and poor conditions (inadequate provision of toilet paper, soap, clothing, bedding, healthcare, sanitation, nutrition, availability of menstrual products, access to exercise, education and reading

materials) (Gordin and Cloete, 2013; Agaboola, 2016; Maseko, 2017) contra Section 35(3)of the Constitution and Section 8 (1 and 2) of the Correctional Services Act (adequate provisions regarding the nutritional requirements of all prisoners, and of pregnant women) (see *Bapoo v Minister of Justice and Correctional Services and Others*). Most recently the JICS reported;

> *'The legal mandate is to guard over the human dignity of inmates, which is inextricably linked to the dignity of all in our country. Whereas overcrowding is a huge general problem in South African correctional centres, the situation of women and infants – especially in Pollsmoor – is unacceptable, sad, and indeed inhumane.'* (JICS, 2018)

Exposure to custodial violence is concerning. Investigative reporting underscores the traumatic and violent conditions experienced by women in South African prisons, underpinned by congestion, and including reference to violence, sexual exploitation, mental illness underpinned by prior and custodial violence, gang activity and disease, solitary confinement as punishment under the guise of segregation and the lack of provision of basic hygiene and adequate nutrition (Hopkins, 2016; Mahlati and Nare, 2019; Khumalo, 2021). Hence, there are some observable breaches in the right to an environment free from torture and inhumane treatment ("Mandela Rule" 1; "Bangkok Rule" 32). Studies report on women's vulnerability to sexual abuse, women to women rape, transactional same-sex-relationships to survive and sexual exploitation by both prisoners and guards in South African prisons (Haffejee, 2005; Agboola, 2015; Kang'ethe *et al.*, 2020). Artz and colleagues posit how the correctional system develops into a de facto extension of violent domestic relations (Artz *et al.*, 2012). This is particularly concerning given the histories of GBVAW experienced by incarcerated women, and the lasting repercussions on successful reintegration on release (Van Hout and Chimbga, 2020). Further, and rather alarming, even though the risk of sexual assault is high in female prisons, women are not explicitly referred to in the DCS/Sonke Policy to Address Sexual Assault (Sonke Gender Justice, 2013). Two studies report on dehumanisation and humiliating treatment, and punitive attitudes of staff against women prisoners who use drugs, with invasive searches by staff and the denial of opiate substitution treatment in South African prisons, despite the Special Rapporteur taking note that punitive denial causing drug withdrawal (known as *"arosto"*) constitutes inhumane and degrading punishment (Hopkins, 2016; SANPUD, 2019). This is contra "Bangkok Rule" 15, which states that prisons should facilitate gender sensitive treatment programmes for women, cognisant of their special histories, cultural backgrounds and vulnerabilities. The "Bangkok Rules" also call on authorities to develop alternative screening methods and that personal searches of women should only be conducted by trained female staff. Our analysis reveals in this sense, a glaring need for further gender sensitive training and capacity building of staff in female prisons in alignment with the "Bangkok Rules" (*Rules* 32, 33).

It should be noted that whilst there are historical and recent challenges regarding prison conditions under right to life and the prohibition of cruel, inhuman or degrading treatment at the ACHPR

and the African Court of Human and People's Rights (ACtHPR), there are none from female applicants and none emanate from South Africa. See Table 3.

Insert Table 3 'African Regional Level Jurisprudence' **about here**

Further, there is little domestic jurisprudence on behalf of women in prison, with the vast bulk of litigation against the State taken by male claimants. There are a series of domestic landmark cases generally centred on the rights to life (abolition of the death penalty), protection from inhumane treatment, right to health and health care (particularly regarding DCS liability regarding contraction of HIV and TB during incarceration, rights and access to free medical treatment including antiretroviral (ARV) treatment; informed consent around HIV testing, medical parole) and protection from sexual abuse (Nagisa-Keehn and Nevin, 2018). See Table 4. In 2010, the UN Human Rights Committee, ruled that South Africa had violated *Articles* 10 (*para* 1), and 7 ICCPR in conjunction with Article 2 (*para* 3) in a prison case, because prison officials had not investigated a prisoner's ill-treatment and sexual abuse in prison, and they had denied him access to medical care (including HIV testing), legal assistance and his family for one month (see *McCallum v. South Africa*). Very few claimants however are women, with the two we located centred on the impact of poor prison conditions and the contraction of infectious diseases (HIV, TB) during incarceration, and awareness of rights regarding State liability around disease acquisition in prison in 2005 and 2015 (see *James v Minister of Correctional Services; S v Magida).* Of note is a third case where a court ruled on the constitutional right to express gender identity as transwoman (albeit anatomically male) in a male prison (see *September v Subramoney NO and Others).* See Table 4.

Insert Table 4 'Domestic Jurisprudence' **about here**

There is however progress in the right to equivalence of health care. Non-discriminatory and adequate health services for women in prisons equivalent to that available in the community remain mandated by the "Mandela Rules" (*Rules* 2, 24, 26, 32) and "Bangkok Rules" (*Rules* 6-18, 48) and must not be limited to pre- and post-natal care. South Africa is a flagship for the SADC region (Parliamentary Monitoring Group, 2014) as it has taken some concerted measures to ensure women (and their children) are treated with dignity and care, with significant improvements since 2012 in the establishment of Mother and Baby Units in several female prisons (Durban, Pollsmoor) (ACHPR, 2004; Gowland, 2011; OHCHR, 2015; Van Hout and Mhlanga Gunda, 2018). One study however, has reported on the insufficient provision of sanitation for mothers and children at the Pretoria Correctional Centre (Hesselink and Dastile, 2010).

There are additional engendered inadequacies in the South African criminal justice system beyond the scope of the paper, and reported elsewhere. They refer to insufficient use of non-custodial sentencing for women, and requisite rehabilitation and reintegration elements enshrined in the "Tokyo

Rules) (Van Hout and Chimbga, 2020), and bringing South Africa, in line with "Bangkok Rules" 26 and 29 (special social reintegration requirements of women), which recognize that women need particular assistance due to their lower educational and socio-economic status in many countries. We reiterate this is crucial given the complexities of race and gender discrimination, GBVAW, poverty related crime and the revolving door of incarceration in South Africa. Further, we recommend a similar investigation regarding rights of the child in South African detention settings.

Conclusion

Despite international (and regional African) norms and standards upholding the rights of prisoners, the UN continues to voice global concern regarding human rights breaches and the precarious situation of women in detention settings (UN Committee against Torture, 2015). The situation in South Africa is no different. Whilst it is encouraging to see the improvement in healthcare for women and their children in South African prisons in recent times, conditions still remain poor and unacceptable when benchmarked against normative minimum standards of care, particularly as they relate to living conditions, reasonable and safe accommodation and protection from custodial violence. It is imperative that the visibility of women (including those with infants) is enhanced in correctional legislation, penal policies and criminal justice practice in South Africa. Racial discrimination in South Africa in this sense has aggravated gender discrimination.

It is questionable if a truly effective complaints mechanism that incarcerated women may turn to for assistance is indeed in place in South Africa. Strategic public interest litigation is warranted to stimulate prison reforms. Civil society organisations to a great extent, contribute to holding government accountable. There are possible routes regarding individual complaints under the CCPR-OPT1 *Articles* 2, 10 and 26 with regard to rights of prisoners to humane treatment, non-discriminatory protection of the law and equality before the law of a State and the right to an effective remedy for violations. South Africa has also ratified the CAT and OPT-CAT, and has accepted the inquiry procedures under CAT *Article* 20 and individual complaints under CAT *Article* 22. Equally important however is that whilst South Africa has ratified both the CEDAW and CRC, and accepts inquiries under CEDAW-OPT *Articles* 8-9 and CERD *Article* 14, it does not accept individual complaints or inquiry mechanisms under the CRC-OP *Article* 13.

We speculate that full adoption of the "Bangkok Rules" is hindered in South Africa due to the historical legacies which underpin the structural inequalities experienced by African women in society, and the continued invisible nature of these women in the prison system. Incarcerated women are omitted from UN reporting on South Africa, yet they constitute a (very vulnerable) minority warranting attention due to their engendered and racial inequalities both in the community and prison and their exposure to multiple levels of discrimination and stigma as Black Africans, as women, as offenders and, where applicable, as members of the LGBTQ minority community. It is imperative they are

included in future CEDAW and UN country periodic reporting. They deserve substantive equality. South Africa has extended a standing invitation to all thematic special procedures since 17 July 2003.

South Africa's commitment to the sustainable development agenda will be called into question; particularly regarding gender equality and empowerment in women and girls (SDG 5) and regarding peace, justice and strong institution (SDG 16), and their efforts to ensure that women, particularly those facing intersectional discrimination in the criminal justice system are not left behind in future prison and criminal justice reforms. In 2019, the SADC Secretariat hosted the SADC symbolic launch of the Corrections/Prisons Womens Network as a formal arm of the SADC Corrections/prisons sub-Committee. This is an encouraging step toward supporting women who work in prisons and raises awareness of the need to improve standards of care for women deprived of their liberty in Africa.

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Region	Sentenced Offenders			Unsentenced Inmates			Total number of Inmates
	Males	Females	Total Number of Sentenced offenders	Males	Females	Total Number of Unsentenced offenders	
Eastern Cape	13 981	238	14 219	6 221	119	6 340	20 559
Gauteng	21 412	661	22 073	13 661	477	14 138	36 211
Free State & Northern Cape	15 382	349	15 731	5 221	91	5 312	21 043
KwaZulu-Natal	17 779	400	18 179	6 784	157	6 941	25 120
Western Cape	14 464	512	14 976	11 394	474	11 868	26 844
Limpopo, Mpumalanga and North West	17 289	374	17 663	6 879	130	7 009	24 672
TOTAL	**100 307**	**2 534**	**108 841**	**50 160**	**1 448**	**51 608**	**154 449**

Table 1 South African Prison population 2019/2020 (DCS, 2020)

Period	2014/2015	2015/2016	2016/2017	2017/2018	2018/2019	2019/2020
Sentenced	3 029	3 036	2 979	2 956	2 957	2354
Unsentenced	1 089	1 157	1 195	1 370	1 359	1448
Total Inmate population	**4 118**	**4 193**	**4 174**	**4 326**	**4 316**	**3982**

Table 2. Pre-trial and sentenced female prison population trend from 2014/2015 to 2019/20 (DCS, 2020)

Krishna Achuthan and Amnesty International v.Malawi(1994)ACHPR Comm Nos.64/92,68/92,78/92. *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de l'Homme, Les Te'moins de Jehovah v. Zaire* (1996) ACHPR Comm Nos.25/89,47/90,56/ 91,100/93 para 47. *International PEN and Others v. Nigeria* (1998)ACHPR Comm Nos.137/94,139/94,154/86,161/97 *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* (1999) ACHPR Comm Nos 143/95,150/96 *Malawi African Association and others v. Mauritania* (2000) ACHPR Comm Nos.54/91,61/91,98/93,164/97 a`196/97 and 210/98 *Lohé lssa Konaté v Burkina Faso*(provisional measures)(2013)1AfCLR310 *African Commission on Human and Peoples' Rights v Libya* (provisional measures)(2013)1AfCLR145 *African Commission on Human and Peoples' Rights v Libya*(merits)(2016)1AfCLR 153 *Konaté v Burkina Faso* (reparations)(2016)1AfCLR346 *Abubakari v Tanzania* (merits)(2016)1AfCLR599 *Mugesera v Rwanda* (provisional measures)(2017)2AfCLR 149 *Guehi v Tanzania* (merits and reparations)(2018)2AfCLR477

Table 3 African Regional Level Jurisprudence

S v Makwanyane [1995] ZACC 3 at 151, 1995 (3) S.A. 391*;*
Van Biljon and Others v Minister of Correctional Services and Others [1997] (4) SA 441 (C);
B and Others v. Minister of Correctional Services and Others [1997] (4) SA 441 (C); 1997 (6) BCLR 789 (C)
Stanfield v Minister of Correctional Services [2003] ZAWCHC 46
Du Plooy v. Minister of Correctional Services [2004] 3 All SA 613 (T)
Mazibuko v. Minister of Correctional Services, et al Case No: 38151 / 05 [2007] JOL 18957 (T)
EN and Others v Government of RSA and Others 006 (6) SA 575 (D); [2007] (1) BCLR 84 (SAHC Durban 2006);
Lee v Minister of Correctional Services 2012[2012] ZACC 30
Sonke Gender Justice v Government of South Africa 24087/15 (unreported)
Sonke Gender Justice NPC v President of the Republic of South Africa and Others [2020] ZACC para 38-40.

UN level
McCallum v. South Africa [2010] UN Doc CCPR/C/100/D/1818/2008 (2 November 2010)

Female Applicants
James v Minister of Correctional Services (795/2014) [2015] ZAWCHC 181 (1 December 2015)
S v Magida 2005 (2) SACR 591 (SCA)

Transgender Applicant
September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC) (23 September 2019).

Table 4 Domestic Jurisprudence