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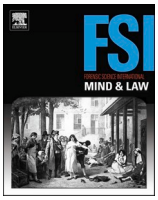

Navigating the complexities of (trans) gender equality rights within the parameters of reasonable accommodation and security tensions in South African prisons: The judgement of *September v Subramoney*

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ABSTRACT

Within the heterogenous global prison population of about 11.7 million, transgender prisoners have unique vulnerabilities and are exposed to substantial risks and harm. Their situation has been viewed as a *"double punishment"* by encompassing the system lack of gender recognition and exposure to traumatic experiences of detention often tantamount to torture. In Africa, sexual minority rights remain a contentious issue, and there is little documented about the situation of incarcerated transgender people.

South Africa is one of the most progressive African countries in terms of equality legislation and advancing the rights of sexual and gender minorities. A legal realist review was conducted of the 2019 South African Equality Court judgement of *September v Subramoney*, based on case decisions and by scrutinizing the international and regional human rights protections and rights assurance mechanisms which encompass the fundamental rights of detained transgender individuals. These are not limited to protection from custodial violence, prohibition of torture and discrimination but include conditions of accommodation, right to express their gender identity and access to gender affirming healthcare. The subsequent legal realist account critiques the impact of this judgement based on extant published literature (empirical, humanitarian, and UN Committee reporting) and jurisprudence in other jurisdictions cognisant of increasing strategic litigation in the field of transgender rights. The implications of this ground-breaking judgement are considered, with a particular lens focusing on the rights of trans-prisoners (particularly trans-women as most vulnerable) to equality, but also dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment. These rights are positioned within the boundaries of safe and reasonable accommodation, ability to gender express and prison system capacity to deal with security tensions in high risk *cis*-normative detention environments.

1. Background

The global prison population continue to rise, with approximately 11.7 million people detained on any given day (Penal Reform International PRI, 2021). Within the heterogenous prison population, there are particularly vulnerable prisoner groups with unique needs and who are at greater risk of exposure to trauma, custodial violence and harm (United Nations Office on Drugs and Crime UNODC, 2009; 2016). These include transgender people (Rodgers et al., 2017; Brömdal et al., 2019; Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021) who are defined by the World Health Organization(WHO) (2020) as "*a diverse group of people whose internal sense of gender is different than that which they were assigned at birth and whose gender identity and expression does not conform to the norms and expectations traditionally associated with their sex at birth*". Beyond legal gender identity, transgender includes those undergoing medical treatment to support the transitioning process of their physical state to conform to their internal sense of gender identity, as well as those living in accordance with their gender identity in the absence of medical treatment (WHO, 2020). Global data on numbers of incarcerated transgender people remains limited due to the complexities around prison system reporting on committal (for example legal sex status as opposed to gender identity or expression) and under-reporting by detained individuals due to fear and disclosure concerns (PRI, 2020; United Nations Development Programme UNDP, 2020). Available evidence in some countries has indicated the over-representation of *trans*-women (male to female) compared to *trans*-men in detention settings (James et al., 2016; Van Hout et al., 2020; Van Hout & Crowley, 2021). Notwithstanding their vulnerability

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to health harms (for example HIV, sexual exploitation) and involvement in crimes of poverty and disadvantage, many countries where same-sex activity is a criminal offence continue to prosecute sexual minorities, including transgender people (Clark, 2014; UNDP, 2020).

Transgender prisoners experience a myriad of trauma which includes exposure to physical and sexual violence, systemic discrimination and social stigma prior to and during incarceration (Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021). Their situation has been viewed as a *"double punishment''* (Erni, 2013, p. 139) by encompassing the custodial system lack of gender recognition and their exposure to substantial traumatic experiences of detention, often deemed tantamount to torture and degrading treatment (Van Hout et al., 2020). In many countries there is a lack of official and cultural understanding and concern regarding their care, treatment and support needs whilst incarcerated, leading to system suppression of their identity, frequent *'othering'* of transgender prisoners and traumatic experiences of minority stress, alienation and victimization in prison (Lydon et al., 2015; Brockmann et al., 2019; Van Hout et al., 2020; Van Hout & Crowley, 2021; Donohue et al., 2021). Transgender lived realities of incarceration are often grounded in their inability to gender express (for example restricted access to gender-appropriate clothing and products), the amplified experience of transphobia, discrimination and gender maltreatment by prison staff and fellow prisoners (for example intentional misgendering and harassment), exposure to custodial violence (sexual and physical abuse), experience of excessive solitary confinement as *"de facto"* protective measure by prison officials, and restricted or denied access to gender affirming medical care (hormone therapy and surgery) (World Professional Association for Transgender Healthcare (WPATH), 2012; Van Hout et al., 2020; UNDP, 2020).

They are particularly vulnerable to sexual violence including rape by prison officials and fellow prisoners (Amnesty International, 2011; United Nations UN Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN-CAT, 2014; UN-CAT, 2018; UN Committee on the Elimination of all Forms of Discrimination Against Women UN-CEDAW, 2017; Human Rights Watch, 2018; Van Hout & Crowley, 2021; Van Hout et al., 2021). There are structural barriers in detention settings which compound capacities to protect *trans*-prisoners from harm. These generally centre on inadequate prison system resources and suitable infrastructure, lack of cultural sensitivity and lack of clinical competence of prison staff (Van Hout et al., 2020). Consequently high rates of poor mental health of *trans*--prisoners are reported globally which include high rates of depression and anxiety disorders, substance abuse and self-harm (including attempted auto-castration, non-suicidal self-injury, and death by suicide) whilst in detention (UNAIDS, 2014; Van Hout et al., 2020; UNDP, 2020; Kilty, 2020).

2. Upholding the rights of transgender people in South Africa

Historically same-sexual orientation and (trans) gender identity in Africa was not socially stigmatised nor was it associated with ill-health or disease. Murray et al. (2021) in *'Boy-Wives and Female Husbands: Studies in African Homosexualities'* document the presence of diversity in same-sex love and non-binary genders as widespread in African societies; and state: *"there are no examples of traditional African belief systems that singled out same-sex relations as sinful or linked them to concepts of disease or mental health — except where Christianity and Islam have been adopted"* (Murray et al., 2021). The practice of same sex marriage was documented in over 40 pre-colonial African societies, indicative that it is not homosexuality and trans identities that are a colonial import into Africa, but rather homophobia and transphobia (Elnaiem, 2021). Sexual minority rights in contemporary Africa are still a contentious issue, with same-sexuality portrayed by media and politicians in many African countries as *"un-African"* and a *"white disease"* imported from the West (Nordic Africa Institute, 2017; Hairsine, 2019; Sowemimo, 2019). Same-sexual activity is criminalised in 34 African countries (Amnesty International UK, 2018). Political, legal and religious frameworks in many of African countries exacerbate trans and homophobic attitudes, and related discrimination and hate crimes toward sexual minorities (Gloppen & Rakner, 2019). As a consequence of these socio-legal conditions, transgender people remain invisible, ignored and discriminated against in Africa (Jobson et al., 2012).

South Africa is viewed as one of the most progressive countries in Africa in terms of acknowledging the vulnerabilities of members of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA+) community and advancing their rights. The South African government has promulgated its commitment to upholding transgender people's rights (including in its 2017 submission to the UN Committee on Economic Cultural and Social Rights CESC) and has an established task team to ensure transgender people's rights are broadly respected and supported by official processes regarding changes in gender status (Sloth-Nielsen, 2021a). During 2018 the South African Government mandated the drafting of the National Strategic Plan on Gender-Based Violence and Femicide (NSP on GBVF) (Department of Women, Youth and Persons with Disabilities, 2020). The NSP on GBVF provides for a cohesive strategic framework to guide the national response to the hyper endemic GBVF crisis in which South Africa finds itself. The scope and approach of the NSP focuses on comprehensively and strategically responding to GBVF, with a specific focus on a lifecycle approach to violence against ***all*** women (across age, physical location, disability, sexual orientation, sexual and gender identity, nationality and other diversities). Despite historical discrimination, harassment and abuse of transgender people in South Africa (Sanger, 2014; OUT, 2016) and stigma within South African healthcare settings (Bateman, 2011; Luvuno et al., 2019), a positive public sentiment toward the rights of transgender people has emerged in recent times (Luhur et al., 2021).

South Africa was the first African country to adopt a constitution (*Section* 9 of the South African Constitution) that explicitly prohibits discrimination on the basis of gender, sex and sexual orientation (amongst other categories) (Luhur et al., 2021). The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter PEPUDA) was *inter alia* promulgated to create a caring South African society. It prohibits unfair discrimination, hate speech and harassment on a number of prohibited grounds, including religion, conscience, belief and culture. The Bill of Rights in the South African Constitution also prohibits unfair discrimination on these and other grounds, and contains pertinent rights such as the right to freedom of association and the right to freedom of expression. All laws, including the PEPUDA, must be interpreted in accordance with the spirit, purport and objectives of the Bill of Rights (Kok, 2017). The South African government however recognises lacunas in its legislative and policy framework regarding the country's constitutional obligations to ensure equality amongst the people of South Africa. This is *inter alia* evident from the address by the South African Minister of Justice and Correctional Services, Ronald Lamola during the South Africa-European Union (SA-EU) dialogue on policy improvements for transgender and intersex persons conference in November 2021 (South African Government, 2021); *"… we must assess to what extent has the consolidation of our democracy matured to address systemic inequalities generated in this context by discriminatory practices, by patriarchy, homophobia, transphobia, toxic masculinity, toxic masculinity and stigmatization. One of the threats to the full realisation and implementation of our Constitution is the lack of consciousness in our communities.* ***Equality*** *is still conditional in many of our communities."*

Whilst gender identity is not explicitly protected by the South African Constitution, domestic jurisprudence has however interpreted that gender identity falls under the non-discrimination provisions based on gender. In recent years the South African Human Rights Commission and lower courts (including the Equality Court, Limpopo Magistrates Court) have set precedence by application of the constitutional prohibition on discrimination in cases involving harassment of transgender individuals (including school children) to constitute hate speech, unfair

discrimination and harassment and with award of damages (for example *Lallu v Van Staden* in 2011 and *Mphela v Manamela and others* in 2016) (Sloth-Nielsen, 2021a). The Civil Union Act also permits same-sex marriages in South Africa and allows for transgender people to marry someone of the same gender identity. There are however complexities with regard to this as noted in the 2017 case of *KOS and Others v Minister of Home Affairs and Others*, where three recently transitioned married persons applied to the Department of Home Affairs to have their gender marker changed on various identity documents. In one of the couples the Department refused the request and instructed the couple to divorce and remarry under the Civil Union Act, with the rationale that the previously heterosexual marriage was sanctioned under the Marriage Act, which does not permit same-sex marriages. The Court held that this denial was unconstitutional and violated the person's rights to administrative justice, equality, and human dignity, and ordered that the alteration of the gender marker on the birth register be granted regardless of the statute under which the partnership was solemnized.

3. The approach

Despite obligations and recommendations in international and regional human rights' instruments, and a range of non-binding principles mandating standards of care, very few countries fully uphold and protect the rights of transgender people in prison (WHO, 2014; UNDP, 2020; Van Hout & Crowley, 2021). The Equality Court judgement of *September v Subramoney* is the first of its kind in South Africa (and Africa). It contributes to growing jurisprudence globally which challenges the invisible nature of *trans*-prisoners, and advocates for respect of their gender expression, their right to equality and ultimately their protection from harm. It also highlights the complexities of fundamental rights assurances within prison system operations.

A legal realist review was conducted on this South African Equality Court judgement. Legal realism as naturalistic theory underpinning this review approach was selected due to its emphasis on the law as derived from real world observations regarding human rights, welfare and social interests, and public policies (Leiter, 2015). This socio-legal approach scrutinized various international and African human rights protections and rights assurance mechanisms which encompass the fundamental rights of transgender individuals deprived of their liberty (not limited to protection from custodial violence, prohibition of torture, degrading treatment and discrimination but including conditions of accommodation, right to express their gender identity and access to gender affirming healthcare). The subsequent legal realist account assesses and critiques the impact of the *September v Subramoney* judgement based on extant published literature (empirical, humanitarian, and UN Committee reporting) and jurisprudence in other jurisdictions cognisant of the increasing strategic litigation in the field of transgender rights in detention. The implications of this unique South African judgement are considered, with a particular lens focusing on the fundamental rights of *trans*-prisoners (particularly *trans*-women as most vulnerable) to equality, dignity, freedom of expression, dignified and humane detention. These rights are positioned within the boundaries of safe and reasonable accommodation, ability to gender express and prison system capacity to deal with security tensions in high risk *cis*-normative detention environments.

Human rights dimensions relevant at the global level for prison policy and practice reform, and avenues for further investigation are presented in Table 1 (*Implications for practice, policy, and research*).

Table 1
Implications for practice, policy, and research.

- Adaptation of existing good practice from other jurisdictions for example as outlined in the UNDP (2020) and WPATH (2012) guidance reports using a whole prison system approach.
- Design, development and establishment of a sustainable gender responsive prison systems with appropriate standard operating procedures and services reflecting the fundamental rights, needs and respect for dignity aligned to that prisoners' gender expression, not their sex assignment at birth, legal status or legal gender recognition.
- Development of comprehensive and non-discriminatory prison policies cognisant of the prioritisation of safety and security of transgender people in prisons, and spanning aspects of gender affirmation, non-discrimination and harm prevention, independent monitoring and supervision.
- Sensitisation of all stakeholders across the criminal justice system, and the design, development and establishment of gender sensitive policies and pathways across the criminal justice system including provision of appropriate housing in consultation with the transgender individual, equal access to gender sensitive and gender affirming medical and mental health care, humane treatment by officials in designated placements and ultimately the protection from violence and harm.
- Capacity building and sensitisation of prison officials to accept and respect self-identification of transgender prisoners, their fundamental rights and the provision of robust complaint mechanisms for transgender individuals.
- Regular independent monitoring and evaluation of rights-based gender responsive prison programmes.
- Implementation of routine health surveillance (for example HIV) and access to prison settings of academic research teams.

4. September v subramoney

The *September v Subramoney* case centres on Jade September, a transwoman convicted of murder, theft and attempted theft of a motor vehicle and serving a 15-year sentence in a male prison in Helderstroom Maximum Correctional Centre in Caledon, Cape Town. September was anatomically male but identified as a woman, and whilst incarcerated was not able to access or undergo medical treatment (including gender reassignment surgery) as provided for under the Alteration of Sex Description and Sex Status Act 49 of 2003. September claimed to be exposed to gender maltreatment, misgendering and inhumane treatment due to the system enforcement of rigid discriminatory practices and regulations regarding gender identity and expression. Prison officials refused to address September using she/her pronouns, and denied her the right to express her gender through her jewellery, gender-affirming underwear, dress, hairstyle and use of cosmetics. September also claimed to be verbally harassed by officials, with her personal items confiscated, forced to cut off her braided hair and reported experience of a period in segregated confinement as punishment for her aggressive behaviour toward prison staff when her cosmetics were confiscated.

Represented by Lawyers for Human Rights, September claimed *"her gender identity is the core and the essence of who she is as a human being"* and claimed that she had experienced unfair treatment and discrimination for expression of her gender identity contra the PEPUDA. September asserted that her treatment in prison constituted unfair discrimination, that the South African Department of Correctional Services (DCS) was denying her the space to express her gender identity, preventing her from exercising rights to equality, dignity and freedom of expression whilst in detention, and that the refusal by DCS officials to enable her to express her gender identity amounted to unfair discrimination under the South African Constitution, the PEPUDA, international law, and foreign and domestic judgments. September sought an order to enable her to express her gender identity whilst in the male prison (wearing make-up, long hair, being addressed using she/her), and an order that DCS standard operating procedures were unconstitutional to the extent that they prohibited transgender prisoners from expressing their gender identity in prisons. September also argued that placement in solitary confinement as punishment for gender identity expression amounted to *"harassment"* under the PEPUDA, and that she was not offered the opportunity to change her gender marker on her identity documents or access gender affirming health care, all of which resulted in her incarceration as a man.

The State in defence of the DCS argued that September had been treated appropriately as male (anatomically and legally as on her identity documents), that until undergoing gender reassignment surgery, September must be treated and regarded as a male prisoner, and that if any discrimination had occurred, that those actions were not unfair, as any limitations on her rights were underpinned by safety and

protection from harm (*"as expressing herself as a female, would expose the applicant to sexual violence"*). The State further disputed that September had been placed in segregated confinement for expressing her gender, and maintained that this administrative process had occurred in response to her aggressive behaviour toward staff.

The *September v Subramoney* case centred on the obligation of the DCS in terms of the PEPUDA to provide for reasonable and safe accommodation for diversity, whether a prison has to take steps to reasonably accommodate *trans*-women prisoners currently in a male prison, including permitting them to wear make-up, female clothing and to be addressed using female pronouns, and that which does not undermine her safety or the safety of detention facilities. Under the PEPUDA, the principle of *"reasonable accommodation"* requires the DCS to take reasonable steps to accommodate diversity. The Court held that the State's DCS had unfairly discriminated against September by not allowing her to express her gender identity and ruled that the denial of September's right to express her gender identity in prison amounted to cruel, degrading or inhuman treatment, as evident by the distress ensured by September. The impact of denial of gender expression in the form of clothes, makeup and hair was deemed to impact on the right to freedom of expression, and ultimately violate September's equality and dignity rights. Whilst *"transgender"* does not appear as a listed ground of discrimination in the South Africa Constitution or the PEPUDA, discrimination on the basis of gender identity was deemed to merit protection. The judge exemplified the Constitution's stance on gender identity by stating: *"Respect for human dignity thus requires the recognition of and respect for the unique identity and expression of each person"* and was critical of the DCS actions relating to failure to allow September to express her gender identity. The States argument regarding safety was rejected with the ruling that this was *"manifestly unfair"* given the extreme hardship and prejudice experienced by September.

The DCS operational procedures which prohibit transgender prisoners from wearing gender appropriate clothing were declared to be unconstitutional, and the DCS were ordered to permit September to express her identity as a woman (and be addressed as such using female pronouns), and provide for reasonable accommodation (for example an option to be placed in a single cell and enabling her to express her gender identity, or be transferred to a prison designated for females). Whilst, the Court did not find September's placement in segregation as discriminatory as it was related to a system sanction of her aggressive behaviour toward officials, it did refer to the DCS responsibility to apply least restrictive measures (*"available to ensure her safety instead of refusing to allow her to express her gender identity"*) to protect September in the event she was granted permission to express her identity, namely in the form of a single cell. Whilst it was cognisant of the resource constraints navigated by the DCS, it recommended that changes be applied to ensure *"that all inmates, including the applicant, and all other transgender inmates are treated with the necessary dignity and respect which is their constitutional right."* The Court further ordered that DCS employees undergo mandatory transgender sensitivity training, and issued a range of recommendations which centred on the adoption of policy which facilitates the access by transgender and gender diverse prisoners to clothing, make up and products designated for female prisoners/appropriate to their self-identified gender, the deferral of decision making to medical professionals and therapists not DCS prison officials, and the establishment of separate detention facilities for transgender prisoners. The piloting of separate wings for transgender prisoners in other countries (India and Thailand) were mentioned.

5. Challenging the boundaries of (trans) gender expression in South African detention settings

The *September v Subramoney* judgement aligns with extant global literature which documents the substantial trauma encountered by transgender prisoners, particularly *trans*-women and their experience of unmet gender-affirmation needs, human rights violations, traumas, harms and inadequate standards of care whilst incarcerated. The following developed legal realist account illustrates how this unique South African judgement, the first of its kind in South Africa and the African continent contributes to the growing evidence base and legal challenges worldwide.

International human rights instruments mandate States to protect all prisoners, irrespective of their sexual orientation and gender identity (SOGI) and facilitate social reintegration within the closed setting (UNODC, 2009). Fundamental rights assurances in detention settings centre on the principles of equality, dignity, freedom of expression, dignified detention and the prohibition of inhumane treatment or punishment. Principle 5 of the UN Basic Principles for the Treatment of Prisoners provides that *"except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and […] United Nations covenants"*(UN, 1990). The Kampala Declaration on Prison Conditions in Africa also mandates that *"prisoners should retain all rights, which are not expressly taken away by the fact of their detention"* (African Commission on Human and Peoples' Rights ACHPR, 1996). Rule 2 of the European Prison Rules states that *"persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody and Rule 5 specifies that life in prison shall approximate as closely as possible the positive aspects of life in the community"* (Council of Europe (CoE), 2020).

Recognition of and ability to express ones gender identity is central to the well-being of the *trans*-prisoner. Equality and dignity rights are the crux of the *September v Subramoney* case. Rule 1 of the non-binding UN Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*) states that *"all prisoners shall be treated with respect because of their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhumane or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification"* (UN, 2016). The non-binding 2017 Yogyakarta Principles are further applicable to detention settings given their central focus on SOGI. Essential is Principle 9 which mandates for the right to treatment with humanity while in detention, along with the right to bodily and mental integrity (Principle 32), whereby one's gender identity is integral *to "dignity and humanity and must not be the basis of discrimination or abuse and that, as far as possible, prisoners should be involved in decisions regarding the place of detention appropriate to their SOGI"* (Yogyakarta Principles, 2017).

With respect to women's positionality in South African detention spaces, post-apartheid historical commentaries observe the heteronormative ideology of incarcerated women, characterized by rights abuses and the invisible nature of women (notwithstanding *trans*-women) in South African criminal justice policies and practice (Van Hout & Wessels, 2021a). As elsewhere, gender blind and biologically-oriented interpretations continue to be the norm (Ciuffoletti, 2020). The *Jali Commission of Inquiry into Corruption and Maladministration in the Department of Correctional Services ('Jali Commission')* reported on serious shortcomings within the DCS including prison warden complicity in facilitating illicit sexual activities at female prisons; the sexual harassment of female staff and refer to the violation of rights of a *trans*-woman placed in a male prison (sexual exploitation, rape, denial of medical attention including HIV testing post rape, placement in solitary confinement) (van der Berg, 2007; Muntingh, 2016; Van Hout & Wessels, 2021a). Impunity for human rights violations is perhaps the most critical challenge, as the DCS has been reluctant to acknowledge the scale of this problem or to seriously address it (Muntingh, 2016).

Whilst the non-binding UN Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (*Bangkok Rules*) (UN, 2010) 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 (for example transwomen, lesbian women) and fail to consider

aspects of intersectionality (Barberet et al., 2017; Van Hout & Crowley, 2021). The *Mandela Rules* also do not specifically refer to women or indeed transwomen, with exception of Rule 7 which recommends that authorities facilitate determination of gender identity and notate during committal *"precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender"* (UN, 2016). The provision of non-discrimination is evident within the *Mandela Rules* which states *"(apply to all prisoners without discrimination … the specific needs and realities of all prisoners)"* and is further emphasised in Rule 2(2), which mandates prison administrations to *"take account of the individual needs of prisoners, in particular the most vulnerable categories"* (UN, 2016). Rule 19 offers some further support applicable to gender affirmation whereby it specifically requires that *"[prison] clothing shall in no manner be degrading or humiliating"* (UN, 2016). In Europe, whilst the 2020 European Court of Human Rights (ECtHR) guide on prisoner rights does not refer to transgender people (ECtHR, 2020), the CoE Steering Committee for Human Rights outlines measures to eliminate discrimination on grounds of SOGI, with Recommendation 4 stating *"measures should be taken so as to adequately protect and respect the gender identity of transgender persons"* (CoE, 2017). In terms of case-law, however, in 2013 in the United Kingdom (UK) (England and Wales High Court) found no discrimination in refusing gender-affirming items such as a wig, tights and a prosthetic vagina to a transgender prisoner (see *R (Green) v Secretary of State for Justice*). In contrast in the United States (US) in 2018, a District Court in Florida ruled that a transgender prisoner was permitted to gender affirm by wearing female clothing and accessing female items (see *Keohane v. Jones*).

Hence, the case of *September v Subramoney* represents a potential turning point for South Africa, and lays the foundation for progression in line with prison systems elsewhere which view gender on the basis of self-identification (for example. parts of Australia such as New South Wales and Victoria, Canada, Malta and Scotland), and policies operationalised in the UK, Italy and Thailand which have dedicated transgender prisons (UNDP, 2020). There are prisons in Australia, Canada, Italy, New-Zealand, Malta and the UK, and in some states in the US where transgender prisoners are permitted to gender affirm (for example clothing) regardless of placement, and where prison systems have training and policies which advocate for respectful gender-neutral language (Van Hout et al., 2020; UNDP, 2020). Italy in particular is reported to be leading the way in reform as they permit transgender incarcerated people to live a real-life experience and gender affirm while in detention (Chianura et al., 2010; Hochdorn et al., 2018).

The concept of *"reasonable accommodation"* as advocated for in *September v Subramoney* centres on placement in a single cell (where available in either a male or female prison) and opportunity to express gender identity safely, or transfer to a prison designated for females. The standard approach of sex segregation in detention settings (*Mandela* Rule 11, UN, 2016) based on normative binarism and conditions of perceived vulnerabilities of the sexes (Dias-Vieira & Ciuffoletti, 2014) has far reaching implications for rights assurance of a range of (trans) gendered placement needs and rights in prison. Individuals range from cisgender, pre-operative, non-operative and post-operative transgender women and men, gender nonconforming and intersex, creating a host of challenges for prison authorities. South African prisons as in other African countries continue to be congested and navigate a host of challenges pertaining to minimum standards of detention, respecting the rights to reasonable and safe accommodation and ability to protect vulnerable prisoners from custodial violence, trauma and harms (particularly for women, trans women and the mentally incapacitated) (Van Hout & Wessels, 2021a; b; c, p. p100068).

The balance of security and safety with gender recognition is then crucial, with complexity arising when the terms gender (a social construct) and sex (individual anatomy) are adopted interchangeably within the detention setting (Barnes, 1998; Mann, 2006). Placement decisions by prison system officials are generally based on pre-operative/non-operative state or on legal gender recognition of the *trans*-prisoner, and commonly hinge on the balance between accommodation, security and safety considerations (Lamble, 2012; Rodgers et al., 2017; McCauley et al., 2018; Brömdal et al., 2019; UNDP, 2020; Van Hout et al., 2020). Factors impacting on such decisions are often grounded in rigid *cis*-normative frameworks of sex and gender, binary classifications and related to prison infrastructure and accommodation capacity in terms of offering population housing, segregation or protective custody, shared or single occupancy cells, general or specialist pods/wings for trans prisoners. In terms of European human rights case law, segregation based on sexual identity has been ruled as unlawful and in breach of Article 3 (prohibition of inhuman and degrading treatment) and 14 of the European Convention on Human Rights (ECHR) (prohibition of discrimination) (see the 2012 ECtHR case of *X v Turkey*). In the UK, the refusal to move a pre-operative transgender prisoner from a men's prison to a women's prison was ruled as a violation of her human rights under the ECHR Article 8 (see the 2015 UK Supreme Court case of *R Bourgass v Secretary of State for Justice*).

The right to humane treatment whilst detained is outlined in Yogyakarta Principle 9, and one which requires routine independent monitoring by the State and it's judiciary inspectorate. Officials in the *September v Subramoney case* used solitary confinement as lawful universal sanction for aggressive behaviour. Although placement in solitary confinement or segregation may be necessary for safety, transgender status itself does not justify limitations on access to recreation, legal or medical assistance (UN Special Rapporteur on Torture, 2011). The 2017 Yogyakarta Principles (5, 7, 10, 18 and 27), and particularly Principle 9 specify that protective measures *"involve no greater restriction of their rights than is experienced by the general prison population."* Black, Latino, mixed-race, and Native American/American Indian transgender prisoners are reported to be twice as likely to be placed in solitary confinement (Lydon et al., 2015). Whilst reviews indicate that prison systems routinely use segregation and solitary confinement to protect transgender prisoners from harm (Van Hout et al., 2020), this is arguably punishment and inhumane, and further compounds the trauma experienced by transgender prisoners. Rule 57 of the Mandela Rules states that *"the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation"* and Rule 45.2 specifies *"the imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures"* (UN, 2016). The placement of transgender prisoners in specialist wards or pods (as in Australia, the UK and Canada), which in reality house *'all'* prisoners with a host of psychiatric conditions and vulnerabilities, are reported to leave transgender prisoners further traumatised (Bashford et al., 2017; McCauley et al., 2018).

Globally, many prison systems lack a robust response to the daily traumas and threats to safety encountered by trans prisoners (Brown, 2014; Simopoulos & Khin, 2014; Routh et al., 2017; Van Hout Kewley & Hillis, 2020, Van Hout & Crowley, 2021). *September v Subramoney* exemplifies the challenges encountered by DCS officials in the South African and indeed African cultural context to protect *trans*-prisoners from harm, albeit via denial of the opportunity to gender affirm, and their placement in single cell accommodation in either a male or female prison. United Nations (UN) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2015) amongst others has described concern regarding the situation of transgender persons in detention settings, particularly relating to exposure to sexual violence (UN CAT, 2018; Harrison, 2020). The Special Rapporteur has been at the forefront in drawing attention to human rights abuses, with concern centring on "*the absence of appropriate means of identification, registration and detention that leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel*" (UN Human Rights Council, 2015, UN Human Rights Office of the High Commissioner, 2016, UN Special Rapporteur on Torture, 2016). Crucial factors include the prevention of harm to transgender prisoners (for example

sexual exploitation and rape) and the protection of fellow prisoners (often in the case of female prisoners in the placement of transwomen sex offenders in female wings) (Lamble, 2012). The UN Committee on Torture (2016) provides that prison authorities must identify risks of harm imposed on those who are vulnerable, protect them by not leaving them isolated and operationalise necessary measures. At the ECtHR, while the deliberate disclosure of transgender status breaches Article 8 (right to respect for private and family life) of the ECHR, in the prison setting where there is a risk of violence, this may also breach Article 3 (see *Bogdanova v Russia* in 2015). Protection from gender maltreatment and abuse by prison staff and other prisoners is mandated in the ECHR (Articles 3, 14) (see *Sizarev v Ukraine* and *G.G. v. Turkey* at the ECtHR in 2013). In the US prison staff failures to protect transgender prisoners are ruled to violate the 8th Amendment, constituting *"cruel and unusual punishment"* (Alexander & Meshelemiah, 2010). The Prison Rape Elimination Act of 2003 was subsequently passed to establish zero tolerance toward custodial rape and sexual violence.

The judgement of *September v Subramoney* further recommends the deferral of decision making to competent medical professionals and therapists and not DCS prison officials. Guiding principles relating to the universal right to health and the entitlement to non-discriminatory and equivalence of care to that in the community for all prisoners are mandated by international treaties and also stipulated in the non-binding UN Standard Minimum Rules for the Treatment of Prisoners (UN 1955; UN 2015), Basic Principles for the Treatment of Prisoners (UN, 1991), and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN, 1988). Medical declarations which provide for the rights of prisoners to humane treatment and appropriate medical care include the UN Principles of Medical Ethics relevant to prisons (Principles 1, 6) (UN, 1982), WHO (2003) and World Medical Association (WMA) (2011) declarations, and the *Mandela Rules* (UN, 2016). According to the Yogyakarta Principles (2017), Principle 17 specifically recommends States to *"facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and* support*."* The WPATH (2012) standards of care apply to all transsexual, transgender, and gender-nonconforming people, irrespective of their housing situation whilst in detention. The issue of access to gender affirming therapies and gender reassignment surgery whilst incarcerated is complex, with WPATH (2012) continuing to advocate for the provision of adequate access to medical care and counselling for transgender people in prison, that which recognises their unique vulnerabilities and special health needs on the basis of their gender identity.

Countries differ in terms of medical treatment of transgender people in prison, ranging from initiation, to freeze-framing, continuation of hormone treatment at the same level as prior to committal or a continuation approach with adjusted dosage based on medical consultations (for example Australia, Malta, New Zealand and Thailand) (UNDP, 2020). Complications exist with regard to prison provision of access to necessary medical specialist input. Several district courts in the US have ruled that hormone therapy is a necessity for transgender prisoners (see *Kosilek v. Maloney* in 2002), and have permitted gender reassignment surgery for transgender prisoners (*Quine v. Beard* et al., in 2017). In 2020 the district court judgement of *Campbell v Kallas* ruled that the prison in question must facilitate access to continued hormone treatments, counselling and the wearing of some women's clothing, but denied the additional requests for breast augmentation, voice therapy and electrolysis, as the claimant failed to provide evidence that these medical interventions were specifically required to treat gender dysphoria. Court decisions elsewhere in the US advised to *"elevate innovative and evolving medical standards to be the constitutional threshold for prison medical care"* (see *Edmo v. Corizon Inc.,* 2020). Very few countries however facilitate prisoner access to gender reassignment surgery equal to that in the community (at present only Australia, UK and the US) (Van Hout & Crowley, 2021). More recently, the CoE Anti-Torture Committee (2015) has made recommendations regarding a case in Austria that *"authorities take the necessary steps to ensure that transgender persons in prisons (and, where appropriate, in other closed institutions) have access to assessment and treatment of their gender identity issue and, if they so wish, to the existing legal procedures of gender reassignment. Further, policies to combat discrimination and exclusion faced by transgender persons in closed institutions should be drawn up and implemented."*. See Table 2 Case Law.

6. Conclusive remarks: equality rights, protection from harm and moving beyond the right to express gender identity

The South Africa Equality Court judgement of *September v Subramoney* is ground-breaking with regard to transgender prisoner positioning and fundamental rights whilst in detention, not only for the transgender community in South Africa, but also across the African continent and globally in terms of spotlighting the rights assurances of transgender prisoners (particularly *trans*-women) in prison system operations (Sloth-Nielsen, 2021a). South Africa's prison system is of no exception in that it continues to operate as a heteronormative and hyper-masculine environment. The central element underpinning the experience of the transgender individual whilst incarcerated is the ability to express their gender. The core of the judgment is the obligation of the DCS under the PEPUDA to provide for reasonable and safe accommodation for diversity. It stipulates; *"**This case is primarily about equality.** Not only equality, but it is also about dignity, freedom of expression, dignified detention, and the prohibition of inhumane treatment or punishment."* The right to reasonable and safe accommodation therefore flows from the constitutionally entrenched right to equality. The court unambiguously stated in its judgment that, as it is aware of the resource implications, it would *'not order major physical changes to the existing correctional centres'* in order to make provision for transgender accommodation.

Since the judgement there has been progress in equality rights assurances of transgender people in conflict with the law in South Africa. The DCS in its Revised 2020–2025 Strategic Plan (DCS, 2020)

Table 2
Case law.

Bogdanova v Russia Application No 63378/13. Council of Europe: European Court of Human Rights, 10 June 2015.
Bogdanova v Russia, Application No. 63378/13 Council of Europe: European Court of Human Rights, 10 June 2015
Campbell v. Kallas US District Court for the Western District of Wisconsin. 16-cv-261-jdp (W.D. Wis). 8 December 2020.
Edmo v. Corizon Inc., 9th Cir., No. 19-cv-35017, Court of Appeal. 10 February 2020.
G.G. v. Turkey Application No. 10684/13, Council of Europe: European Court of Human Rights, 31 March 2013.
Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. *2018*) United States District Court for the Northern District of Florida. 22 August 2018.
KOS and Others v Minister of Home Affairs and Others, High Court (2298/2017) [2017] ZAWCHC 90; [2017] 4 All SA 468 (WCC); 2017 (6) SA 588 (WCC) South Africa. 6 September 2017.
Kosilek v. Maloney, 221 F. Supp. 2d 156 (D. Mass. 2002). US District Court for the District of Massachusetts. 22 August 2002.
Lallu v Van Staden Roodepoort Equality Court, Case No 3 of 2011. South Africa 28 September 2012
Mphela v Manamela and others Seshego Magistrates Court (Equality Court). South Africa. 9 September 2016.
Quine v. Beard et al., No. 3:2014cv02726 - Document 116 (N.D. Cal. 2017 28 April 2017.
R (Bourgass) v Secretary of State for Justice United Kingdom Supreme Court 54, 29 July 2015.
R (Green) v Secretary of State for Justice, [2013] England and Wales High Court (Administrative Court) 3491, 4 December 2013.
September v Subramoney NO and Others (EC10/2016) [2019] ZAEQC 4; [2019] 4 All *SA 927 (WCC). South African Equality Court. 23 September 2019.*
Sizarev v Ukraine, Application no 17116/04, Council of Europe: European Court of Human Rights, 17 January 2013, para 112; 9.
X v Turkey, Application no 24626/09, Council of Europe: European Court of Human Rights, 9 October 2012.

specifically mentions the matter of *September v Subramoney* and discusses the implications of the judgment in this Strategic Plan. It references the NSP on GBVF, of which the vision underpins a South Africa free from GBV directed at women, children and LGBTQIA + persons. At present the DCS aims to develop a Policy Framework, aligned to the NSP, which addresses the prevalence of GBV in correctional services, through prevention mechanisms, and outlines the steps to be taken in caring for and providing internal support to the victims, people in prison and officials. As of 2021, only the Western Cape South African Police Service (SAPS) has some form of Standard Operating Procedure (SOP) for transgender people who have been arrested. It does not apply to prisoners awaiting trial or those convicted. The SOP calls for transgender people who have been arrested to be treated with dignity and respect and to be placed *in "separate detention facilities at the police station where they were arrested"*. They must also be *"recorded in the gender column of the custody register (SAPS 14) with a red pen as 'T'"*.

The judgement of *September v Subramoney* illustrates the inherent tensions between human, gender and equality rights, prohibition of discrimination and inhuman treatment, and security considerations regarding such transgender placement and protection from harm in prisons. The principle of reasonable accommodation and least restrictive measures applies to all prisoners who identify as transgender and are entitled to express their gender identity (for example by wearing makeup and long hair, issued female underwear, placement in a single cell to protect her and fellow prisoners) while incarcerated in South Africa (Sloth-Nielsen, 2021a). This aligns to the 2020 UNDP good practices in the management of transgender prisoners, centring on self-identification without the need for medical or psychological examination or confirmation, irrespective of legal recognition, legal documents and surgical status, gender neutral access to clothes and commodities, and adequate access to a full range of appropriate medical care while detained (UNDP, 2020). Whilst adaptation of existing good practice from other jurisdictions is a starting point, the *September v Subramoney* judgement however does not provide a clear and implementable pathway for the DCS beyond *'reasonable accommodation'* to reform its prison infrastructure, its systems, policies and practices, albeit beyond recommendations to ensure they are inclusive, respect the lived experiences and needs of trans people in prison, and promote and protect the full realisation of their rights. The court acknowledged competing constitutional rights in its judgement when it stated as follows: *"Reasonable accommodation is a factor this court* ***must consider*** *when determining the fairness of the discrimination in question. There are a variety of reasonable steps open to government to accommodate the applicant. These steps should* ***balance the competing interests*** *raised by this dispute. They should* ***allow for gender expression, but also not undermine the safety of the applicant or detention facilities*** *…. the relief* granted *in casu should be nuanced and make provision for a balanced enforcement of the constitutional rights of the applicant and the constitutional obligations of the respondents."*

The *September v Subramoney* judgement is not about injuring the beliefs of fellow prisoners and prison officials, but rather ensuring that they understand what it means to uphold and protect human rights. Essentially the gist is ***not*** that fellow prisoners and prison officials should give up on any constitutional rights of theirs or change their belief systems, rather as per the above quote it is about the acknowledgment of and respect toward the fundamental rights of transgender persons in the detention space. Acknowledging the constitutionally entrenched right to equality is no different than acknowledging someone else's constitutionally entrenched right to life, liberty, privacy and so forth. Whilst the preamble of the PEPUDA and the South African Constitution provide that one cannot exercise rights in a manner which infringe others, this is dependent on the individual exercising their rights in a constitutionally acceptable manner, for example by not discriminating and infringing the dignity (etc) of others. In terms of Section 36 of the Constitution, which provides for the limitation of rights in terms of the Bill of Rights, a constitutionally enshrined right may only be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors (a)-(e) of the aforementioned section. One can therefore argue that should a prisoner and/or prison official feel that his/her right to for instance "*freedom of association*" have been limited by the *September v Subramoney* judgment, that this limitation will be reasonable and justifiable in terms of Section 36 of the Constitution. Indeed, the court specifically, in order to balance the competing interests, made provision in its order for alternative relief options to be implemented by the DCS (in that the applicant could be placed in a single cell in either a male or female prison).

The African Charter on Human and People's Rights (Organisation of African Unity, 1981) further recognises that cultural values, beliefs and traditions must be exercised in a constitutional manner and balanced within the socio-legal context of the constitution, even though such beliefs may change over time (Maluleke, 2012). Whilst courts in South Africa are deemed pivotal in social transformation, judicial enforcement is dependent on public awareness of recognition and protection of human rights, population level commitment to respect, protect and uphold the rights of all to the values contained in Constitution, access to justice, human rights activism and independent and effective government institutional implementation of enforcement of such rights (Smith, 2014). The Minister for Justice Ronald Lamola has acknowledged the need for gender sensitivity training; *"I would like to add one more recommendation and that is that all officials in government must undergo gender sensitivity training, and in particular become familiar with what LGBTIQ + persons require and how best to serve them."* (South African Government, 2021). The purpose of such training would be not only to create an understanding of what being transgender entails, but also to reinforce the existence of everyone's right to equality, in the hope of creating tolerance.

In other (more developed) jurisdictions, whole prison approaches to tackling discrimination and supporting and responding to the needs of transgender people are advised to capacity build prison and medical staff, and operate alongside advocacy and strategic litigation to ensure that States' human rights assurances of incarcerated transgender people are upheld (Brömdal et al., 2019; Van Hout et al., 2020). Equally important however is the sensitisation of ***all stakeholders*** across the criminal justice system, and the design, development and establishment of gender sensitive pathways across the criminal justice system including provision of appropriate housing in consultation with the transgender individual, equal access to gender sensitive and gender affirming medical and mental health care, humane treatment in designated placement areas and protection from violence and harm. *September v Subramoney* whilst commendable in South Africa, and the first of its kind in Africa, highlights the lack of specific prison infrastructure, capacity and gender sensitive policy in African contexts to guide transgender prisoner management, protect them from experiencing trauma, violence and stigmatization without restricting their rights, and provide them with adequate gender sensitive and gender affirming medical and mental healthcare. The judgement however sets the foundation for future development and establishment of sustainable (trans) gender responsive prison systems, standard operating procedures and health services reflecting the fundamental rights, needs and respect for dignity aligned to that prisoners gender expression. At the SA-EU event on intersex and transgender policy in November 2021, the UN Special Rapporteur on the Right to Health Dr Tlaleng Mofokeng, underscored how right to health of transgender people is linked to the rights to equality, life, dignity and to not be tortured (Pikoli, 2021). Speaking at this dialogue event, Deputy Minister John Jeffery (2021) stated; *"Transgender and intersex persons have very distinct legal needs and often face enormous challenges when trying to access services or care that most people take for* granted*, such as accessing gender-affirming documentation, like identity documents."* Health autonomy and reduced barriers to healthcare access of transgender people in South Africa were noted by those in attendance as crucial, along with the requirement for health

workers (and other government officials *inter alia* DCS staff) to receive training in human rights (Pikoli, 2021).

Finally, the *September v Subramoney* judgement transgresses that of DCS prison system, policy and practice functioning and lends itself to a revision of the South Africa's gender recognition law, the Alteration of Sex Description and Sex Status Act, No. 49 of 2003 (Act 49) in line with the Yogyakarta Principles (2017). Essentially in South Africa this would result in the removal of the current medical requirements whereby the Act requires that medical or surgical gender reassignment procedures have taken place (which are highly exclusionary) and replacing this with a gender self-determination model permitting individuals to change their legal gender through self-declaration, including with the option of gender unspecified. Whilst *September v Subramoney* does not leverage for access to gender affirming therapy and reassignment surgery in prisons (Sloth-Nielsen, 2021a), it highlights the lack of access to legal gender recognition in South Africa and that illustrates the inaccessibility of gender affirming health care in South Africa to many in the community, where private access to gender affirming treatment is expensive and not covered by medical aid, and where waiting lists in government hospitals are approximately 25 years. *September v Subramoney* also does not challenge the binary model, or advance the rights of individuals identifying as non-binary or propose to recognise a third gender in South Africa. South African law, like many countries does not provide for one to be legally recognised as neither female nor male. Within the broader South African landscape, critiques have opined that the non-recognition of a third gender option in South Africa could amount to constitute discrimination under the analogous ground of gender identity (Sloth--Nielsen, 2021b).

Hearing the voices and appreciating the experience of transgender people in contact with the law and in prison in South Africa is a vital component in achieving prison reform. The UN Independent Expert on protection against violence and discrimination based on SOGI, Victor-Madrigal-Borloz has stated that *"information about the lived realities of lesbian, gay, bisexual, trans and gender-diverse persons around the world is, at best, incomplete and fragmented; in some areas it is non-existent […] It means that in most contexts policymakers are taking decisions in the dark, left only with personal preconceptions and prejudices or the prejudices of the people around them.''* Lessons learnt, multi-stakeholder consultations and best practices arising on foot of *September v Subramoney* in South Africa are not only of significant importance globally, but vital for prison systems operating within low resource settings in Africa and other countries, and within particular societal and cultural boundaries and dynamics. In addition to the requirements for routine health surveillance and independent inspections at the prison level by the South African Judiciary Inspectorate, further research and consultation with transgender people in South Africa is warranted.

Declaration of interests

The author declares that she has no conflict of interest to declare and has no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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References

African Commission on Human and Peoples' Rights (ACHPR). (1996). *The Kampala declaration on prison conditions in Africa*. Kampala: ACHPR. Available at www.penalreform.org/resource/kampaladeclaration-prison-conditionsafrica. (Accessed 4 January 2022).

Alexander, R., & Meshelemiah, J. C. A. (2010). Gender identity disorders in prisons: What are the legal implications for prison mental health professionals and administrators? *The Prison Journal, 90*(3), 269–287.

Amnesty International. (2011). Not part of her sentence: Violations of the human rights of women in custody. Available at. https://www.amnestyusa.org/reports/usa-not-part-of-my-sentence-violations-of-the-human-rights-of-women-incustody/. (Accessed 4 January 2022).

Amnesty International UK. (2018). Mapping anti-gay laws in Africa. 31 may 2018. Available from www.amnesty.org.uk/lgbti-lgbt-gay-human-rights-law-africa-uganda-kenya-nigeria-cameroon . (Accessed 3 March 2022).

Barberet, R., Jackson, C., & Jay, J. (2017). UN rules for the treatment of women prisoners and non-custodial sanctions for women offenders (the Bangkok rules): A gendered critique. *Papers: Revista de Sociologia, 102*(2), 215–230.

Barnes, A. (1998). The sexual continuum: Transsexual prisoners. *New England Journal on Criminal and Civil Confinement, 599*, 600–602.

Bashford, J., Hasan, S., & Marriott, C. (2017). Inside gender identity: A report on meeting the health and social care needs of transgender people in the criminal justice system. Available at. https://docs.wixstatic.com/ugd/cc310197d3c7c868bd434a843546100db510f2.pdf. (Accessed 4 January 2022).

Bateman, C. (2011). Transgender patients sidelined by attitudes and labelling. *South African Medical Journal, 101*(2), 91–93.

van der Berg, A. (2007). Summary and comment on the final report of the judicial commission of inquiry into allegations of corruption, maladministration and violence in the department of correctional servicesthe jail commission, Civil society prison reform initiative, South Africa, available at. www.acjr.org.za. (Accessed 4 January 2022).

Brockmann, B., Cahill, S., Wang, P., & Levengood, T. (2019). Emerging best practices for the management and treatment of incarcerated lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals. The fenway Institute; Boston, MA, USA. Available at https://fenwayhealth.org/wp-content/uploads/TFIP-33_Best-Practices-for-LGBTI-Incarcerated-People-Brief_web.pdf. (Accessed 4 January 2022).

Brömdal, A., Clark, K. A., Hughto, J. M. W., Debattista, J., Phillips, T. M., Mullens, A. B., Gow, J., & Daken, K. (2019). Whole-incarceration-setting approaches to supporting and upholding the rights and health of incarcerated transgender people. *International Journal of Transgenderism, 20*(4), 341–350.

Brown, G. R. (2014). Qualitative analysis of transgender inmates' correspondence: Implications for department of correction. *Journal of Correctional Health Care, 20*, 334–342.

Chianura, L., Di Salvo, G., & Giovanardi, G. (2010). Clandestine transgender female convicts in Italian detention centers: A pilot inquiry. *Ecologica Della Mente, 33*, 219–238.

Ciuffoletti, S. (2020). Regardless of their sex' or 'biological differences'. An analysis of the European court of human rights' case law on women in prison. *Revista Direito e Praxis, 11*(2), 1275–1311.

Clark, F. (2014). Discrimination against LGBT people triggers health concerns. *Lancet, 383*, 500–502.

Council of Europe (CoE). (2017). *Steering committee for human rights CDDH, combating discrimination on grounds of sexual orientation or gender identity follow-up to recommendation CM/Rec(2010)5 of the committee of ministers CDDH*. Strasbourg: CoE. Available at www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules. (Accessed 4 January 2022).

Council of Europe (CoE). (2020). *Revised European prison rules: New guidance to prison services on humane treatment of inmates*. Strasbourg: CoE. Available at www.coe.int/en/web/human-rights-rule-oflaw/european-prison-rules. (Accessed 4 January 2022).

Council of Europe (CoE) Anti-Torture Committee. (2015). Anti-torture committee scolds Austria over treatment of trans inmates. Available at. https://tgeu.org/anti-torture-committee-scolds-austria-over-treatment-of-trans-inmates/. (Accessed 4 January 2022).

Department of Correctional Services (DCS). (2020). *Department of correctional services (DCS) revised five-year strategic plan 2020-25*. DCS: South Africa.

Department of Women, Youth and Persons with Disabilities. (2020). *National strategic plan on gender-based violence and Femicide. Department of women, Youth and persons with disabilities*. Pretoria: South Africa.

Dias-Vieira, A., & Ciuffoletti, S. (2014). Section D: A tertium genus of incarceration? Case-study on the transgender inmates of sollicciano prison. *Journal of Law and Criminal Justice, 2*(2), 209–249.

Donohue, G., McCann, E., Brown, M., & Tchounwou, P. B. (2021). Views and experiences of LGBTQ+ people in prison regarding their psychosocial needs: A systematic review of the qualitative research evidence. *International Journal of Environmental Research and Public Health, 18*(17), 9335.

Elnaiem, M. (2021). *The "deviant" african genders that colonialism condemned. 29 april 2021. Available at the "deviant" african genders that colonialism condemned - JSTOR daily*. . (Accessed 30 May 2022).

Erni, J. N. (2013). Legitimating transphobia: The legal disavowal of transgender rights in prison. *Cultural Studies, 27*(1), 136–159.

European Court of Human Rights (ECtHR). (2020). Guide on the case-law of the European convention on human rights: Prisoners' rights. Council of Europe (CoE): European court of human rights (ECtHR). Available from https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf. (Accessed 4 January 2022).

Gloppen, S., & Rakner, L. (2019). The perfect enemy: From migrants to sexual minorities. Bergen: Chr. Michelsen Institute (CMI Brief no. 2019:05) 4 p. Available from www.democraticbacklash.com/the-perfect-enemy-from-migrants-to-sexual-minorities. (Accessed 3 March 2022).

Hairsine, K. (2019). Why is homosexuality still taboo in many african countries? 4 december 2019. Deutsche welle (DW). Available from www.dw.com/en/why-is-hom

osexuality-still-taboo-in-many-african-countries/a-51528737. (Accessed 3 March 2022).
Harrison, V. (2020). CEDAW disapproves: The United States' treatment of transgender women in prisons. *DePaul Journal for Social Justice*. Available at https://via.library.depau l.edu/jsj/vol13/iss2/2. (Accessed 4 January 2022).
Hochdorn, A., Faleiros, V. P., Valerio, P., & Vitelli, R. (2018). Narratives of transgender people detained in prison: The role played by the utterances "not" (as a feeling of hetero-and auto-rejection) and "exist" (as a feeling of hetero-and auto-acceptance) for the construction of a discursive self. A suggestion of goals and strategies for psychological counseling. *Frontiers in Psychology, 8*, 2367.
Human Rights Watch. (2018). Submission to the UN working group on discrimination against women in law and practice. Available at https://www.hrw.org/news/2018/10/01/humanrights-watch-submission-un-working-group-discriminationagainst-women-law-an. (Accessed 4 January 2022).
James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. Transgender survey. National center for transgender equality; Washington, DC, USA*.
Jeffery, J. (2021). *SA-EU dialogue on Policy improvements for transgender & intersex persons conference.* Welcome and opening remarks by the deputy minister of justice and constitutional development, the hon JH Jeffery, MP at the policy dialogue on the rights of transgender and intersex persons, held at the sheraton hotel, Pretoria. South African government press release. Available at www.gov.za/speeches/deputy-minister-john-jeffery-sa-eu-dialogue-policy-improvements-transgender-intersex. (Accessed 4 January 2022).
Jobson, G. A., Theron, L. B., Kaggwa, J. K., & Kim, H. J. (2012). Transgender in Africa: Invisible, inaccessible, or ignored? *Journal of Social Aspects of HIV/AIDS Research Alliance, 9*(3), 160–163.
Kilty, J. (2020). I just wanted them to see me: Intersectional stigma and the health consequences of segregating Black, HIV + transwomen in prison in the US state of Georgia. *Gender, Place & Culture, 22*, 1019–1039.
Kok, A. (2017). The promotion of equality and prevention of unfair discrimination Act 4 of 2000: How to balance religious freedom and other human rights in the higher Education sphere. *South African Journal of Higher Education, 31*(6), 25–44.
Lamble, S. (2012). Rethinking gendered prison policies: Impacts on transgender prisoners. *ECAN Bulletin, 16*, 7–12.
Leiter, B. (2015). Legal realism and legal doctrine. *University of Pennsylvania Law Review, 163*(7), 1975–1984.
Luhur, W., Mokgoroane, L., & Shaw, A. (2021). Public opinion of transgender rights in South Africa. *Rucla Williams Institute School Of Law*. Available at https://williamsinstitute.law.ucla.edu/publications/opinion-trans-rights-south-africa/. (Accessed 4 January 2022).
Luvuno, Z. P. B., Ncama, B., & Mchunu, G. (2019). Transgender population's experiences with regard to accessing reproductive health care in kwazulu-natal, South Africa: A qualitative study. *African Journal of Primary Health Care and Family Medicine, 11*(1), e1–e9.
Lydon, J., Carrington, K., Low, H., Miller, H., & Yazdy, M. (2015). Coming out of concrete closets: A report on Black & pink's national lgbtq prisoner survey. Black and pink; boston, ma, USA. Available at www.issuelab.org/resources/23129/23129.pdf. (Accessed 4 January 2022).
Maluleke, M. (2012). Culture, tradition, custom, law and gender equality. *PEL, 15*(1).
Mann, R. (2006). A comparative analysis of American, Australian, and Canadian prison policies concerning the treatment of transgender prisoners and a 'universal' recommendation to improve treatment. *Law and Sexuality, 15*, 92–133.
McCauley, E., Eckstrand, K., Desta, B., Bouvier, B., Brockmann, B., & Brinkley-Rubinstein, L. (2018). Exploring healthcare experiences for incarcerated individuals who identify as transgender in a Southern jail. *Transgender Health, 3*(1), 34–41.
Muntingh, L. (2016). Ten years after the Jali Commission: Assessing the state of South Africa's prisons. *SA Crime Quarterly, 58*, 35–44.
Murray, S. O., Roscoe, W., & Epprecht, M. (2021). *Boy-Wives and female Husbands: Studies in african Homosexualities.* State university of New York press. *Project MUSE*. https://doi.org/10.1353/book.83859. Available from . (Accessed 4 March 2022).
Nordic Africa Institute. (2017). *Homosexuality is still taboo in many African countries. 17 November 2017. Available from Homosexuality is still taboo in many African countries - the Nordic Africa Institute (uu.se).* . (Accessed 3 March 2022).
OUT. (2016). Hate crimes against transgender people in South Africa, 2016. Available at. https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-Transgender-People-web.pdf. (Accessed 4 January 2022).
Penal Reform International. (2021). Global prison trends 2021- key messages, Facts and figures. PRI, london, UK. *Available at www.penalreform.org/global-prison-trends-2021/key-messages-facts-and-figures/*. (Accessed 4 January 2022).
Penal Reform International (PRI). (2020). *Global prison trends. PRI*. London: UK. Available at. https://www.penalreform.org/resource/global-prison-trends-2020/. (Accessed 4 January 2022).
Pikoli, Z. (2021). More laws are needed to protect rights of intersex and transgender people, say activists. Daily Maverick. Available from *www.dailymaverick.co.za/article/2021-11-08-more-laws-are-needed-to-protect-rights-of-intersex-and-transgender-people-say-activists/*. (Accessed 4 January 2022).
Rodgers, J., Asquith, N. L., & Dwyer, A. (2017). *Cisnormativity, criminalisation, vulnerability: Transgender People in prisons. University of tasmania, hobart*.
Routh, D., Abess, G., Makin, D., Stohr, M., Hemmens, C., & Yoo, J. (2017). Transgender Inmates in prisons: A Review of applicable Statutes and policies. *International Journal Of Offender Therapy And Comparative Criminology, 61*(6), 645–666.
Sanger, N. (2014). In *Young and transgender: Understanding the experiences of young transgender persons in educational institutions and the health sector in South Africa.* Available at http://genderdynamix.org.za/wpcontent/uploads/GDXtransyouth2015-web.pdfKwaZulu. (Accessed 4 January 2022).
Simopoulos, E. F., & Khin, E. K. (2014). Fundamental principles inherent in the comprehensive care of transgender inmates. *Journal of the American Academy of Psychiatry and the Law., 42*(1), 26–36.
Sloth-Nielsen, R. (2021a). September v. Subramoney and its implications for transgender persons in South Africa. *African Journal of International and Comparative Law, 29*(2), 325–337.
Sloth-Nielsen, R. (2021b). Failure to recognise a third gender option: Unfair discrimination or justified limitation? *Law Democracy and Development, 25*. https://doi.org/10.17159/2077-4907/2021/ldd.v25.4
Smith, A. (2014). Equality constitutional adjudication in South Africa. *African Human Rights Law Journal, 14*, 609–632.
South African Government. (2021). Minister Ronald Lamola: SA-EU dialogue on policy improvements for transgender & intersex persons conference. 4 november 2021. Available at https://www.gov.za/speeches/minister-ronald-lamola-sa-eu-dialogue-policy-improvements-transgender-intersex-persons.
Sowemimo, A. (2019). *How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities. 15 April 2019. Available from How Britain's exported homophobia continues to drive health inequalities amongst LGBTQI communities - gal-dem.* . (Accessed 3 March 2022).
UN Human Rights Council. (2015). Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the united Nations high commissioner for human rights (4 may 2015), UN human rights Council Doc A/HRC/29/23. *Paras*, 34–36.4.
UN Human Rights Office of the High Commissioner. (2016). Targeted and tortured: UN experts urge greater protection for LGBTI people in detention. OHCHR, geneva. Available at. www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20165&LangID=E U. (Accessed 4 January 2022).
UNAIDS. (2014). *Transgender people in the GAP report. UNAIDS, geneva*.
United Nations Committee on the Elimination of Discrimination Against Women (UN CEDAW). (2017). *Concluding observations on the 7th periodic report of Paraguay: Convention on the elimination of all forms of discrimination against women (report No. CEDAW/C/PRY/CO/7). New york: UN, november 22, 2017*.
United Nations Development Programme (UNDP). (2020). *Mapping of good practices for the management of transgender prisoners*. Bangkok: UNDP. Available at www.th.undp.org/content/thailand/en/home/library/democratic_governance/mapping-of-good-practices-for-the-management-of-transgender-pris.html. (Accessed 4 January 2022).
United Nations Office on Drugs and Crime (UNODC). (2009). *Handbook on prisoners with special needs*. Vienna: UNODC. Available at www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf. (Accessed 4 January 2022).
United Nations Office on Drugs and Crime (UNODC). (2016). *Handbook on the management of high risk prisoners*. Vienna: UNODC. Available at www.unodc.org/documents/justiceand-prison-reform/HB_on_High_Risk_Prisoners_Ebook_appr.pdf. (Accessed 4 January 2022).
United Nations (UN). (1955). *Standard minimum rules for the treatment of prisoners (30 august 1955)*. Geneva: United Nations.
United Nations (UN). (1982). *Principles of medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment. (18 September 1982) a/RES/37/194*. New York, NY: United Nations General Assembly.
United Nations (UN). (1988). *Body of principles for the protection of all persons under any form of detention or imprisonment: Resolution/adopted by the general assembly (9 december 1988)a/RES/43/173*. New York, NY: United Nations General Assembly.
United Nations (UN). (1991). *Basic principles for the treatment of prisoners: Resolution/adopted by the general assembly. (28 march 1991)a/RES/45/111,Para 9*. New York, NY: United Nations General Assembly.
United Nations (UN). (2010). United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the bangkok rules). A/C.3/65/L.5. UN: New York, NY. Available at www.unodc.org/documents/hivaids/publications/Prisons_and_other_closed_settings/P_BangkokRules_2010_EN.pd. (Accessed 4 January 2022).
United Nations (UN). (2015). United Nations standard minimum rules for the treatment of prisoners (the nelson Mandela rules). A/RES/70/175" united Nations: New York. Available at www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/175&referer=/english/&Lang=E. (Accessed 4 January 2022).
United Nations (UN). (2016). *Standard minimum rules for the treatment of prisoners(Nelson Mandela rules)(8 january 2016)a/RES/70/175*. New York, NY: United Nations General Assembly.
United Nations (UN) Committee Against Torture (UN CAT). (2014). *Concluding observations on the combined 3rd to 5th periodic reports of the United States of America: Committee against torture (report No. CAT/C/USA/CO/3–5). Geneva: UN, december 19, 2014*.
United Nations (UN) Committee Against Torture (UN CAT). (2016). *Ninth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment (22 march 2016) CAT/C/57/4*.
United Nations (UN) Committee Against Torture (UN CAT). (2018). *Concluding observations on the 7th periodic report of Guatemala: Committee against torture (Report No. CAT/C/GTM/CO/7)*. Geneva: UN.
United Nations (UN) Special Rapporteur on Torture. (2016). Report of the special Rapporteur on torture. *A/HRC/31/57*, 34–35.
United Nations (UN) Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (2015). *Eighth annual report of the subcommittee on prevention of torture and other cruel, inhuman or degrading treatment or punishment* (Report No. CAT/C/54/2). Geneva: UN, 5 July, 2016.

United Nations (UN). Special Rapporteur on Torture. (2011). *Interim report of the Special Rapporteur on Torture to the UN General Assembly A/66/268 (5 August 2011) para.19*.

Van Hout, M. C., & Crowley, D. (2021). The 'double punishment' of transgender prisoners: A human rights based commentary on placement and conditions of detention". *International Journal Of Prisoner Health*. https://doi.org/10.1108/IJPH-10-2020-0083 [Epub ahead of print.

Van Hout, M. C., Fleißner, S., & Stöver, H. (2021). *"# Me Too"*: Global progress in tackling continued custodial violence against women. The 10 year anniversary of the Bangkok Rules. *Trauma, Violence, & Abuse: A Review Journal*. https://doi.org/10.1177/15248380211036067 [Epub ahead of print].

Van Hout, M. C., Kewley, S., & Hillis, A. (2020). Contemporary transgender health experience and health situation in prisons: A scoping review of extent published literature (2000-2019). *International Journal of Transgender Health, 21*(3), 258–306.

Van Hout, M. C., & Wessels, J. (2021a). Human rights and the invisible nature of incarcerated women in post-apartheid South Africa: Prison system progress in adopting the Bangkok Rules. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-05-2021-0045 [Epub ahead of print].

Van Hout, M. C., & Wessels, J. (2021b). *"Ubuntu"* I am because we are: COVID-19 and the legal framework for addressing communicable disease in the South African prison system. *International Journal of Prisoner Health*. https://doi.org/10.1108/IJPH-05-2021-0046 [Epub ahead of print].

Van Hout, M. C., & Wessels, J. (2021c). Navigating the complexities of the mentally ill and mentally incapacitated in the criminal justice system in South Africa. *Forensic Science International: Mind and Law., 2*, p100068. https://doi.org/10.1016/j.fsiml.2021.100068 [Epub ahead of print].

World Health Organization (WHO). (2003). *WHO moscow declaration: Prison Health as Part of public health WHO, copenhagen*.

World Health Organization (WHO). (2014). *Prisons and health*. Copenhagen: World Health Organization (WHO) Regional Office for Europe. Available at https://www.euro.who.int/en/health-topics/health-determinants/prisons-and-health/publications/2014/prisons-and-health. (Accessed 4 January 2022).

World Health Organization (WHO). (2020). *Transgender health in the context of ICD-11*. Geneva: WHO. Available at http://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgenderhealth-in-the-context-of-icd-11. (Accessed 4 January 2022).

World Medical Organisation (WMA). (2011). *Declaration of edinburgh on prison conditions and the spread of tuberculosis and other communicable diseases*. Geneva: WHO.

World Professional Association for Transgender Healthcare (WPATH). (2012). Standards of care for the health of transsexual, transgender, and gender-nonconforming people-7th ed. Available at www.wpath.org. (Accessed 4 January 2022).

Yogyakarta Principles. (2017). The Yogyakarta principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity. Available at. https://yogyakartaprinciples.org/. (Accessed 4 January 2022).