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Women in prison

Protecting women's human rights in the hypermasculine prison context

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Abstract

Throughout history, men have always made up the vast majority of the prison population, with the result that prison as an institution has organised itself around a male norm. Ever since the introduction of imprisonment as a way of punishment, female prisoners have been incarcerated in prisons that are not designed for them and neglect their gender-specific needs, leading them to often have a tougher time within prison than male prisoners. The current prison context is rooted in patriarchal conceptions of society that are completely outdated, reinforcing hypermasculine, heteronormative, cisnormative, gender binary views, making it very difficult for (trans) female prisoners to find their way in this environment. The lack of focus on gender-sensitive policies in prisons leads to the continuous undermining of the (human) rights of female prisoners and trans prisoners. Fortunately, the international level is not blind to these issues. Several international and regional instruments have already recognised the specific position in which female prisoners find themselves, which differs in many ways from that of a male prisoner, yet the situation in practice seems far from perfect. This thesis aims to draw additional attention to this issue in the hope that (trans) women prisoners will have their human rights recognised in the future.

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1 Introduction

1.1 Delineation of the research topic

Societies are organised through laws and legal rules. If a person fails to comply with these rules, he or she risks punishment. When people think of punishment, they often immediately associate it with imprisonment. And when people think of prisoners, they often associate this with the bulky, muscled, fully tattooed, 'Michael Scofield'-lookalikes. Series like Prison Break prove that prison life comes with many stereotypes. Perhaps the biggest stereotype is that only men go to prison and that women do not end up there, but this is anything but true.

It is indeed true that the majority of the prison population worldwide consists of male prisoners. While there is no doubt that women form a minority group within prison facilities, this does not alter the fact that there are still a significant number of women incarcerated and this number only seems to be increasing. Precisely because they form a minority group, their gender-specific needs are often forgotten or neglected. The entire prison culture is based on a male stereotype as they are the overwhelming majority in prison, but this has far-reaching consequences for the small percentage of female prisoners whose human rights risk being neglected. From the moment a convicted person is placed in a prison or detention centre to the moment of release, the entire process, including post-release support, is geared towards the norm of a male prisoner, causing women in prison additional difficulties in an already challenging environment.

The issue underlying this thesis is the perception that prison rules and facilities are developed for a prison population in which a male prisoner is the norm. It is well known by now that treating men and women formally equal by applying the same rules to them does not necessarily lead to de facto equality. The fact that prison rules are the same for men and women does not guarantee substantial equality as the rules are based on a male stereotype. Therefore, ignoring the specific needs of female prisoners is a discriminatory practice that must be undone.

The three main questions that will underpin this thesis are, first, what factors within prison systems should be taken into account to ensure that male and female prisoners are treated substantively equally. Second, to what extent ignoring the gender-specific needs of female prisoners may constitute a form of human rights violation and third, what the situation is like for trans women in prison.

To arrive at a structured answer to these three main questions, some sub-questions will try to be answered, such as what exactly are the gender-specific needs of female prisoners and which international and regional (legal) instruments provide for the protection of female (trans) prisoners.

1.2 Research structure

The first part of this thesis will look, from a gender-specific lens, at the situation of women in prison and the related problems (I). This descriptive analysis will look at the gender-specific issues that arise for women in prison, ranging from institutional barriers to gender-specific health problems, from their role within the family to stereotypical practices within prison and, finally, the highly topical issue of trans women in prison. The purpose of this chapter is to provide a clear picture of the situation and demonstrate the importance of a gender-sensitive prison policy.

This descriptive chapter will be followed by a legal analysis of the existing international instruments that serve to protect (trans) women in prison (II). In doing so, a distinction will be made between the general human rights treaties and the specific soft-law instruments that focus on the rights of (female) prisoners. This analysis aims to assess the extent to which their rights are already protected in the current international legal framework and whether there is a need for more protection.

The thesis will then proceed in a similar manner, but with a delineated focus on the regional level and, more specifically, on the European level (III). Again, it will first look at the legal instruments that offer protection to female prisoners. Subsequently, it will have a look at the jurisprudence of the European Court of Human Rights. This Court has an extensive arsenal of case law related to prisoners' rights, but a deeper analysis shows that the gender-specific situation of female prisoners is often ignored. This raises questions about the Court's general approach to equality issues, as the underlying issue essentially revolves around gender equality. This chapter will end with a critical analysis of the Court's current jurisprudence with the aim to show that the court is still often too gender-blind.

In the last chapter, this thesis will look at the situation of women in prison at the national level and, more specifically, at the Belgian level (IV). This chapter will look at the existing instruments regulating the situation of women in Belgian prisons and will examine whether the Belgian standards meet the internationally prescribed guidelines for women in prison discussed in chapter II and chapter III. Finally, this chapter will also examine how the situation of trans women in prison is addressed within the Belgian prison system. This part of the research aims to demonstrate the policy gap in Belgium regarding the situation of (trans) women in prison and raise awareness at the national level.

The thesis will end with a conclusion (V) in which an attempt will be made to give an answer to the main research questions. This conclusion will be written from a personal, critical point of view where the key points will be summarised one more time.

1.3 Methodology

This thesis is structured in four main parts: A detailed, descriptive introduction, followed by a legal analysis at three different levels, namely at the international level, at the regional level and finally at the national level.

The first, introductory part of the thesis is mainly of a descriptive nature and was therefore preceded by an extensive literature review. The sources that will be used in this part and in general throughout the thesis are of varying nature. In principle, this is a legal thesis, but sociological, psychological, criminological, and even medical literature will also be used on several occasions, as numerous studies about women in prison have already been conducted within these fields. These insights are thus necessary to arrive at a well-founded legal answer to the research question(s).

The second and third chapter will mainly employ a legal analysis of judicial human rights instruments. In the third chapter, the regional analysis, a large part will be devoted to a case law analysis of the European Court of Human Rights.

The final chapter on national analysis will again draw on a legal research methodology, as well as insights from the literature. The purpose of this chapter is to check the effectiveness of the previously discussed international and regional instruments in practice.

Overall, the underlying issues in this thesis will be viewed from a gender-specific lens, often adopting a critical, feminist perspective.

2 Introduction to current issues relating to women in prison

It is an established fact that there are more men than women in prison, and consequently women constitute a clear minority group within the prison population. It is estimated that around 740,000 women and girls are being held in prison or detention facilities worldwide, making up around 6,9% of the total prison population, but this number is expected to be even higher as some data are incomplete¹. The exact number of incarcerated women and girls varies from country to country, with the US being the outlier in terms of the number of female prisoners². These numbers are often influenced by a variety of country-specific factors, such as a country's legal and criminal justice system, cultural factors, socio-economic factors, etc³.

Over the last two decades, a worrying trend has been emerging, namely the rapid increase in the number of female prisoners. They may still constitute a clear minority within prison, their numbers are increasing at a very high rate. According to the latest edition of the World Female Imprisonment List, the number of women and girls in prison has increased by 60% since 2002. When compared with the increase in the male prison population since 2002, which has risen by 'only' 22%, this very clearly indicates that a shift is happening within the criminal landscape⁴.

This can be explained by several factors. On the one hand, the popularity of the use of imprisonment as punishment has increased enormously in recent years⁵, which is contradictory because imprisonment should always be seen as a last resort⁶. Another explanatory factor for the specific growth in the number of women in prison is the increase in the criminalisation of drug-related crimes⁷. The world has become embroiled in a true 'war on drugs' and it is

¹ Helen Fair and Roy Walmsley, 'World Female Imprisonment List (fifth edition)' (*WPR* August 8, 2022) <www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf> accessed 16 May 2023.

² Ibid.

³ The Quaker Council for European Affairs (QCEA), 'Women in Prison: A review of the conditions in Member States of the Council of Europe' (2007) 39 <www.qcea.org/wp-content/uploads/2011/04/rprt-wip1-main-en-feb-2007.pdf> accessed 23 May 2023; Roy Walmsley, 'Global Incarceration and Prison Trends' (2003) 3(1) *Forum on Crime and Society* 65, 72-74.

⁴ Helen Fair and Roy Walmsley (n 1).

⁵ Roy Walmsley (n 3) 70-72.

⁶ See for example: Council of Europe Recommendation No. R(99)22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation states that "deprivation of liberty should be regarded as a sanction or measure of last resort and should be therefore provided for only, where the seriousness of the offence would make any other sanction or measure clearly inadequate".

⁷ Barbara H Zaitzow, "'Doing Gender" in a Women's Prison' in Barbara H Zaitzow and Jim Thomas (eds), *Women in Prison: Gender and Social Control* (Lynne Rienner Publishers 2003), 22-23.

estimated that, proportionally, more women than men end up in prison for drug-related offences⁸.

In short, the number of women in prison continues to rise, but the prison system itself remains organised with a male stereotype in mind. It is therefore highly urgent, as the United Nations Office on Drugs and Crime (UNODC) already clearly pointed out in its ‘Handbook on Women and Imprisonment’, to reshape women's prisons without taking the male prison as a reference point⁹. This chapter will discuss the various gender-specific needs that currently receive insufficient attention in women's prisons. This chapter aims to paint a picture as clear as possible of the discriminatory practices currently taking place within prison walls and to emphasise why a gender-sensitive approach is necessary.

2.1 Placement of women within the prison system

For a long time, few women ended up in prison but, as explained above, this has changed significantly in recent decades. When convicted women or women awaiting sentencing are placed in (pre-trial) detention, a number of important factors must be taken into account.

First, international standards require the separation of male and female prisoners¹⁰. Countries must provide for separate women's prisons or, where this is not possible, provide for separate sections within a mixed prison for female prisoners¹¹. One of the main current problems is that, precisely because there are fewer women's prisons because of the lower percentage of female prisoners compared to male prisoners, women often end up in prisons far from home, which, as will be discussed later in this chapter, is an aggravating factor in the problem of maintaining a detainee's family life¹².

⁸ Linda Montanari, ‘Women Offenders in Europe: Drug Problems and Drug Offences and/or Gender-based Violence’ (2020) 30 *European Journal of Public Health* 501, 501.

⁹ UN Office on Drugs and Crime (UNODC), ‘Handbook on Women and Imprisonment’ (2014) 26 <www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf> accessed 17 May 2023.

¹⁰ See for example: Nelson Mandela Rules, Rule 11(a).

¹¹ European Prison Rules (version 2020), Rule 18.8(b).

¹² Brenda J van den Bergh and others, ‘Imprisonment and Women's Health: Concerns about Gender Sensitivity, Human Rights and Public Health’ (2011) 89 *Bull World Health Organ* 689, 690.

A similar problem arises with regard to prison staff. In principle, staff in a women's prison should be female¹³, because of the risk of sexual abuse and discomfort for female inmates¹⁴. Due to shortages within this job sector, this is not always possible, and it regularly happens that male staff supervise in women's prisons¹⁵. This could have far-reaching consequences, especially if male supervisors are allowed to conduct 'body searches'¹⁶. This creates additional stress for female prisoners, impacting their mental health and making their time inside prison walls even more difficult than it already is.

Second, women with very different profiles are often incarcerated in the same prison unit¹⁷. In principle, prisoners should be classified according to the 'risk-need-responsivity' model, meaning that both the level of risk and the personal needs of the prisoner should be considered¹⁸. As women's prisons are more limited in number and consequently have fewer places, women often end up in a unit together even though they have committed completely different crimes¹⁹. This can disrupt the atmosphere within the prison walls and cause a higher level of security to be applied than is actually necessary for the majority of the female prisoners²⁰.

Moreover, as will be elaborated later in this chapter, insufficient attention is paid to the gender-specific profile of the average female prisoner, who has often been the victim of an abusive relationship and/or experienced (sexual) violence prior to her incarceration and, in many cases, has developed a serious drug addiction²¹. Prison systems do not take this gender-typical

¹³ Nelson Mandela Rules, Rule 81.

¹⁴ Kathleen J Ferraro and Angela M Moe, 'Women's Stories of Survival and Resistance' in Barbara H Zaitzow and Jim Thomas (eds), *Women in Prison: Gender and Social Control* (Lynne Rienner Publishers 2003), 81; Allen J. Beck, Ramona R. Rantala and Jessica Rexroat, 'Sexual Victimization Reported by Adult Correctional Authorities (research report)' (*BJS* January 2014) 9 <<https://bjs.ojp.gov/content/pub/pdf/svraca0911.pdf>> accessed 13 June 2023.

¹⁵ Penal Reform International (PRI) and Association for the Prevention of Torture (APT), 'Women in Detention: A guide to Gender-sensitive Monitoring' (2013) 12 <https://cdn.penalreform.org/wp-content/uploads/2013/06/Women-in-Detention-a-guide-to-gender-sensitive-monitoring_English_0.pdf> accessed 18 May 2023.

¹⁶ Aurore Vanliefde, 'Body searches and Vulnerable Groups: Women and LGBTQI+ People in Prison' in Tom Daems (ed), *Body Searches and Imprisonment* (Palgrave Macmillan Cham 2023), 108.

¹⁷ Jo Baker, Therese Rytter and DIGNITY, 'Conditions for Women in Prison: Needs, Vulnerabilities and Good Practices' (2014) 38 <www.dignity.dk/en/publications/> accessed 18 May 2023.

¹⁸ UN Office on Drugs and Crime (UNODC), 'Handbook on the Classification of Prisoners' (2020) 38 <www.unodc.org/documents/dohadeclaration/Prisons/HandBookPrisonerClassification/20-01921_Classification_of_Prisoners_Ebook.pdf> accessed 18 May 2023.

¹⁹ Pat Carlen, 'Women's Imprisonment: An Introduction to the Bangkok Rules' (2012) 3 *Revista Crítica Penal y Poder* 148, 149.

²⁰ Brenda J van den Bergh and others (n 12) 11.

²¹ UNODC (n 9) 34; Pat Carlen (n 19) 151.

background into account when screening female prisoners on arrival, which can result in female prisoners being placed in more restricted detention levels than actually necessary²².

Finally, a non-gender-specific issue that is nevertheless important to cite to present a good picture of the situation within prison walls is that of overcrowding. In both male and female prison institutions, the problem of overcrowding occurs, with all its adverse consequences (sharing a tiny cell with several people, bad sleeping conditions, little hygiene, no privacy, etc.)²³. In women's prisons this can bring additional gender-specific disadvantages, for example, when female prisoners have their periods and are in need of extra sanitary guarantees²⁴. Moreover, as noted in the previous section, women are more often locked up together for completely different crimes, which is not particularly favourable in cases of overcrowding²⁵.

2.2 Stigmatization and marginalization of female prisoners

We live in a binary structured world, where a person is either 'male' or 'female', determined on the basis of one's biological characteristics²⁶. These biological differences are linked to certain social expectations, also known as gender roles²⁷. Being 'male' or 'female' involves conforming to these culturally constructed gender roles, which have caused women to be oppressed in society for decades, not to mention the oppression of the LGBTQIA+ community²⁸. For example, women are expected to be responsible for raising children based on their sex-specific reproductive capacity. They are expected to always need protection based on their so-called weaker biological muscle mass. Another gender role that is stereotypically associated with the female sex is that they do not belong in prison which makes those who do end up here very quick to be criticised and subject to stigmatisation²⁹. Prison staff often

²² Olivia Stuart and Evelyn F McCoy, 'Gender-Responsive Programming in Women's Prisons' (*Urban Institute* April 25, 2023) 5 <www.urban.org/research/publication/gender-responsive-programming-womens-prisons> accessed 18 May 2023.

²³ UN Office on Drugs and Crime (UNODC), 'Handbook on Strategies to Reduce Overcrowding in Prisons' (2013) 11 <www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf> accessed 18 May 2023.

²⁴ Julie Ashdown and Mel James, 'Women in Detention' (2010) 92 *IRRC* 123, 130.

²⁵ Jo Baker and others (n 17).

²⁶ Ekaterina Yahyaoui Krivenko, *Gender and Human Rights: Expanding Concepts* (Edward Elgar Publishing Limited 2020) 8.

²⁷ Amy M. Blackstone, 'Gender Roles and Society' in Julia R. Miller, Richard M. Lerner and Lawrence B. Schiamberg (eds), *Human Ecology: An Encyclopedia of Children, Families, Communities, and Environments* (ABC-Clío 2004), 335.

²⁸ LGBTQIA+ stands for Lesbian, Gay, Bisexual, Trans, Queer, Intersex, Asexual and all other genders, sexual orientations and gender identities.

²⁹ Pat Carlen (n 17) 150.

reinforce this stigma by treating female prisoners as inferior and always imposing their sense of superiority³⁰.

It is impossible to define a 'typical female prisoner' because everyone who enters prison is different, but there are some characteristics that often reoccur. Women who end up in prison typically come from a disadvantaged and marginalised part of society: many are uneducated and some even illiterate, have few economic resources and know little about the justice system³¹. There is also said to be a link between skin colour and ethnicity and the incarceration of women, but a detailed discussion of this is beyond the scope of this thesis³².

Research has revealed that many female prisoners have a history of partner violence, sex work and sometimes sexual abuse, severe drug use, mental health issues and poverty³³. Moreover, they are often abandoned by their relatives from the moment they have to go to prison, because of the above-described stigma surrounding female prisoners³⁴. Consequently, they are extremely vulnerable when they arrive in prison and the current prison system is far too insensitive to these specific circumstances, as already pointed out above.

In short, the terms stigma, marginalisation and discrimination perfectly describe the situation of female prisoners. It is high time to change this and give female prisoners more dignity and use the prison institution as a tool to give an already highly marginalised group a new chance in society. This calls for gender-sensitive prison policies that take into account the physical, mental, vocational, legal and social needs of female prisoners³⁵.

³⁰ Jo Baker and others (n 17) 65.

³¹ PRI and APT (n 15) 9-10.

³² See for example: Anne Elliott and others, 'Women of Color in Prison' (2000) 2(1) *Souls* 79, 79-83; Sandra D. Langston, 'Commentary: The Reality of Women of Color in the Prison System' (2003) 1(2) *Journal of Ethnicity in Criminal Justice* 85, 85-86.

³³ Penal Reform International (PRI), 'Penal Reform Briefing No 3' (2008) <<https://cdn.penalreform.org/wp-content/uploads/2013/06/brf-03-2008-women-in-prison-en.pdf>> accessed 23 May 2023.

³⁴ PRI and APT (n 15) 10.

³⁵ Barbara Bloom, Barbara Owen and Stephanie Covington, 'Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders' (2003) <<https://info.nicic.gov/nicrp/system/files/018017.pdf>> accessed 13 July 2023.

2.3 Health related issues

A large number of the gender-specific needs of female prisoners are health-related. The right to health has already been recognised as a human right since the adoption of the Universal Declaration of Human Rights³⁶ and continues to be recognized in international human rights instruments³⁷. A key player in protecting the right to health is the World Health Organisation. In its constitution it is stated that ‘the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’³⁸. It can be understood from this phrasing that the right to health is a universal right that applies regardless of whether you are detained or not³⁹. This means, therefore, that the fact that a person is deprived of their liberty does not deprive them of an equal right to enjoy good health standards.

The right to health within prison is extremely important. Studies have shown that female prisoners are more likely to have specific health issues, as they often come from a particular environment in which certain health problems manifest themselves more quickly (e.g. drug and alcohol abuse, unequal access to healthcare due to lack of financial resources, history of sex work)⁴⁰. It is therefore important to distinguish between the health needs of men and the health needs of women within the prison system, as they are very different. One can think of their productive and sexual health needs, but also regarding mental health and substance use, there are notable gender-specific differences that need to be considered by the prison system⁴¹.

Studies have shown that female prisoners only have limited access to healthcare in prison, due to a lack of available healthcare personnel, lack of available materials, the hierarchical prison

³⁶ Article 25 of this Declaration reads: *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

³⁷ See for example: International Covenant on Economic, Social and Cultural Rights, Art. 12; Convention on the Elimination of All Forms of Discrimination Against Women, Art. 12.

³⁸ Constitution of the World Health Organization (adopted by the International Health Conference New York 19-22 June 1946 signed on 22 July 1946 entered into force on 7 April 1948) Official Records of the World Health Organisation No.2, 100 (WHO Constitution) Preamble.

³⁹ Rick Lines, ‘The Right to Health of Prisoners in International Human Rights Law’ (2008) 4(1) IJPH 3, 12.

⁴⁰ Barbara H Zaitzow (n 6) 32-33.

⁴¹ Preeta Saxena, Nena P Messina and Christine E Grella, ‘Who Benefits from Gender-Responsive Treatment? Accounting for Abuse History on Longitudinal Outcomes for Women in Prison’ (2014) 41(4) Criminal Justice and Behavior 417, 418.

structure, discrimination, favouritism, and lack of trust⁴². This, however, contradicts the principle that ‘the health care provided to persons deprived of their liberty be of a standard equivalent to that enjoyed by patients in the outside community’⁴³. In what follows, some of the typical female health concerns will be discussed, each time demonstrating why these concerns should be addressed through a gender-sensitive lens.

2.3.1 Reproductive health and sexual health issues

A clear example where female health needs differ from male health needs is in terms of reproductive health and sexual health. Reproductive health relates to ‘a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system, and to its functions and processes’⁴⁴. Sexual health, on the other hand, is defined as ‘a state of physical, emotional, mental and social well-being in relation to sexuality’⁴⁵.

When people think of sexual and reproductive health issues, they often link this to the presence of sexual diseases, such as HIV or other sexual transmitted diseases(STDs). Addressing these conditions is of great importance within prison walls, as female prisoners constitute a high-risk group for these types of diseases⁴⁶. Statistics show that the prevalence of HIV and other STDs in prisons is significantly higher than among the population outside prison⁴⁷, with a higher percentage of female prisoners being infected⁴⁸. Once again, this can be explained by looking at the background of the average female prisoner. A large proportion of the female prison population comes from a poor environment, where heavy drug use and sexual exploitation are

⁴² Jessica Liauw and others, ‘Reproductive Healthcare in Prison: A Qualitative Study of Women’s Experiences and Perspectives in Ontario, Canada’ (2021) 16(5) PLoS ONE 1, 5.

⁴³ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), ‘Women deprived of their liberty: Extract from the 10th General Report of the CPT’ (2000) CPT/Inf (2006) 13-part, para 32(1).

⁴⁴ UN Population Fund (UNFPA), ‘Report of the International Conference on Population and Development of 5-13 September 1994’ (1995) A/CONF.171/13/Rev.1, para 7.2.

⁴⁵ Ibid para 7.3.

⁴⁶ United Nations Office on Drugs and Crime (UNODC) and World Health Organization (WHO), ‘Women’s Health in Prison: Correcting Gender Inequity in Prison Health’ (2009), 22 <www.unodc.org/documents/hiv-aids/WHO_UNODC_2009_Womens_health_in_prison_correcting_gender_inequity-EN.pdf> accessed 23 May 2023.

⁴⁷ Theodore M Hammett, ‘HIV/AIDS and Other Infectious Diseases Among Correctional Inmates: Transmission, Burden, and an Appropriate Response’ (2006) 96(6) AJPH 974, 974.

⁴⁸ Carolyn Sufirin, Alexa Kolbi-Molinas and Rachel Roth, ‘Reproductive Justice, Health Disparities and Incarcerated Women in the United States (2015) 47(4) Perspect. Sex. Reprod. Health 213, 214.

part of their lifestyle⁴⁹. Both (unsafe) sex with different sex partners and injected drug use increases the risk of sexually transmitted diseases, which may consequently explain the high rates within women's prisons⁵⁰.

Sexual and reproductive health refers not only to being free from sexual and reproductive diseases, as outlined above, but also to a women's right to bodily integrity and sexual freedom⁵¹. This includes, among other things, access to contraception within prison⁵², the ability to have an abortion⁵³, provision of menstrual products such as sanitary pads, tampons, and bins to dispose these products in a subtle way⁵⁴, and assistance in going through menopause⁵⁵.

Finally, the right to sexual and reproductive health includes the right to pre- and postnatal care for pregnant women in prison. It regularly happens that women end up in prison while pregnant. There is a large body of research and literature on pregnant women within prison, but a comprehensive discussion of these is beyond the scope of this thesis. Some key issues will be briefly listed to highlight the need for a gender-sensitive approach within the prison system regarding pregnant inmates.

First of all, it is important to reiterate that detention should be a very last resort, especially in the case of pregnant women⁵⁶. Non-custodial measures or special centres for pregnant prisoners or female prisoners who have recently given childbirth should always prevail over incarceration⁵⁷. Secondly, appropriate prenatal care should be understood to include sufficient nutritious food to meet the dietary needs of both mother and child, adequate access to exercise

⁴⁹ Anne Searls De Groot, 'HIV Infection Among Incarcerated Women: Epidemic Behind Bars' (2000) 10(5) *Aids* read 287, 287; Pat Carlen (n 19) 151.

⁵⁰ UNODC (n 9) 11.

⁵¹ CPT (n 43) para 31(4).

⁵² Sophie G. Wenzel, Barbie Zabielski and Shelby Borowski, 'Contraceptive Needs Among Women Recently Incarcerated at a Rural Appalachian Jail' (2021) 2(1) *Women's Health Reports* 263, 270.

⁵³ Carolyn Sufrin and others (n 48) 214-215.

⁵⁴ Chandra Bozelko, 'Opinion: Prisons that Withhold Menstrual Pads Humiliate Women and Violate Basic Rights' in C Bobel and others (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan 2020).

⁵⁵ UN General Assembly (UNGA), 'Report of the Special Rapporteur on Violence against Women, its causes and consequences (*Pathways to, conditions and consequences of incarceration for women*)' (21 August 2013) UN Doc A/68/340, para 54.

⁵⁶ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), '24th General Report of the CPT (1 August 2013-31 December 2014)' CPT/Inf(2015) 1, para 117.

⁵⁷ Somayeh Alirezai and Robab Roudsari, 'Promoting Health Care for Women in Prison: A Review of International Guidelines' (2020) 25(2) *Iranian J Nursing Midwifery Res* 91, 99.

opportunities to remain in healthy condition during pregnancy and regular check-ups by a gynaecologist⁵⁸.

Unfortunately, it is still too often the case that pregnant women have to give birth in unhygienic conditions or, worse, are shackled during labour, which is recognized as a form of inhuman and degrading treatment⁵⁹. Therefore, prisons should ensure that women can give birth under dignified conditions, always preferring delivery in a public hospital rather than in the prison itself⁶⁰.

With regard to postnatal care, mothers should be given the opportunity to breastfeed, have free access to appropriate nutrition to enable breastfeeding and should be given the necessary privacy to do so⁶¹. Furthermore, it is often customary for new-born children to stay with their mothers in prison for a certain time after delivery, with the duration varying from country to country⁶². It is therefore appropriate to provide child-friendly spaces and facilities within prison for the children so that they can spend their early years in the best possible environment⁶³.

2.3.2 *Mental health issues*

The right to health includes not only the right to physical health, but also the right to mental health⁶⁴. Studies have shown that mental health disorders are more common among prisoners than among the general population, with the prevalence of mental disorders being even higher among female prisoners than male prisoners⁶⁵.

⁵⁸ Barbara A. Hotelling, 'Perinatal Needs of Pregnant, Incarcerated Women' (2008) 17(2) *The Journal of Perinatal Education* 37, 40.

⁵⁹ UN Committee Against Torture, 'UN Committee against Torture: Conclusions and Recommendations, United States of America' (25 July 2006) CAT/C/USA/CO/2, para 33.

⁶⁰ UNODC and WHO (n 46) 31.

⁶¹ UNODC and WHO (n 46) 32.

⁶² QCEA (n 3) 48.

⁶³ UNODC and WHO (n 46) 32.

⁶⁴ Article 12 of the International Covenant on Economic, Social and Cultural Rights states that "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" (own underlining).

⁶⁵ Megan Bastick and Laurel Townhead, *Women in Prison: A Commentary on the Standard Minimum Rules for the Treatment of Prisoners* (Human Rights & Refugees Publications 2008) 75-76.

There are several explanations for these high rates. Many female prisoners are victims of domestic violence and/or sexual abuse prior to their incarceration⁶⁶. In addition they often enter prison with a serious alcohol and/or drug addiction⁶⁷. Consequently, they are not always mentally stable when they arrive in prison and may suffer from (various) mental health problems, most commonly post-traumatic stress disorder (PTSD) and depression⁶⁸.

The different conditions upon arrival in prison, like overcrowding, lack of safety, emotional and, in some cases, physical abuse and recent separation from their family and children, exacerbate the feeling of anxiety and stress, increasing the likelihood of mental disorders or worsening pre-existing ones⁶⁹. As a direct consequence, this state of mental instability, as mentioned above, is often seen as an additional risk factor rather than a concern or a need by prison authorities⁷⁰. This leads to many female detainees being assessed at an excessive risk level, worsening their mental health condition⁷¹.

According to a 2014 WHO rapport, female prisoners are more likely to self-harm and are more suicidal than male prisoners, which is opposite to the figures among the population outside prison⁷². These alarming figures on the prevalence of self-harm and suicide (attempts) among the female prison population confirm the importance of the need to properly address their mental health upon arrival in prison.

In conclusion, it is of utmost importance to adequately screen women upon arrival in prison, including for the presence of possible mental illnesses, so that these issues can be addressed rather than exacerbated, as is often the case now, and to avoid disastrous consequences, such as female prisoners injuring themselves or, worse, attempting suicide.

⁶⁶ Brenda J van den Bergh, Emma Plugge and Isabel Yordi Aguirre, 'Women's Health and the Prison Setting' in Stefan Enggist, Lars Møllze, Gauden Galea and Caroline Udesen (eds), *Prisons and Health* (WHO 2014) 159.

⁶⁷ Ibid.

⁶⁸ Shannon M Lynch and others, 'A Multisite Study of the Prevalence of Serious Mental Illness, PTSD, and Substance Use Disorders of Women in Jail' (2014) 65(6) *Psychiatric Services* 670; Storm Ervin and others, 'Addressing Trauma and Victimization in Women's Prisons (research report)' (*Urban institute* October 5, 2020), 4 <www.urban.org/research/publication/addressing-trauma-and-victimization-womens-prisons> accessed 24 May 2023.

⁶⁹ PRI and APT (n 15) 15; UNGA (n 55) para 48.

⁷⁰ Megan Bastick and Laurel Townhead (n 65) 13.

⁷¹ UNODC (n 9) 34.

⁷² Brenda J van den Bergh and others (n 66) 161.

2.3.3 *Substance use*

As briefly touched upon in the previous two sections, there is a large drug problem among the female prison population. Most women who end up in prison are convicted for drug-related offences, which often include criminal acts committed to finance their own drug use⁷³. About 75% of female prisoners are said to struggle with alcohol or drug addiction upon arrival in prison⁷⁴ and 42% of the offenders were under the influence of drugs at the time of committing the offence⁷⁵.

As a prison institution it is important to take these drug problems into account, to do sufficient screening for them upon arrival in prison and offer the necessary, gender-sensitive treatment programmes. Attention to the gender aspect is of particular importance, as research has shown that drug use among women exhibits completely different characteristics than drug use among men and consequently requires a different approach⁷⁶.

These treatment programmes can make female prisoners less likely to relapse into the drug scene upon release and thus less likely to reoffend. It should always be kept in mind that the purpose of imprisonment is not only to punish delinquents, but also to prepare them for release and ensure that they leave prison as a 'better person' and are able to make a fresh start in society⁷⁷. It is with this reintegration goal in mind that drug abuse treatment, and in general any health-related treatment, in prison is of great importance⁷⁸.

2.4 Family life

Many women who end up in prison are also mothers and consequently leave behind a family when they are incarcerated in prison. Prison sentences restrict a person's personal freedom at the highest level, but it should not be forgotten that it also has far-reaching consequences for those around them, such as their family and children⁷⁹. Traditionally, women are still often the

⁷³ Angela M. Wolf and others, 'Responding to the Health Needs of Female Offenders' in Rosemary Sheehan, Gill McIvor and Chris Trotter (eds), *What works with women offenders* (Willan Publishing 2007).

⁷⁴ UNODC and WHO (n 43) 24.

⁷⁵ Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (2004) 63 *Research and Public Policy Series* 122.

⁷⁶ Angela M. Moe, 'Women, Drugs and Crime' (2006) 19(4) *Criminal Justice Studies* 337, 337-339.

⁷⁷ PRI (n 30), 10.

⁷⁸ Olivia Stuart and Evelyn F McCoy (n 22) 8.

⁷⁹ Rosi Enroos, 'Mothers in Prison: Between the Public Institution and Private Family Relations' (2010) 16 *Child and family social work* 12, 14.

main ‘caretaker’ of the family, leaving their children often without a safety net when incarcerated⁸⁰. In addition, separation from their children causes them to arrive in prison in a stressful state and the fact that they are often locked up far away from their homes and do not know who will take care of their children makes this already stressful situation much worse⁸¹.

It is important that the possibility to have contact moments with their family is encouraged and facilitated as much as possible by the prison facilities⁸². One way to do this is by extending visiting hours in women's prisons, as their visitors often have to travel a long distance⁸³, or by providing private rooms so that they can have more peace and quiet during visiting hours, especially when their children come to visit⁸⁴. It can be very frightening for children to see their parents in a prison environment and therefore separate, child-friendly spaces for these visits would be beneficial for maintaining the bond between mother and child⁸⁵.

Maintaining family ties is important both for the female prisoner with a view to her reintegration in the future, as for the children themselves. It is crucial that they continue to receive some form of parenting and are not neglected, as neglect can lead to them ending up on the same criminal path as their mothers in the future⁸⁶.

2.5 Gender-specific activities and vocational training

Another, more direct⁸⁷, discriminatory practice in prisons is the (in)availability of activities and vocational training for female prisoners. A large proportion of women who end up in prison

⁸⁰ UNODC (n 9) 17.

⁸¹ QCEA (n 3) 17 and 54.

⁸² Office of the United Nations High Commissioner for Human Rights (OHCHR), ‘Dignity and Justice for Detainees Week: Information Note no. 5’ (2008) 4 <www.ohchr.org/sites/default/files/UDHR/Documents/60UDHR/detention_infonote_5.pdf> accessed 23 May 2023.

⁸³ Julie Ashdown (n 24) 132.

⁸⁴ QCEA (n 3) 73.

⁸⁵ Megan Bastick and Laurel Townhead (n 65) 48.

⁸⁶ Joseph Murray, ‘The Effects of Imprisonment on Families and Children of Prisoners’ in Alison Liebling and Shadd Maruna, *The Effects of Imprisonment* (Willan Publishing 2005), 450; David Murphey and Mae Cooper, ‘Parents Behind Bars: What Happens to their Children?’ (*Child trends* October 27, 2015) 4-6 <<https://cms.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>> accessed 13 July 2023.

⁸⁷ Discrimination can take different forms and can be direct or indirect. The poorer employment offer for female detainees compared to male detainees is a form of direct discrimination, as two groups are treated differently solely on the basis of their sex. Indirect discrimination takes more subtle forms, often making it less noticeable at first glance. An example of this within the prison context is the gender-neutral health policy. Both male and female prisoners are given equal access to health screenings and treatment, but as the previous section made clear, female

often come from rather low social and economic backgrounds upon arrival⁸⁸. Prisons could therefore play an important role in improving their status and providing them with the best possible education to enable them to function as optimally as possible in society upon release and avoid the vicious cycle of crime⁸⁹.

Unfortunately, female prisoners are subject to a much smaller range of programmes than male prisoners, and these programmes are less varied and of a lower standard than those offered for male prisoners⁹⁰. Moreover, the activities offered are often heavily influenced by gender stereotypes and by social roles women are supposed to fulfil in society. For example, female prisoners are offered activities such as sewing, cooking, or cleaning⁹¹.

This is another example that shows that the prison system is not adapted to the needs of women and directly contributes to their further marginalisation⁹². This discriminatory practice has far-reaching consequences, as male prisoners often have a better economic status upon release than female prisoners and are consequently better able to integrate back into society⁹³.

2.6 Transgender women in prison

2.6.1 Introduction to the subject using the illustrative case of 'Isla Byrson'

A very recent case in Scotland has reignited the debate surrounding transgender people in prison. The case concerns a trans woman, Isla Byrson, who was being tried for sexual offences she committed while still going through life as a man. In 2016 and 2019, Bryson, then under the name and disguise of Adam Graham, raped 2 women. While awaiting trial, Byrson underwent a gender transition and currently goes through life as a woman. In January 2023, she was convicted of both crimes and subsequently transferred to a women's prison, albeit on a separate ward⁹⁴. This placement caused great outrage among the public, who felt it was

prisoners have completely different health needs than male prisoners. Current prison health treatment programmes rarely take this into account, as the programmes are based on the needs of a male prisoner. Thus, equal rules do not mean equal treatment. For more information on the subject of direct and indirect discrimination see: Sandra Fredman, *Discrimination Law* (Oxford University Press 2011), 166-190.

⁸⁸ PRI and APT (n 15) 9; Pat Carlen (n 19) 151.

⁸⁹ UNODC (n 9) 50; Pat Carlen (n 19) 150.

⁹⁰ UNGA (n 55) para 68.

⁹¹ Julie Ashdown (n 24) 138.

⁹² Jo Baker and others (n 17) 122.

⁹³ UNODC (n 9) 21-22.

⁹⁴ Nicola Rutherford, 'Isla Byrson: What is the transgender prisoners row all about' (*BBC News* February 28, 2023) <www.bbc.com/news/uk-scotland-63823420> accessed 19 April 2023.

unacceptable for a trans woman convicted of sexual crimes to be placed in a women's prison, as she potentially posed a danger to the other women in the prison. The criticism was heard and, in late January, Byrson was transferred to a men's prison. This debate also reached the political level and, as a result of this case, the policy on the placement of transgender prisoners was legally changed. Henceforth, newly convicted or remanded transgender prisoners will be placed initially on the basis of their birth sex. Thereafter, there remains scope for a case-by-case assessment, with the possibility of transfer⁹⁵.

This case is a good illustration of the different interests and arguments currently at stake in the debate surrounding the placement of transgender people in the prison system. The 'safety argument' is a favourite in this debate and is therefore often cited as a reason for classifying transgender prisoners on the basis of their birth sex rather than their gender identity⁹⁶. This, very specific and, moreover, exceptional case concerning Isla Byrson has caused an entire policy change within the Scottish prison system, ostensibly with a view to protecting the safety of female prisoners, but one may ask whether this is not at the expense of the safety and dignity of trans people.

So far, this thesis has dealt extensively with the various gender-specific needs of female prisoners, but this study would not be complete without mentioning the situation of trans people in prison. As this illustrative case in Scotland makes clear, reflecting upon this burning contemporary issue is needed. This section will therefore look at their particular situation, by discussing their specific needs, which differ in many ways from the cisgender population. Since the focus of this thesis is on women in prison, this section will mainly focus on the situation of trans women in prison. However, trans men in prison also represent a vulnerable group and their human rights should naturally also be considered, but a deeper analysis of their situation is beyond the scope of this thesis.

2.6.2 Definitions

Before going into the precise issues, it may be useful to provide some definitions of the terms discussed in this chapter. First of all, it is necessary to make a clear distinction between the

⁹⁵ James Cook, 'Trans Prisoners in Scotland to be placed according to birth sex' (*BBC News* February 10, 2023) <www.bbc.com/news/uk-scotland-64586523> accessed on 14 April 2023.

⁹⁶ Aurore Vanliefde (n 16) 114.

terms biological sex and gender, as they encompass completely different connotations, but are unfortunately still too often used interchangeably. A person's biological sex includes the biologically determined characteristics that a person is born with, such as a person's hormone composition, genitals, body hair and other features⁹⁷. Usually, these biological characteristics are linked to being either male or female. Sometimes, one can also be born with a combination of characteristics of both sexes, which is called intersexuality⁹⁸.

Gender identity is defined in the international human rights discourse as 'each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'⁹⁹.

Transgender people are people whose gender identity is different from the gender they were thought to be at birth¹⁰⁰. For example, a trans woman is a person born with the biological characteristics of the male sex, but whose gender identity corresponds to that of a woman. When someone's gender identity is congruent with their assigned sex at birth, we call them cisgender¹⁰¹.

2.6.3 The specific needs of trans women in prison

Just as the 'male norm' prevails in prison life, a 'cis-normative gender binary norm' prevails in general society¹⁰². Transgender people form a minority group within society and unfortunately still face a lot of discrimination and stigmatisation purely because they do not fall within the constructed boxes of today's society and are therefore seen as 'deviant'¹⁰³. As discussed in detail above, women form a minority within the prison system, making trans women in prison a minority group within another minority group. This leaves them even more vulnerable to abuse

⁹⁷ Information retrieved from: www.genderbread.org.

⁹⁸ Information retrieved from: https://isna.org/faq/what_is_intersex/.

⁹⁹ Yogyakarta Principles, 6.

¹⁰⁰ Information retrieved from: <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

¹⁰¹ Information retrieved from: www.health.com/mind-body/lgbtq-health/what-is-cisgender.

¹⁰² Candance West and Don H Zimmerman, 'Doing Gender' (1987) 1(2) *Gender and Society* 125.

¹⁰³ Annette Brömdal, 'Whole-Incarceration-Setting Approaches to Supporting and Upholding the Rights and Health of Incarcerated Transgender People' (2019) 20(4) *International Journal of Transgenderism* 341, 342.

and discrimination within the prison context¹⁰⁴. Ordinary society already has a hard time recognising different gender identities, but in prison, a system steeped in patriarchal and cis-normative views on sex and gender, people who deviate from the norm are placed in a particularly vulnerable position¹⁰⁵.

Often, the disregard for trans people's rights starts as early as their placement in prison. The prison system is a hyper-gendered institution that strongly reinforces the male/female binary¹⁰⁶. There is no general guideline on the placement of trans detainees and the policy varies from country to country, where different points of reference may be used, for example pre- or post-operative status, case-by case analysis, classification based on self-declaration or on a person's birth sex, which will now be the case in Scotland, etc¹⁰⁷.

As the case of Isla Byrson shows, one of the main arguments for not placing trans women in a women's prison is the 'safety argument'. Very often, trans women are still seen as 'fake women' who abuse the women's status for all sorts of reasons, including to get closer to cisgender women and (sexually) abuse them¹⁰⁸. The case of Isla Byrson shows that in specific cases this argument can be substantiated, for example when the trans woman is tried for sexual offences committed against women in the past. Nevertheless, this is an exceptional case and there is no evidence that transgender women in general pose more danger to their fellow prisoners than other cisgender women¹⁰⁹. Currently, the safety of cisgender female prisoners comes at the expense of the safety of trans women prisoners when they are placed in male prisons, where they are extremely vulnerable to sexual exploitation and violence¹¹⁰.

¹⁰⁴ Yvonne Boyer and others, 'Vulnerable Targets: Trans Prisoner Safety, the Law and Sexual Violence in the Prison System' (2019) 31(2) Canadian Journal of Women and the Law 386, 388.

¹⁰⁵ Nicole A. Fransisco, 'Bodies in Confinement: Negotiating, Queer, Gender Nonconforming, and Transwomen's Gender and Sexuality behind Bars' (2021) 49 *Laws* 10 1, 6; Nicole L. Asquith and Angela Dwyer, 'Cisnormativity, Criminalization, Vulnerability: Transgender People in Prisons' (2017) TILES Briefing Paper No. 12, 2.

¹⁰⁶ Victoria Patrickson, 'A 'Double Punishment': Placement and Protection of Transgender People in Prison' (*IPR blog* September 30, 2020) <www.penalreform.org/blog/transgender-people-in-prison-the-double-punishment/> accessed 14 June 2023.

¹⁰⁷ United Nations Development Programme (UNDP), 'Mapping of Good Practices for the Management of Transgender Prisoners' (2020) 15-20 <www.undp.org/thailand/publications/mapping-good-practices-management-transgender-prisoners> accessed 26 May 2023.

¹⁰⁸ Nicole A. Fransisco (n 105) 3.

¹⁰⁹ National Center for Transgender Equality (NCTE), 'Ending Abuse of Transgender Prisoners: A Guide for Advocates on Winning Policy Change in Jails and Prisons' (2018) 20 <<https://transequality.org/sites/default/files/docs/resources/EndingAbuseofTransgenderPrisoners.pdf>> accessed 28 May 2023.

¹¹⁰ Nicole A. Fransisco (n 105) 3-4.

Besides the issue of placement, transgender prisoners also face discrimination in many other ways¹¹¹. The most common problem areas are difficulties in accessing appropriate healthcare (prison medical staff are often unaware of the specific health needs of transgender people, such as hormone treatment, or intentionally ignore their needs for transphobic reasons)¹¹², misgendering or misnaming¹¹³, (sexual) violence and (sexual) abuse by other prisoners or prison staff¹¹⁴, restricted access to gender appropriate clothing¹¹⁵, and the overuse of solitary confinement¹¹⁶.

Conservative thinking about gender and sex prevails within the prison system, making anyone who deviates from the heteronormative binary norm particularly vulnerable to discrimination and abuse¹¹⁷. Although there has been increasing attention in the literature in recent years to the alarming situation of trans people in prison, very little official data can be found on this issue¹¹⁸. It is time for prison policy to be more committed to protecting the fundamental rights of trans people in prison and to actively combat transphobia in prisons. The Isla Byrson case unfortunately shows that, even in rather progressive countries like Scotland, the interests of cisgender people continue to take precedence at the expense of the rights of transgender people. It would be helpful if there existed international standards specifically for the rights of transgender people in prison, but, as the next chapter will show, there is still a long way to go to achieve the full recognition of their rights.

¹¹¹ UNGA (n 55) paras 58-63.

¹¹² Jaclyn M. White Hughto and others, 'Creating, Reinforcing, and Resisting the Gender Binary: A Qualitative Study of Transgender Women's Healthcare Experiences in Sex-Segregated Jails and Prisons' (2018) 14(2) *Int J Prison Health* 69, 74-76.

¹¹³ Annette Brömbdal (n 103) 343; Marie-Claire Van Hout and Des Crowley, 'The "Double Punishment" of Transgender Prisoners: A Human Rights-Based Commentary on Placement and Conditions of Detention' (2021) 17(4) *International Journal of Prisoner Health* 439, 440; Carol du Plessis and others, 'A Trans Agent of Social Change in Incarceration: A Psychobiological Study of Natasha Keating' (2023) 91 *Journal of Personality* 50, 51.

¹¹⁴ Annette Brömbdal and others, 'Experiences of Transgender Prisoners and Their Knowledge, Attitudes, and Practices Regarding Sexual Behaviors and HIV/STIs: A Systematic Review' (2019) 20(1) *International Journal of Transgenderism* 4, 5-6; Jason Lydon and others, 'Coming out of concrete Closets: A Report on Black & Pink's National LGBTQ Prisoner Survey' (2015) 39-45 <www.issuelab.org/resources/23129/23129.pdf> accessed 28 May.

¹¹⁵ Annette Brömbdal (n 103) 343; Marie-Claire Van Hout and Des Crowley (n 113) 440.

¹¹⁶ Jason Lydon and others (n 114) 37.

¹¹⁷ Yvonne Boyer and others (n 104).

¹¹⁸ UNDP (n 107) 7.

2.7 Intermediate conclusion

All the aforementioned issues show that the situation of female prisoners clearly differs from the norm of the male prisoner and that failure to take into account the gender-specific needs of female prisoners actually amounts to discrimination against this particular category of prisoners. In some cases, these discriminatory practices even affect fundamental rights, such as the right to health and the right to family life, making this issue a clear human rights issue¹¹⁹.

In short, the current issues are as follows: Women form a clear minority group within the prison system, even though the number of female prisoners has been rising sharply in recent years. This causes that less attention is paid to their specific needs, which manifests itself in all different areas. Throughout the entire prison experience, women are discriminated because their gender-specific needs, which, as this chapter has tried to show, differ from the male needs, are not adequately met

Prison authorities often claim that the same rules apply to female prisoners as to male prisoners, and that they are consequently treated equally, but that is not what equality entails¹²⁰. Equal treatment for different needs is, in practice, inequality¹²¹. Moreover, there are also practices taking place within prisons that are directly discriminatory, for instance in terms of the range of activities, training and education offered to female prisoners. It is therefore urgent to look at women's prisons from a gender-sensitive perspective and eliminate these discriminatory practices. Concerns about the current situation of female prisoners have already been voiced at both the international and regional levels. The guidelines, documents, conventions, and other instruments developed at the global and European level to address these issues will be discussed in the next chapters.

¹¹⁹ Brenda J van den Bergh and others (n 12).

¹²⁰ Sandra Fredman, *Discrimination Law* (Oxford University Press 2011), 166-190.

¹²¹ Pat Carlen (n 19) 149.

3 Women in prison - International protection

As the previous chapter has tried to make clear, many changes are necessary to improve the situation of (trans) women in prison and counter discriminatory practices. The previous chapter ended by arguing that the gender-specific problems currently experienced by female prisoners represent a human rights issue. Imprisonment may take away their liberty, but this does not take away their basic human rights, like the right to human dignity, the right not to be discriminated against and the right to be free from inhuman and degrading treatment. These are fundamental principles that apply regardless of whether a person is behind bars or not.

It is appropriate here first to give a brief introduction to the world of international human rights law. Since the end of the Second World War, the international legal landscape has changed. Traumatized by these horrific events, there was a very intense 'never again' feeling from which the United Nations arose in 1945¹²². In 1948, the Universal Declaration of Human Rights (UDHR) was created, containing a comprehensive enumeration of various human rights¹²³. Together with the two treaties that followed in 1966, the International Covenant on Civil and Political Rights (ICCPR)¹²⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹²⁵, the UDHR forms the 'Bill of Rights'.

These three documents form the heart of the international human rights discourse. Several international treaties have followed in the years after that focus more specifically on certain themes, for example the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or certain target groups, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

These treaties are all hard law, meaning that when a country becomes a party to one of these human rights treaties, by signing and ratifying it, the provisions of that treaty become legally

¹²² Jerome J. Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20(2) Human Rights Quarterly 201, 215.

¹²³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

¹²⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200 A(XXI) (ICCPR).

¹²⁵ International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200 A(XXI) (ICESCR).

binding within that state¹²⁶. This obliges states to respect, protect, and fulfil the human rights obligations and duties within that treaty¹²⁷. Where states fail to comply with these commitments, mechanisms such as treaty bodies, complaints procedures and special procedures exist to ensure that human rights violations are being addressed effectively¹²⁸.

These binding human rights treaties are accompanied by a whole set of guidelines, declarations, principles, rules, etc., also called soft law instruments. These do not have the same binding force as the treaties, but they are therefore not any less important. They often complement and clarify the general human rights treaties and, sometimes, even become a form of customary law through which violations can be raised at the international level¹²⁹.

This chapter will look at the international human rights instruments that may be applicable to the specific situation of women in prison. This analysis will help identify what mechanisms, if any, are in place to address violations of their rights. In this analysis a distinction will be made between the applicable hard-law instruments and the applicable soft-law instruments.

3.1 General human rights instruments

3.1.1 *International Bill of Human Rights*

These three treaties are at the core of the international human rights discourse, and they guarantee the most important human rights. All of them begin with the proclamation that ‘the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world’¹³⁰.

The UDHR is the first international document that focuses exclusively on the protection of international human rights. Its main aim is standard setting which makes that the wording remains quite general¹³¹. Nevertheless, there are some articles that may be relevant to the situation of (female) prisoners. For instance, Article 2 includes the principle of non-

¹²⁶ Kenneth W Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54(3) *Legalization and World Politics* 421, 421.

¹²⁷ Information retrieved from: www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law.

¹²⁸ Ibid.

¹²⁹ Stéphanie Lagoutte, *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2017) 1.

¹³⁰ UDHR, Preamble; ICCPR, Preamble and ICESCR, Preamble.

¹³¹ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press 2009), 4.

discrimination, which prohibits, amongst others, discrimination based on sex. Moreover, an open category of ‘other status’ has been introduced, which may relate, for example, to sexual orientation or gender identity¹³². Furthermore, the provisions on the right to life, liberty and security (Article 3), the prohibition of torture (Article 5), the prohibition of arbitrary detention (Article 9), the right to a fair trial (Article 10-11) and the right to an adequate standard of living and health (Article 25) are relevant to female prisoners.

The two Covenants differ slightly from the UDHR in the way they focus more on concrete responsibilities for states to provide for the protection, respect and fulfilment of the rights contained. The ICCPR covers largely the same rights as the UDHR, albeit in more detail¹³³. There is one specific article that is of great interest to (female) prisoners, namely Article 10. This article deals specifically with the situation of people whose liberty has been deprived and goes as follows:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”

[...]

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. [...].¹³⁴

This article thus explicitly states that the fact that a person is deprived of his/her liberty does not mean that that person also loses his human dignity. Moreover, the third paragraph makes it clear that the purpose of incarceration must always remain reintegration into society. As discussed in the first chapter, this is often forgotten in the prison system, where punishment still prevails over a future-oriented reintegration policy, which is particularly visible in women's prisons¹³⁵.

The ICESCR is of slightly less relevance when it comes to prisoners' rights, but again, one article stands out. It has already been mentioned in the first chapter in the section on gender-

¹³² UDHR, Art. 2; Marie-Claire Van Hout and Des Crowley (n 113) 442.

¹³³ For instance, the right to a fair trial (ICCPR, Art. 14) is described much more extensively than in the UDHR (UDHR, Artt. 10-11). The ICCPR lists several minimum guarantees to be observed, where it also takes into account the possible specific background of people who end up in prisons, such as foreign origin (right to a translator) and poverty (right to legal assistance).

¹³⁴ ICCPR, Art. 10.

¹³⁵ Supra 2.5.

specific health needs of female prisoners, namely Article 12 on the right of everyone to ‘the enjoyment of the highest attainable standard of physical and mental health’. As noted above, this right applies regardless of whether a person is in custody or at liberty¹³⁶. Another right guaranteed in the ICESCR that deserves to be mentioned is the right of everyone to ‘social security’¹³⁷.

Finally, all three instruments include an article guaranteeing gender equality¹³⁸. Since, as shown above, the issue of women in prison is largely a discrimination issue, these provisions certainly add value to this debate and are worth mentioning here¹³⁹.

In addition to these general human rights treaties, there exist also several specific treaties that elaborate a specific right (prohibition of torture) or relate to a specific group (women, children, persons with disabilities, etc.). In the following sections, this thesis will look at two other human rights treaties, the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment and Punishment¹⁴⁰ and the Convention on the Elimination of All forms of Discrimination Against Women¹⁴¹, as both may be relevant to the rights of female prisoners. This does not mean that other international human rights treaties are completely irrelevant, but for the purposes of this thesis, the aforementioned instruments are more appropriate to be analysed here.

3.1.2 The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Prisoners form a high-risk group for torture and ill-treatment¹⁴². They are deprived of their freedom and constantly subjected to the prison system. A combination of stigma surrounding the prisoners' status and inferiority to the outside world and the unequal power relationship between prison staff and prisoners make that ill-treatment and torture are not exceptional

¹³⁶ Supra 2.3.

¹³⁷ ICESCR, Art. 9.

¹³⁸ UDHR, Preamble; ICCPR, Art. 3; ICESCR, Art. 3.

¹³⁹ Supra 2.7.

¹⁴⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res 39/46 (CAT).

¹⁴¹ Convention on the Elimination of All forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/180 (CEDAW).

¹⁴² Information retrieved from: www.ap.t.ch/en/knowledge-hub/detention-focus-database/treatment/torture-and-ill-treatment.

practices in prison¹⁴³. The isolating nature of the prison system makes it easier to carry out these practices without scrutiny, which also makes that many cases of torture in the prison system remain under the radar and that much data on them is missing¹⁴⁴.

When people think of the word ‘torture’, they often think of medieval practices such as the cutting off of limbs, confinement in a cage with animals and even decapitation, but today this takes much more subtle forms, like psychological torture. Regarding prisoners, one can think of constant exposure to light, overcrowding in a cell, prolonged solitary confinement etc.¹⁴⁵, but also ignoring the specific needs of female prisoners fits into this list.

In 1987 the United Nations drafted a separate Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This document starts by giving a definition of the term ‘torture’¹⁴⁶. Articles 10 and 11 of this Convention address the specific situation of imprisonment. These articles impose obligations on the State Party to prevent torture in the prison system, such as training prison staff on the prohibition of torture¹⁴⁷ and reviewing the overall prison system against this prohibition¹⁴⁸.

The second part of this convention is devoted to the establishment of a ‘Committee against Torture’¹⁴⁹. As briefly mentioned above, treaty bodies exist to monitor the implementation of human rights treaties¹⁵⁰. The Committee against Torture is specifically concerned with monitoring Member States' implementation of treaty provisions of the Convention against Torture.

On top of that, there exists also a special rapporteur on torture and other cruel, inhuman or degrading treatment. This is an independent human rights expert who deals specifically with

¹⁴³ Sophie van der Valk and Mary Rogan, ‘Experiencing Human Rights Protections in Prisons: The Case of Prison Monitoring in Ireland’ (2021) 18(1) *European Journal of Criminology* 101, 101.

¹⁴⁴ Giuseppe D Albano and others, ‘Torture and Maltreatment in Prison: A Medico-Legal Perspective’ (2023) 11 *Healthcare* 576, 591.

¹⁴⁵ Information retrieved from: www.apr.ch/en/knowledge-hub/detention-focus-database/treatment/torture-and-ill-treatment and www.amnesty.org/en/what-we-do/torture/.

¹⁴⁶ CAT, Art. 1.

¹⁴⁷ CAT, Art. 10.

¹⁴⁸ CAT, Art. 11.

¹⁴⁹ CAT, Art. 17.

¹⁵⁰ Information retrieved from: www.ohchr.org/en/treaty-bodies.

the issue of torture and drafts reports on it¹⁵¹. For this study, one specific report by the former Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment is of interest, namely the 2016 report addressing gender perspectives on torture and other cruel, inhuman, or degrading treatment¹⁵². In this report, the Special Rapporteur recognises that the situation of women in the context of torture and ill-treatment is unique from that of men and that a gender-blind approach has been taken in this regard for too long¹⁵³.

Moreover, the report also focuses on lesbian, gay, bisexual and transgender people. This is a very progressive evolution, as it often remains difficult at the international level to recognise the rights of people who fall outside the heteronormative framework, even though it is usually their rights that are the most disrespected. This separate focus on their situation regarding torture practices and ill-treatment is therefore a very good step forward and important to mention here.

With regard to the situation of female prisoners, the 2016 report lists the following acts that can lead to a form of torture or ill-treatment and therefore deserve extra attention: authorities' failure to prevent inter-prisoner (sexual) violence¹⁵⁴, the use of shackles and handcuffs on pregnant women¹⁵⁵, the prolonged use of solitary confinement as a way of punishment¹⁵⁶, the discriminatory, humiliating or disproportionate use of body searches¹⁵⁷, the use of detention on the grounds of 'protecting' female victims of rape, honour-based violence and other abuses¹⁵⁸, the absence of gender-specific health care¹⁵⁹, the deprivation of liberty of children¹⁶⁰ and the State's failure to properly screen migrants and refugees¹⁶¹.

This report consequently does the same for the situation of lesbian, gay, bisexual and transgender persons in detention. With regard to the situation of transgender people, the

¹⁵¹ Information retrieved from: www.ohchr.org/en/special-procedures-human-rights-council.

¹⁵² UN Human Rights Committee (UNHRC), 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment' (2016) UN Doc. A/HRC/31/57.

¹⁵³ Ibid para 5.

¹⁵⁴ Ibid para 19.

¹⁵⁵ Ibid para 21.

¹⁵⁶ Ibid para 22.

¹⁵⁷ Ibid para 23.

¹⁵⁸ Ibid para 24.

¹⁵⁹ Ibid para 26.

¹⁶⁰ Ibid para 30.

¹⁶¹ Ibid para 31.

following acts can lead to a form of torture or ill-treatment: the automatic placement in male or female prisons based on their birth sex without regard to their gender identity¹⁶², their placement in solitary confinement or administrative segregation as a ‘protective measure’¹⁶³ and the conduct of humiliating and invasive body searches¹⁶⁴.

It should be noted that both the Convention and the Special Rapporteur's report place great emphasis on the role of the state and prison authorities to prevent torture and ill-treatment. The report tries to show that female prisoners and trans prisoners form an extra vulnerable group in the prison system and that they are more likely to be a victim of torture or ill-treatment, which is why they require additional protection from the authorities. This means that ignoring gender-specific needs of female detainees and trans prisoners can lead to a form of torture or ill-treatment and that a state, who has ratified the CAT, can be held responsible for this.

3.1.3 The 1979 UN Convention on the Elimination of All forms of Discrimination Against Women

Since the research here is specifically focused on the situation of (trans) women in prison, it is appropriate to also briefly mention the UN Women's Convention¹⁶⁵. Every UN treaty emphasises formal equality between men and women, but this is the first treaty that focuses specifically on protecting women and fighting discrimination based on sex, seeking substantial equality¹⁶⁶. The Women's Convention introduces the concept of equality of result, which goes beyond the concept of formal equality¹⁶⁷. It recognises that sometimes it is not enough to simply treat men and women equally and that there is a need for affirmative action specifically targeting women's interests to counter indirect discrimination¹⁶⁸. This focus on substantial equality is important for women in prison because most prison systems are based on a male norm. Treating female prisoners in the same way as male prisoners leads to indirect discrimination, as the system currently only considers the needs of men.

¹⁶² Ibid para 34.

¹⁶³ Ibid para 35.

¹⁶⁴ Ibid para 36.

¹⁶⁵ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1979) UNGA Res 34/180 (CEDAW).

¹⁶⁶ Dianne Otto, ‘Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law’ in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 337-344.

¹⁶⁷ Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85(4) *The American Journal of International Law* 613, 631.

¹⁶⁸ CEDAW, Art. 4; see also supra footnote 87 on direct and indirect discrimination.

Chapter one has shown that female prisoners have gender-specific needs that differ from the needs of male prisoners. Consequently, it is necessary to provide separate, gender-sensitive regulations for female prisoners to tackle discriminatory practices within the prison context. It is in this respect that Article 4 CEDAW is very important. This article provides for the possibility of (temporary) special measures to promote de facto equality between men and women.

Another important provision in the context of female prisoners is Article 12 on women's health. As discussed at length in the first chapter, female prisoners clearly have different health-related needs than male prisoners. Article 12 CEDAW requires State Parties to take these differences into account and provide for appropriate measures to meet these needs and to eliminate discrimination against women in the field of health care.

There exists also a separate mechanism associated with this treaty, namely the Committee on the Elimination of Discrimination against Women¹⁶⁹. This treaty body has a whole range of tasks, from preparing annual reports and general recommendations to dealing with state reports and handling complaints and inquiries¹⁷⁰. At present, there is no separate general recommendation relating to female prisoners, but many general recommendations do, indirectly, relate to their situation¹⁷¹. The concluding observations of country-specific reports occasionally refer to the situation of women in prison¹⁷², and the issue is also discussed at times in the personal complaint procedure¹⁷³.

To conclude, the Women's Convention also plays an important role in protecting the rights of female prisoners, even though it does not specifically target this group. The rationale behind this instrument, namely the achievement of substantial gender equality, covers all women,

¹⁶⁹ CEDAW, Art. 17.

¹⁷⁰ Information retrieved from: www.ohchr.org/en/treaty-bodies/cedaw.

¹⁷¹ See for example: UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 24: Article 12 of the Convention (women and health)' (1999) UN Doc A/54/38/Rev.1 and UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19' (26 July 2017) UN Doc CEDAW/C/GC/35.

¹⁷² See for example: UN Committee on the Elimination of Discrimination Against Women, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (30 July 2013) UN Doc CEDAW/C/GBR/CO/7, paras 54-55.

¹⁷³ See for example: UN Committee on the Elimination of Discrimination Against Women, 'Communication No 23/2009' (27 September 2011) UN Doc CEDAW/C/49/D/23/2009.

detained or not. Moreover, the Committee is not blind to the situation of female prisoners either, but a separate general recommendation would, in my opinion, be a welcome change.

3.1.4 *International protection of trans people's rights?*

It is perhaps worth to briefly discuss here the, rather limited, international protection of trans people and, more specifically, trans prisoners. Unfortunately, there is not yet a similar specific document for sexual minority groups that provides for the protection of their fundamental rights as there is for women. A criticism of the above-mentioned Women's Convention is that it is based on the heteronormative, binary gender division and thus does not cover individuals who differ from this, like transgender people, homosexual people, lesbians, and non-binary people¹⁷⁴. However, their rights are implicitly guaranteed by the general non-discrimination principle under 'other status'¹⁷⁵, but a separate convention to protect the rights of this category of people seems to be a long way off. Many countries are still struggling to accept people who do not conform to the heterosexual, cisgender norm and therefore it is very difficult to find consensus on this matter at the international level¹⁷⁶.

So, for a long time, outside the general non-discrimination principle, there was no protection at all for people belonging to a sexual minority group or having a gender identity that differs from the cisgender norm. This changed in 2006 with the introduction of the Yogyakarta principles¹⁷⁷. This soft-law document, together with its updated version of 2017 (the Yogyakarta Principles +10)¹⁷⁸, focuses specifically on the protection of fundamental rights related to a person's sexual orientation or gender identity. While these are very welcome improvements, both documents remain soft-law documents, which means they are not binding on member states and have no enforceable power.

¹⁷⁴ Ekaterina Yahyaoui Krivenko (n 26) 75-76.

¹⁷⁵ See for example: UDHR, Art. 2; ICCPR, Art. 2 and ICESCR, Art. 2.

¹⁷⁶ Ryan R Thoreson, 'Queering Human Rights: The Yogyakarta Principles and the Norm that Dare Not Speak Its Name' (2009) 8(4) *Journal of Human Rights* 323, 324.

¹⁷⁷ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), adopted March 2007.

¹⁷⁸ Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (Yogyakarta Principles +10), adopted November 10, 2017.

The protected target group of these principles includes trans people¹⁷⁹. If we look at these principles in relation to the subject of this study, namely (trans) women in prison, there are some principles worth mentioning.

The most important principle in this context is Principle 9 regarding the right to treatment with humanity while in detention. This principle states that *‘everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity’*. The principle then lists several obligations for states to address the needs of prisoners in relation to their sexual orientation and gender identity. This principle is of great importance to trans women in prison, as it addresses issues such as marginalisation¹⁸⁰, ill-treatment¹⁸¹ and (sexual) violence based on one's gender identity¹⁸², inappropriate medical care for transgender people¹⁸³ and the importance of awareness-raising for prison staff¹⁸⁴.

In 2017, the updated version of the Yogyakarta principles added some important provisions to this principle, including the obligation for states to provide regulations to protect trans prisoners with regard to prison placement, (body) searches, medical care and the use of solitary confinement¹⁸⁵.

Besides this Principle, the following principles are also worth mentioning here: The right to security of the person (Principle 5), the right to freedom from arbitrary deprivation of liberty (Principle 7), the right to freedom from torture and cruel, inhuman or degrading treatment or punishment (Principle 10), the protection from medical abuses (Principle 18) and the right to bodily and mental integrity (Principle 32).

In conclusion, even though there is not yet a separate international treaty guaranteeing rights in relation to sexual orientation and gender identity, the Yogyakarta Principles are of considerable

¹⁷⁹ Yogyakarta Principles, Preamble.

¹⁸⁰ Yogyakarta Principles, Principle 9 (a).

¹⁸¹ Ibid.

¹⁸² Yogyakarta Principles, Principle 9 (d).

¹⁸³ Yogyakarta Principles, Principle 9 (b).

¹⁸⁴ Yogyakarta Principles, Principle 9 (g).

¹⁸⁵ Yogyakarta Principles +10, Principle 9 (h).

importance and are already seen by many as a document with authoritative force¹⁸⁶. These Principles show the need to protect these groups, as they still very often face discrimination, especially in environments such as prisons. Even though the Yogyakarta principles have no enforceable power, states can already draw inspiration from these principles to improve the situation of trans people in prison. But again, this requires willpower on the part of states to introduce a change, and this is often sadly lacking.

3.1.5 *Intermediate conclusion*

In short, although there are few explicit references to the rights of female prisoners in international human rights treaties, this analysis shows that their situation is nevertheless protected, albeit in more general terms. Imprisonment does not take away their human dignity and therefore their fundamental rights must be respected even in prison. If this is not the case, there are several mechanisms in place that can act against this, such as the Committee Against Torture and the Committee on the Elimination of Discrimination against Women mentioned above.

The same evidently applies to trans women in prison. Their rights should also be guaranteed at all times, regardless of whether they are in prison or not. Unfortunately, their situation does not yet receive much attention in international human rights discourse, but the terms 'sexual orientation' and 'gender identity' do seem to be increasingly finding their way into the international human rights debate, especially with the introduction of the Yogyakarta Principles.

We can sum up this first part of the chapter with the conclusion that there is still much room for improvement at the international level with regard to the protection of (trans) women in prison, but that until any improvement comes, the current instruments and associated mechanisms can and should already be used to ensure their protection.

Besides these general international human rights instruments, there exist some soft law documents that focus specifically on prisoners' rights. The second part of this chapter will look at the extent to which these instruments apply a gender-specific lens.

¹⁸⁶ Ryan R Thoreson (n 176) 324.

3.2 Specific instruments for prisoner's rights

3.2.1 *The 1990 Tokyo Rules*

The Standard Minimum Rules for Non-Custodial Measures¹⁸⁷, adopted in 1990 by the United Nations and also known as the 'Tokyo Rules', is the key document on alternatives to imprisonment¹⁸⁸. The rules aim 'to provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment'¹⁸⁹. The idea behind this document is to reduce the unnecessary use of prison sentences and impose more appropriate non-custodial sentences based on a personal analysis of the offender¹⁹⁰.

These standards are important in this study, as female offenders often end up in prison for rather minor crimes, usually drug-related or property-related¹⁹¹. Often a non-custodial alternative would better fit their profile, but unfortunately this is still too rarely offered, even despite being explicitly recommended in the Tokyo Rules¹⁹². This shows that almost 35 years after these standards came into force, there is still very much room for improvement. A welcome development, therefore, is the introduction of the Bangkok Rules in 2010, which explicitly encourages the adoption and use of non-custodial alternatives to imprisonment, specifically for women. These rules will be discussed in more detail later in this chapter¹⁹³.

3.2.2 *The 2015 Nelson Mandela Rules*

In 1955, the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held which resulted in the adoption of the Standard Minimum Rules for the Treatment of Prisoners (SMRs)¹⁹⁴. These rules aim to reflect what can generally be seen as good standards regarding the treatment of prisoners and the management of prisons¹⁹⁵.

¹⁸⁷ United Nations Standard Minimum Rules for Non-Custodial Measures (adopted 14 December 1990) UNGA Res 45/110 (The Tokyo Rules).

¹⁸⁸ Information retrieved from: www.penalreform.org/issues/alternatives-to-imprisonment/international-standards/.

¹⁸⁹ Tokyo Rules, Rule 1.1.

¹⁹⁰ Tokyo Rules, Rule 2.3.

¹⁹¹ UNODC (n 9) 4; Pat Carlen (n 19) 149.

¹⁹² Tokyo Rules, Rule 5.1.

¹⁹³ *Infra* 3.2.3.

¹⁹⁴ United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted 30 Augustus 1955) UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C 5XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (SMR).

¹⁹⁵ SMR, Preliminary observation 1.

Although it is a soft law document, its influence on various national regulations cannot be underestimated¹⁹⁶.

In 2015, the SMRs were succeeded by a revised version called the ‘Nelson Mandela Rules’¹⁹⁷. The purpose of this document remains the same as that of the SMR, but the Mandela Rules are more comprehensive and set out in more detail what is expected of states regarding the treatment of prisoners and prison management.

The majority of the rules included in this document relate to the issues discussed in the first chapter, such as: Separation of male and female prisoners¹⁹⁸, provision of education and vocational training¹⁹⁹, adequate hygienic standards²⁰⁰, adequate nutritious food²⁰¹, access to the opportunity to exercise²⁰², appropriate health care, with particular attention to the treatment of infectious diseases, drug addictions and mental problems²⁰³, prohibition of prolonged solitary confinement²⁰⁴, prohibition of the use of restraints²⁰⁵, rules regarding the searching of prisoners and cells²⁰⁶, contact with the outside world²⁰⁷ and gender-specific prison staff²⁰⁸. The rules are, in principle, gender neutral as they apply to all detainees regardless of their sex²⁰⁹. Despite the overall gender-neutral approach, there are nevertheless some provisions that address the specific situation of female prisoners.

Regarding female prisoners, the following gender-specific rules can be identified. Rule 11 refers to the separation of men and women in prison. If this is not possible, for logistical reasons, it should be ensured that all areas for women are completely separated from the men's section²¹⁰. Accordingly, the rules state that in such mixed establishments, it is mandatory to have female

¹⁹⁶ Information retrieved from: www.un.org/en/events/mandeladay/mandela_rules.shtml.

¹⁹⁷ United Nations Standard Minimum Rules for the Treatment of Prisoners (adopted 17 December 2015) UNGA Res 70/175 (The Nelson Mandela Rules).

¹⁹⁸ Nelson Mandela Rules, Rule 11.

¹⁹⁹ Nelson Mandela Rules, Rule 4(2).

²⁰⁰ Nelson Mandela Rules, Rule 18.

²⁰¹ Nelson Mandela Rules, Rule 22.

²⁰² Nelson Mandela Rules, Rule 23.

²⁰³ Nelson Mandela Rules, Rule 24.

²⁰⁴ Nelson Mandela Rules, Rule 43(b).

²⁰⁵ Nelson Mandela Rules, Rule 47-49.

²⁰⁶ Nelson Mandela Rules, Rule 50-53.

²⁰⁷ Nelson Mandela Rules, Rule 58-63.

²⁰⁸ Nelson Mandela Rules, Rule 81.

²⁰⁹ Nelson Mandela Rules, Rule 2(1).

²¹⁰ Nelson Mandela Rules, Rule 11(a).

prison staff as supervision in the women's wards²¹¹. Rule 28 addresses the need to provide prenatal and postnatal care and treatment to pregnant women in prison and Rule 45(2) refers to the general prohibition to use solitary confinement in cases involving women and children. Under the section on the use of 'instruments to restrain people', there is a specific rule prohibiting the use of these instruments on women during labour, childbirth and immediately after childbirth²¹². Finally, regarding the rules about contact with the outside world, there is a specific rule on the equal right for women to receive conjugal visits²¹³.

So, while this is a gender-neutral document that serves to protect all prisoners, it does recognise that women are a distinct group within the prison system and should be treated differently in some respects. An important provision in line with this is the second paragraph of Rule 2, which refers to the possibility of affirmative action to protect certain vulnerable groups²¹⁴. This provision reflects the abovementioned Article 4 of the CEDAW²¹⁵. It justifies the implementation of specific regulations to promote the situation of female prisoners without being discriminatory, which is necessary to address the inequality in practice. This rule may also cover trans prisoners, as they too constitute a vulnerable group within the prison environment.

There is no explicit reference anywhere in the Mandela rules to the situation of trans people in prison, but implicitly some provisions do guarantee their rights. To begin with, the rules apply without discrimination to all prisoners, including the non-discriminatory ground of 'other status', which may include gender identity²¹⁶. Rule 7 lists the various details of information to be registered when a person arrives in prison, including identity details. Regarding these identity details, it states that respect must be shown to a person's 'self-perceived gender'. This provision is of great importance for people who identify as transgender, as it gives them the freedom to enter prison in accordance with their gender identity. Rule 19 also contains an implicit protection for trans people in prison by stating that prison clothing should in no case

²¹¹ Nelson Mandela Rules, Rule 81.

²¹² Nelson Mandela Rules, Rule 48(2).

²¹³ Nelson Mandela Rules, Rule 58(2).

²¹⁴ Article 2(2) of the Mandela Rules goes as follows: *'In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.'*

²¹⁵ Supra 3.1.3.

²¹⁶ Nelson Mandela Rules, Rule 2(1).

be ‘degrading or humiliating’. Often, trans prisoners are forced to wear gender-stereotypical clothing that does not match their gender identity, which can be very humiliating for them²¹⁷.

In conclusion, both the SMRs and the Nelson Mandela Rules are of enormous value when it comes to the rights and treatment of prisoners. These documents are not treaties, but the rules they contain nevertheless take the form of an authoritative guide to binding treaty norms. This means that the rules are binding on governments insofar that the norms set out in them elaborate on the broader standards contained in human rights treaties²¹⁸. While both are in principle gender-neutral and applicable to all prisoners, a deeper analysis shows that they recognise that (trans) women prisoners have different needs. Nevertheless, it was felt at the international level that this was not enough to fully protect the needs of female prisoners, and so in 2010 they came up with a gender-specific instrument, namely the Bangkok Rules.

3.2.3 *The 2010 Bangkok Rules*

The Bangkok Rules, officially called the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, were adopted by the United Nations General Assembly in December 2010²¹⁹. This is the first international soft-law document to focus on female prisoners and address their specific issues. These rules should be seen as complementary to the instruments mentioned above, the Tokyo Rules and the Standard Minimum Rules²²⁰, but with a specific focus on female prisoners²²¹.

This instrument starts by supplementing Rule 6 of the Standard Minimum Rules but shifts the perspective of this Rule by looking at the distinctive needs of female prisoners when applying the non-discrimination rule to achieve substantial equality rather than formal equality²²². This again reflects the aforementioned Article 4 of CEDAW, which allows affirmative action to improve the situation of women²²³.

²¹⁷ Marie-Claire Van Hout and Des Crowley (n 113) 443.

²¹⁸ Nigel Rodley and Matt Pollard (n 131) 384.

²¹⁹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (adopted 6 October 2010) UNGA C.3/65/L.5 (The Bangkok Rules).

²²⁰ Now replaced by the Nelson Mandela Rules, but the Bangkok Rules still refer to the previous SMRs.

²²¹ Bangkok Rules, Preliminary observations.

²²² Bangkok Rules, Rule 1.

²²³ UN Office on Drugs and Crime (UNODC), ‘Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)’ (2009) 23 <www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf> accessed 8 June 2023, supra 3.1.3.

Further, the second part of this document covers various potential problems women may face in prison (e.g., conditions regarding admission²²⁴, registration²²⁵, allocation²²⁶, health care²²⁷, safety and security²²⁸, contact with the outside world²²⁹ and institutional personnel and training²³⁰) which prison institutions should be aware of and take into account.

The third part of the document talks about non-custodial measures and means to supplement the Tokyo Rules, but from a gender perspective. As already mentioned under the subsection relating to the Tokyo rules, this is extremely important for female offenders, as they are often convicted of relatively minor offences, such as drug offences or theft²³¹. Rule 57 states that it is important for states to take into account the ‘history of victimization of many women offenders and their caretaking responsibilities’. This reflects an important principle that emerged several times in the first chapter, namely that their reasoning for committing a crime is often related to their typical background and that imprisonment is often an unfavourable and disproportionate punishment for them²³².

The document ends with four rules on research, planning, evaluation and public awareness-raising, which is a new approach compared to the previous instruments regarding prisoners' rights. These are important provisions to ensure that everything put on paper in this document actually reaches people and is monitored in practice²³³.

One criticism of the Bangkok Rules is that it focuses only on women, reinforcing the heteronormative, binary norm. No rule in the Bangkok rules addresses women in prison who belong to a sexual minority or trans women in prison, which is regrettable. This document is already an enormous step forward regarding the protection of female prisoners, but unfortunately regulation alone is not enough to bring about change, and certainly not when it

²²⁴ Bangkok Rules, Rule 2.

²²⁵ Bangkok Rules, Rule 3.

²²⁶ Bangkok Rules, Rule 4.

²²⁷ Bangkok Rules, Rules 5-18.

²²⁸ Bangkok Rules, Rules 19-25.

²²⁹ Bangkok Rules, Rules 26-28.

²³⁰ Bangkok Rules, Rules 29-35.

²³¹ Penal Reform International (PRI) and UKaid, ‘UN Bangkok Rules on Women Offenders and Prisoners: Short Guide’ (2013) 3 <<https://cdn.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf>> accessed 8 June 2023; supra 3.2.1.

²³² Supra 2.1.

²³³ PRI and UKaid (n 231) 10.

comes to non-binding soft law documents. Again, it takes willpower from the states individually to adapt their national prison system to the Bangkok standards and a monitoring mechanism is needed to control implementation in practice.

3.2.4 *Intermediate conclusion*

The soft law documents discussed above are all based on the premise that prisoners still maintain their human dignity and that additional safeguards should be provided to realise respect for their human rights. Unlike the international Human Rights Conventions, these soft-law documents do focus specifically on prisoners, which was a necessary evolution, especially with regard to the situation of female prisoners. Today, thanks to the adoption of the Bangkok Rules, there even exist separate rules on the protection of female prisoners.

Thus, in the context of this thesis, it can be concluded that the situation of women in prison does receive attention at the international level. International human rights defenders and policymakers are not blind to this issue, and action is being taken, but it remains at the soft-law level for now.

Regarding the protection of trans women in prison, we are unfortunately not at all as far advanced, but broad interpretations of open provisions can already provide limited protection. The reference to 'gender' in the updated Mandela Rules is a step in the right direction, but many more steps are needed to improve their situation.

From this chapter on the protection of women in prison at the international level, it can be concluded that ignoring the gender-specific needs of female prisoners undoubtedly leads to a violation of their human rights. This issue falls entirely within the human rights discourse, as the basic right to human dignity applies to everyone, regardless of whether a person is incarcerated or not. Consequently, several international human rights treaties and soft-law documents are applicable to address this situation. However, the international treaties remain quit generally formulated and thus do not specifically address the rights of female prisoners. Over the years, especially with the introduction of the Bangkok Rules, this group has been able to find protection at the international level, albeit through soft-law instruments. Nevertheless, this is a strong signal from the international human rights discourse that this is a pressing issue that needs to be addressed.

4 Women in prison - Regional protection

The previous chapter consisted of a legal analysis of the existing international human rights instruments that provide for the protection of prisoners, and more specifically female prisoners. In addition to the development of human rights instruments at the international level, there have also been developments at the different regional levels. This chapter will take a closer look at the protection of female prisoners on the European regional level, looking at both legal instruments and the jurisprudence of the European Court of Human Rights.

4.1 Legal instruments

4.1.1 *The 1950 European Convention on Human Rights*

The first major development at the European level regarding the protection of fundamental human rights came with the introduction of the European Convention on Human Rights (ECHR) in 1950²³⁴. This document provides a catalogue of all the fundamental rights and freedoms people possess, largely inspired by the Universal Declaration of Human Rights, but with some differences²³⁵. The ECHR contains similar guarantees as the UDHR, such as the prohibition of torture²³⁶, the right to a fair trial²³⁷ and the prohibition of discrimination²³⁸. An important article relating to prisoners' rights is the abolition of the death penalty, which came into force with the introduction of Additional Protocol number six²³⁹.

A special strength of the ECHR is that it also provides for the establishment of its own court, namely the European Court of Human Rights (ECtHR)²⁴⁰. The ECtHR monitors the Member States' implementation of the different treaty articles and intervenes in case of non-compliance²⁴¹. It has already ruled on numerous human rights issues, including cases on prisoners' rights, which will be discussed in more detail later in this chapter²⁴².

²³⁴ Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention on Human Rights, as amended) (ECHR).

²³⁵ Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th ed, Oxford University Press 2020), 3.

²³⁶ ECHR, Art. 3.

²³⁷ ECHR, Art. 6.

²³⁸ ECHR, Art. 14.

²³⁹ Treaty Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty 1983.

²⁴⁰ ECHR, Art. 19.

²⁴¹ ECHR, Art. 27-49.

²⁴² *Supra* 4.2.

4.1.2 *The Istanbul-Convention*

The European regional system also has some human rights instruments that are established for a specific theme or a specific group, just like the international level. Comparable to the UN Convention on the Elimination of All Forms of Discrimination Against Women there exists the Convention on Preventing and Combating Violence Against Women and Domestic Violence, also called the Istanbul Convention²⁴³. The Istanbul Convention, drafted by the Council of Europe in 2011, is a unique legally binding instrument aimed at preventing and combating violence against women. The Convention is based on a gender-specific understanding of violence against women, which translates into its scope and approach²⁴⁴. This legally binding Convention obliges states to take measures to combat violence against women in four areas: prevention, protection, prosecution, and policy²⁴⁵. As part of the effective implementation of this convention, a monitoring body, namely the Expert Group on Combating Violence against Women and Domestic Violence ('GREVIO'), has been established²⁴⁶.

The Istanbul Convention says nothing about the specific situation of female prisoners, yet a brief mention is appropriate here. Women form the main subject of this study, which therefore would not be complete without a mention of the main instruments that provide for the protection of women's rights, and the Istanbul Convention is a key player in this field. Moreover, chapter two of this thesis showed that female prisoners are more likely to experience gender-based violence by other inmates or staff members, such as rape or sexual harassment²⁴⁷. This Convention focuses specifically on violence against women and its provisions apply to all women, imprisoned or not. Prison institutions should therefore ensure that the treatment of female prisoners is in line with the principles set out in this Convention. A deeper analysis of the articles in this convention is beyond the scope of this study.

²⁴³ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS no. 210 (Istanbul-Convention).

²⁴⁴ Dubravka Simonovic, 'Global and Regional Standards on Violence Against Women: The Evolution and Synergy of the CEDAW and Istanbul Convention (2014) 36(3) HR Quarterly 590, 602.

²⁴⁵ Eugénie D'Ursel, 'La Convention du Conseil de l'Europe sur la prévention et la lutte contre les violences à l'égard des femmes : Une révolution silencieuse ?' (2018) 1(113) Rev. trim. Dr. h. 25, 33.

²⁴⁶ Istanbul Convention, Art. 66.

²⁴⁷ Allen J. Beck and others (n 14).

4.1.3 *The European Prison Rules*

At the hard law level, concrete protection of prisoners' rights remains largely absent, but at the soft law level, several regional instruments do provide for the explicit protection of prisoners. For example, the 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas'²⁴⁸, the 'Kampala Declaration on Prison Conditions in Africa'²⁴⁹, the 'Arusha Declaration on Good Prison Practice'²⁵⁰ and the 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa'²⁵¹ are all regional soft-law documents that foresee the protection of prisoner's rights. A deeper analysis of these instruments is unfortunately beyond the scope of this thesis. The focus here will only be on the European level, where the European Prison Rules (EPR), developed by the Council of Europe in 1973²⁵² and revised in 2006²⁵³ and again in 2020²⁵⁴, constitute the most important soft-law document regarding the protection of prisoners' rights.

This regional soft-law document is comparable to the UN Nelson Mandela Rules mentioned above²⁵⁵. The EPR are in principle aimed at both male and female prisoners, but they do contain some provisions specifically relating to women in prison²⁵⁶. This was not always the case, only with the introduction of the revised version in 2006 (some) specific needs of female prisoners are being recognised. This revised version also welcomes a number of provisions that are in principle gender-neutral, but in practice are especially relevant for female prisoners, such as

²⁴⁸ Inter-American Commission on Human Rights (IACHR), Resolution 1/08 on Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 13 March 2008.

²⁴⁹ The African Commission on Human and Peoples' Rights, Kampala Declaration on Prison Conditions in Africa, September 1996.

²⁵⁰ The Prison Services in Central, Eastern and Southern African (CESCA), Arusha Declaration on Good Practice, 27 February 1999.

²⁵¹ The African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.

²⁵² Council of Europe (CoE) Committee of Ministers, Resolution Res (73) 5 on the Standard Minimum Rules for the Treatment of Prisoners (adopted on 19 January 1973).

²⁵³ Council of Europe (CoE) Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules (adopted on 11 January 2006).

²⁵⁴ Council of Europe (CoE) Committee of Ministers, Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules (adopted on 11 January 2006, and revised and amended on 1 July 2020).

²⁵⁵ *Supra* 3.2.2; The preamble to the European Prison Rules contains an explicit reference to the Mandela Rules, indicating that it was used as an inspiration for drafting these rules.

²⁵⁶ E.g., Rule 18.8 on separation of male and female prisoners, Rule 19.7 on female hygiene, Rule 26.4 on the prohibition of discrimination based in gender in the type of work provided, Rule 34 on women's special needs, Rule 54.4 on the prohibition of searches on prisoners by staff of the other gender and Rule 81.3 on the training of prison staff working with female prisoners.

provisions relating to prisoners suffering from alcohol or drug addiction²⁵⁷ or the separate chapter on mental health problems in prison²⁵⁸.

In 2020, the EPR were again revised and updated. If we compare the new 2020 version with the 2006 one, some improvements can be observed, but regarding the situation of female prisoners, they could have inserted an even more gender-sensitive approach. Despite the Quaker Council for European Affairs (QCEA)' extensive analysis from a gender perspective on the 2006 European Prison Rules and its accompanying recommendations for possible future adjustments, these have been taken into account only to a limited extent²⁵⁹.

The positive changes regarding the situation of female prisoners that can be observed in the latest version of the EPR are the following. As recommended by the QCEA, the new rules include an additional paragraph on detainee record-keeping. From now on, it will also be mandatory to keep information on a detainee's number of children, their age, and their current primary caregiver²⁶⁰. Women who end up in prison are often also mothers and the main caregiver of their children, meaning that their imprisonment leaves the children behind without anyone to look after them²⁶¹. Documenting this information is therefore important to ensure the safety of these children²⁶².

The distinct subsection of the EPR on women in prison also made some positive innovations compared to the 2006 text. First, this subsection begins with introducing a completely new rule talking about the need to develop 'specific gender-sensitive policies' and encouraging the member States to take 'positive measures to meet the distinctive needs of female prisoners in the application of these rules'²⁶³. This new rule is in line with the international legal instruments discussed above, which refer to the need for positive action in order to ensure de facto equal treatment of men and women²⁶⁴. Moreover, this rule clearly recognises the fact that female

²⁵⁷ EPR, Rule 15.1 f.

²⁵⁸ EPR, Rule 47.

²⁵⁹ The Quaker Council for European Affairs (QCEA), 'The European Prison Rules: A Gender Critique' (2006) <www.qcea.org/wp-content/uploads/2011/04/resp-wip3-gencritique-en-mar-2006.pdf> accessed 14 June 2023.

²⁶⁰ EPR (2020 version), Rule 15.1 h.

²⁶¹ Supra 2.4.

²⁶² QCEA (n 259) 7.

²⁶³ EPR (2020 version), Rule 34.1.

²⁶⁴ Supra 3.1.3, 3.2.2 and 3.3.3.

prisoners have different needs from the male prison population and that, to meet these needs, gender-sensitive policies are essential.

An additional safeguard has been added in Rule 34.3 that requires prison authorities to inform female prisoners of their right to seek recourse from judicial authorities, legal assistance, psychological support or counselling, and appropriate medical advice to ensure protection from physical, mental, or sexual violence.

Furthermore, the provision on pregnancy and childbirth in prison also has been amended in the new version. The drafters changed the wording from ‘allowing’ pregnant female prisoners to give birth outside prison²⁶⁵ to ‘arranging’ that pregnant female prisoners can always give birth outside prison²⁶⁶. Moreover, it requires prison authorities to provide special accommodation in case women do give birth in prison²⁶⁷.

Finally, some other rules also introduce additional safeguards for female prisoners, for example regarding the use of solitary confinement²⁶⁸ and the use of instruments of restraint²⁶⁹.

Although these additional safeguards are already a step in the right direction, still it is unfortunate that the QCEA’s recommendations have not been taken more into account. Their recommendations also address the right to abortion, the quality of prenatal and postnatal care, the possibility of breastfeeding in prison, contact with midwives and the treatment of menopause²⁷⁰.

This analysis of the most recent version of the EPR shows that this document is not gender-blind and that it tries to take the specific needs of women into account when shaping prison policies. However, the commentary of the QCEA makes clear that, despite the progressive evolution, policies could be much more gender-sensitive and that not all gender-specific needs of female prisoners are currently being recognised.

²⁶⁵ EPR (2006 version), Rule 34.3.

²⁶⁶ EPR (2020 version), Rule 34.4.

²⁶⁷ Ibid.

²⁶⁸ EPR (2020 version), Rule 60 a.

²⁶⁹ EPR (2020 version), Rule 68.7.

²⁷⁰ QCEA (n 259) 24-26.

Moreover, it is also possible to criticize this document from an LGBTQ+ perspective. The EPR target different vulnerable groups in separate subsections, such as women²⁷¹, detained children and infants²⁷², foreign nationals²⁷³ and ethnic or linguistic minorities²⁷⁴, but nowhere does it say anything about transgender detainees, which is regrettable²⁷⁵.

4.1.4 CPT instruments

At the European level, there exists a mechanism similar to the UN Committee against Torture, namely the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The CPT's main task is preventing ill-treatment of persons deprived of their liberty in Europe and it does so by visiting all kinds of places of detention and publishing reports on it²⁷⁶. It also publishes General Reports and Factsheets on a variety of topics, including women in prison. For the purpose of this study, it is interesting to look at these documents to get a better idea of how much attention is paid to these issues at the regional level.

In its 10th general report, the CPT has devoted a separate chapter to 'women deprived of their freedom', describing various specific problems faced by female prisoners²⁷⁷. In this Report, the CPT confirms that ignoring certain gender-specific needs of female prisoners, such as not providing sanitary pads and tampons, can lead to a form of degrading treatment²⁷⁸.

In 2018, the CPT developed an important Factsheet on 'women in prison'²⁷⁹. This Factsheet discusses various problem areas and provides recommendations, but it is mainly the introductory part of this document that is of significance. To address a problem effectively, the first step is always recognition of the problem. This Factsheet recognises that female prisoners have specific needs and vulnerabilities that differ from those of men and that they are often

²⁷¹ EPR (2020 version), Rule 34.

²⁷² EPR (2020 version), Rule 35-36.

²⁷³ EPR (2020 version), Rule 37.

²⁷⁴ EPR (2020 version), Rule 38.

²⁷⁵ Marie-Claire Van Hout and Des Crowley (n 113) 444.

²⁷⁶ Information retrieved from: <https://www.coe.int/en/web/cpt/about-the-cpt>.

²⁷⁷ For example: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Women deprived of their liberty: Extract from the 10th General Report of the CPT' (2000) CPT/Inf (2006) 13-part.

²⁷⁸ Ibid para 31.

²⁷⁹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Factsheet on women in prison' (2018) CPT/Inf (2018) 5.

treated less favourably than male prisoners because of the predominant male norm within the prison system. It highlights that ‘vulnerability’ should not be interpreted as meaning that female prisoners are weaker than male prisoners, but rather that they are present in smaller numbers in prison, which makes it more difficult for prison administrations to meet their needs²⁸⁰.

The CPT recognises with this Factsheet that to achieve substantive equality, it can be necessary to take special measures to eliminate existing inequalities²⁸¹. In theory, female prisoners are treated, most of the time, equally to male prisoners, but within a system that has based and designed itself entirely on a male prison population²⁸². This makes that women's gender-specific needs are being ignored resulting in the de facto unequal treatment of female prisoners. This call for substantive equality by the CPT is in line with general developments at the international level and confirms that this is a gender equality issue at its core.

4.1.5 *Intermediate conclusion*

From the analysis conducted so far of the available legal instruments at the European level protecting female prisoners' rights, we can conclude that there exist a lot of similarities with the international level. Comparable to the international Bill of Rights, Europe has the European Convention on Human Rights. The two levels have also developed similar instruments regarding the protection of women's rights, namely the international Convention on the Elimination of All Forms of Discrimination Against Women and the European Istanbul Convention.

Looking at how both levels deal with the specific situation of prisoners and the protection of their rights, we can again see similarities. The biggest parallel is between the United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules) and the European Prison Rules. This is not difficult to explain, as the EPR explicitly refer to the Nelson Mandela Rules as their inspiration source²⁸³. In addition to the Nelson Mandela Rules, the international level also foresees a gender-specific instrument relating to female prisoners, namely the Bangkok Rules. To date, no such specific document has been developed at the

²⁸⁰ Sofia Ciuffoletti, “‘Regardless of Their Sex’ or “‘Biological Differences’”. An Analysis of the European Court of Human Rights’ Case Law on Women in Prison’ (2020) 11(2) Rev. Direito e Práx. 1275, 1287.

²⁸¹ CPT (n 279) paras 1-3.

²⁸² Sofia Ciuffoletti (n 280) 1283.

²⁸³ EPR (version 2020), Preamble para 11.

European level, but an evolution can be observed in the revised versions of the EPR. While the original version hardly took into account the special needs of female prisoners, the latest updated version from 2020 explicitly recognises these needs²⁸⁴. That said, introducing a separate document, as has been done at the international level with the Bangkok Rules, would be a welcome evolution.

Furthermore, at both levels, there is still too little focus on protecting the rights of trans people and, more specifically, trans prisoners. In this area, the international level did make progress with the introduction of the Yogyakarta Principles, but more effort on both levels is needed to effectively protect the rights of this extremely vulnerable group.

In conclusion, the protection of female prisoners is quite similar at both levels. The main difference is that the international level has already developed rules specifically aimed at protecting female prisoners. On the other hand, the European level has a huge advantage when it comes to the enforcement of rights with its European Court of Human Rights. This Court is concerned with the upholding of all types of human rights, and prisoners' rights are no exception, as will be shown in the next section.

4.2 Analysis of the European Court of Human Rights' case law on (trans) female prisoner's rights

The European Court of Human Rights (ECtHR) is the European regional court that monitors compliance with the provisions encompassed in the European Convention on Human Rights through individual and State applications²⁸⁵. If we look at the functioning of the European Court of Human Rights and the different issues it decides on, we see that prisoners' rights is a very familiar topic and that there is a lot of case law on the subject, ranging from conditions of imprisonment to prisoner's rights in judicial proceedings²⁸⁶. A deeper look into this case law however shows that the majority of these cases concern the situation of male prisoners. This is explainable by the fact that most of the prison population are men compared to only a small percentage of female prisoners. Still, it is unfortunate that the Court, a judicial body with great

²⁸⁴ EPR (2020 version), Rule 34.1.

²⁸⁵ Bernadette Rainey et al. (n 235) 21.

²⁸⁶ European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: prisoners' rights' (2022) <www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf> accessed 18 June 2023.

power and authority, rarely deals with violations of female prisoners' rights, and that when it does, it barely includes a gender-specific point of view.

In the following subsections, this thesis will look at the existing jurisprudence from the ECtHR regarding women in prison and criticise its current approach. Finally, it will also take a brief look at the ECtHR's approach to the protection of transgender prisoners' rights.

4.2.1 *ECtHR's case law on female prisoners*

As the previous chapters have tried to show, the underlying problem is that prison systems are based on a male norm and are often inadequately adapted to gender-specific, female needs. The preceding analysis of the international and regional human rights instruments shows that the various problems faced by female prisoners in prison can amount to the violation of different fundamental human rights. This has also been recognised by the ECtHR in its jurisprudence. It has delivered a number of rulings over the years regarding the situation of female prisoners. Most cases relate to a violation of the right to be free from torture or ill-treatment²⁸⁷, but also the right to security²⁸⁸, the right to a fair trial²⁸⁹, the right to private life²⁹⁰ and the right to an effective remedy²⁹¹ appear in the Court's case-law. The ECtHR thus regularly rules on prisoners' rights and provides for the protection of female prisoners' rights, but it rarely looks at these cases from a gender-specific point of view. In what follows, four important ECtHR cases will be discussed, in which the Court did take a gender-specific approach.

4.2.1.1 *Korneykova and Korneykov case*

The case of *Korneykova and Korneykov* concerns a pregnant woman who gave birth to a child in prison²⁹². The woman filed a complaint before the Court for being shackled to the bed in the maternity hospital. She found that this was grossly unjustified, painful, and humiliating given her physical and psychological state at the time²⁹³. She also filed a complaint about her

²⁸⁷ *Aydin v. Turkey* (1997) ECHR 1997-VI; *Price v. The United Kingdom* (2001) ECHR 2001-VII; *Testa v. Croatia* App no 20877/04 (ECtHR, 12 July 2007); *Raffray Taddei v. France* App no 36435/07 (ECtHR, 21 December 2010); *Yazgül Yılmaz v. Turkey* App no 36369/06 (ECtHR, 1 February 2011); *Ebru Dinçer v. Turkey* App no 43347/09 (ECtHR, 29 January 2019).

²⁸⁸ *Kats and others v. Ukraine* App no 29971/04 (ECtHR, 18 December 2008).

²⁸⁹ *Juhnke v. Turkey* App no 52515/99 (ECtHR, 13 May 2008).

²⁹⁰ *Ibid.*

²⁹¹ *Aydin v. Turkey* (n 273); *McGlinchey and others v. The United Kingdom* (2003) ECHR 2003-V.

²⁹² *Korneykova and Korneykov v. Ukraine* App no 56660/12 (ECtHR, 24 March 2016).

²⁹³ *Ibid* [99].

conditions of detention (malnutrition, use of a metal cage and lack of proper medical care for the son). The Court examined all the complaints under Article 3 ECHR (the prohibition of torture) and found a violation of this article for the alleged shackling of the first applicant in the maternity hospital²⁹⁴, for the conditions of the applicants' detention²⁹⁵ and for the placement of the first applicant in a metal cage during court hearings²⁹⁶.

The Court uses in this case, for the first time, a gender-specific approach in the prison context, which can be found in the wording of paragraph 115 where explicit reference is made to her condition 'as a pregnant woman' and of paragraph 144 where reference is made to her 'specific needs as a breastfeeding mother'²⁹⁷. Moreover, at the beginning of this judgment, the Court also refers to several gender-specific international instruments, such as CEDAW, the Bangkok Rules, extracts from the General Reports of the CPT and different WHO recommendations²⁹⁸.

This is a positive aspect as we have already seen that these instruments attach great importance to recognising the gender-specific aspect of the problems female prisoners face. On top of that, this recognition is important for soft law instruments, such as the Bangkok Rules and the EPR, as it gives them more authority²⁹⁹. So, instead of simply deciding on a violation of Article 3 in this judgment, the Court's reasoning emphasises the applicant's specific situation as a pregnant woman and mother to be³⁰⁰.

4.2.1.2 Case-law on positive action measures within the prison setting

In later case law, the ECtHR had to rule several times on the admissibility of gender-specific positive measures in the cases of *Khamtokhu and Aksenchik*³⁰¹, *Alexandru Enache*³⁰² and *Ēcis*³⁰³. As already discussed at length, it is sometimes necessary to provide for special measures in favour of a specific group, in this case female prisoners, to protect them and achieve de facto equality³⁰⁴.

²⁹⁴ Ibid [116].

²⁹⁵ Ibid [158].

²⁹⁶ Ibid [166].

²⁹⁷ Ibid [115], [144].

²⁹⁸ Ibid [89]-[93].

²⁹⁹ Sofia Ciuffoletti (n 280) 1291.

³⁰⁰ Ibid 1294.

³⁰¹ *Khamtokhu and Aksenchik v. Russia* ECHR 2017.

³⁰² *Alexandru Enache v. Romania* App no 16986/12 (ECtHR, 3 October 2017).

³⁰³ *Ēcis v. Latvia* App no 12879/09 (ECtHR, 10 January 2019).

³⁰⁴ Supra 3.1.3 and 4.1.3.

Each of these cases concerns complaints lodged by male prisoners contesting the, in their view, discriminatory effect of affirmative action measures intended for female prisoners.

4.2.1.2.1 *Khamtokhu and Aksenchik case*

In the first case concerning the contestation of positive measures for female prisoners, the complainants challenged the Russian provision excluding women, among other categories, from the possibility of life imprisonment. They found this to be a form of different and less favourable treatment on the basis of sex³⁰⁵. After adapting the typical two-step test to cases concerning Article 14 ECHR³⁰⁶, the Court decided that there had been no violation of Article 14 of the Convention, taken in conjunction with Article 5 ECHR. The Court bases its decision on the special characteristics of female prisoners, specifically their reproductive function, and refers to the international instruments dealing with the protection of female prisoners to support its arguments³⁰⁷.

This case is quite controversial and a bit inconsistent with the Court's usual approach to gender equality issues³⁰⁸. A deeper analysis of this debate and the associated dissenting opinions is beyond the scope of this study, although it is a very interesting discussion³⁰⁹. In my opinion, it is debatable whether the Court made the right decision in this case, but from the point of view of this study, it is to be encouraged that the Court recognises and wants to protect the gender-specific situation of female prisoners, even though this case may not have been entirely appropriate for that purpose.

³⁰⁵ *Khamtokhu and Aksenchik v. Russia* [33].

³⁰⁶ As a first step the Court has to check whether the applicants were in an analogous or relevantly similar position to other offenders. If this is the case, then the Court checks whether the difference in treatment can be justified, considering whether there is an objective or reasonable justification, if it pursues a legitimate aim and whether it is proportionate (*Khamtokhu and Aksenchik v. Russia* [64]).

³⁰⁷ *Khamtokhu and Aksenchik v. Russia* [82].

³⁰⁸ It is established case law that 'very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the grounds of sex as compatible with the Convention' (see *Van Raalte v. the Netherlands* ECHR 1997-I [39]; *Petrovic v. Austria*, ECHR 1998-II [37]; and *Stec and Others v. the United Kingdom* ECHR 2006-VI [52]).

³⁰⁹ See the concurring opinions of judge Sajo, judge Nussberger and judge Turkovic, the joint partly dissenting opinion of judges Sicilianos, Møse, Lubarda, Mourou-Vikström and Kucsko-Stadlmayer and the dissenting opinion of judge Pinto De Albuquerque. In a nutshell: The main reason for not deciding on a violation of Article 14 ECHR is the fear of levelling down the protection of prisoners. Therefore, the majority has decided to prefer to maintain the (discriminatory) rules in favour of female prisoners rather than decide on a violation with the risk that female prisoners will also lose this protection and the whole situation will deteriorate (concurring opinion of judge Turkovic [10]). The judges who disagree with the majority rely on the fact that there is an obligation to 'level up in cases of false positive discrimination' (dissenting opinion of judge Pinto De Albuquerque [22]-[24]).

4.2.1.2.2 *Alexandru Enache case*

This case concerned a difference in treatment based on sex due to a legal regulation that allowed deferred imprisonment for mothers of young children under one year old, but not for fathers in a similar position. The applicant, who was a father of a new-born child at the time of his detention, requested for a postponement of execution of his sentence to be able to take care of his family³¹⁰. This was refused by the Bucharest Court of First Instance, as this exceptional rule only applies to convicted mothers³¹¹. The applicant found this to be a violation of his right not to be discriminated against on the grounds of sex (Article 14 ECHR) in conjunction with his right to a private life (Article 8 ECHR).

Again, the Court found no violation of Article 14 ECHR, read in conjunction with Article 8 ECHR, after applying the two-step test. The Court based its argumentation in this case on the ‘special bond between mother and child during the first year’³¹² and accepted that ‘motherhood has specific features which need to be taken into consideration, sometimes by means of protective measures’³¹³. In its assessment, it refers multiple times to the aforementioned case of *Khamtokhu and Aksenchik*³¹⁴.

This decision can be challenged as well, which is also done by Judges Pinto De Albuquerque and Bosnjak in their partially dissenting opinion. But again, in the context of this study, it is positive that the Court recognises the specific position of female prisoners and, in this case, specifically that of pregnant prisoners and mothers in prison. In my view, this should not have to come at the expense of the rights of male prisoners who are also fathers, and it would therefore be better, in my opinion, to extend this exception to fathers of new-born babies in prison, but this brings us back to the levelling-up or levelling-down debate³¹⁵. The outcome of this judgment entirely aside, it is positive to see that the Court recognises the special characteristics of imprisoned mothers.

³¹⁰ *Alexandru Enache v. Romania* [8].

³¹¹ *Ibid* [9].

³¹² *Ibid* [76].

³¹³ *Ibid* [77].

³¹⁴ *Ibid* [70], [72], [78].

³¹⁵ *Supra* footnote 309.

4.2.1.2.3 *Ēcis case*

In a more recent case, the Court reached a different outcome. The *Ēcis* case concerned a male applicant who felt he was treated unfairly differently from female prisoners who had committed the same offences with regard to the execution of the prison sentence and the right to prison leave³¹⁶. The Court reaffirmed some arguments it had established in the previous two cases³¹⁷, but reached a different conclusion in the end and decided that in this case there had been a violation of Article 14 ECHR, read in conjunction with Article 8 ECHR. In its reasoning, the Court stresses that the prison leave regime must be based on an individual risk assessment, treating men and women equally³¹⁸. Moreover, the Court stresses that the principle that imprisonment should aim at rehabilitation applies regardless of the gender of the prisoner³¹⁹.

A clear difference from the previous two judgments is that in this case there is no reference to the ‘reproductive function’ of a woman or the ‘motherhood’ arguments. These two arguments were decisive in the other two judgments for not finding a violation of the prohibition of discrimination. This can be interpreted as a rather limited understanding of the gender-specific needs of female prisoners by the ECtHR, which focuses mainly on biological, reproductive differences, a criticism that can also be found in the literature.

4.2.2 *Critique from a gender perspective*

The current jurisprudence of the ECtHR has been criticised in the literature for being too biologically oriented and gender-blind towards the situation of female prisoners³²⁰. This chapter will look at the extent to which these criticisms are justified and how the Court can adapt its jurisprudence to better protect female prisoners in the future.

The criticism that the ECtHR’s current approach is gender-blind and too biologically oriented is, in my opinion, partly true. From the previous analysis of the different cases, it has become clear that the Court attaches great importance to women's reproductive function and their state of motherhood, and that it uses these biological, sex characteristics to look at the situation of female prisoners from a gender-specific perspective.

³¹⁶ *Ēcis v. Latvia* [9].

³¹⁷ *Khamtokhu and Aksenchik v. Russia* [79]-[80], [83]-[84]; *Alexandru Enache v. Romania* [83], [86].

³¹⁸ *Ēcis v. Latvia* [90].

³¹⁹ *Ēcis v. Latvia* [92].

³²⁰ Sofia Ciuffoletti (n 280) 1279.

While it is positive that the Court is already trying to adopt a gender-specific approach by referring to biological characteristics of female prisoners, there is need for a broader gender-sensitive approach by the Court that is not limited to reproductive capacities and motherhood.

Besides, it is unfortunate that most cases in which the Court has already applied such a biological gender-specific approach were brought by male plaintiffs in connection with affirmative action measures in favour of female prisoners. This takes the essence of the debate out of context. It would therefore be desirable for the Court to start looking at cases brought by female prisoners as plaintiffs from a gender-specific perspective, as it already did in the *Korneykova and Korneykov* case.

Moreover, I believe that it is necessary to include the anti-discrimination aspect in the jurisprudence regarding female prisoners, just like the Court did in its jurisprudence regarding violence against women and domestic violence. Since the landmark *Opuz* case and subsequent case law, the Court has recognised that violence against women constitutes a form of discrimination and should be dealt with under the application of Article 14 ECHR³²¹. This reasoning could, by analogy, also be applied in the jurisprudence regarding the situation of female prisoners, since discrimination based on sex is at the root of many of the problems female prisoners face in prison. Ignoring the specific needs of female prisoners simply because the system is based on a male stereotype amounts at its core to the omnipresent problem of gender discrimination in society³²².

The first chapter of this thesis described the various gender-specific characteristics and problems that women face in prison, from which it can be concluded that different treatment of male and female prisoners is necessary in certain situations. In this context, reference can be made to the *Thlimmenos v. Greece* judgment in which the Court stated that ‘the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’³²³. Consequently, in my opinion, it would

³²¹ *Opuz v. Turkey* ECHR 2009; *M.G. v. Turkey* App no 646/10 (ECtHR, 22 March 2016); *Halime Kiliç v. Turkey* App no 63034/11 (ECtHR, 28 June 2016); *Balsan v. Romania* App no 49645/09 (ECtHR, 23 May 2017).

³²² Pat Carlen and Anne Worrall, *Analyzing Women’s Imprisonment* (Willan Publishing 2004), 82-86.

³²³ *Thlimmenos v. Greece* ECHR 2000-IV [44].

be a favourable development to deal in the future with such cases under the application of Article 14 EHCR.

4.2.3 *ECtHR's case law on transgender rights*

As already shown in the previous chapters, transgender prisoners constitute a very vulnerable group within the prison system and there are still too little safeguards to protect their rights. Unfortunately, this is also reflected in the absence of case law of the ECtHR relating to trans prisoners. To this day, the ECtHR has never ruled on situations concerning the rights of transgender people in prison, and it makes no reference anywhere to this extremely vulnerable group in its Guide to the Rights of Prisoners³²⁴. This is unfortunate, because the ECtHR can have a major impact on the visibility of this vulnerable group and the recognition of their rights.

Nevertheless, the ECtHR has recognised in its jurisprudence that gender identity is a protected ground under the non-discrimination principle of Article 14 ECHR³²⁵ and has developed specific case law on the right to the legal recognition of gender identity, which is interesting to discuss briefly in the context of this study. Furthermore, this subparagraph will look at the Court's approach to situations of discrimination based on sexual orientation in prison facilities, as this can be applied by analogy to situations involving discrimination based on gender identity.

4.2.3.1 *ECtHR's case law on the right to gender identity*

The Court has undergone a transformation over the past decades regarding the recognition of the rights of transgender people. The ECtHR's first major interest in transgender rights came in 2002 with the landmark judgment *Goodwin v. UK*³²⁶. In this case, the Court ruled that refusing to legally recognize a post-operative transsexual's gender reassignment constitutes a violation of the right to private life³²⁷. In 2017, the ECtHR successfully challenged the condition of a medical transformation for legal recognition of a sex change in the case *A.P., Garçon and Nicot v. France*³²⁸. Sadly, the right to gender identity stays to this day conditional as Member States

³²⁴ ECtHR (n 286).

³²⁵ *P.V. v. Spain* App no 35159/09 (ECtHR, 30 November 2010) [30]; *Identoba and others v. Georgia* App no 73235/12 (ECtHR, 12 May 2015) [96].

³²⁶ *Christine Goodwin v. the United Kingdom* ECHR 2002-VI.

³²⁷ *Ibid* [93], [104].

³²⁸ *A.P., Garçon and Nicot v. France* ECHR 2017.

are still free to provide for measures such as the proof of the existence of a gender identity disorder in order to obtain legal recognition of someone's gender identity³²⁹.

Nevertheless, this case-law is of enormous importance regarding the fight for trans people's rights, as this begins with the recognition of their identity. This jurisprudence is an important starting point to provide more protection for this specific minority group and thus, possibly in the future, also provide for their protection in specific contexts, such as in prison.

4.2.3.2 ECtHR's case law on discrimination on grounds of sexual orientation in prison

In 2012, the ECtHR decided on a case concerning a homosexual applicant who claimed to have been treated inhumanely in a Turkish prison because of his sexual orientation³³⁰. The case, *X v Turkey*, involved a homosexual man who was initially held in a shared prison cell with other, heterosexual, inmates. In this initial cell, he experienced harassment and intimidation by his cellmates because of his sexual orientation. Because of these unpleasant and potentially dangerous cell conditions, the applicant requested a transfer to another shared cell with, preferably, homosexual cellmates. The prison authorities subsequently transferred him, but instead of moving him into a new shared cell, he was moved to an individual, isolated cell that usually serves as a punishment for serious criminals, like rapists. Here the applicant stayed for 8 months and 18 days, most of it without contact with the outside world and in shabby conditions (no washing facilities, rat infestation, etc.), despite several attempts to be transferred. He submitted these facts to the Court, claiming that his right to be protected from torture and degrading and inhuman treatment (Article 3 ECHR) combined with the prohibition of discrimination (Article 14 ECHR) had been violated.

In this case, the ECtHR found in favour of the claimant and set a clear precedent that the prolonged segregation or isolation because of someone's sexual orientation breaches Article 3 ECHR read in conjunction with Article 14 ECHR³³¹. The Court takes an important stance in this case, as matters relating to sexual orientation and gender identity are still considered a sensitive topic on which there is little consensus, so it is encouraging that the Court dares to be

³²⁹ Ibid [139]-[144].

³³⁰ *X v. Turkey* App no 24626/09 (ECtHR, 9 October 2012).

³³¹ Ibid [58].

progressive in this regard. This case could therefore well be an important precedent for possible future case law on the rights of transgender prisoners.

4.2.4 *Intermediate conclusion*

The second part of this chapter was devoted to an analysis of the case law of the European Court of Human Rights. Some interesting observations can be made from this analysis.

First, the ECtHR is well acquainted with the rights of prisoners, but especially with those of male prisoners. In the rare cases where it rules on the position of female prisoners, it usually concerns cases related to affirmative action measures.

The analysis of four specific judgments, *Korneykova and Korneykov*, *Khamtoku and Aksenchik*, *Alexandru Enache* and *Ēcis*, showed that although the Court sometimes adopts a gender-specific perspective in cases involving female prisoners, this is mainly based on the biological characteristics of women, such as their ability to become pregnant and their special position as a mother. Much room is left for the Court to adopt a more comprehensive gender-specific perspective in its jurisprudence on female prisoners' rights in the future, and it would potentially be interesting to include the non-discrimination aspect in its reasoning in doing so. A particularly positive point is that the Court refers to gender-specific international and regional instruments in its legal analysis. This shows that it recognises the different, vulnerable position in which female prisoners find themselves. Moreover, it gives strength and authority to soft law instruments.

Finally, this chapter has also briefly looked at the situation of trans prisoners within the Court's jurisprudence, but unfortunately no precedent can be found on this matter. The future will show how the Court will deal with such cases, but hope can already be drawn from the (limited) case law on sexual minorities in prison.

5 Women in prison - National situation of Belgium

After the comprehensive enumeration of the specific needs of (trans) women in prison and the subsequent analysis of the international and regional instruments that provide for the protection of their rights, this study will conclude with a country-specific assessment of their situation and test whether these instruments have an actual impact in practice.

I chose to conduct a country-specific analysis in Belgium, my home country. Belgium is internationally known for its poor prison conditions, as evidenced by the case law of the European Court of Human Rights. As such, the Court has already cited in several judgments that there is a structural problem in Belgium regarding the design of prisons and houses of detention, with overcrowding being the main problem³³².

This final chapter will therefore look at Belgian legislation relating to the organisation of prisons and the position of prisoners and, more specifically, to what extent this legislation takes into account the gender-specific needs of female prisoners. Furthermore, the current situation in Belgium will also be examined through an analysis of the most recent reports of the CPT and other institutions. Finally, the situation of trans people in Belgian prisons will be briefly discussed.

The purpose of this chapter is, on the one hand, to test in practice the impact of the international and regional soft-law instruments discussed above. On the other hand, this chapter aims to raise awareness about the situation of female and trans prisoners in Belgium, in the hope that future policies will address this issue.

5.1 Belgium's Fundamental law on prison system and legal status of inmates

In Belgium, the ins and outs of the prison system and the legal status of detainees are regulated by the Fundamental Law of 12 January 2005 (Prison Law)³³³. This law must be read in conjunction with the internal rules laid down separately for each prison³³⁴.

³³² *Claes v. Belgium* App no 43418/09 (ECtHR, 10 January 2013); *Vasilescu v. Belgium* App no 64682/12 (ECtHR, 25 November 2014); *W.D. v. Belgium* App no. 73548/13 (ECtHR, 6 September 2016).

³³³ Law of 12 January 2005 on prison system and legal status of inmates BS 1 February 2005, 2815 ('Prison law').

³³⁴ Prison Law, art. 16.

Belgium's Prison Law is in principle gender-neutral and targets both male and female prisoners. The particular, gender-specific situation of female prisoners is only taken into account to a very limited extent. Reference to this distinct group can be found in three different articles. First, the law requires the Belgian prison system to provide a separate ward for female prisoners³³⁵ and for female prisoners accompanied by children under 3 years old³³⁶. Second, the Prison Law contains an explicit provision on the obligation to transfer pregnant prisoners to the hospital when they are due to give birth³³⁷. Remarkably, this article also mentions the obligation to provide pregnant prisoners with the option of abortion if desired³³⁸. This is a rather progressive provision since there is still much controversy surrounding the right to abortion and it is often ignored within the prison context. Finally, the Prison Law provides for the prohibition of confining pregnant female inmates or female inmates with children under the age of 3 in a punishment cell³³⁹.

Apart from these three provisions, which mainly focus on the biological, reproductive characteristics of female detainees, such as being pregnant or having young children, there are no other provisions that provide for the protection of gender-specific needs of female prisoners. As a result, it can be concluded that the Belgian Prison Law is not in line with the Bangkok Rules and the European Prison Rules, which call for more attention to the gender-specific situation of female detainees. This confirms that soft law instruments unfortunately have less impact on national practices and that political goodwill is needed to take them into account.

5.2 Current situation in Belgium

5.2.1 *Situation of women in prison*

According to the latest published figures, female prisoners make up about 5% of the entire prison population³⁴⁰. In Belgium, 9 of the 37 prisons give access to female prisoners. There seems to be an increase in the number of female prisoners in Belgium in the latest years, resulting in overcrowding of women's wards³⁴¹. Already in 2008, there was a 16% capacity

³³⁵ Prison Law, art. 15, para 2, 2°.

³³⁶ Ibid 3°.

³³⁷ Prison Law, art. 93, para 2.

³³⁸ Ibid para 3.

³³⁹ Prison Law, art. 134, para 3.

³⁴⁰ Federal Public Service of Justice, Annual figures 2019, 8.

³⁴¹ An Nuytiens, 'Het Profiel van Vrouwen in de Gevangenis' (2008) 4 *Panopticon* 40, 42.

deficit for female prisoners³⁴². As is clear from various CPT reports and numerous ECtHR rulings, overcrowding is the biggest problem within the Belgian prison system, and this problem does thus not only apply to the male prison population³⁴³.

If we look at the CPT's most recent report, we can find some observations that relate specifically to the situation of women in Belgian prisons. These reports are a useful tool to get a picture of the actual situation inside national prison facilities. In the report from 22 July 2022, the CPT highlights the lack of a systematic screening procedure of female prisoners for domestic violence and/or sexual assault, mental health needs (like PTSD), risk of suicide and self-harm and history of reproductive health³⁴⁴. It recommends the Belgian prison policy to take more account of the specific health needs of female prisoners, for example by employing more doctors and nurses who have received specific training in women's health³⁴⁵.

Besides the CPT's country-specific reports, we also get a better picture of the national situation of female prisoners in Belgium thanks to the EU Agency for Fundamental Rights' (FRA) Criminal Detention database. This database offers information on detention conditions in all 27 EU Member States, including Belgium³⁴⁶. In 2021 it came with an update on the conditions and monitoring of the situation in Belgium. In this updated document close attention is paid to the specific situation of women in detention. It shows that Belgium does provide for some gender-specific needs of female prisoners, but this mainly concerns the needs of pregnant women and women who are residing in prison with their child. The current legislation and practices still lack provisions regarding (mental) healthcare, sanitary conditions, nutrition, etc.³⁴⁷.

³⁴² Ibid 43.

³⁴³ The CPT already outlined this issue after its very first visit to Belgium: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Rapport au Gouvernement de Belgique relative à la visite effectuée en Belgique du 14 au 23 Novembre 1993' (1994) CPT/Inf (94) 15, paras 84-86.

³⁴⁴ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Rapport au Gouvernement de Belgique relative à la visite effectuée en Belgique du 2 au 9 Novembre 2021' CPT/Inf (2022) 22, para 25.

³⁴⁵ Ibid.

³⁴⁶ Information retrieved from: <https://fra.europa.eu/en/databases/criminal-detention/>.

³⁴⁷ Tom Daems and Marjolein Robert, 'Criminal Detention in the EU Conditions and Monitoring: Belgium' (2021) <https://fra.europa.eu/sites/default/files/fra_uploads/belgium-criminal-detention-2022-country-study_en.pdf> accessed 3 July 2023.

Overall, it can thus be concluded that the current Belgian prison law is not in line with the Bangkok Rules, as it only refers in a very limited way to the distinct needs of female prisoners. This is also made clear by the reports of different organisations who have analysed the situation in the field, namely the CPT and FRA. Both mechanisms note in their country-specific research that Belgium still falls short in protecting the gender-specific needs of women prisoners, mainly in the area of adapted healthcare. So, it is now up to Belgian policymakers to respond to these observations and bring their prison law in line with the Bangkok Rules.

5.2.2 *Situation of trans women in prison*

No official figures can be found on this category of detainees in Belgium. In 2016, the former Minister of Justice was asked how many transgender people were being held in Belgian prisons and he was not able to give an answer³⁴⁸. This is largely due to the fact that prisoners in Belgium are classified according to their legal gender, i.e. the gender shown on the identity card. In Belgium, a person's legal sex is determined by their birth sex. For trans people, this is problematic as their gender identity does not match their birth sex.

Since the Transgender law of 25 June 2017³⁴⁹, it is possible in Belgium to change your legal gender identity without the condition of medical change³⁵⁰. While this is already a big step forward in protecting trans people's rights and recognising their gender identity, this remains a difficult procedure for many trans people. Such a gender reassignment procedure costs a lot of money and effort, meaning that many trans people cannot afford to do it. Not surprisingly, many trans prisoners have not yet undergone this legal change upon arrival in prison. As a result, under the current classification system, they are classified on the basis of their birth sex, with all of the ensuing consequences. The former Minister of Justice did however clarify that 'if a detainee believes to have a different sexual identity, this will be further discussed and investigated by the psychosocial service'³⁵¹.

³⁴⁸ Parl. St. Kamer, Question nr. 54-1-0008872 of Ms. Valerie VAN PEEL of 23/02/2016 to the Minister of Justice Koen GEENS, *De Kamer* 25/03/2016.

³⁴⁹ Law of 25 June 2017 on the reform of regulations on transgender people as regards the indication of an adjustment of gender registration in civil status records and its consequences, BS 10 July 2017 ('Transgender Law').

³⁵⁰ Previously, there was another law in force that provided for gender reassignment, but only on condition that the person in question first underwent a medical transformation to physically conform to the new, desired sex. As this conditional element did not fit within the international human rights framework and more specifically violated the right to self-determination and self-identification, they abolished these far-reaching conditions in the new law (Law of 10 May 2007 on transsexuality, BS 11 July 2007 ('Transsexuality Law')).

³⁵¹ Parl. St. Kamer (n 338).

Besides the fact that the classification system does not take prisoners' gender identity into account and consequently does not register it, the nature of the prison environment also leads to the concealment of this specific group³⁵². The hypermasculine and transphobic culture prevalent in (Belgian) prisons causes trans prisoners to hide their gender identity out of fear of discrimination and mistreatment³⁵³.

Sadly, there does not yet exist any national guidelines or legal regulations regarding the protection of trans persons in Belgian prisons. This is unfortunate, as international literature has already shown that this group finds itself in a particularly vulnerable position³⁵⁴. Additional protection measures are therefore necessary but are currently lacking in Belgium. The 2018-2019 Interfederal Action Plan against Discrimination and Violence against LGBTI-People does mention the situation of transgender detainees and states that there will be specific guidelines for transgender people in prison, but unfortunately, this had not been further elaborated in practice so far³⁵⁵.

In a recent study, a couple of researchers have tried to map the experiences of trans women in Belgian prisons. Through a survey, six transgender (ex-)detainees were questioned about the current situation in Belgian prisons and their personal experience in this setting. This study found that the main difficulties are the focus on the biological aspect in the screening procedure, the lack of bodily integrity during body searches and showering, the limited (or non-existent) access to gender-affirming clothing and tools, practices of misgendering and deadnaming, the limited knowledge and inexperience of healthcare providers within the prison system, and finally the lack of psychosocial support (resulting in delays in transition)³⁵⁶. Besides this research, there is little in the literature about the situation of trans prisoners in Belgian prisons. There is thus not only a lack of official data, but also of scientific research on this subject.

³⁵² Aurore Vanliefde, 'Queer Penologie? Aandacht voor Lesbische, Homosexuele, Bisexuele, Transgender en Intersekse Personen in Gevangenisonderzoek' (2021) 172 FATIK 5, 8.

³⁵³ Caroline Gordon and others, 'A Literature Review of Transgender People in Prison: An 'Invisible' Population in England and Wales' (2017) 233 Prison Service Journal 11, 17-18; Anette Brömdal and others (n 95) 341.

³⁵⁴ See for example: Valerie Jennes, 'The Social Ecology of Sexual Victimization Against Transgender Women Who Are Incarcerated: A Call For (More) Research on Modalities of Housing and Prison Violence' (2021) Criminology & public policy 1; Benish A. Shah, 'Lost in the Gender Maze: Placement of Transgender Inmates in the Prison System' (2010) 5(1) Journal of Race, Gender and Ethnicity 39.

³⁵⁵ Interfederal Action plan against Discrimination and Violence against LGBTI-People 2018-2019, 39 <https://fedweb.belgium.be/sites/default/files/Actieplan_LGBTI_2018-2019_NL.pdf> accessed 4 July 2023.

³⁵⁶ Davo Maras, Joz Motmans and Freya Vander Laenen, 'Gender-Binaire Tralies: Een Kwalitatief-Exploratief Onderzoek Naar de Ervaringen en Uitdagingen van Transgender Personen in Detentie' (2021) 172 FATIK 14.

5.3 Intermediate conclusion

This short country-specific research has shown that there is a great need for awareness of the situation of (trans) women in prisons in Belgium. Currently, Belgian prison legislation is outdated and not in line with the standards imposed by the Bangkok Rules. In recent years, several international organisations have already indicated that Belgium should take more account of the gender-specific situation of female prisoners, but so far this has not been acted upon.

Belgium has been struggling for years with the problem of outdated prisons that do not provide enough space in relation to the number of prisoners, and it therefore seems that solving this institutional problem is at the top of the to-do list within prison policy, partly due to pressure from the ECtHR. It is therefore especially important to spread more awareness about the situation of women in prison, so that addressing this issue will also be higher on the policy agenda. With this analysis of the Belgian situation, I hope to encourage the need to initiate scientific research on this issue, both with regard to the situation of female prisoners and trans women in prison and to motivate policymakers to take action on this issue.

6 Conclusion

This study has attempted to answer three main questions regarding the position of (trans) women in prison. In this conclusion, each of the three main questions will be answered using the information gathered from the preceding study.

The first question, 'what factors within prison systems should be taken into account to ensure that male and female inmates are treated substantially equally?', relates to the problem that prison systems are currently designed according to a male norm. This study examined to what extent gender plays a role within the prison context and in which areas female prisoners' specific needs are currently inadequately acknowledged. The first chapter analysed in detail the different problems women specifically experience within prison life and in which areas they need different treatment from male prisoners.

This study found that the main issues are found in relation to the placement procedure of female prisoners and the lack of gender-specific screening procedures, the strong presence of stigma and marginalisation, the need for gender-specific health care treatment, their special role within the family and the discriminatory offer of employment opportunities and activities. To achieve substantive equality within prison, it is therefore necessary to develop gender-sensitive policies that take into account these gender-specific factors.

Regarding the second question, namely 'to what extent can ignoring the gender-specific needs of female prisoners constitute a violation of their human rights?', a clear answer can be derived from the research conducted. This research has demonstrated that in many situations, ignoring the specific needs of female prisoners constitutes a violation of their fundamental rights, such as the right not to be subjected to torturous or degrading practices or the right to adequate health care. Two full chapters have been devoted to the analysis of legal instruments that provide, explicitly or not, for the protection of women's rights in prison. The important thing to remember is that (most) human rights apply regardless of whether a person is deprived of their liberty, which is also confirmed in the jurisprudence of the European Court of Human Rights.

Finally, the situation of trans women in prison was also briefly examined several times during the study in order to answer the third question 'what is the situation like for trans women in prison?'. This was perhaps the most difficult part of the study because very little is known about

this particular group of prisoners and there is not much concrete data available. Nevertheless, it is possible to portray their situation and especially the problems they experience in prison based on the existing literature. It is established that trans women in prison represent an extremely vulnerable group and that better regulations are urgently needed to protect them from discrimination and abuse within prison walls.

Unfortunately, it seems there is still a long way to go before they will get the recognition and protection they need. This is clear from the fact that transgender's rights have only recently and only at the soft-law level received international recognition and protection with the Yogyakarta Principles, which is still better than the European level where no such instrument for this particular group yet exists. The lack of attention to this vulnerable prison population is also evident from the Belgian situation, where it is not even known how many transgender people are currently held in the Belgian prisons. Therefore, with this research, I want to bring additional attention to this current issue in the hope that it will receive more recognition, both internationally and nationally.

In conclusion, this study sought to draw extra attention to the problems that (trans) women in prison unfortunately still often face today. The aim of this study is, on the one hand, to provide an overview of the already existing international and regional instruments dealing with this issue. By listing all existing initiatives, it becomes clear that the international and regional level are not blind to this issue and that several (major) steps have already been taken to address this through legal regulations. In turn, this research also showed that protection through human rights instruments is unfortunately not enough to bring about a change in practice. This is evident from the national-level analysis, where it became clear that Belgium has not yet brought its legislation into line with the international guidelines at all.

Although the situation is still far from perfect and much additional awareness-raising is needed on these issues, to which this study will hopefully contribute, some positive evolutions can be observed. For example, the international landscape has undergone a significant transformation in the development of specific instruments aimed at protecting female prisoners, with the Bangkok Rules being the ultimate example. As has been said several times, change can only happen when there is recognition of a particular problem. This recognition has clearly penetrated at the international and yet also regional level, which means that national authorities

are now ready for the next step, which is to actually bring about change. I keep up the courage and look forward to the future, hoping that these international standards will continue to develop and increasingly find their way into national legal systems, for example through the jurisprudence of the European Charter of Human Rights and the work of mechanisms such as the CPT. It remains particularly important to continue to conduct field research, certainly also in Belgium, because the more data available, the easier it is to demonstrate the severity of the problem and the more chance of change in the future.

This research teaches us that international human rights instruments are a good first step towards creating public interest in problems, but they are not enough to bring practical change. Thus, more efforts will have to be made at small-scale levels to actually improve the situation of female prisoners, using the international instruments as a guideline to get started.

7 Annexes

Table of Cases

European Court of Human Rights

Alexandru Enache v. Romania App no 16986/12 (ECtHR, 3 October 2017)
A.P., Garçon and Nicot v. France ECHR 2017
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