

TACKLING THE INTERSECTIONALITY OF DRUG OFFENCES, GENDER BASED VIOLENCE AND VICTIMISATION IN THE SOUTH AFRICAN CRIMINAL JUSTICE SYSTEM: LEVERAGING FOR GREATER IMPLEMENTATION OF THE TOKYO RULES WITHIN A SUSTAINABLE DEVELOPMENT AGENDA.

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This year is the 10th anniversary of the United Nations (UN) Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (*'Bangkok Rules'*) (United Nations (UN) General Assembly, 2010). The female prison population of women and girls continues to increase globally (Penal Reform International, 2020a). Of these, a higher proportion are deprived of their liberty due to drugs offences which include punitive responses to women who use drugs (WWUD), those involved in minor offences or commercial sex work (Penal Reform International, 2020b). Most have not committed serious or violent offences, nor do they pose a risk to the community (Ginn, 2013). Intersectionality of drug related offences by women with a history of trauma, victimisation and gender based violence (GBV) is often ill explored by criminal justice systems. There is a need for careful consideration of the underlying social determinants causing these women to come into contact with the law. Detention coupled with stigma, seriously hinders these women's recovery, reintegration and rehabilitation pathways (UNODC, 2009). Gender sensitive and trauma informed responses cognisant of the distinctive needs of women prisoners, particularly those held on drug related offences warrants continued global attention (Penal Reform International, 2020b).

Further it is 30 years since the UN Standard Minimum Rules for Non-Custodial Measures (*'Tokyo Rules'*) was adopted by the UN General Assembly (GA) (UNGA, 1991). In addition to the *'Bangkok Rules'* and *Tokyo Rules*, the UN Standard Minimum Rules for the Treatment of Prisoners (*'Nelson Mandela Rules'*) and the International Covenant on Civil and Political Rights contain provisions on alternatives to sentencing, vocational training, rehabilitation and social reintegration of those deprived of their liberty (UNGA, 1966; UNGA, 2016). Provision of such measures are further expressly permitted to support drug treatment and rehabilitation as diversion or alternative to pre-trial detention or incarceration. This is particularly the case for minor drug or other offences, and can include a range of alternative sentencing measures such as fines, house arrest, suspended or community sentencing, diversion, parole, correctional supervision, conditions such as attending drug treatment and rehabilitation programmes and case dismissal. These measures can apply across every stage of the criminal justice process, redirect State investment towards community based solutions, reduce costs of incarceration, reduce recidivism rates, and ultimately support a focus on rehabilitation and reintegration of the female offender herself.

Despite the potential of non-custodial sentencing for women contributing strongly to the achievement of global sustainable development goals, by *'leaving no one behind'* (particularly the sustainable development goals SDG 5 *'Achieve gender equality and empower all women and girls'* and SDG 16 *'peace, justice and strong institutions'*, States particularly in the Global South encounter a myriad of challenges in their implementation; underpinned by legislative and policy gaps,

insufficient capacity and sensitisation in the criminal justice system, lack of acceptance of its restorative approach and public favouring of retribution, justice and security. The United Nations Office on Drugs and Crime (UNODC, 2020) has recently published a Toolkit on Gender-Responsive Non-Custodial Measures to assist States in integrating non-custodial measures into domestic legal and policy frameworks, support the upscaling of gender sensitive legal aid services and design of capacity building efforts to train criminal justice staff, support detailed victim assessments and in community rehabilitation planning.

WOMEN AND WWUD IN PRISON IN SOUTH AFRICA

Sustained action is needed in Africa to address the disproportionate increase in the imprisonment of women, and the lack of gender-specific health care and social reintegration programmes in communities, prisons and on prison release (Van Hout & Mhlanga-Gunda, 2018). In South Africa, as elsewhere in Africa, prison systems are primarily designed for men, with continued need for sensitisation and development of gender-responsive approaches to address women's situation in prison (Van Hout & Mhlanga-Gunda, 2019). Prisons in South Africa continue to suffer from overcrowding and are conducive to violence and spread of disease, often with many women placed far away from family support systems (Mail & Guardian, 2016; Judicial Inspectorate for Correctional Services, 2018). They also operate over capacity, and by end of 2019, there were 162,875 inmates against the approved bedspace of 118,572 of the inmate population (Department of Correctional Services, 2020). Women however are a very small minority of the total South African prison population (both in pre-trial detention and incarcerated) at 3% (Department of Correctional Services, 2020). Pre-trial incarceration rates appear to still be used as default by the South African Police (SAPS) (about 30% of the total female inmate population), despite the *Tokyo Rules* requiring States to implement alternatives to pre-trial detention as early a stage as possible (see case *S v Walters and Another*, 2002). This is also contrary to the unequivocal language in the South African Constitution, and the provisions outlined in the *Bangkok Rules*.

The impact of gross economic and gender inequalities in South Africa contribute to women's engagement in petty crime, commercial sex work and drug related activity in efforts to fend for themselves and their children (The World Bank Report, 2018). South African studies have shown that WWUD are over represented in those incarcerated, and that the links between substance abuse, drug use, exploitation and crime are inter-woven, with women frequently engaging in drug distribution and commercial sex work (or are trafficked) as a way of supporting their families (Artz et al., 2012; Steyn & Booyens, 2018). Extant literature suggests that women in prison in South Africa have unique pathways, which if considered with a nuanced gendered lens, reveal a pathway of trauma and victimisation leading to committal of non-violent crimes (for example carrying of drugs as 'mules', commercial sex work) making them ill-suited for incarceration. This is especially the case for victims of GBV, human and sex trafficking and other forms of trauma, making custodial sentencing inappropriate and unproportionate. Common determinants in South Africa include exposure to intimate partner violence (IPV), exploitation and coercion to commit crimes by gangs, mental health conditions, unemployment, poverty and caregiving responsibilities as single parent. Criminal sanctions on drug use and commercial sex work in South Africa in this sense merely serve to exacerbate stigmatisation of these women; and obstruct their re-integration into the wider social and economic fabric of the community (AIDS and Rights Alliance for Southern Africa, 2019). Studies in South Africa highlight the extreme exposure of WWUD and those involved in commercial sex work to violence including rape by police, close intimate partners, people around them, and those they would expect to protect them (African Sex Worker Alliance, 2011; Manoek, 2012; UNODC, 2019).

With the current COVID-19 pandemic and challenges of controlling outbreaks in African prisons in general, promoting non-custodial measures is more relevant now than ever before, especially for certain categories such as pregnant women with dependent children (Van Hout, 2020a). Arrest and placement of people in pre-trial detention and incarceration increases the risk of transmission, and further COVID-19 outbreaks (Van Hout, 2020b). At the time of writing, COVID-19 case numbers and fatalities in South Africa are 860,964 and 23,276 respectively and rising in a second wave of the epidemic (South Africa COVID-19 tracker, 2020). Prisons in South Africa have not escaped with 7,409 COVID-19 cases reported to date (4627 officials, 2782 inmates) and with 74 deaths of officials and 57 inmates respectively (South Africa COVID-19 tracker, 2020). In May 2020, President Cyril Ramaphosa authorised the release of nearly 19,000 qualifying inmates, in terms of Section 82(1)(a) of the Correctional Services Act (CSA) of 1998. To date no official figures are available with regard to operationalisation of these de-congestion measures, nor of the follow up of these prisoners. The conditions for the parole release excluded inmates sentenced to life imprisonment or serving terms for specified other serious crimes, including sexual offences, murder and attempted murder, gender-based violence and child abuse. Of note however was the likelihood that these qualifying criteria (set at low risk offenders with low risk of re-offending, low risk to the community; and those with minor children) set for prison release should see, to some extent, the release of women, including WWUD.

The purposes of our *Commentary* is to present an evaluative framework based on transitional justice to explore South Africa's alignment with relevant international standards and norms on alternatives to imprisonment, accountability and application of a victim centred approach spanning all relevant moral, gender, health, legal, policy and medical issues regarding WWUD and women in contact with the law on drug related offences.

GENDER NUANCES, DRUG RELATED OFFENCES, AND THE ALIGNMENT WITH THE TOKYO AND BANGKOK RULES

South Africa, like many other countries, retains a comprehensive and somewhat harsh legal framework to arrest, prosecute and sentence offenders on a range of drug-related offences; with a possibility of penalties up to life imprisonment depending on the nature of offense involved. The primary legislation creating criminal sanctions for drug-related offences is the Drugs and Drug Trafficking Act No. 140 of 1992. According to SAPS crime statistics, there were 232,657 drug related cases in 2018 and 170,510 in 2019 (SAPS Crime Statistics 2018; 2019). There have been harsh penalties regardless of their gender where persons are convicted of dealing in dangerous dependence-producing drugs as provided for by section 5(b) of the Drugs and Drug Trafficking Act. Official data however is not disaggregated on gender and the data does not also reflect the specific nature of the drug offences. There is further no published gender disaggregated data with regard to police arrests, those in police custody, those sentenced from court or from custody; number detained for drug offence with children in prison; non-custodial sentences awarded for drug related offences; type of non-custodial sentence; number of foreign non-national women detained on drug offences in immigration detention/holding prior to deportation, or in South African prisons; or the number of South African women detained on drug trafficking offences in foreign countries. A personal communication with the Central Drug Authority revealed in late 2020, that 298 women were registered in the criminal justice system (11 with children) on drug related offences, 89 were on parole, 50 on probation, 88 sentenced, and 70 unsentenced (pre-trial and those with trials ongoing and awaiting sentence).

South Africa's approach towards trial proceedings, sentencing and punishment is, in the main, gender-neutral in nature, whereby courts do not consider gender as a factor in determining guilt or otherwise of those accused. The South

African courts, in certain narrow circumstances, do however reflect the spirit of the *Tokyo Rules* (Rules 2 and 3) and *Bangkok Rules* (Rules 57, 58 and 59) that prescribe an approach that intentionally takes into account gender nuances and prioritises applying non-custodial sentences to women offenders, wherever possible. Gender does come into consideration at mitigatory stage before sentencing (see case *S v Kgabo and Others*, 2005). The approach of courts in South Africa is that certain factors which, on their own, do not necessarily constitute full defenses at law, can be relied on as mitigatory factors that can reduce the sentence. The factors include physical and mental abuse of the offender. Courts have applied the so called “*battered woman syndrome*” doctrine to reduce the sentence where it is shown that GBV or other form of abuses contributed to the commission of a crime by women (see cases *S v Potgieter*, 1994; *S v Ferreira and Others*, 2004; *S v Engelbrecht*, 2005; *S v Kgabo and Others*, 2005). Hence, there is wide discretion towards determination of most appropriate sentencing by trial judges only subject to limited specified legislated parameters. For example, legislation provides for minimum mandatory sentences for specific offences. However courts still retain considerable discretion to depart from the prescribed minimum sentences whenever they find a “*substantial and compelling circumstance*” warranting such a departure (see cases *S v Maglas*, 2001; *Mxolisi and Another v S*, 2018). Decisions are guided by the well-established, broad sentencing principles which require that, when making sentencing determinations, judges consider four things: the victim must be heard and impact on the victim considered, the personal circumstances of the offender, the nature of the crimes including the gravity and extent thereof and the interests of the community (see cases *S v. Zinn*, 1969; *Mhlongo v S*, 2016).

COMBATTING EXPLOITATION OF VULNERABLE PERSONS BY TRAFFICKERS

Further and of relevance is that South Africa has adopted progressive legislation in 2013 by enacting the Prevention and Combating of Trafficking in Persons Act, Act 7 of 2013 which was supplemented by the Regulations Under Section 43(3) of the Prevention and Combating of Trafficking In Persons Act, in 2015, to address the pervasive problem of trafficking of persons, (particularly women and young girls) for exploitative sex work and coercion into the drug trade. This legislation criminalises the act of trafficking another person by means of, “*abuse of the vulnerability.*” Section 22 acknowledges the existence of special circumstances, whereby the prosecutor is obliged to give due consideration as to whether the offence was committed as a direct result of the person’s position as a victim of trafficking. If the authorities establish that the individual is a victim of trafficking, criminal prosecution may be quashed. In this way, the rights of victims are considered, and strengthen possibilities of protecting rights of WWUD and those who survive on sex work, if such crimes are committed in the context of human trafficking.

Potentially a similar approach and fundamental principles should apply, *a fortiori*, in cases where women get into contact with the law for drug offences. The commission of crime by these women is distinct to that of men in South Africa, and is inextricably linked to a combination of socio-economic factors that disproportionately affect them and which should be taken into consideration when they come into contact with the law (Steyn & Booyens, 2018). There is potential for reform here, whereby in late 2020, South Africa had gazetted a number of Bills, that may fundamentally impact and address some of the aforementioned social determinants around womens’ exposure to GBV and pathways toward involuntary involvement in drug related crime. These Bills include the Domestic Violence Bill, the Criminal Matters Bill, Sexual Offences Bill, Cannabis for Private Purposes Bill, and the Correctional Services Amendment Bill).

The *Tokyo Rules* (Rules 3 and 8) require States to adopt laws, guidelines and policies that encourage non-custodial approaches wherever possible and appropriate, when sentencing or deciding on pre-trial measures for women. This is

further reinforced by the *Bangkok Rules (Rules 57-62)* that also direct States to consider gender-specific options for diversionary measures and pretrial and sentencing alternatives within Member States' legal systems. South Africa has a fairly permissive and progressive framework for application of a diverse range of non-custodial sentencing reflecting the letter and spirit of the *Tokyo Rules*. Depending on a court's evaluation of these considerations, South African courts have wide scope, to order custodial or non-custodial sentences from quite a generous menu provided for by legislature in the Criminal Procedures Act (CPA) of 1977. South African courts consider and order the most suitable of non-custodial sentences informed by the individual circumstances, and based on a pre-sentence report by an expert on suitability of a community correction sentence (see case *S. v Vetter*, 2012). The application of correctional supervision was introduced via an amendment to the law in 1991. At the time of writing a Correctional Services Amendment Bill is being considered, following subjection to public hearings and is currently being debated in parliament. It seeks to introduce amendments and strengthened provisions regarding parole and placement to the principal Act. In practice however, the formulation of community corrections provisions tend to be gender-neutral and courts seem to generally approach sentencing in the same manner. This reliance on court discretion however potentially represents a blind spot which can result in injustices, given its gender neutral approach. The domestic laws in South Africa generally fail to reflect gendered nuances either in the legislation or via judge-made law, as dictated by the *Bangkok Rules*, and do not specifically provide for such nuanced approaches that take into consideration the peculiar gendered pathways of women into the criminal justice system. Non-custodial sentences are however preferred for women with children or those with caregiving responsibilities, and whilst there are no explicit rules obliging judicial officers to adopt a gendered lens when sentencing female offenders, there have been some precedent-setting judgments (see case *M v. The State*, 2007) which have applied purposive interpretation of the best interests of the child, and with a net effect to encourage the diversion of women offenders who are mothers or caregivers from incarceration.

Essentially, South African judicial laws and policies are not especially nuanced to address specific needs of WWUD, nor indeed those manipulated and exposed to GBV to commit drug related crimes. The Prevention of and Treatment for Substance Abuse Act of 2009 is generally gender-neutral with only a single mention of women in the whole text; '*Section 4 provides that all services rendered to service users and to persons affected by substance abuse must be provided in an environment that, (h) ensures that services are available and accessible to all service users, **including women**, children, older persons and persons with disabilities without any preference or discrimination*'. However, it can be argued however that there is enough scope within the South African legal framework to ensure that women who are charged and convicted for drug-related offences are not incarcerated, and are supported by consideration of rehabilitative sentences that focus on the treatment of a drug user (see case *S v. Williams*, 1995). This resonates well with the *Tokyo Rules* which advocate for specialized treatment of various categories of offenders, and whereby South African courts are permitted to commit an offender to a treatment centre *in lieu* of imprisonment in terms of the Prevention of and Treatment for Substance Abuse Act. There is ample jurisprudence that shows that courts endeavor to give effect to these provisions, in order to balance the interests of the society to ensure justice (see cases *S v. Williams*, 1995; *S v Masike*, 1992; *S v Ramone*, 2013; *S v Vetter*, 2012; *Jonga v S*, 2020), while remaining in conformity with rule 12 and 13 of the *Tokyo Rules*.

In the practical sense, it has been reported however that despite such law and policies supporting the establishment of mechanisms to cater for WWUD, in practice there is a dearth of specialist welfare support for affected women, and the vast geographic nature of South Africa has contributed to sub-optimal application of correctional supervisions due to lack of supervisors in more remote areas (Department of Correctional Services, 2019). Resource constraints across line ministries

impact on effective operationalisation and effective reintegration of these women into their communities, and centre on the lack of adequate infrastructure and human resources for pre-sentence reports, monitoring and provision of community correction services; and the lack of evidence-based treatment options for drug users requiring rehabilitative services (not limited detoxification, but including substitution, psychosocial interventions, and trauma informed supports).

Lastly, this raises a key tension, if not a paradox, on the framing of the current domestic legal and policy framework in South Africa grounded in harsh criminal sanctions and penal provisions on drug-related offences, and the adoption of laws and policies that seek to provide for holistic socio-oriented solutions (albeit gender neutral) to the problem of substance abuse in a manner that is suggestive of a shift away from the penal approach (for example as in the Prevention of and Treatment for Substance Abuse Act; the National Drug Master Plan, 2019 to 2024). This is aptly showcased by the pro-active approach to decriminalize private possession of cannabis, and the current consideration of the Cannabis for Private Purposes Bill which proposes to expunge criminal records of those previously convicted of possession of cannabis.

CONCLUSIVE REMARKS

Women affected by drug use and/or involvement in drug related criminal activity in South Africa experience a myriad of structural inequalities, and vulnerabilities based on discrimination, stigmatisation, social exclusion, GBV, poverty, and difficulties in accessing justice, health care and economic advancement. Research in South Africa highlights criminalisation of drug offences does not serve as a deterrent, but rather fuels increased exposure to violence and exploitation by partners, communities and police (Vanwesenebeck, 2017). There is an imperative for greater commitment to the *Tokyo Rules*, in the understanding and consideration of a woman's situation and sensitized criminal justice responses which fully consider the aggravating factors contain in the pathways from victim of GBV or trafficking, to that of perpetrator of drug or trafficking related crimes. Neglecting this gender nuanced approach to tackling drug use as a public health issue, and drug related crime by women, will undermine other State-led interventions to tackle public health issues such as HIV and socio-economic challenges linked to drug use and sex work. South Africa's state commitment to reform and improve its criminal justice and penal systems will be measured against the 2030 Agenda for Sustainable Development's commitment: '*No one will be left behind*' and particularly SDG 5 "*Achieve gender equality and empower all women and girls*", and 16("*peace, justice and strong institutions.*"). The reform of South African justice and penal policies using a gendered lens, and cognisant of trauma dictated pathways toward involvement in drug related crime is further a pre requisite for the achievement of several other SDGs, namely SDG 1 on poverty; SDG 3 on health and wellbeing, and SDG 10 on reducing inequality and discrimination. Further to this, and given the 30 year anniversary of the *Tokyo Rules*, it will shine the spotlight on the government commitment to operationalise alternatives to sentencing for WWUD. The link between the *Tokyo Rules* and ever increasing prison populations and overcrowding in South Africa, inherently affect implementation of the Nelson *Mandela Rules*.

Policy and legislative reform, sensitization, training and capacity building of all criminal justice system stakeholders in South Africa should refer to the UNODC Toolkit on Gender-Responsive Non-Custodial Measures which provides an overview of international & regional standards and recommends that policy makers incorporate provisions of the *Bangkok Rules* and *Tokyo Rules* into domestic law & practice. The redirection of resources by the State towards scale up of holistic, gender sensitive and trauma informed programmes using rights-based, psychosocial and medical approaches could raise awareness and target the multi-layered aspects of victimisation, GBV, sex work and drug use by women not limited to those in South Africa, but also with a focus on South African women exploited and detained in foreign countries

on drug offences. For those with substance dependencies, further development of voluntary gender sensitive and trauma informed drug treatment and rehabilitation in South Africa is warranted. Compulsory drug treatment or rehabilitation in detention should never be enforced. This societal and judicial shift will require public and law enforcement sensitization, resources, policy and practice reform, and a cohesive multi-agency response spanning all stakeholders across the social, health, criminal justice system and community continuum.

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