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**The Bangkok Rules in Mexico: advances and challenges from a  
critical feminist analysis**

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## Introduction

### Research problem

Human rights of people deprived of their liberty are constantly violated, despite that they are entitled to all of them except for, naturally, the right to liberty and very specific political rights depending on each State's legislation. Women's rights inside penitentiary centers<sup>1</sup> are particularly neglected due to their minority status, as they constitute 6.9% of the global prison population (Penal Reform International [PRI], 2021). However, the proportion of women deprived of their liberty<sup>2</sup> has been growing at a faster rate than male prisoners since the 1990s. This growth has aggravated and uncovered the deplorable situation of these women.

Even though the penitentiary system is an oppressive and dehumanizing institution for everyone, the structure of gender makes women and the LGBTQIA+ community experience it in a different and often more brutal way than cis-heterosexual-men. Behind the criminalization of women are gender norms and structural inequalities that are frequently overlooked by androcentric criminal law, judicial process and conviction. Once incarcerated, they suffer specific gendered violences like social abandonment, sexual abuse, denial of health and maternity rights, among others.

Paramount international instruments of human rights, such as the Nelson Mandela Rules (1955, reviewed in 2015) failed to recognize these violences and needs and, thus, do not protect specific women prisoner's rights. Acknowledging this void, the Bangkok Rules

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<sup>1</sup> The terms penitentiary center, prison and penitentiary will be used interchangeably throughout the thesis. These refer to the facilities where people are held in custody as a penalty for allegedly committing a crime.

<sup>2</sup> The terms and expressions women deprived of their liberty, women prisoners, incarcerated women, female detainees, and women offenders will be used interchangeably throughout the thesis. These refer to women held in custody in penitentiary centers. Women deprived of their liberty in other context (psychiatric institutions, home detention, etc.) are not included unless otherwise stated.

were created in 2010 with the objective of diminishing the female prison population and protecting human rights of this group.

More than ten years later, the attainment of these goals is highly questionable. In the case of Mexico, punitive laws intended to combat organized crime and overuse of pretrial detention have disproportionately criminalized women. Indeed, the year of 2020 saw the highest increase in the annual incarceration rate in fifteen years (Intersecta & CIDE Región Centro, 2021) in a penitentiary system with self-government issues and in a country blinded by punitive populism. Regretfully, the Bangkok Rules seem to have no place in such panorama.

### **Objective and research question**

The overall objective of this thesis is to analyze the achievements of the Bangkok Rules as a means to guarantee the human rights of women deprived of their liberty and as a tool to reform criminal justice systems from a gender perspective in Mexico. To this end, I have formulated the following research question: To what extent have the Bangkok Rules provided a successful framework to guarantee the human rights of women deprived of their liberty and to reform criminal justice system from a gender perspective in Mexico?

This research question leads to the following hypothesis: The Bangkok Rules have not been enough to guarantee the human rights of women offenders and to reform criminal justice systems from a gender perspective in Mexico, as neither agreed minimal conditions nor efforts to meet them have been consummated. Even if they had, the results would fall short due to the Rules narrow questioning to the carceral system and gender norms.

### **Justification**

The justification for this research project is that people deprived of their liberty, and women in particular, are a forgotten group worldwide. Many structural inequalities and oppressions intersect in this population, which falls into a never-ending cycle of vulnerabilization and criminalization, which leads to further vulnerabilization. Consequently, whole communities are hindered in their development, becoming a problem deserving the attention of the international community. This is why international organizations have signaled the importance of the problem, being the Bangkok Rules proof of their concern. Nevertheless, much needs to be done to achieve social justice in criminal systems, beginning with more research on the topic, just as the Bangkok Rules (67, 68 and 69) invite to do.

Moreover, this research is also framed within the Sustainable Development Goals (SDGs) 5, achieve gender equality and empower all women and girls; 10, reduce inequality within and among countries; 11, make cities inclusive, safe, resilient and sustainable; and 16, promote just, peaceful and inclusive societies. Violence and discrimination against women prisoners need to be eliminated to reach SDG 5 (targets 5.1, 5.2 and 5.C). Similarly, the described vulnerabilization-criminalization cycle must be broken up to achieve Goal 10 (target 10.2). Furthermore, questioning the efficiency of the carceral system as a means to justice and safer societies, contributes to the debate of how to reform institutions in order to meet SDG 11 and 16 (target 16.3, 16.6, 16.A, 16.B).

The relevancy of the case of Mexico lies on its current stagnated high insecurity (81 intentional homicides daily [Secretaría de Seguridad y Protección Ciudadana, 2022]), since the ultimate goal of the penitentiary system is the safety of the country. In Mexico various dynamics, including drug-related punitive policies, and pretrial detention, interact to affect women disproportionately. Therefore, Mexico must direct stronger efforts to attend the needs

and respect the rights of women deprived of their liberty, as demanded in its domestic law and international commitments.

### **Limitations**

The present research project is limited in several ways. Although imprisoned men also suffer gendered violences and cruel repression by the penitentiary system, this research is limited to study adult women for the particular violences to which they are exposed, and because this is the objective group of the Bangkok Rules. Likewise, as the research intends to analyze this international instrument, it is unfortunately influenced by the binary-lenses under which it is framed. An effort is made to include information about the LGBTQIA+ community, especially transwomen, because otherwise there is no authentic gender perspective. Yet, due to the scarcity of data and the limited focus of the Bangkok Rules in cis-heterosexual women, the research does not fully incorporate the mentioned community.

Female juveniles are also excluded from the analyses, for their age creates differentiated dynamics that would require their own analysis. Similarly, notwithstanding the fact that the expression “women deprived of their liberty” goes beyond women prisoners (including women held in psychiatric institutions, home detention, among others), only women held in custody in penitentiary centers will be analyzed for pragmatic reasons.

Regarding the interviews conducted as part of the methodology, key actors such as prison staff and authorities, as well as criminal justice agencies were contacted several times without success. The role of these people is indispensable for the implementation of the Bangkok Rules and, hence, an interview with them would have contributed to a fuller evaluation of the advancements or setbacks. Nevertheless, official documents and non-governmental organizations (NGOs) reports were used to cover their absence.

A last limitation is that the research is conducted by a student of International Relations, who does not have specialized knowledge of criminal law nor the penitentiary system from a legal perspective. Nonetheless, several authors of legal sociology, critical criminology and feminist legal studies are cited in the theoretical framework, appealing to the interdisciplinary nature of International Relations. Related with this limitation, language was carefully chosen so as not to mistake legal terms. However, the lack of legal formation and the translation of Mexican legal terms to English may have resulted in ambiguity of certain concepts.

### **Methodology**

The methodology chosen is mixed method. Quantitative data (incarceration rates, demographic data, quantification of human rights violations etc.) was collected from official and non-official data bases and reports in order to provide an overview of the dimension of the problem internationally and nationally. For the qualitative information, a bibliographic revision of human rights reports and ethnographies was carried out to comprehend the way in which the problem impacts women prisoners' life from their own voice and perspective, as well as the interpretation that organizations that advocate for their rights make about this.

The bibliographic revision was complemented with seven semi-structured interviews with eight experts on the topic (one interview was directed to two experts from the same organization). The interviews served as a source of information on their own and as guidance to orient the general research. The design of the interviews followed a general guide approach; meaning that changes, follow-ups and new interrogations could emerge according to the answers and flow of the interview. The questions of the interviews are shown in Annex 2.

The type of sampling for the interviews was non-probabilistic, combining quota and snowball sampling. The quota sampling required that at least two persons belonging to the following groups were interviewed: scholars, NGOs who work with women deprived of their liberty, and penitentiary staff/authorities. Unfortunately, as explained in the section on limitations, people from the last group could never be reached. Therefore, the sampling was composed by 4 scholars (one of them identifies herself as an activist as well) and 4 workers of NGOs. Seven of them self-identified as woman and one as a transperson who uses neutral and female pronouns. Their names and organization/university are enlisted in Annex 1. Women prisoners were not considered for interviews for the difficulties of accessing prison facilities and because their testimonies were taken from the bibliographic review.

## **1. Chapter One: Theoretical Framework**

This chapter will explore critical criminology, feminist critical criminology, and global governance contributions that are relevant to the study of the Bangkok Rules from a feminist perspective. It will begin by touching on characteristics of critical perspectives on criminalization, some of the prior theories and authors they derive from, and the subsequent theories that they inspired such as abolitionism and legal guarantees theory. The purpose of touching on these theories is that their questioning of the institution of prison gave rise to demands to reform it. From radical demands to abolish the penitentiary system, to more humble ones about protecting the guarantees of the incarcerated, which is the aim of the Bangkok Rules.

Yet, the Rules are closer to the findings of feminist critical criminology, which will be explored in second place, along with its interpretation of criminal law and its research on women prisoners. In third place we will turn to gender and international law, followed by the international regime of women in prison, since both are relevant strands of the global governance in which the Bangkok Rules are inscribed.

Before continuing, it is important to define three concepts that are interrelated and frequently referenced in the cited theories and the present thesis as a whole: criminal law, penitentiary law and criminology. According to Cáliz Hernández (2006), the main difference between the first two and the third is the type of science, since criminology is a descriptive science, while the other two are normative. In this sense, criminology is the empirical and interdisciplinary science that studies the crime, the criminal, the victim, social control, as well as the theoretical and legal framework that surrounds all these (e.g. criminal and

penitentiary law). Criminal law, on the other hand, is the juridic branch that establishes the penalties and measures of security to be applied when a crime is committed. Penitentiary law operates on the penalties established by criminal law that involve deprivation of liberty. It deals with the norms that regulate the efficient execution of custodial sentences.

### **1.1. Critical criminology**

Critical perspectives on criminalization aim to *de-essentialize* crime and punishment (Núñez, 2018), focusing mostly on criminal law and the institution of prison.<sup>3</sup> Criminal law is assumed as a tool that restricts liberties and removes rights by establishing prohibitions. Alessandro Baratta (cited in Aniyar de Castro, 2010), one of the pioneers of these theories, shows the double selection exercised through criminal law: primary criminalization, which is the selection of the legal rights protected and the undesirable behaviors; and secondary criminalization, where certain individuals<sup>4</sup> are selected as offenders.

Prior theories, such as the labelling approach and symbolic interactionism, studied why certain behaviors are considered as “deviant” (diverted from social norms) (Becker, 2009). Yet, critical perspectives noted that these didn’t take into account structural and fundamental aspects such as inequalities, power relations, and the origins of criminal law that condition the legislation process and its application (Núñez, 2018). Therefore, critical criminology

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<sup>3</sup> However, it must be clarified that the punitive system, which these theories seek to question, is not limited to the carceral system. Indeed, the punitive power of the State is exercised through every action that is carried out under the name of security and/or justice, without seeking any reparation nor interruption of a harmful ongoing or impending process. Therefore, it covers a broad spectrum of practices that go from public street surveillance to torture (Zaffaroni, 2009).

<sup>4</sup> Besides selecting existing individuals, criminal law creates subjectivities whenever it defines a crime (Butler, 2007), as it will be explained later.

alluded to the bourgeoisie and disciplinary heritage of criminal law, as studied by Foucault (Foucault, 1975).

Indeed, the western XVIII<sup>th</sup> century reform of the penal system sought to reduce the violence of punishment inflicted by the sovereign through the introduction of a “political economy of power and punishment” (own translation, Foucault, 1975, p. 96) in order to make it more efficient and precise. This was encouraged by a capitalist and liberal society which demanded protection for its goods from “traitors” (who happen to belong to the popular classes) who dared to break the new social pact. In this context, given that the reformists’ project required penalties to be minimum, specific, and pedagogical,<sup>5</sup> imprisonment was considered inadmissible and tyrannical, unless the crime was directly related to freedom (ex. kidnapping) or its abuse (ex. social unrest).

Nonetheless, at the beginning of the XIX<sup>th</sup> century, imprisonment was the punishment *par excellence*. Within its logic, the incarcerated were not subjects of law, but obedient subjects under an “omnidisciplinary” device, for it controlled all the aspects of the individual. It did so under three schemas: the moral-political schema of isolation (submission to avoid plots and facilitate redemption), the economic schema of compulsory labor (to form workers for the capitalist society), and the scientific-medical schema of criminal knowledge (to medically define the criminal to, afterwards, reeducate him/her (Foucault, 1975). As it was to be expected, the flaws of the system were revealed within few years: it did not

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<sup>5</sup> The effects of the punishment must be stronger on the society as an incentive than on the punished as a misery. Moreover, crime and penalty must be inherently linked, in a way that certain condemned behavior automatically brings up the thought of a particular punishment in the social imaginary, in order to *naturalize* a punitive society (Foucault, 1975).

diminish insecurity, it stimulated recidivism, it enabled criminal networks and it drove families to vulnerability (Foucault, 1975).

Although these criticisms were clear since then, unsubstantiated justifications about the social goods of the carceral system persist nowadays. According to the supporters of the carceral system the social goods include: expiation and retribution, denunciation of undesirable behaviors, deterrence, offender incapacitation and rehabilitation (Carlen & Worrall, 2004c). However, in practice, none of these social goods are attained: the imprisonment logic based on vengeance does nothing to retribute the offended; penalties are useless for deterrence since crimes have more to do with situated contexts than rational choice; most of the incarcerated do not pose a threat to society and thus incapacitation makes no sense; and no rehabilitation could emerge from such inhuman conditions (Almeda Samaranch & Di Nella, 2017; Carlen & Worrall, 2004c).

About the system's contributions to security, the lack of evidence showing any relation between higher incarceration rates and lower crime rates is even known as the "prison paradox" (Lerman, 2013). As a matter of fact, a study in the United States shows that 75-100% of the reduction in crime rates since the 1990's is due to other factors rather than incarceration (Stemen, 2017),<sup>6</sup> such as socioeconomic and environmental reasons from income growth to aging population (Roeder et al., 2015).

Still, imprisonment keeps on being the primary punishment of criminal systems across the globe, turning States into "debtors" who owe citizens a safe life with social and economic justice, as Segato (2007) argues. Furthermore, not only have States failed to offer protection

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<sup>6</sup> Crime reduction due to incarceration has only been proven in property crimes (Stemen, 2017).

through incarceration, but they use crime-related issues to manipulate public opinion in order for citizens to believe that problems will be solved through harsher and longer sentences. This phenomenon was referred to as “populist punitiveness” by Bottoms (1995), also known as punitive populism, and is widely used today by populist parties who advocate for hardline policies instead of social and economic progressive reforms.

This is congruent with what Wacquant (2004) theorizes about the neoliberal State. He says that, over the last decades of the XX<sup>th</sup> century, western States compensated their reduction in social welfare policies with stronger disciplinary and punitive ones to maintain social control. Nevertheless, other authors have warned that other factors besides neoliberalism play a role for the punitive approach to gain ground, since it was also experienced in left-wing governments throughout Latin America at the same period of time (Sozzo, 2015). As illustrated in the case of Mexico,<sup>7</sup> in addition to neoliberal policies, the punitive turn of the last decade of the past century was also motivated by a tough approach to combat organized crime (Núñez Rebolledo, 2019b).

With all the previous points in mind, the theory and movement of abolitionism has emerged from critical criminology. It advocates for the abolition of the carceral system and/or criminal law, given that far from guaranteeing security, it aggravates inequalities and social injustice by disproportionately punishing marginalized sectors of society (Carlen & Worrall, 2004b).<sup>8</sup> Therefore, they seek a new vision of justice that privileges reparation and

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<sup>7</sup> In particular in the criminal law reforms initiated in 1993 and published until 2008 (Núñez Rebolledo, 2019b).

<sup>8</sup> For example, indigenous people account for 28% of incarcerated population in Canada, although they represent around 4% of Canadian total population. Furthermore, the figure for indigenous women incarcerated represents 40% of imprisoned women in the country (Government of Canada, 2020).

reconciliation through horizontal, communitarian and autonomous alternatives; accompanied by democratic institutions that distribute political and socioeconomic power equally (Davis, 2005).

In contrast with abolitionism, other theories recognize the utility of criminal law as long as it is limited. For instance, legal guarantee theories propose the following limitations: penal prohibitions must be the minimum necessary to protect fundamental rights, the harm infringed needs to be the lowest, and rights and guarantees of the offender must be genuinely respected (Ferrajoli, 2006; Beccaria cited in Núñez, 2018). These legal guarantee approach, could be considered to have inspired instruments like the Bangkok Rules, as will be later explored.

Before moving to the feminist approach, it must be noted that there are plenty of other perspectives (Marxist, postmodern, socialist, queer, etc.) whose point in common is questioning the application of the penitentiary law and its differentiated impact according to time, space, and subjectivities (Carlen & Worrall, 2004b). Similarly, they disapprove the eagerness to use criminal law for social change, as complex phenomena like racism or classism (depending on the theory) are oversimplified when translating them into criminal law. This is because legal language has the aim of avoiding discretion when describing and judging a criminal offence and, therefore, it distorts complex phenomena. Indeed, according to Freeman (cited in Dean, 2015, p. 42), law intended to prohibit discrimination fails to do so because it adopts a “perpetrator perspective” which: 1) individualizes a social problem by conceiving *bad* perpetrator who chooses to discriminate a certain victim; 2) ignores the

historical context by condemning particular actions instead of structural patterns; 3) promotes the false impression that previously marginalized groups are no longer so.

## **1.2. Feminist critical criminology**

When first articulated, critical criminology was gender blind. It has been argued that the lack of interest in studying imprisoned women was the low percentage they represent in prison population. Some have tried to explain this percentage with essentialist/biologist arguments—ex. women are *naturally* less inclined to commit crimes—and social ones—ex. women are socialized to be more respectful of the authority or they are submitted and disciplined through more informal norms than men outside the penal system (Carlen & Worrall, 2004a).

When women were incorporated into the analysis, not all the publications were necessarily feminist. Indeed, some chose women and/or girls as their subject of study, but did not challenge the patriarchal logic behind the carceral system in any transformative way.<sup>9</sup> It was until feminists influenced by the second wave in the 1970's realized that the legal rights they fought so arduously to get were not enough to grant equality, that they began to question the legal system itself, including criminal law and penitentiary law (Pitch, 2010). They<sup>10</sup> did so by applying a methodology in which the researcher truly engaged with the researched (mostly women) in a non-hierarchical way, maximizing the experiences of the

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<sup>9</sup> For instance, although the work by Freda Adler and Rita Simon in the 1970's focused on women ignored in criminological discourse in the US, their conclusions linking increases in crime with women's liberation, did not particularly contribute to the feminist cause (and didn't intend to) (cited in Gelsthorpe, 2020).

<sup>10</sup> Among the pioneers of the theory in Latin America we can mention Lola Aniyar de Castro and Rosa del Olmo; Marcela Lagarde is also a known expert on the topic. In other regions, like Europe, the names of Tamar Pitch, Elena Larrauri and Carol Smart stand out. Same as Angela Davis and Meda Chesney-Lind in the United States.

last by allowing them to speak for themselves, and considering the relevancy of the results to assist them (Gelsthorpe, 2020). Such methodology challenged mainstream criminology or, in the words of Cain (1986), *malestream* criminology.

It also demystified the allegedly neutral and impartial nature of criminal law, revealing how it constructs subjects and its relations, sexualities and its restrictions, bodies and its regulations, and criminals and its deviances (Smart, 1976). In addition, it uncovered situations specific to women that make the carceral system especially oppressive to them. For instance, what Lagarde (2005) calls “double participation in crime”, as victim and as offender, since they are generally victims of violence, poverty and abandonment when committing a crime.

Consequently, several feminist legal scholars and lawyers have rejected punitive and carceral feminism. Carceral feminism is defined as reliance on criminalization —the definition of offences, policing, prosecution, imprisonment— to seek *protection* from acts caused by gender inequality, discrimination and violence (E. Larrauri, 2002; Pitch, 2009; Terwiel, 2020). The reason why feminist legal scholars and lawyers reject carceral feminism is not only the futility of prison and the individualization of a complex social problem, as already explained, but the severe consequences that the State’s punitive power can have on women and other marginalized groups’ freedoms. In fact, the more criminalized everyday life is, the more power is granted to tribunals and legal elites in detriment of particulars’ agencies (Núñez, 2018).<sup>11</sup> Governments have taken advantage of carceral feminism by

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<sup>11</sup> For example, the 2003 National Prison Rape Elimination Act (NPREA) passed in the United States to tackle sexual assault in prisons became another tool to increase sentences and further signal prisoners of color and

incorporating their demands into their punitive populism, to create the illusion that they take action on women and gender matters (especially in relation with violence). As will be explored in chapter 3, this has happened in Mexico.

Moving to the issues denounced by feminist critical criminology, I will divide its most important contributions in, on the one hand, those that concern criminal law and its interpretation, and, on the other hand, women in prison. Nevertheless, they are both indissociable parts of the criminalization process, since the first precedes and allows the second.

### **1.2.1 Feminist critical criminologist interpretations of criminal law**

Among feminist legal critiques there are three main strands regarding law, which can be applied to criminal law: it is sexist, it is masculine, and it (re)produces gender (Smart, 1994). Although some authors argue that the third is the most appropriate lens to interpret law and gender (Núñez, 2018), the three will be briefly reviewed for they all have created useful knowledge for the purpose of this investigation.

Beginning with the view that the law is sexist, it argues that the law discriminates on the basis of sex, creating first-class (men) and second-class (women) citizens; the latter not being considered full citizens at all until well into the last century. Under this logic, the law grants more resources and opportunities to men, while limiting the autonomy of women. This is seen in restrictions like needing a masculine figure's permission (usually father or husband) to work, drive, and sign contracts. Although many reforms have been introduced worldwide

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LGBTQ+, for having consensual sexual activity (including handholding). This owing to the fact that the main tools to enforce the act were punishment tools, conceived under a punitivist framework.

to grant equal formal rights, many countries still deny women's autonomy over their body and lives. For example, 41% of the world's female population are denied their right to decide over their maternity through abortion (Center for Reproductive Rights, 2021). From this perspective, a solution would be to ensure the objective, rational and universal nature of law, by correcting sex and gender references made by it (Olsen, 2000). However, criticism to this approach note that sex differences is inherent to all societies and, thus, a gender-blind law will not grant substantive equality.

Moving on to the second strand, arguments about law being masculine recognize that even once that norms are formally equal for everyone, it assimilates "everyone" to men (Azaola, 2005); of course, not any men, but white, adult, heterosexual and proprietary men (Pitch, 2018). Based on the fact that the law was (and still is to an extent) built, interpreted and applied by men, it takes him as the model, disguising this bias with notions of neutrality and universality. In the case of criminal law in particular, Pitch (2003) clarifies that women do appear in these codes, and so do weak, poor and diverted men. This is because they are the *deviated*, the criminals that deviate from the norm. In contrast, adult privileged men are conspicuous by their absence in criminal law for they do not need to be normed; they are the norm.

Furthermore, the very principles of law —rationality, objectivity, neutrality and abstraction— are traditionally attributed to men and, hence, considered ideal (Olsen, 2000). Catherine Mackinnon and Janet Rifkin represent this approach. They consider the law as the fundamental symbol of male authority in patriarchal societies. Accordingly, no effort done in the legal front (e.g. the creation of non-discrimination laws) will bring social change. What

is more, these efforts would mean tacitly consenting to the existent patriarchal order which is sustained by law (cited in Olsen, 2000). However, a critique of this approach is that, in addition to neglecting the contradictions within the law and that it is not a single simple and homogeneous unit, it prioritizes the binary sexual division that essentializes masculinity and femininity (Núñez Rebolledo, 2019a).

The third interpretation of criminal law transcends the notion that law is applied to *natural* or preexisting gendered identities and studies the way it actually produces such identities. For this analysis, many have used the concept of “technology of gender” by De Lauretis (1989), who in turn takes it from Foucault’s “technology of sex”. The latter considers sexuality as a set of effects, behaviors and relations deployed and reproduced in our bodies as a form of disciplinary control. In this sense, De Lauretis affirms that criminal law is part of a technology of gender that directs punishment not only as a mechanism of repression, but as a reproducer of gendered subjectivities and relations.

Butler (2011) continues the discussion by reminding that the law expresses the good and bad in a society, and the success of these constructions relies on its performative potential. Indeed, she argues that the production of gender subjectivities occurs in a two-stage process: 1) the invocation of the norm; and 2) the ritualized performance of the norm. It is the reiterated performance of criminal law, and not the norm itself nor the authority that applies it, what makes it violently powerful. Moreover, the norms follow gender regimes or what Núñez (2018) calls “coordinates of gender subjectivization”, referring to discursive axes scaled according to what is seen as good and bad from a heteronormative vision. The

figure of women within such coordinates follows a series of stereotypes that will be explained below.

### ***Women subjectivities in criminal law***

Central to feminist research in criminology and criminal law is the deconstruction of official assumptions and categories for defining women *offenders*: women who transgress the law and thus must be imprisoned (Cain, 1989). These are those who fall into the “undeserving” types of women under the patriarchal gaze: sex workers, bad mothers, riotous leaders, LGBTQIA+, and other intersecting identities that society looks down upon (Davis, 2003; Lagarde, 2005; Wonders, 2020). In contrast, the State creates laws and policies to protect the “deserving” women, who are those that fit the heteronormative, sexually honorable, and passive role that society expects from them.

This is seen in the wording and the tacit assumptions of several offenses.<sup>12</sup> One of the most illustrative assumptions is Article 332 of the Mexican Federal Criminal Code, where the attenuating circumstances to the crime of abortion are defined. These are: not having bad reputation, having successfully hidden her pregnancy, and that it was product of an illegitimate union. The importance of a woman’s honor before society is evident in these attenuates, since all of them concern the image of pureness that she must portray. At the same time, Núñez (2018) mentions that the criminalization of abortion depicts women as dangerous subjects, whose arbitrary choices need to be controlled.

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<sup>12</sup> Another interesting example is the General Law to Prevent, Sanction and Eradicate the Crimes concerning Human Trafficking and for the Protection and Assistance of the Victims of these Crimes. This law, together with the punitivist regime surrounding human trafficking for sexual exploitation, has had enormous repercussions for sex workers (Global Alliance Against Traffic in Women, 2018). This due to the fact that it fixes women into two molds: responsible for the crime of sexual exploitation, or victim of it. The first leads them to prison, the second stigmatizes their source of income.

The same author argues that prioritizing morality and the integrity of traditional family over the freedom of women has been characteristic of Mexican liberalism since the first Criminal Code of 1871.<sup>13</sup> Yet, the pattern is also present in other latitudes of the world. By way of example, prior to the Spanish Criminal Code of 1995, an attenuating circumstance for the crime of abortion was to have committed it as a mean to safe its honor. In contrast, there was no mention of economic vulnerability, father abandonment, rape, or any other situation that should be more important than someone's honor (Larrauri, 2002).

Nevertheless, it has also been asserted that it is not the woman's honor which is protected, but the man's honor. In this regard, female chastity and monogamy is meant to shield a man's property, and law must guard women from the aggression of men other than her *natural* protectors/owners (father or husband) (Brownmiller, 1981). Returning to the Mexican situation, despite the reforms done to the Federal Criminal Code of 1931 (the one currently in force), women are still represented as passive subjects in need of protection and/or surveillance (Núñez, 2018).

On the other hand, some authors do not agree with the statement that women offenders are those who transgress the heteropatriarchal model. They argue, instead, that the majority of women who break the law do so under their assigned role: as mothers who must provide for their families or as manipulated girlfriends (Aniya de Castro, cited in Almeda Samaranch & Di Nella, 2017; Torres Angarita, 2008)

### **1.2.2 Feminist critical criminology findings of women in prison**

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<sup>13</sup> For example, in this Code the crime of abduction of women was exempted if the abductor married the woman, since it was the only way to save the honor of the woman.

Similar to critical criminology studies in general, the first analysis of imprisoned women were done through a “zoo-keeping” or voyeuristic lens, focusing in particular on essentialized psychological explanations of inmate culture (Gouldner, cited in Carlen & Worrall, 2004c). However, later studies paid more attention to prison regimes themselves, finding patterns in the violence lived by women during detention, prosecution, imprisonment, and release. Some of such conclusions are the following.

### *The effects of the war on drugs*

The proportion of incarcerated women worldwide has seen an increase since the last decades of the past century, from 3% to 6% (Macaulay, 2020). Many authors attribute it to the war on drugs and neoliberal policies. This is especially evident in Asia and Latin America. In the latter, drug offenses are the first or second cause of female incarceration,<sup>14</sup> which is explained by the overuse of pretrial detention, mandatory minimum sentences and disproportionate penalties that distinguish drug policies in the region (Chaparro et al., 2017). Indeed, while laws vary among countries, the maximum penalties for drug-related crimes range from 12-40 years,<sup>15</sup> which sometimes is even more than the sentences for murder and rape (Giacomello & Youngers, 2020).<sup>16</sup>

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<sup>14</sup> Precise data is shown in chapter 2.

<sup>15</sup> Although most women and men incarcerated for drug offences are users accused of possession or possession with intent to sell; that is, low-level and non-violent crimes with less harsher sentences (Giacomello & Youngers, 2020).

<sup>16</sup> For instance, in Colombia the maximum sentence for trafficking is 30 years, while rape is 20 years. Similar to the case of Bolivia, where the first figure ascends to 25 years, and the maximum sentence for murder is 20 years (Giacomello & Youngers, 2020). It must be clarified, however, that by no means should this comparison be interpreted as a demand for rising murder and rape sentences, but an account of what is considered as more deserving of punishment in the region.

This trend began in the 1970's,<sup>17</sup> during the presidency of Richard Nixon, who redefined narcotic drugs as a threat to the national security of the United States. Subsequently, the war on drugs was further promoted in the international arena in the 1980's under the administration of Ronald Reagan. This was done by preserving the American geostrategic presence in third countries, and enabling the military budget to be kept dramatically high as the war on communism was ending (Buxton & Burger, 2020).<sup>18</sup> Due to the American influence in global governance, the war was incorporated to the international regime that had previously stemmed from the 1961 UN Single Convention of Narcotic Drugs, which has been complemented by twelve other treaties up to this day. One that emerged during the time in question is the 1988 Convention Against the Illicit Traffic in Narcotic Drugs and Psychoactive Substances, which specifically mandates States to impose sanctions in the form of deprivation of liberty for drug-related offences. Moreover, the UN General Assembly declared the years of 1991-2000 as the “Decade Against Drug Abuse”, during its first Special Session (UNGASS) on “the world drug problem” in 1990.

Although the punitive approach of the war on drugs is internationally challenged nowadays,<sup>19</sup> its effects on the Latin American region are very present. Punitive policies and legislation were incorporated throughout the continent due to the focus on the supply side. In

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<sup>17</sup> Nonetheless, the prohibitionist paradigm started to gain popularity since the first decades of the XX<sup>th</sup> century in the United States, France, Great Britain, Germany, among others (Guala, 2019).

<sup>18</sup> Some of the actions taken were strengthening the Department of Defense (DOD)'s role in eliminating overseas drug cultivation, manufacture and import to the United States; and the coercive strategy of listing and certifying countries who cooperated in their efforts (being sanctioned when they did not) (Buxton & Burger, 2020)

<sup>19</sup> For example, Kofi Annan (General Secretary of the UN between 1997-2006) joined the Global Commission on Drug Policy, defending a health-based response to drugs; the 2016 UNGASS recognized the negative effects of the hardline approach for women; and over 30 countries (and 20 federal entities of the United States) have introduced some form of depenalization or decriminalization for drug-related offenses (Talking Drugs, 2022).

the case of Mexico, this approach was reenforced during the presidency of Felipe Calderón by militarizing public security and prioritizing armed conflict against organized crime (Hernández Castillo, 2019). According to Guala (2019), four main consequences derive from this prohibitionist approach: 1) the increase of violence and consolidation of corruption networks; 2) the selective penal persecution in “producer countries”, fostering the militarization of peripheries and burdening them with highest economic and humanitarian costs of the war (Centro de Estudios Legales y Sociales [CELS], 2014); 3) the rise of incarceration rates, punishing the lowest ranks of the supply chain (“mules”, peasants, etc.); 4) lack of preventative policies and access to health attention for consumers.

At the same time, women have been particularly hit by the third consequence for two main reasons (Guala, 2019): 1) the feminization of poverty; and 2) the patriarchal justice system that imposes a “triple conviction” on them by criminalizing structurally discriminated women, imposing disproportional penalties, and not guarantying their rights once in prison (Giacomello, 2013). About the feminization of poverty, Del Olmo (cited in Castillo, 2008) was one of firsts to observe that economic crises during the 1970’s and 1980’s led many Latin American women to enter the drugs trade as a mean to survive poverty. This is consistent with the reported profile of detained women for drug-related offenses, who are predominantly heads of households with children and other dependent family members,<sup>20</sup> with no previous criminal record, with limited access to education and employment (Giacomello, 2013).

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<sup>20</sup> A study commissioned by the Inter-American Development Bank showed that 87% of women incarcerated have children (Safranoff & Tiravassi, 2018).

Drug trafficking tends to fit these women for its compatibility with their care responsibilities and as a collective and familiar strategy in rural areas where cultivation of narcotics crops (or crops used to produce drugs) is common (CELS, 2014). It is also relatively convenient for historically marginalized women whose stigmatization prevents them from accessing other sources of employment.<sup>21</sup> Of course, they enter the industry at the lowest and “disposable” levels: cultivation, mules (frequently introducing the drugs in their bodies), small-scale drug dealing, cooks of other workers, and similar activities. Often, they get involved as a result of romantic relations with men in the industry, entangled in the thin line between coercion or consent out of love (Torres Angarita, 2008).

However, although patriarchy does place women in vulnerable positions that makes them prone to be coerced into drug trafficking, there should be a cautious balance that recognizes their agency as autonomous subjects. Indeed, some research reveals that while some women feel victimized (specially due to the gender violence they suffer), others feel empowered by their economic autonomy and social network, and yet others are living a mixture of both (Fleetwood, 2014 & Moloney et al., 2015, cited in Macaulay, 2020).

Their low rank in the chain makes their incarceration insignificant to tackle drug trafficking as an industry, but they are included in the overall statistics of imprisoned drug dealers so as to show the results of law enforcement. Once in prison, the *business* continues with the drug that their visitors bring them to sell internally (Lagarde, 2005).

### ***Violence specific to imprisoned women***

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<sup>21</sup> By way of illustration, 70.4% of trans women imprisoned in Argentina committed drug-related offenses (Guala, 2019).

Even though prison conditions are dreadful for every human being, women suffer it in a differentiated way than men do. The primary reason for this is that, since the proportion of women offenders is significantly smaller than that of men, their specific needs are neglected. The majority of women are held in former male prisons or a section within a male prison, which are often located at greater distance from their place of origin, isolating them more from their family (Carlen & Worrall, 2004c; Wright et al., 2012). Moreover, police, prosecutors, judges, the prison personnel and other functionaries who interact with the offender do not apply a gender and intersectional perspective. For instance, they do not take into account the context of violence and social exclusion that a certain “criminal” might have grown up in as a mitigating factor in the sentence (Giacomello & Youngers, 2020). Even worse, Azaola (2007) reports that sentences for the same crime tend to be 25% longer for women than for men. This lack of gender perspective and intentional degrading practices also occur during mandatory health revisions, when the personnel’s’ condescending attitude (including female personnel) leaves female prisoners with deep scars of humiliation (Carlen & Worrall, 2004c)

Violent practices are manifested physically, in the form of sexual abuse and torture, but also in generalized lack of basic services. Not only do they have to pay for water, a place to sleep, to be given their papers and for protection (just like men do), but goods and services such as menstrual hygiene products are often not available or completely unaffordable (Lagarde, 2005). Additionally, although not always recognized as violence by the imprisoned women, the role of the carceral system as a technology of gender is displayed in the work that they are bound to do as prisoners, and the jobs they are offered for “rehabilitation”. Most of them are stereotyped and relegated to their domestic role: cleaning, sewing and laundry

—the three carried out as services for the male prison area too—, as well as manual jobs such as weaving bags (Azaola, 2014).

Furthermore, a key form of violence that men and women experiment differently is abandonment. Indeed, female family members, partners and friends frequent their imprisoned male relatives and take care of their dependents. In contrast, most women are harshly judged and stigmatized by their acquaintances when labelled as criminals and, thus, are abandoned during their prison sentence and after their release, being deprived of their already fragile social network (Lagarde, 2005). This is due to the fact that men who transgress the law are only seen as *bad citizens*, while women are considered *bad women* (Carlen & Worrall, 2004b). In addition to the serious suffering this causes them, the repercussions are also resented by their dependents, who are left without their main caregiver and stigmatized for having a *bad mother*. These children are frequently looked after by female relatives of the imprisoned women, burdening them with more responsibilities. However, because of their social abandonment, women offenders' dependents are often neglected. This is why many of them choose to (or are forced to) raise their children in prison. Therefore, when a woman is incarcerated, it has an impact on the entire social tissue of already marginalized communities (Coba Mejía, 2015; Lagarde, 2005).

All these burdens lead women deprived of their liberty to suffer from mental health problems, which are in turn not correctly addressed inside the prison system (United Nations Office on Drugs and Crime [UNODC], 2021). In fact, in the United Kingdom, rates of self-harm in prison are almost five times higher among women and men, and self-harm quadrupled in the last decade for incarcerated women in Canada, half of them being indigenous women (Stubbs, 2020).

### *Intersectional perspective*

Intersectionality is defined as the sum of multiple oppressive structures (gender, racialization, age, socioeconomic status, etc.) that condition the agency of an individual (Crenshaw, 1989). In the same way that the carceral system produces differentiated gender effects on women and men, other historically intersecting structures such as race, ethnicity, sexuality, nationality, age and disability play an important role in how incarceration is experienced. In this regard, given that feminist critical criminology came from occidental literature, Latin American authors have called for a situated analysis that takes into account the different socio-economic and political context of carceral systems in the South (higher inequality, corruption, no social safety nets, role of woman in the family, among other characteristics) (Del Olmo, 1987).

Moreover, most intersectional studies have studied race as a fundamental element of the carceral system. Segato (2007) considers that race is the “color of prisons”, which illustrate the colonial domination that persists to our days through the selective tortures, executions, and incarcerations. Indeed, indigenous women, for instance, are specially targeted by penal systems as land-grabbing, militarization of their lands and social marginalization push them into minor *criminal* practices which are disproportionately punished (Hernández, 2013). Furthermore, their human rights are violated during a stereotyped prosecution in which authorities take advantage of their monolingualism (not speaking the official hegemonic language of the country), analphabetism and lack of information about legal matters, to the point of torturing them to confess crimes they did not commit (Azaola, 2005; Hernández, 2013).

Similarly, intersections between colonization and criminalization have been broadly found in aboriginal communities in Canada and Australia, where these women are labelled as troubled or troublesome, and their vulnerability is attributed to individual failing instead of systematic discrimination (National Inquiry into Missing and Murdered Indigenous Women and Girls (NIMMIWG), 2019; Porter, 2019). The structure of race also intersects with nationality in the Global North, where nonoccidental immigrants are criminalized as a tool of punitivist populism and xenophobic nationalism (Wacquant, 2004).

Race has also been a key variable in black feminist critical criminology, owing to the fact that intersectional theory has its roots in black feminist legal studies (Crenshaw, 1989). The criminalization of black women begins with their construction as dangerous, welfare dependent and drug addicts, a construction that can be traced back to slavery (Davis, 1981). This multifactorial discrimination limits young generations' opportunities to disentangle themselves from the penal system, since the disproportional presence of black female youth and girls in prisons and juvenile detention centers contrasts dramatically with their absence in the education system and public representation (Crenshaw, 2012).

Another group that suffers deprivation of liberty in a particularly violent way due to the structure of gender and sexuality are women pertaining to the LGBTQIA+ community. Certainly, transwomen are significantly affected by the heteronormative rules that govern sex-segregation of key institutions, from restrooms to prisons. Their prison sentences are also frequently extended for alleged sexual inappropriate behavior inside prison. Furthermore, medical needs for transgender women or women suffering from HIV is seriously neglected (Dean, 2015).

Even though programs with an intended intersectional framework have been introduced in some penal systems, for example Canada's "risk scores", they follow an individualized focus that fails to understand how intersectionality works. Instead of recognizing sexism, racism, classism and other systems as oppressive structures that render certain groups as criminals; those programs direct correctional efforts to specific identities with the aim of reforming them cognitively and socially (Hannah-Moffat, 2010).

### **1.3 Gender and global governance**

The Bangkok Rules are part of the global governance of gender and are one of the three key instruments that lead the international regime of the rights of the people deprived of their liberty (the other two are explored in Chapter 2). Global governance is defined as the sum of different ways in which multiple and diverse actors administer their common affairs (Commission on Global Governance, 1995). It is a response to the plural global society whose problems require a complex and participatory cooperation to formulate horizontal, efficient and transparent solutions (Jacquet et al., 2002).

International regimes, on the other hand, are understood as the set roles, institutions, principles and decision-making procedures in which expectations around a specific problems lie (Krasner, 1983). Feminist interpretations of global governance are relevant for the study of the Bangkok Rules, particularly with respect to international law. Similarly, it is important to know which are the international instruments that frame the international regime of women prisoners in which the Rules are inscribed.

#### **1.3.1 Gender and international law**

Global governance, and specifically international law, began to reflect feminists and gender interests in the early 1990's. The recent and slow emergence of this trend can be explained

by several of the points covered in the previous section: international law is seen, in contrast to politics, as an impartial and objective system immune to situational biases (Charlesworth, 2016). This is why feminist international lawyers, building on insights by feminist critical criminology and feminist international relations scholarship,<sup>22</sup> grouped up with other critical theorists under the name of “New Approaches to International Law”. Some of the strands covered under these approaches are concerned with the participation of women, how gender shapes international law, sexual violence in armed conflict, and the limitations of international law to satisfy feminists demands.

Those concerned with the participation of women point out the unequal representation in international law-making forums. By way of illustration, in 2015, only 38% of the members of the nine UN human rights treaty committees were women, and 55% of them are concentrated in the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child<sup>23</sup> (Charlesworth, 2016). About the feminists who study the role of gender in international law, they argue that doctrines such as the responsibility to protect and humanitarian law rely on gendered binaries like force/passivity and civilian/combatant to legitimize the use of force as a means to stability (Charlesworth, 2010; Kinsella, 2016). And those who study the situation of women in armed conflicts have paid a

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<sup>22</sup> Cynthia Enloe, V. Spike Peterson, Jan Jindy Pettman and J. Ann Tickner, to name a few (Charlesworth, 2016).

<sup>23</sup> In the case of the Bangkok Rules there is no treaty committee and, fortunately, civil society members (mostly women) were part of its drafting, as will be later explained.

special attention on sexual violence, in the same way that the international criminal courts have.<sup>24</sup>

Concerning the strand that studies the limitations of international law as a feminist tool, Kapur argues that the human rights movement and instruments are built upon an erroneous conception of a common “international women’s victimhood” (Charlesworth, 2016, p.141). This assumption keeps the idea that sex is the locus of women’s vulnerability and in need of the masculine protection. Furthermore, Otto (2009) denounces a “selective engagement” of feminist ideas by international law-makers, which apart from incorporating inclusive language, it actually reinforces stereotypes and lacks accountability. What is more, even the attempts to incorporate terms as basic as “gender” have not been without controversies. For instance, the Rome Statute of the International Criminal Court provides a fixed and biologist definition of gender when it states that “(...) the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” (United Nations, 1998, article 7.3)

Although it strives to remain more *neutral* than passed conventions,<sup>25</sup> this definition fails to capture the performative and power-related aspects of gender, besides being framed under a heteronormative view. Such view was allegedly starting to be contested in the

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<sup>24</sup> This is a controversial point between feminist international lawyers for, on the one hand, they recognize the importance of the topic and have successfully used it as a flag to draw attention to gender issues in the international arena. On the other hand, some consider that the focus on, for example, rape as a weapon of war invisibilizes other less drastic but more frequent violences suffered by women in war and peace times (Copelon, 1994; Ní Aoláin et al., 2011; Roth, 2004)

<sup>25</sup> Conventions such as the 1949 Geneva Convention III relative to the Treatment of Prisoners of War states in its Article 14 that “women shall be treated with all the regard due to their sex (...)”, and the Commentary by Jean Pictet justifies a distinct treatment for women “(...) based on suffering, distress, or the weakness of the protected person (...). It is normal and natural to favour children, old people and women.” (Pictet, 1952, p. 119, emphasis added). Although this is similar to current and legitimate differentiated treatment to groups in vulnerable situations, the criticism is directed at the wording. It reproduces an image of women as the weak sex, whose subordinated condition is natural and not the result of structural discrimination.

international arena around the same years, in the mid-1990s.<sup>26</sup> However, it was not until December 2006—a few months before the launch of the Yogyakarta Principles—that the International Lesbian and Gay Association (ILGA) and the Danish National Association for Gays and Lesbians (LSVD) were granted consultative status at the U.N., after several rejections (Johnson, 2016).

Beyond this criticism, feminists keep invoking international law as a mechanism for visibilization and empowerment, especially for women and marginalized communities in countries whose domestic law do not guarantee their rights. Moreover, these instruments, specially “hard law” such as treaties and international courts jurisprudence, are considered *official* and *legitimate* statements of how governments and societies must conduct themselves, having an influence in domestic law. Therefore, some feminist activists rely on these instruments to advance their agendas, even if it is through soft law like the Bangkok Rules (see Chapter 2). Nevertheless, plenty of the feminist criticisms of international law discussed up to this point (women’s victimhood, heteronormativity, etc.) are present in the content of the Rules, as will be discussed in the following sections.

### **1.3.2 The International regime of women in prison**

Before moving forward it is necessary to point out that the Bangkok Rules are the only relevant global instrument that specifically targets women deprived of their liberty. However, there are is a series of documents that protect certain rights that are relevant to them. According to Kempen & Krabbe (2017), there are three categories of sources relevant to the

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<sup>26</sup> During this decades, NGOs related to LGBTQ+ issues developed closer alliances with government bodies and other NGOs during the platform offered by some U.N. meetings. This was the case of the 1994 International Conference on Population and Development in Cairo and the 1995 Conference on Women in Beijing. (Johnson, 2016).

rights of women deprived of their liberty: international treaties, international instruments and domestic law. This section looks at the first two, while the third one (Mexico's domestic law) is covered in following chapters.

### ***International treaties***

About the international treaties, they do not specifically target women offenders, but touch on protecting detainees or protecting the rights of women. Particularly, the international treaties that concern the topic in question are general human rights treaties, specific international human rights treaties (for example, on human trafficking), and international human rights treaties on women.

Regarding general human rights treaties, although their general anti-discrimination provisions are often cited as a source of protection,<sup>27</sup> their explicit content pays very few attention to women in prison (Kempen & Krabbe, 2017). Indeed, one of the most important treaties, the United Nations International Covenant on Civil and Political Rights ([ICCPR], 1966) fails to mention women in prison. It does protect people in general from arbitrary detention, and states that no one shall be deprived of their liberty in Article 9. However, while some differentiated needs of imprisoned juvenile are recognized in Article 10, women nor girls are mentioned as a distinctive category. It is a *gender-neutral* protection, as if their needs were identical. The exception to this is Article 6(5), which prohibits death sentences on pregnant women, portraying that the female body *is* entitled to a specific protection when performing its maternity role.

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<sup>27</sup> Worryingly, general anti-discrimination provisions could be mistakenly interpreted as an obligation to treat imprisoned people exactly the same, without taking into account the particularities in terms of gender, abilities, race and other intersecting variables. In other words, confusing equality (equal conditions) with equity (fair and differentiated conditions needed to effectively guarantee equal treatment).

Likewise, more rights are recognized for women because of the principle defending the best interest of the child. Here we move on to specific international human rights treaties, like the United Nations Convention on the Rights of the Child ([CRC]1989). which includes some protections for women who perform as mothers. For example, Article 9 condemns the separation of a child from his/her parents, unless it is for his/her best interest. The demand of mothers to keep their children with them inside prison or to be allowed continuous and prolonged visits to maintain a close relationship is framed under the cited right. Similarly, the obligation of the State to provide imprisoned mothers and their children with accommodations that ensure the appropriate development of the minors, is often demanded under Article 18(2), which compels States to assist in child-rearing responsibilities with institutions, facilities, and services.

Other specific human rights treaties that are a source of imprisoned women's rights are the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the International Labour Organization's Workers with Family Convention (1981) and the Maternity Protection Convention (2000). Actually, it must be said that all general and specific (when applicable) international human rights treaties are applicable for imprisoned women, for they are entitled of all their human rights except for the right to liberty.

Concerning international human rights treaties on women, the most important binding treaty is the United Nations Convention on the Elimination of All Forms of Discrimination against Women ([CEDAW], 1979), and it does not contain any specific provision about women in prison. However, its principal aim of condemning and requiring the elimination of discrimination against women in order to guarantee full enjoyment of their human rights, has

been used to protect women deprived of their liberty. Among the articles that are relevant to these women is Article 2 (d, e, f, g), which obligates States parties to ensure that public authorities and institutions refrain in any practice of discrimination against women, including to modify or abolish laws, regulations, customs, and penal provisions that constitute discrimination against women. Moreover, the Convention compels States to take all appropriate measures in all fields (political, social, economic and cultural) to ensure the full development and advancement of women (Article 3), including “temporary special measures aimed at accelerating de facto equality” (Article 4).

Evidently, if at least those three articles were fully respected and implemented, women deprived of their liberty will not suffer the abuses currently lived inside prisons. If authorities—such as the police, public prosecutors, judges, and prison workers—and institutions—like the criminal system—were to refrain from any discriminatory act, the female incarcerated population would decrease (Observatorio de Amnistías, 2022). Such trend would be bolstered if penal provisions that disproportionately affect women were abolished. In addition, the dignity of imprisoned women would be respected if their full development was pursued and special measures that target their needs were implemented. Of course, if further articles were respected—like Article 13(c) which concerns the right to participate in recreational, cultural activities and sports—prisons would have a completely different configuration.

Correspondingly, States would have a more active commitment in guaranteeing human rights inside this institution if they enforced the CEDAW. This is because it entails a triple obligation: to respect, to protect and to promote. The first requires States parties to avoid laws and policies prejudicial to women, the second to take specific actions to eliminate

customary and all other practices that perpetuate women's oppression, and the third compels them to adopt medium- and long-term policies to eliminate gender-based discrimination (Committee on the Elimination of Discrimination against Women [CEDAW Committee], 2010).

Nevertheless, the CEDAW fails to explicitly protect not only imprisoned women, as already mentioned, but the diverse groups of women that experience incarceration under certain intersecting discriminatory structures. To begin with, the prohibition of discrimination is based on a binary biologist conception of sex, and the standard of equality is in reference to men (Chinkin, 2016). This is illustrated in Article 1: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made *on the basis of sex* (...) on a basis of equality of *men and women* (...)." (Emphasis added, CEDAW, 1979, Article 1) This binary lens is shown in other articles, like Article 16, where family and marriage rights are protected under a heteronormative framework. Moreover, the only clear acknowledgement of diverse and/or marginalized groups is the reference to "rural women" in Article 14. However, later recommendations of the CEDAW Committee do recognize the importance of addressing intersecting discriminations, since "the discrimination of women based on sex and gender is inextricably linked with (...) race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity." (2010, p. 4)

### ***Regional human rights treaties***

Throughout the regions of the globe there are general or specific human rights treaties that are relevant to women deprived of their liberty, although not directly targeted to them. For instance, the Council of Europe Convention on Preventing and Combating Violence Against

Women and Domestic Violence ([the Istanbul Convention] 2011) does not mention the group of women in question, but Article 3 considers the arbitrary deprivation of liberty as an expression of violence against women.

In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ([the Maputo Protocol], 2003) calls States parties to guarantee the rights of pregnant and nursing women in detention. Furthermore, point 5(d) of the plan of action in the Kampala Declaration on Prison Conditions in Africa (1996) urges the adoption of concrete measures to improve the conditions of “vulnerable groups”, including women and mothers. While this weak reference to women is not enough to guarantee their protection, it is interesting to note that they make a distinction between these two groups. Deliberately or not, this implies what other instruments fail to acknowledge: not all women are mothers, and not all pregnant persons are women (although it is not likely that they referred to transmen nor non-binary people when drafting the Declaration). Additionally, the Kampala Declaration is also noteworthy in the sense that it explicitly describes prisons as a bad use of public scarce resources and human potential.

On the American continent, the American Convention on Human Rights (1969) includes several articles relevant to women deprived of their liberty. For example, the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial and the presumption of innocence (Article 8), and the right to compensation in the event of a legally unjustified sentence (Article 10). Although it recognizes a differentiated treatment for minors, it does not do so for other groups such as women.

Another important treaty on the continent on the matter is the Interamerican Convention on the Prevention, Punishment and Eradication of Violence Against Women

([Belém do Pará] 1994). Article 9 of this Convention obliges States parties to take special account of certain groups of women, including those deprived of their liberty, when adopting the duties of the States under the Convention. Moreover, Article 1 includes psychological harm and suffering to women in the public and private sphere as violence against women, which should certainly include the damage inflicted upon incarcerated women. Article 2(c) recovers this point by recognizing the physical, sexual, and psychological violence perpetrated or condoned by the State or its agents.

In the same way, Article 7(a) requires States and its “authorities, officials, personnel, agents, and institutions” to refrain from engaging in any practice of violence against women. And to ensure that their commitment is not limited to passive abstention, in Article 8 (c) States agree to enforce education and training programs on the prevention and eradication of violence against women for “all those involved in the administration of justice, police and other law enforcement officers.”

#### ***Other international instruments***

Besides legally binding international treaties, other non-binding international instruments form part of the international regime governing the rights of women deprived of their liberty. In 1980, the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Caracas adopted a resolution on the specific needs of women prisoners. The resolution recommends the application of alternatives to imprisonment; the fair and equal treatment during arrest, trial, sentence, and imprisonment, with “particular attention being paid to the special *problems* which women offenders encounter, such as pregnancy and childcare.” (emphasis added, UNODC, 1981, p. 13).

More than a decade later, in 2000 the General Assembly adopted the resolution 55/59 containing the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century. This calls States to mainstream a gender perspective<sup>28</sup> in the crime prevention and criminal justice strategies, in order to tackle the disparate impact of programs and policies on women, as well as to develop policies based on the needs of women prisoners and offenders. Similarly, the General Assembly resolutions 58/183 of 2003 and A/58/183 of 2004 asks governments, relevant international and regional bodies, national human rights institutions, and non-governmental organizations to devote more attention of the issue of women in prison and their children. In 2006, the resolution 61/143 on the intensification of efforts to eliminate all forms of violence against women recognizes arbitrary deprivation of liberty as violence against women, urges States to put their legal systems in place with human rights obligations and principles, and strengthen efforts that address discriminatory practices towards groups like “women in institutions or detention.”

Relevant instruments from other UN bodies include the initiative of the United Nations High Commissioner for Human Rights to designate the week from 6 to 12 October 2008 as Dignity and Justice for Detainees Week, which placed particular emphasis on the human rights of women and girls. Also, the Human Rights Council Resolution 10/2 of 2009, which draws attention to gender-specific challenges in prison, including issues related to the children of incarcerated women. On the other hand, the UNODC has issues several

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<sup>28</sup> The United Nations Economic and Social Council ([ECOSOC] 1997) defines gender mainstreaming as the “the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes (...) so that women and men benefit equally and inequality is not perpetuated.” (p.2).

handbooks on the matter, for example, the Handbook on Prisoners with Special Needs (2009), the Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment (2007), the Handbook on Restorative Justice Programmes (2006, 2020), the Handbook on Strategies to Reduce Overcrowding in Prisons (2013) and the Handbook for Prison Managers and Policymakers on Women and Imprisonment (2008).

Regionally, a non-binding instrument is the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, which was adopted by the Interamerican Commission on Human Rights in its resolution 1/08 of 2008. These Principles acknowledge the risks experienced by women in its preamble, and explicitly mention specific needs of women throughout the principles. Some worth mentioning are the rights of HIV-AIDS infected people, and pregnant and nursing mothers (Principle II and X); reproductive health rights (Principle X); accommodation, hygiene and clothing (Principle XII); separation of elderly, of men and women, and of accused and convicted (Principle XIX); custody and surveillance of women exercised exclusively by female personnel (Principle XX); and the prohibition of imposing solitary confinement on pregnant women and mother with their children (Principle XXII).

Finally, all instruments covered until this point are assumed to cover *all* women, but they do not explicitly invoke LGBTQIA+ women. One of the few instruments that are directed to this community are the Yogyakarta Principles, which could be assumed as a protection of imprisoned LGBTQIA+ women. There are three main recommendations within the Principles that are relevant. The first is the prevention on torture and cruel, inhumane or degrading treatment. Another one is the repeal of laws that criminalize homosexuality, and the condemn to arbitrary detention. A third one is the safeguard of freedom of expression,

considering LGBTQIA+ women must be entitled to express their gender identity and sexual orientation while serving their sentence.

## **Conclusion**

This chapter explored the theoretical perspectives that are relevant to the study of the Bangkok Rules. Critical criminology insights show that criminal law is an exercise of power that seeks to punish those considered deviated, which usually belong to historically marginalized groups. The prison is its most repressive tool, and it has been criticized since the XVIII<sup>th</sup>-XIX<sup>th</sup> centuries for failing to bring retribution, expiation, deterrence, and rehabilitation.

Moreover, critical perspectives note that the use of law, and criminal law in particular, is never enough to accomplish social change, for it reduces complex social problems into individualized crimes. Feminists expand these criticisms by noting that criminal law is not gender neutral. Some sustain it is masculine, others that it is sexist, and others that it (re)produces gender. These criticisms are shared by feminists who study gender and global governance, and especially international law. These institutions create stereotyped subjectivities of women that perpetuate structural inequalities and, in the case of criminal law, criminalize undesirable behaviors. Those who are criminalized and held in prison suffer violences specific to their gender.

Consequently, some theorists advocate for the abolition of criminal law and the penitentiary system altogether, while others argue that it must be regulated by being used minimally and protecting legal guarantees. The Bangkok Rules is built on this later proposal

with the aim of filling the void that the international regime of women's rights had left with respect to women in prison. This instrument seeks to protect the human rights of women deprived of their liberty without aspiring to change the system that criminalized them. Indeed, the Rules only respond to the sufferings of women prisoners, but fail to take into account the rest of the findings of feminist critical criminology and feminist international relations scholars, which would require more structural reforms. This will be explored in the following chapter.

## 2. Chapter two: The Bangkok Rules

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders were adopted by the U.N. General Assembly at its 65<sup>th</sup> session on December 21<sup>st</sup>, 2010. Known as the Bangkok Rules —to honor Thailand’s efforts to place the issue on the global agenda — it is the first international instrument to target women’s specific risks and rights in the criminal justice system. It is framed under the rise in female prison population since the 1980’s<sup>29</sup> and, therefore, it answers feminists’ and human rights advocates’ demands to recognize the differentiated profiles and needs of women in contrast with men, which previous international instruments failed to consider.

The Bangkok Rules are conceived as a supplement to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules). All three aim to guarantee a human treatment and respect for the prisoners’ and offenders’ dignity, however, the Bangkok Rules also incorporate the pillar of “gender sensitivity” (Thailand Institute of Justice (TIJ), n.d.). Moreover, although the three sets of rules are the main reference for an optimal design and evaluation of prisons conditions worldwide, they fall into the category of “soft law” as they are not legally binding. This means that State’s non-adherence carries no penalties, and results monitoring is voluntary. Still, like other resolutions of the

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<sup>29</sup> It has continued to grow by 17% in the ten years following the adoption of the Rules (Penal Reform International (PRI), 2021). Although male prison population has also increased, the female rate is higher. See “Global advancements” at the end of this chapter.

U.N. General Assembly they could constitute a valid source of international law since they might enshrine international custom<sup>30</sup> (Shaw, 2017).

With this in mind, this chapter will expose the background and content of the Bangkok Rules, starting with a review of the two international instruments that complement the Bangkok Rules, and following with the process of creation of these Rules. Next, we will look at the content of the Rules and analyze them from a critical gender perspective. Finally, the chapter will close with an overview of the global advancements reported on the matter.

## **2.1 Background**

### **2.1.1 The Nelson Mandela Rules and the Tokyo Rules**

The most important treaties in the international regime of the rights of persons deprived of their liberty are the Nelson Mandela Rules (2015) and the Tokyo Rules (1990). As previously mentioned, the Bangkok Rules supplement both documents, which are non-binding resolutions. The first one was adopted in 1955 at the First United Nations Congress on Crime Prevention and Criminal Justice, and were known as the Standard Minimum Rules. However, in 2011 —probably influenced by the discussions held in previous years to design the Bangkok Rules— the General Assembly issued a mandate for revision, which concluded in 2014 to see the adoption of the revised Rules, renamed as Nelson Mandela Rules in 2015. These include 122 rules (of which 35% were revised) that cover nine areas: prisoners' dignity, vulnerable groups of prisoners, medical and health services, restrictions and sanctions, investigations of deaths and torture in custody, access to legal representation,

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<sup>30</sup> According to Article 38 of the Statute of the International Court of Justice (ICJ), the sources of international law are: international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of qualified publicists (subject to provisions of the article 59).

complaints and inspections, terminology, and staff training. Women are mostly absent in the first version, since gender issues were practically excluded from the UN agenda, and the second, so as to avoid overlapping with the already existent Bangkok Rules.

Therefore, they only refer to women to prohibit discrimination based on sex and other categories (Rule 2), call for separated facilities by sex (Rule 11), adequate facilities for prenatal and postnatal care (Rule 28), the prohibition of solitary confinement (Rule 45), the prohibition of instruments of restraint during and after childbirth (Rule 48[2]), the right to conjugal visits (Rule 58[2]), the sex of guarding authorities (Rule 81). A rule particularly relevant for the LGBTQIA+ community is Rule 7, which states the information that must be entered in the prisoner's file. According to this rule, the gender registered must respect "his or her self-perceived gender".

The Tokyo Rules were adopted by the General Assembly in December 1990, promoting the use of non-custodial measures and sanctions as effective alternatives to the advantage of society. They are based on some key principles, which include the use of pre-trial detention only as a means of last resort, the selection of non-custodial measures based in contextual factors (nature and gravity of the offence, personal characteristics, etc.), and the adequate training and remuneration of personnel implementing the non-custodial alternatives. It is constituted by 23 rules, divided in the following themes: general principles,

pre-trial state, trial and sentencing stage<sup>31</sup>, post-sentencing stage,<sup>32</sup> implementation of non-custodial measures, staff, volunteers and other community resources, research, planning, policy formulation and evaluation.

Moreover, the Tokyo Rules, in contrast with the Nelson Mandela Rules, go beyond protecting the rights of people deprived of their liberty, to actually question and offer alternatives to the carceral system. Although not explicitly mention, they sustain some of the arguments pushed by advocates for “open prisons”.<sup>33</sup> Indeed, Rule 17 emphasizes the importance of public participation not only as a means for offenders to improve ties with their community, but also as “an opportunity for members of the community to contribute to the protection of their society.” While it might not be seen as such, a genuine embracement of this rule would mean a change of paradigm in which justice is not an exclusive matter of the patriarchal State, but a communitarian issue.

In the same line of thought, Rule 18 encourages the involvement of the private sector and NGOs in the promotion of non-custodial measures. Besides, it calls for the use of mass media and every other effort to inform the public about the importance of non-custodial measures, as well as to build a “constructive public attitude, leading to (...) the social integration of offenders.” Last but surely not least, the Tokyo Rules were conceived as “part

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<sup>31</sup> As listed in Rule 8, the proposed non-custodial alternatives for this stage are: (a) Verbal sanctions, such as admonition, reprimand and warning; (b) Conditional discharge; (c) Status penalties; (d) Economic sanctions and monetary penalties, such as fines and day-fines; (e) Confiscation or an expropriation order; (f) Restitution to the victim or a compensation order; (g) Suspended or deferred sentence; (h) Probation and judicial supervision; (i) A community service order; (j) Referral to an attendance center; (k) House arrest; (l) Any other mode of non-institutional treatment; (m) Some combination of the measures listed above.

<sup>32</sup> As listed in Rule 9, the non-custodial alternatives for this stage are: (a) Furlough and halfway houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon.

<sup>33</sup> Refers to the model of prisons that do not entail a total reclusion, but a partial restriction of liberty in which offenders interact with the outside community and vice-versa (e.g. through direct commercial relations). (Giacomello, direct communication).

of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.” (Preliminary observation 1). This remarkable influence of critical criminology with a tendency towards decriminalization, is not perceived nor unambiguously mentioned in the Nelson Mandela Rules nor the Bangkok Rules.

Yet, this reading might be too optimistic, for the fundamental aims cited in Rule 1(3) of the Tokyo Rules state that they “shall be implemented taking into account the *political, economic, social and cultural conditions* of each country and the *aims and objectives* of its criminal justice system” (emphasis added). Hence, if a State’s political context involves punitive populism, if offenders and prisoners are highly stigmatized in its social and cultural context, and the objective of its criminal justice system is to punish and exclude them, there is no place for all the cited rules.

### **2.1.2 The creation of the Bangkok Rules**

The origin of the Bangkok Rules dates back to the Kamlangjai Project launched in October 2006, as a domestic program pushed by Thailand’s Princess Bajrakitiyabha, under the supervision of the Ministry of Justice of Thailand. The project whose name means “inspire”, aimed to provide psychological support, basic healthcare and economic opportunities for women and their children during sentence and after their release, with the objective of “returning them back to society as good citizens, minimizing their chance of re-offending, and raising public awareness about giving a second chance to female ex-offenders” (Thailand Institute of Justice (TIJ), n.d., para. 12). The project was piloted at the Central Women Correctional Institution in Thailand and was later expanded to other institutions. Its principles and results were presented in the 17th session of the Commission on Crime Prevention and Criminal Justice in Vienna in 2008, and it was well-received (TIJ, n.d.).

Consequently, the Ministry of Justice of Thailand and Princess Bajrakitiyabha started advocating for a worldwide policy on the matter through the Enhancing Lives of Female Inmates Project (ELFI). Specifically, they lobbied for the creation of supplementary rules to the Standard Minimum Rules (today Nelson Mandela Rules) and the Tokyo Rules. To gain international support, the idea was presented in numerous forums, such as the 10th Annual Conference of the International Corrections and Prisons Association (ICPA) in Prague, the 12th Asia Crime Prevention Foundation's World Conference on Crime Prevention and Criminal Justice in Ulaanbaatar, and the 2009 American Society of Criminology Conference in Pennsylvania (TIJ, n.d.).

Such actions proved successful, for Thailand could arrange an International Roundtable Experts Meeting in Bangkok in February 2009, to draft a guideline for the treatment of women prisoners. Among the attendants to the roundtable were representatives from NGOs, experts on criminology from different regions, and the UNODC. With this background, two months later Thailand proposed the resolution 18/1 "Supplementary Rules Specific to the Treatment of Women in Detention and in Custodial and Non-Custodial Setting" to the 18th session of the Commission on Crime Prevention and Criminal Justice in Vienna.

The resolution was adopted and, thus, the Commission requested an open-ended intergovernmental expert group meeting in Thailand, to further develop the draft that resulted from the February roundtable, in order to submit it to the 12th United Nations Congress on Crime Prevention and Criminal Justice in Salvador, Brazil, in April 2010. The draft of the Rules was included in the Salvador Declaration that resulted from this Congress. Then, in May 2010, Thailand presented a follow-up draft resolution to the 19th session of the primary UN organ concerning crime prevention and criminal justice, the Commission on Crime

Prevention and Criminal Justice (CCPCJ). The resolution was once more adopted and co-sponsored by Indonesia, the Philippines, the United States, Canada, Venezuela, El Salvador, and Cote d'Ivoire. Subsequently, when the General Segment of the ECOSOC took place in July to revise the work of its functional commissions (the CCPCJ being one of them), it recommended the resolution in question to be considered for adoption in the upcoming 65th Session of the General Assembly to be held in December 2010. The session came, and the Bangkok Rules were adopted without a vote.

Ironically, during the same session in which such a progressive resolution on criminal guarantees was adopted without a vote,<sup>34</sup> other resolutions condemning issues like extrajudicial and arbitrary executions did generate debate and divisive voting<sup>35</sup> (UNGA, 2010). The undisputed acceptance of the Bangkok Rules could be read in two ways. One is that it was a success of the years of Thailand's diplomatic efforts and a growing acknowledgment of the need to guarantee women's rights. The second, with a more pessimistic view, as a sample of the little time and attention that States decided to pay on the subject.

## **2.2 The Bangkok Rules' content**

### **2.2.1 Crossing themes in the Bangkok Rules**

The Bangkok Rules contain 70 rules divided in four sections: 1) Rules of General Application, covering the general management of all women deprived of their liberty; 2)

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<sup>34</sup> Given that the General Assembly is based on consensus, the majority of their resolutions are adopted without a vote. This is seen as a desirable outcome since, if the General Assembly's resolutions are not legally binding, the best alternative to foment compliance is to reach consensus (Kurtas, n.d.). However, considering the low level of compliance regarding the Bangkok Rules, one could doubt after the accuracy of such assumption.

<sup>35</sup> The Draft resolution III on Extrajudicial, summary or arbitrary executions was adopted with a recorded vote of 122 in favor, 1 against (Saudi Arabia) and 62 abstentions (UNGA, 2010).

Rules Applicable to Special Categories, directed for example to pregnant women, victims of violence and indigenous groups; 3) Non-custodial Sanctions and Measures; and 4) Research, Planning, Evaluation and Public Awareness. Throughout the Rules, I identified fourteen crossing themes: 1) non-discrimination; 2) hygiene and physical health; 3) mental health; 4) drug-dependency; 5) violence and sexual abuse; 6) maternity and care responsibilities; 7) children; 8) sexual and reproductive rights; 9) non-custodial measures; 10) reintegration and community; 11) intersectionality; 12) research, planning and evaluation; 13) public awareness and stigma; and 14) prison staff.

Although most of the themes are self-explanatory, there are two that must be clarified: theme 6, “maternity, care-responsibilities and family”, and theme 7, “children”. Clearly both categories are inherent to each other, yet, they are separated because some Rules are expressly about children’s rights (theme 6), while others are rights granted to women in virtue of their condition as mothers, care-takers or family members (theme 7). For example, Rule 68 falls into theme 6:

Rule 68: Efforts shall be made to organize and promote research on the number of children affected by their mothers’ confrontation with the criminal justice system (...), and the impact of this on the children, in order to contribute to policy. (UNGA, 2010a, Rule 68)

On the other hand, Rule 58 illustrates theme 7:

Rule 58: (...) women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pretrial and sentencing alternatives, shall be implemented wherever appropriate and possible. (UNGA, 2010a, Rule 58)

Nonetheless, the majority of the Rules under these categories cover both themes, as it seen in Rule 64:

Rule 64: Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, (...) and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children. (UNGA, 2010a, Rule 64)

In this case, while certain rights are being recognized for pregnant women and mothers, the best interest of the children and adequate accommodations for them are also evoked.

The Rules fall predominantly into more than two categories, as can be seen in Figure 1, which shows which themes are covered by each of the 70 Rules. When the fourteen themes are grouped into four broad categories (Figure 2), it can be noted that the subjects most covered in the Rules are maternity and reproductive rights, followed by violence and non-discrimination, then health, and lastly public policy and transition. However, one must be cautious in the interpretation of Figure 2 by taking into consideration the preponderance (the size of the box) of the themes in each of the four categories. For example, although a higher number of Rules encompass the category of maternity and reproductive rights (51) than the category of health (35), when comparing the size of the box of the theme of sexual and reproductive rights with the one of mental health, one can observe that the second is brought up with more frequency than the first.

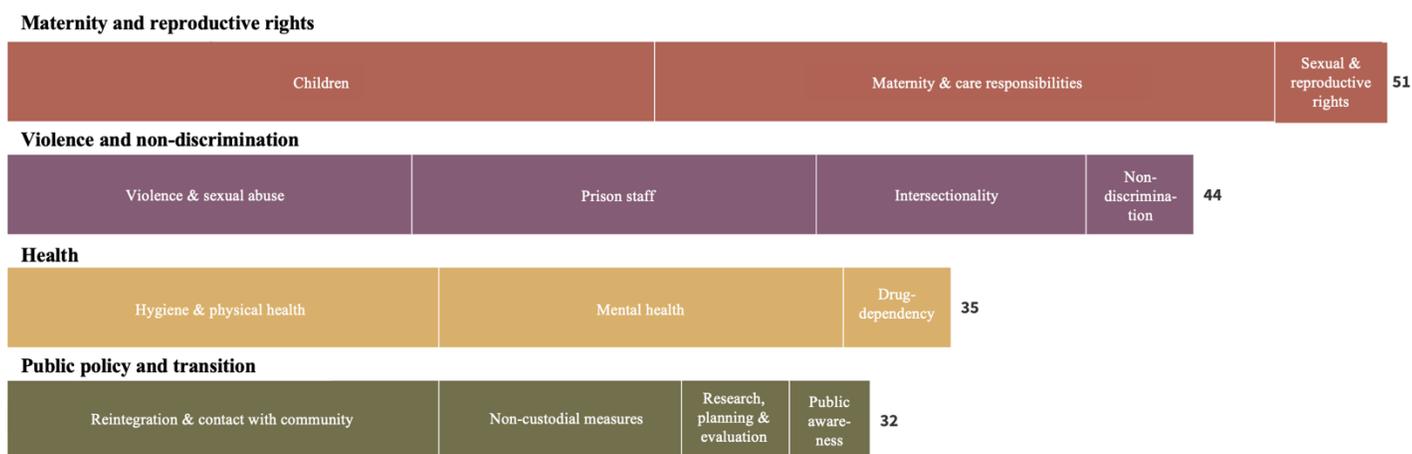
Figure 1. Themes covered in the Bangkok Rules

| Rule | Non-discrimination | Hygiene and physical health | Mental health | Drug-dependency | Violence and sexual abuse | Maternity and care responsibilities | Children | Sexual and reproductive rights | Non-custodial measures | Reintegration and community | Intersectionality | Research, planning, evaluation | Public awareness and stigma | Prison staff |
|------|--------------------|-----------------------------|---------------|-----------------|---------------------------|-------------------------------------|----------|--------------------------------|------------------------|-----------------------------|-------------------|--------------------------------|-----------------------------|--------------|
| 1    | ●                  |                             |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 2    |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             | ●                 |                                |                             |              |
| 3    |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 4    |                    |                             |               |                 |                           |                                     |          |                                |                        | ●                           |                   |                                |                             |              |
| 5    |                    | ●                           |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 6    |                    | ●                           | ●             | ●               | ●                         | ●                                   | ●        | ●                              |                        |                             |                   |                                |                             |              |
| 7    |                    |                             | ●             |                 | ●                         |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 8    |                    | ●                           |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 9    |                    | ●                           |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             |              |
| 10   |                    | ●                           |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 11   |                    | ●                           | ●             |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 12   |                    |                             | ●             |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 13   |                    |                             | ●             |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 14   |                    | ●                           |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             |              |
| 15   |                    |                             | ●             | ●               | ●                         | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 16   |                    |                             | ●             |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 17   |                    | ●                           |               |                 |                           |                                     |          | ●                              |                        |                             |                   |                                |                             |              |
| 18   |                    | ●                           |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 19   |                    |                             |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 20   |                    |                             |               |                 | ●                         |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 21   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             | ●            |
| 22   |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 23   |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 24   |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 25   |                    |                             | ●             |                 | ●                         | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 26   |                    |                             |               |                 |                           | ●                                   | ●        |                                | ●                      |                             |                   |                                |                             |              |
| 27   |                    |                             |               |                 |                           | ●                                   |          | ●                              |                        |                             |                   |                                |                             |              |
| 28   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             | ●            |
| 29   |                    |                             |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 30   | ●                  |                             |               |                 |                           |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 31   |                    |                             |               |                 | ●                         |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 32   | ●                  |                             |               |                 | ●                         |                                     |          |                                |                        |                             |                   |                                |                             | ●            |
| 33   |                    | ●                           |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             | ●            |
| 34   |                    | ●                           |               |                 |                           |                                     |          | ●                              |                        |                             |                   | ●                              |                             | ●            |
| 35   |                    |                             | ●             |                 |                           |                                     |          |                                |                        |                             |                   |                                | ●                           | ●            |

| Rule | Non-discrimination | Hygiene and physical health | Mental health | Drug-dependency | Violence and sexual abuse | Maternity and care responsibilities | Children | Sexual and reproductive rights | Non-custodial measures | Reintegration and community | Intersectionality | Research, planning, evaluation | Public awareness and stigma | Prison staff |
|------|--------------------|-----------------------------|---------------|-----------------|---------------------------|-------------------------------------|----------|--------------------------------|------------------------|-----------------------------|-------------------|--------------------------------|-----------------------------|--------------|
| 36   |                    |                             |               |                 |                           |                                     |          |                                |                        |                             | ●                 |                                |                             | ●            |
| 37   |                    | ●                           |               |                 | ●                         |                                     |          |                                |                        |                             | ●                 |                                |                             |              |
| 38   |                    | ●                           |               |                 |                           |                                     |          |                                |                        |                             | ●                 |                                |                             |              |
| 39   |                    | ●                           |               |                 |                           | ●                                   |          |                                |                        |                             | ●                 |                                |                             |              |
| 40   |                    |                             |               |                 |                           | ●                                   |          |                                |                        | ●                           |                   |                                |                             |              |
| 41   |                    |                             | ●             | ●               | ●                         |                                     | ●        |                                |                        | ●                           |                   |                                |                             |              |
| 42   |                    |                             | ●             |                 | ●                         | ●                                   |          |                                |                        | ●                           |                   |                                |                             |              |
| 43   |                    |                             | ●             |                 |                           |                                     |          |                                |                        | ●                           |                   |                                |                             |              |
| 44   |                    |                             |               |                 | ●                         |                                     |          |                                | ●                      | ●                           |                   |                                |                             |              |
| 45   |                    |                             |               |                 |                           |                                     |          |                                |                        | ●                           |                   |                                |                             |              |
| 46   |                    |                             |               |                 |                           |                                     |          |                                |                        | ●                           |                   |                                |                             |              |
| 47   |                    | ●                           | ●             |                 |                           |                                     |          |                                |                        | ●                           |                   |                                |                             |              |
| 48   |                    | ●                           |               |                 |                           | ●                                   | ●        |                                |                        |                             |                   |                                |                             |              |
| 49   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             |              |
| 50   |                    |                             |               |                 |                           | ●                                   |          |                                |                        |                             |                   |                                |                             |              |
| 51   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             |              |
| 52   |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             | ●                 |                                |                             |              |
| 53   |                    |                             |               |                 |                           | ●                                   | ●        |                                |                        |                             | ●                 |                                |                             |              |
| 54   | ●                  |                             |               |                 |                           |                                     |          |                                |                        |                             | ●                 |                                |                             |              |
| 55   |                    |                             |               |                 |                           |                                     |          |                                |                        | ●                           | ●                 |                                |                             |              |
| 56   |                    |                             |               |                 | ●                         |                                     |          |                                |                        |                             |                   |                                |                             |              |
| 57   |                    |                             |               |                 | ●                         | ●                                   |          | ●                              |                        |                             |                   |                                |                             |              |
| 58   |                    |                             |               |                 |                           | ●                                   |          | ●                              |                        |                             |                   |                                |                             |              |
| 59   |                    |                             |               |                 |                           |                                     |          | ●                              |                        |                             |                   |                                |                             |              |
| 60   |                    |                             | ●             |                 | ●                         | ●                                   |          | ●                              |                        | ●                           |                   |                                |                             |              |
| 61   |                    |                             | ●             | ●               |                           | ●                                   |          | ●                              |                        |                             |                   |                                |                             |              |
| 62   |                    |                             |               |                 |                           | ●                                   |          | ●                              |                        | ●                           |                   |                                |                             |              |
| 63   |                    |                             |               |                 |                           | ●                                   |          | ●                              |                        |                             |                   |                                |                             |              |
| 64   |                    |                             |               |                 |                           | ●                                   | ●        | ●                              |                        |                             |                   |                                |                             |              |
| 65   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   |                                |                             |              |
| 66   |                    |                             |               |                 | ●                         |                                     |          |                                |                        |                             | ●                 |                                |                             |              |
| 67   |                    |                             |               |                 |                           |                                     |          |                                |                        | ●                           |                   | ●                              |                             |              |
| 68   |                    |                             |               |                 |                           |                                     | ●        |                                |                        |                             |                   | ●                              |                             |              |
| 69   |                    |                             |               |                 |                           |                                     | ●        |                                |                        | ●                           |                   | ●                              | ●                           |              |
| 70   |                    |                             |               |                 |                           |                                     | ●        |                                |                        | ●                           |                   | ●                              | ●                           | ●            |

Source: own elaboration based on the Bangkok Rules (2010).

**Figure 2. Preponderance of themes in the Bangkok Rules by number of Rules that mention them**



Source: own elaboration based on figure 1.

Another point is that non-discrimination might also seem like an infrequent topic in Figures 1 and 2, since both are based on explicit reference in the Rules to the themes. However, the whole Bangkok Rules are based on the principle of non-discrimination towards women deprived of their liberty, principle that is articulated in the preliminary observations and in Rule 1. To go deeper into the analysis of the themes, the next section will explore some of the Rules under the identified categories and themes.

### ***Maternity and reproductive rights***

As depicted in Figure 2, maternity and reproductive issues are the most prominent theme in the Bangkok Rules. Interestingly, although the Rules are directed to women deprived of their liberty, twenty-four of the Bangkok Rules concern rights for their children, who of course are not prisoners and must not be treated as such. To understand the proportion, rights recognized to mothers account add up to twenty-three, and sexual and reproductive rights

add up to four. In other words, the Rules prioritize the children and women in their role of mothers, over any other theme.

About the specific rights that are protected under the theme of maternity are the right to a proper diet for pregnant and breastfeeding women, monitoring and advice on their health, the right to breastfeed, facilitated contact with their children outside prison, especial programs, and activities. Moreover, the Rules demand post-natal care, even if the woman's children do not live inside the prison with her. It is also important to note that maternity is also mentioned in the Nelson Mandela Rules, for it requires special accommodation for pre-natal, birth and postnatal care, prioritizing that women give birth outside prison (UNGA, 2015, Rule 28 & 34). Other rights granted to pregnant women and mothers are the prohibition of certain punishments and disciplinary sanctions, such as instruments of restraint during delivery, close confinement,<sup>36</sup> and cutting off family contact.

Despite those protections, Rule 64 acknowledges that prisons are far from optimal to exercise maternity and, thus, recommends that pregnant women and mothers of small children are not imprisoned unless absolutely necessary (2010a). This is why the Rules emphasize the use of non-custodial measures for this population, and several rules encourage authorities to consider women's care-taking responsibilities and family background<sup>37</sup> when dictating the conditions and time of a sentence. For instance, Rule 4 calls for the allocation of women in prisons close to their homes, "taking account of their caretaking responsibilities"

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<sup>36</sup> According to Rule 44 of the Nelson Mandela Rules solitary confinement is confinement for 22 hours or more a day without meaningful human contact. Confinement for more than 15 days, know and prolonged confinement is prohibited under Rule 45 of the cited document (UNGA, 2015).

<sup>37</sup> The importance of the family and its protection has its legal basis in international law in Article 23 of the ICCPR: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." (ICCPR, 1966, Art. 23)

(UNGA, 2010a, Rule 4), and Rule 26 asks for compensatory measures when this is not possible. Similarly, the admission procedure signaled in Rule 2 gives the right to women with caretaking responsibilities to make the necessary arrangements concerning such responsibilities before being deprived of their liberty (UNGA, 2010a).

Without delving into the children's rights protected in the Rules, in general terms they seek to guarantee the right to protect their identity and information, the right to visit their imprisoned mothers with open and extended contact in a positive environment, right to an upbringing inside prison as close as possible to that outside this institution, the right to an individual assessment before being separated of their imprisoned mothers. Of course, the best interest of the child is one of the guiding principles of the Rules.

On the other hand, the sexual and reproductive rights are mainly health rights. As illustrated in Figure 1, three out of four of this Rules fall into themes of hygiene and physical health as well, for they have to do with the prevention, detection and treatment of sexually transmitted diseases like HIV/AIDs or illness that affect women like breast and gynecological cancer. The only Rule concerning sexual and reproductive rights outside the health field is Rule 27, which demands guarantee of conjugal visits for women prisoners on equal basis with men (UNGA, 2010a). Given that the Rules do not specify the conditions to exercise this right, one could question if they apply to all couples regardless of their legal status and/or their sexual orientation and gender identity.

### ***Violence and non-discrimination***

With respect to the theme of violence and sexual abuse, the notion that women are frequent targets of mental, physical and sexual abuse is present throughout the Rules. Several of them order the protection, support and counselling of women who report having been abused, as

well as they dictate that claims must be investigated and prosecuted if she desires so. Moreover, the Rules take into account that violence may come from previous experiences, external actors, prison inmates, or prison custodians and authorities. Consequently, the Rules support a series of measures to prevent abuse inside prison, such as employing and training female staff on this matter, special rules on searches and medical examinations, and protection from retaliation by the aggressor once an abuse has been reported.

A particularly interesting Rule is number 59, because it is not directed to women offenders, but to victims of violence. It requests the use of non-custodial means of protection (e.g., shelters managed by independent NGOs) for women who need such protection, claiming that custody shall only be applied when necessary and requested by the woman, ending when she demands so (UNGA, 2010a). This Rule responds to the practice of some countries where prisons are used as “shelters” for victims of violence. For instance, in Jordan some women are detained to protect them after committing an act that is likely to be punished by their family, couple or society (e.g., adultery) (PRI, 2014). Either as a mean of protection or penalization, the fact is that women are being deprived of their liberty for violating formal or informal gender norms, while their (potential) aggressors are free. The Rules do not explicitly condemn such situation, but Rule 59 does encourage governments to build and run actual shelters for violented women.

Regarding the theme of prison staff, the Bangkok Rules complement the Nelson Mandela Rules that require adequate remuneration, favorable conditions of service, education, training, among other matters for prison staff (UNGA, 2015, Rules 74-82). Specifically, the Bangkok Rules concerning this theme focus on two issues: women-related issues training for prison staff, and non-discrimination for women staff. About the first

subject, as stated before the Rules demand clear policies and regulations to prevent gender-based violence exercised by staff. Furthermore, they mandate that all staff assigned to work with women prisoners must receive training on the main issues relating to women's health, child development and health care, HIV/AIDS prevention and care, detection of self-harm and suicide risks, human rights and discrimination. On the other hand, the Rules call for a sustained commitment from the prison administration to address gender-based violence against female staff, and their access to the same benefits and training than male staff.

Moving to the theme of intersectionality, the Bangkok Rules go beyond the Nelson Mandela Rules (UNODC, 2015). These last do not make explicit reference to marginalized groups, although the rules on freedom of religion (Rules 65-66) and requirements for language interpretation (Rules 41, 61, 80) do grant some protection. In contrast, the Bangkok Rules do mention juvenile females, foreign nationals, women who belong to indigenous, ethnic minority and racialized groups. However, the Rules fall short to incorporate all the issues relevant to intersectionality that were explained in the theoretical framework.

For example, the Rules acknowledge that “women prisoners from different religious and cultural backgrounds have distinctive needs and may face multiple forms of discrimination in their access to gender- and culture-relevant programmes and services” (UNGA, 2010a, Rule 54) and, thus, call for comprehensive services that address these needs. They also require pre- and post-release services to be “appropriate and accessible to Indigenous women prisoners and to women prisoners from ethnic and racial groups” (UNGA, 2010a, Rule 55). Without denying the relevance of these two Rules and the protection they would grant if truly implemented, none of the Rules mention the need to revise the discriminatory laws that overcriminalize these groups, and do not mention discrimination

within the prison outside “gender- and culture-relevant programmes and services”. Moreover, they leave behind other groups such as LGBTQIA+ community, and women with disabilities (the only disability mentioned is mental disability).<sup>38</sup> These weaknesses will be further criticized later.

Girls are another group touched in the Bangkok Rules and, in fact, the one most referenced compared to other vulnerable groups. Although there are specific instruments to protect juvenile imprisoned population, like de Beijing Rules (UNGA, 1985), the Bangkok Rules demand their equal access to education and vocational training, counselling on sexual violence and women’s and pregnant women’s health care similar to adult females. In spite of the fact that the rate of imprisonment for boys is higher than that of girls, the latter face gender-based discrimination in the sense that they end in prison for behaviors that should not constitute crimes or when they were actually the victims. For instance, they are more commonly arrested for status offences<sup>39</sup> (e.g., running away and disorderly conduct) and lacking a proper identification; or in the context of human trafficking, when they were the trafficked persons but were accused as the traffickers or for lacking migration documents (Nowak, 2019).

Finally, the Bangkok Rules mention the right of foreign non-resident women to be transferred to their countries of origin when relevant agreements are in place and, “especially if they have children in their home country”(UNGA, 2010a, Rule 53). The importance of

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<sup>38</sup> However, the Nelson Mandela Rules do consider other disabilities: “Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis. (UNODC, 2015, Rule 5)

<sup>39</sup> In the U.S. girls comprise just 15% of imprisoned youth, but these girls account for 36% of youth incarcerated for status offenses (The Sentencing Project, 2020).

maternity and children is highlighted in the same Rule, which protects the right of the children born in prison of being relocated to their home country, according to the best interest of the child and in consultation with the mother. This is a relevant protection for undocumented migrants who would like their children to stay in the host country, for the children's return or stay would depend on what is best for him/her. Protection of foreign women is especially pertinent for Latin America, given that in Chile, Colombia and Peru, they constitute a large proportion held in pre-trial detention (73%, 50%, 42% respectively), most of them due to drug-related crimes (PRI & TIJ, n.d.; Youngers et al., 2020). However, the right to repatriation does not seem like the appropriate solution for their case, for nothing guarantees that their country of origin will have laxer sentences for drug-related issues, nor that they wanted to go back to their home country before being detained.

### *Health*

Hygiene and physical health are priority subjects in the Bangkok Rules since they were two of the most obvious deficiencies of the Nelson Mandela Rules. Indeed, while those Rules clearly noted hygiene needs of men, such as providing facilities for “(...) the proper care of the hair and beard (...)” (Nelson Mandela Rules, 2015, Rule 18), there was no mention of women's necessities. Accordingly, Rule 5 of the Bangkok Rules amends such absence by demanding the materials required to meet women's hygiene needs, remitting specifically to sanitary towels free of charge. The same Rule also calls for the regular supply of water, justifying such need in blatant gender-norms: “(...) water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.” So, while Rule 5 is a remarkable advancement compared to the Nelson Mandela Rules —especially regarding sanitary

towels—, it is impossible to ignore that beard care shall be guaranteed to men for hygiene reasons *per se*, whereas water must be provided for women to cook.

On a more positive note, gender-specific health care services are demanded in Rule 10, and so is health screening in Rule 6. Health screening is important to the extent that it is meant to identify health-care needs, signs of ill-treatment, contagious diseases, and the capacity of the person to carry out certain activities (Penal Reform International (PRI) & Thailand Institute of Justice (TIJ), n.d.; Youngers et al., 2020). Besides, Rule 6 successfully incorporates much of the evidence reported by scholars, activists and OIGs about health issues that imprisoned women face, such as the presence of blood-borne viruses (due to a history of drug use, sexual work or abuse) and trauma from suffering harsh treatment in police custody (e.g. torture to make them confess) (Human Rights Council, 2010, 2016; UNODC & WHO, 2009).

This is why Rule 6 asks health screening to detect sexually transmitted diseases, post-traumatic stress and risk of self-harm, reproductive health history including recent pregnancies, drug dependency and sexual abuse. Regardless of the fact that this Rule has been beneficial and is based on the documented frequent presence of these health problems, the Rule, in the same way than any other legal instrument, constructs a particular image of women deprived on their liberty: infected with a blood-borne viruses (e.g., HIV), with mental health problems, breeders, drug addicts and abused.

Owing to the extended research that has found that women deprived of their liberty are more prone to develop depression, anxiety, and phobias than their male counterparts, mental health is another issue raised by the Bangkok Rules (Bastik & Townhead, 2008; Human Rights Council, 2016; Player, 2007; UNODC & WHO, 2009). Additionally, women in prison

are more likely than men to have experienced domestic, physical and/or sexual abuse than men (van den Bergh et al., 2014), and studies have found that their risk to commit suicide is four times higher than women outside jail (Fazel et al., 2017; Ramesh, 2018). About drug-dependency, 50% of female prison population, compared to 30% of the same male population, had experienced drug dependence in the year prior to detention (UNODC, 2020)

With all this in mind, several Rules touch the subject in question. Some with the intention of avoiding recidivism and improve reintegration, demanding therapeutic courses, education and training programs that compose a comprehensive policy toward mental health. Others suggest gender-sensitive and trauma-informed substance abuse treatments as alternative sentences to incarceration. This is an outstanding step in changing the mindset with which drug matters are dealt, from a securitized and carceral paradigm to one concerning physical and mental health. However, depending on how the treatments are designed and implemented, this alternative sentence could mean a deprivation of liberty in another violent, total and disciplinary institution (Foucault, 1975).

### ***Public policy and transition***

This final category includes themes that, although not explicitly mentioned, could be used to go beyond the protection of prisoners' human rights, by questioning the carceral system. Unfortunately, this interpretation might be too optimistic, and these Rules account for the lowest proportion of the document. Still, the first theme covered under this category is reintegration and contact with community. These Rules break the false idea that prison is a rehabilitation center, acknowledging that when the ex-incarcerated population, especially women, leave prisons, they have to deal with an even more precarious situation than before being imprisoned. By way of illustration, women might be rejected by their families for not

being a “good woman/mother”, and they might have lost their parental rights. Moreover, if they used to be in a violent relationship or context, they need assistance in order not to go back to such reality. In addition, they frequently encounter economic and legal restrictions due to the label of “criminal” they carry for life (PRI, 2021).

Therefore, these Rules aim to ease the transition to liberty by encouraging the use of alternatives to re-establish contact with the community before being freed (e.g., open prisons, halfway houses, etc.). Furthermore, they call for support following release to women who need psychological, medical, legal or other type of help to guarantee their successful reintegration. Interestingly, the Rules promote the engagement of local community groups and NGOs in this process, recognizing their key role and their closeness with the problems that these women confront.

About non-custodial sentences, although the Bangkok Rules document carries these measures in its official name, it doesn't dedicate many Rules to the matter compared to other themes. Indeed, it cites the Tokyo Rules as the principal guide to develop these responses. However, it does call the use of non-custodial sentences under the justification that usually imprisoned women do not pose a risk to society. Additionally, it requires mitigating factors to be considered, such as care-taking responsibilities and history of victimization (UNGA, 2010a, Rules 57 & 61).

Finally, perhaps the most substantive, but unfortunately less prioritized subjects, are those concerning research, planning, evaluation and public awareness raising. In contrast with the Nelson Mandela Rules, but similar to the Tokyo Rules, the Bangkok Rules demand the conduction of

(...) result-oriented research on the offences committed by women, the reasons that trigger women's confrontation with the criminal justice system, the impact of secondary criminalization and imprisonment on women, the characteristics of women offenders, as well as programmes designed to reduce reoffending by women, as a basis for effective planning, programme development and policy formulation (...). (UNGA, 2010a, Rule 67)

The shift to data-based public and social policies instead of criminalization, would actually render safer cities and diminish the use of dehumanizing institution like prison (Davis, 2003, 2005). Furthermore, Rule 70 recognizes the role of the media and public opinion in building fear, discrimination and even despise towards imprisoned population, which is frequently used by punitive populist governments to impose harsher sentences and conditions. Therefore, this Rule foments that

The media, the public and those with professional responsibility in matters concerning women prisoners and those in contact with the law shall be provided regularly with factual information about the matters covered in these rules (...). Training programmes on the present rules and the results of research shall be developed (...) for relevant criminal justice officials to raise their awareness and sensitize them (...). (UNGA, 2010a, Rule 70).

A slow but substantive sensibilization of public opinion and relevant authorities could lead to a transformative change in criminal law and criminal systems more broadly (Charlesworth, 2016; Davis, 2003, 2005).

### **2.2.2 “Woman” and transformative scope in the Bangkok Rules**

To sum up and concretize the content of the Bangkok Rules through a gender-lenses, this section will comment on the construction of *woman* depicted in the Rules (mothers, cis-heterosexual, and fragile) and the absence of transformative objectives.

#### ***Construction of “woman” as mothers***

First of all, it is important to recall from the theoretical framework that every unofficial and official normative builds and reproduces gendered subjects, either as a reflection of the social context or as the producer of such context (Núñez, 2018). Therefore, regardless of the fact that the Rules emerged from evidence-based concerns, their veracity does not exempt them from portraying a certain type of *woman*. With this in mind, to say that the Rules conceive women as mothers, does not necessarily imply that imprisoned women are not mothers and, thus, that the Rules are deceitful. Indeed, although there is no global figure about the proportion of imprisoned mothers, data from some countries show that they are a majority: 87% of women in prison are mothers in Brazil, 82% in Thailand, 80% in the United States and Russia, and 66% in the United Kingdom (Rathmell, 2021). Consequently, it is logical that maternity- and children-related issues are a priority in the Rules.

Nevertheless, the attention given to this role of women, reproduces the cultural construction that women are breeders and caretakers before anything. Although the Preliminary Observation 12 states that “there is a need to recognize the central role of both parents (...) some of these rules would apply equally to male prisoners and offenders who are fathers (...)” (UNGA, 2010a), the excessive focus on motherhood in the Rules gives the impression that parenting is exclusive responsibility of the mother. There is no reference to the role of men outside prison as fathers nor the distribution of tasks among other family members. The Rules forget that “to be a mother (social function) there is no need to breed, nor to be a woman, nor to be young.” (own translation Núñez, 2018, p. 199).

Women prisoners are protected due to their biological and social reproductive functions, more than their condition as human beings. That was clear in the Rules regarding discipline and punishment, which only prohibited certain measures for pregnant women and

mothers, and the Rules about special programs and accommodations, which were only granted for the same population. Moreover, the affairs about motherhood and incarceration are more framed around the children's rights than the mother's rights (Barberet & Jackson, 2017), which was also illustrated in the number of Rules designed to protect the children. This is why there is no mention of the right to abortion inside prisons, for example, which is an important concern for women in countries where abortion is legal outside prison, but unreachable inside them due to the costs or lack of medical accommodations and training (Kempen & Krabbe, 2017).

This criticism towards the focus on maternity is not to deny, I insist, biological needs (e.g., menstruation hygiene) and current social realities (e.g., women being primary caretakers), but to point out that the family's, children's and mother's rights protected under the Bangkok Rules recognize and reproduce those realities.

### ***Construction of "woman" as cis-heterosexual***

In the same way that many international instruments concerning gender equality, the Bangkok Rules adopt a binary framework in which cis-woman and cis-man are conceived as the only existing expressions of gender. There is no mention of the women who belong to any LGBTQIA+ community. This is particularly relevant for trans-woman, who not only are not explicitly mentioned, but most of the Rules will not apply to them since they are based on the reproductive needs of cis-women. The Rules ignore the medical needs of transwomen, just like the access to hormones or health services gendered as male health care (e.g., prostate exam) (Barberet & Jackson, 2017).

Similarly, the Rules do not consider the realities of non-heterosexual women. For instance, it is common for lesbian women to be put in isolation "for their protection", which

should be regarded as a punishment rather than a protective measure (Barberet & Jackson, 2017). Likewise, none of the Rules condemn discrimination and violence on the basis of sexual orientation nor gender identity.

Part of this absence could be explained as one of the compromises made in order to pass the resolution by absolute consensus. As mentioned before, one of the other resolutions (concerning extrajudicial and arbitrary executions) passed at the General Assembly on the same day with a more divisive vote (UNGA, 2010b). Part of the debate centered around an amendment to that resolution that added the words “sexual orientation” to an operative paragraph. Such amendment had 93 votes in favor, 55 against and 27 abstentions. Therefore, perhaps if reference to the LGBTQIA+ community was made in the Bangkok Rules, absolute consensus would not have been reached, but the resolution would still have passed.

### ***Construction of “woman” as fragile and as victims***

The priority given to the mental health of women deprived of their liberty is attached to the cultural notion that women are the “weak sex”, since this much attention is not demanded to men deprived of their liberty. This does not suggest that that mental health is not important, nor that all the evidence proving that the female population suffers more anxiety, depression, and self-harm is false. Once again, this point is to signal how the Rules are reproducing an image of women inside prison, in spite of the true urgent need of trauma-informed and holistic mental health care and treatment.

However, the Rules give the impression that women are unfit for imprisonment due to their *feminine fragility* (Barberet & Jackson, 2017), which is a gender-biased mistaken claim. It is not a matter of fragility, but humanity. No human being is fit for imprisonment, and mental health care should be a normalized requirement for all the pollution deprived of their

liberty or not. Of course, nevertheless, that there should be specific treatments for imprisoned women according to their needs, which are product of a certain context, not of an inherent fragility.

Regarding victimization, the introduction to the document, its Preliminary Observations, and the Rules *per se* mention several times that female offenders do not pose a risk to society. There are no *real* criminals, but victims of circumstances. Although this has been highly documented, as cited in the theoretical framework, the Rules portray an image of women as victims (not *victimized*), in the sense that they are infantilized. According to Barberet & Jackson (2017) this represents the tension between protection and protectionism: “Are we protecting women or do we assume women need protection based on sexist stereotypes?” (p. 222). In order not to reproduce the image of women as passive and powerless subjects, the Rules should have adopted the rhetoric of empowerment used for *survivors* (not *victims*) of human trafficking, for example.

By way of illustration, the fact that Rule 42 demands the development of activities and programs suitable for “gender-appropriate needs”<sup>40</sup>, instead of calling for “gender-empowerment programs” (Kempen & Krabbe, 2017), evidences the attention devoted to needs rather than rights, and paternalism rather than agency. Nevertheless, interestingly there is some recognition of agency in the Rules concerning marginalized groups. For example, Rules 54 and 55 mention that programs and services directed to these groups shall be designed and reviewed in consultation with the relevant groups.

### ***Individuality vs. intersectionality***

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<sup>40</sup> “(...) access to a balanced and comprehensive programme of activities, which take account of *gender-appropriate needs*.” (emphasis added, UNGA, 2010a, Rule 42).

As mentioned before, the Bangkok Rules refer to some marginalized groups acknowledging the multiple oppressions they face. Besides the criticism previously made about this topic, another remark must be added: the distinction between individuality and intersectionality. Several Rules point out the need to consider the background of each woman, stressing their histories of violence, discrimination and precarity. However, they fail to do so in the sense that multiple structures of oppression limit the agency of these women. Instead, the Rules read it as part of their individual identity and life (Stubbs, 2020).

The problem with this is that the diagnostic of the problem determines the solution. Hence, if the problem is the oppressive structures, the solution would tackle those structures. In contrast, when the challenge are the individual characteristics of the woman, the solution would be to *rehabilitate* the women as if she was the problem. Consequently, the Rules aim to *rehabilitate* a woman who was deprived of her liberty for drug-related offenses by training her in other tasks (e.g., sewing), instead of questioning the punitive drug regime or the poverty that led her to such industry, where she risks to fall again (Deschenes et al., 2006).

Actually, the idea of registering and analyzing the background of the *criminals* is far from new. As explored in the theoretical framework, in the XIX<sup>th</sup> century prisons became the setting for cultivating criminalistic knowledge from a scientific-medical schema, in order to formulate better policies and measures to discipline the population (Foucault, 1975). Accordingly, demanding attention to the violences suffered by women offenders to grant them an individualized punishment and treatment, is not transformative at all. As long as the focus rests on the *criminal* instead of the *criminalizing* structures, the Bangkok Rules nor any other instrument would bring substantive change.

### ***Absence of paradigm shift***

The objective of the Bangkok Rules was never to challenge criminal justice systems, and least to promote abolitionism. Indeed, Preliminary Observation 11 disclaims such ambition by stating that:

In view of the great variety of legal, social, economic and geographical conditions worldwide, it is evident that not all of the following rules can be equally applied in all places and at all times. They should, however, serve to stimulate (...) the global aspirations considered by the United Nations as leading to the common goal of improving outcomes for women prisoners, their children and their communities. (UNGA, 2010a, Preliminary Observation 11)

For that reason, it might be absurd to expect from them a transformative questioning of the punitive and carceral system. Indeed, as previously analyzed, the themes covered by the Rules that could lead to a paradigm shift are barely mentioned, while the most accentuated have to do with common social constructions around women, such as motherhood and mental health.

Without underestimating the usefulness of the rights regarding those themes, such rights will never be enough to guarantee the dignity and integrity of women deprived of their liberty while the totalitarian institution of prison persists as the primary measure of punishment. To achieve such transformation, the executors of the Rules must give more importance to those concerning research and public opinion, for reliable data about the problematic and conscious citizens could be the driving force for eventual change.

### **2.3 Global advancements regarding the Bangkok Rules**

Data about the advancements on the protection of human rights of women deprived of their liberty is difficult to obtain and analyze for two main reasons: the lack of disaggregated data by gender and the disparities between prisons within each State (let alone prisons in different

countries and regions). Given that the Bangkok Rules are not a treaty with a body supervising its implementation, information about its results is collected mainly by NGOs and scholars who rely on partial data, case studies and official reports about related topics (e.g., UNODC reports on drugs). Moreover, the efforts made by certain countries to explicitly comply with the Rules, do not necessarily translate into successes. For example, Thailand has implemented a complete “Bangkok Rules Model Prison” in at least fourteen correctional institutions and prisons (PRI, 2020); but, as will be explored, it is arguable that conditions for women deprived of their liberty in the country have improved significantly. In contrast, States like Australia and Germany have made some progress in the matter, in spite of the Rules being largely unknown by public functionaries (Kempen & Krabbe, 2017).

Having said this, this section will begin by exploring some figures about the prison female population growth worldwide and the factors that contributed to this phenomenon. Then, I will present some examples of progress and challenges regarding the four categories previously used to analyze the themes covered in the Rules (maternity and reproductive rights, violence and non-discrimination, health, public policy and transition).

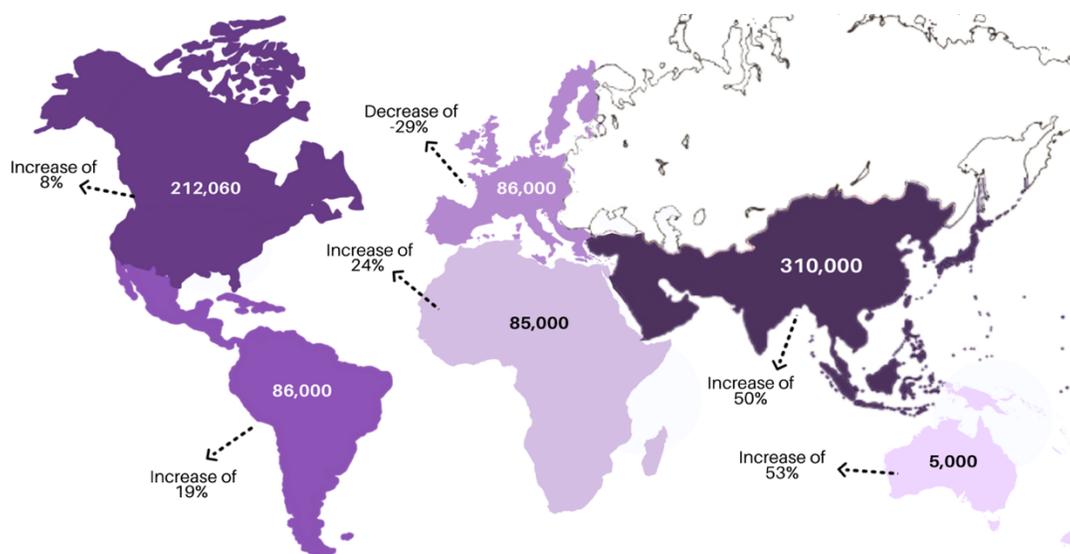
### **2.3.1 Female prison population**

Although the Bangkok Rules do not focus enough on matters that would reduce the incarceration of women (non-custodial measures, public awareness and social policies), they were conceived in response to the increase in the female prison population. Therefore, its objective was not only to protect the human rights of imprisoned women, but to prevent them from being imprisoned. Besides, lessening prison overcrowding makes it easier to guarantee the human rights of the people inside. Unfortunately, according to the last global available data, the Rules have failed in this second objective. There are 740,000 more women in prison

than before the approval of the Rules, that is an increase of 17% since 2010 (PRI, 2021a). This is not explained by the global population growth nor the total prison population. Indeed, the female prison population has increased 53% since 2000, while the same figure for the male prison population is 20%, and the global population rose 21% (PRI, 2021a).

The rise in the number of women in prison varies across regions (Figure 3). Oceania and Asia have experimented the biggest increase, and North America the lowest (53% and

**Figure 3. Number of women in prison by region and its percentual increase from 2010 to 2020**



**Source:** own elaboration with information from PRI (2021a), the World Prison Brief (n.d.), and Government of Canada (2021).

50%, and 8%, respectively), while Europe has seen a decrease of 29%.<sup>4142</sup> Still, Asia continues to have the highest number of female prisoners (310,000), followed by North America (212,060). Oceania and Africa have the least number of imprisoned women (5,000 and 85,000, respectively).

<sup>41</sup> However, there are variable trends between countries. For example, the United Kingdom (included in the figure for its geographic location in the European continent) projected in early 2021 that by 2025 there would be a 40% increase of women prisoners (Brown, 2021).

<sup>42</sup> Such diminution is congruent with the fall of the total imprisonment rate that started in 2013 in the European Union Members (Council of Europe, 2021), and with the implementation of non-custodial measures that will be explored later.

Women continue to be a minority in all regions and countries, constituting 6.9% of the total prison population (PRI, 2021a), varying between 2-9% among countries (Walmsley, 2018). According to the latest edition of the World Female Imprisonment List (Walmsley, 2018), only in nineteen systems (independent and dependent territories) women represent a higher percentage than.<sup>43</sup> Regionally speaking, the proportion of women in prison is the lowest in Africa (3.4%), followed by Europe (61.1%, and 5.1% excluding Russia), then by Asia (6.7%), Oceania (7.4%), being the Americas the one with the biggest proportion of female prisoners (8.4%, 6.3% without the United States) (Walmsley, 2018). Regarding female prison population rates (imprisoned women per 100,000 of the national population), Figure 4 enlists the ten countries with the highest rates.

**Figure 4. Top ten countries with the highest female prison population rates**

| Country            | Female prison population rate<br>(per 100,000 of the national population) |
|--------------------|---|
| United States      | 65.7  |
| Thailand           | 60.7  |
| El Salvador        | 58.4  |
| Turkmenistan       | 38.2  |
| Seychelles         | 34.8  |
| Russian Federation | 33.5  |
| French Guiana      | 32.4  |
| Macau-China        | 31.3  |
| Rwanda             | 29.6  |
| Greenland          | 28.5  |

**Source:** own elaboration with information from the World Female Imprisonment List (Walmsley, 2018).

<sup>43</sup> Five of them are Hong Kong-China (20.8%), Laos, (18.3%), Macau-China (20.8%), Qatar (14.7%) and Kuwait (13.8%) (Walmsley, 2018).

The majority of these women are convicted for non-violent crimes of economic nature (e.g. drug crimes, theft, embezzlement) (Kempen & Krabbe, 2017). Of those imprisoned for drug-related offences in Latin America, 87% are primary caregivers for dependent children or elderly, 72% committed non-violent offenses, for 62% this was their first time in conflict with the law, 56% are victims or witnesses of domestic violence, and 24% are single mothers. (Youngers et al., 2020).

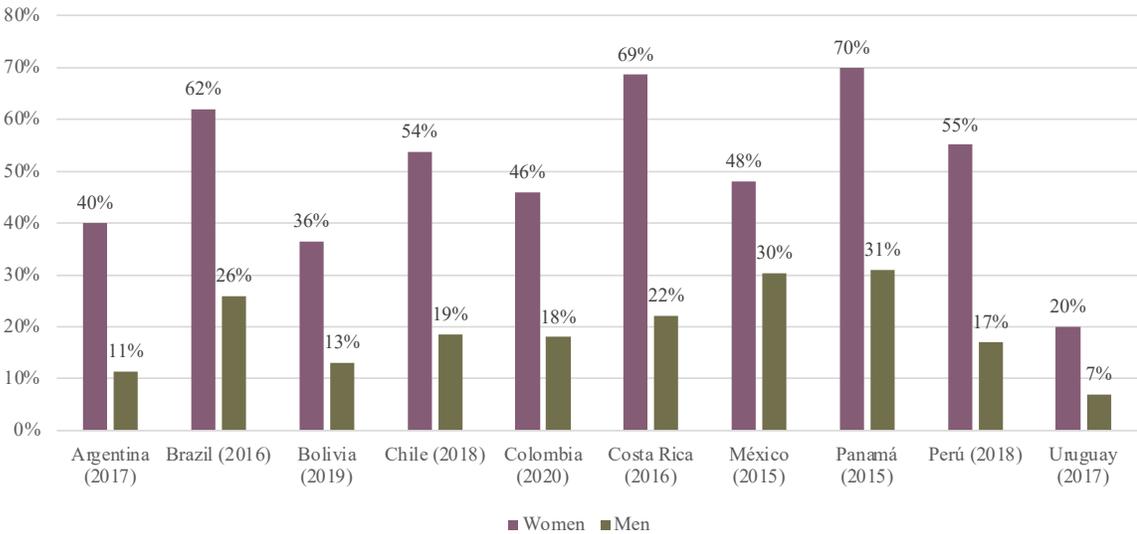
Going back to the issue of female prison population growth and the consequent overcrowding, more than 118 countries operate their prisons above their 100% capacity (considering the total prison population), and another 11 countries do so at 250% of their capacity (PRI, 2021a). Among the drivers for high imprisonment and overcrowding are four structural factors and a conjunctural one: overuse of pre-trial detention, mandatory sentencing, longer sentencing, punitive drug policies and the pandemic of COVID-19 (PRI, 2021a; Youngers et al., 2020). The last two drivers will be explored in detail in the following paragraphs.

But first, about pre-trial detention, there are 47 countries with half of the prison population untried. From these, 70% operate above their 100% capacity. In other words, their prisons are overcrowded by people who are not even declared guilty yet. Two dramatic cases are the Philippines and Haiti, where 75% of prisoners have not been sentenced, and prisons operate at 450% capacity (PRI, 2021a). Similarly, more than half of incarcerated women are untried in Guatemala, Argentina, Bolivia, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay. More than half of them, with percentages as high as 71% in Bolivia, are in pretrial detention for drug offenses. (Youngers et al., 2020).

### ***Drug policies as drivers of the growing female prison population***

The criminalization of drug possession for personal use continues to be a major force for prison population growth, as around 61% of people arrested globally for drug-related crimes are held under this offence (UNODC, 2020b). In Latin America, this problem affects women disproportionately, for a higher proportion of women are incarcerated for drug-related offences than men (Figure 5). In some countries these offences account for the first or second cause of incarceration among women, while it is second and fourth cause among men (UNODC, 2018).

**Figure 5. Proportion of women and men in prison for drug-related offenses in certain countries of Latin America**



Source: own elaboration with information from Youngers et al. (2020).

Similarly, a study conducted by the Washington Office on Latin America (WOLA), found that 10 out of 12 Latin American countries have a higher percentage of imprisoned women for drug-related offences than the global average of 35% (Youngers et al., 2020).<sup>44</sup> Many of such women are held in pre-trial detention, which is automatically imposed in

<sup>44</sup> These are Panama (70%), Costa Rica (68.6%), Venezuela (64%), Brazil (62%), Peru (55.1%), Ecuador (54%), Chile (53.7%), Colombia (46%), Mexico (43%), Argentina (40%) (Youngers et al., 2020).

countries like Bolivia, Brazil, Ecuador, Honduras, Mexico and Peru (Human Rights Council, 2021). Besides, in most of the countries, drug-related offences require a mandatory custodial sentence and preclusion of early release, without distinguishing between levels of involvement in the drug trade, violent and non-violent offences (Youngers et al., 2020).

On the other hand, some countries have made advancements towards decriminalizing the possession of small amounts of certain drugs for personal use. For example, Ghana was the first African country to do so in 2020. Oregon in the United States has gone further by doing the same for all drugs, and Vancouver is aiming to do the same (PRI, 2021a). However, these are exceptions to the persistent criminalizing trends that do affect subordinated women in the drug industry chain. Nevertheless, a Colombian report underlines that, although men continue to overwhelmingly occupy the highest posts of the chain, the growing prominence of women in organized crime should not be disregarded (Tickner et al., 2019).

### ***Pandemic of COVID-19 as a driver of the growing female prison population***

Besides worsening the conditions inside prison, which will be exposed later, the pandemic of COVID-19 was a driver for the growing female prison population, as governments used criminalizing measures to prevent people from breaking pandemic rules. For instance, Uzbekistan sanctioned the distribution of misinformation about the virus with up to three years of imprisonment, Cambodia imposed up to twenty years for gatherings, Philippines came to apprehend 190,000 people for violating quarantine rules, and many other countries (France, Taiwan, Ireland, Singapore, etc.) imposed a variety of sanctions from fines to short prison terms for similar reasons (PRI, 2021a). The use of fines ended in the imprisonment of economically vulnerable people, who couldn't afford to pay the charges (Loop News, 2021).

However, given that prisons are a breeding ground for any infectious disease due to their deplorable conditions and overcrowding, more than 109 countries adopted emergency release mechanisms to alleviate the risks (PRI, 2021a). Many of these schemes targeted high-risk groups (elderly, people with certain diseases, etc.), and some had successful results. For example, Turkey released 40% of its prison population, Jordan 30%, Spain, Norway, Cyprus, Portugal, and France around 15% (PRI, 2021a).

Nevertheless, globally such releases represented less than 6% of the prison population, and only a minority of the schemes explicitly mentioned women (including mothers and pregnant women) (DLA Piper, 2021). Moreover, people incarcerated for drug-related offences were largely excluded, disproportionately impacting women. In addition, for countries with severe overcrowding release measures were not enough. This was the case of Malawi, where, although over 12% of its prison population was released, it did not have a significant impact, for its prisons operate at 260% capacity.

### **2.3.2. Advancements on maternity and reproductive rights**

Regarding children's rights, the report *Childhood that Matters* (Giacomello, 2019) highlights that there are more than two million children in Latin America whose father or mother are deprived of their liberty. Usually, the incarcerated parent is the father, but as a consequence, the mothers have to assume the burden of taking care economically and emotionally of the incarcerated parent, the children and other family members. When the mother is the one incarcerated, the children are often neglected and end up living in inadequate conditions, since their communities tend to reject them for having a “troubling-making” mother (Giacomello, 2019).

Some countries have made advancements to guarantee children's right to visit or live with their incarcerated mother in a desirable environment. For example, Kenya has installed child friendly daycare centers and play areas for the children who live with their mothers in some prisons (Kuria, 2020). In Spain there are parenting cells, arrangements for outside childcare and weekends furloughs with foster families (Barberet & Jackson, 2017) Similarly in Finland, parents can apply for special family visits that can last up to a few days and take place in rooms that resemble a home with furniture and toys.

The Vanaja Open Prison in the same country even offers a separate family house for the same objective (EuroPris Family Relations Expert Group, 2017). Lithuania and Bulgaria also built a detached house for up to five incarcerated women with their children, so they are brought up in a home until the age of 3-4 (Allen in TIJ Just Right Channel, 2021). New Zealand follows a similar model in its Mother with Babies Units, which places the mother and her children near her family, with the objective of growing a positive relationship with them so that they support her once she is released. Another example is Drew House in New York, United States, where, in partnership with a non-profit supportive housing provider, certain women are allowed to live with their children in a supportive housing apartment. The women also receive counselling and job training (Goshin & Byrne, 2012).

Despite these examples, most prisons around the world keep failing on guaranteeing access to medicines for children, food with adequate nutritional value for them and their mothers, and areas for children development (Kyazze in TIJ Just Right Channel, 2021). Additionally, children were not exempted from the suspension of in-person visits to their parents, and education and recreational programs for the ones living in prison were restricted

(PRI, 2021a). Finally, in the sources reviewed, there are no substantive examples of advancements in sexual and reproductive rights for incarcerated women.

### **2.3.3. Advancements on violence and non-discrimination**

The most reported advancements in this field have to do with searches. For instance, Kenya has installed protocols and search rooms so that women are informed about the objective of the search and it is carried out in a private and dignifying environment (Kuria in PRI, 2020). Thailand has introduced body scanning technology in some correctional institutions to avoid invasive searches (Laohong, 2016). Nevertheless, many other countries (e.g., United States, Greece, Turkey) do not respect the standards that prohibit systematic searches—they should only be conducted under a specific reason—for their potentiality to trigger trauma abuses (Kempen & Krabbe, 2017)

Furthermore, excessive use of force and degrading punishments keep on being inflicted to people in detention. Solitary confinement is one of the most important concerns, for it has been found to be more frequently used in women and minority groups than in men (Shalev, 2020). Some other challenges to tackle violence are the fact that women-only prisons and cells keep being scarce, as well as torture and beatings are still regular punishments (Kyazze in TIJ Just Right Channel, 2021).

About prison staff, the ratio of staff to prison population varies from 1:1 to 1:28, being the highest ratios in Thailand (1:28), Niger (1:17) and the Philippines (1:10) (PRI, 2021a). Some countries, especially in Africa and Asia have conducted training programs on the Bangkok Rules for heads of female prison institutions, officers with different ranks and female offenders (PRI, 2020). However, the Bangkok Rules stopped being a priority (if they ever were) as soon as the pandemic started, for prison staff was reduced due to contagions,

firings to reduce costs or overcrowding, and resignations for bad working conditions. Despite of labelling prison staff as essential workers, little was done to protect their physical and mental health.

Indeed, in some countries prison staff contracted COVID-19 at higher rates than the general population (e.g., seven times higher in South Africa, two times higher in Colombia and England), and than detainees (e.g. Poland's prison staff represented 85% of cases in the country's prisons) (PRI, 2021a). Apart from the virus, staff endured heavier workloads to execute and oversee sanitary protocols and make up for the labor shortage. Moreover, many countries confined them for weeks or even months to prison, without letting them leave, under the justification of reducing the amount of people get in and out of the building (PRI, 2021a).

Moving on to the theme of intersectionality, research shows that LGBTQIA+ women (who are not protected under the Bangkok Rules) are arrested at disproportionate rates, but the lack of disaggregated official data makes it difficult to prove in statistical terms (PRI, 2021a). However, evidence of this trend is that by 2020, sixty-nine UN Member States continued to criminalize consensual same-sex relationships with life imprisonment or death penalty (Mendos et al., 2020). About transwomen, many countries do not involve the offender in the decision of which detention center to attend, and consequently end up in male prisons. This happens even in countries like Argentina and Colombia, where national norms concerning the accommodation of transwomen offenders are in force (Castro & Santos, 2020).

Besides this violation to the right to an identity, these women are deprived to their right to life—transwomen have died in Argentina's prisons for health reasons and negligence from

the authorities (CELS, 2014)— and their right to non-discrimination — 285 cases of discrimination were reported in just one year in Colombia, including sexual harassment and visitation restrictions (Justicia el Tiempo, 2020). These are examples of countries that recognize collective rights of the LGBTQIA+ community, therefore, not many advancements can be expected of other countries, especially since the Bangkok Rules do not protect them.

Concerning imprisoned women who belong to an indigenous group, their proportion in the prison population has seen an increase in multiple countries, especially in Canada, Australia and New Zealand (PRI, 2021a). Different projects have been implemented in Canada and Australia to guarantee the rights and reinsertion of indigenous women, although none of them appear to tackle the root problem of structural discrimination that leads to overcriminalization of these people.

One example is the facility “Bindi Bindi” in Australia, which hosts imprisoned women (half of them indigenous) whose mental needs are not met in regular units, with the objective of preventing their risk of harm and suicide (Fernandes, 2021). The Buffalo Sage Wellness House in Canada has a wider objective, since it provides a home-like atmosphere to indigenous female offenders, with daily routines (employment training, recreational programs and household chores) to develop life skills that will help them in reintegration (Native Counselling Services of Alberta[NCSA], n.d.). Once again, although these programs are valuable for the simple fact of rehumanizing indigenous women offenders, they fail to question the oppressive structures that criminalize these women regardless of their mental health and life skills.

Unfortunately, the pandemic of COVID-19 impacted these groups more severely. By way of illustration, the criminalization of quarantine non-compliance led to the arrests of

poor people who have to work outside every day to provide for their family (Sajor, 2020). Moreover, African-descent and indigenous communities have been disproportionately surveilled and controlled to ensure their compliance to the pandemic rules (Allam, 2020; United Nations Human Rights Office of the High Commissioner, 2020). Naturally, this contributed to their higher detention.

#### **2.3.4. Advancements on health**

More challenges than advancements have been reported in the field of health. The problems vary from poor health in general (e.g., Russia, South Africa and the United States), lower level of care in prison than in the community (e.g., Germany), to confidentiality issues in prison healthcare systems run by prisoners (e.g. Greece) (Kempen & Krabbe, 2017). Other common concerns are lack of medical screening on entry, poor hygiene standards, delay in receiving treatment, absence special care for handicaps or prisoners with serious illnesses, no supply of water and washing facilities, and not enough medical staff (Kempen & Krabbe, 2017; TIJ, 2021). About this last point, the scarcity varies among countries, reaching a ratio of 1:300 in Indonesia (PRI, 2021a).

Also, there has not been enough progress in menstrual hygiene, which was one of the most important subjects for the Bangkok Rules. Some countries report providing free sanitary products for women and girls (e.g. United Kingdom and Malawi) (PRI, 2021a), but the question remains as to how often and under what conditions. For instance, in Chaiyaphum Prison in Thailand women were promised to receive an annual quota of 120 sanitary pads, but they only received 12 (Wongsamuth, 2020). Similarly, many women imprisoned in India did not know they could ask for free sanitary towels, and so they continued to buy them from

the prison canteen at exceptionally high prices, or using old cloth and rags instead(John, 2021).

Regarding mental health, much of the support is provided in collaboration with NGOs, as reported by Nigeria, Kenya and Uganda (TIJ Just Right Channel, 2021). An interesting program used to be offered in the London's Holloway Women's Prison at the "first night custody centers", which aimed to reduce the stress experienced on the arrival to prison by welcoming the women in the most personal and non-institutional way possible, before being transferred to their actual units (Jacobson et al., n.d.). Yet, this support offered in conjunction with civil society contrasts with the treatment given by custodians and state authorities. This is portrayed in the absence of prison staff training to manage psychological breakdowns and the deficit of stationed mental health workers (TIJ Just Right Channel, 2021). Once more, the shortage of mental healthcare staff can be as severe as 1:460, which is the case of Peru (PRI, 2021a).

Talking about drug-dependency, most prisons do not provide adequate treatment for women who use drugs. However 59 countries reported providing opioid agonist therapy in at least one prison in 2020, which five times the figure reported in 2018 (Harm Reduction International, 2020). Also, there are particular civil society-led examples which can be considered advancements. Metzineres in Barcelona, Spain is one of them. This is a gender-sensitive holistic model of support for women and gender non-conforming people who use drugs

Evidently, the pandemic of COVID-19 had important repercussions in this field, beginning with the fact that the scarcity of health professionals, specially female, was severely felt when positive cases started to rise inside prison (PRI, 2021a). Additionally, most

recreational activities were halted, movement inside prison restricted, and family visits prohibited. All these affected imprisoned women's mental health more than men's. As a proof, the number of self-harm incidents in female prisons in England and Wales increased 24% on a quarterly basis in 2020, while the increase in male prisons was of 5% (Grierson & correspondent, 2021).

### **2.3.5. Advancements on public policy and transition**

Most of the advancements in this category concern reintegration and contact with community, while little has been reported regarding public awareness. In Africa, several countries established open door policies in some prisons to allow more contact with between the imprisoned women and the services offered in the community (e.g., Ghana, Nigeria, Kenya, Uganda, Malawi, Botswana) (TIJ Just Right Channel, 2021). In the same way, countries like Scotland have created Community Custody Units with employment and voluntary services, in order for women to rebuild links with their communities and families before being released (Scottish Prison Service, n.d.).

About professional training programs, although most prisons keep offering training on *female* skills, there are a few examples that challenge this approach. For instance, the Change Hub Innovation Centre at Langata women's prison in Nairobi, Kenya is technology-focused program thought by university graduates to offer incarcerated women the opportunity to employ themselves in the technology sector after their release (Penal Reform International et al., 2019). Another program that challenges gender stereotypes is being developed in Bolivia, in collaboration with the UNODC and the NGO CECOPI, which trains imprisoned women in the field of construction and related technical skills (metalwork, plumbing, pipefitting, carpentry and electricity). After their release, these women can join the National

Association of Women Constructors to help them find work opportunities in the sector (UNODC, 2018a).

As mentioned before, the global health crisis paused activities and exterior contact indefinitely. Besides, the rearrangement of prisons to allow for quarantine areas to be delimited meant the relocation of women offenders—for they are a minority and, thus, easy to transfer—away from their home and without distinction between high or low security facilities (PRI, 2021a). This affected their reinsertion opportunities if released during the pandemic, since not only they were away from home, but because many community services to assist them in this process were suspended at the time (Prais, 2020). However, in those penitentiary institutions with digital technology accessible to women offenders, contact with their family and civil society services could be maintained remotely (PRI, 2021a), evidencing the privileges and inequalities between prisons, both at a local and international level.

## **Conclusion**

This chapter provided a deep analysis of the Bangkok Rules, from its conception, passing by its content, to its implementation worldwide. The Rules are meant to complement existent international instruments on prisoners' rights which failed to address women's needs. They were adopted in the General Assembly by an absolute consensus, which, in theory, should motivate the States to implement them, for it is a document they agreed to. However, its status of soft law makes it non-binding and, thus, governments might not feel that they must comply to it.

About its content, the Rules touch fourteen crossing themes, which could be divided in four broad categories (ordered according to their preponderance in the document): maternity and reproductive rights, violence and non-discrimination, health, public policy and transition.

Although the Rules in each category respond to legitimate data-based needs, their configuration do not address structural issues that lead to women's discrimination. This is mainly seen in the fact the Rules construct an image of women as mothers, cis-hetero, fragile and victims. Intersectionality is also understood as a matter of identities who need rehabilitation, instead of structures of oppression that need to be challenged and overturned. Similarly, the document does not prioritize the questioning of the penitentiary system, for it destines less space to public awareness and research that could lead to an eventual reform of the system.

Regarding global advancements and areas of improvement, there is a general failure in preventing prison population to increase. This is owing to the persistent factors of pre-trial detention, mandatory sentencing, longer sentencing and punitive drug policies. These are some of the structural issues that the Bangkok Rules fail to address. On the other hand, the advancements are basically isolated examples in specific centers, mostly implemented by NGOs. This does not reduce their merit, of course. But neither does it mean that those countries committed and complying with the Rules.

Even those that are committed to them, like Thailand, have some prisons with body scanning technology to avoid invasive searches, and at the same time presents the lowest proportion of staff with respect to its high prison population. The introduction of the mentioned technology is welcomed, but it is unlikely that human rights are guaranteed inside a prison with overpopulation and overwhelmed staff. The case of Mexico is similar in the sense that there are isolated successes, but general failures. This will be analyzed in the following chapter.

### **3. Chapter three: The Bangkok Rules in Mexico**

This chapter will present the quantitative and qualitative findings about the application of the Bangkok Rules in Mexico, obtained through databases, bibliographical sources and interviews with experts (see Methodology, Appendix 1 and 2). It will be divided in two main parts. The first provides important background elements to women's rights in prison in Mexico, beginning with the international and national framework, and following with trends related with drug policies and privatization of prisons. The second part will portray the current situation of women in Mexican prisons through statistics and testimonies, organized according to the four categories used in the previous chapter (maternity and reproductive rights, health, violence and non-discrimination, public policy and transition).

#### **3.1 Background of female prisoners' rights in Mexico**

##### **3.1.1 Legal framework**

###### *International instruments and Constitution*

The international legal framework that protects the rights of the women deprived of their liberty has been exposed in Chapter 1. Mexico has ratified all of the treaties mentioned and consented to international instruments that were not in need of ratification.<sup>45</sup> For instance, as a party to CEDAW, the CEDAW Committee has expressed its concern about the "(...) existing conditions in many detention centers, especially those situated in remote zones, which offer a limited access to health services (...), legal services, rehabilitation measures, reintegration and contact with familiars" (Committee on the Elimination of Discrimination against Women [CEDAW Committee], 2018, no. 49).

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<sup>45</sup> Except of course for the regional treaties that did not concern Mexico because of its geographic location (the Istanbul Convention, the Maputo Protocol, the Kampala Protocol).

Moreover, as a party to the treaties that fall under the jurisdiction of the Interamerican Court of Human Rights, the Mexican State is obliged to “(...) assume a series of particular responsibilities and take diverse special initiatives to guarantee the detainees the necessary conditions to develop a dignified life (...)” (Interamerican Court of Human Rights, 2004, paras. 152 & 153). According to the Court, this is due to the condition of total control that a State has over the people deprived of their liberty, which attaches a greater obligation to guarantee the rights that the individuals can not satisfy by themselves owing to the restrictions inherent to imprisonment.

The relevance of the international treaties lies in the fact that Mexico has a monist system regarding human rights, meaning that ratified International Law on the matter becomes part of the domestic legal system (Shaw, 2017). The legal basis of this is founded in the human rights reform of 2011, which, among other things, changed Article 1 of the Constitution of the United States of Mexico (Constitución Política de los Estados Unidos Mexicanos [CPEUM]) and established that all the authorities are obliged to promote, respect, protect and guarantee the human rights included in the CPEUM and international treaties to which Mexico is a party. This means, however, that treaties that are not ratified are not covered by this article. Therefore, the human rights established through the Bangkok Rules, which are not a treaty but a non-binding resolution of the General Assembly, are not formally considered part of Mexico’s legal system.

Still, Mexico consented to the resolution containing the Bangkok Rules (as every other Member State of the General Assembly), and consequently it must apply its content under the International Law principles of good faith and *pacta sunt servanda* (Ciofalo Lagos, interview January 28<sup>th</sup>, 2022). Nevertheless, there has not been any substantive improvement

in the lived conditions of women deprived of their liberty in Mexico since the emergence of the Bangkok Rules in December 2010. This is regardless of the constitutional and penal reforms of 2008, 2011 and 2016, which will be explored in a moment.

The Rules did not have any influence on those reforms, for they were previous to them (reform of 2008) or were not referred to in the reforms of 2011 and 2016.<sup>46</sup> It could be that someone who advocated for the inclusion of women's rights in the National Law on Criminal Enforcement (Ley Nacional de Ejecución Penal [LNEP] 2016) had the Bangkok Rules in mind, but, if that was the case, it is hard to find evidence as that lobbying process was not formally documented (Giacomello, interview February 7<sup>th</sup>, 2022).

The constitutional reform of 2008 was about security and justice and the 2011 reform touched on human rights. Together, they constituted a new paradigm for the administration of justice based on the protection of human rights, at least *de iure*. For instance, the reforms changed the language of Article 18 from "social readaptation" to "social reintegration", with the objective of destigmatizing the people deprived of their liberty and conceiving prison as a means to avoid recidivism through education, labor training, recreational activities and the restitution of human rights (Suprema Corte de Justicia de la Nación [SCJN], 2016). Therefore, although not attributable to the Bangkok Rules, these reforms are in line with its objectives.

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<sup>46</sup> The influence of other international instruments has been clearly noted in making explicit reference to such instrument. For instance, the General Law to Prevent, Research and Sanction Torture and other Cruel, Inhuman or Degrading Punishment (Ley General Para Prevenir, Investigar y Sancionar la Tortura y otros Tratos o Penas Crueles, Inhumanas o Degradantes [LGPIST], 2017), cites the Palermo Protocol in Articles 4, 5, 36, 49, 43, 44, 45, 47.

About the reform of 2016, it marks the transition begun since 2008 from an inquisitive criminal system to an accusatorial criminal justice system, through a series of laws and regulations intended to dignify the system. Among the most relevant norms are the LNEP (2016), the National Code on Criminal Procedures (Código Nacional de Procedimientos Penales [CNPP], 2014) and the Ley General Para Prevenir, Investigar y Sancionar la Tortura y otros Tratos o Penas Cruelles, Inhumanas o Degradantes (LGPIST [2017]).

### ***National Law on Criminal Enforcement***

The LNEP is a very progressive law and, although it does not make reference to the Bangkok Rules, it incorporates many of the rights protected under them. To begin with, Article 4 describes the principles that must guide the criminal system: dignity, equality, legality, due process, transparency, confidentiality, openness, proportionality, and social reintegration. Similarly, Article 9 states that people deprived of their liberty will enjoy all the rights enshrined in the CPEUM and the international treaties to which Mexico is a party, except for those rights restricted as part of their sentence. Accordingly, whole chapters outline how to guarantee, the right to education, health, work, recreational activities, sports and post-penal services for reintegration.

Particularly relevant for our analysis is Article 10, which specifies the rights of women deprived of their liberty. It covers a total of ten rights, all of which are part of the Bangkok Rules: 1) maternity and breastfeeding; 2) female prison staff; 3) proper and dignified facilities according to their hygiene needs; 4) initial medical evaluation; 5) health care; 6) retain custody of their children and the possibility to live with them inside prison; 7) proper and healthy alimentation for their children; 8) education, clothing and pediatric care for their children; 9) access the necessary means to manage the care of their children; and 10) proper

facilities for their children to receive healthcare, enjoy an integral development, and leisure when she receives visits from her children outside prison. From the ten rights, six concern maternity or children's rights, three are about health and hygiene, and the one remaining involves prison staff.

In this respect, the LNEP is even more limited than the Bangkok Rules, for it not only equates women to their reproductive function, but it fails to take into account most of the issues mentioned in previous chapters and commonly encountered by imprisoned women. Besides, it does not mainstream a gender perspective in the totality of the law, such as the needs of women the right to work, reintegration, etc. Furthermore, apart from condemning discrimination on the basis of gender, "sexual preferences" and gender identity in Articles 4 and 9, the LGBTQIA+ community is absent.

However, the sole fact of devoting an article to women's rights marks a difference from previous criminal laws. In the same way, the LNEP is also recognized for protecting the rights of indigenous people deprived of their liberty in Article 35. It mentions the importance of confining them in a prison close to their community, the preservation of their habits and customs, guaranteeing bilingual education and due process in their native language.

Other criticism of the LNEP are formulated by the NGO *Equis Justicia para las Mujeres* ([Equis], 2021) highlighting the shortfalls of the law regarding social reintegration, which is supposed to guide the LNEP. Specifically, it signals that the definition of social reintegration focuses only of post-penal services, neglecting the vital efforts that should be implemented inside prison. Such penal services are entrusted to a unity inside the criminal system instead of another government area, prolonging the link with the carceral system for the released people. Besides, the language adopted by the LNEP regarding reintegration features liberties,

but not rights. This entails the risk of assuming that once the liberties of transit and association are restituted (by being released of prison), the rights are automatically guaranteed, which is false, for it has been documented that former prisoners are stigmatized and deprived of their rights (see Chapter 1).

### ***Constitutional Article 19***

This article was not mentioned in the subsection regarding the CPEUM, for it covers pretrial officious detention. As such it deserves to be analyzed separately. This article contains a long list of the offenses that merit automatic detention before a trial. Such violation of the presumption of innocence is allegedly justified by how dangerous the offender is and his/her probability to run away without facing justice. However, this is not the case for most people incarcerated under this Article which, in fact, disproportionately affects women.

Before moving to the figures that prove this, it must be emphasized that having pre-trial officious detention inscribed in the CPEUM is highly detrimental from a human rights perspective. In the words of Dr. Giacomello:

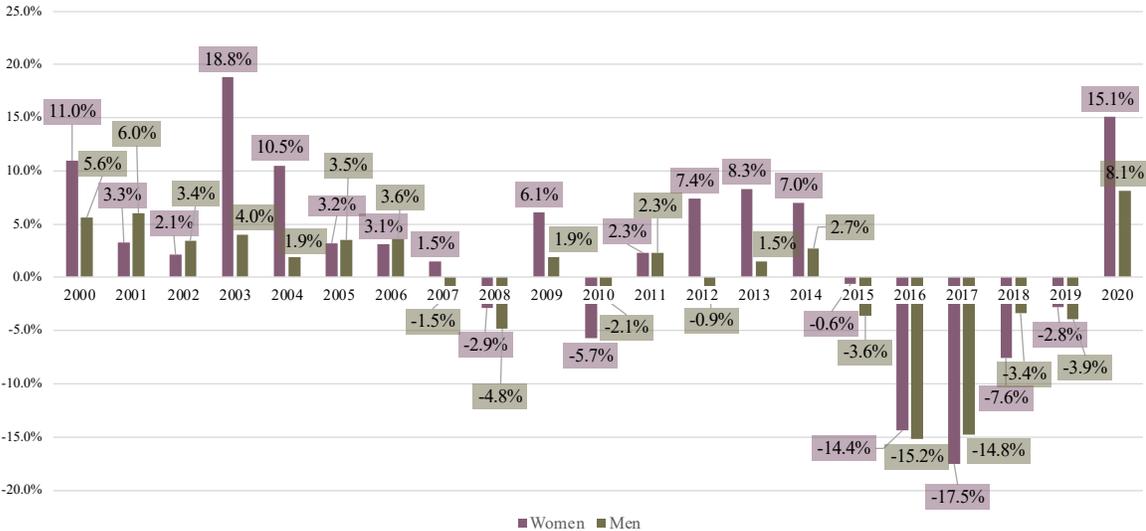
Mexico has pre-trial detention in its constitution, that is very serious. It has Article 1 and then Article 19, which are an absolute contradiction. This reflects a country that does not know what to do with its criminal system, that does not think about it in an organic way (...). Because Article 1 and Article 19 cannot be in the same text. Pre-trial detention cannot be in any constitution. It is the most violent condition of human rights that exists, and it is in the Constitution. This is not a symptom of schizophrenia, but a lack of vision. (...) We come and ask: "what do you need? what does my political ally need? what do the feminists need?" Because I need them to be silent, allied, and close. "Pretrial officious detention? Here you have it. Increase prison sentence for this crime? Here you have it." There is no vision, not even a genuine interest to think about it. (own translation, interview February 7<sup>th</sup>, 2022).

These words illustrate the oxymoron of having such progressive laws as the human rights constitutional reforms of 2011 and the LNEP of 2016, while at the same time holding people

in prison for years without a trial. This a consequence of the absence of an organic planification of the criminal justice system and the penitentiary system. Moreover, the punitive populism (defined in Chapter 1) alluded to in the last words of Dr. Giacomello was evidenced in the reform of 2019, which added nine offenses to Article 19. Two of them promoted by carceral feminism: femicide and sexual abuse or violence against minors. Likewise, in 2021 there was an attempt to incorporate even more offenses (related to tax fraud), but the SCNJ declared it unconstitutional (Ferri, 2021).

Nevertheless, the reform of 2019 was enough to change the downward trend of the annual incarceration rate in 2020, experiencing the highest increase in 15 years (Intersecta & Animal Político, 2021). This rise is attributable to pretrial officious detention, given that 85% of people incarcerated that year did not have a mandated sentence. The figure is worse in certain federal entities: the 100% of incarcerated people in the Mexico City and Oaxaca in 2020 were detained before having a trial (Intersecta & Animal Político, 2021).

**Figure 6. Porcentual changes in the annual incarceration rate without a sentence by sex (2000-2020)**

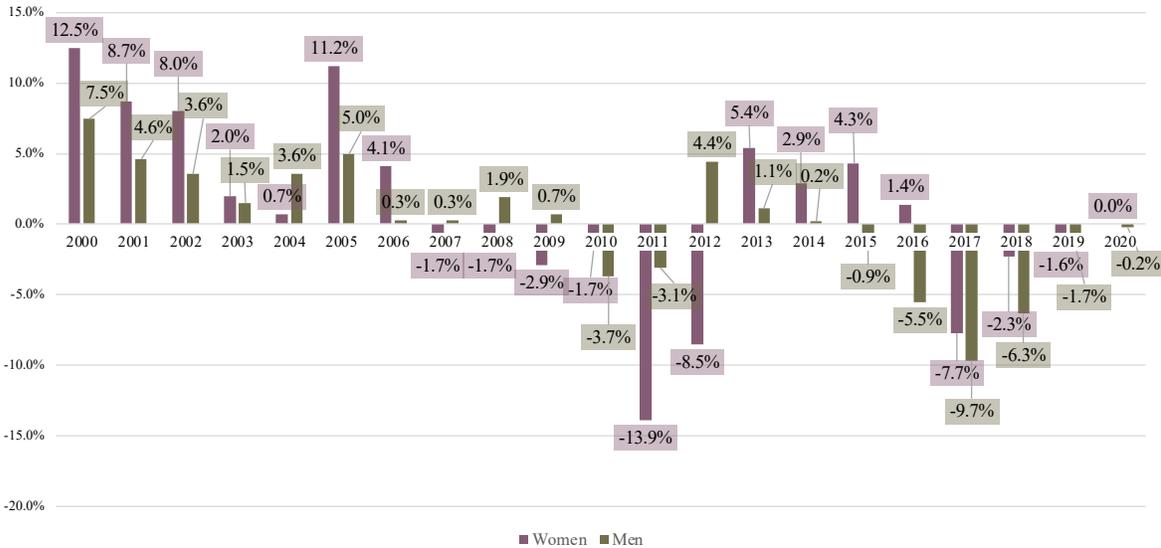


Source: own elaboration with data from Intersecta & CIDE Región Centro, 2021, p. 29.

When looking at the percentual change in the annual incarceration rate without a sentence by sex (Figure 6), it is evident that in proportion more women have been incarcerated under pre-trial detention than men for most years since 2000 (except for the years 2001, 2002, 2005, 2006, 2010, 2017, 2018). In 2020, after the reform of Article 19 in 2019, the female incarceration rate increased by 15.1%, in contrast with 8.1% for men. With these percentual changes, today 46.1% of women deprived of their liberty do not have a mandated sentence, and 26.7% of men deprived of their liberty face the same situation (Instituto Nacional de Estadística y Geografía (INEGI), 2021b). This shows that a figure that is intended to incapacitate dangerous criminals before running away, disproportionately criminalizes women.

Furthermore, when looking at the changes in the rates of incarceration with sentence since 2010 (Figure 7), both men and women saw a decrease in comparison with the previous

**Figure 7. Porcentual changes in the annual incarceration rate with sentence by sex (2000-2020)**



**Source:** own elaboration with data from Intersecta & CIDE Región Centro, 2021, p. 29.

decade. However, the percentual decrease in female rates were lower (or the increase rates

higher) than in the male rates (except for the years of 2010 and 2011). In other words, women were incarcerated in higher proportions than men.

### *Amnesty Law*

Another important law for the purposes of this investigation is the Amnesty Law (2020). It was applauded as an act of justice for the vulnerabilized groups that have been disproportionately affected by punitive laws, as it offers them the extinction of criminal liability. Those who could be released under this law were people detained or prosecuted for the crime of abortion,<sup>47</sup> crime against health,<sup>48</sup> simple theft with no violence,<sup>49</sup> sedition,<sup>50</sup> and people belonging to indigenous communities whose right to a translator or defender with knowledge of their language and culture was not guaranteed.

On paper the law had many advantages in line with the Bangkok Rules—it recognizes that women, people living in poverty and indigenous communities are often criminalized for their situation of vulnerability and the lack of access to justice in equal conditions—and beyond—it includes people with disabilities, afrocommunities and the criminalization of abortion. What is more, the Bangkok Rules were cited in the debates and documents that promoted the law in the Mexican Congress (Senado de la República, 2020) and further

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<sup>47</sup> Women whose pregnancy was interrupted, health personnel who carried it out, familiars who were implicated (Amnesty Law, 2020, Art. 1.I).

<sup>48</sup> Who live in poverty or in a vulnerable situation due to discrimination or permanent disability; who committed the crime following orders of a sentimental partner, familiar or out of affinity; who committed the crime out of a fundamental fear or coerced by organized crime groups; people belonging to an indigenous or afro-mexican community; drug consumers who possessed a particular amount of substances with no trading intentions (Amnesty Law, 2020, Art. 1. III).

<sup>49</sup> With a prison sentence lower than 4 years (Amnesty Law, 2020, Art. 1.V).

<sup>50</sup> As long as it did not involve terrorism, homicide, serious injuries and the use of firearms (Amnesty Law, 2020, Art. 1.VI).

initiatives in the federal entities (Villavicencio Ayala et al., 2020). Therefore, this law could be considered an application of the Bangkok Rules in Mexico.

Unfortunately, it cannot be considered a successful application<sup>51</sup> for the following reasons. First of all, the latest available official data —criticized for not been disaggregated by sex, condition met (poverty, belonging to an indigenous group, etc.), and offence— shows that only 47 people have been released from prison under this law (Secretaría de Gobernación [SEGOB], 2021). Moreover, of a total of 1,560 received cases, only 568 have been reviewed (from which 521 were not approved), 245 were turned down for lack of information and 747 are still under revision when the report was published<sup>52</sup> (SEGOB, 2021). This slow deliberation is explained by the fact that the Commission in charge of reviewing the cases only met four times throughout a year, without an established periodicity.

The problem with this inefficiency is that the law establishes that cases can be turned down by default if there is no deliberation after four months. Moreover, the law does not consider crimes that entail pretrial officious detention, nor crimes prosecuted under ordinary law in federal entities (only federal crimes are considered for amnesty). This limits the possibility of women deprived of their liberty accused of abortion to be released, given that they are often prosecuted in federal entities (Equis, 2021a). Besides, by the end of 2020, only 13.1% of incarcerated people were prosecuted under federal law (INEGI, 2021a).

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<sup>51</sup> Some local laws who replicated the Law of Amnesty in the federal entities have reported a bigger success. For instance, the State of Mexico reported that 2,279 people were released from prison in a year under the Law of Amnesty of the State of Mexico (Fernández, 2022).

<sup>52</sup> These were the only cases whose data was somewhat provided: 626 are men, 121 women, and 41 belong to an indigenous community (37 are men and 4 are women); 571 are accused of crimes against health. Most of these cases (466) will not proceed, for they lack the needed information (Secretaría de Gobernación, 2021).

The law has also been criticized for not being accessible to the population it is supposed to target. Although it was intended for incarcerated people to carry out the process without legal assistance, accessible information about it has not been disseminated through the appropriate means nor with the necessary priority (Observatorio de Amnistías, 2022). Secondly, the documents for the process must be handled in person in Mexico City, imposing an economic burden for the families who often live outside the capital and have limited options of mobility. Similarly, the Commission violates the principle of self-identification and the ILO Convention No. 169 on Indigenous and Tribal Peoples (1989) by requiring that the belonging to an indigenous community is proved by a birth certificate or a letter issued by an indigenous authority. The same goes for people with disabilities, who must attest their condition with a medical certification, contrary to the social approach model (vs. the medical model) embraced in the Convention on the Rights of Persons with Disabilities (2006).

### **3.1.2 Punitive trends in Mexico**

As mentioned in the first chapter, since the 1980's the world has turned to punitive measures meant to tackle organized crime, with the objective of allegedly granting more security to its citizens. Mexico was not exempt from this and, what is more, by the end of the decade punitive populism extended to other areas, including those embraced by carceral feminism. Núñez Rebolledo (2019b) explains that president Carlos Salinas de Gortari attempted to manage his legitimacy crisis —caused by the “system crash” during the presidential elections of 1988 from which he emerged victorious— by addressing concerns of social movements,

like gender violence.<sup>53</sup> Accordingly, the 1990's saw a proliferation of institutions devoted to eliminate gender violence as well as the promotion of harsher penal sentences and approaches. This trend is very present nowadays, with the recent approval of longer sentences for femicide and sexual abuse,<sup>54</sup> to protect women as *victims*; but does not involve effective social policies that empower women as *agents*.

Going back to the punitive approach to drug-related issues, the presidency of Felipe Calderón Hinojosa is infamously known by his “war on drugs”. According to Suárez Ávila (2016) the effect of this so-called war on the criminal legal field was the culmination of a series of criminal and procedural reforms that had started in 1993. These reforms created two regimes, one for the *common* offender, and another one for organized crime. The latter was characterized by exceptions to traditional guarantees of criminal law and protections under a human rights framework. The problem with this sort of state of exception is that it stopped being an exception. The boundary between both regimes is blurred and practices that violate human rights are partially incorporated into the everyday administration of justice (Núñez Rebolledo, 2019b).

This punitive system has had a huge impact on women in the country. By 2016, 53% of women deprived of their liberty under federal law were accused of drug-related crimes (Giacomello & Blas Guillén, 2016), many of them for transporting packages, especially in the border states (INEGI, 2016). Pretrial detention is also an issue in this field, especially

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<sup>53</sup> Reforms to the Federal Criminal Code precede his presidency (ex. the reform of 1967 and 1984 to increase the prison sentence for the crime of sexual violation). But, the punitivist rhetoric has characterized the State approach to gender issues since his presidency (Núñez Rebolledo, 2019b).

<sup>54</sup> The reform of articles 25, 261 and 325 of the Federal Criminal Code to punish femicide with 65 years of prison sentence, sexual abuse of minors aged less than fifteen years old with 10-18 years of prison sentence, and public functionaries who hinder the criminal process with 6-10 years of prison sentence.

since 2019. Before this year, pretrial detention represented only 25% of the preventive measures used for people prosecuted for these crimes, but by the end of 2020, the percentage had duplicated (Intersecta & Animal Político, 2021c).

### *Privatization of prisons*

Punitive reforms were accompanied by the incorporation of the private sector into the carceral system. The administration of president Felipe Calderón opened the doors to the first prisons built under a Public-Private Partnership (PPP) scheme, and private funding for their equipment and functioning through Services Provisions Contracts (SPC) (Documenta / Análisis y Acción para la Justicia Social A.C. [Documenta] et al., 2016). Indeed, in his Fourth Governmental Report, Felipe Calderón announced the building of twelve prisons throughout the country<sup>55</sup> under these schemes (Presidencia de la República, 2010).

The justification behind this approach was mainly the high cost of maintaining and expanding the prison system. So, instead of decriminalizing in order to reduce prison overpopulation, the administration decided to tap into the wealth of the private sector. Although a convincing argument, the evidence suggests that financial problems in prisons will not be (and are not) solved by this initiative. First of all, although the budget destined to this sector is scarce (as will be later explored), there was an under-spending of 60% when privatization was being discussed; meaning that the money destined to the penitentiary centers was not being used in its totality (Documenta et al., 2016). Therefore, the State could

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<sup>55</sup> Sonora, Chihuahua, Durango, Jalisco, Guanajuato, Michoacán, Morelos, Oaxaca, Chiapas, Campeche, Puebla, Hidalgo and the State of Mexico. Nowadays, there are eight federal prisons under these schemes, which are CEFERESOS no. 11-18.

have tried to spend wisely and efficiently all the available resources before moving to privatization.

It did not do so, and the CNDH found that the costs actually increased: while the mean cost per person deprived of their liberty varies between \$150-390 Mexican pesos a day in the local and federal prisons, the cost elevates to \$1,500 in private penitentiaries (cited in Espejel Espinoza & Díaz Sandoval, 2015). According to the same source, such rise in the expenditure is unfortunately not translated into an improvement of conditions for the prisoners. Other public institutions have criticized the implementation of SPCs in prisons since the lack of regulations hindered their supervision and control (Auditoría Superior de la Federación, 2013).

Despite these observations, the first exclusively female prison in Mexico was built and is currently administered under these schemes. The Federal Center for Social Readaptation (Centro Federal de Readaptación Social [Cefereso]) No. 16 located in the state of Morelos was built by Grupo Carso, property of Carlos Slim, who was directly awarded a contract, without proper licitation (Hernández Castillo, 2016). It was inaugurated in 2016 and its immediate consequence was concentrating all incarcerated women in mixed prisons throughout the republic prosecuted under federal law in a single place. This action distanced most of these women from their families and communities, in clear contempt of the Bangkok Rules. Furthermore, civil organizations<sup>56</sup> denounced physical and sexual violence during the transfer of the women prisoners to the new center (Centro Prodh, 2016).

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<sup>56</sup> Centro de Derechos Humanos Miguel Agustín Pro Juárez (Centro Prodh), Ciudadanos en Apoyo a los Derechos Humanos (CADHAC), the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH), the Centro de Derechos Humanos de la Montaña Tlachinollan y Jass, Asociadas por lo Justo.

Although these violations of human rights are not directly attributable to the private character of the prison, they add to the total sum of violations taking place in the Cefereso No. 16, that will be exposed later. Besides, the use of private schemes in detention centers has been widely studied and condemned by several experts and civil organizations for prioritizing profit over human rights and reintegration objectives, especially in the United States (American Civil Liberties Union (ACLU), 2017; Appleman, 2018.; Davis et al., 2022; United Nations Human Rights Office of the High Commissioner (OHCHR), 2021.). In the case of Mexico, the criticisms are about these and about the fact that a false demand is created. Given that private companies like the one operating in the Cefereso No. 16 charge the Mexican State for available places inside prison, whether they are used or not, the government has no incentive to reduce the prison population for they will pay for the free spaces anyway (Documenta, 2016).

### ***The impact of the American Correctional Association***

As mentioned in previous chapters, the United States has had a leading role in the punitive approach towards drug-related issues. Accordingly, the security bilateral agreements with Mexico, such as the Merida Initiative, reflected this approach. One of the programs implemented under this agreement is the Correctionals Program, whose objective is:

To provide assistance to the government of Mexico to improve the capacities of the penitentiary system and to develop a more *efficient management of its population* (...) in order to prevent transnational criminal organizations to operate from these centers. (Emphasis added, The Embassy of the United States in Mexico, 2014, cited in Documenta et al., 2016, p.28).

Such “efficient management” of incarcerated people has indeed translated into maximum security conditions of reclusion that are incompatible with social reintegration and human rights. Among the tools of the Correctionals Program, in addition to the \$14 million dollars

provided to “improve” the penitentiary infrastructure, there is the certification granted by the American Correctional Association (ACA) to prison facilities. The prisons interested in receiving the accreditation must meet a 100% of 39 mandatory standards, and minimum a 90% of 100 optional standards. These 139 standards are divided in seven areas: security, order, care, programs, activities, justice, and administration. However, the only ones that are fully implemented are the first two, while the rest are neglected (Hernández Castillo, 2016).

This was denounced by researches and activists in a report for the National Institute of Women and the Institute of Women in the State of Morelos (Instituto Nacional de las Mujeres [INMUJERES] & Instituto de la Mujer para el Estado de Morelos [IMM], 2019) in four prisons in the State of Morelos.<sup>57</sup> A woman deprived of their liberty in the Feminine Center for Social Reintegration of Atlacholoaya, a certified prison by the ACA, testified that they were asked to appear satisfied with the conditions of the center when the accreditors came, on the promise that the certification would solve all their problems:

They promised us food, that they would feed us better, that harassment would stop, that education would be for free, that we would have basic medicines, (...), and our life would be better with all the money that received with the great certification. (...) We cheered when we heard that we certified; our smile false, like the promises they made. (...) The prison is worse today than before the certification. The leisure increased, there is no work, what reintegration? (...) Today we only have leisure, [time for] improving our crime [skills]. (...) There is something that the certification left indeed, maybe nobody cares, but it left us more expensive products in the store and lightbulbs turn on all day long. (own translation, INMUJERES & IMM, 2019, pp. 238–239).

From this quote it is evident that the conditions in the prison in question were deplorable and contrary to the Bangkok Rules even before the certification. Prisoners were poorly nourished,

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<sup>57</sup> The Centro Femenil de Reinserción Social de Atlacholoaya, la Cárcel Distrital de Cuautla (women’s area), y la Cárcel Distrital Jojutla (women’s area) and the Cefereso No. 16. It must be said that they were not allowed to conduct their research inside the Cefereso No. 16, but they collected information about it through in-depth interviews with women ex-convicts.

harassed, they were charged for education and did not have access to basic medicines. Apparently, what they did have were activities and work opportunities, which ended after the certification. Other issues included the prohibition of books on the promise that common libraries would be built, which did not happen. Moreover, the prices of products sold inside the prison facilities increased.

The report explains that the increase in prices is due to the closure of the stores driven by the women prisoners who sold different products. Although the offer was limited, the prices were affordable and the women could choose in which of the four stores to buy, which at the same time represented a source of work. Now, however, the stores were administered by the penitentiary authorities at triple the price for the same or inferior quality of products. To make things worse, regular money was prohibited inside prison to prevent corruption. Consequently, every transaction must be done through cards where their families transferred them money. Although this might appear legitimate and efficient, in practice the management of such cards is opaque and often the women cannot access their money when needed (INMUJERES & IMM, 2019).

Furthermore, the toughening and dehumanization of carceral measures is also evidenced in the closure of common spaces that women used to cook and interact with each other. In spite of the fact that cooking is one of the stereotyped activities as *women's business*, the cited report argues that many incarcerated women built a sense of community around those moments where they could share their culinary knowledge with others. Nevertheless, this valued conviviality ended due to the standardization of food which is outsourced to private companies (INMUJERES & IMM, 2019).

The women's unrest for the changes under the ACA certification in Atlacholoaya was such that fifty of them went on a hunger strike on August 2014 (Hernández Castillo, 2014). Many of the leaders were punished with solitary confinement for several weeks and they were transferred to Cefereso No. 16 after it was built, which has the characteristics of a high security center. After such repression, the women prisoners ended up submitting to the new rules, not without suffering for many years the absence of recreational and educational spaces (INMUJERES & IMM, 2019).

Regardless of these issues, the ACA keeps on renovating its certification to prisons that are clearly not following any standard of care, activities, and justice. Moreover, there is no transparency to know exactly how the organization is taking these decisions. This has been asserted by Documenta et al. (2016) after asking the local governments and the Secretary of International Affairs for the complete audit opinions conducted by the ACA during the process of certification and receiving a negative response. Neither could Documenta et al. (2016) have access to a document that contained the total information about the Correctionals Programs, since the mentioned Secretary says that they did not count with such document.

It is clear that the ACA certification does not guarantee the protection of human rights nor the rights of women deprived of their liberty protected under the Bangkok Rules. The process of certification does not even consider interviews with prisoners as mandatory, letting the prison authorities to recount and show what is in their own interest, and paying for a deceitful certification (since the ACA charges for the certification) (INMUJERES & IMM, 2019). The organization's lack of interest in the rights of incarcerated people is evident in one of the points they enlist as a benefit of accreditation: "Accredited agencies have a

stronger defense against litigation through documentation and the demonstration of a ‘good faith’ effort to improve conditions of confinement” (ACA, n.d., para. 6). In other words, instead of focusing on protecting the rights of the prisoners, the advantage is making more difficult for them to sue a center for not guaranteeing such rights.

To end this section, it is relevant to point out that the IACHR has expressed its concern on both the privatization of the prisons and the ACA certification. Specifically, it has condemned the measures based on the United States’ high security model, which restricts visits of family members, recreational and outdoors activities, and allows excessive searches even in intimate areas of the body. Moreover, the Commission also points out the elevated costs of these schemes, worried that “the resources are principally directed to sustaining repressive models contrary to international standards, instead of allocating them to the humanization of prisons and the development of measures meant to guarantee social reintegration” (own translation, IACHR, 2015, p. 159).

### **3.2 Situation of women deprived of their liberty in Mexican prisons**

#### **3.2.1 Population and demographics**

Following the global trend, women continue to be a minority in the penitentiary system of Mexico. According to the National Survey of the Population Deprived of Liberty (Encuesta Nacional de las Personas Privadas de Libertad [ENPOL]) women represent 5.7% of the total prison population (INEGI, 2021b). Similar to another global trend, the female prison population saw an increase between the year 2000 and 2015, with the duplication of the number of women deprived of their liberty in fourteen years, from 6,583 to 13,346 (Intersecta & CIDE Región Centro, 2021). Since then there has been a downward trend, with a total of

12,494 incarcerated women by the end of 2020 (INEGI, 2021b). This could be attributable to the reforms of 2016 that included preventive measures and alternative releases.

However, this downward trend might be reversed due to the reforms of 2019 to the constitutional Article 19 already explained. Because of such reforms, that same year was the first in five that more people were incarcerated than released (Intersecta & Animal Político, 2021c). The same happened in 2020. Ironically, 2020 was the year of the pandemic when efforts were made to reduce prison populations worldwide (although not very efficiently, see Chapter 2) and the same year that the Amnesty Law was approved. One of the reasons behind this was that the courts of control, in charge of dictating pretrial detention, continued operating almost in complete normality during the pandemic, while activities in the courts of execution that approve releases were stopped for weeks (Intersecta & Animal Político, 2021d).

The increase of prison population has resulted in a situation where almost 20% of women deprived of their liberty share a cell with five to nine other women, 8.1% do so with ten to fourteen women, and 11.1% with more than fifteen women. The majority, 54.1%, share their cell with less than four women (INEGI, 2021b). Reducing prison population is the basic objective of the Bangkok Rules, for no dignified conditions can be granted in overpopulated facilities.

About demographic characteristics, the majority of imprisoned women (35.8%) are between 30-39 years old, followed by the range 33.4% of women between 18-29, then 20.7% who are 40-49 years old, and a minority of 10.1% are 50 or more years old. Interestingly, women are criminalized at a younger age than men, as the proportion of women prisoners

between 18-29 years old is higher (33.4%) than that of men (25.1) (INEGI, 2021b). This is a crucial age to define future career and personal prospects.

Another interesting difference is that there are more women with upper secondary education (25%) and superior education (9.6%, from bachelor's degree to PhD), than men (20.7% and 5.9% respectively) (INEGI, 2021b). Although no conclusions can be derived from these data, it is intriguing to note how the privilege of attaining a higher education level does not exempt women from falling into vulnerable conditions or unfortunate situations to be criminalized. However, most of the women and men deprived of their liberty received a basic education (62.8% and 70.1%, respectively) (INEGI, 2021b). Which shows that people who could not access their right to a complete education—which in Mexico covers until higher education, according to Article 3 of the CPEUM—are more incarcerated.

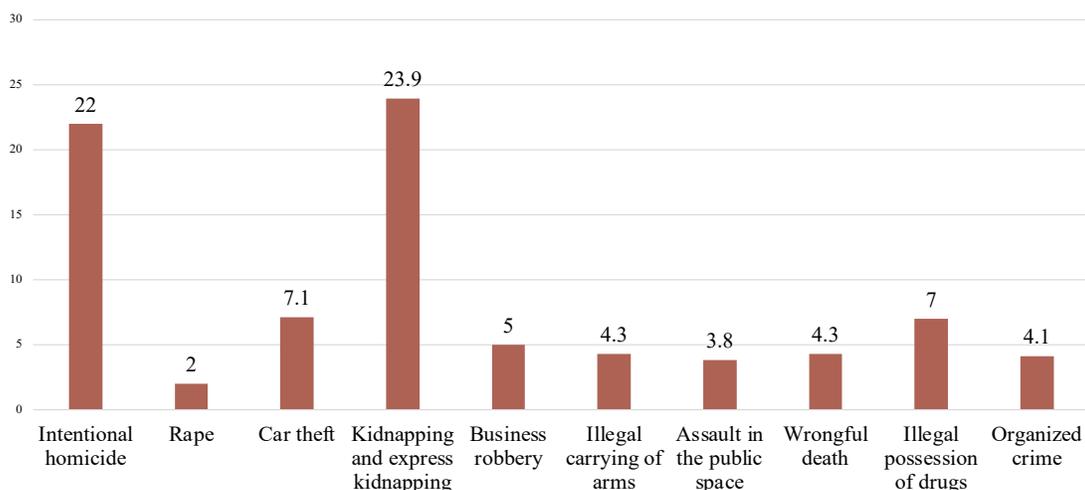
The majority of imprisoned women had a job before being detained (73%). Most of them were employed as merchants or salesperson (37.2%), in personal services (20.9%),<sup>58</sup>

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<sup>58</sup> Includes: food preparation and serving, carework, protection and vigilance, Armed Forces, among others.

and in elementary or supportive activities (15.8%);<sup>59</sup> and only a few labored in illegal activities (2%) (INEGI, 2021b).

**Figure 8. Principal crimes for which women prisoners are accused in Mexico**



**Source:** own elaboration with data from INEGI, 2021b.

Moving on to the crimes they are accused for, it must be recalled that at the federal level drug-related crimes are the principal cause of women’s incarceration (Equis, 2018). However, when considering federal and ordinary law, the most common crime is kidnapping and express kidnapping (23.9%), followed by intentional homicide (22%) (Figure 8). Although the percentage of women deprived of their liberty due to illegal possession of drugs is relatively small (7%), it is relevant to point out that the percentage of men accused for this crime is smaller (4.6%). The same happens with organized crime, as 4.1% of women are accused for this, while men’s figure is 2.4% (2021b). These data confirms that women are more criminalized through punitive measures that tackle drug-related issues and organized

<sup>59</sup> Includes: agriculture, forestry, fishing, hunting, mining, construction, manufacturing, drivers, among others.

crime when, as reviewed in the theoretical framework, they tend to occupy the lower-level spaces in these illegal sectors.

As a final point, according to the NGO Reinserta on average women prisoners in Mexico spend more years deprived of their liberty than men, averaging 23.5 years confined, while men average 17.5 years (Padrilla, 2020). Congruently, the same source reports that the most common sentence dictated to women are 25 years, while for men are 5 years. This in spite of the fact that women who pay for their defense spend more money (\$155,000 pesos) than men (\$100,000 pesos) (Padrilla, 2020). These longer sentences could probably depict that, contrary to the Bangkok Rules, a gender perspective that considers the background and danger of these women is not being considered in the legal process.

### **3.2.2 Analysis under the framework of the Bangkok Rules**

#### ***General issues***

Although the previous sections already depicted the few advances in Mexico with respect to the implementation of the Bangkok Rules, this section will use the four categories used in Chapter 2 to organize the themes touched in the Rules. Before that, there are some general points that must be taken into account. The first one was pointed out by Dr. Giacomello (interview February 7<sup>th</sup>, 2022), who mentions that every prison operates in a different way and they change depending on the current director. Mexico has 19 federal penitentiary centers and 251 local penitentiary centers (INEGI, 2021a), and each one of them is managed in its own way. However, the directors have the responsibility to implement the pertinent national, local and international standards, and therefore, some consistency among prisons would be expected, which in reality does not happen. This is why some prisons might have made more

advances than others in respect to the Bangkok Rules. Nevertheless, for practical reasons the successes and failures here provided will be assumed as part of the Mexican penitentiary system in general, although when possible the names of specific prisons will be provided.

In general terms Mexican prisons have still much to improve to meet the Bangkok Rules. According to the CNDH (2021), the majority of federal prisons present irregularities in the healthcare services (87.5%), procedures for denouncing human rights violations (81.3%), the existence or sufficient availability of training and work activities (75%), among other issues (Figure 9). What is worrying is that this data is *gender neutral*. In other words, when the CNDH reports that 25% of federal prisons provide adequate training and work activities, it does not include whether the activities directed at women are stereotyped or whether they increase women’s labor potential in competitive sectors.

**Figure 9. Irregularities with more prevalence in federal prisons**

| Issue  | Percentage of prisons |
|--|-----------------------|
| Healthcare   | 87.5%                 |
| Prison staff and custodian   | 87.5%                 |
| Tracks for referring denounces of human rights violations                | 81.3%                 |
| Training and work activities   | 75%                   |
| Voluntary programs for detoxification and prevention of drug consumption | 68.8%                 |
| Community contact  | 62.5%                 |
| Educational activities   | 43.8%                 |
| Material and hygienic conditions   | 31.3%                 |
| Sport activities   | 25%                   |
| Attention provided to prisoners with HIV/AIDs                            | 12.5%                 |

**Source:** own elaboration with data from CNDH, 2021.  
**Note:** irregularities refer to inexistence, deficiency or/and insufficiency. Data includes male and female centers due to the lack of disaggregated data.

According to the same report but now referring to local prisons, deficiencies concerning attention to indigenous groups were reported in 15 centers, deficiencies regarding people with disabilities were observed in 20 centers, the same for prisoners with HIV/AIDS

in 12 centers, deficiencies concerning LGBTQIA+ community in 5, and insufficiency in programs for voluntary detoxification and prevention of drug consumption (CNDH, 2021). However, these numbers seem lax when compared to what has been reported by civil society organizations, which will be explored later.

The CNDH (2021) report contains specific information about the Cefereso No. 16, although not very detailed. The report mentions two deficiencies to work on: insufficiency of procedures to denounce human rights violations, and deficiency of attention to prisoners in isolation conditions. On the other hand, the report indicates that there is a proper attention in the matter of alimentation, material and hygienic conditions (in the kitchen, dining halls, healthcare areas, visits areas, activities and sport areas), facilities needed for the functioning of the center, and capacitation of prison staff. As can be seen, the report does not bring up the violations of human rights condemned in this center by civil and intergovernmental organizations, cited previously.

Another relevant general problem in the penitentiary system is that prisoners must pay for most services, either because of the prison legal norms or because of corrupt practices. For example, the ENPOL (INEGI, 2021b) accounts that 37.3% of women prisoners pay for having electronic gadgets, 32.8% for medicines, 27% for drinkable water, among other basic services and rights. The same source reports that 88.9% of payments for corruption are handed to the custodians, 36.3% to other prisoners, and 16% to technical staff. Yet, the practice is so normalized that only 3.4% of prisoners have complaint or denounced the problem. Regardless of whether charging services is due to corruption or legal norms, women (and men) deprived of their liberty and their families are the ones sustaining the penitentiary

system financially (Espinoza Nieto, interview January 31<sup>st</sup>, 2022). Contrary to what the Interamerican Court of Human Rights (2004) said about the extra responsibility of the State to guarantee the human rights of prisoners, the State transfers this burden to the families of the incarcerated.

The last general point before moving on to the Bangkok Rules categories is keeping in mind why the advancements have been so poor. According to Dr. Giacomello (interview February 7<sup>th</sup>, 2022), one is the scarce budget, which becomes even scarcer when considering the inefficiency in expenditures. The spent budget in 2020 for federal and local prisons was \$37,982,945,681, which is 1.4% less than that of 2019 (INEGI, 2021a). It is not enough to guarantee dignified conditions for the people deprived of their liberty, even if there are directors with the intention of doing so.

Dr. Giacomello comments that indeed there are some directors willing to improve the prisons they head, especially the centers for adolescents. Yet, without resources, they are prevented from making substantive changes. The same expert argues that unfortunately many of the directors, with good intentions or not, do not have the credentials nor the experience to occupy their post. Consequently, prisons are inadequately administered. Gelhorn (interview February 28<sup>th</sup>, 2022) adds that no government wants to invest in prison since it is considered to host the worst people, the ones who damaged the society and did not respect the social contract, the criminals.

Another issue that inhibits improvement is the paradigm under which prisons are conceived, which is reflected in the portfolio in which prisons operate. Dr. Giacomello considers that the fact that the penitentiary system is administered by the Secretary of

Security (as in many countries), leads to the prioritization of measures meant to contain and supervise the prison population, not to protect their human rights nor guarantee their reinsertion (interview February 7<sup>th</sup>, 2022). Finally, the expert adds that, regrettably, the protection of women's human rights is very low on the agenda of the penitentiary authorities. They will not focus on these goals when they have other serious issues like self-government inside the facilities.

Indeed, 36.7% of incarcerated people report having witnessed practices of self-government or co-government<sup>60</sup> between the detainees and the authorities. The percentage is bigger in some states: 61% in the State of Mexico, 60.2% in the City of Mexico, 52.3% in Queretaro, 48.7% in Sonora and 47.2% in Puebla (INEGI, 2021b). The prisons in the north have also reported this problem, as pointed out by a familiar of a prisoner held in Chihuahua: “the men sentenced for many years for drug-dealing are the rulers inside. Not the director, nor the commanders.” (cited in Documenta et al., 2016, p. 35). The CERESO No. 3 has also been signaled for the implication of the Cartel of Sinaloa in the government of the prison (Dávila, 2016).

### ***Maternity and reproductive rights***

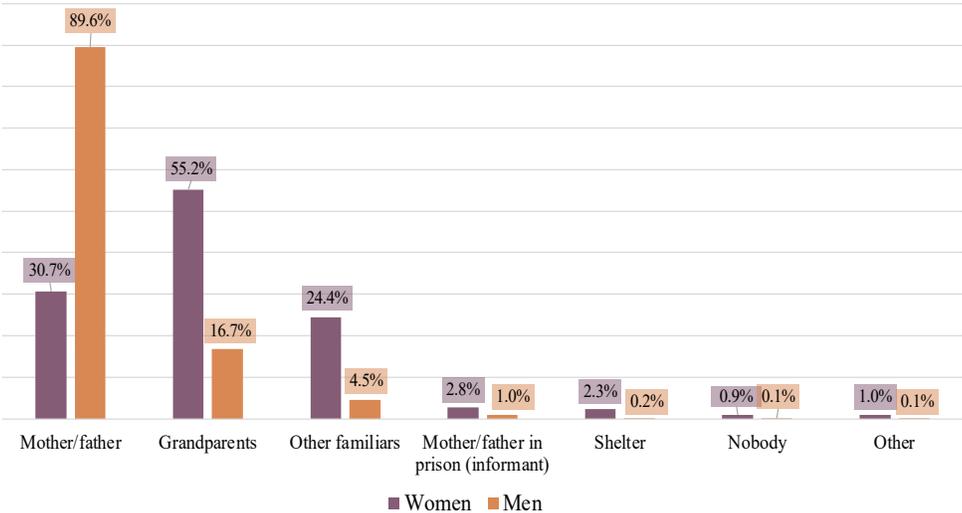
As discussed in previous chapters, despite that maternity is just one of many roles that women play and that essentializing women to their reproductive function can lead to patriarchal oppression, the topic matters for most female prisoners, as they are indeed mothers. The

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<sup>60</sup> Examples of activities of self-government and co-government according to the ENPOL are: management of cells' keys, fights for the control of the prison, cell assignment, cell supervision, charges for goods and services, violence against authorities, imposition of sanctions, protection of detainees, denial or allowance of participation in activities/use of phones/access to healthcare (INEGI, 2021b).

ENPOL (INEGI, 2021b) shows that 67.8% of women deprived of their liberty are mothers of under age children, and more than half of these mothers (53.5%) have between two or three children. The majority of male prisoners are fathers of minors too (60.3%), and often have between two or three children as well (49.2%).

**Figure 10. Persons responsible for the care of the children of people deprived of their liberty by sex**



**Source:** own elaboration with data from INEGI, 2021b.  
**Note:** Numbers do not add up to 100% because respondents could choose more than one answer.

However, both motherhood and parenthood of prisoners represent a greater burden for women, because the upbringing of the children often falls onto a female figure. This is depicted in Figure 10. An overwhelming majority of male prisoners (89.6%) report that their children are being taken care by the mother outside prison. In contrast, female prisoners rely on their children’s father in a significantly less proportion (30.7%), being mostly the grandparents who assume this care responsibility (55.2%), or other family members (24.4%). For the information analyzed in the theoretical framework, it is highly probable that the ones taking this role are the grandmothers, the aunts and female cousins, but the data is not disaggregated.

From Figure 10 it is also evident that mothers deprived of their liberty who raise their children inside prison constitute a small percentage. Specifically, 5.8% of the female prison population in Mexico are mothers living with their children inside prison (INEGI, 2021b). This is an interesting fact since a significant proportion of the Bangkok Rules concern children living inside prison and their mothers (Chapter 2). That means that many of the Rules do not concern 94.2% of women prisoners in Mexico. This does not imply that children living in prison and their mothers do not need to be protected due to their minority status (because under that logic women prisoners in general would not deserve protection either), but that more Rules that protect women who do not perform as mothers with children living in custody with them should be incorporated.

Still, the rights of imprisoned mothers and their children inside prison are not guaranteed. Only 13.3% of women report having received educational material for their children, 33.3% say the center provides their children with psychological attention, only 34% receive diapers, less than half (43.9%) have exclusive recreational play areas and access to prison nurseries (44.9%). The service that is received by the biggest percentage of child are vaccines (81.5%) and healthcare services (77.4%), although only 56.9% are provided with medicines (INEGI, 2021b).

Similarly, less than half have an exclusive area to sleep (48.5%) (2021b). The expert Gelhorn (interview February 28<sup>th</sup>, 2022) advocates for keeping imprisoned mothers with their children in a separate area, for she and the organization where she works, Reinserta, have witnessed different dynamics related with this issue that make reclusion even harder for the female population. The dynamics can go from something as basic as the fact that children

and babies wake up at nights and disturb the sleep of all the women prisoners in the cell and, understandably, those who do not have children (not all, though) are more probable to resent it.

Moreover, by keeping all women and their children together, they could manage to create an environment more suitable for them. As long as this is not implemented, 71.1% of the children are exposed to violent language (71.1%), psychoactive substances (19.5%), witnessed fights (15.9%) and riots (16%) (Reinserta, 2021). Another reason why Gelhorn (interview February 28<sup>th</sup>, 2022) suggests the separation between these two populations is because some women prisoners begrudge mothers living with their children inside prison for receiving what they view as *privileges*. This situation creates a state of constant tension that is exacerbating an already precarious situation of imprisonment.

Of course, this is not the case of every woman. Networks of support are also built between mothers with children inside prison, mothers whose children live outside and women who are not mothers. As Gelhorn puts it: “there are women who become like the auntie or the grandma. They support and accompany the mother in the upbringing of her children, with food and more.” (own translation, interview February 28<sup>th</sup>, 2022). Indeed, 34% of mothers with children living inside prison affirm that other women prisoners help them with the care of their children (INEGI, 2021b).

The idea that motherhood inside prison is a privilege has even developed into a way of resistance, humanization or survival for some women. According to a study conducted by Reinserta (2021), 70% of pregnant prisoners pointed out that their pregnancy started during imprisonment and, from them, 52.2% planned it. Although the motivations behind this are

not detailed in the study, Gelhorn's and Quiñonez Rivera's (interview February 28<sup>th</sup>, 2022) reflections offer a hint about this. They mention that some women prisoners resort to pregnancy in order to enjoy some of the basic rights they are denied as *regular* prisoners.

Of course, this information should not be used to judge those women's decision, but to condemn the penitentiary system that deprives them from their human rights to the point where they seek all kinds of survival measures. Furthermore, Quiñonez Rivera adds that other women get pregnant to have a company, someone to love and care, a purpose. It must be recalled that most imprisoned women received a basic education and lived in precarious conditions. Most of them did not receive sexual education and neither do they project the future impact of having a(more) child(ren), because they do not have a life project.

According to Gelhorn, this is one of the topics on which far more work needs to be done: "We need to work on awareness, sometimes more than the actual access to contraceptives. Because I can give you the contraceptive, but if there is no clear understanding of its value, of how you benefit from it, what guarantees it offers you, then you do not see the point of using it." (own translation, interview February 28<sup>th</sup>, 2022). Indeed, regardless of the availability of contraceptives inside prison, more than half (53.4%) of women deprived of their liberty do not ask for them (INEGI, 2021b). Women prisoners need to develop a life project for reintegration to actually work. They need to conceive a future to make decisions accordingly.

Regarding pregnant women, 11.7% of female prison population report having been pregnant during their imprisonment. Of them, 19.9% had an abortion and 9.4% is currently pregnant (INEGI, 2021b). There is no more information about women who aborted,

therefore, there needs to be research about whether they were natural or induced, the causes in case they were natural, the conditions if they were induced, the medical and psychological care they received during and after (if any), among many other inquiries to design policies to attend this affair.

Going back to the 11.7% who has been pregnant during their detention, the majority (82%) attended or have attended medical revisions. From those who did not or have not, 22% argue that they could not since the doctors of the center refuse to give them the service, 15.8% mention the authorities of the center say they did not have the adequate equipment, 14.7% affirms that there are no doctors in their center, 9.9% has been hindered by the authorities to do so (INEGI, 2021b). Moreover, almost the totality of women prisoners who have been pregnant (91.8%) were transported to a medical center or hospital to deliver, according to the study of Reinserta (2021). This is good news, although not as good as if the percentage was 100% or, better yet, if non-custodial sentences were given to pregnant women so that none was incarcerated.

The study of Reinserta (2021) reports that 30% of pregnant women were pregnant at the moment of detention. Some of them have other children, which reveals that care responsibilities did not dissuade judges from incarcerating them, as the Bangkok Rules demand. What is worse, not only are women denied the chance to arrange their care responsibilities before being held, a right protected under the Rules, but they are sometimes violently detained in front of their children. The study reports the story of Carmen to exemplify a tragic example of this. She had a 7-month pregnancy at the moment of detention, which took place in front of her children of 4, 6, and 8 years old, who were left alone in the

street when she was forced into the patrol car. She received beatings and electric shocks in her breasts and genital area, which induced her into premature labor. Her baby was born dead for viscera bursting and calcination. She got pregnant again during her imprisonment, but the lack of attention received, and her health record ended in another abortion (Reinserta, 2021, p. 63)

### ***Health***

About the advancements in hygiene and physical health, 72.7% of the total prison population (male and female) had a medical examination when entering prison. The percentage is lower for revisions throughout the imprisonment (41.7%). Specific to women, 41% had underwent a Pap Test in the last year, and 30.6% a test to detect breast cancer (INEGI, 2021b). These numbers show that efforts have been made to guarantee the right to having an initial medical examination and other tests during imprisonment, however, more needs to be done to cover the totality of women prisoners.

Moreover, 81.5% women deprived of their liberty have received medical services from the prison, 83.3% psychological services, and 71.1% dental services (INEGI, 2021b). Although these are relatively positive figures —especially the psychological services, which is in line the Bangkok Rules and is higher than men’s figure (78%)—, testimonies raise doubts about the quality of such services. In the words of a women held in Atlacholoaya:

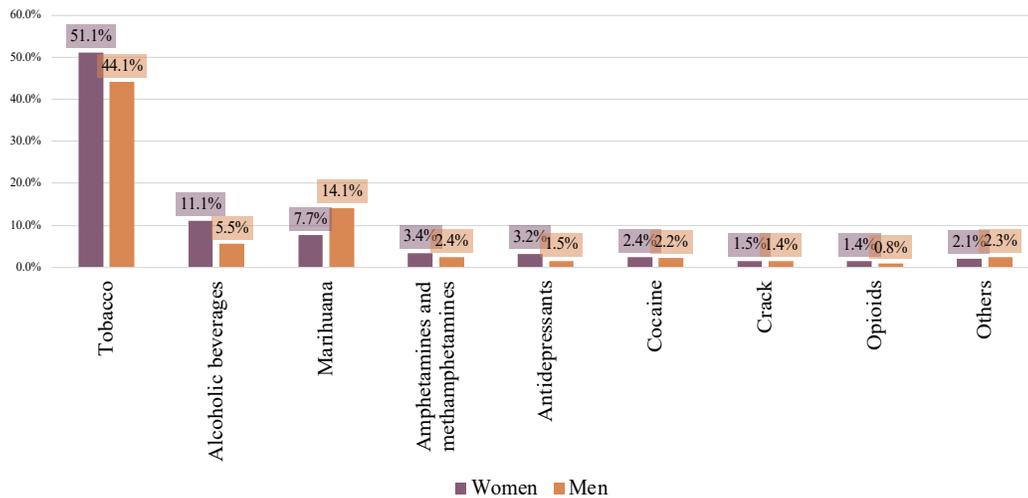
We are attended by a woman doctor who uses the professional license of a male doctor. She has never wanted to share her name, so we call her Doctor Heart. She barely comes and when she does, she tells us that she cannot give us medicines because there are not any. (...) I have been here for almost three years and to this day I have not received the medicines I need for an illness I have (own translation, INMUJERES & IMM, 2019, p. 127)

Just like this woman, 34.2% of women prisoners mention that they do not receive medication from the prison (INEGI, 2021b). Regarding hygiene, one of the key rights incorporated in the Bangkok Rules, the access to sanitary pads, is unfortunately only granted to 29.8% women prisoners. Likewise, only 23.8% receive products of personal hygiene (INEGI, 2021b).

Beyond this, Dr. Espinoza Nieto (interview January 31<sup>st</sup>, 2022) shared alarming information she has observed and analyzed in her fieldwork with twenty women held in Atlacholoaya. She studied how turning points, like being incarcerated, affected life trajectories (familiar trajectory, labor trajectory, intimate relations trajectory, etc.) and the impact of this in life expectancy of released women. The inquiry came from findings in Australia and the United States about the dramatic decrease of life expectancy of women after being held prisoner: two and ten years, respectively. Although she is still working on her research, for the moment she has recorded that three of the twenty women she worked with in Atlacholoaya have died after being released, due to health problems that were exacerbated in detention. Two of them were indigenous, suggesting that the intersection of racialization plays a role in the reduction of life expectancy that Dr. Espinoza Nieto is studying.

Concerning drug-dependency issues, another recurrent theme in the Bangkok Rules, it is interesting to note that indeed a bigger proportion of women consume psychotropic substances than men (Figure 11). The percentage of women who consume tobacco, alcohol and amphetamines/methamphetamines is bigger than the percentage of men. The same goes for antidepressants, which doubles the percentage. Regrettably, 68.8% of federal prisons present irregularities in the programs of voluntary detoxification and consumption prevention, as referenced before (CNDH, 2021).

**Figure 11. Psychotropic substances consumed by the prison population in the last twelve months by sex**



Source: own elaboration with data from INEGI, 2021b.

Testimonies recorded in a report by Equis (2020) illustrate that women get in touch with new and harder drugs inside prison. This was the case of several women interviewed: “Paola, for example, who drank alcohol, learnt to use cocaine in prison. Viviana and Patricia recount having known several drugs for the first time there. Graciela knew marihuana and cocaine in reclusion for the first time.” (own translation, Equis, 2020, p. 24). One can deduct

from this that the Bangkok Rules devoted to the prevention and treatment of drug consumption are not being accomplished.

### ***Violence and non-discrimination***

A serious proportion of women and men suffered an act of aggression throughout the detention process, according to the ENPOL (INEGI, 2021b). Referring to women, 48% report that the police or authority used force to subdue her during detention and 35% suffered a minor injury. After detention almost half of the women (45.7%) were uncommunicated or isolated, 39.1% were threatened with pressing false charges against them, and in 29.9% of cases the police or authority threatened to damage their family. The proportion of men who received the same threat was 21.2%. This depicts how these aggressions are gendered: the authorities use this threat more with those who are *obliged* to care for their family, expecting it to be a compelling threat.

Another example of gendered violence evidenced in the ENPOL (INEGI, 2021b) is the fact that the only physical aggressions suffered after detention in which the proportion of women is bigger than that of men are sexual aggression (15.5% of women vs. 3.2% of men) and rape (4.8% of women vs. 1.9% of men).<sup>61</sup> Men suffered more physical aggressions that could be labelled as masculine: kicks, punches, beatings with objects, electric shocks, among others. This does not mean, however, that women were exempt from those aggressions. Indeed, 29.8% was kicked and/or punched too. The same happened during their stay at the Public Ministry. The proportion of men who suffered physical violence is higher in all the

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<sup>61</sup> A bigger proportion of women also suffered “other aggressions.” (INEGI, 2021b).

categories, except for two: sexual aggression (11% of women vs. 2.3% of men) and rape (3.8% vs. 1.5%). Another important aggression suffered more by women than men is having been pressured or threatened to plead guilty (29% of women who pleaded guilty vs. 17.8% of men who pleaded guilty). In other words, more innocent women (in proportion) than men are coerced to declare a crime they did not commit.

The stories behind these numbers are terrible. Equis (2018) tells several of them, here is only one. Raquel worked in a bar and one night consented to have sexual relations with a client in exchange of money. Once in the motel, agents from the Navy entered violently and took the man with whom she was. She was tortured by these agents: tied up and with the head covered, more than thirty of them groped her whole body while they offended her for having a sexual encounter with her client and for being in her menstrual period. She was also punched, thrown ice water and forced to pose in different ways while they took photos. Now she has been more than four years in pre-trial detention for drug-dealing and arms possession.

Her story brings together several patriarchal violences denounced throughout this thesis: sexual abuse, judgements for not being a *good* and *pure* woman (having a sexual life and menstruate), criminalization for drug-related punitive laws and operations, and overuse of pre-trial detention. Needless to say that none of the human rights mentioned in the Bangkok Rules was respected in her case.

Violence also comes from other prisoners inside the centers. In mixed prisons, prostitution is a common practice in which both the prisoners and authorities collaborate. For instance, male prisoners pay between \$900-\$1,000 pesos to have female prisoners taken to the men's area in the CERESO no. 3. Some women consent to this, others are forced, and

others do it to pay internal or external debts, which is of course a form of coercion and violence (Documenta et al., 2016).

Another theme of the Bangkok Rules categorized as part of violence and non-discrimination was prison staff. The Rules state that women prisoners must be custodied by female prison staff, which experts Gelhorn and Quiñonez Rivera have confirmed from their visits to prison, saying that you see a majority of female custodians (interview February 28<sup>th</sup>, 2022). The INEGI (2021a) reports that 25.1% of the heads of local penitentiary centers are women, 37.6% of local prison staff are women, and 55.1% of federal prison staff are women too. However, it does not specify how are they distributed between male, female, and mixed centers.

Nevertheless, experts Gelhorn and Quiñonez Rivera explain that being a woman does not exempt prison staff from exercising patriarchal violences against women deprived of their liberty. Although some of them develop certain empathy for the detainees due to common experiences (from menstrual cramps to suffering domestic violence), others have internalized patriarchal discourses about the *good* and *bad* woman, which leads them to judge the prisoners. Moreover, some others adopt a masculine posture when performing their role of custody and supervision, for these are indeed very masculinized jobs. But these varies according to the posts, the person and the relation they develop with each prisoner.

This is why the Bangkok Rules insist in the importance of training all prison staff on their content. Unfortunately, there is no official data about the topics on which they are trained, nor how and how frequently do they receive such trainings. However, all the experts interviewed for this research mentioned that, although they do not possess reliable

information about it, they doubt that prison staff receive any training on the Bangkok Rules. In case they did, at least it is not effective because the results are not tangible.

The only expert that confirmed that prison staff receive training on a related issue was Morales Sotelo (interview February 28<sup>th</sup>, 2022), because the association where she works, Casa de las Muñecas Tiresias, offers this service, especially in Mexico City. Their trainings go further than the Bangkok Rules do, for they are intended to sensitize prison staff on LGBTQIA+ matters. Still, she points out that the organization and resources for these trainings are very limited. They have managed to offer their trainings because of their insistence, but there is still much more work to do, and the authorities do not always have the will.

Another relevant finding concerning prison staff is the violence they also suffer due to their precarious work. As documented by Azaola and Pérez Correa (2017), they feel as “(...) we were expendable, disposable” as “the backyard of the federal system” (p. 44). They denounce the violation of their labor rights, since they are not paid enough, they are constantly transferred, and they do not have grown opportunities as they remain in the same low-level posts for decades. Moreover, they are constantly discriminated by the society, who takes every one of them as corrupted people, which is why they will not get hired in other jobs when they try (Azaola & Pérez Correa, 2017).

Something similar happens to public defenders who receive five to six cases every day, when particular defenders have two or three in a month. Besides, very few of them receive labor incentives (e.g., only 20% get promoted) and benefits (e.g., only 36% receive retirement support) (Intersecta & Animal Político, 2021a). Of course, this does not compensate for the

thousands of innocent people and women who are deprived of their liberty due to their public defender's negligence. Neither does it justify the violence exercised by some prison staff towards the incarcerated. Nevertheless, recognizing their humanity and the violences that intersect them too is necessary to protect their own human rights and the human rights of the people deprived of their liberty they attend.

Economic violence is very common in an institution that criminalizes poverty. This is seen in all the previous data about the services that prisoners need to pay, when they should be granted by the State. Besides, the ENPOL (INEGI, 2021b) shows that among the discriminations suffered by women prisoners, the second most frequent is discrimination for their economic status (31.1%). The first one is due to the crime they are accused for (36.5%). Women prisoners are also discriminated for their physical aspect (20.9%) and illnesses (14.4%). In all of those categories, the proportion of women discriminated is bigger than men. The gender dimension of this is especially interesting in the discrimination for the crime they are accused for, since it is congruent with the literature reviewed in the first chapter, in the sense that women are more condemned for breaking the law.

Another form of discrimination suffered more by women than men and whose proportional difference is bigger, is for sexual orientation (13.5% women vs. 2.5% men) and gender identity (women 5.8% vs. 2.2% men). Before exploring more about this group, it is important to mention that discriminatory acts were reported to come specially from other prisoners (82.3%), then from custodians (30%) and technical staff (9.1%; psychologists, criminologists, doctors, etc.) (INEGI, 2021b).

Regarding the LGBTQIA+ community, the ENPOL (INEGI, 2021b) records that 0.3% of the prison population are transmen, 0.2% are transwomen, 2.7% are bisexual, and 1.1% are homosexual. However, Castro & Santos, (2020) mention that the LGBTQIA+ community accounts for more than 30% in the prisons in Mexico City, probably because many members of the community live in the capital as its local laws guarantee them more rights. Such rights are also extended to prisoners. For instance, prisons in Mexico City offer specialized healthcare for transwomen, including hormone treatment (Castro & Santos, 2020). Although access is not always guaranteed owing to the lack of institutionalization of the practices and the fact that the permission is subject to a council approval, which is not always granted.

Still, this is a huge advantage compared to the situation in the penitentiary systems of other states that deny transgender people their right to identity. The expert Morales Sotelo regrets that in Mexico there are “second-class citizens” according to the state where you live in (interview February 28<sup>th</sup>, 2022). There are thirteen federal entities that do not recognize a right as basic as the right to an identity for transgender people, thus, it is impossible to talk about their rights inside prison. In contrast, with the laws in Mexico City and their relative greater sensitivity, a transwoman has even won a judicial resolution that exhorts the penitentiary authorities to take the appropriate measures to guarantee her dignity (Tercer Tribunal Colegiado en Materias Penales y Administrativas del Octavo Circuito, 2018).

Yet, even in the states that do recognize it, not all transgender people have had access to the legal process to match their official documentation with their gender identity. Consequently, if they are incarcerated, they will still be imprisoned in an area according to their genitals. There they suffer different violences, from being shaved and denied to use

make-up—which has an enormous significance for some, as these are expressions of their identity—to being raped as a tool of humiliation (Morales Sotelo, interview February 28<sup>th</sup>, 2022). These violences could be behind the suicide attempts of transwomen in Mexican prisons (Castro & Santos, 2020).

After asking Morales Sotelo about the fact that the Bangkok Rules do not mention transwomen, she replied that this absence is serious in the sense that it invisibilizes them, for “what is not named, does not exist.” (interview February 28<sup>th</sup>, 2022). She argues that if the instrument includes other historically marginalized groups but omits the LGBTQIA+ community, then there was not enough diversity in the process of its creation. There was no one who raised the voice for their rights. She also reflected about non-binary people, who she thinks encounter even more challenges in binary institutions, like prison.

People belonging to an indigenous group constitute 3.3% of the prison population (INEGI, 2021a), but these data is not disaggregated. The three groups with more population are Nahuatl (16.8%), Zapoteco (15.4%) and Maya (7.3%). One of the most important violences executed against these communities in the penitentiary system, and the legal system in general, concerns language. Dr. Romero López emphasizes that the right to a translator for legal processes is a way to compensate the State’s failure for being monolingual (everything is done in Spanish). In that sense, it is not the indigenous person who is wrong for being monolingual (indigenous language speaker), but the State. It is the State’s obligation to be plurilingual because it recognizes 68 indigenous languages as national languages, besides Spanish, Mexican Sign Language and Mayan Sign Language. However, there are only 25 bilingual public defenders, and 1,649 translators accredited by the National Institute of

Indigenous Languages in all the country (Equis et al., 2019). This problem is exacerbated inside prison, where in order to denounce a violation of human rights to the CNDH, you need to do so through a written letter in Spanish (Espinoza Nieto, interview January 31<sup>st</sup>, 2022).

Another violence suffered by women deprived of their liberty who belong to an indigenous group is related with the models of collective rearing that characterizes some indigenous communities. As it has been mentioned before, women who do not belong to an indigenous group, their families and the social tissue of which they form part are also severely impaired from incarceration. Nevertheless, Dr. Romero López argues that women who belong to an indigenous group experiment this social disruption in a different way, for the caretaking roles and the life in couple with their husbands is extremely important for these women and their communities. The breakup of these bonds and their absence in the collective rearing of their community is a huge burden for them.

At the same time, the expert mentioned that obstetric violence is particularly cruel with these women, for it is founded on the violent discourse that poverty is tackled by damaging their uterus and preventing them from reproducing. Accordingly, the way in which women who belong to an indigenous group experience maternity inside prison might involve more oppressive and violent dynamics than the already brutal experiences of women who are not identified as part of such communities. More research needs to be carried out to analyze and understand those differentiated dynamics.

On the other hand, the book *Under the Shade of the Guamúchil* (Hernández Castillo, 2010) contains the story of imprisoned women who belong to an indigenous women told by themselves or through the pen of a fellow female prisoner able to read and write. Besides the

importance of this exercise as collective therapy and a form of resistance, the testimonies depict the multiple and intersecting violences lived by these women, which somehow ended in their incarceration. During their childhood most of them lived domestic violence by their fathers who beat their mothers, or by their relatives who raped them. They married before turning majority age, stopped attending school and became mothers very young and of multiple children (up to 15 children). Many of them have not heard from their children since their detention. These women hope their husbands do not beat them as they used to beat the women. After all that, the State criminalized them for crimes they did not commit or were not aware of their illegal nature, denied them their right to a fair trial, and deprives them for basic human rights now inside the prison.

### ***Public policy and transition***

To begin with reintegration and contact with community, an advance can be seen in the fact that since 2016 the LNEP demands penitentiary centers to design activities for social reintegration. However, a study conducted by Equis (2021b) in four female prisons in Morelos, Oaxaca and Mexico City,<sup>62</sup> found that the activities are almost the same than those offered before the LNEP, meaning that they do not reflect the new paradigm of social reintegration and human rights adopted by such law. Moreover, the activities are highly stereotyped (cooking, jewelry, embroidery and weaving), except for some interesting programs in Oaxaca about electricity, community gardens and organic chicken coops.

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<sup>62</sup> Centro Federal de Readaptación Social Núm. 16 in Morelos; Centro Penitenciario Femenil Tanivet in Oaxaca; el Centro Femenil de Readaptación Social Tepepan in Mexico City; and Centro Femenil de Readaptación Social Santa Martha Acatitla in Mexico City.

Besides, experts Gelhorn and Quiñonez Rivera (interview February 28<sup>th</sup>, 2022) point out that not all women prisoners have access to those trainings or labor activities, and the requirements to do so vary according to the center. The ENPOL (INEGI, 2021b) reports that 65.8% of women performed a labor activity in the penitentiary center (in contrast with 71.6% of men) and the majority of women prisoners (60.9%) are worried about their labor expectancies after being released. Moreover, the CNDH (2015) denounces the conditions in which women are required to conduct such activities (overcrowding, lack of water, food and insalubrity), evidencing the lack of congruence between the activities they plan and the material capabilities to carry them out.

About the right to education, only 22.2% of the total prison population was registered in an educational program. The majority of women who are not registered owe it to their need to work or their financial problems (22.2%),<sup>63</sup> lack of documents (19.7%) and lack of programs for their education level (16.6%) (INEGI, 2021b). This is serious, for most imprisoned women are not receiving an education that is likely to guarantee a better reinsertion due to economic reasons (worsened by being inside prison) and because the penitentiary authorities do not make the programs accessible (document requirements and appropriate levels).

Regarding post-penitentiary services, Mexico City is the only entity that has an Institute of the Social Reintegration. Yet, many women report having difficulties to access their services due to administrative issues. For instance, the services are denied if they were

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<sup>63</sup> The 22.2% corresponds to the category “others”, which includes these two reasons and others such as Covid-19.

incarcerated outside Mexico City, in spite of having lived there when detained (Intersecta & Animal Político, 2021b). Moreover, in 2018 only sixteen federal entities registered a post-penitentiary program meant to support social reintegration after release (2021b). Many of them involve the creation of jobs board, others include periodic advice or assistance, and follow-up to addiction programs. Few of them consider the creation of a saving fund, and none contain shelters for the released who have nowhere to go to. None of these programs have a gender perspective that take into account the needs of women, and even less an intersectional perspective that contemplates marginalized groups.

About the contact with civil society, Dr. Giacomello argues that this is an actor with the potential of being an agent of change (interview February 7<sup>th</sup>, 2022). She mentions that depending on how active and aware civil society is, they can pressure the State to open up the prisons to participate in activities and in the local economies. This is seen in the CERESO Santa Marta Acatlitla in Mexico City, where multiple NGOs are always present to help women access their human rights.

Two of such NGOs are the Casa de Las Muñecas Tiresias A.C. and Reinserta. The first is concerned with LGBTQIA+ community's rights, and the second with children's and juvenile's rights (and thus, their mothers). When asked if they had encountered resistance from the authorities, the people of Reinserta answered that bureaucracy is always an issue, but in general terms they manage to achieve their practical goals (e.g. installing "bebetecas", conducting training about proper nutrition and other care skills, designating maternity areas, etc.). Similarly, Morales Sotelo from Casa de Las Muñecas Tiresias A.C. recognized, to her amusement, that she and her team always feel very welcomed in the penitentiary centers. She

attributes this to the important role they play for the penitentiary system. After all, they are there to help authorities accomplish their domestic and international compromises (like the Bangkok Rules) and the prisoners are always very thankful for their services.

Regarding non-custodial measures, Article 144 of the LNEP considers the substitution of incarceration for other penalty in order to guarantee the principle of the best interests of the child, when the accused has children or a disability and does not represent a danger to society, for age- or illness-related reasons, or when then judge approves a special program (addiction treatment, restitutive justice, community service, etc.). However, the interviewed experts agreed that prison keeps being the overwhelmingly principal penalty.

Dr. Giacomello (interview February 7<sup>th</sup>, 2022) notes that we should remain critical to how the non-custodial measures are implemented, for they can trigger a process called “net-widening”. This refers to the situation in which the surveillance and punitive system is widened due to the incorporation of new tools. Before the existence of less drastic measures, some people would have been left in liberty as imprisonment was not proportional to their fault. But now, they will apply a less harsh measure instead of letting them free.

Moreover, non-custodial measures can be very restrictive too. This is the case of house arrest, which is considered for pregnant women under Article 166 of the CNPP. However, Dr. Giacomello emphasizes that this is very dangerous, for pregnant women could always have a health emergency that needs to be attended outside home. Furthermore, the home is not always a safe place for women, as evidenced during the Covid-19 pandemic. She also criticizes measures like electric monitoring, because that entails the sharing of highly

sensitive information (the real location of prisoners) with private companies. Without mentioning that the monitoring gadget is visible and, thus, very stigmatizing.

Finally, about research, evaluation and public awareness, a huge advancement is the fact that the ENPOL included a vast quantity of sex disaggregated data for the first time in 2021. However, intersectional data is still lacking. NGOs often fill that void by conducting their own research, which are highly valuable due to their mixed approach that let prisoners tell their stories. The implication of civil organizations can be directly link with the usefulness of the Bangkok Rules, for the experts interviewed who belong to an NGO confirm that they use these kinds of instruments to press the State in their advocacy.

What is more, these are the legal framework that justifies the importance of their work and keeps authorities from denying their participation. More importantly, argued Gelhorn (interview February 28<sup>th</sup>, 2022), when the prisoners have access to these documents (often through NGOs, not through the State), they get to know their rights, become more committed to their legal defense and denounce the treatment they are given inside prison.

## **Conclusion**

This chapter provided information about women prisoner's situation in Mexico and analyzed it with respect to the Bangkok Rules. It started by analyzing that although Mexico is party to several relevant international treaties, it is not guaranteeing the rights in them protected and important actors like the CEDAW Committee and the IACHR have condemned this situation. Similarly, the country underwent a series of reforms in 2008, 2011 and 2016 which rendered criminal law and the penitentiary system more in line with social integration and human rights.

An important product of those reforms was the LNEP. The Bangkok Rules could have influenced Article 10 of the LNEP, which contemplates women's rights. Although an important step, the law fails to mainstream gender in the entire document, and it limits women to their reproductive function. However, the five years that followed the LNEP publication did see a downward trend on incarceration. Unfortunately, the trend was halted by the reform of Constitutional Article 19, which broadened the use of pre-trial detention. This is a serious issue in Mexican criminal law, totally contrary to the human rights approach it allegedly sustains. There are certain initiatives that seem to go in the direction of respecting human rights, like the Amnesty Law, but overall progressive promises are not materialized. This is due to the absence of an organic and holistic vision of what is intended with the penitentiary system.

Consequently, women in Mexican prisons still live in deplorable conditions that violate their human rights. Official statistics show some advancements, like the percentage of pregnant women who receive healthcare or the women who get psychological care. But such numbers do not guarantee that the attention that they receive is good or incorporates a gender perspective. Furthermore, both statistics and testimonies demonstrate that the issue of violence throughout the detention process and inside prison is severe. Although sexual violence represents a small percentage of the aggressions suffered, women experience these aggressions in a higher proportion than men.

Finally, it is important to highlight that very few advances have been done in the field of social reintegration. The statistics regarding the proportion of women receive education inside prison is disgraceful, especially when considering that most of them have a basic education. Furthermore, many of the programs that kept women in contact with the exterior

community, mostly NGOs, were halted due to the pandemic. These are the areas that should be prioritize, but both the Bangkok Rules and the State of Mexico neglect them the most.

## **Final Conclusions**

The present research was guided by the question: to what extent have the Bangkok Rules provided a successful framework to guarantee the human rights of women offenders and to reform criminal justice system from a gender perspective in Mexico? After an analysis of the information presented, the answer to this question is that there are both successes and failures concerning human rights protection and that it has failed to influence substantive reform of the criminal justice system in Mexico.

With respect to human rights protection, more failures than successes could be identified. To start with the latter, the biggest success of the Bangkok Rules in Mexico has been the involvement of NGOs and the research that they have developed. Indeed, the programs and projects that they carry out in specific penitentiary centers make a difference in the lives of the women deprived of their liberty. Of course, their efforts cannot be directly attributed to the Rules, however, their usefulness lie in the fact that it adds to the legal framework that NGOs employ to legitimize their actions. Moreover, a thesis like this one could not have been carried out without the research conducted by the NGOs, which is consistent with one of the Rules' objectives.

Along the same lines, the Bangkok Rules' success in the protection of human rights can be observed in symbolic and practical terms. First, their existence has merit because the needs and rights of women prisoners as a marginalized population are on the international agenda. Evidently this is not enough, especially because such needs and rights are particularly limited to mothers and children inside prison, and because of the stereotyped subjectivities of women that they reproduce (cis-hetero, fragile, victims, caretakers). Nevertheless, the

construction of this image corresponds to the patriarchal reality we live in. The statistics show that most women are indeed mothers, that they suffer from mental health problems, and that they have been victims of violence. On the one hand, the reinforcement of these social constructions is counterproductive for a more profound feminist transformation. On the other hand, the acknowledgement of these characteristics, especially motherhood, allows the creation of pragmatic solutions for the everyday problems that these women encounter behind bars.

Still, even after these reflections, the disproportional attention to children living inside prison with their mothers should be questioned. Not only because most women's children live outside the penitentiary centers, but because they deserve an international instrument on their own. Child's development at an early age is extremely important and should be recognized independently from the role of women as mothers. Certainly, both issues are related, however, an instrument devoted to the protection of women prisoners' rights cannot have twenty-four rules devoted to children's rights (as revealed in Chapter 2) and none concerning the right to contraceptives inside prison. This fact shows the Rules bias to protect women because of their value as caretakers, instead of their value as humans.

Despite a few successes in specific prison facilities, and thanks to specific NGO's programs, Mexico has failed to incorporate the Bangkok Rules to protect imprisoned women in Mexico. Numbers show that the female prison population keeps increasing and that basic services are not being provided by the State. In fact, the violation of human rights affects not only the women inside the centers, but the families that must carry the burden of maintaining an incarcerated relative and the rest of the family. Moreover, the stories and testimonies

reported make the menstrual rights' debate appear very distant in a criminal *justice* system where innocent women are tortured to make them confess a crime they did not commit. In other words, if the more elemental human rights are not being guaranteed for people deprived of their liberty in Mexico, women's rights are unfortunately too far behind on the agenda.

With respect to the failure to reform the criminal justice system, there actually was a reform inspired by the Bangkok Rules in Mexico: the Amnesty Law of 2020. However, so far the results of this law demonstrate that, although symbolically relevant, very few women (and people in general) have been released to consider it a success. Moreover, the same structural reasons that disproportionally criminalized women before the Bangkok Rules are still present today: pre-trial detention and drug-related punitive policies. Now, new issues have been added: privatization of prisons and foreign certifications that implement high-security measures contrary to human rights. Hence, not only has the carceral system not been challenged in these last twelve years, but it has been strengthened.

Nevertheless, one could question whether the Bangkok Rules could reform the criminal system of a country, not to mention of the world, since they never intended to do so. Indeed, as most international instruments, they recognized their limited potential since their inception, by disclaiming that they are global aspirations meant to be adapted to each State's reality. As seen in the case of Mexico, its reality implies that the protection of human rights in Article 1 of the CPEUM coexists with pre-trial detention established in Article 19. Accordingly, in Mexico's reality the State can consent to the Bangkok Rules and sign other multiple human right treaties on women's rights, at the same time that 10 women are killed each day (UN Women et al., 2020).

Maybe this is not to blame on the Bangkok Rules and international law, which scope is limited by the wording of their own text; or maybe not. Despite the acknowledgement that international consent impedes international law from being more ambitious, I sustain that the Bangkok Rules could have been (and still can, if revised). I also sustain this claim in light of the debate of giving priority to pragmatic solutions or transformative aspirations. Here is the explanation.

When I asked the interviewed experts about the potential of the Bangkok Rules to bring social justice to women prisoners, they told me that if they were fully implemented, they would bring important improvements for their living conditions. Certainly, this is true in the sense that providing them appropriate medicines could make a difference between living or dying. Yet, I think that the Rules as they are right now are not enough. One could argue that discussing radical transformations is too abstract when you have tangible problems like women being forced into prostitution in prison facilities. Well, I argue that the reason why you have forced prostitution inside prison is due to patriarchal structures (that the Bangkok Rules do not address) which are not abstract nor distant, but lived in the sexualization of women bodies that make them *objects* of desire. As long as the Rules do not address those structures, the problem will persist. Of course, I am not arguing that short-term solutions to help those women should not be implemented while turning down the cited structures, as that would take years and even generations. However, efforts should be made in both dimensions at the same time.

The Rules could make contributions in both fronts by paying more attention to themes concerning reintegration, research for public policies and public awareness. Designing public

policies aimed to prevent crime, to restore the violated rights and to reintegrate former prisoners are an important step to shift the focus from punishment to justice. Changing the discourse from *fragile* women unfit for imprisonment to *empowered* agents entitled to human rights not compatible with the carceral paradigm, shows that the issue are not women's needs, but punitive policies and the penitentiary system. This begins with at least with writing in their Preliminary Observations that they are part of "the movement towards depenalization and decriminalization", as the Tokyo Rules do. And follows with education campaigns directed to the whole society (prisoners included) about people deprived of their liberty's rights, the (mediocre) results of the penitentiary system to bring security and reintegration, and alternatives to this penalty. If international law is to be a relevant tool for tackling global challenges, it is imperative for it to be to be bolder.

### **Practical and theoretical implications**

Among the practical implications of this thesis is the contribution it makes to visibilize the violences that affect marginalized groups like women deprived of their liberty. It does so under the frame of the Bangkok Rules, meaning that it evaluates the advancements and failures of this instrument. This is with the hope that the analysis may contribute to their better application and, more ambitiously, reform of the criminal justice system. If the criticisms made to the criminal system are seriously considered, it would have profound implications for Mexico's justice system and the country's insecurity. The reason of this is that criminal systems' final objective is to guarantee safe communities. Mexico is failing at this goal and the attempt of solving the issue by widening the carceral system only worsens

the situation of insecurity, violates the rights of already vulnerabilized groups, and prevents the country from meeting its international commitments.

Regarding the theoretical implications, the thesis adds to the literature on gender and global governance from a critical perspective, relying on reflections from feminist legal studies and feminist critical criminology. It questions the capability of international law to challenge patriarchal structures such as the penitentiary system and signals its role as reproducer of stereotyped subjectivities of women prisoners.

### **Limitations and suggestions for further research**

Recalling the limitations stated in the introduction, the most important absences in this thesis were LGBTQIA+ women deprived of their liberty and the perspective of penitentiary staff and authorities. In that respect, further research on women prisoners in Mexico should focus on the differentiated violences that intersect the LGBTQIA+ community, and to what extent the binary approach of international law deepens such violences.

Furthermore, research on the perspective of criminal system functionalities and penitentiary workers should be conducted in order to know how much they know about the Bangkok Rules and what they are doing to implement them. The importance of this is that here it is concluded that there is not even a significant interest to comply with the Rules, for that is the impression that emanates from current prison conditions. However, maybe it is not a matter of disinterest from authorities and functionalities, but of problems in the design of projects that seek to protect human rights, or political communication inefficiency, or other issues. These problems would be tackled in a different way than the lack of interest, and therefore, it is necessary to find out which one is it to solve it.

Finally, more research on alternatives to incarceration is needed. As shown in this thesis, the prison system is not effective for security objectives, and it is contrary to the protection of human rights. However, the question still remains of what measures could replace them. Indeed, from the research conducted, it was clear that all the authors thought about non-custodial measures, or even abolitionism, but there is not much evidence that measure the efficiency of these proposals, how to improve them and how to adapt them to different realities.

## Annexes

### Annex 1. List of experts interviewed

All the interviewed consented to the publication of their names, post/work, and organization/university.

| Group                | Name                         | Post / work   | Organization / University   | Date of the interview            |
|----------------------|------------------------------|---|---|----------------------------------|
| Scholar              | Kira Ciofalo Lagos           | Full-time professor and researcher on human rights, the protection of rights in the legislative, judicial and public policy agencies.   | Universidad de las Américas Puebla (UDLAP)  | January 28 <sup>th</sup> , 2022  |
| Scholar and activist | Lucía Espinoza Nieto         | Professor, researcher and activist on life cycles and women deprived of their liberty.  | Universidad Autónoma del Estado de México (UAMEX), editorial collective Hermanas en la Sombra, Feminist Anticarceral Network. | January 31 <sup>st</sup> , 2022  |
| Scholar              | Laura Elena Romero López     | Full-time professor and researcher on indigenous communities, disability and childhood in indigenous communities, indigenous population deprived of their liberty.                | Universidad de las Américas Puebla (UDLAP)  | February 7 <sup>th</sup> , 2022  |
| Scholar              | Corina Giacomello            | Consultant and full-time professor and researcher on management and enforcement of justice, gender theories, penitentiary system, alternatives to imprisonment and drug policies. | Universidad Autónoma de Chiapas (UNACH), Equis Justicia para las Mujeres A.C.   | February 7 <sup>th</sup> , 2022  |
| NGO                  | Ytzel Maya Jiménez           | Feminist activist and official of investigation in CEA Justicia Social  | Centro de Estudios y Acción por la Justicia A.C.  | February 18 <sup>th</sup> , 2022 |
| NGO                  | Ana Gabriela Quiñonez Rivera | Coordinator of monitoring and evaluation in the area of childhood and prison in Reinserta un Mexicano A.C.  | Reinserta un Mexicano A.C.  | February 28 <sup>th</sup> , 2022 |

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|-----|-----------------------------|--|-----------------------------------|----------------------------------|
| NGO | Magali Rocio Gelhorn        | Lawyer specialist in criminal law. Activist for the rights of institutionalized children and youth. Director of Reinserta Movil.   | Reinserta un Mexicano A.C.        | February 28 <sup>th</sup> , 2022 |
| NGO | Xchell Josué Morales Sotelo | Transactivist for the rights of people belonging to the LGBTQIA+ community who have lived in a situation of violence. Founder and member of the advisory board of Yaaj México A.C. Coordinator of the Casa Hogar "Catherine Danielle Márquez Félix" from Casa de Las Muñecas Tiresias A.C. | Casa de Las Muñecas Tiresias A.C. | March 3 <sup>rd</sup> , 2022     |

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## **Annex 2. Guiding questions for the interviews**

Given that the interviews followed a general guide approach, not all the questions here enlisted were posed to every expert. Many questions were asked as follow-ups and according to the answers and, consequently, are not presented here. Since the interviews were conducted in Spanish, the questions are exposed in the same language.

### ***Avances perspectiva legal***

- Dado que las Reglas de Bangkok (RB) no se consideran un tratado, ¿es legalmente vinculante para México en virtud del artículo 1º constitucional?
- ¿México ha hecho alguna reforma legislativa, penal, institucional o implementado alguna política para cumplir con las Reglas de Bangkok?
- En caso de sí haber tomado acciones concretas, ¿qué tan exitosas ha sido la implementación éstas?
- ¿Qué aspectos deberían tomarse en cuenta para la reinserción desde un enfoque de derechos humanos? ¿Las RB los toma en cuenta?
- ¿Las legislaciones vigentes garantizan el derecho a la reinserción?
- Las RB mencionan medidas no privativas de la libertad, ¿qué avance ha hecho México al respecto?

- ¿Otros países han hecho cambios sustantivos?

#### ***Avances perspectiva de ONGs***

- ¿En su organización ocupan las Reglas de Bangkok como referencia o para algún otro objetivo?
- ¿Las personas que trabajan en la cárcel (autoridades y trabajadores/as) con las que han tenido contacto conocen las Reglas de Bangkok? ¿Saben si reciben capacitaciones al respecto?
- ¿Han observado alguna mejora en la protección de los derechos humanos de las mujeres privadas de su libertad del 2011 a la fecha?
- Las RB mencionan incluyen medidas no privativas de la libertad, ¿qué avance ha tenido México al respecto?
- ¿Hay algún país que haya tenido más éxito?

#### ***Alcance de las Reglas de Bangkok (RB)***

- ¿A qué mujeres buscan proteger las RB? ¿a qué mujeres se está excluyendo?
  - ¿Qué pasa con las “mujeres malas” (las que sí son peligrosas, las que no son madres, etc.)?
- Evaluando el diseño de las RB y suponiendo que se implementaran completamente, ¿cuál sería su alcance? ¿Qué tan transformadoras se consideran?
  - ¿Se pueden proteger realmente los derechos de las mujeres (y de las personas) en una institución como la cárcel?
  - ¿Las medidas no privativas de la libertad que sugiere podrían suponer una reforma al sistema carcelario?
- ¿Corresponde al derecho internacional reformar sustantivamente el sistema punitivo-carcelario? ¿es pedirle demasiado?
- ¿Deberían reformarse las RB, ser más ambiciosas? ¿En qué sentido?

#### ***Perspectiva mujeres que pertenecen a poblaciones indígenas***

- ¿De qué manera se diferencia la experiencia de las mujeres indígenas privadas de la libertad de las mujeres no indígenas? Desde las primeras etapas de la criminalización (leyes, investigación, etc) hasta la experiencia en la cárcel.

- ¿Cuáles son los factores que llevan a una mujer indígena a transgredir la ley?
- ¿Cuál es el impacto en su familia y en el tejido social en general cuando se priva a una mujer indígena de la libertad?
- ¿Qué alternativas al sistema carcelario exigen las comunidades indígenas?
  - ¿Son viables?
  - ¿Se asemejan al abolicionismo?

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