

**THE RIGHTS OF CHILDREN LIVING WITH THEIR INCARCERATED  
MOTHERS IN SOUTH AFRICAN PRISONS**

**This research paper is submitted in partial fulfillment of the requirements for the  
M.Phil. degree in human rights in the Faculty of Law at the University of the Western  
Cape.**

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## TABLE OF CONTENTS

KEYWORDS.....	5
ABSTRACT.....	6
DECLARATION.....	7
ACKNOWLEDGEMENT.....	8
ACRONYMS AND ABBREVIATIONS.....	9
CHAPTER 1: INTRODUCTION.....	10
1.1 Introduction.....	10-11
1.2 Problem Statement.....	11-12
1.3 Research questions.....	12
1.4 Aim of the Study.....	12-13
1.5 Research Methodology.....	13
1.6 Significance of the Study.....	13-14
1.7 Structure of the argument.....	14
1.8 Literature Review.....	15
1.8.1 Introduction.....	15
1.8.2 Impact of the prison environment on women incarcerated with their children.....	15-16
1.8.3 Female prisoners and their children in the South African context.....	16-18
1.8.4 Inadequate resources and shortage of trained prison staff.....	18
1.8.5 Children's rights to movement.....	18
1.8.6 Lack of imaginative play.....	19
1.9 Limitations of the Study.....	19-20
CHAPTER 2: INTERNATIONAL AND REGIONAL FRAMEWORK.....	21
2.1 INTRODUCTION.....	21-22
2.2 International legal Framework on incarcerated mothers living with their child.....	22
2.2.1 United Nations Standard Minimum Rules for the Treatment of Prisoners (The Standard Minimum Rules).....	22-23
2.2.2 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women (Bangkok Rules).....	23-24
2.3 Other international instruments.....	24
2.3.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).....	24
2.3.2 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its (UNCAT) Optional Protocol.....	25
2.4 Convention on the Rights of the Child (CRC).....	25-27
2.5 The three main non-binding instruments adopted by the United Nations.....	27
2.5.1 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in 1988.....	27
2.5.2 The Basic Principles of Treatment of Prisoners 1990.....	27-28
2.5.3 United Nations Standards Minimum Rules of Non-Custodial Measures (the Tokyo Rule) 1990.....	28
2.6 Other non-binding instruments adopted by the United Nations.....	29

2.6.1 United Nations Declaration on the Elimination of Discrimination Against Women (DEDAW).....	29
2.6.2 United Nations Declaration on the Elimination of Violence Against Women (DEVAW).....	29-30
2.7 Regional legal framework on rights of children living with their incarcerated mothers...	30
2.7.1 African Charter on the Rights and Welfare of the Child.....	30-31
2.7.2 Article 30 of the ACRWC and its general comment.....	31-33
2.8. Conclusion.....	33

### CHAPTER 3: DOMESTIC LEGAL, POLICY, AND PROGRAMMATIC

FRAMEWORK.....	34
3.1 Introduction.....	34
3.2 Historical overview of Female incarceration in South Africa.....	35
3.3 Domestic legislation.....	35
3.3.1 The Constitution of the Republic of South Africa, No.108 of 1996.....	35-36
3.3.2 White Paper on Corrections in South Africa (2005) .....	36-37
3.3.3 Correctional Services Act, No 111 of 1998.....	37-38
3.3.4 Correctional Services Amendment Act; No 25 of 2008.....	38
3.3.5 Children’s Act, (Act No 38 of 2005 as amended) .....	38-39
3.4 Policy frameworks on children in confinement with their mothers.....	39
3.4.1 Mothers and Babies Policy and Procedures.....	39-40
3.4.2 Judicial Inspectorate for Correctional Services (JICS).....	40-41
3.4.3 Detention International-South Africa (JDI-SA).....	41-42
3.4.4 Imbeleko project.....	42-43

### CHAPTER 4 CHALLENGES FACED BY CHILDREN WHO LIVE WITH THEIR INCARCERATED MOTHERS IN SOUTH AFRICAN PRISON

4.5.1 Statistics on children born in South African Prisons.....	44
4.5.2 Overcrowding in female prisons.....	44-45
4.5.3 Health care.....	45-46
4.5.4 Food.....	46
4.5.5 Staff Shortage.....	46-47
4.5.6 Lack of recreational activities for mothers and children.....	47
4.7 Challenges with legislation.....	48
4.8 Conclusion.....	49

### CHAPTER 5 CONCLUSIONS AND RECOMMENDATIONS

5.1. Introduction.....	50
5.2 Recommendations.....	50
5.2.1 Improvement on overcrowding.....	50
5.2.2 Improvement on health.....	50-51
5.2.3 Improvement on food.....	51
5.2.4 Improvement on Imaginative play.....	51-52
5.2.5 Improvement on legislation.....	52

5.2.6 Improvements in mother and baby units.....52-53  
5.2.7 Improvement on South African Judicial Inspectorate for Correctional Services (JICS).53  
5.3 Conclusion.....53  
6. Bibliography.....54-64



**KEYWORDS**

CAREGIVER

RIGHTS

CHILD

INCARCERATED MOTHERS

BEST INTEREST

SEPARATION

IMPRISONMENT

CRC

ACRWC



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## ABSTRACT

Children living in South African prisons with their incarcerated mothers continue to experience the harsh conditions experienced by their mothers when they were innocent. The Department of Correctional Services responsible for housing these mothers and their children was aware of the conditions that were not conducive for children living with their mothers in prison, as the facility was not meant to house children.<sup>1</sup> Regrettably, due to the circumstances that are predominant in South Africa, incarcerated mothers often find themselves in situations where they had to be with their babies in prison.<sup>2</sup> This research paper examines whether the rights of children living with their mothers in South African prisons are promoted, protected, and fulfilled in the prison system. Recommendations for improvements will be provided to the responsible Department so that these innocent children will not be the victims of poor implementation of the law. This study utilizes a descriptive approach which allows the researcher to obtain data through desktop research. The primary source of data will be legislation, including international, regional, and domestic laws. The secondary literature information will be extracted from books, articles, media reports, and electronic materials from the internet.



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<sup>1</sup> Department of Correctional Services Annual Report of 2012/2013 [https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim\\_v21\\_n2\\_a16.pdf?sequence=1](https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim_v21_n2_a16.pdf?sequence=1) (accessed 28 June 2022)

<sup>2</sup> Schoeman. M. (2011) Babies behind bars-hidden victims of policy and practice. *Child Abuse Research: A South African Journal* 2011, 12(2):78-87

## DECLARATION

I declare that '*The Rights of Children Living With Their Incarcerated Mothers In South African Prisons*' is my work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Neziswa Murriel Ntshikaniso

Signature:



Date: 9 December 2022



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I give my sincere gratitude to the most powerful Lord Jesus for all the strength, mercy, and love he has showered me with; without him, this journey would not have been completed (Philippians 1:6). I can do all things through Christ, who strengthened me (Philippians 4:13).

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## **ACRONYMS AND ABBREVIATIONS**

CRC: Convention on the Rights of the Child

ACRWC: African Charter on the Rights and Welfare of the Child

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

UNCAT: United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

DEDAW: United Nations Declaration on the Elimination of Discrimination Against Women

DEVAW: United Nations Declaration on the Elimination of Violence Against Women

JICS: South African Judicial Inspectorate for Correctional Services

JDI-SA: Detention International-South Africa

DCS: Department of Correctional Services

CSA: Correctional Services Act 111 of 1998

ICCV: Independent Correctional Centre Visitor

DJF: Detention Justice Forum



## CHAPTER 1: INTRODUCTION

### 1.1 Introduction

The Republic of South Africa is a member of the United Nations<sup>3</sup> and the African Union.<sup>4</sup> It has made binding international commitments to comply with the standards laid down in conventions, rules, and treaties. According to the Universal Declaration of Human Rights,<sup>5</sup> everyone is deserving of basic human rights, including women who are accused of a crime and their innocent children who are consequently imprisoned alongside them.<sup>6</sup> The United Nations Convention on the Rights of the Child (CRC)<sup>7</sup> was specifically designed as a legally binding instrument to incorporate the full range of human rights for children with fundamental principles.<sup>8</sup> The issue of babies and very young children who remain with their mothers in prison remains highly concerning.<sup>9</sup>

The Committee on the Rights of the Child<sup>10</sup> said the difficulties faced in many countries by babies and children living with their incarcerated parents were not taken into consideration nor were their rights respected.<sup>11</sup> The African Charter on the Rights and Welfare of the Child (ACRWC)<sup>12</sup> obliges States Parties to undertake the provision of special treatment to incarcerated pregnant women, and mothers of infants and young children who have been accused or found guilty of encroaching upon domestic laws of a criminal or civil nature.<sup>13</sup> The

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<sup>3</sup> South Africa was re-admitted to the United Nations General Assembly in 1994 following the dismantling of apartheid and its transition into democracy. See <https://www.sahistory.org.za/dated-event/south-africa-becomes-charter-member-United-nations> (accessed on 12 July 2022).

<sup>4</sup> South Africa became a member of the African Union in May 1994.

<sup>5</sup> Hereafter the UDHR.

<sup>6</sup> Smith P *When the Innocent are punished: The Children of Imprisoned Parents* (2009) p 7-8.

<sup>7</sup> Hereafter the CRC.

<sup>8</sup> These principles include the right not to be discriminated against in Article 2(2), the right to life, survival and development in Article 6(1) (2), the child's best interest in Article 3(1) and respect for the child's views in Article 12 of the CRC.

<sup>9</sup> Smith (2009) 48-50.

<sup>10</sup> Hereafter the Committee on the CRC.

<sup>11</sup> The Committee on the CRC, Day of General Discussion on "Children of Incarcerated Parents", 30 September 2011, 3-4.

<sup>12</sup> Hereafter the ACRWC.

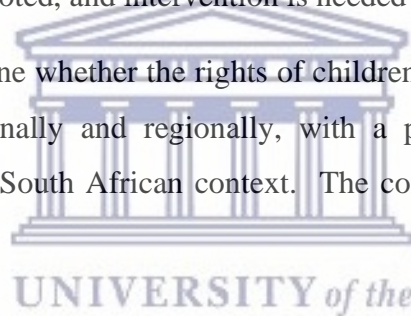
<sup>13</sup> Under Article 30, States Parties must ensure that non-custodial sentences are always considered first for pregnant women and mothers of young children and they must establish alternatives to detention for them. See also General Comment on Article 30, p6 para 5. Available at [https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document\\_files/gc\\_1\\_article\\_3](https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/document_files/gc_1_article_3)

Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules)<sup>14</sup> and the Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders<sup>15</sup> are fundamental for the management of prisons and the treatment of prisoners and will be considered in light of incarcerated mothers, during this research paper. The Constitution of the Republic of South Africa 1996<sup>16</sup> includes a special provision in the Bill of Rights highlighting the rights of children, which are to be protected and promoted at all times.<sup>17</sup>

## 1.2 Problem Statement

Children living in some prisons with their incarcerated mothers are in a difficult position, living in an environment adverse to their development<sup>18</sup> and subjected to the deplorable health and sanitation conditions of prison, and, in some cases, denied their most basic rights.<sup>19</sup> The physical effects of poor nutrition and health standards are perhaps the most visible signs of the impact of imprisonment.<sup>20</sup> Children's rights to movement, recreation, and interaction with the outside world are limited due to their mother's incarceration. An increase in the number of incarcerated women has been noted, and intervention is needed in this regard.<sup>21</sup>

This research paper will examine whether the rights of children living with their incarcerated mothers are upheld internationally and regionally, with a particular focus of which on situational analysis within the South African context. The constitutional rights that will be



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[0\\_booklet.pdf#targetText=States%20Parties%20to%20the%20present,the%20family%20and%20social%20rehabilitation.%E2%80%9D](#) (accessed 12 July 2022).

<sup>14</sup> Hereafter “the Standard Minimum Rules”. Available online at [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf) (accessed 13 July 2022).

<sup>15</sup> Also known as “the Bangkok Rules” Available online at [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf) (accessed 13 July 2022). (Hereafter “the Rules”).

<sup>16</sup> Hereafter “the Constitution”.

<sup>17</sup> See section 28 of the Constitution.

<sup>18</sup> Robertson O *Collateral Convicts: Children of incarcerated parents* (2012) 21.

<sup>19</sup> Rule 51(1) provides that children living with their mothers in prison shall be provided with ongoing health-care services and specialists, in collaboration with community health services, shall monitor their development. This is not often the case.

<sup>20</sup> Todrys K, Amon J ‘Health and Human Rights of Women Imprisoned in Zambia’ (2011) 11 *Biomedcentral International Health & Human Rights* 8 p3-5. <http://www.biomedcentral.com/1472-698X/11/8> (accessed 13 July 2022).

<sup>21</sup> In 2018, the number of female inmates in South African prisons were recorded at 4326, which accounts for 2.6% of the total prison population, as opposed to 4118 in 2015. <https://www.prisonstudies.org/country/south-africa> (accessed 13 July 2022).

considered are the right to access health care services,<sup>22</sup> the right to a healthy environment,<sup>23</sup> the right to human dignity,<sup>24</sup> as well as the child's right to life.<sup>25</sup>

### 1.3 Research questions

The main research question aims to establish the extent to which the rights of children of incarcerated mothers are upheld in South African prisons. Children's rights are protected by internationally, regionally, and domestically recognized human rights charters/instruments/guiding documents which should be integrated into individual countries' legal and policy frameworks.

The following sub-research questions will be addressed:

1. Are there adequate resources to ensure the daily protection, promotion, and fulfillment of children's needs? More specifically, do children who live with their incarcerated mothers have access to proper healthcare services?
2. Does the prison system have enough recreational equipment for the developmental needs of children who reside with their incarcerated mothers?
3. Are prison authorities well-trained and equipped with laws and policies that promote the rights of children who are in the care of their mothers in prison, and what are the consequences for those who fail to adhere to laws and policies that obligate them to act in fulfillment of children's rights?

### 1.4 Aim of the Study

This study aims to examine the rights of children living with their incarcerated mothers in South African prisons and whether their rights are being promoted, fulfilled, and protected.<sup>26</sup>

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<sup>22</sup> Section 27 of the Constitution.

<sup>23</sup> Section 24 of the Constitution.

<sup>24</sup> Section 10 of the Constitution.

<sup>25</sup> Section 11 of the Constitution.

<sup>26</sup> The Preamble of The Children's Amendment Act, 2007 (Act No 41 of 2007), provides that the State must respect, protect, promote and fulfil the rights contained in Section 28 of the Constitution.

There have been concerns about the prison setting not being a proper environment for the upbringing of a child.<sup>27</sup> Even though the law clearly states that children are to stay with their mothers in prison up until the age of two years.<sup>28</sup> However, legislation or policy-setting standards have been absent, and establishing principles to ensure that the prison environment is conducive to the proper upbringing of a child within the next two years.<sup>29</sup>

### 1.5 Research methodology

This study provides an overview of the literature on the subject of the rights of children living with their incarcerated mothers. A descriptive approach to the study allows the researcher to obtain data through desktop research. The primary source of data will be legislation, including international, regional, and domestic laws, which will provide information on the situation of the rights of children who are in the care of their incarcerated mothers in South Africa. Secondary literature, which will include books, articles, media reports, and electronic materials from the internet, will also be relied upon. Several different agencies or institutions will also serve as important sources of knowledge, good practices, innovations, and lessons learned regarding the rights of children who live with their incarcerated mothers.

### 1.6 Significance of the Study

In the absence of appropriate enabling provisions, the findings from this research paper will be provided to the Department of Correctional Services in the Western Cape, together with valuable data about the high number of the most vulnerable group, children, and how their rights are violated during imprisonment with their mothers.

Moreover, this research will shed light on how the system of incarcerating biological mothers can be improved in terms of the protection, promotion, and fulfillment of the rights of their

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<sup>27</sup> The Catholic Parliamentary Liaison Office held a Roundtable Discussion on Prisons and the Family, which sought to place the spotlight on the families of the incarcerated. <http://www.wecanchange.co.za/Editors/Articles/tabid/55/itemid/1837/amid/376/prison-and-the-family.aspx> (accessed 13 July 2022). South African Catholic Bishop's Conference, Parliamentary Liaison Office, 2014. [Hereafter the Parliamentary Liaison Office].

<sup>28</sup> The Department of Correctional Services (DCS) was mindful of section 28(1) of the Bill of Rights, which asserted that every child had the right to be treated in a manner, and kept in conditions appropriate to the child's age. The Correctional Services Amendment Act No 25 of 2008 also allowed female offenders, who had become mothers while incarcerated, to stay with their babies in a correctional facility until the babies reached the age of two years. See <https://pmg.org.za/committee-meeting/16961/#targetText=As%20at%2031%20December%202013,in%20DCS%20Female%20Correctional%20facilities.&targetText=The%20Correctional%20Services%20Amendment%20Act,the%20age%20of%20two%20years> (accessed 12 July 2022).

<sup>29</sup> Parliamentary Liaison Office (2014).

children. This research paper will also provide an insightful approach for stakeholders to develop programs, policies, and legislation, and in some cases, amend existing policies and legislation, to combat this crisis.

### 1.7 Structure of the argument

This study will be organized into five chapters.

**Chapter one**, which is the introductory chapter, will highlight the background and contextualization of the study, the research problem, research questions, aims and objectives of the study, and finally the methodological approach employed in the study.

**Chapter two** will look at the international and regional laws, policies, and frameworks on the rights of children living with their incarcerated mothers. It will further compare all instruments that carry at heart the protection, fulfillment, and promotion of children's rights.

**Chapter three** will take an in-depth look at the domestic laws, policies, and programs created for the implementation of the rights of children who reside with their incarcerated mothers within the South African context. A South African precedent, which dealt with the rights of children living with their mother in prison, will also be discussed.

**Chapter Four** This chapter will pay particular attention to the difficulties experienced by children whose mothers are imprisoned in South African prisons. In order to evaluate if the laws and policies have been successfully implemented since South Africa became a signatory to these laws. The laws, policies and programs will also be examined.

**Chapter five** will provide an overview of the chapters and conclude with recommendations to the Department of Correctional Services, based on the outcomes of the research.

## 1.8 Literature Review

### 1.8.1 Introduction

Inside the prison, women with children are confronted with two roles: that of a prisoner and that of a primary caregiver.<sup>30</sup> Their mothering roles are monitored, and they are dependent on the guidelines and decisions of the prison officials, who decide where the children can go, when they can go outside, what they can eat, and when they are allowed to attend preschool and visit their families.<sup>31</sup> Mothers can interact with their children in any way as long as it fits in with prison rules and regulations.<sup>32</sup>

### 1.8.2 Impact of the prison environment on women living with their children

Vetten reiterated what Todrys and Amon have stressed about the rights of children who reside with their incarcerated mothers. These authors have all stated that female prisoners in Africa are frequently faced with overcrowded and unsanitary conditions conducive to poor health and the spread of infectious diseases.<sup>33</sup> Female prisoners reported that sanitation and hygiene are poor, and water is frequently unclean and tastes foul, but they do not have a choice but to drink the water.<sup>34</sup> Furthermore, these authors have highlighted that women are also confronted with unique challenges related to menstruation, pregnancy, and childbirth.<sup>35</sup>

The Standard Minimum Rules require suitable accommodation for prenatal and postnatal care, further providing that, where practical, the child of an expectant incarcerated mother should be born in a hospital as opposed to being born in the institution.<sup>36</sup> Furthermore, nursing babies are allowed to remain with their incarcerated mothers, in which case provision will be made for a nursery to be staffed by qualified persons.<sup>37</sup> Despite the many challenges that women with

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<sup>30</sup> Parke R, Clarke-Stewart K “Effects of Parental Incarceration on Young Children”, Working papers prepared for the "From Prison to Home" Conference (January 30-31, 2002) 5-6. Available online at <https://aspe.hhs.gov/system/files/pdf/74981/parke&stewart.pdf> (accessed 14 July 2022).

<sup>31</sup> Parke (2002) 8.

<sup>32</sup> Parke (2002) 12-14.

<sup>33</sup> Todrys (2011) 5.

<sup>34</sup> Southern African Development Community (SADC) protocol on gender and development (2006) <http://www.sadc.int/index/browse/page/465> (accessed 14 July 2022).

<sup>35</sup> Todrys (2011) 3.

<sup>36</sup> Article 23 (1) of the Standard Minimum Rules. Available online at [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf) (accessed 14 July 2022).

<sup>37</sup> Article 23(2).

children face, there has been little research on this subject. The living conditions of female inmates living with their children are reported to be of concern in Zambian prisons. The female inmates reported sleeping four to a mattress, packed together in unventilated cells with young children and the sick.<sup>38</sup> Their cells are reported to be stuffed, with no ventilation and windows. People sick with diarrhea were held together with healthy prisoners.<sup>39</sup>

### 1.8.3 Female prisoners and their children in the South African context

Female prisoners have been branded as having smaller numbers compared to their male counterparts.<sup>40</sup> However, female prisoners have specific needs, mainly in the fields of health care, pregnancy, childbirth, and childcare.<sup>41</sup> Despite these well-known natural needs of female prisoners, South Africa, however, does not have a clear policy framework in this field.<sup>42</sup> The South African Constitution deals with the rights of prisoners in general, but there are no laws or regulations that are designed for the needs of female inmates.<sup>43</sup> This is especially the case for women who are pregnant and for mothers of infants and very young children.<sup>44</sup> These are the gaps in policies that still need to be addressed for the realization of the rights of children living with their incarcerated mothers. Article 30 of the ACRWC promotes non-custodial sentences for expectant mothers or mothers of young children. To this end, the best interest of the child remains of paramount importance.

In *S v M*<sup>45</sup> the Constitutional Court passed a judgment that took into full account the best interests of the child and how the concept should be applied in cases where the child's primary caregiver is being sentenced, which gives rise to competing rights. Where imprisonment of the parent would be detrimental to the well-being of the child, a court is

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<sup>38</sup> PRISCCA, ARASA, Human Rights Watch: Interview with Inonge, inmate, Lusaka Central Prison. 2009.

<sup>39</sup> PRISCCA, ARASA, Human Rights Watch: Interview with Inonge, inmate, Lusaka Central Prison. 2009.

<sup>40</sup> Manning R (2011) Punishing the Innocent: Children of incarcerated and detained parents *Criminal Justice Ethics* 30, 267-287.

<sup>41</sup> IOL news, 8th March 2014. Department of Correctional Services Annual Report 2012-2013. Available online at <http://www.dcs.gov.za/wp-content/uploads/2016/08/DCS-Annual-Report-2012-2013.pdf> (accessed 29 October 2019).

<sup>42</sup> South African Catholic Bishop's Conference-Parliamentary Liaison office (2014) Mothers and Babies in Incarceration352.

<sup>43</sup> South African Catholic Bishop's Conference-Parliamentary Liaison office (2014) Mothers and Babies in Incarceration352.

<sup>44</sup> Todrys (2011) 4.

<sup>45</sup> *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).



obliged to give due consideration to possibilities for a non-custodial sentence. This does not digress from the severity of the offense committed by the parent, but it does promote the values enshrined in the internationally binding instruments.<sup>46</sup> Subsequently, it may also help balance the rights of all parties involved, especially those of children at the receiving end of a parent's incarceration,<sup>47</sup> either as an awaiting trial prisoner or as a convicted criminal. Skelton<sup>48</sup> concluded her evidence by emphasizing that the best interests of the child should be the central consideration at all stages of the process relating to the incarceration of a parent.

Another concerning factor in South African prisons is the attachment bond between the mother and the child, as this is important for the child to form in the first year of life as it provides a sense of security and trust.<sup>49</sup> A 2011 study conducted amongst women in Pollsmoor and Worcester prisons in the Western Cape indicated that 64% of female prisoners are under the age of 40 and that 75% of them had children.<sup>50</sup> The study revealed that approximately 60% of the women either did not reside with their biological mothers growing up or lived with them for only a portion of their childhood. Many women's relationships with their mothers were characterized by their mothers being emotionally or physically unavailable, due to their mothers' making choices that did not prioritize their children or being forced to live separately from their children due to difficult circumstances, including imprisonment.<sup>51</sup>

In a prison environment, the patterns of interactions between mothers and their children are influenced by the environment in which they find themselves.<sup>52</sup> "Yet, little is known about these processes and the ways in which mother-child interaction patterns present inside the walls of a prison".<sup>53</sup> Therefore, there is a gap that needs to be addressed, as there has been limited

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<sup>46</sup> See Article 10(1) of the International Covenant on Civil and Political Rights, 1966.

<sup>47</sup> The binding principle at an international level is that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of a human person." See also Article 2 of the Code of Conduct for Law Enforcement Officials, 1979.

<sup>48</sup> The Centre for Child Law, represented by Ms Skelton, acted as *Aminius Curiae* in this case.

<sup>49</sup> Shaw R (1992) Prisoners' Children: What are the Issues p41-49.

<sup>50</sup> Artz L, Hoffman-Wanderer Y, and Moulton K., 2012. Hard Time(s): Women's Pathways to Crime and Incarceration. <http://detentionjusticeforum.org.za/wp-content/uploads/2013/09/GHJRU-Hard-Times-Report-on-Women-in-SA-Prisons.pdf> (accessed 3 September 2019) 6.

<sup>51</sup> Artz *et al* (2012) 10.

<sup>52</sup> Clark J (1995) "The impact of the prison environment on mothers" *The Prison Journal* 75 306–329.

<sup>53</sup> Eloff I and Moen M (2003) An analysis of mother-child interaction patterns in prison, *Early Child Development and Care*, 173:6, 711-720.

research on mothers and their children in prison. By addressing this gap, there will be an improvement in practice and a better understanding of this phenomenon.

#### 1.8.4 Inadequate resources and shortage of trained prison staff

Research has revealed concerns concerning inadequate resources and the shortage of trained prison staff for the protection and fulfillment of the rights of children who reside with their mothers in prison.<sup>54</sup> According to prisoners and prison officers, “a lack of adequate prison staff for the transfer of sick prisoners, inadequate vehicles for transportation and fuel, and security fears keep inmates from accessing medical care outside of prisons, in some cases for weeks after they fall ill”.<sup>55</sup> The Standard Minimum Rules<sup>56</sup> emphasize the importance of the provision of adequate staff training upon admission of expectant mothers, as well as in-service training, with a view to giving all prison staff the ability and means to carry out their complex duties in a professional manner.<sup>57</sup>

#### 1.8.5 Children’s right to movement

Before the age of two years, children incarcerated with their mothers are not allowed out of the prison environment, and they, therefore, have little contact with the outside world before this age.<sup>58</sup> Concepts such as cars, animals, shopping malls, visiting friends, and so on are unknown to them. Children are cut off from the outside world; human exchanges are limited to the same people-prisoners and guards - most of whom are women. According to Shaw, prisons provide restricted and impoverished environments in which young children will not develop satisfactorily.<sup>59</sup> Physically, the children are restricted in their exploration of the outside world. The amount of new information they are confronted with is very limited.

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<sup>54</sup> Sloth-Nielsen, J. (2007) ‘The state of South Africa’s prisons’ in Buhlungu S, Daniel J, Southall R and Lutchman L ‘State of the Nation – South Africa 2007’ 390.

<sup>55</sup> [https://www.hrw.org/sites/default/files/related\\_material/zambia0410\\_brochure\\_Lores.pdf\\_p4](https://www.hrw.org/sites/default/files/related_material/zambia0410_brochure_Lores.pdf_p4) (accessed 29 October 2019).

<sup>56</sup> The section relating to the training of institutional personnel supplements rules 46 to 55 of the Standard Minimum Rules for the Treatment of Prisoners.

<sup>57</sup> Rule 32.

<sup>58</sup> Under South African law, children can stay with their mothers in prison until age two. The mothers choose how long to keep their babies in jail based on their own preferences and the availability of other guardians for the child. Until 2008, children could live in jail until age five, but the legislation was changed when new research emerged on the damaging developmental effects of early childhood imprisonment. See <https://www.groundup.org.za/article/babies-prison/> (accessed 29 October 2019).

<sup>59</sup> Shaw (1992) 3.

### 1.8.6 Lack of Imaginative Play

When a child is playful, he/she is creative and imaginative, ensuring a self-motivating and enjoyable process leading to learning.<sup>60</sup> Playing provides an integrating mechanism for all aspects of the child's development.<sup>61</sup> As a child gets older, his or her play moves from simple exploratory activities to games that are more abstract.<sup>62</sup>

Child play is important for the well-being of a child and is recognized by the CRC in Article 31 and in Article 12 of the ACRWC as a fundamental human right.<sup>63</sup> Moreover, play is so basic to childhood that it is seen even among children in the direst conditions.<sup>64</sup> Play decreases the rise of anxiety, depression, and suicidal attempts.<sup>65</sup> It is therefore unfortunate for children who live with their incarcerated mothers that they do not get sufficient time for play, prison rarely has resources to meet all their needs for their full development, and play is one of them.

### 1.9 Limitations of the study

A limitation observed in this study is the absence of adequate representativeness of the data required to make a definitive observation of the issue at hand. The availability of current data to be considered against older documents is especially problematic. The failure to properly archive records leads to deterioration with age and thus becomes unusable. The Minister of Correctional Services in his 2016 budget speech alluded to this issue with regards to not observing proper record-keeping,<sup>66</sup> or not creating an all-inclusive platform from which the general public, researchers included, can readily access the information.

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<sup>60</sup> Play is essential to development because it contributes to the cognitive, physical, social, and emotional well-being of children and youth. Moen M and Eloff I 2003 'An analysis of mother-child interaction patterns in prison' (173) 6 p711-720. Available at <https://doi.org/10.1080/0300443032000103070> (accessed 29 October 2019).

<sup>61</sup> Frost JL. Neuroscience, play and brain development. Paper presented at: IPA/USA Triennial National Conference; Longmont, CO; June 18–21, 1998. Available online [www.eric.ed.gov/ERICDocs/data/ericdocs2/content\\_storage\\_01/0000000b/80/11/56/d6.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/11/56/d6.pdf) (accessed 29 October 2019)

<sup>62</sup> Sayeed Z, Guerin E (2000) Early Years Play: A Happy medium for assessment and intervention 16, 18-24.

<sup>63</sup> CRC Article 31

<sup>64</sup> Siobhan O' Connor 'The Science of childhood' Time's special edition 06 September 2017. <https://time.com/4928925/secret-power-play> (accessed 29 January 2022)

<sup>65</sup> Siobhan O' Connor 'The Science of childhood' Time's special edition 06 September 2017. <https://time.com/4928925/secret-power-play> (accessed 29 January 2022)

<sup>66</sup> In his 2016 budget vote speech, correctional services minister Michael Masutha said that the auditor-general "still has serious concerns about the credibility of our records". The auditor-general's report for 2015/16 stated that the department's reported performance information for its incarceration, rehabilitation and care programmes wasn't reliable "when compared to the evidence provided". <https://africacheck.org/factsheets/factsheet-the-state-of-south-africas-prisons/> (accessed 4 September 2019).

The biggest limitation is the absence of one-on-one interviews with these mothers and direct observation of the children, in which case the researcher would have also observed the environment to which these children are exposed. The information that could have been obtained would be more in-depth and sincere if it had been obtained directly from incarcerated mothers who live with their children in prison. The desktop study provides the most descriptive analysis of the research conducted.



## CHAPTER 2: INTENATIONAL AN REGIONAL FRAMEWORK

### 2.1 Introduction

The children of prisoners have been recognized as the invisible victims of crime and the penal system.<sup>67</sup> Even though they have done no wrong, they continue to suffer the stigma of criminality.<sup>68</sup> It is reported that only rarely do ministries responsible for children see them as a group of children exposed to particular challenges, meaning children of incarcerated parents often fall into the gaps between government agencies.<sup>69</sup> This chapter will provide an overview of the most important legal instruments in the international and regional framework that specifically deal with the rights of children who are living with their incarcerated mothers and the realization of these rights.

Three instruments adopted by the United Nations that are relevant to the discussion at hand include the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 1988, the Basic Principles of Treatment of Prisoners of 1990, and the United Nations Standards Minimum Rules of Non-Custodial Measures of 1990.<sup>70</sup> The binding and adopted instruments are the Convention on the Elimination of All Forms of Discrimination against Women<sup>71</sup>, and The United Nations Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment and its Optional Protocol.<sup>72</sup> The non-binding treaties include the United Nations Declaration on the Elimination of Violence<sup>73</sup> and the United Nations Declaration on the Elimination of Discrimination against Women.<sup>74</sup> There was then a realization that protecting the rights of children needed a fuller and more precise framework than was provided by the UDHR.<sup>75</sup> After several years of preparation, the General Assembly

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<sup>67</sup> Alejos M (2005) 'Babies and small children residing in prisons' Geneva, Switzerland: Quaker United Nations Office p10 available online at <https://quano.org/sites/default/files/resources/Babies%20and%20small%20children%20residing%20in%20prisons.pdf> (accessed 13 July 2022)

<sup>68</sup> Alejos (2005) 10.

<sup>69</sup> Alejos (2005) 11.

<sup>70</sup> Also referred to as the Tokyo Rules, it was adopted by Resolution No 45/110. Available at <https://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf> (accessed 12 July 2022).

<sup>71</sup> Hereafter CEDAW.

<sup>72</sup> Hereafter UNCAT.

<sup>73</sup> United Nations Declaration on the Elimination of Violence Against Women, 1993 (1993) 48 ILM 104

<sup>74</sup> United Nations Declaration on The Elimination of Discrimination Against Women 1993 (1993) 48 ILM 104

<sup>75</sup> Alejos (2005) 11

of the United Nations approved and adopted the Convention on the Rights of the Child.<sup>76</sup> The general comments of the Committee on the Convention on the Rights of the Child will also be looked at. On regional standards, this paper will look at the ACRWC and the general comment on Article 30 of the ACRWC as it specifically speaks about the rights of children who are with their incarcerated mothers.

## 2.2 International Legal Framework on Incarcerated Mothers Living with Their Children

### 2.2.1 United Nations Standard Minimum Rules for the Treatment of Prisoners (The Standard Minimum Rules)

The Standard Minimum Rules were adopted in 1955 and are the most established non-treaty document within the international legislative framework pertaining to detention.<sup>77</sup> It sets standards for acceptable practice and management of detention facilities, is widely used as a guideline for monitoring purposes, and was adopted as a key legal text addressing the rights of detainees.<sup>78</sup>

The Standard Minimum Rules put an emphasis on Article 15, which speaks about the hygiene of women and children in prison. It states that “prisoners shall be required to keep their persons clean, and to this end, they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”<sup>79</sup>

The Standard Minimum Rules provide a comprehensive list of minimum requirements that, if effectively implemented, create the foundation for the proper treatment of incarcerated women and their children. To this end, the Standard Minimum Rules require suitable accommodation for pre-and post-natal care, further providing that, where practical, the child of an expectant incarcerated mother should be born in a hospital as opposed to being born in the institution.<sup>80</sup>

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<sup>76</sup> General Assembly of the United Nations resolution 44/25). <https://www.un.org/en/ga/62/plenary/children/bkg.shtml> (accessed 24 July 2022)

<sup>77</sup> Standard Minimum Rules for the Treatment of Prisoners was adopted 31 July 1975.

<sup>78</sup> Chirwa D 2002 ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’ Volume 10, The International Journal of Children’s Rights, 157.

<sup>79</sup> Article 15 stipulates that, “Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”

<sup>80</sup> Hereafter UNSMR.

Furthermore, nursing babies are allowed to remain with their incarcerated mothers, in which case provision will be made for a nursery to be staffed by qualified persons.<sup>81</sup>

However, as much as this international law framework was introduced for those living in prison, women in prison continue to be a group whose specific vulnerabilities and unique needs remain poorly met.<sup>82</sup> Three main instruments adopted by the UN were then introduced which specifically focused on the needs of women in prison with their children with intentions of promoting, protecting, and fulfilling their rights, as the Standard Minimum Rules could not progressively address all women's needs.<sup>83</sup>

### 2.2.2 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women (Bangkok Rules)

The Bangkok Rules represent a progressive step towards advancing basic human rights and the rights of access to justice for women deprived of their liberty.<sup>84</sup> It does this by recognizing their unique needs under 'soft law'. Before this rule was introduced, once imprisoned, female detainees encountered several critical problems which disproportionately affect women, and threaten their rights to human dignity and security of person.<sup>85</sup>

Issues faced by women in detention gained formal recognition in international human rights law with the adoption by the UN General Assembly of the Bangkok Rules in 2010.<sup>86</sup> The Bangkok Rules drew attention to the plight of women in prison who live with their children and, for the first time, issues such as women's reproductive health, mental health, histories of abuse, children imprisoned with mothers, and duties of care with respect to female detainees were recognized in the international legal framework.<sup>87</sup>

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<sup>81</sup> Article 23(2) stipulates that, "Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers."

<sup>82</sup> Martynowicz A. *Oversight of Prison Conditions and Investigations of Deaths in Custody* (2011)

<sup>83</sup> Martynowicz A. (2011) 89.

<sup>84</sup> *Women and Imprisonment* 2nd edition, with reference to the United Nations (2014) Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders

<sup>85</sup> Martynowicz A (2011) 91.

<sup>86</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010 available online at [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Rules\\_for\\_the\\_Treatment\\_of\\_Women\\_Prisoners\\_and\\_non-custodial\\_Measures\\_for\\_Women\\_Offenders\\_Bangkok\\_Rules.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Rules_for_the_Treatment_of_Women_Prisoners_and_non-custodial_Measures_for_Women_Offenders_Bangkok_Rules.pdf) (accessed 12 July 2022).

<sup>87</sup> Muntingh & Ballard (2012) 66.

Bangkok Rule 48 gives more details on women in prison with their children, but in no way replaces the provisions of the Standard Minimum Rules. This Rule stipulates that “women prisoners should not be discouraged from breastfeeding their children as it is the children’s right to receive basic nutrition in order to develop adequately”<sup>88</sup>. Even so, there have been challenges in the support of imprisoned mothers to breastfeed their children as this has implications in prison facilities.<sup>89</sup> Furthermore, The Rules<sup>90</sup> emphasize the importance of adequate staff training to be provided to expectant mothers upon admission as well as in-service, with a view to giving all prison staff the ability and means to carry out their complex duties in a professional manner.<sup>91</sup> It is therefore important that the training of staff should cover the overall rights and duties of prison staff in the exercise of their function, in addition to training on issues relating to women’s health during incarceration. If the staff is well trained, it minimizes the infringement of the rights of those mothers who are imprisoned and promotes the children’s right to health care.

## 2.3 Other international legal instruments

### 2.3.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW promotes women’s rights to equality in a general sense, with a focus on the exercise of civil rights. Sudan and Somalia are the only African states not to have signed or ratified CEDAW.<sup>92</sup> The concerns involve situations of poverty where women have the least access to food, health, education, training, and opportunities for employment and other needs. Article 12 (2)<sup>93</sup> states that “Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.

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<sup>88</sup> Rule 48(1).

<sup>89</sup> Facilities are not always equipped with the necessary facilities, and a clean and sanitary environment conducive to breastfeeding.

<sup>90</sup> The section relating to the training of institutional personnel supplements rules 46 to 55 of the Standard Minimum Rules for the Treatment of Prisoner.

<sup>91</sup> Rule 32.

<sup>92</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979

<sup>93</sup> Article 12 (2) stipulates Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation”.



### 2.3.2 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) and its (UNCAT) Optional Protocol

UNCAT compliments CEDAW by recognizing the urgent need for the universal application of the rights and principles of equality, liberty, security, integrity, and dignity to women.<sup>94</sup> This treaty's purpose is to recognize that, States have the primary responsibility for implementing those articles that strengthen the protection of people deprived of their liberty, and the full respect for their human rights is a common responsibility shared by all.<sup>95</sup>

UNCAT and the accompanying Optional Protocol are the authoritative umbrella texts that protect all persons against torture and ill-treatment whilst deprived of their liberty.<sup>96</sup> Article 10 of the United Nations Convention Against Torture points to the importance of State Parties to ensure that education and information regarding the prohibition against torture are fully included in the training<sup>97</sup> of Law enforcement personnel, civil or military, medical personnel, public officials, and other persons who may have custody over the interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>98</sup>

### 2.4 Convention on the Rights of the Child (CRC)

The CRC was adopted and approved by the General Assembly of the United Nations on the 20th of November 1989.<sup>99</sup> It was opened for signature and ratification by member countries and entered into force on September 2, 1990. Before the adoption of this international instrument, children were treated as objects, mini-human beings with mini rights. Children remained as objects that should be seen but not be heard.<sup>100</sup> A paradigm shift came after the

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<sup>94</sup> Declaration on the Elimination of Violence and the Convention against torture. Available online at [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsq\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsq_no=IV-9&chapter=4&lang=en) (accessed 12 July 2022).

<sup>95</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

<sup>96</sup> The United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

<sup>97</sup> UNCAT article 10.

<sup>98</sup> UNCAT article 10.

<sup>99</sup> United Convention on the Rights of a Child (1989).

<sup>100</sup> Kilbourne S (1998) 'The Wayward Americans-Why the US has not Ratified the UN Convention on the Rights of the Child' 10 Child and Family Law Quarterly 243.

adoption and ratification of the CRC which put a special emphasis on children as a whole, whose views and voices need to be heard and respected at all times.<sup>101</sup>

Children living with their convicted or detained mothers are innocent and have never committed any crime.<sup>102</sup> The number of children accompanying their mothers in prison or being born in prison is increasing.<sup>103</sup> The CRC promotes the child's best interest which needs to be considered by States, as well as the child's right to family unity, before separating the child from the parent.<sup>104</sup> This is relevant in the context of mothers separated from their children through imprisonment.<sup>105</sup> The CRC has four pillars which are considered general principles of fundamental importance for the holistic implementation of the CRC<sup>106</sup> namely, children's rights to non-discrimination found in article 2<sup>107</sup>, the child's best interest being the primacy consideration in all actions concerning them found in article 3<sup>108</sup>, the third principle is the right to life in Article 6, and finally, the right of the child to participate or express his/her views/opinions,<sup>109</sup> freely in all matters affecting them, according to their maturity level, which is covered in Article 12 of the CRC.<sup>110</sup> These principles are imperative to be applied in terms of children who accompany their mothers in prison as these principles specifically promote the notion that children are equal to humans.<sup>111</sup>

The Committee on the Convention on the Rights of the Child raised concerns on issues involving children who live with their incarcerated mothers. These issues include overcrowded prisons, poor living conditions, and the unavailability of health services which systematically violate the rights of children.<sup>112</sup> The isolation of children, with limited access to the outside world, was also highlighted as a frequent cause of their rights being directly or indirectly

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<sup>101</sup> Kilbourne (1998) 245.

<sup>102</sup> Price S (2004) Women in Prison, MIDIRS 14 Midwifery Digest 3.

<sup>103</sup> Glaze, L., E & Maruschak, C., M (2008) Parents in Prison and Their Minor Children. Bureau of Justice Statistics. Special Report <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf>. Accessed 21 July 2022

<sup>104</sup> Smith P (2009) 'When the innocent is punished: The children of imprisoned parents' 8-9.

<sup>105</sup> Price (2004) 13.

<sup>106</sup> Report on Children living in Prison: Insights from Sierra Leone. Advoc Aid for the Quaker United Nations office. January 2008.

<sup>107</sup> Article 2. CRC

<sup>108</sup> Article 3. CRC

<sup>109</sup> Article 6. CRC

<sup>110</sup> Article 55. CRC

<sup>111</sup> The Four Principles of the Convention on the Rights of the Child (2019). Available online at <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> (accessed 12 July 2022).

<sup>112</sup> UN Committee on the Rights of the Child Day of General Discussion 2011.

violated.<sup>113</sup> Poor environmental conditions which include hygiene, poor living conditions, and inadequate access to health care services seemed to be the major challenges that result in the infringement of children's rights while residing with their incarcerated mothers.<sup>114</sup>

## 2.5 The non-binding three main instruments adopted by the United Nations

### 2.5.1 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in 1988

This body of principles provides several principles that seek to protect, promote, and fulfill the rights of all those who are under any form of detention or imprisonment.<sup>115</sup> Principle 5 speaks about the measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children, and juveniles, aged, sick or handicapped persons, such shall not be deemed to be discriminatory.<sup>116</sup> The applications of these laws need to be applied by the judicial or other authorities who are law enforces in that specific country.<sup>117</sup> Furthermore, Principle 24 speaks about a proper medical examination to be offered to a detained or imprisoned person as promptly as possible after his/her admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.<sup>118</sup>

### 2.5.2 The Basic Principles of Treatment of Prisoners 1990

The Basic Principles for the Treatment of Prisoners were adopted and proclaimed by the General Assembly of the United Nations by resolution 45/111 on 14 December 1990.<sup>119</sup> As in its name, these are basic principles that mainly focus on the protection and promotion of the

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<sup>113</sup> UN Committee on the Rights of the Child Day of General Discussion 2011.

<sup>114</sup> Cunningham A & Baker L (2004) 'What about me: Seeking to understand a child's view of violence in the family. London: Centre for Children and Families in the Justice System' 102.

<sup>115</sup> United Nations Human Rights office of the High Commissioner. Body of Principles for the Protection of all persons under any form of Detention or imprisonment. General Assembly resolution. 43/173. 09 December 1988 <https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention> (accessed 29 June 2022)

<sup>116</sup> Principle 5.

<sup>117</sup> Principle 5.

<sup>118</sup> Principle 24

<sup>119</sup> The basic principle of treatment of prisoners 1990. Available online at <https://www.ohchr.org/en/professionalinterest/pages/basicprinciplestreatmentofprisoners.aspx> (accessed 12 July 2022).

rights of prisoners. These principles are eleven (11) in total, basic principle number five (5) speaks about the retention by prisoners of their Human Rights, and, where the State concerned is a party.

### 2.5.3 United Nations Standards Minimum Rules of Non-Custodial Measures (the Tokyo Rule) 1990

At the time of adoption of this resolution, the Standard Minimum Rules did not consider the particular needs and vulnerabilities of women in detention, nor did the additional instruments address such issues adequately.<sup>120</sup> The United Nations Congress on the Prevention of Crime and the Treatment of Offenders effectively served as the main forum at which the recognition of the needs of women in detention was addressed and promoted. The Tokyo Rules recognize the need to develop a non-institutionalized approach to the treatment of offenders and call on States to make use of non-custodial measures at the earliest possible stage.<sup>121</sup> Although the Tokyo Rules are gender-neutral, they are highly beneficial for women in detention and should be applied in cases of petty crime and in cases where the offender poses a minimal risk to society.<sup>122</sup>

In 2003 and 2008, the United Nations General Assembly called for State Parties to acknowledge the problems faced by women in detention and to consider the impact of imprisoning women with childcare duties, as well as babies or small children incarcerated with mothers.<sup>123</sup> At the 18th session of the Commission on Crime Prevention and Criminal Justice in 2009, a resolution submitted by the Government of Thailand was adopted,<sup>124</sup> acknowledging as a premise to the Bangkok Rules that prison facilities are built primarily for males. It had therefore become necessary to address and accommodate female detainees' specific needs.<sup>125</sup>

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<sup>120</sup> Quaker United Nations Office (2012).

<sup>121</sup> Muntingh L & Ballard C (2012) Report on Children in Prison in South Africa p29.

<sup>122</sup> Muntingh & Ballard (2012) 53.

<sup>123</sup> Tokyo Rule (1990).

<sup>124</sup> Commission on Crime Prevention and Criminal Justice (2009).

<sup>125</sup> Quaker United Nations Office (2012).

## 2.6 Other Non-binding instrument adopted by the United Nations

### 2.6.1 United Nations Declaration on the Elimination of Violence Against Women (DEVAW)

This declaration was adopted in 1993 by the United Nations with the intention to completely cease violence against women.<sup>126</sup> The DEVAW speaks out about sexual, physical, and even mental violence against women.<sup>127</sup> This declaration concentrates on violence that takes place against women happening in every place including their homes.<sup>128</sup> The DEVAW emphasizes that acts of violence against women and girls are not only grievous human rights abuses but are also a serious hindrance to the realization of many other rights for them.<sup>129</sup> Even though this declaration is not legally binding to States, it has however shed light and paved the way to the recognition of efforts toward eliminating all forms of violence against women. Article 2 aims at eliminating violence perpetrated by the State, such as violence against women in custody and as part of warfare.<sup>130</sup>

### 2.6.2 United Nations Declaration on the Elimination of Discrimination Against Women (DEDAW)

The DEDAW is a human rights decree issued and adopted in 1967 by the United Nations General Assembly,<sup>131</sup> Article 1 declares that discrimination against women is “fundamentally unjust and constitutes an offense against human dignity.”<sup>132</sup> While Article 7 calls for the elimination of gender discrimination in criminal punishment.<sup>133</sup> The DEDAW states that discrimination against women is an offense against human dignity and calls on States to “abolish existing laws, customs, regulation, and practice which are discriminatory against

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<sup>126</sup> United Nations Declaration on the Elimination of Violence Against Women 1993. Available online on <https://www.bing.com/search?q=United+Nations+Declaration+on+the+Elimination+of+Violence&src=IE-SearchBox&FORM=IESR4A> (accessed 13 July 2022)

<sup>127</sup> DEVAW 1993

<sup>128</sup> <https://www.legalserviceindia.com/legal/article-7037-the-declaration-on-the-elimination-of-violence-against-women.html> (accessed 13 July 2022)

<sup>129</sup> <https://www.legalserviceindia.com/legal/article-7037-the-declaration-on-the-elimination-of-violence-against-women.html> (accessed 13 July 2022)

<sup>130</sup> DEVAW Article 2

<sup>131</sup> United Nations Declaration on the Elimination of Discrimination against Women 1967

<sup>132</sup> DEDAW Article 1

<sup>133</sup> Herewith Article 7

women, and to establish adequate legal protection for equal rights of men and women.”<sup>134</sup> This declaration was an important pioneer in the legally binding 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which promotes gender equality specifically for the protection of the rights of women.<sup>135</sup>

## 2.7 Regional legal framework on rights of children living with their incarcerated mothers

### 2.7.1 African Charter on the Rights and Welfare of the Child

Apart from the CRC, the ACRWC is the only regional human rights treaty regarding the civil, political, economic, social, and cultural rights of children.<sup>136</sup> The ACRWC has already been introduced as a forerunner in the fulfillment of the rights of children who are temporarily being raised in the prison system with their incarcerated mothers.<sup>137</sup> One of the reasons for the drafting and adoption of the ACRWC was the feeling that Africa was underrepresented during the drafting of the CRC as only four African countries participated significantly in the drafting of the CRC namely, Morocco, Algeria, Senegal, and Egypt.<sup>138</sup> Article 30 promotes non-custodial sentences for expectant mothers or mothers of young children.<sup>139</sup>

This Charter is of particular importance as it obliges State Parties to apply protective measures to children of imprisoned mothers and is the special provision and unique feature that aims to protect the infants and young children of imprisoned mothers.<sup>140</sup> To this end, the best interest of the child remains of paramount importance. No State Party should impose the death penalty on pregnant women or mothers of young children.<sup>141</sup> The other relevant Articles on the subject of children and their parents who are deprived of their freedom are about the right not to be

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<sup>134</sup> Women’s Rights are Human Rights (2014). United Nations Human Rights office of the high Commissioner. New York and Geneva. <https://www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-2.pdf>

<sup>135</sup> Women’s Rights are Human Rights (2014).

<sup>136</sup> African Charter on the Rights and Welfare of the Child. Available online at <https://resourcecentre.savethechildren.net/library/african-charter-rights-child#targetText=The%20ACRWC%20and%20the%20CRC,and%20Welfare%20of%20the%20Child> (accessed 18 July 2022).

<sup>137</sup> Viljoen F (2012) ‘International Human Rights Law In South Africa’ De Jure Law Journal 214, 218.

<sup>138</sup> Viljoen F (2000) 6 ‘The African Charter on the Rights and Welfare of the Child’ in CJ Davel (ed) Introduction to child law in South Africa 214 at 218.

<sup>139</sup> Article 30 ACRWC

<sup>140</sup> Mezmur B (2008) The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game *AHRLJ* 197.

<sup>141</sup> African Charter on the Rights and welfare of a Child (2002).

discriminated against based on the status of their parents (Article 3),<sup>142</sup> the best interests of the child as the primary consideration in actions affecting children (Article 4(1))<sup>143</sup>, the opportunity to be heard in any judicial and administrative proceedings affecting them (Article 4(2))<sup>144</sup>, and the right to survival and development (Article 5)<sup>145</sup>. Other Articles of relevance include the rights to be registered immediately after birth (Article 6)<sup>146</sup>, to education (Article 11),<sup>147</sup> to health (Article 14),<sup>148</sup> to protect against abuse (Article 16)<sup>149</sup>, and the enjoyment of parental care and protection (Article 19).<sup>150</sup>

The African Committee of Experts on the Rights and Welfare of the Child adopted its first General Comment and focused specifically on Article 30 of the African Charter, and therefore on the situation of children incarcerated with their mothers.<sup>151</sup> A total of 50 of the 55 African states have signed and ratified this treaty including South Africa, Malawi, Kenya, Ghana, and Guinea.<sup>152</sup>

### 2.7.2 Article 30 of the ACRWC and its general comment

This Article is known and described as a unique feature of the African Charter.<sup>153</sup> Article 30 of the ACRWC introduces a special provision that aims to protect the infants and young children of imprisoned mothers and the unborn children of expectant imprisoned mothers.<sup>154</sup> It finds no counterpart in the CRC and has been ascribed to the fact that the mother is considered to be the primary caretaker in most parts of Africa.<sup>155</sup> The Special Rapporteur on Prisons and Conditions of Detention in Africa reported concerns with regard to children who reside with their mothers as prison is regarded as not a safe place for babies.<sup>156</sup> However, the separation of babies and

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<sup>142</sup> Article 3 ACRWC

<sup>143</sup> Article 4 (1) ACRWC

<sup>144</sup> Article 4 (2) ACRWC

<sup>145</sup> Article 5 ACRWC

<sup>146</sup> Article 6 ACRWC

<sup>147</sup> Article 11 ACRWC

<sup>148</sup> Article 14 ACRWC

<sup>149</sup> Article 16 ACRWC

<sup>150</sup> Article 17 ACRWC

<sup>151</sup> The Committee of Experts on the Rights and Welfare of the Child.

<sup>152</sup> Olowu D, 2002 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' Volume 10, The International Journal of Children's Rights, 127–136.

<sup>153</sup> Chirwa (2002) 168.

<sup>154</sup> Chirwa (2002) 176.

<sup>155</sup> ACRWC General Comment on Article 30.

<sup>156</sup> Long, D & Muntingh, L. 2010. "The Special Rapporteur on Prisons and Conditions of Detention in Africa and The Committee for the Prevention of torture in Africa" Issue 13, The International Journal on Human Rights.

young children from their mothers is discouraged unless such acts are in the children's best interests.<sup>157</sup>

The general comment aims to supporting States parties and other stakeholders in ensuring that article 30 of the ACRWC is effectively implemented.<sup>158</sup> Article 30 carries provisions that ensure “special treatment” for pregnant women and mothers who are accused or convicted of criminal offenses.<sup>159</sup> The non-custodial sentencing for pregnant women and mothers of young offenders and the establishment of alternatives to detention for them should be a paramount consideration by State parties.<sup>160</sup> Article 30 is informed by the fact that children of incarcerated parents/primary caregivers may find a number of their rights violated as a result of their parent's incarceration.<sup>161</sup> The General Comment on Article 30 seeks to strengthen understanding of the meaning and application of Article 30 and its implications for States Parties, international organizations, civil society organizations, community-based structures, and society at large.<sup>162</sup> This includes to “engage in a constructive dialogue with States Parties on the constitutional, policy, legal and operational framework for the effective implementation of Article 30”<sup>163</sup> Furthermore, the general comment on Article 30 encourages and promotes periodic reports to be submitted by State parties with particular to the constitutional, policy, legal and administrative measures undertaken by States Parties to fulfil their obligations under Article 30.<sup>164</sup> The general comment highlights positive approaches in implementing Article 30, benefitting from the monitoring experience of the African Committee as well as research on the issue.<sup>165</sup> This General Comment also applies whether the primary caregiver is in custody or subject to non-custodial measures.<sup>166</sup>

Article 30.1 of the ACRWC states that “States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children

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<https://sur.conectas.org/en/special-rapporteur-prisons-conditions-detention-africa-committee-prevention-torture-africa/> (accessed on 25 July 2022)

<sup>157</sup> Long & Muntingh. 2010

<sup>158</sup> Chirwa (2002)

<sup>159</sup> ACRWC Article 30

<sup>160</sup> ACRWC General Comment on Article 30.

<sup>161</sup> Article 30 ACRWC

<sup>162</sup> ACRWC General Comment on Article 30.

<sup>163</sup> ACRWC General Comment on Article 30.

<sup>164</sup> ACRWC General Comment on Article 30.

<sup>165</sup> Women in Prison, Africa Regional Initiative (2019)

<sup>166</sup> Women in Prison, Africa Regional Initiative (2019) 19



who have been accused or found guilty of infringing the penal law and shall in particular”.<sup>167</sup> This clause emphasizes the importance of how the rights of children with incarcerated mothers should be upheld at all times and in keeping with their best interests. Article 30 is applicable when primary caregivers are accused or found guilty of infringing the respective criminal law.<sup>168</sup> This includes all levels of criminal proceedings whether arrest, incarceration, and integration of the primary caregiver. It is wise for State Parties to take an individualized approach that is based on actual information about incarcerated parents/caregivers and children.<sup>169</sup> “To encourage such an approach, statistics about children of incarcerated parents should be routinely and consistently gathered by relevant agencies to help develop policy and practice in States Parties.”<sup>170</sup> All multi-disciplinary practitioners that include Teachers, Social Workers who may come into contact with children of incarcerated parents, must be trained to appropriately provide any needed support.<sup>171</sup>

## 2.8 Conclusion

There are various studies, and treaties that are binding, and non-binding that are found internationally, regionally, and domestically which speak about the promotion, protection, and fulfillment of the rights of children who reside with their biological mothers or primary caregivers in prison. These treaties give clear guidelines for states that are a signatory to not violate, or expose to any form of torture, discrimination, and any form of unfavourable circumstances when children accompany their mothers in prison. According to the research reviewed in this chapter, infants whose mothers are deprived of their liberty see some of their basic rights being affected by their mothers’ incarcerations. Children who live with their mothers in prisons are not offenders and should be treated as such. Furthermore, there is minimal attention given to children who accompany their mothers to prison, policies, and more legislation on such should be formulated. Chapter 3 of this paper will focus specifically on South African laws on the subject and assess the conditions of children who accompany their mothers in prison. This will then assist the student to answer the research question on whether the rights of children who reside with their incarcerated mothers are upheld, and if not, indicate what steps can be taken to improve these conditions.

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<sup>167</sup> Article 30.1 of ACRWC

<sup>168</sup> Article 30. ACRWC

<sup>169</sup> General comment of Article 30

<sup>170</sup> Herewith General comment of Article 30

<sup>171</sup> See General comment of Article 30

## CHAPTER 3: DOMESTIC LEGAL, POLICY, AND PROGRAMMATIC FRAMEWORK

### 3.1 Introduction

The number of male inmates in South Africa is estimated at nearly 98% of the prison population, which often leads to a neglect of the needs of incarcerated women as a minority group within the correctional facilities.<sup>172</sup> The neglect of female prisoners is not only seen in terms of programs and service delivery but as well from a research point of view.<sup>173</sup> This has, consequently, led to a rise in concerns regarding the experience of women during incarceration, and this includes exposure to sexual molestation during their period of incarceration which compromises the rights of these women in prison. This research project, therefore, looks at the imbeleko project, a South African initiative aimed at improving the lives of children who find themselves behind bars with their incarcerated mothers. Also, examines if the experiences of the children who live with their mothers in prison are in line with the law of South Africa.

Furthermore, this chapter will unpack domestic legislation and policy framework that are applicable to children living with their mothers in South African prisons. The legislation which will be discussed for the sake of the research includes the Constitution of the Republic of South Africa, No.108 of 1996, White Paper on Corrections in South Africa (2005), Correctional Services Act, No 111 of 1998, Correctional Services Amendment Act No 25 of 2008, Children's Act, (Act No 38 of 2005 as amended) and Mothers and Babies Policy and Procedures. The responsible bodies for the inspection of prisons in South Africa which are the Judicial Inspectorate for Correctional Services (JICS), and Detention International-South Africa (JDI-SA) will also be reviewed. Lastly, the chapter will consider and refer to the other international and regional laws which have been highlighted in previous chapters.

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<sup>172</sup> Luyt, W.F.M 'Imprisoned mothers in South African prisons with children outside of the institution' C2008a) 16:299-323.

[https://www.researchgate.net/profile/WillemLuyt/publication/240679345\\_Imprisoned\\_Mothers\\_in\\_South\\_African\\_Prisons\\_with\\_Children\\_Outside\\_of\\_the\\_Institution/links/59e47832458515393d60e7a6/Imprisoned-Mothers-in-South-African-Prisons-with-Children-Outside-of-the-Institution.pdf?origin=publication\\_detail](https://www.researchgate.net/profile/WillemLuyt/publication/240679345_Imprisoned_Mothers_in_South_African_Prisons_with_Children_Outside_of_the_Institution/links/59e47832458515393d60e7a6/Imprisoned-Mothers-in-South-African-Prisons-with-Children-Outside-of-the-Institution.pdf?origin=publication_detail)  
(accessed 19 August 2022)

<sup>173</sup> Luyt, W.M.F (2008b). 303

## 3.2 Historical overview of female incarceration in South Africa.

The Department of Correctional Services has been mandated to place offenders in a secure, safe, and humane environment,<sup>174</sup> and ensure that rehabilitation and successful reintegration programs are implemented.<sup>175</sup> Historically children were not allowed to live with their mothers in South African prisons.<sup>176</sup> However, today as a result of the needs and rights of both mother and children, the law has allowed for this to happen, under the Correctional Services Amendment Act No 25 of 2008.<sup>177</sup> Children are now allowed to reside with their Mothers in prison from when their mothers are pregnant until the age of two years, however, this two years is not a cast in stone.<sup>178</sup> Meaning that, depending on circumstances, children might leave prison before they reach the age of 2 years.<sup>179</sup> The court decided it was in the child's best interest for such children to live in prison with their incarcerated mothers until the age limit.<sup>180</sup> This decision derived from the case law of *In S v M* dated 26<sup>th</sup> of September 2007 where the Constitutional Court passed a judgment that took into full account the best interests of the child.<sup>181</sup> Moreover, a clear indication of how the concept of the child's best interest best should be applied in cases where the child's primary caregiver is being sentenced, which gives rise to competing rights.<sup>182</sup>

## 3.3 Domestic legislation

### 3.3.1 The Constitution of the Republic of South Africa, No.108 of 1996

Post-apartheid the Constitutional Assembly was established and tasked to draw up a constitution to represent the interests and needs of all the people of South Africa.<sup>183</sup> Included in the Constitution was a Bill of Rights which outlines people's rights and responsibilities.<sup>184</sup> The rights of all children who reside in South Africa are all protected by this highest law in the

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<sup>174</sup> Correctional Services Act no 111 of 1998

<sup>175</sup> Act no 111 of 1998

<sup>176</sup> Professor Ann Skelton 'Children in Prison with their mothers-South Africa leading the way' available at [https://www.up.ac.za/faculty-of-law/news/post\\_2265750-children-in-prison-with-their-mothers-south-africa-leading-the-way](https://www.up.ac.za/faculty-of-law/news/post_2265750-children-in-prison-with-their-mothers-south-africa-leading-the-way) (accessed 27 September 2022)

<sup>177</sup> Correctional Services Amendment Act No 25 of 2008

<sup>178</sup> Hereafter Correctional Services Amendment Act No 25 of 2008

<sup>179</sup> Professor Ann Skelton 'Children in Prison with their mothers-South Africa leading the way' available at [https://www.up.ac.za/faculty-of-law/news/post\\_2265750-children-in-prison-with-their-mothers-south-africa-leading-the-way](https://www.up.ac.za/faculty-of-law/news/post_2265750-children-in-prison-with-their-mothers-south-africa-leading-the-way) (accessed 27 September 2022)

<sup>180</sup> See Correctional Services Amendment Act No 25 of 2008

<sup>181</sup> *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

<sup>182</sup> *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC).

<sup>183</sup> Constitution of the Republic of South Africa, 1996.

<sup>184</sup> Chapter 2 of the South African Constitution of 1996

land despite their jurisdictions, origins, or family circumstances. Therefore, even children who reside with their incarcerated mothers are all protected under this Constitution. Section 35 of the Constitution, specifically provides for the rights of detained, arrested, and accused persons including the right to be detained under conditions that are congruent with human dignity;<sup>185</sup> including the right to access at state expense, adequate accommodation, nutrition, reading material and medical treatment.<sup>186</sup> This section, specifically 35(2) (e) is aligned to the 1948 Universal Declaration of Human Rights (1948) and contains guarantees for the human dignity of prisoners.<sup>187</sup> However, looking at Section 35 of the Constitution, there is no specificity of the kind of congruent prison conditions should be.

The Department of Correctional Service is reported to respect human rights as enshrined in the Bill of Rights.<sup>188</sup> Section 28 (1) (g) (iii) asserts that every child has the right to be treated in a manner, and kept in conditions, that take account of the child's age.<sup>189</sup> Furthermore, (c) states that the child has a right to basic nutrition, shelter, basic health care services, and social services,<sup>190</sup> and subsection (2) of this same section stipulates that a child's best interests are of paramount importance in every matter concerning the child.<sup>191</sup> Children who live in South African prisons with their mothers are not exceptions to these provisions as the South African Constitution also covers their rights.

### 3.3.2 White Paper on Corrections in South Africa (2005)

The fundamentals of the white paper derive from the Constitution of South Africa No 108 of 1996, the Correctional Services Act (Act No 11 of 1998), and the integrated justice system.<sup>192</sup> The White paper is informed by the strategic imperatives of correcting offending behavior, rehabilitation, and correction as a societal responsibility.<sup>193</sup> A crucial lesson was learned from

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<sup>185</sup> Section 35 of the Constitution

<sup>186</sup> Section 35 (2) of the Constitution

<sup>187</sup> Dissel A and Ellise S 'Reform and stasis: Transformation in South African prisons' 2003

<sup>188</sup> Woman in Prison (2019)

<sup>189</sup> Herewith Section 28 (1) (g) (iii) of the Constitution

<sup>190</sup> Section 28 (1) (c) of the Constitution

<sup>191</sup> Herewith Section 28 (2) of the Constitution

<sup>192</sup> Couzens M & Mazoue N 'A critical analysis of selected aspects of the South African legal framework pertaining to the children living in prison with their mothers-with brief comparative comments' (2013) 34 available at [https://uwc.primo.exlibrisgroup.com/discovery/fulldisplay?docid=cdi\\_sabinet\\_saepub\\_10520\\_EJC148923&cont\\_ext=PC&vid=27UWC\\_INST:UWC&lang=en&search\\_scope=MyInst\\_and\\_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,infants%20living%20with%20their%20mothers%20in%20south%20african%20prison&mode=basic](https://uwc.primo.exlibrisgroup.com/discovery/fulldisplay?docid=cdi_sabinet_saepub_10520_EJC148923&cont_ext=PC&vid=27UWC_INST:UWC&lang=en&search_scope=MyInst_and_CI&adaptor=Primo%20Central&tab=Everything&query=any,contains,infants%20living%20with%20their%20mothers%20in%20south%20african%20prison&mode=basic) (accessed 28 August 2022)

<sup>193</sup> The White Paper on Corrections in South Africa (published on 09 February 2005) available at [https://www.gov.za/sites/default/files/gcis\\_document/202001/whitepaperoncorrectionsinsouth-africa.pdf](https://www.gov.za/sites/default/files/gcis_document/202001/whitepaperoncorrectionsinsouth-africa.pdf) (accessed 25 September 2022)

international law regarding the importance of not regarding all offenders at correctional facilities as being a uniform entity. Rather, special consideration needs to be given to the various groups of offenders who are not part of this perceived uniform majority.<sup>194</sup> The White Paper asserts the position of the Department on children in detention by forming “mothers and child units” within the correctional centres, where pregnant women are accommodated separately with their children as well as a crèche facility.<sup>195</sup> Under the white paper, the prison environment has ensured that it promotes the emotional and physical development of children who live with their incarcerated mothers. Despite the Department of Correctional Services introducing the mothers and baby unit, it was reported by Schoeman (2011) that the baby units remain not to be a conducive place for children to live in.<sup>196</sup> In a Mail and Guardian (2012) article of interviewed imprisoned mothers at Johannesburg Central Prison, it was stated that no matter how the baby unit can be painted in an attempt to diminish the prison mind on children, the prison walls will always look out of place and also have an impact to children mentally and emotionally.<sup>197</sup>

### 3.3.3 Correctional Services Act, No 111 of 1998

South African laws and policymakers have opted to allow mothers of children below the age of two to apply for permission to bring their children to be with them in correctional centers.<sup>198</sup> Section 12 of the Correctional Services Act prescribes that all offenders including children shall be assisted to maintain contact with their families, friends, and communities.<sup>199</sup> Section 8(1) recognizes the importance of providing inmates with nutritional diets that are adequate and promote good health.<sup>200</sup> Subsection (2) of Section 8 promotes the importance of good nutritional requirements for children, pregnant women, and any other category of inmates whose physical condition requires a special diet.<sup>201</sup> Section 20 informs about Mothers of young

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<sup>194</sup> Fourie E ‘Thinking about incarceration in South Africa: The inside-out Outside-in interest group’ (2015) 34 Psychology in Society. available at [https://www.researchgate.net/publication/297588248\\_Thinking\\_about\\_incarceration\\_in\\_South\\_Africa\\_The\\_inside-out\\_Outside-in\\_interest\\_group](https://www.researchgate.net/publication/297588248_Thinking_about_incarceration_in_South_Africa_The_inside-out_Outside-in_interest_group) (accessed 28 September 2022)

<sup>195</sup> White Paper on Corrections in South Africa 2005

<sup>196</sup> Schoeman M ‘Babies behind bars-hidden victims of policy and practice. *Child Abuse Research*’ (2011) 12(2) South African Journal

<sup>197</sup> Rawoot I ‘babies behind bars’ Mail & Guardian 28 June 2012 available at <https://mq.co.za/article/2012-06-28-babies-behind-bars-2/> (accessed 01 November 2022)

<sup>198</sup> NCOP women, children and people with Disabilities ‘Women with children in correctional center: Gauteng correctional services briefing’ available <https://pmg.org.za/committee-meeting/16961/> (accessed 01 November 2022)

<sup>199</sup> Section 12 of Correctional Service Act of 1998

<sup>200</sup> Section 8(1) Act 111 of 1998

<sup>201</sup> Section 8(2) of Correctional Services Act

children being allowed to reside with their children in prison until their children reach the age of 2 years.<sup>202</sup>

### 3.3.4 Correctional Services Amendment Act; No 25 of 2008

Before the amendment of this Act, children were allowed to stay in prison with their mothers up until the age of 5 years,<sup>203</sup> however, the age limit changed to 2 years.<sup>204</sup> The age of 5 years is when children's motor skills are advanced as their emotional, social, and thinking skills are more developed. Prison is reported to be traumatic; children of five years could have been exposed to more trauma due to their level of development. These dire effects range from lack of privacy, freedom of movement, limited choice, social interaction, and familial and age-appropriate contact, which all contribute to the baby and toddlers' perception of reality.<sup>205</sup> The change of age limit to 2 years was therefore created as one of the measures to eradicate the above-mentioned negative factors which easily affect children who are above that age. At least by the age of 2 years, children's bond with their parents is developed and they do not experience the harsh reality of prison as much as those who are 5 years and older.

### 3.3.5 Children's Act, (Act No 38 of 2005 as amended)

The Children's Act gives effect to certain rights of children as contained in the Constitution and set out principles relating to the care and protection of children.<sup>206</sup> Section 7 of the aforementioned Act requires the best interest of the child to be of paramount importance in all matters concerning the child.<sup>207</sup> Furthermore, Section (6) (2) stipulates a general principle that fosters that every decision in matters concerning children should be aligned with principles of respect, protect, promote, and fulfill the children's rights set out in all South African legislations.<sup>208</sup> It is by this piece of legislation that children who are in confinement with their mothers are guaranteed that their best interests are always protected.

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<sup>202</sup> Herewith Section 20 of Act 20 of 2008

<sup>203</sup> Artz, L. and Hoffman-Wanderer, Y. 'Word on the inside: epistemological considerations on women, crime and imprisonment' (2017) *Acta Criminologica: Southern African Journal of Criminology*, Vol. 30 No. 4, pp. 1-15

<sup>204</sup> Artz L and Hoffman-Wanderer Y (2017), page 5

<sup>205</sup> Hesselink A and Dastile NP "The reality of babies and toddlers behind bars" *Acta Criminologica CRIMSA 2009 Conference Special Edition* 12010 65-79

<sup>206</sup> Julia-Sloth-Nielsen. Policy and practice in South Africa prison: An update.1-19 available at <file:///C:/Users/55777937/AppData/Local/Microsoft/Windows/INetCache/IE/03LQRA1D/Sloth-NielsenPracticeandPolicy2005.pdf> ( accessed 28 September 2022)

<sup>207</sup> Section 7 of the Children's Act of no 38 of 2005

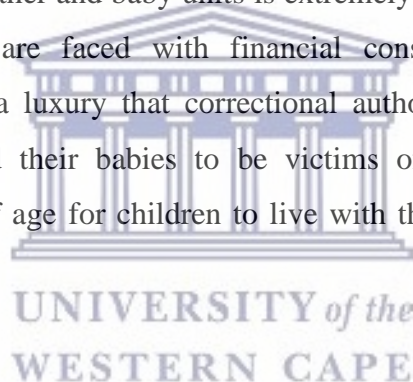
<sup>208</sup> See Section 6 (2) of the Children's Act of no 38 of 2005

### 3.4 Policy frameworks on children in confinement with their mothers.

#### 3.4.1 Mothers and Babies Policy and Procedures

Sixteen Female Correctional Centres have been designed with mothers and baby units to accommodate children who are in confinement with their mothers.<sup>209</sup> In instances where such facilities were not available closest to the mother's home, the mother had to be transferred, with her baby, to the nearest Female Correctional Centre.<sup>210</sup> However, in the report by JICS (2018), a court order of 2016 alluded that the Department of Correctional Services (DCS) continues to violate its obligation of housing females near their homes and families due to overcrowding.<sup>211</sup> Moreover, this policy guides and informs operations with regard to the treatment and management of mothers with their babies considering their unique and specific needs.<sup>212</sup> Furthermore, collaborative efforts are ensured for effective and efficient service delivery to mothers with babies and also promote compliance with legislation.<sup>213</sup>

However, there are shortcomings with this policy's implementation. It is reported by Schoeman (2011) that maintaining the mother and baby units is extremely expensive and, in most cases, where correctional facilities are faced with financial constraints, overpopulation, and overburden, then it becomes a luxury that correctional authorities cannot afford.<sup>214</sup> This, therefore, leaves mothers and their babies to be victims of unimplemented policy and practice.<sup>215</sup> Mandatory cut-off age for children to live with their mothers in prison is used



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<sup>209</sup> NCOP women, children and people with Disabilities 'Women with children in correctional center: Gauteng correctional services briefing' available at <https://pmg.org.za/committee-meeting/16961/> (accessed 01 November 2022)

<sup>210</sup> See NCOP women, children and people with Disabilities 'Women with children in correctional center: Gauteng correctional services briefing' available at <https://pmg.org.za/committee-meeting/16961/> (accessed 01 November 2022)

<sup>211</sup> Department of Correctional Services Annual Report of 2012/2013 available at [https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim\\_v21\\_n2\\_a16.pdf?sequence=1](https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim_v21_n2_a16.pdf?sequence=1) (accessed 29 September 2022)

<sup>212</sup> Department of Correctional Services, Strategic Plan for 2015/2016\_2019/2022 <http://www.dcs.gov.za/wp-content/uploads/2016/08/Strategic-Plan-2015-2016-2019-2020.pdf> (accessed 09 September 2022)

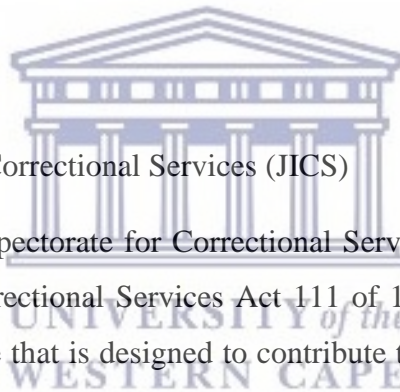
<sup>213</sup> Dr Amelia Kleijn, Ariane Nevin and Zia Wasserman 'One Judge. One Jail. A guide for inspecting and reporting on places of detention in South Africa' (2017) 3-61. Available at <https://genderjustice.org.za/publication/one-judge-one-jail/> (accessed 28 September 2022)

<sup>214</sup> Schoeman M 'Babies behind bars-hidden victims of policy and practice' (2011) 12(2) *Child Abuse Research: A South African Journal* . 78-87

<sup>215</sup> Schoeman M (2011) page 78

instead of first conducting individual assessments to ensure if it will be in the child's best interest to be united with the outside community.<sup>216</sup>

In research that was conducted at Johannesburg central prison, it was reported that despite measures of painting prison baby units to be child friendly, these paintings are said to always look out of place in prison.<sup>217</sup> A mother living with her baby in a baby unit at Johannesburg central prison was reported to find it "heart-breaking" to be living in the baby unit.<sup>218</sup> She reported her baby not knowing about dogs or cats or birds, moreover, the baby never felt car movements.<sup>219</sup> These babies are referred to as "The Forgotten" and the only famous terms they know in prison are, 'Wake up, 'parade' and 'dankie hek' (thank you gate). The prison baby units do not have sufficient brightness, meaning the children are not really exposed to the outside world.<sup>220</sup> This statement is confirmed by Eloff & Moen. (2003) stating that concepts such as cars, animals, shopping malls, and visiting friends are unknown to children who are in prison.<sup>221</sup> Children who are in prison with their mothers are cut off from the outside world.<sup>222</sup> Human exchanges are limited to the same people, prisoners, and guards, most of whom are women.<sup>223</sup>



### 3.4.2 Judicial Inspectorate for Correctional Services (JICS)

The South African Judicial Inspectorate for Correctional Services (JICS) was established in terms of section 85 of the Correctional Services Act 111 of 1998 (CSA).<sup>224</sup> The JICS is an independent prison inspectorate that is designed to contribute to improving prison conditions

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<sup>216</sup> Hesselink A and Dastile P 'The reality of babies and toddlers behind bars' (2010) *South African Journal of Criminology*. 65-69, available at: <https://hdl.handle.net/10520/EJC28572> (accessed 29 September 2022)

<sup>217</sup> Rawoot I 'Babies behind bars' Mail and Guardian 28 June 2012 available at <https://mq.co.za/article/2012-06-28-babies-behind-bars-2> (accessed 07 November 2022)

<sup>218</sup> Herewith Rawoot I 'babies behind bars' Mail and Guardian 28 June 2012 <https://mq.co.za/article/2012-06-28-babies-behind-bars-2> (accessed 07 November 2022)

<sup>219</sup> See Mail and Guardian 28 June 2012 <https://mq.co.za/article/2012-06-28-babies-behind-bars-2> (accessed 07 November 2022)

<sup>220</sup> Herewith Mail and Guardian 28 June 2012 <https://mq.co.za/article/2012-06-28-babies-behind-bars-2> (accessed 07 November 2022)

<sup>221</sup> Eloff L & Moen 'An analysis of mother-child interaction patterns in prison' (2003) 173(6) *Early Child Development and Care* 711-720

<sup>222</sup> See Eloff L & Moen (2003) Page. 718

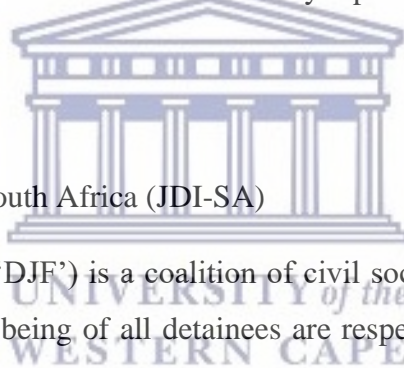
<sup>223</sup> Herewith Eloff L & Moen (2003) Page. 718

<sup>224</sup> The Judiciary Inspectorate Correctional Report. Annual report 'People are living there' for the period of 01 April 2015 TO 31 March 2016 [https://static.pmq.org.za/JICS\\_Annual\\_Report\\_2015-2016\\_as\\_at\\_30\\_September\\_2016-V5.pdf](https://static.pmq.org.za/JICS_Annual_Report_2015-2016_as_at_30_September_2016-V5.pdf) (accessed 27 August 2022)



and protecting the human rights of prisoners.<sup>225</sup> JICS is referred to as a watchdog body that oversees South Africa's correctional system, mandated to inspect, and report on the treatment of inmates.<sup>226</sup> Mothers who are incarcerated with their babies also depends on the JICS that is responsible to ensure that their rights are not violated. Under the JICS, the people who conduct site visits in prisons are called the Independent Correctional Centre Visitors (ICCV).

However, shortcomings with this body have been reported to be on the lack of dependence.<sup>227</sup> The JICS requires the assistance of DCS in the execution of its mandate but frequently faces a lack of cooperation from DCS members, which hinders its work.<sup>228</sup> Delivery of services are also hampered as this body depends on DCS for financial funding.<sup>229</sup> There is also conflict of interest as this body operates depending on DCS.<sup>230</sup> Therefore, how will inmates trust this body to report in a just and non-biased manner the conditions they live under. When ICCV conducts site visits to inmates in prison, it is reported that they face numerous challenges such as being prevented access by not unlocking the doors for JICS members.<sup>231</sup> Moreover, ICCVs are escorted for security purposes by DSC members when engaging with inmates, which hinders confidentiality as inmates would feel intimidated to fully report the violation they are exposed to in correctional centres.<sup>232</sup>



### 3.4.3 Detention International-South Africa (JDI-SA)

The Detention Justice Forum ('DJF') is a coalition of civil society organizations working to ensure that the rights and well-being of all detainees are respected and upheld, as enshrined

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<sup>225</sup> Kleijn A, Nevin A and Wasserman Z' One Judge. One Jail. A guide for inspecting and reporting on places of detention in South Africa' (2017) 3-61. Available at <https://genderjustice.org.za/publication/one-judge-one-jail/> (accessed 28 September 2022)

<sup>226</sup> Herewith One Judge. One Jail. A guide for inspecting and reporting on places of detention in South Africa. 2017) 3-61. Available at <https://genderjustice.org.za/publication/one-judge-one-jail/> (accessed 28 September 2022)

<sup>227</sup> Keehn, Nyembe and Sukhijo 'Evaluation of South Africa's Judicial Inspectorate for Correctional Services. Assessing its independence, effectiveness, and community engagement' (2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2791848](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791848) (accessed 28 October 2022)

<sup>228</sup> Herewith Keehn, Nyembe and Sukhijo (2013) 'Evaluation of South Africa's Judicial Inspectorate for Correctional Services. Assessing its independence, effectiveness and community engagement.' (2013) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2791848](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791848) (accessed 28 October 2022)

<sup>229</sup> Keehn, Nyembe and Sukhijo (2013) page 20

<sup>230</sup> Keehn, Nyembe and Sukhijo (2013) page 21

<sup>231</sup> Detention Justice forum South Africa. A Report Submitted for the Office of the High Commissioner for Human Rights in the Universal Periodic Review of South Africa (2016)

<sup>232</sup> Herewith Detention Justice forum South Africa A Report Submitted for the Office of the High Commissioner for Human Rights In the Universal Periodic Review of South Africa (2016)

under the South African Constitution, laws, and international human rights norms and standards.<sup>233</sup> A comprehensive legal framework laying out the minimum standards for safe and healthy prison conditions exists.<sup>234</sup> However, it is not uniformly implemented at all correctional facilities.<sup>235</sup> If there is no uniformity, then there is a threat of imbalance in the protection of detainees which includes children who live with their sentenced mothers. The JDI-SA after its findings in Pollsmoor prison called for a deeper understanding and a better response to, the need for incarcerated women, to be provided with gender-sensitive rehabilitative programs, adequate nutrition, hygiene, and sexual and reproductive health tools.<sup>236</sup> Clearly the JDI-SA found a gap of improper implementation of rights of female prisoners, hence there was a call made.

#### 3.4.4 Imbeleko project

Section 12 of the Correctional Services Act No 111 of 1998 prescribes that all offenders, including their children, must be assisted to maintain contact with their families, friends and communities.<sup>237</sup> To ensure that this was a success the DCS had established a project called Imbeleko, whose main purpose was to seek suitable alternative care for the placement of babies with families, foster care and adoptive parents.<sup>238</sup> Furthermore, the creation of the imbeleko project was to address the plight of babies by creation of safe environment for all children who reside with their mothers in prison.<sup>239</sup> The Imbeleko project is aligned with the Government Programme of Action, which calls for the creation of a safe environment for all children.<sup>240</sup> The aim of this project was to ensure every child is kept in conditions conducive for optimal development<sup>241</sup> Furthermore, to ensure that children are treated in a manner that takes into

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<sup>233</sup> Mahlali U and Nare P 'Incarcerated women tell NGO they are desperate for help' 30 august 2019 <https://www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/> (accessed 28 September 2019)

<sup>234</sup> Herewith Detention Justice forum. South Africa . A Report Submitted for the Office of the High Commissioner for Human Rights In the Universal Periodic Review of South Africa (2016)

<sup>235</sup> Herewith Mahlali U and Nare P 'Incarcerated women tell NGO they are desperate for help' 30 august 2019 <https://www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/> (accessed 28 September 2022)

<sup>236</sup> See Mahlali U and Nare P ( 30 August 2019) <https://www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/> (accessed 28 September 2022)

<sup>237</sup> Van Hout. M., C and Wessels (2022)

<sup>238</sup> Imbeleko. Report. Nelson Mandela Children's Fund . Cultivating resourcefulness, not dependency. <https://bettercarenetwork.org/sites/default/files/Imbeleko%20Report%20-%20Cultivating%20Resourcefulness,%20Not%20Dependency.pdf> (accessed September 2022)

<sup>239</sup> <https://www.groundup.org.za/article/babies-prison/>

<sup>240</sup> Van Hout. M., C and Wessels (2022) page 313

<sup>241</sup> Department of Correctional Services. Strategic plan for 2015/2016-2019/2020

account the child's age and basic needs.<sup>242</sup> There are slight improvement with babies with their mothers in prison through the initiative of the imbeleko project, however, there are still concerns raised by incarcerated mothers in prisons. The DCS facilities, although they tried to offer education and support to mothers and children, did not comply with the norms and standards that were set by the Department of Social Development (DSD) for these centres to be registered as Early Childhood Development Centres.<sup>243</sup> Furthermore, in practice, the design of female correctional centres is based mainly on a model originally developed for men and therefore not an environment which is conducive for the raising of children.<sup>244</sup>



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<sup>242</sup> Herewith Department of Correctional Services. Strategic plan for 2015/2016-2019/2020

<sup>243</sup> Bastick, M 'Women in prison a commentary on the Standard Minimum Rules for the Treatment of Prisoners' Discussion draft, Quaker United Nations Office (2005)

<sup>244</sup> Schoeman M 'Babies behind bars-hidden victims of policy and practice' (2011) 12(2) *Child Abuse Research: A South African Journal* 78-87

## CHAPTER 4 CHALLENGES FACED BY CHILDREN WHO LIVE WITH THEIR INCARCERATED MOTHERS IN SOUTH AFRICAN PRISON.

### 4.1 Statistics on children born in South African prisons.

There is a limit on a statistic on the numerical number of children born in prison. The only recent statistic which was reported by the Ministry of Correctional Services is dated 2022.<sup>245</sup> This research illustrates the percentage of females who are incarcerated, and it provides a percentage of 2.6 % but no recent statistic on children living in prison with their incarcerated mothers.<sup>246</sup>

### 4.2 Overcrowding in female prisons

Overcrowding has been a challenge in South African prisons even in female sections despite consisting of a small number in prison, however for male sections overcrowding is exacerbated.<sup>247</sup> Despite females in prison being a small number, research reports that they do face overcrowding in prison. The issue of overcrowding has been discussed in the research conducted by Agboola (2016) where it is indicated that overcrowding causes tension and violence in prisons through competition for resources, including toilets, showers, basins, beds, and bedding.<sup>248</sup> Moreover, the average South African prisoner in a communal cell does not have the bare minimum floor space (set by the Committee for the Prevention of Torture at four square meters per person), which could be declared by courts as cruel or degrading.<sup>249</sup> The standard minimum rules put an emphasis on Article 15 which speaks about hygiene of women and children in prison.<sup>250</sup> It states that “Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”<sup>251</sup> It has been reported that the conditions of Pollsmoor prison were dire even for women, women remand were crowded into a poorly aerated room.<sup>252</sup> The women

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<sup>245</sup> World Prison Brief. Institute For Crime and Justice Policy Research.

<https://www.prisonstudies.org/country/south-africa> (accessed 15 March 2023)

<sup>246</sup> World Prison Brief. Institute For Crime and Justice Policy Research.

<https://www.prisonstudies.org/country/south-africa> (accessed 15 March 2023)

<sup>247</sup> Agboola. C ‘ Memories of the “inside” Conditions in South African women’s prisons (2016) SA Crime Quarterly. No56

<sup>248</sup> Agboola (2016)

<sup>249</sup> Schoeman. M. (2011) Babies behind bars-hidden victims of policy and practice. Child Abuse Research: A South African Journal 2011, 12(2):78-87

<sup>250</sup> Article 15. Standard Minimum Rules

<sup>251</sup> Herewith Article 15. Standard Minimum Rules

<sup>252</sup> Cameron E ‘Pollsmoor Correctional Centre – Remand Centre and Women’s Centre’ (2015) Constitutional Court, South Africa

shared beds or slept on the floor on thin mattresses and the mattresses were stinking.<sup>253</sup> Yet Section 9 of the Correctional Services Act speaks about the importance of hygiene in places of confinement.<sup>254</sup> Furthermore, it was reported that in Pollsmoor female section there were no working toilets, a clogged sink drains and only cold water and the cell was infected with cockroaches.<sup>255</sup> Section 35(2) of the Constitution of the Republic of South Africa stipulates that all individuals, including female prisons inmates, have the right to conditions of imprisonment that are in line with human dignity.<sup>256</sup> However, the realization of this right still seems to be a dream after more than two decades of democracy.

#### 4.3 Health care

Most authors speak about the health provisions of South African prisons not being up to standard. Agboola (2016) found that the healthcare provision in certain South African correctional facilities was poor and inadequate.<sup>257</sup> A number of pregnant female inmates did not receive medical care at any point in their incarceration, and some pregnancies allegedly went unnoticed by the authorities.<sup>258</sup> Furthermore, it was reported that the wardens and nurses did not give proper attention to reports of ill-health of female inmates.<sup>259</sup> As a result, inmates resorted to treating their illnesses themselves, using home-made remedies.<sup>260</sup> Also little to no measures or mentions of women's gendered health and hygienic needs nor complaints made by female offenders to correctional services authorities, which is reported on in relation to male inmates, were put in place or attended to.<sup>261</sup> The JICS (2013) in its report found failure of correctional facilities to provide medical treatment.<sup>262</sup> The dire shortage of health care services

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<sup>253</sup> Cameron E (2015)

<sup>254</sup> Section 9 of the Correctional Services Act

<sup>255</sup> Schoeman. M. (2011) Page 82-84

<sup>256</sup> Section 35 (2) of the Constitution of the Republic of South Africa 108 of 1996

<sup>257</sup> Agboola (2016)

<sup>258</sup> Gordin and Cloete (2013)

<sup>259</sup> Mahlati U and Nare P 'Incarcerated women tell NGO they are desperate for help' 30 august 2019 <https://www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/> (accessed 28 September 2019)

<sup>260</sup> Agboola (2016)

<sup>261</sup> Artz L and Rotmann B Taking "A count" of women in prison (2016)

<sup>262</sup> Keehn, Nyembe, and Sukhija 'Evaluation of South Africa's Judicial Inspectorate For Correctional Services. Assessing its independence, effectiveness and community engagement' (2013) <file:///C:/Users/55777937/Documents/Jucicial-inspection-in%20correctional-services-in-south-africa.pdf> (accessed 28 September 2022)

puts incarcerated women and their children in harm's way, however the priorities of women's health continue to be neglected.<sup>263</sup>

#### 4.4 Food

Incarcerated women claimed being fed poor quality food during their incarceration.<sup>264</sup> They claimed that the food was 'terrible' and in some cases not properly cooked. Moreover, the food in some prisons was said to be rotten.<sup>265</sup> As a result, some female inmates reported being close to starvation at times, prison food was monotonous and did not constitute a balanced diet.<sup>266</sup> Some female prisoners reported that their diet consisted mainly of carbohydrates in the form of bread and pap (a porridge made from ground maize), which was sometimes served with cabbage and boiled eggs.<sup>267</sup> Section 8 of the Correctional Services Act gives incarcerated inmates the right to adequate nutrition that promotes good health.<sup>268</sup> What then happens with those chronic inmates and those who require special diets if the prison environment fails to provide adequate nutritious food for them? Clearly they are facing death threats in such an environment.

#### 4.5 Staff Shortage

The South African Department of Correctional Services (DCS) and the Judicial Inspectorate have both raised concerns about the lack of mental health professionals,<sup>269</sup> overburdened nurses and social workers in their Annual Reports of 2012/2013 (DCS, 2014).<sup>270</sup> In the report by the IJCS (2014), amongst many challenges the correctional system faces are sometimes related to the shortage of staff which has affected the support that women living with their children in prison need to receive.<sup>271</sup> The staff shortage makes it a challenge for the realization of the rights of incarcerated inmates for protection in terms of access to adequate health care services, their

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<sup>263</sup> Mahlati U and Nare P 'Incarcerated women tell NGO they are desperate for help' 30 August 2019 <https://www.groundup.org.za/article/incarcerated-women-tell-ngo-they-are-desperate-help/> (accessed 28 September 2019)

<sup>264</sup> Agboola (2016) page 22-23

<sup>265</sup> Agboola (2016) page 22-23

<sup>266</sup> Hopkins R "Filth, disease, sex and violence for Pollsmoor's female inmates" (2016) available at <https://mg.co.za/article/2016-03-03-filth-disease-sex-and-violence-for-pollsmoors-female-inmates/> (accessed 28 August 2022)

<sup>267</sup> Hopkins, R. (2016)

<sup>268</sup> Section 8 of Correctional Services Act no 111 of 1999

<sup>269</sup> Artz L and Rotmann B Taking "A count" of women in prison (2016)

<sup>270</sup> Department of Correctional Services Annual Report of 2012/2013 accessed (29 August 2022) [https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim\\_v21\\_n2\\_a16.pdf?sequence=1](https://uir.unisa.ac.za/bitstream/handle/10500/15064/2008%20Contemporary%20corrections%20in%20SA%20after%20more%20than%20a%20decade%20of%20transformation%20crim_v21_n2_a16.pdf?sequence=1)

<sup>271</sup> Artz. L and Rotmann. B (2016) page 4

safety is compromised when there are shortages of wardens as well. It has been reported that some institutions did not have doctors to attend to the medical needs of female prisoners.<sup>272</sup>

#### 4.6 Lack of recreational activities for mothers and children

Section 11 of the Correctional Services Act no 111 of 1998 promotes the rights of inmates to be granted an opportunity for about an hour to exercise sufficiently daily in order to remain healthy.<sup>273</sup> However, research has found that women's participation in sports, recreation, arts, and culture remains unspecified.<sup>274</sup> Prison conditions have been reported to have negative impact on children living with their mothers as children receive very few visits from family members, they have limited space to play and have little exposure to the external environment.<sup>275</sup> Prison environment is clearly not conducive to the development of the child in prison.

The role of mothers in prison is dependent on the guidelines and decisions of the prison officials who decide where the children can go, and when they can go outside, etc.<sup>276</sup> Furthermore, there are restrictions on what these mothers and their children can eat, and when they are allowed to attend preschool and visit their families.<sup>277</sup> Mother and child can interact in their own way as long as it fits in with prison rules and regulations.<sup>278</sup> The research conducted in Pretoria prison was reported that by 14:30 gates are locked, meaning the mother and child can only move within their communal cell.<sup>279</sup> Elof and Morn (2003) in their article further reported that there are toys available for the children in prison, however prison environment inside the unit cannot be described as child friendly.<sup>280</sup> Moreover, Elof and Moen (2003) reported that in an environment where outside stimulation and materials are restricted, imaginative games can be of good use, as they do not restrict the mothers to the materials available in prison.<sup>281</sup> There is little research that confirms if mothers provide their children with imaginary play as it is believed to be effective in a restrictive environment.

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<sup>272</sup> Artz and Rotmann (2016) page 4

<sup>273</sup> Section 11 of Correctional Services Act

<sup>274</sup> Artz and Rotmann 2016. Page 4

<sup>275</sup> Van Hout M C and Wessels (2022) page 306-307

<sup>276</sup> Elof and Moen (2003) 717-718

<sup>277</sup> Elof, L & Moen 'An analysis of mother-child interaction patterns in prison.' (2003) 173(6) *Early Child Development and Care* 711-720

<sup>278</sup> Elof & Moen (2003) page 716

<sup>279</sup> Clark J 'The impact of the prison environment on mothers' (1995) 75 *The Prison Journal* 306-329.

<sup>280</sup> Herewith Elof & Moen (2003) 717

<sup>281</sup> See Elof & Moen (2003) 718

#### 4.7 Challenges with legislation

The Commission on Gender Equality, established in 1997, reveals no detail on women in detention settings.<sup>282</sup> Furthermore, the current DCS (Department of Correctional Services [DCS], 2020) reporting still conveys a dogmatic cis-normative perspective of woman (and the care of women) by only referring to female prisoners regarding segregation by sex (S7 (2)b) and as mothers to be admitted with their infants (S20).<sup>283</sup> Whereas, the Correctional Services Act of 1998 does prescribe the obligation to create a gender-sensitive environment in prisons, and South Africa endorses the Bangkok Rules,<sup>284</sup> it falls short in providing concrete guidelines on how to achieve this and implementation is not reflected well on the ground.<sup>285</sup> In 2018, the Judicial Inspectorate for Correctional Services reported that Pollsmoor Correctional Centre was still in violation of the Overcrowding Court Order of 2016 (JICS, 2018), alluding that even though overcrowding in female section is not so intense compared to the males section, the DCS continues to violate its obligation of housing females near their homes and families due to overcrowding.<sup>286</sup>

It is alluded that little appeared to change in subsequent years, with minimal progress in addressing the basic rights of the living conditions of these women.<sup>287</sup> Academic studies reported on continued overcrowding on lack of sufficient floor space, and insufficient bathrooms. Furthermore, concerns on poor conditions that include the inadequate provision of toilet paper, soap, clothing, bedding, healthcare, sanitation, nutrition, availability of menstrual products, access to exercise, education, and reading materials were also of concern.<sup>288</sup> This contradicts Section 35 (3) of the Constitution and Section 8 (1 and 2) of the Correctional Services Act which stipulates that everyone has a right to adequate provisions regarding the nutritional requirements of all prisoners, and of pregnant women (see *Bapoo v Minister of Justice and Correctional Services and Others*), JICS reported.<sup>289</sup>

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<sup>282</sup> The Commission on Gender Equality (1997)

<sup>283</sup> Department of Correctional Services Annual Report (2020) available [https://www.gov.za/sites/default/files/gcis\\_document/202110/dcs-annual-report-2020-21.pdf](https://www.gov.za/sites/default/files/gcis_document/202110/dcs-annual-report-2020-21.pdf) (accessed 28 September 2022)

<sup>284</sup> See Department of Correctional Services Annual Report (2020) available at available [https://www.gov.za/sites/default/files/gcis\\_document/202110/dcs-annual-report-2020-21.pdf](https://www.gov.za/sites/default/files/gcis_document/202110/dcs-annual-report-2020-21.pdf) (accessed 28 September 2022)

<sup>285</sup> *Sonke Gender Justice NPC v President of the Republic of South Africa and Others* ( CCT307/19) [201] ZACC 26: 2020 (3) SA 132 (CC): 2022 BCLR 269 (CC)

<sup>286</sup> Judicial Inspectorate for Correctional Services report (2018)

<sup>287</sup> Agboola (2016) page 19

<sup>288</sup> Gordin and Cloete, (2013) ; Agboola, (2016)

<sup>289</sup> Judicial Inspectorate for Correctional Services report (2018)



#### 4.8 Conclusion

It is evident that even though women who live with their children in prison form part of a small number as compared to their male counterparts, it is unfortunate that to date there is little research conducted on their living conditions of them. This chapter has revealed the unfavorable living conditions women and their children still find themselves in, even today. The overcrowding in prison, the lack of play, the women's health and those pregnant being compromised, the shortage of staff, the violation of legislation, and inappropriate implementation have all been of concern throughout this chapter. The organizations which are mandated to keep the Department of Correctional Service accountable if they violate their obligations is depending on the same Department for financial assistance. Who would put accountable their masters? Violation of rights of children living with their mother in prison seems will take a long time to cease. Furthermore, a gap in recent/updated statistics on the number of children born in South African prisons places these children in a dire situation. Unknowing the number of children born in prison then indicates unknowing adequate budget and resources that will cover for their needs so their rights can be upheld.



## CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Introduction

South Africa had come from a dark place of apartheid and gained its democracy in 1994. It is now almost three decades into democracy, and one would assume that the status quo of the country would have improved immensely. However, it does not seem so in practice. Section 20 of the Correctional Services Act of 1998 provides for mothers of young children to be allowed to reside with their children in prison until their children reach the age of 2 years.<sup>290</sup> However, children who live with their mothers in South African prisons continue being the victims of poor policy implementation. South Africa is a signatory state to international and regional laws that protect, promote, and fulfill the rights of children who live with their incarcerated mothers. Furthermore, South Africa has various laws and policy frameworks on children living in prisons with their mothers. However, this research has demonstrated that, despite the modest progress that has been made, there are still shortcomings within South African law and policy. This chapter will provide recommendations to the Department of Correctional Services so improvements in the living conditions of these innocent children can be considered.

### 5.2 Recommendations

#### 5.2.1 Improvement on overcrowding

Numerous concerns were found that threaten the fulfillment of the rights of children who live with their incarcerated mothers in prisons. Despite female offenders being the minority group, overcrowding has been indicated as the main concern in their section. Overcrowding compromises, the standard of hygiene, which contradicts laws and regulations that require a good standard of hygiene in the prison setting, especially where children are concerned. This challenge can be overcome by prioritizing finances that will build more female prisons so as to house female inmates with their children.

#### 5.2.2. Improvement on health

The issue of health provision has been stipulated as being one of the main challenges in South African prisons. Pregnant women were reported to not have received adequate medical care at any point during their incarceration period and some pregnancies were unnoticed. The student

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<sup>290</sup> Correctional Services Act of 1998 section 20

has found that the other cause of unnoticed pregnancies was due to insufficient prison staff. The shortage of prison staff is caused by the above-indicated challenge, which is overcrowding. When there is a shortage of staff, it is not unusual that attention will not be provided to vital matters in the prison setting. Therefore, unborn babies become the unfortunate victims of their lives being at major risk. Despite previous research conducted and recommendations provided to the Correctional Services Department, it has been reported that females' health care services remain neglected. The government needs to be held accountable before The Committee on the Rights of the Child and the African Committee of Experts on the Rights and Welfare of the Child, in terms of its obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, which they are signatory to. Furthermore, the employment of more staff at correctional facilities will alleviate the issue of staff shortages, which in turn may reduce the number of pregnancies of female offenders going unnoticed.

### 5.2.3 Improvement on food

What the student has observed is that the issues that affect the fulfillment of the rights of children living with their incarcerated mothers are interlinked. The issue of food shortage has been an enormous one that has been raised by numerous researchers. Poor quality of food, and in some instances, food being rotten has been of concern. Pregnant women and infants require a special diet, if that is not being delivered then surely the lives of these children are at risk. Shortage of food is highly caused by overcrowding, overcrowding results in a shortage of food and competition for resources. Due to the South African economy which at this stage is a constraint, it will not be wise to fully depend on the government to provide all required fresh nutritional food for female inmates and their children. Therefore, the student recommends inmates should be provided with farming and plowing skills. The government can provide land, seeds, and capital to start this initiative.

### 5.2.4 Improvement on imaginary play

Children require a free environment in order to play, however since children that are in prison are restricted it becomes a challenge for them to be exposed to proper playing facilities that will enhance their development. This is crucial because the main reason for the children to be with their mother in prison from birth until two years is for bonding purposes. However, in most cases, it becomes a challenge as children are limited in prison. Children can only move in communal cells and prison units have been described as not child friendly. Reports indicate

that there is not sufficient time for play for these infants in prison due to inadequate resources to meet their needs. In order to avoid placing too much responsibility on the government despite being obligated to fulfil these rights, Non-Government Organization (NGOs) can be approached. NGOs can be approached to donate resources that children living in prison with their mothers require in order to realize their right to play. Being locked inside prison most of the time and not being able to play can lead to children developing psychological problems in later life.

#### 5.2.5 Improvement on legislation

South Africa is a state party to international and regional laws such as CRC, ACRWC, The Standard Minimum Rules, Bangkok Rules, CEDAW, and UNCAT. Therefore, South Africa is bound by the provisions of such instruments for the realization of the rights of children. These laws are seen being incorporated into the domestic laws of South Africa, however, children who live with their mothers in prison continue to be victims of poor policy implementation. It has been found that commissions that are supposed to report on women and children living in prison had no details on women in detention. Furthermore, there is a great need of creating gender sensitivity in the prison environment, as there are still issues of concern regarding cis-normative of women in prison. Revisiting policies and holding the government accountable for its failure to abide by laws and policies should be prioritized. Otherwise, children's lives with their mothers in prison will continue to be at risk. Moreover, it has been found that in some instances there is no uniformity in the implementation of laws and policies. Lawmakers to revisit and address the above-mentioned gaps so improvement in laws and policies can take place.

#### 5.2.6 Improvements on mother and baby units

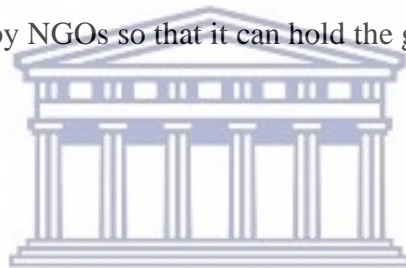
It has been found that maintaining mother and baby units is expensive, it becomes a challenge as more of these units are required as the number of women and children continues to grow. Financial constraints continue to be an obstacle in addressing most of these challenges that children living in prison with their mothers experience. The conditions of mother and baby units are not up to standard due to poor maintenance. A great need for investments is required so capital can be available to realize adequate care and properly maintained mother and baby units.

The mandatory cut-off of children to two years without doing a proper assessment of whether it will be in their best interest to be reunited with the outside community continues to expose

these children to failure of proper care. Appropriate assessment needs to be conducted before such decisions can be taken. Each case will differ according to its merits. For example, mentally challenged children will not internalize the prison setting intensely as mentally sound children as these children are different.<sup>291</sup> For these children if prison conditions are improved, they can reside a little longer until it is fit for them to be reunited with the outside community.

#### 5.2.7 Improvement on South African Judicial Inspectorate for Correctional Services (JICS)

The South African Judicial Inspectorate for Correctional Services (JICS), is an independent organization that is designed to contribute to improving prison conditions and protecting the human rights of prisoners. However, there are gaps when it comes to its finances as its budget depends on the Department of Correctional Services. This makes the body find it difficult to hold accounts for its master (DCS). This then leaves a huge gap in proper reporting of violations of the rights of inmates in South African prisons. After coming out of the dark era of apartheid, mismanagement of resources continues to be a challenge. Those involved in such barbaric behavior of mismanagement of resources should face the full might of the law. Furthermore, this body should be supported by NGOs so that it can hold the government accountable for its inappropriate conduct.



#### 5.3 Conclusion

Looking at the purpose of this research conducted, the student's research questions have been fulfilled. It has been found that there are no adequate resources to fulfill the realization of the rights of children living in prison with their mothers. Children living in prison with their mothers continue to have their rights violated. Improvements to these conditions are paramount.

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<sup>291</sup> Diane. C. R. "Similarities and differences between children with and without disabilities on identified clinical findings" *Developmental Disabilities Bulletin*, 2005, Vol 35, No 33, No 1& 2. pp. 40-70 <https://files.eric.ed.gov/fulltext/EJ844470.pdf> (Accessed 04/12/2022)

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