

LEVERAGING THE MAPUTO PROTOCOL: ENHANCING THE POLICE RESPONSE TO IMPROVE ACCESS TO JUSTICE FOR WOMEN

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ACRONYMS

APCOF	African Policing Civilian Oversight Forum
AU	African Union
GBV	gender-based violence
SSR	Security Sector Reform
UNDP	United Nations Development Programme

ABSTRACT

The Maputo Protocol signals a commitment to substantive gender equality by African states. Despite this, incarcerated women continue to experience discrimination and violence when attempting to access justice, while the number of incarcerated women continues to rise. Given that law enforcement officials act as the gatekeepers to the criminal justice system, this paper examines how the policing response can be engendered to be more responsive to the intersecting vulnerabilities experienced by women. Examples of these vulnerabilities include the feminisation of poverty and high levels of gender-based violence. Given that cumulative violence increases women's risk of incarceration, there is a need for effective policing that is responsive to the intersecting factors that shape women's pathways to prison.

While the Maputo Protocol provides a progressive framework of rights, this is not necessarily translating into further (and necessary) normative guidance for African states on gender-responsive policing at the regional level. Using a relational feminism lens, this paper examines how existing legal interpretive instruments intersect with gendered dynamics to structure relations that hinder access to justice. A relational feminist approach further considers how these norms can be transformed in order to structure more gender-sensitive criminal justice responses. Ultimately, this paper aims to distinguish potential solutions in terms of shifting the current discourse and guidance on policing towards an approach that is able to improve access to justice for incarcerated women.

INTRODUCTION

Women experience gendered barriers to accessing justice whether they are victims, witnesses, accused or incarcerated.¹ However, one of the most striking findings in researching access to justice for women is the lack of detailed data on women in contact with the criminal justice system.² This is despite the rapid rise in the number of incarcerated women in recent years. Globally, this number has increased by nearly 60% since 2000.³ In the previous two decades alone, a number of African countries witnessed a growth of over 200% in the incarcerated female demographic.⁴ This increase is at a much faster rate than that of male prisoners.⁵ In addition to increasing rates of incarceration, women are disproportionately affected by morality crimes, such as adultery or extramarital sex, or for violations of dress codes (demonstrating gender bias). Women and girls have also been imprisoned for running away from home, even when seeking to escape child and forced marriage, forced sex work or sexual and physical violence.⁶

However, while more women are entering the criminal justice system as accused or sentenced persons, places of detention such as police custody, remand facilities and prisons have traditionally been built to host and accommodate men.⁷ This gender-blind approach⁸ has been compounded by liberal conceptions of autonomy that underlie and inform contemporary criminal justice theories.⁹ These liberal notions have the propensity to entrench gendered patterns of inequality through ignoring the need for transformative and redistributive measures.¹⁰ This neglect is further emphasised in the limited data on the distinct pathways that lead to the arrest and detention of women. This lack of data, combined with inherent gender bias and the over-policing of marginalised groups, effectively prevents equal access to justice.

Given these barriers, this paper uses a relational feminist approach to examine gendered gaps in existing legal interpretive instruments at the African Union (AU) level that guide the policing and incarceration of women. The analysis is informed by the clear commitment to substantive gender equality in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Given the pivotal role played by police as the gatekeepers of social order and legal enforcement, the paper then examines how the police response can be transformed to foster improved access to justice for women.

USING RELATIONAL FEMINISM TO ADVOCATE FOR TRANSFORMATION

It is widely recognised that family relationships form an integral part in shaping who we are in terms of our capacities, our temperaments and our talents.¹¹ Less attention, however, is given to the role of relational dynamics, such as poverty and discriminatory policing, in contributing to women's feasible options and their vulnerability to incarceration.¹² A relational feminist lens places social relationships at the core of social and legal analysis. It recognises oppression as a phenomenon that manifests within relationships at the interpersonal, institutional and systemic levels.

In this paper, we scrutinise Jennifer Nedelsky's relational feminism theory for its capacity to bring this relational context to the foreground. This theory advocates for transformation through examining how laws, institutions and norms of behaviour (including criminal justice institutions such as the police) currently structure gendered relations.¹³ This approach moves beyond focusing only on specific examples of police misconduct or incompetence. Instead, it examines how broader social norms, gendered stereotypes, lack of resource allocation and lack of sensitisation on the rights of women foster discriminatory conduct by the police. This is necessary as social relations and structures, including discriminatory laws, gender-based violence (GBV) and masculinised policing institutions, continue to shape women's choices and their capacity to access justice.¹⁴ Relational feminism is further scrutinised for its capacity to render existing criminal justice systems more responsive to the needs and lived experiences of women.

PROBLEMATIC POLICING AND ITS IMPACT ON ACCESS TO JUSTICE FOR WOMEN

The United Nations Development Programme (UNDP) defines access to justice as the capacity of individuals to seek and receive a remedy through either formal or informal justice systems, while adhering to human rights principles.¹⁵ For women, accessing justice is a nuanced and complex issue given that they experience multiple layers of gendered discrimination and disadvantage. For example, a woman's ability to access justice is often impeded by her location, lack of knowledge of justice processes and stigma.¹⁶ Accessing justice goes beyond physical admittance into formal justice settings and encompasses the entire detention continuum, which is shaped by patriarchal norms and socio-economic vulnerability.¹⁷ The concept of access to justice as defined by the UNDP includes the ability of law enforcement officials to create an environment that is conducive to protecting women's rights.¹⁸

A 2021 report by UN Women focusing on East and Southern Africa found that access to justice for women and girls had declined over recent decades, and was worsened by the effects of the Covid-19 pandemic.¹⁹ The report highlighted that women in the study countries face numerous obstacles when seeking access to justice. These challenges include cultural and customary practices that are harmful to women, legislative and policy barriers, corruption that hinders access to justice for women and girls, limited access to technology, demographic and economic factors, as well as a pervasive lack of awareness.²⁰ The report found that this was unlikely to improve given the high levels of GBV and the limited opportunities available to women to access justice.²¹

By initiating the detention continuum through the act of arrest, the police play a pivotal role in either facilitating or hindering access to justice, often operating as the gatekeepers of social order and legal enforcement.²² As recognised agents of the state,²³ law enforcement officials also play a critical role in ensuring that states meet their human rights obligations under the African Charter on Human and Peoples' Rights (African Charter) and the Maputo Protocol.

The police are often the first interaction or engagement that women will have with the criminal justice system. However, this role is not without complexities and challenges. While law enforcement members are tasked with upholding the rule of law and ensuring peace, they frequently become agents of harm and discrimination through harassment and

exploitation.²⁴ This paper thus examines gendered human rights violations by police officers. It needs to be emphasised, however, that police officers have at times emerged as advocates for human rights.²⁵ This underscores the positive potential for law enforcement to contribute to safeguarding human rights within specific contexts, emphasising the importance of *how* the police are deployed. There is also a need for reform and heightened awareness of the distinct challenges faced by women within the realm of policing. For example, in their early interaction with the criminal justice system, women frequently encounter discrimination and a lack of awareness and training by police officers.²⁶

While each African country experiences unique challenges, there are common gendered issues pertaining to effective policing, including victim blaming, lack of capacity (in terms of effective investigation, being sensitive to victims and managing DNA evidence), insufficient data on GBV crimes and entrenched gender discrimination.²⁷ This suggests that the overly masculinised occupational culture within police organisations tends to filter into their responses to GBV,²⁸ as evidenced in reports detailing dissatisfactory police responses to such violence.²⁹ One example of how gender discrimination manifests itself is through gender-blind laws³⁰ that tend to provide police with broad discretionary powers.³¹ This increases the potential for exploitation in the form of violence, coercion, the request for bribes or sexual favours³² and at times rape.³³

Gender stereotypes then inform the nature of the charges brought against women,³⁴ many of whom struggle with a lack of access to resources, knowledge and proficient legal representation.³⁵ This is problematic, as early access to legal aid – either upon arrest or when at the police station – can play a significant role in determining whether a woman remains in pre-trial detention or is released.³⁶ Gender bias further influences how women are treated during pre-trial detention, court proceedings, sentencing and while in prison.³⁷ For example, while conditions of pre-trial detention are dire across Africa, such as overcrowding, female offenders experience higher risks of violence, discrimination and abuse.³⁸ At the same time, women find themselves unprepared for their interactions with police and judges, and are often forced into signing confessions.³⁹

The failure to address the over-incarceration of women also has relational implications, with devastating consequences for imprisoned women and their families. For example, studies have found that imprisoned women who are mothers are more likely to suffer from post-traumatic stress disorder (PTSD) and self-harm than their male counterparts.⁴⁰ The rights to life, dignity and liberty of both female prisoners and their children provide compelling reasons to explore alternatives to detention. While the focus on women's rights alone is necessary, it is also crucial to recognise the profound impact of maternal incarceration on the well-being of children.

Imprisoning mothers often leads to the transmission of poverty and trauma across generations,⁴¹ underscoring the urgent need for interventions that protect the rights of both women and their children. This problem is evidenced by the fact that, in 2022, approximately 19 000 children across the world were living in jail with their mothers.⁴² Children incarcerated with their mothers endure dire conditions, including inadequate nutrition, hygiene, sanitation and access to safe drinking water.⁴³ Overcrowded cells also expose them to diseases, while the inadequate provision of clothing and bedding exacerbates their vulnerabilities.⁴⁴

Certain African countries also have rigid rules in place, such as the mandated removal of a child once they reach a certain age.⁴⁵ This is often implemented without consideration for the child's best interests and how this will impact the mother. In addition to a lack of responsive healthcare services, legal provisions pertaining to non-custodial sentences remain

underdeveloped and unresponsive to women's needs, such as their caregiving duties.⁴⁶ These gaps have an impact on the families and children of incarcerated women, as well as their capacity to reintegrate into society. This demonstrates that there are numerous impediments that hinder access to justice for women in Africa, including accused and arrested women.

A number of legal instruments at the African regional level focus on women's rights and access to justice (discussed below). However, there are significant gaps within the overarching regional framework for policing and criminal justice that fall short of the important goal of fostering substantive gender equality. While there have also been a limited number of important decisions at the African regional level pertaining to access to justice for women, these cases have been criticised for failing to foster a transformative conception of substantive equality.⁴⁷

A RELATIONAL FEMINIST ANALYSIS

Contextual analysis

Relational feminism is utilised as a theoretical framework as it recognises the broader social context that shapes how women interact with the criminal justice system and with the police.⁴⁸ The first step in a relational feminist analysis entails examining the existing context through a relational feminist lens, in terms of how existing gendered relations and norms are currently structuring access to justice for women.⁴⁹ This is necessary given the high levels of GBV, the feminisation of poverty⁵⁰ and the steep rise in the number of female inmates.

When viewing women's incarceration through a relational feminist lens, it is easier to recognise how intimate relations (such as experiences of domestic violence) intersect with broader social norms (gender bias) and patterns of relating. Different groups of women experience intersecting axes of disadvantage. For example, women living in poverty are more likely to be targeted and harassed by the police,⁵¹ with poverty being the main driver of women coming into contact with the criminal justice system.⁵² If we wish to address the high number of female prisoners, we therefore need to address the underlying socio-economic causes of female incarceration. Additional factors driving female incarceration include prior victimisation, discriminatory laws, gender bias, gendered patterns of exploitation and punitive drug policies.⁵³

Given the feminisation of poverty, many women are forced to engage in petty crimes in order to survive.⁵⁴ Women are particularly at risk of arrest and prosecution under vagrancy laws, while many women engage in sex work to support themselves and their dependents.⁵⁵ This underscores that women's 'choice' to commit certain crimes is often influenced by a lack of feasible economic options available to them. Once they are arrested, women often spend a longer time in pre-trial detention due to their inability to pay fines, bail or for legal representation.⁵⁶

Relational feminism is responsive to the prevalent intersection between victimisation and offending⁵⁷ through recognising the web of relationships (such as abusive family relationships) that are implicated in women's offending behaviour. This is crucial, as research has shown that there is a strong link between sexual and physical abuse and the subsequent offending behaviour of women.⁵⁸ As emphasised by a 2023 Human Rights

Council Resolution, 'women may be violently coerced to engage in criminal activity, they may be imprisoned as a result of being trafficked, and they may be subject to criminalisation when responding to violence through self-defence'.⁵⁹ This is underscored in research confirming that where women are convicted of murder or manslaughter, in a high number of cases 'the victim is a male family member and there is a history of domestic violence'.⁶⁰ Given that the criminal justice system is currently failing to protect women from GBV,⁶¹ there is a need to recognise the relationship between impaired autonomy and the objective failure by the system (and often the police) to provide basic protection.⁶²

If we are truly committed to building back better and to improving the lives of African women, there is a need to transform how criminal justice systems, including the police, perceive and respond to women. This entails undertaking the extensive project of seeking to transform broader patterns of relating, as well as structural and material spaces within patriarchal and economic systems.⁶³ A relational feminist lens effectively foregrounds this reality.

Underlying values

Following the contextual analysis, this section examines the underlying values at play. This is key, as policy arguments against introducing gender-responsive measures for arrested women are often based on liberal conceptions of choice. For example, policymakers have expressed concern that female prisoners who have 'chosen' to commit their crimes will not be held accountable for their transgressions if gender-responsive measures are introduced.⁶⁴ Relational feminism recognises, however, that true autonomy (choice) comes into being or is restricted through relationships, power structures and socio-economic circumstances.⁶⁵

Focusing on a liberal conception of autonomy also perpetuates a persistent gendered pattern of blaming women. Examples of this blame encompass condemning women for engaging in sex work, blaming them for staying in unregulated relationships and chastising them for remaining in abusive relationships. As an illustration, a key policy argument against effective responses to GBV resides in the aim to protect autonomy. This has at times been expressed as the perception that this is 'private violence', beyond the scope of the state or of the police.⁶⁶ This perspective fails to recognise the impact of relational and socio-economic factors on women's choices and their personal relationships.⁶⁷

While discriminatory laws, such as those criminalising female dress codes, access to abortion and sex work, tend to focus on the conduct of the female perpetrator, there is a need for a shift in focus in terms of recognising how state structures and systems respond. Instead of primarily focusing on the transgression, which is often influenced by cultural norms and values, as well as gender bias,⁶⁸ the criminal justice system response should be interrogated. For example, when arrested women are kept in prolonged pre-trial detention, this exacerbates patterns of poverty among women, 'with severe downstream social and economic effects on their children and families'.⁶⁹ A number of feminist theories recognise the social context and the impact of discrimination in considering the 'choice' argument. However, liberal individualism remains a dominant mode of thought within jurisprudence and within discussions on offending women.⁷⁰ We therefore need a theoretical framework that is able to shift the liberal 'choice' argument when dealing with incarcerated women.

Gender-responsive measures do not equate to no accountability for female offenders. Instead, these measures, informed by a relational feminist lens, recognise that true accountability is dependent on a complex tapestry of social, economic and cultural

dynamics. In this approach, instead of focusing on a liberal conception of choice, autonomy as a value can be shifted and enhanced through constructive systems, structures and behaviours. For example, if we invest in social security systems, many women may not have to resort to sex work in order to survive. If we have strong social support for women in abusive relationships, such as effective policing, access to housing and access to schooling for their children, then we can expand their feasible options.

Relations and structures to foster gender equality

With respect to the kinds of relations and structures that would foster substantive gender equality, it is clear that there is a need to shift responsibility onto state institutions, and to alleviate the socio-economic responsibility on women. This is necessary in order to foster more constructive gendered relations. As opposed to being used as a blunt instrument, criminal justice systems should instead be strategically integrated into broader governmental strategies that are aimed at alleviating poverty and at social development. Police culture and the resultant police response can in this manner be reimagined to play a key role in changing the social paradigms which blame women for the violence they experience. Role players within the criminal justice system, including law enforcement, can therefore play a proactive role in tackling the root causes of structural injustice.

Finally, it is vital to determine what would need to change – what kind of transformative or redistributive element would result in a shift in gendered relations. A number of changes that need to occur are discussed in further detail in the next section. However, we do need to mainstream gender into conversations on access to justice while also reimagining the police response to women, particularly in communities that are over-policed.

A RELATIONAL FEMINIST ANALYSIS OF THE AFRICAN REGIONAL FRAMEWORK

Applicable instruments: An African framework for rights-based policing

At the level of the AU, there has been significant investment over the previous two decades in developing a normative framework to guide rights-based policing and access to justice.⁷¹ This has been in response to a growing recognition of the key role played by police in providing security, which is a central pillar for achieving continental peace and security, inclusive societies and sustainable development.⁷² The approach of African intergovernmental mechanisms has also been informed by emerging political consensus that systems for policing reflect the governance context within which they derive their power and mandate. Where those governance systems are weak, the capacity of the state and the police to ensure security is compromised. This, in turn, can cause or exacerbate violence and conflict, and undermine the rule of law, access to justice, human rights and sustainable development.⁷³ The overarching strategy of the AU and other intergovernmental mechanisms, in terms of developing policing standards, has therefore been both anchored and substantially informed by efforts to promote good governance and the provision of safety and security within that framework.⁷⁴

The emerging normative standards for policing and access to justice more broadly derive from African states' membership of the AU and from international human rights law. A core value of the AU is the promotion of peace and security, with its founding treaty making specific reference to the need to protect and promote human rights.⁷⁵ The AU's Policy Framework for Security Sector Reform (SSR) confirms the norms underpinning the governance of the police as comprising democratic governance and democratic control, the rule of law, and international and regional human rights law.⁷⁶ The Policy is intended to guide the AU, its member states, and all SSR partners on a principled and rights-based approach to building and reforming security sector institutions, including the police. It includes among its core principles the 'transformative possibilities of gender equality' within SSR, and the relevant principles enshrined in the Maputo Protocol and other gender-specific policies of the AU and its member states.⁷⁷ To that end, the AU has adopted a gender policy that provides guidance to member states on mainstreaming gender across institutions, legal frameworks, policies and programming.⁷⁸

Regional human rights standards are established by the African Charter. It recognises the indivisibility of civil and political, and social, economic and cultural rights, and affirms key rights relevant to policing. Examples of these rights include equality, the right to life, freedom from torture and other ill-treatment, liberty, security and freedom from arbitrary arrest and detention, and the right to a fair trial, access to justice and due process.⁷⁹ The African Charter includes a binding obligation for AU member states to adopt legislative and other measures to give effect to the provisions of the Charter.⁸⁰ The Charter also establishes the African Commission on Human and Peoples' Rights as an organ of the AU. The African Commission has a mandate 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.'⁸¹

Invoking this mandate, the African Commission has developed a range of subsidiary instruments to provide authoritative guidance to AU member states on the implementation of human rights obligations in a policing and criminal justice context.⁸² The Commission has also provided guidance in relation to gender equality and non-discrimination more broadly. The centrepiece of the Commission's focus on gender is the Maputo Protocol, and its further interpretive instruments under the leadership of the Commission's Special Rapporteur on the Rights of Women.

On policing and criminal justice more broadly, the Commission has adopted a range of instruments that seek to guide AU member states on operationalising human rights frameworks in the policing and access to justice spheres. These include the Kampala Declaration and Plan of Action on Prison Conditions in Africa; the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa; the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines); the Principles on the Decriminalisation of Petty Offences in Africa; the Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa; the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the Resolution on Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines); the Guidelines on Combating Sexual Violence and its Consequences in Africa; and the Guidelines on adhering to human and peoples' rights under the African Charter in the context of states of emergency or disaster.

In addition to the above, the Model Law for Police in Africa was adopted in 2019 by the Pan African Parliament, an organ of the AU with a legislative mandate. This Model Law draws on the AU standards articulated above to guide member states on how to give legislative effect to their obligations in the adoption and reform of police laws.⁸³

Analysis of the normative framework through a relational feminism lens

From a gender perspective, the most developed components of the AU's policing and access to justice framework relate to women as victims of crime, and to their participation in crime and violence prevention. This centres largely on ending violence against women. Here, the AU and African Commission have provided clear guidance on measures that member states should take to ensure gender-responsiveness to victims or survivors of GBV, harmful cultural practices and human trafficking.⁸⁴ There is also a well-developed framework to support state planning and monitoring on gender-mainstreaming in conflict prevention and women's participation in peace and security.

Notable is the African Commission on Human and Peoples' Rights Guidelines for Combating Sexual Violence and its Consequences in Africa, which were adopted in 2017. The Guidelines provide an authoritative interpretation of the Maputo Protocol. These Guidelines are also

informed by key general principles, including non-discrimination, do no harm, and due diligence, the obligation to protect, guaranteeing access to justice, and ensuring effective remedy and reparation. They further include measures on preventing violence utilising the best practice socio-ecological model.⁸⁵

The value in these Guidelines to achieving a transformative objective is that they go beyond normative statements of law and principle. They also provide prescriptive guidance for states on how to operationalise these directives at an institutional level. They contain, for example, details on police procedure relative to the investigation of crimes involving sexual violence. Significantly, this includes the establishment of early warning systems, specialised investigative and prosecution units, standards for best practice evidence gathering, and the informed consent of victims.⁸⁶

However, when analysing the framework pertaining to accused, charged or convicted women, similarly detailed and specific guidance for state parties on the rights of women is largely absent. While gender considerations are included, and direct reference is made to the Maputo Protocol and its transformative aims, a relational feminist analysis reveals three key issues⁸⁷ which limit the extent to which the framework can currently support transformative change. These challenges are discussed next.

Creating a comprehensive framework for enabling women's access to justice

As noted, using a relational feminist lens requires considering the broader social norms and structures which either enable or hinder women's access to justice. Generally, the overarching framework for rights-based policing and access to justice focuses on the obligations of state institutions regarding the treatment of women once they come into contact with the policing and justice systems.

However, the framework and individual instruments, both binding and interpretive, are generally silent regarding the unique experiences of women as accused or detained persons. Instead, issues are framed in broad terms relating to equality and non-discrimination. The existing framework also fails to provide detailed guidance on gender considerations for policing and justice actors for women in conflict with the law. This leaves a significant gap in terms of both promoting and measuring effective state responses that protect the rights of women in conflict with the law.

This narrow scope also fails to recognise and address the importance of relational norms that lead to women's offending, as well as the structural issues that shape how offences are defined and enforced. The impact of gender bias on decisions relating to the arrest, detention, prosecution and sentencing of women across the criminal justice chain is also neglected. The framework further excludes broader structural factors such as the extent to which systems of policing and justice are effective and accountable from a gender-responsive viewpoint.

Furthermore, the overarching AU framework tends to silo issues relating to the experience of women as accused persons, rather than substantively mainstreaming gender considerations. For example, the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa, which provide guidance to African states on reducing prison populations through integrated law and policy approaches, contain no specific gender considerations in terms of achieving this objective.⁸⁸

Similarly, the Robben Island Guidelines, which aim to guide African states on measures to prevent and combat torture in a law enforcement context, provide few gender-specific

recommendations to states. Where there is guidance, it is framed in broad terms, referring to the need for further cooperation with the Special Rapporteur on the Rights of Women in Africa in terms of implementation planning, and a broad policy statement regarding the criminalisation of gender-related forms of torture.⁸⁹

The African Commission's Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa are the most gender-responsive instruments available to African states in the area of criminal justice reform. However, these Guidelines themselves are illustrative of the broader challenge regarding a transformative approach to women's experiences of policing and criminal justice. The Guidelines were developed in response to a growing concern by the African Commission regarding state compliance with articles 4 and 5 of the African Charter in relation to police custody and remand detention. Article 4 of the Charter pertains to freedom from arbitrary arrest and detention. Article 5 provides for freedom from cruel, inhuman and other degrading treatment or punishment. The Guidelines acknowledge the disproportionate impact of pre-trial detention on the basis of socio-economic status, but do not provide a specific consideration of the feminisation of poverty and its implications for women's exposure to arrest and detention.⁹⁰

The structure of the Guidelines provides broad guidance to states on rights-based processes for arrest, police custody and remand detention, with an emphasis on ensuring decisions and actions by criminal justice institutions are non-discriminatory. This includes prohibiting arrest or pre-trial detention orders on the basis of gender discrimination (among others) and ensuring that searches are conducted by an officer of the same gender as the suspect. The Guidelines also call for pre-trial detention to be as close to home as possible to take into account caregiving responsibilities, while requiring the separation of categories of detainees, including along gender lines.⁹¹ Guideline 32 provides specific safeguards for the arrest and detention of women and their accompanying children, drawing from the international legal framework, including the Bangkok Rules.⁹²

However, consideration regarding the differentiated experiences of women in decisions on arrest, bail and pre-trial detention orders is not included in the Luanda Guidelines, despite emerging recognition of the impact of gender bias and the specific needs of women in these processes.⁹³ This is similar to the approach taken by the Pan African Parliament in the development of the Model Police Law, and its framing of the obligations on police officers regarding the arrest and custody of accused women.⁹⁴

Also of particular note are the Principles on the Decriminalisation of Petty Offences in Africa,⁹⁵ which were developed by the African Commission⁹⁶ to guide member states on the review and repeal of laws that criminalise poverty and status. As detailed in this paper, it is necessary to identify the laws that have a discriminatory or disproportionate impact on women, and which essentially criminalise their attempts to survive poverty. This is essential if we are to adopt a transformative approach to enhancing (engendering) policing and criminal justice responses.

The Principles recall the Maputo Protocol, and frame laws that criminalise life-sustaining activities in public spaces (including vagrancy-related offences, sleeping and erecting shelter, and informal trading) as a violation of article 2 of the African Charter on non-discrimination and equality before the law.⁹⁷ However, the Principles fall short of providing specific guidance to states on gender-inclusive approaches to decriminalisation.

This analysis reveals that Africa has developed a framework for policing and access to justice that reiterates established international norms on the treatment of women deprived of their liberty. However, this framework lacks nuanced and specific consideration of gendered

barriers to accessing justice in relation to women in conflict with the law. It also fails to provide detailed guidance on measures that should be taken to address structural factors that impact on effective and accountable policing for women as accused persons.

When taken as a whole, the framework has the potential to highlight and address the intersection between the underlying causes of women's criminalisation from the perspectives of poverty and violence. There is also the potential to address special measures to ensure their protection once they enter the criminal justice system, and considerations to inform gender-impacted decisions on issues such as bail and pre-trial detention.

However, further guidance is required to provide a level of detail that ensures states are both making that link between the causes and consequences of women's offending, and operationalising their obligations in a way that is gender-sensitive and evidence-based. The Maputo Protocol, with its specific focus on gender, should be instructive in this context. Ultimately, an examination of the Maputo Protocol and its subordinate instruments reveals a normative gap in terms of a comprehensive guide on gender-responsive approaches for female accused persons. In addition, this framework lacks provisions that holistically address the intersection between violence, poverty and structural factors that shape women's feasible options and their vulnerability to incarceration.

Inadequate guidance under the Maputo Protocol and its subordinate instruments

The Maputo Protocol is often referred to in the preambular clauses of the normative framework for policing and criminal justice outlined in the preceding section. It serves as both a guiding and interpretive instrument for states in implementing their human rights obligations. Although there have been challenges in implementing the Protocol, it has resulted in progress in advancing the rights of women, particularly in terms of sexual and reproductive health rights, and in promoting the establishment of national strategies for ending violence against women.⁹⁸ Significant here are the interpretive instruments, policies and guidance as outlined earlier.

However, in terms of engendering policing responses to women in conflict with the law, and addressing the intersectional pathways to women's offending, the Maputo Protocol is underutilised. Indeed, the only direct reference to women in conflict with the law is provided in article 24(b) on the special protection of women in distress, which includes provision for the rights of pregnant or nursing mothers in a detention context to be 'provided with an environment which is suitable to their condition and the right to be treated with dignity'.

However, the transformative ethos of the Maputo Protocol, particularly as it pertains to the positive obligations on states to end discrimination against women through integrated gender perspectives across all law, policy and development planning, provides a conceptual framework for engendering the police response to improve access to justice.⁹⁹ Article 24 read together with article 8(d), which requires law enforcement agencies to be 'equipped to effectively interpret and enforce gender equality rights', provides a clear normative basis for the further development of guidance for states on how to foster substantive (redistributive) gender equality in policing and criminal justice spheres.

An example of how the transformative aims of the Maputo Protocol can be utilised in addressing the inequality of women in this context is found in the 2020 Advisory Opinion of the African Court on Human and Peoples' Rights on the incompatibility of vagrancy-related offences with human rights.¹⁰⁰ The court found that vagrancy-related laws violate the rights to freedom from discrimination, the right of equal protection before the law and the right to dignity.¹⁰¹

The court invoked article 24(a) of the Maputo Protocol, which imposes a positive obligation on states to ensure the protection of poor women. The court found that vagrancy laws are inconsistent with article 24(a) insofar as they allow for an arrest without warrant.¹⁰² While the court referenced article 24 of the Maputo Protocol, this provision remains underutilised in feminist advocacy, jurisprudence and scholarly discourse. There is the opportunity, therefore, to further advocate for its comprehensive implementation through highlighting the intersectional rights violations of marginalised women, such as women in conflict with the law.

UTILISING RELATIONAL FEMINISM TO IMPROVE ACCESS TO JUSTICE

Addressing access to justice for women and the current over-incarceration of women in Africa requires a multilayered and holistic response, one that is attuned to the underlying socio-economic context experienced by women. If we are committed to implementing the Maputo Protocol, including its provisions on socio-economic justice and combating GBV, we need to focus on the rights and needs of imprisoned and formerly imprisoned women. A paradigmatic shift is therefore needed, whereby a gender-responsive relational feminist lens is more deeply integrated into everyday legal analysis, interpretation and policing. This gender lens is necessary at every stage of the detention continuum, including at the front-end of the justice system, as a relational feminist analysis provides a better framework for identifying what is really at stake.¹⁰³

In order to ensure that conversations on engendering access to justice are appropriately responsive, it is important to understand the interconnecting contexts (personal, institutional, legal and structural). Research and data collection needs to account for this context, while being done in a participatory manner. The police can be utilised as a key resource in terms of collecting and managing disaggregated data on women who come into contact with law enforcement. This data would need to focus on women's unique experiences and needs, while also being disaggregated by race, age, disability and other characteristics that may lead to disparities. This research is necessary in order to fully capture women's distinctive pathways to prison and to ensure that policymaking is more responsive to the needs and experiences of women.

In line with the transformative and redistributive elements of relational feminism, there is a need to allocate resources and to invest in training for law enforcement as well as legal aid services, particularly for women.¹⁰⁴ In terms of the ambit of policing, law enforcement can be trained to play a proactive role in ensuring that arrested women have access to legal aid services once they are arrested. This training needs to address the link between prior experiences of GBV and subsequent incarceration. This linkage needs to be strengthened through further research, while law enforcement needs to be sensitised to the unique nature of gender discrimination and the unique forms of vulnerability women experience. There is

therefore a need for sustained capacity building for law enforcement, through offering improved, ongoing and expanded training.

Research has further indicated¹⁰⁵ that community-based structures (as opposed to prisons) are a far more cost-effective measure for female offenders while also being more responsive to women's specific needs and experiences.¹⁰⁶ Alternatives to incarceration, such as community-based rehabilitation programmes or diversionary options, are also more likely to assist in positively shifting gendered norms and patterns of relating in a direction that will serve to empower women.¹⁰⁷ This is particularly necessary where women have children. As further pointed out in the UN Office on Drugs and Crime's (UNODC) toolkit on non-custodial measures, these measures offer potential reductions in the social and economic costs associated with imprisonment and can contribute to mitigating prison overcrowding and recidivism rates.¹⁰⁸

Through emphasising community policing principles, law enforcement officers can build positive relationships with community members. This can foster trust and cooperation, making it more likely that individuals will engage with non-custodial measures and services. In a review of The Gambia, Kenya, Malawi, Nigeria and Tanzania, it was shown that 'alternatives to incarceration are employed in at least some circumstances'.¹⁰⁹ Among the surveyed countries, suspended sentences appeared to be the most consistently available alternative.¹¹⁰ For charges where the women in contact with the law do not pose a serious or dangerous threat to safety and society, alternatives to prosecution such as case dismissal, gender-responsive diversion and treatment programmes and other related alternatives should be considered by police, while keeping in mind the need to uphold respect for the law and the rights of victims.¹¹¹

While the Maputo Protocol and its subordinate instruments, particularly those dealing with GBV, establish the fundamental groundwork for a framework aimed at tackling the root causes of female incarceration, the African Commission should consider providing more detailed guidance to states on how to respond to women in contact with the law. This is particularly necessary in terms of operationalising article 24 of the Maputo Protocol, as this section remains underutilised in advocacy, jurisprudence and scholarly discourse.¹¹²

CONCLUSION

While addressing the police response will not on its own ensure equal access to justice for women, effective policing is a core component of improving access to justice for women. There have been progressive developments pertaining to combating GBV at the AU level. However, implementation remains a significant challenge. There are, furthermore, notable gaps within key instruments. These gaps relate to recognising and addressing the unique pathways to prison for women, gender-appropriate treatment, as well as the interconnection between GBV and female offending. In order to address these gaps, significant efforts are required at both the AU and national levels.

In terms of regional responses, the AU and its relevant organs should urgently consider the development of further research and normative guidance for states on how to achieve the Maputo Protocol's transformative objectives in a policing and access to justice context. In particular, this requires considering how policing responses can be engendered at the organisational and individual levels. This must go beyond a restatement of broad norms and take on an approach similar to the Guidelines for Combating Sexual Violence and its Consequences in Africa, which provide prescriptive guidance for states on how to operationalise a transformative approach at an institutional level.

It furthermore demands guidance on how to improve criminal justice system approaches to the feminisation of poverty, the distinct pathways to offending for women, and ensuring their substantive rights are recognised and protected within the system. This comprehensive approach should include guidance on the formulation and enforcement of laws, the availability and appropriateness of non-custodial measures, access to appropriate legal assistance, and the needs of women in a detention context.

At a national level, it is essential for African countries to take steps towards implementing their existing legal frameworks pertaining to GBV and incarcerated women. This needs to be coupled with steps aimed at shifting accountability onto police organisations. Examples of this include placing positive obligations on police to assist in collecting gender-disaggregated data, and requiring police officers to proactively ensure that women have access to legal aid services and to screen women in terms of non-custodial measures.

It is also important to provide training and capacity building that is able to address social attitudes and persistent bias within all levels of the criminal justice system, including the police. These are all crucial steps in working towards improving policing responses to women, access to justice in Africa, and reversing the current disturbing trend of women's over-incarceration.

ENDNOTES

- 1 UN Women (2021) Multi-country and analytical study on access to justice for victims and survivors of violence against women and girls in East and Southern Africa, <https://africa.unwomen.org/sites/default/files/Field%20Office%20Africa/Attachments/Publications/2021/MULTI%20COUNTRY%20ANALYTICAL%20STUDY%20ON%20ACCESS%20TO%20JUSTICE%20FOR%20VICTIMS%20AND%20SURVIVORS%20OF%20VIOLENCE%20AGAINST%20WO.pdf> (accessed 1 August 2023), p. 1.
- 2 L Artz, Y Hoffman-Wanderer & K Moul (2017) Women, crime and incarceration: Exploring pathways of women in conflict with the law – The case of South Africa, in P van Kempen & M Krabbe (eds) *Women in prison: The Bangkok Rules and beyond*. Antwerp: Intersentia, p. 73. As pointed out by Artz: 'There are only a few studies of female criminality and/or on women in prison from other African countries.' See also: The South African Commission for Gender Equality (2018) Bound by duty to care: Assessing correctional service centres on the health and welfare services for female offenders, <https://cge.org.za/wp-content/uploads/2021/01/bound-by-duty-correctional-report-2018.pdf> (accessed 1 July 2024).
- 3 H Fair & R Walmsley (2022) World female imprisonment list, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf (accessed 2 June 2023). See also: MC van Hout & R Mhlanga-Gunda (2018) Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: A scoping review of extant literature, *BMC International Health and Human Rights* 18(art. 31).
- 4 Africa Regional Initiative (2019) Women in prison, https://www.vancecenter.org/wp-content/uploads/2019/10/WIP_ARI_Report-Final-10-15-2019-compressed.pdf (accessed 8 August 2023). This paper quoted the following source for this statistic: R Walmsley (2017) World female imprisonment list, http://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf. This 'Women in prison' paper emphasises that in Malawi and Tanzania, however, the number of women prisoners has remained stable.
- 5 Over the same period, male prisoner numbers increased by around 22%, and general population growth has been around 30%, according to United Nations figures as reported by Helen Fair and Roy Walmsley. See H Fair & R Walmsley (2022) World female imprisonment list, https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_5th_edition.pdf (accessed 2 June 2023), p. 2.
- 6 Office of the High Commissioner for Human Rights (2014) Women and detention, https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/OnePagers/Women_and_Detention.pdf (accessed 5 July 2024).
- 7 L Maiello & S Carter (2015) 'Minus the urinals and painted pink'? What should a women's prison look like? <https://www.penalreform.org/blog/10020/> (accessed 5 July 2024).
- 8 A gender-blind approach is not only evident in the manner in which prisons are built. Research has revealed that women have specific healthcare needs (such as reproductive healthcare needs) and that they are more likely to experience physical and sexual abuse, as well as mental illness. In spite of this, there is a lack of quality reproductive and mental healthcare services for female prisoners. See MC van Hout & R Mhlanga-Gunda (2018) Contemporary women prisoners health experiences, unique prison health care needs and health care outcomes in sub Saharan Africa: A scoping review of extant literature, *BMC International Health and Human Rights* 18(art. 31); UNODC (2008) Women and HIV in prison settings, https://www.unodc.org/documents/hiv-aids/Women_in_prisons.pdf (accessed 18 July 2024); EH Plugge, CE Foster, PL Yudkin & N Douglas (2009) Cardiovascular disease risk factors and women prisoners in the UK: The impact of imprisonment, *Health Promotion International* 24(4): 334–343.
- 9 J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, p. 173. Autonomy is treated as a presumption, something to be ordinarily assumed. This dominant conception of autonomy has hindered the capacity of the legal system to adequately respond to gendered issues, such as domestic violence.
- 10 One example of redistributive measures would include government-funded legal services/advice for detained women.
- 11 J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, pp. 3 and 208.
- 12 Women Beyond Walls (2021) Forgotten by funders, https://www.womenbeyondwalls.org/_files/ugd/2d77c8_ae579a0503db4104b73671a79f407c1c.pdf (accessed 31 July 2023).
- 13 J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, p. 16.
- 14 AA Yaley & MS Olutay (2020) Gender, masculinity and policing: An analysis of the implications of police masculinised culture on policing domestic violence in southern Ghana and Lagos, Nigeria, *Social Sciences and Humanities Open Journal* 2(1): 1–2.
- 15 UNDP (2015) Programming for justice: Access for all – a practitioner's guide to human rights-based approach to access to justice, <https://www.undp.org/asia-pacific/publications/programming-justice-access-all> (accessed 23 June 2023).

- 16 UN Women (2019) Progress of the world's women 2019-2020: Families in a changing world, <https://www.unwomen.org/en/digital-library/progress-of-the-worlds-women> (accessed 23 June 2023), p. 80.
- 17 E Durojaye, O Adeniyi & C Ngang (2018) Access to justice as a mechanism for the enforcement of the right to development, in C Ngang, SD Kamga & V Gumedé (eds) *Perspectives on the right to development*. Pretoria: Pretoria University Law Press, p. 49.
- 18 Equality Now (2018) Breathing life into the Maputo Protocol: Case digest – jurisprudence on the rights of women and girls in Africa, <https://equalitynow.org/resource/breathing-life-into-the-maputo-protocol-case-digest-jurisprudence-on-the-rights-of-women-and-girls-in-africa/> (accessed 18 July 2024).
- 19 UN Women (2021) Multi-country and analytical study on access to justice for victims and survivors of violence against women and girls in East and Southern Africa, <https://africa.unwomen.org/sites/default/files/Field%20Office%20Africa/Attachments/Publications/2021/MULTI%20COUNTRY%20ANALYTICAL%20STUDY%20ON%20ACCESS%20TO%20JUSTICE%20FOR%20VICTIMS%20AND%20SURVIVORS%20OF%20VIOLENCE%20AGAINST%20WOMEN.pdf> (accessed 1 August 2023) .
- 20 Ibid., xvii.
- 21 Ibid., 16.
- 22 R Crawshaw, S Cullen & T Williamson (2007) *Human rights and policing*. Leiden/Boston: Martinus Nijhoff, pp. 19-29; SR Neusteter, R Subramanian, T Trone, M Khogali & C Reed (2019) Gatekeepers: The role of police in ending mass incarceration, <https://www.vera.org/downloads/publications/gatekeepers-police-and-mass-incarceration.pdf> (accessed 18 July 2024); T Bannister (2023) Utilising relational feminism to engender the police response to GBV, <https://apcof.org/wp-content/uploads/utilising-relational-feminism-to-engender-the-police-response-to-gender-based-violence-dr-tarryn-bannister.pdf> (accessed 8 July 2023), pp. 8-9.
- 23 International Law Commission Commentary 'Attribution of Conduct to a State', in *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*, Chapter II para. 2. Text adopted by the International Law Commission (ILC) at its fifty-third session, in 2001, and submitted to the United Nations (UN) General Assembly as part of the Commission's report covering the work of that session, in UN doc. A/56/10, <https://bit.ly/32A30cT> (accessed 2 May 2023).
- 24 As pointed out by the Dullah Omar Institute in its report on women in pre-trial detention, laws that criminalise life-sustaining conduct or sex work 'are open to abuse and exploitation by the police'. The report underscores law enforcement's harassment and attempts to exploit female detainees. See M Ackerman (2014) Women in pre-trial detention in Africa, https://dullahomarinstitute.org.za/acjr/resource-centre/WomenInPreTrialDetention_V2.pdf (accessed 9 July 2024).
- 25 One example of positive policing is the events that took place in Durban, South Africa, during the level 5 Covid-19 lockdown. Throughout this period, the police were actively involved in a harm-reduction initiative designed to assist homeless individuals grappling with significant heroin withdrawal symptoms. The police played a proactive role in planning and facilitating this medical intervention and were a key component in securing the success of the programme.
- 26 APCOF (2023) Annual convening for the global campaign to decriminalise poverty and status – Theme: Decriminalising status and activism, <https://apcof.org/wp-content/uploads/report-for-the-annual-convening-of-the-global-campaign-to-decriminalise-poverty-and-status-eng-fr-por-27-29-september-2022.pdf> (accessed 31 July 2023), pp. 15-16.
- 27 African Union (2020) Gender-based violence in Africa during the Covid-19 pandemic, https://au.int/sites/default/files/documents/39878-doc-final-final-policy_paper-_gbv_in_africa_during_covid-19_pandemic.pdf (accessed 3 August 2023); S Frohlich (2022) How African women suffer silently through abuse, *DW*, 26 August, <https://www.dw.com/en/abuse-how-african-women-suffer-in-silence/a-62935824> (accessed 14 August 2023). For further examples of these issues, see the 2022 US State report on human rights practices in Uganda at https://www.state.gov/wp-content/uploads/2023/03/415610_UGANDA-2022-HUMAN-RIGHTS-REPORT.pdf and the 2022 US State report on human rights practices in South Africa, https://www.state.gov/wp-content/uploads/2023/02/415610_SOUTH-AFRICA-2022-HUMAN-RIGHTS-REPORT.pdf (both accessed 14 August 2023).
- 28 AA Yaley & MS Olutay (2020) Gender, masculinity and policing: An analysis of the implications of police masculinised culture on policing domestic violence in southern Ghana and Lagos, Nigeria, *Social Sciences and Humanities Open Journal* 2(1): 1-2.
- 29 For example, pages 23-24 in the 2022 US State report on human rights practices in Uganda detail the inadequate police response to GBV. See https://www.state.gov/wp-content/uploads/2023/03/415610_UGANDA-2022-HUMAN-RIGHTS-REPORT.pdf (accessed 14 August 2023). Pages 17-18 of the 2022 US State report on human rights practices in South Africa detail how law enforcement officers are frequently responsible for acts of GBV. See https://www.state.gov/wp-content/uploads/2023/02/415610_SOUTH-AFRICA-2022-HUMAN-RIGHTS-REPORT.pdf (accessed 14 August 2023).
- 30 For example, section 7 of Sierra Leone's Public Order Act of 1964 provides that 'Any person loitering in or about any stable house or building, or under any piazza, or in the open air, and not having any visible means of subsistence, and not giving a good account of himself, shall be deemed an idle and disorderly person, and shall, on conviction thereof, be liable to imprisonment for any period, not exceeding one

month'. The City of Cape Town's By-law Relating to Streets, Public Places, and the Prevention of Noise Nuisances, as outlined in the Western Cape Provincial Gazette of 28 September 2007, appears neutral. However, this by-law imposes restrictions that disproportionately affect poor women. For example, restrictions on washing, cleaning or bathing outside designated areas place an additional burden on women, who bear a disproportionate responsibility for childcare, as it impedes their ability to maintain hygiene for themselves and their children.

- 31 See the note above. South Africa's 2010 Public Parks By-law No. 6788 restricts (unless permission from City Parks has been obtained) trading or operating a business, displaying, selling or renting wares or articles utilising benches in a manner that obstructs others from using them, engaging in the use of foul, lewd or indecent language, as well as dumping or littering. Those who contravene these provisions or fail to comply with instructions from peace officers to cease such activities, may be charged with an offence. Furthermore, the 2004 Public Open Spaces By-laws of the City of Johannesburg (No. 179, 21 May 2004) prohibit behaviours categorised as 'nuisance and behaving in an indecent or offensive manner'. The broad definitions of 'nuisance' and 'indecent' raise concerns about potential misuse and subjective interpretation. In 2019, the South African media reported on a story about a woman (Esethu Mcinjana) who was arrested by Sea Point police officers while sitting on a public bench on the Sea Point Promenade in Cape Town, while waiting to attend a job interview at a nearby hotel. In video footage that was circulated on social media, police officers could be seen searching through her handbag, while she complained of unnecessary harassment. She was kept in detention for one night. See A Gossar (2019) South African vagrancy laws hark back to colonial times and violate human rights, <https://www.saferspaces.org.za/blog/entry/south-african-vagrancy-laws-hark-back-to-colonial-times-and-violate-human-r> (accessed 22 November 2023). For more examples of specific laws that provide police with broad discretionary powers, see APCOF (2021) Poverty is not a crime, <https://apcof.org/wp-content/uploads/030-study-on-decriminalising-poverty-in-south-africa-clare-ballard-patrick-burton-louise-edwards-abdirahman-maalim-gossar-and-chumile-sali.pdf> (accessed 23 November 2023). See also APCOF (2023) Annual convening for the global campaign to decriminalise poverty and status – Theme: Decriminalising status and activism, <https://apcof.org/wp-content/uploads/report-for-the-annual-convening-of-the-global-campaign-to-decriminalise-poverty-and-status-eng-fr-por-27-29-september-2022pdf.pdf> (accessed 31 July 2023).
- 32 Pan African Lawyers Union (PALU), Request 001/2018, Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa (4 December 2020) (hereafter *Vagrancy Opinion*), para. 133.
- 33 J Howarth (2022) Press release – Court case filed against Sierra Leone to overturn discriminatory loitering laws, 4 May, <https://advocaidsl.org/press-release-court-case-filed-against-sierra-leone-to-overturn-discriminatory-loitering-laws/#:~:text=In%20the%20case%20filed%20on,rather%20than%20actual%2C%20harmful%20acts> (accessed 27 September 2022). With regard to South Africa, 'There was a 24% increase (representing 99 cases) in "rapes by a police officer" reported to the Independent Police Investigative Directorate (IPIID), as reflected in its 2021/22 annual report. Only 64 cases were recommended for prosecution, leading to concerns of weakened police accountability.' See Amnesty International (2022) South Africa, <https://www.amnesty.org/en/location/africa/southern-africa/south-africa/report-south-africa/#:~:text=There%20was%20a%2024%25%20increase,concerns%20of%20weakened%20police%20accountability> (accessed 28 September 2023).
- 34 An example is the case of Aminata (name changed) in Sierra Leone, who was 17 years old, illiterate and an orphan when she was arrested for killing her former boyfriend. Aminata was in a relationship with Foday (name changed) but left him as he used to beat her. Foday lived in the same compound as Aminata and harassed her to continue the relationship. One morning in September 2009, Foday beat Aminata with a rubber pipe and she stabbed him with a knife to protect herself. She was arrested by the police and detained for several days. It was argued at the jury trial that Aminata acted in self-defence and was not guilty of murder. However, the judge did not agree and, when advising the jury, he stated that using a knife to defend yourself when being beaten with a rubber pipe was disproportionate use of force. Aminata was sentenced to death for murder. Her sentence was commuted to life imprisonment in 2011. See S Mahtani (2017) Aminata's story: Justice for women who kill, <https://old.sierralii.org/content/aminatas-story-justice-women-who-kill> (accessed 14 August 2023).
- 35 A Rudman (2018) Women's access to regional justice as a fundamental element of the rule of law: The effect of the absence of a women's rights committee on the enforcement of the African Women's Protocol, *African Human Rights Law Journal* 18: 321.
- 36 UNODC (2020) Toolkit on gender-responsive non-custodial measures, https://www.unodc.org/documents/justice-and-prison-reform/20-01528_Gender_Toolkit_complete.pdf (accessed 11 August 2023).
- 37 Judicial processes around the globe frequently reinforce damaging gender stereotypes, leading to the denial of justice for countless women. This stereotyping is particularly detrimental in cases of sexual and gender-based violence (SGBV). As highlighted by N Pillay 'Equality and justice in the courtroom', *Huffington Post*, 3 March 2014, https://www.huffpost.com/entry/equality-and-justice-in-t_b_4892624 (accessed 29 July 2024). A Rudman 'Article 8: Access to justice and equal protection before the law' in A Rudman, C N Musembi & T M Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A Commentary*, p. 191.
- 38 C Heard (2017) Why are women prisoner numbers rising so rapidly? Penal Reform International: Unequal Justice, <https://www.penalreform.org/blog/why-are-women-prisoner-numbers-rising-so-rapidly/> (accessed 2 August 2023).

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- 40 Women Beyond Walls (2021) Forgotten by funders, https://www.womenbeyondwalls.org/_files/ugd/2d77c8_ae579a0503db4104b73671a79f407c1c.pdf (accessed 31 July 2023), p. 2; APCOF (2023) Annual convening for the global campaign to decriminalise poverty and status – Theme: Decriminalising status and activism, <https://apcof.org/wp-content/uploads/report-for-the-annual-convening-of-the-global-campaign-to-decriminalise-poverty-and-status-eng-fr-por-27-29-september-2022pdf.pdf> (accessed 31 July 2023), pp. 15-16.
- 41 AdvocAid (2008) Children living in prison: Insights from Sierra Leone, <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/DeprivedLiberty/CSO/AdvocAid.pdf> (accessed 7 January 2024). Online presentation by Sabrina Mahtani on 28 April 2023 at the Virtual Regional Conference on Human Rights Situations in Prisons in Africa.
- 42 This Life (2022) 19000 young children are in prison right now, <https://thislife.ngo/archives/6313> (accessed 30 September 2022). This is a global estimate. There are limited statistics available on the number of children living with their mothers in Africa.
- 43 MC van Hout & R Mhlanga-Gunda (2019) 'Mankind owes to the child the best that it has to give': Prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons, *BMC International Health and Human Rights* 19: 1.
- 44 Ibid.
- 45 For example, in accordance with the Angolan Prisons Act of 2008, female prisoners who are pregnant or have children receive special treatment and are allowed to stay with their children until the latter reach the age of three. Section 20 of the South African Correctional Services Act 111 of 1998 provides that mothers may keep their children with them up until two years of age and the state is responsible for providing food, clothing and healthcare for the child. In Tanzania, section 25(2) of the Prison Act, 1967 allows the admission of an infant child with the mother in the prison. Section 144 of the Law of the Child Act, 2009 and section 63(3) of the Prison Act provide that the prison authorities shall ensure that children staying with their mothers while in prison receive the necessary child care, which includes an adequate diet, nutrition, access to education and healthcare, including immunisation, but in most cases the services provided to children are inadequate. In Zimbabwe, section 25(2) of the Prison Act, 1967 allows for the admission of an infant child with the mother in the prison.
- 46 APCOF (2023) Annual convening for the global campaign to decriminalise poverty and status – Theme: Decriminalising status and activism, <https://apcof.org/wp-content/uploads/report-for-the-annual-convening-of-the-global-campaign-to-decriminalise-poverty-and-status-eng-fr-por-27-29-september-2022pdf.pdf> (accessed 31 July 2023), pp. 15-16.
- 47 C O'Connell (2019) Reconceptualising the first African Women's Protocol case to work for all women, *African Human Rights Law Journal* 19: 510.
- 48 J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, pp. 74-75. Page 74: 'Rights structure relations of power, trust, responsibility and care. All claims of rights involved interpretations and contestations. First one should ask how existing laws and rights have helped to construct the existing problem being addressed...What patterns and structures of relations have shaped it and how has law helped shape those relations?'
- 49 Ibid., 208.
- 50 See D Budlender (2005) Women and poverty, *Agenda* 64: 35, where she points out: 'While there are many different ways of measuring poverty, all suggest that women are more likely than men to live in poverty. This statement holds, whether we measure poverty simply by income, or use wider measures which encompass other aspects.'
- 51 *Vagrancy Opinion*, paras. 133-134.
- 52 Women Beyond Walls (2021) Forgotten by funders, https://www.womenbeyondwalls.org/_files/ugd/2d77c8_ae579a0503db4104b73671a79f407c1c.pdf (accessed 31 July 2023), p. 2.
- 53 Ibid.; *Vagrancy Opinion*, paras. 133-140.
- 54 As emphasised by the Human Rights Council, which expressed its concern about 'the disproportionate incarceration of women and girls for crimes related to poverty, such as theft, fraud, inability to pay debts and other offences related to homelessness or poor living conditions, and the discriminatory application of public order offences, such as loitering, vagrancy, public nuisance and public indecency, which are often applied to women and girls experiencing poverty'. See UN Human Rights Council (2023) Accelerating efforts to eliminate all forms of violence against women and girls: Preventing and responding to all forms of violence against women and girls in criminal justice detention, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G23/141/37/PDF/G2314137.pdf?OpenElement> (accessed 14 August 2023).

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- Rights: The Right to Life (article 4) (2015); Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (2016); Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017); Guidelines on Combating Sexual Violence and its Consequences in Africa (2017); Principles on the Decriminalisation of Petty Offences in Africa (2017); Guidelines on adhering to human and peoples' rights under the African Charter in the context of states of emergency or disaster (2022); and Study on the Use of Force by Law Enforcement Officials in Africa (2023). Full text for all soft law instruments is available at <https://achpr.au.int/en/category/soft-law> (accessed 12 February 2024). The African Union has also adopted a Security Sector Reform (SSR) Policy Framework, under which a series of Operational Guidance Notes to African States are under development on issues which include gender equality within the SSR context, and oversight and accountability of security actors. See, for example, <https://au.int/en/pressreleases/20231121/african-union-au-security-sector-reform-ssr-policy-framework-decade> (accessed 12 February 2024). Finally, the Pan African Parliament adopted a Model Police Law for Africa, which provides legislative guidance on implementation of the normative standards listed above. The full text is available at <http://apcof.org/wp-content/uploads/pap-model-police-law-for-africa.pdf> (accessed 12 February 2024).
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- 102 *Ibid.*, para. 140.
- 103 J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, p. 3. The second aspect of Nedelsky's approach entails establishing the particular competing values that are at stake in determining how to respond to women in contact with the law. This step is value-sensitive and counters the traditional formalistic conception of rights prevalent under a classic liberal lens. For example, the traditional conception of autonomy or choice is not always responsive to the lived reality of women who have experienced domestic violence.

- 104 Nedelsky's theory is transformative, as it examines how alternative interpretations of rights can shift social interactions (and responsibility) to structure more equitable relations. Nedelsky uses the example of the 1992 amendments to the Canadian laws on sexual assault which required affirmative sexual consent. This placed greater responsibility on men to reasonably ascertain whether a woman consented to intercourse. These changes to Canada's laws inevitably entailed a redistribution of resources, for example through the need for training of law enforcement officers, prosecutors, judges and other legal professionals. Through the law prioritising women's perspectives and experiences, this change sought to address gendered power imbalances. In a similar manner, there is a need to further shift accountability onto state institutions such as the police, to prioritise the unique needs and experiences of women in contact with the law. This inevitably requires a level of redistribution and transformation. See J Nedelsky (2011) *Law's relations: A relational theory of self, autonomy, and law*. New York: Oxford University Press, pp. 218-221.
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- 109 Africa Regional Initiative (2019) Women in prison, https://www.vancecenter.org/wp-content/uploads/2019/10/WIP_ARI_Report-Final-10-15-2019-compressed.pdf (accessed 8 August 2023), p. 6.
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Louise Edwards (B.A. (Arabic), L.L.B, L.L.M (International Law)) has spent the past 16 years working on police accountability and access to justice across Africa. Her focus has included the provision of technical legal assistance to organs of the African Union, Regional Economic Communities and national stakeholders in the drafting and implementation of regional legal standards for rights-based policing. This includes leading the drafting of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (ACHPR, 2014), the Guidelines on the Policing of Assemblies in Africa (ACHPR, 2017), the Principles on the Decriminalisation of Petty Offences in Africa (ACHPR, 2017), and the Common Standards for Policing in East Africa (EAC/EAPCCO, 2010). Prior to this, Louise was a lawyer in private practice (Allens) and in the community legal sector.

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ABOUT THIS REPORT

This paper was first presented at the 2023 Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Africa Academic Human Rights Conference. The theme of the conference was 'Women's Rights, Gender Inequality and Intersectional Vulnerabilities: Exploring substantive transformative equality in the African Regional and Sub-Regional human rights systems 20 years after the adoption of the Maputo Protocol'. The Conference was hosted by Stellenbosch University, from 13-15 September, and brought together brilliant human rights researchers and representatives of the Regional and Sub-Regional human rights bodies. The convening fostered insightful discussions and enriching perspectives.

The paper explores gendered barriers to accessing justice, focusing on arrested and incarcerated women. This is important as, while the Maputo Protocol provides a progressive framework of rights, this is not necessarily translating into further (and necessary) normative guidance for African states on gender-responsive policing at the regional level. Using a relational feminism lens, this paper examines how existing legal interpretive instruments intersect with gendered dynamics to structure relations that hinder access to justice. A relational feminist approach further considers how these norms can be transformed in order to structure more gender-sensitive criminal justice responses. Ultimately, this paper aims to distinguish potential solutions in terms of shifting the current discourse and guidance on policing towards an approach that is able to improve access to justice for incarcerated women.

ABOUT APCOF

The African Policing Civilian Oversight Forum (APCOF) is a Not-for-Profit Trust working on issues of police accountability and governance in Africa. APCOF promotes the values which the establishment of civilian oversight seeks to achieve; namely to assist in restoring public confidence, developing a culture of human rights, promoting integrity and transparency within the police, and nurturing good working relationships between the police and the community. While APCOF is active in the field of policing, its work is located in the broader paradigm of promoting democratic governance and the rule of law.

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