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# Universalism vs Women's Rights

A critical discussion on gender-specific human rights regulation

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# Summary

When founding the modern human rights protection, the UN did to a great extent have focus on protecting men and men's rights, even though one of the core principles of human rights is their universality. Over the past few decades work has been done to include women's perspectives in the human rights protection. The UN has chosen a dual strategy, where women's rights are both protected in gender-specific instruments and mainstreamed into general human rights documents. This thesis aims to bring a critical perspective to the theoretical discussion on women's rights and universality. The research questions concerns gender-specific human rights regulation and its compatibility with the universality of human rights. Alternative solutions to the UN dual strategy will be discussed with focus on sustainability and universalism. As a theoretical fundament, the thesis discusses the view of gender-specific regulation in feminist legal theory in relation to theories on universality. The conflict between women's particular human rights needs and universalism is discussed. As an example of the UN dual strategy, protection of women prisoners is used. Prisoners were previously protected in an instrument with an explicitly male perspective, the UN Standard Minimum Rules for the Treatment of Prisoners (SMR). In 2010 a women specific instrument, the Bangkok Rules, was added to enhance the protection of women prisoners. This was followed by an updated version of the SMR, the Mandela Rules, where the perspective of women prisoners was partly included. This example is analyzed from the theoretical perspective of feminist legal theory and universalism. A conclusion is that permanent gender-specific human rights instruments are problematic both from a feminist perspective and in relation to universalism, it risks devaluing the concept of universality and contributing to gender stereotypes. The thesis also brings up a more general discussion on the lack of theoretical framework for the UN human rights protection. Even though the main role of the UN is more pragmatic human rights work, a lack of theoretical justification for the human rights framework can lead to a weak and unsustainable system.

# Sammanfattning

Vid grundandet av det moderna systemet för mänskliga rättigheter hade FN till stor del fokus på att skydda män och mäns rättigheter, trots att en av de grundläggande principerna för de mänskliga rättigheterna är deras universalitet. Genom åren har arbete utförts för att inkludera kvinnors perspektiv i människorättsskyddet. FN har valt en dubbel strategi där kvinnors rättigheter både är skyddade i könsspecifika instrument och integreras i de generella dokumenten om mänskliga rättigheter. Uppsatsen syftar till att ge ett kritiskt perspektiv på den teoretiska diskussionen om universalitet och kvinnors rättigheter. Frågeställningarna berör könsspecifika reglering av mänskliga rättigheter och dess förenlighet med de mänskliga rättigheternas universalitet. Alternativa lösningar till FN:s dubbla strategi kommer att diskuteras med fokus på hållbarhet och universalism. Som teoretisk utgångspunkt diskuteras synen på könsspecifik reglering i genusrättsvetenskapen i förhållande till teorier om universalitet. Konflikten mellan universalism och kvinnors särskilda behov i rättighetsskyddet diskuteras. Som ett exempel på FN:s dubbla strategi lyfts skyddet av kvinnliga fångar. Fångars rättigheter var tidigare skyddade i ett instrument med ett explicit manligt perspektiv, SMR. 2010 antogs ett könsspecifikt instrument, Bangkokreglerna, för att förbättra skyddet av kvinnliga fångar. Detta följdes av en uppdaterad version av SMR, Mandelareglerna, där kvinnliga fångars perspektiv till viss del är inkluderat. Exemplet analyseras utifrån både ett universalistiskt och ett genusrättsvetenskapligt perspektiv. En slutsats är att permanenta könsspecifika instrument för mänskliga rättigheter är problematiska både ur ett feministiskt perspektiv och i relation till universalismen. De riskerar att underminera begreppet universalitet och bidra till könsstereotyper. Uppsatsen tar också upp en mer allmän diskussion om bristen på teoretiskt ramverk för FN:s skydd av de mänskliga rättigheterna. Även om FN:s huvudsakliga uppgift är pragmatiskt människorättsarbete kan en brist på teoretisk rättfärdigande av de mänskliga rättigheterna leda till ett svagt och långsiktigt ohållbart system.

# Abbreviations

Bangkok Rules	United Nations Bangkok Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
Mandela Rules	(Revised) Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)
OHCHR	United Nations Office for the High Commissioner on Human Rights
SMR	United Nations Standard Minimum Rules for the Treatment of Prisoners
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization

# 1 Introduction

## 1.1 Background

*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>1</sup>*

These well-known words are the introduction to the modern human rights system’s most central document – the Universal Declaration of Human Rights (UDHR). The two sentences lay out the foundation of a core principle in the human rights protection, universalism. Human rights are for everyone, always.<sup>2</sup>

Since the UDHR was adopted, the human right’s system has developed fast and met many challenges on the way, one of them the protection of particularly vulnerable groups. Already in the adoption of the UDHR, and even more so in the decades following the adoption, the particular need for protection of women was highlighted. It was raised that the human rights framework had a male perspective and neglected the situation of women.<sup>3</sup>

To build an effective and sustainable human rights framework, which takes into consideration the particular needs of both men and women without compromising the principle of universality is challenging. The UN has decided on a dual strategy to protect women’s rights, where they are both protected in gender-specific documents and mainstreamed into the general human rights framework. However, the discussion has been limited on what effects gender-specific regulation has on universality. Neither has the

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<sup>1</sup> Universal Declaration of Human Rights.

<sup>2</sup> Universal Declaration of Human Rights.

<sup>3</sup> UN Global Issues, *Women 2016*; UN International Human Rights Instruments, *Integrating the gender perspective into the work of United Nation human rights treaty bodies*, 1998, Part II.

discussion on the long-term effects of such regulation on women's rights been particularly vivid.<sup>4</sup>

One situation where women have shown to be particularly vulnerable is in the context of imprisonment. Women prisoners are a small minority of the world's prison population and face partly different problems than male prisoners. Over the past years, the female prison population has grown fast, which has created initiative for further protection of their rights. In order to create a stronger framework for the protection of prisoner, the UN adopted a set of rules that specifically concerned the situation for women prisoners in 2010, the Bangkok Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules).<sup>5</sup>

How gender-specific regulations like the Bangkok Rules work in a universal human rights framework is not evident. Can the human rights framework be called universal if it includes gender-specific documents? Can the universality of human rights be undermined by the introduction of protection only applicable to half of the world's population? What long-term effects comes from separating the human rights needs of women and men?

In the following, the positive and negative aspects of gender-specific regulation and the effects such a regulation has on the universality will be discussed. The protection of women prisoners, and in particular the Bangkok Rules will serve as an example.

## 1.2 Purpose

The aim of this thesis is to give a critical perspective on the UN strategy of protection of women's rights. The theoretical foundation for the UN view on

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<sup>4</sup> Cf. 2.3; Kouvo, *Making Just Rights*, 2004, p 44f, 115ff; UN International Human Rights Instruments, *Integrating the gender perspective into the work of United Nations human rights treaty bodies*, 1998, Part II C2.

<sup>5</sup> Cf. 3.1; The Bangkok Rules; UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, 2008, p 4 ff.



gender equality, and in particular on gender-specific regulation, will be discussed as well as the relation between gender-specific regulation and universalism. The starting point for the discussion will be in feminist legal theory and in theories on universalism.

To solidify the issue, it will be exemplified with the protection of women prisoners in international law and soft law. The field of prisoner's protection is a clearly delimited area which states a good example of when the UN has moved from a male centered perspective, to a dual protection where women's rights are both mainstreamed in to general documents and protected in a separate instrument.

Furthermore the thesis will discuss possible alternative strategies on how to protect women's rights in a sustainable way that is compatible with the notion of universalism.

### **1.3 Research Questions**

In order to give a critical perspective of the UN strategy for protection of women's rights and offer alternative solutions, three main research questions will be posed:

- What are the positive and negative aspects of gender-specific regulations?
- Are gender specific-regulations compatible with the universality of human rights?
- How can women's rights be effectively protected in human rights law in a manner that is compatible with universalism and sustainable over time?

## 1.4 Method and Material

The theme for the thesis is interdisciplinary and has elements of both law and social sciences. The method used for the thesis is a combination between legal method and social scientific method.

Feminist legal theory, which is covering the area between gender studies and law, will be central as well as the theories on universalism. The theories on universalism are gathered from the field of law, philosophy and legal philosophy. These theories, and in particular the relation between them, will be discussed to create a general theoretical foundation for the thesis. For the discussion on gender-specific regulation and its effect on the universalism of human rights, these two theoretical fields are the most relevant, and bring arguments both for a strong protection of women's rights and arguments for a human rights law applicable to everyone. The crossings between the two theories are however, not explored to any greater extent in previous research, hence an important task for the thesis is to give an idea on how they can be brought together.<sup>6</sup>

The theoretical framework will be applied on an example from international law in pursuit of a clearer and more concrete discussion on strategies for protecting women's rights. The example chosen is the regulation protection of women prisoners, in particularly the SMR, the Bangkok Rules, the Mandela Rules and the relation between the three. This example is chosen since it is clearly framed towards other areas, and contains many of the relevant elements of the UN women's rights strategy – male centered regulation, women centered regulation and gender-neutral regulation. The aim of the thesis is however to provide a more general discussion on gender-specific regulation with relevance for more areas than specifically the protection of women prisoners.<sup>7</sup>

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<sup>6</sup> Cf. 2.

<sup>7</sup> Cf. 3

In the descriptive parts regarding the legal framework on prisoner's rights, legal dogmatic method is used. The material used in this section is mainly sourced from different bodies within the United Nations. Both legal and soft law instruments are described and detailed by comments by the United Nations and non-governmental organizations. A possible development from this would be to study case law or reports on the implementation of the legal framework. However, the aim of this thesis is to provide a critical perspective on the theoretical foundation of the UN women's rights strategy, rather than a discussion on the effects of the implementation of the regulation, why this has been deemed unnecessary for the present study.

An important element in social scientific method (for example discourse analysis) as well as in the method of feminist legal theory is to analyze language in order to find underlying power structures the language reflects.<sup>8</sup> This method will be used to some extent when analyzing the instruments protecting prisoner's rights to find and discuss the premises they build upon.

## 1.5 Previous Research

The issue of gender-specific regulation is mainly discussed in the field of feminist legal theory<sup>9</sup>. This is a relatively new field although there are feminist theories ranging back from the past century, which touches upon issues regarding the legal system.<sup>10</sup> The fairly narrow field of feminist legal theory must be narrowed down further to find the sections applicable on international law. Chapter 2.1 gives an oversight of the relevant parts of this field.

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<sup>8</sup> Bryman, *Samhällsvetenskapliga metoder*, 2008, p 474 ff; Levit, Verchick, *Feminist legal theory*, 2016, p 41 ff.

<sup>9</sup> Also known as *feminist jurisprudence*. In this thesis, the research field in Swedish known as *genusrättsvetenskap*, has also been used. This field is closely related to, however not entirely interchangeable with feminist legal theory (cf. Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 20 ff.)

<sup>10</sup> Cornell University Law School, *Feminist jurisprudence*, 2016; Lacey, *Feminist Legal Theory and the Rights of Women*, 2004, p 13 ff.; Levit, Verchick, *Feminist legal theory*, 2016, p 10 f.

The discussion on universalism is on the other hand broad and well established. In the philosophical area the ideas of inherent human value, human reason and common human good have been discussed for centuries. The notion of universalism have been discussed and developed successively alongside the creation of the international human rights system.<sup>11</sup> Some of the core ideas regarding universalism, relevant to this thesis, are described in chapter 2.2.

Regarding protection of prisoners, and women prisoners in particular, there is research done in different scientific fields, both legal and social science. The UN, as well as non-governmental organizations have issued reports on the area. However, the research does mostly regard the actual condition for women prisoners, and contains next to no theoretic reasoning on how to strategically protect the rights of women prisoners in international law. Hence, the research is not entirely relevant for the purpose of this thesis. The situation is similar when it comes to women's rights in general. Women's rights is a field with extensive research, but very little is regarding the relation between women's rights and universalism.

The central discussion in this thesis regarding the relation between gender-specific regulation and universalism is not covered in research, at least not to an extent making it reasonably accessible.

## 1.6 Delimitations

When discussing the rights of women and men, there is a great risk of applying a binary gender system that does not fully reflect reality. In such a discussion, transgender people, or people that for one reason or another does not want to be categorized as woman or man, may not be adequately considered. This, in many senses essential, perspective will not explicitly be covered to any greater extent in the following, due to lack of time and

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<sup>11</sup> Edmundson, *An Introduction to Rights*, 2012.

resources. However, many of the conclusions made will further a less binary system, and can possibly through that contribute to this crucial discussion.

The thesis will neither discuss other vulnerable groups and their particular needs in imprisonment. Juveniles, children, and persons with disabilities will only be covered in cases where these groups are included under the protection of women prisoners.

Since the purpose of this thesis is to contribute with a critical perspective to a theoretical discussion focus is on strategic, theoretical and philosophical ideas rather than on practical aspects and implications of such ideas. The implementation of the Bangkok Rules and of the Mandela Rules, to the extent it even exists considering the fairly recent adoption of the rules, will not be covered.

To keep emphasis on the core question of gender-specific regulation and universalism the thesis will be limited to the example of protection of women prisoners in international law. Regional instruments on prisoners' rights or women's rights will not be given any further attention. Also the international instruments on different types of imprisonment, such as custody, different forms of detention and prisoners of war, will be left out. Hence, instruments such as the Tokyo Rules, Part II B-E of the Standard Minimum Rules for the Treatment of Prisoners and Part II B-E the Mandela Rules will not be discussed.

The choice of theoretical framework of the thesis somewhat limits the perspectives discussed. Feminist legal theories are discussing gender, equality and justice, but often from a female perspective. The aim is generally to discuss and strengthen legal protection of women's rights. Theories with a clearly male perspective will not be included in the thesis and no particular focus will be on the protection of men's rights. Instead the feminist legal theory will be contrasted against the theories on universality that considers women and men alike.

## 1.7 Definitions

A central discussion in feminist legal theory regards the use of the terms “gender” and “sex”. Simplified, “gender” is usually used referring to a socially constructed sex, while “sex” is used mainly when pointing to biological differences between men and women.<sup>12</sup> However, this discussion has many layers not relevant to the present thesis. In the following “gender” or “gender identity” will be most frequently used and then referring to the sex someone defines themselves as or that the surrounding community sees them as. When “sex” is used it refers to biological sex.

“Prisoner” will in the following refer to all individuals kept incarcerated because of an offence or a crime. Whether they are imprisoned following a trial or not will not be relevant for the purpose of the thesis. “Women prisoners” will refer to prisoners that are either by themselves or by society defined as women. “Women prisoner” is used over “female prisoner” since women prisoner is the term used in international law.<sup>13</sup>

“The United Nations” or the “UN” is used throughout the thesis as a broad concept referring to a variety of UN bodies. Most relevant for this thesis is the UN General Assembly and the UN Office on Drugs and Crime. Unless the UN body is specified, “UN” refers to the general concept of the United Nations including all bodies.

## 1.8 Outline

The thesis is divided in to four main chapters. After the introduction chapter that gives a short background and setting for the thesis follows a chapter on theory, a chapter on the protection of prisoners and a final chapter where the theory will be applied on the example of the protection of women prisoners.

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<sup>12</sup> I.a. Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 133ff.

<sup>13</sup> Cf. The Bangkok Rules.

The theory chapter aims at giving a theoretic foundation to the following discussion and analysis. Two theoretical fields are covered, feminist legal theory and universalism. The feminist legal theory gives reasoning on different strategies to protect women's rights and in particular on gender-specific regulation. The theories on universalism give us an idea of what the often thoughtlessly used concept of universalism actually entails. The two theoretical fields will be complemented with the UN's more practical view of these issues in the chapter on *UN approach to gender equality*. The theory chapter will be summed up by a discussion on and analysis of the intersections between these theories, how they relate to each other and how they do not relate to each other. This discussion will lay the theoretical foundation for the following analysis and conclusions.

The third chapter gives a picture of the protection of women prisoner in international law. This chapter aims at giving an example of an area in international law where gender-specific regulation is used. This chapter describes the background to the adoption of the Bangkok Rules and the content of the regulation with particular attention to the language used in the document. Furthermore, it describes the SMR and the revised version, the Mandela Rules, with focus on the protection of women prisoners. Also other relevant regulation in the general field of women's rights will be described.

The fourth chapter contains analysis and concluding remarks. The theoretical foundation will be applied to the example of the protection of women prisoners in international regulations. The chapter aims at providing discussion around, and answer to, the research questions.

## 2 Theory

### 2.1 Feminist Legal Theory

When discussing protection of women's rights essential perspectives are found in the interdisciplinary field of feminist legal theory, moving in the area between law and gender studies. Feminist legal theory includes a wide variety of different ideas and approaches to gender, women's rights, human rights and to law in general.<sup>14</sup> To understand the core question on strategies for protection of women's rights in international law, some of the main elements of the feminist legal theories must be considered. In the following some of these issues will be discussed.

#### 2.1.1 Who are Women?

The first question for feminist legal theories is who they refer to when discussing women and women's rights. Is there a common ground for women, a shared interest that justifies the discussion on women's rights? A common critique amongst the feminist theories are that they are constructed from a western perspective, without taking other cultural backgrounds into consideration. A woman that suffers multiple forms of discrimination, for example on the basis of her origin or her social status, might have a completely different situation, and other interests than, a relatively privileged woman suffering from discrimination only on the basis of her gender.<sup>15</sup> In the post-colonial research field, the role of the feminist movement has been discussed as sometimes leading to positive development, but not rarely also contributing to a continued colonial power structure in the globalized world.<sup>16</sup> Though problematized, this is not an issue that the core feminist legal theories provide a solution for. However it is occasionally used as an argument for not

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<sup>14</sup> I.a. Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009; Kouvo, *Making just Rights?*, 2004; Lacey, *Feminist Legal Theory and the Rights of Women*, 2004; Peach, *Are Women Human? Feminist Reflections on "Women's Rights as Human Rights"*, 2005.

<sup>15</sup> Kouvo, *Making Just Rights?*, 2004, p 54 ff.

<sup>16</sup> Loomba, *Kolonialism/Postkolonialism*, 2005, p 207 ff.



talking about women as a group, but rather include them in a more general humanity.<sup>17</sup>

## 2.1.2 Equality or Justice?

One of the main discussions in the feminist legal theory is on whether the starting point in discussing gender inequalities should be in the sameness of the sexes or in the differences of the sexes. Whether one emphasizes differences or sameness can give profoundly different conclusions. The difference feminists<sup>18</sup> focus on the biological and social differences between men and women and argue that the society, including the legal system, needs to be structured in a way that sees to the different needs of the sexes. In this model the goal is not equality, in this perspective different treatment is based on inherent dissimilarities between the sexes and does not constitute inequality. One idea raised by difference feminists is that women are more caring by nature and therefore have their natural place in the private sphere while men naturally are less caring and more analytical why their place is in the public sphere. With the prerequisites of a difference feminist the legal system does not have to be equal, but can have different provisions (or provisions with different effects) for men and women on the grounds of their biological differences.<sup>19</sup>

However, a view more commonly occurring in feminist legal theory than difference feminism is its opposite the sameness feminism.<sup>20</sup> The sameness feminism emphasizes the likeness between men and women, and has equality between the sexes as the goal. Measures taken should aim at equality either in the short term or in the long term. Usually a sameness feminist would argue that the main differences between men and women are not inherited, but

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<sup>17</sup> Bunch, *Transforming Human Rights from a Feminist Perspective*, 1995, p 12; Kouvo, *Making just rights?*, 2004, p 82 ff; Peach, *Are Women Human? Feminist Reflections on "Women's Rights as Human Rights"*, 2005, p 81 ff.

<sup>18</sup> Cf. Swedish term *Särartsfeminister*

<sup>19</sup> Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 141, p 182 ff.

<sup>20</sup> This is however said from a western, more specifically Swedish, perspective.

created by the society we grow up in where historical patterns create gender roles and inequalities.<sup>21</sup>

There is arguments from a sameness feminist perspective giving that men and women are basically the same, hence they should be treated the exact same in law and in the legal system. The aim of such an argument is to acquire formal equality between men and women. This view has gained a lot of ground in both national legal systems and to a large extent in international law. The effect is a gender-neutral law with anti-discrimination clauses. This view is fundamental in liberal feminism that has an individualistic view of society where both explanations for, and solutions to, inequality are found in individual attitudes and actions. If the same formal opportunities are given to men and women, it is up to the individual to use them.<sup>22</sup>

On the other hand, there are sameness feministic arguments meaning that formal equality is not enough. In this view the historically different treatment of women and the societal structure it created cannot be compensated simply by a gender-neutral law. A gender-neutral law might obtain formal equality, but will not give substantial equality. Rather on the opposite some sameness feminists argue that a gender-neutral law can hide inequalities since women and men de facto have different situations and possibilities that might require different legal provisions. To reach substantial equality, a legal system that compensates for historical inequalities is, according to this feministic view, needed. The effect of such an argument is a law that is not gender-neutral, but can have specific provisions in order to protect women from injustices and to advance their position in society in order to reach substantial equality, often known as affirmative action. This is a view that is growing in both national legal systems and in international law and is often connected to a structural explanation model of inequalities. In difference from the liberal feminism that focus on individuals, this theory focus on overarching structures in society

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<sup>21</sup> Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 141, p 182 ff.

<sup>22</sup> Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 180 ff; Kouvo, *Making just rights?*, 2004, p 38 ff.; Lacey, *Feminist Legal Theory and the Rights of Women*, 2004, p 13 ff.

where men have more power than women. The imbalanced power structures are seen in the legal system, where men are privileged in comparison with women. The structural view is fundamental for several feministic theories, amongst them, the radical feminism, and the postmodern feminism.<sup>23</sup>

In addition to this, there are arguments made for avoiding both the aim of formal and substantial equality, since they both further a system that is comparative. The critique against a comparative system is that it takes a starting point in a male view of the world where women should be equal, either formally or substantially to men. Instead, the system should fundamentally change the perspective so that women views are included in its very premises. The aim is then not equality, which has an inherent component of comparison, but rather justice. This view makes the discussion on sameness or difference less relevant, since it promotes a more individualistic solution which there is room for taking individual differences, biological or acquired as part of a group or individually, into account and build a system that is not necessarily entirely equal, but fair.<sup>24</sup>

### **2.1.3 Feminist Critique on Human Rights**

Legal feminist theory is only partly concerning international law. When moving from national law to international law the concept of human rights is essential. In feminist legal theories this concept is, however, not without controversy. In order to get full understanding of the feminist legal theory view of different strategies to protect women's rights the revelation that some feminist legal theories questions the entire concept of human rights holds some interest. To analyze international law, feminist theories deconstruct the law to find what values and presumptions it is built on. A common conclusion is that international law often is built from a male perspective, where the situation for women is excluded. The notion of human rights is controversial

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<sup>23</sup> Gunnarsson, Svensson, *Genusrättsvetenskap*, 2009, p 145 ff, 180 ff; Kouvo, *Making just rights?*, 2004, p 36 ff.

<sup>24</sup> Kouvo, *Making just rights?*, 2004, p 41 ff.

in feminist legal theory. While the liberal feminism support the idea of individual rights, many other theories in the field raise criticism against the human rights system. The bottom line in this critique is that the human rights are created from a male point of view, and that it is built in to the system that the human rights have a male perspective. Some argue that human rights are per definition women's rights, since women are human, hence violations of the rights of women are also human rights violations. The challenge is to create well-established interpretations of the human rights documents that are relevant for the violations women face. Others are more skeptical towards the human rights system and mean that it can never be a way of protecting women's rights, but will just strengthen a system that oppresses women.<sup>25</sup>

An argument for maintain the human rights system, raised in different forms by feminist theories, is that human rights are so well established that it is more effective to try and find room for the realities of women within the system than trying to change the system in itself.<sup>26</sup>

#### **2.1.4 Specialized Rights or Gender Mainstreaming**

There are different strategies on how to protect women's rights within the international legal system. The core issue is whether women's rights should be treated separately from other general human rights, or if it should be integrated into general human rights framework. There are three main equality strategies defended by different feminist theories, the gender-neutral strategy, the woman-centered strategy and a dual strategy that combines the two. The strategies are closely connected to the view on the reason for inequality and on the likenesses and differences between men and women as mentioned above regarding the feminist legal theories.

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<sup>25</sup> Engle, *International Human Rights and Feminism: When discourses meet*, 2005, p 47 ff.; Kouvo, *Making just rights?*, 2004, p 52 f, 61 ff.; Peach, *Are Women Human? Feminist Reflections on "Women's Rights as Human Rights"*, 2005, p 81 ff..

<sup>26</sup> Engle, *International Human Rights and Feminism: When discourses meet*, 2005, p 47 ff.; Kouvo, *Making just rights?*, 2004, p 64 ff..

The gender-neutral equality strategy means that women's rights should be integrated in general human rights documents. A female perspective should be mainstreamed in all instruments in order to give a full protection of both men and women. This view has been criticized for not taking into account that the very legal system is built from a male perspective. The critics argue that it cannot be presumed that the law is neutral and objective.

The women-centered equality strategy regards it important to single out women and have specific instruments promoting their rights. The instruments should both reinterpret already existing general human rights to function in a female context, but should also add new rights where required in order to have a full protection of women's rights. This strategy has been criticized for enhancing gender roles and gender stereotypes. There has also been critique against the strategy for creating women's rights project on the side of the core human rights framework, which can lead to a marginalization of women's rights.

The dual equality strategy has the aim of combining the two strategies mentioned above, by creating documents specifically covering women's rights, but also integrate a women's rights perspective into general human rights documents.<sup>27</sup>

## 2.2 Universality of Human Rights

The most fundamental of the UN human rights document, the Universal Declaration of Human Rights, declares in its very first article that all humans are born free and equal in dignity and rights.<sup>28</sup> This lays out a core concept in the human rights framework – the universality of human rights. However, the

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<sup>27</sup> Kouvo, *Making just rights?*, 2004, p 44 ff.; Lacey, *Feminist Legal Theory and the Rights of Women*, 2004, p 47 ff.; Stamatopoulou, *Women's Rights and the United Nations*, 1995, p 45.

<sup>28</sup> Universal Declaration of Human Rights, art 1.

universality is a frequently discussed issue in the philosophical discourse on human rights.<sup>29</sup> In the following some of the core questions regarding universalism will be discussed. The aim is to provide an understanding of the concept of universalism that can be related to other, possibly conflicting, values such as gender-specific regulation within the field of human rights.

## 2.2.1 Justifications of Human Rights

Theories on universality often have their point of departure in the justification for human rights. The concept of human rights have several different possible justifications, some that are mutually exclusive, and others that can be combined. Religion is a traditionally common justification, which still has ground in parts of the world, claiming that the rights are given by god. However, the UDHR does not have a religious foundation, at least not explicitly. The two main categories of justification for human rights is the legal or procedural justification and the moral justification based on the content of the human rights. Both these justifications exist in many different shapes. The UDHR can be claimed to build on one of these or on a combination of the two.

The legal justification views human rights as political rather than natural rights. Essentially, the human rights are right because we, humans, have agreed on them. Through legislators, representing the people, a set of rights have been created and agreed upon by the all states in the UN. That we have made this agreement, and found the lowest common denominator is, in the theory of legal justification, enough justification for the human rights to be respected. However, it can also be argued that a legal justification is not enough. If states would have agreed on a human rights document with morally unacceptable content, should the provisions in the document still be followed?<sup>30</sup>

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<sup>29</sup> Ia. Ernst, Heilinger (Eds), *The Philosophy of Human Rights*, 2012; Dunér, *The global Human Rights Regime*, 2002, p 55 ff..

<sup>30</sup> Boylan, *Natural Human Rights*, 2014, p 106 ff.; Tasioulas, *On the nature of human rights*, 2012, p 17 ff..

The moral justification, with its basis in the theory of natural rights, has many different forms. Instead of looking to the process of the agreement on the rights, this perspective has its starting point in the content of the rights. The basis for human rights are in these arguments often the notion of a common humanity, that we share a human good on which the human rights build. One of the core philosophical fundamentals of this view is found in Kantian theory. Kant argues that human beings are reasonable and autonomous, and that we through our free will act morally, we self-legislate. Kant argued that rights are based on moral law, that is not given to us by a god, and that is neither a product of a political negotiation, but rather inflicted upon ourselves through our own moral sense.

There are also justifications of human rights as natural rights giving that they are right because the interest or well-being of every person is an ultimate value that cannot be negotiated, and the rights aim at giving every individual the maximum well-being. Another view is that the rights are the best way to help people help themselves, it gives agency to individuals. Both these views are more utilitarian than the Kantian theory, but builds on the same idea of an inherited morality.<sup>31</sup>

## 2.2.2 Justifications for Universality

When you move on from the question of justification for the existence of human rights, to the very closely related issue of justification for the universality of human rights, Kant is still a center figure. As in the justification of the existence of human rights, there are several different grounds for justifying universalism, for example the religious, the moral or the legal.

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<sup>31</sup> Boylan, *Natural Human Rights*, 2014, p 106 ff.; Hope, *Common humanity as a justification for human rights claim*, 2012, p. 211 ff.; Kant, Liddell, *On the Foundation of Morality: A Modern Version of the Grundlegung*, 1970, p 138 ff..

The legal argument is that the UN is so broad, covering such a great part of the world's population, that an agreement between the states of the UN can be seen as universal. If the UN agrees that a right is applicable to every individual, it is per se universal. The moral argument builds on the previous mentioned notion on a common humanity, based on the Kantian theory.<sup>32</sup>

Kant argued, through his three variations of the categorical imperative, that human beings are not means to an end, but ends in themselves – we have an inherited dignity. He argued that every person has free will. We are autonomous and should act after principles we could see raised to universal law. A conclusion of Kant's imperatives is that everyone is free and equal, and that we, through reason and moral, should treat everyone equally with dignity. This argument lays out a clear justification for universality. We are all reasonable, autonomous human beings and should be treated accordingly.<sup>33</sup>

When looking at the justifications for universalism, it is also essential to define whether it is actual universalism – that everyone actually enjoys the same rights – or a theoretical, normative claim that everyone should have the same rights. If actual universality is sought, it has been claimed that universality cannot be justified legally, since not every human being in the world is legally protected against violations. The UN-system is applicable to a large part of the world's population, but far from everyone is protected by effective national legislation. Another justification focus on shared norms, however not legal ones, on how to act that the rights are based upon. Also this justification of shared norms has been criticized for a naïve view of the world. The norms on which we act differ over different societies. A justification that is normative and says that human rights *should* be respected universally,

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<sup>32</sup> Boylan, *Natural Human Rights*, 2014, p 106 ff.; Hope, *Common humanity as a justification for human rights claim*, 2012, p. 211 ff..

<sup>33</sup> Edmundson, *An Introduction to Rights*, p 28 f.; Kant, Liddell, *On the Foundation of Morality: A Modern Version of the Grundlegung*, 1970, p 138 ff.; Lanzerini, *The Culturalization of Human Rights Law*, 2014, p 3 ff..



rather than *are* respected universally, is easier to justify from both a legal and a moral perspective.<sup>34</sup>

### 2.2.3 Universalism and Relativism

A frequent argument against universality of human rights is based on cultural relativism or moral diversity. Relativism in a pure form is not compatible with the notion of universalism, there is not a common humanity, but rather our values and moral beliefs comes from our context and culture. This creates a diversity of moral grounds across the world, and presuming that human rights are based on natural law, this leads to a variety of concepts of human rights that might be conflicting and following this not universal. One aspect in this discussion is whether the relativist describes a factual situation – that different societies have at least partially different moral views – or if it is a normative statement that a moral stand is right because it is accepted in one cultural context. As a descriptive statement the notion of moral diversity is uncontroversial, but as a normative idea, it is more radical, and in opposition to universalism.<sup>35</sup>

However, the debate concerning universalism and cultural relativism is not necessarily so polarized, but is rather regarding how to solve the conflict that arises when different societies have differing views on human rights. The common solution is to hold on to the universalism of human rights, but accept local variations of the interpretation of the provisions based on the cultural context.<sup>36</sup>

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<sup>34</sup> Ernst, *Universal human rights and moral diversity*, 2012, p. 231 ff..

<sup>35</sup> Donnelly, *Cultural Relativism and Universal Human Rights*, 1989, p 109 ff.; Ernst, *Universal human rights and moral diversity*, 2012, p. 231 ff.; Lanzerini, *The Culturalization of Human Rights Law*, 2014, p 1 ff..

<sup>36</sup> Cf. Margin of appreciation under the European Convention on Human Rights; Duquette, *Universalism and Relativism in Human Rights*, 2005, p 59 ff.; Ernst, *Universal human rights and moral diversity*, 2012, p. 231 ff.; Lanzerini, *The Culturalization of Human Rights Law*, 2014, p 1 ff..

## 2.3 UN Approach to Gender Equality

The UN is the central actor in the human rights field of today. However, the UN has a pragmatic focus, and very little discussion can be found on theoretical or philosophical justifications to their view of human rights and human rights protection. On the relation between women's rights protection and universalism the UN does not seem to have produced any material with theoretical perspectives or justifications. However, there is some to be said about the UN approach to gender equality and to the issue of gender-specific regulations, a brief description of this will be given in the following.

After intensive work towards ensuring women's equal status in the first years of the UN, the basic human rights documents, such as UDHR, ICCPR and ICESCR, are written in gender-neutral language. The Vienna Declaration and Programme of Action from 1993 gives that women's rights are "an inalienable, integral and indivisible part of universal human rights"<sup>37</sup>. This view was further strengthened in the Beijing declaration and Platform for Action from 1995, where it is stated that women's rights are human rights. The Beijing declaration also gives that women's rights should be mainstreamed in all the UN human rights work. These decisions build on the presumption that the general human rights documents further male interests and excludes the realities of women. To realize women's human rights, they need particular attention. The two declarations were also a start of a dual strategy for the realization of women's rights, where women's rights are both mainstreamed into general human rights document, through revision of the documents or broadened implementation, and in focus for specialist instruments and bodies on women's human rights.<sup>38</sup>

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<sup>37</sup> Vienna Declaration and Programme of Action, p.18.

<sup>38</sup> UN Global Issues, *Women 2016*; Vienna Declaration and Programme of Action; Beijing Declaration and Platform for Action; UN International Human Rights Instruments, *Integrating the gender perspective into the work of United Nation human rights treaty bodies*, 1998, p 3 ff.

The UN has also made recommendations on how to handle women's rights in national legislation. In the Handbook for Legislation on Violence Against Women, gender-neutral legislation is criticized for neglecting the reality for women and conceal violations of women's rights. Instead a "gender-sensitive" legislation (in difference from a gender-blind legislation) is advocated. Such legislation can either be directed only towards women, with the risk of excluding the realities of men, or be doubled so there are both gender-neutral and gender-specific language concerning every relevant area, such as sexual violence.<sup>39</sup>

CEDAW, the core convention on protection of women's rights, introduces the concept of temporary measures, a form of affirmative action. In article 5 of CEDAW, it is stated that measures that are introduced in order to enhance the position of women, should not be regarded discriminatory even if they are favoring women over men – as long as they are temporary until equality is reached.<sup>40</sup>

Further theoretical or philosophical justification of the UN view of women's rights and universalism is not easily found.

## 2.4 Universalism and Gender Equality

Feminist legal theory has limited reasoning regarding universalism, focus is on how to most effectively ensure protection of women's rights, and not on how to shape a consistent and theoretically sustainable human rights framework.<sup>41</sup> The UN has minimal theoretical discussions on gender and human rights, and no discussion on the relation between gender, human rights and universalism.<sup>42</sup> Neither the universalism discourse offers any solutions on how to protect a big, particularly vulnerable group within a universal

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<sup>39</sup> UN Department for Economic and Social Affairs, *Handbook for Legislation on Violence Against Women*, 2010, p 3.1.4.

<sup>40</sup> CEDAW, art 5.

<sup>41</sup> Cf. 2.1.

<sup>42</sup> Cf. 2.3.

human rights system.<sup>43</sup> The cultural relativists are questioning the idea of universalism, but not on the grounds that different groups might *need* different protection, but rather on the grounds that different cultures have different views on human rights.<sup>44</sup> What is common between most cultures is however the unprivileged position of women. In the following the crossings between feminist legal theory and the theories on universalism will be discussed in order to give a general theoretical foundation for the analysis of this thesis.

### 2.4.1 Theories in Conflict?

Feminist legal theory criticizes the human rights system for being male-centered. The strategies to reach a full protection of women's rights differ in the theories, but in general a common denominator for many of them is that they have a female perspective and focus on women and their rights. Though the aim is to reach equality by compensating historic inequalities between men and women, the application of a female perspective is equally problematic from a Universalist perspective as the previous starting point in a male perspective. The very idea with the notion of universality is that there are no differences between human beings relevant to the human rights protection.<sup>45</sup> Hence to build a human rights protection that excludes parts of humanity is hardly compatible with universalism.

In universality it is central that human rights are for everyone, always. In a Universalist view, regardless of whether it is legally or morally justified, the sameness feminism seems given. There are no differences between men and women relevant to their human rights protection. Even though a female perspective on the human rights protection is not a solution compatible with

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<sup>43</sup> Cf. 2.2.

<sup>44</sup> Cf. 2.2.3; Duquette, *Universalism and Relativism in Human Rights*, 2005, p 59 ff..

<sup>45</sup> Cf. 2.1, 2.2; Kouvo, *Making just rights?*, 2004, p 36 ff.; Dunér, *The Global Human Rights Regime*, 2002, p 55.

universality, it is a fundamental problem also from a Universalist view if the human rights protection is built on male premises.<sup>46</sup>

An intriguing question is whether the concept of gender equality, a common goal in the UN work for women's rights, is really compatible with universalism. The UDHR is stating that everyone is born free and equal, but feminist legal theories have raised a discussion on whether the goal of equality is really a fruitful way forward. Gender equality emphasizes the existence of genders, and the need to work towards equality between these. In the human rights system of today the male perspective is the norm. To claim gender equality is to put women's rights in relation to the position of men, which is hardly compatible with either a feminist, or a Universalist, view.<sup>47</sup>

Kant's categorical imperatives do not speak of equality, it can be seen as entailed, but is not necessarily an effect of Kant's theories. Rather on the opposite, the notion of justice that some feminist legal theories proclaim where a greater focus is on individual needs, could be just as, if not more, adequate as an effect of the imperatives. Kant, living centuries ago, did possibly not consider women in his universal thoughts, but a Kantian of today should be inclined to see to everyone's capacity and needs, rather than to their gender identity. We have an inherited autonomy and reason, unconnected to our gender, which makes us all the same. The maxims that can be raised to universal law should be applicable to both men and women, but will require room for a lot of individual adaptations, since we all have different circumstances and possibilities.<sup>48</sup>

However, this means that equality *should* be irrelevant to a Universalist, but not that equality *is* irrelevant from a Universalist perspective. Some feminist legal theories put a lot of emphasis on structural inequalities as a source of

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<sup>46</sup> Cf. 2.1, 2.2.

<sup>47</sup> Cf. 2.1.2; Kouvo, *Making just rights?*, 2004, p 41 ff.

<sup>48</sup> Cf. 2.1.2, 2.2.2 Kant, Liddell, *On the Foundation of Morality: A Modern Version of the Grundlegung*, 1970, p 138 ff.; Kouvo, *Making just rights?*, 2004, p 43.

injustice. In a perfect world, equality would not be sought, instead justice, which considers individual needs and possibilities, would be the goal. The world of today is however not perfect, and to acknowledge the structural inequalities between sexes in society is essential to reach true universalism where everyone can enjoy their human rights.<sup>49</sup>

The core concepts of feminist legal theories, such as the protection of women's rights, are not directly in conflict with the notion of universality, rather on the opposite, they go hand in hand in many senses although from different perspectives. However it is not easy to find a human rights protection that build on both feminist and universal premises. There might be a need to revalue the system, tear it down and rebuild it in a way that doesn't presume the male perspective.

## 2.4.2 Strategies for Combining Theories

One way of countering structural inequalities is the UN dual strategy, where women's rights should be both mainstreamed into the general human rights system and protected in gender-specific regulation. Gender-specific regulation has been defended by some feminist legal theories meaning that they highlight the particular situation for women in a necessary way.<sup>50</sup> The dual strategy is however not self-evident from a Universalist point of view. Both the gender mainstreaming strategy and the introduction of gender-specific regulation can be questioned from a Universalist perspective. That the UN decides to mainstream women's rights into the general human rights framework, is problematic. That can be interpreted as the UN confirming that human rights document's fundamental to modern universalism, such as the UDHR, is excluding the perspectives of half of the world's population. However, it is clear that the ambition in a gender mainstreaming process is universality. On the other hand, the dual model entails another method that is even more questionable from a Universalist perspective - the gender-specific

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<sup>49</sup> Cf. 2.1.2.

<sup>50</sup> Cf. 2.1.4; Kouvo, *Making Just Rights?*, 2004, p. 44 ff.

regulation protecting women's rights. This could possibly be compatible with universalism if the protection was temporary until the goal of universalism could be reached with other means. As a permanent measure, to create human rights framework only applicable to half of the population does not seem to have universalism even as a long term goal.<sup>51</sup>

In order to build a consistent human rights protection that considers the specific situation for women without devaluing the universality of human rights, the foundation for human rights needs to be challenged. People of all gender identities should be seen as individuals, with different needs and possibilities, but with the same value in the human rights system. Instead of trying to make the present system equal, justice should be sought. Unfair measures should only be introduced as efforts in order to change the system, and not as permanent solutions to inequalities.

### **2.4.3 Theoretical Framework**

Following the above, it is essential to keep in mind that a strict theoretical view of human rights, and philosophical discussions on how to build a consistent human rights protection, is a privilege. In a context with a generally good human rights protection and high equality between men and women, it is easy to claim universalism. But in an urgent human rights crisis, every tool in order to protect people from human rights violations is welcome and important – whether it fits long term in a universal human rights framework is irrelevant.<sup>52</sup> However, it is not without relevance to have the theoretical discussion when possible. A thorough theoretical justification for the human rights system can strengthen the human rights framework (or at least hinder weakening of the system) for future crisis.

Feminist legal theory and the theories of universalism seems to be most compatible if the agreed merged aim of the two is a truly universal human

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<sup>51</sup> Cf. 2.3.

<sup>52</sup> Cf. 2.1.1.

rights system, based on the idea of human reason, autonomy and common human good, which makes gender essentially irrelevant. This would give that every individual is entitled to the same human rights protection. In such a system ideas of gender differences, gender equality or gender neutrality would not hold any greater interest.<sup>53</sup>

With this theoretical basis, gender-specific regulation cannot be permanent since that will always regard women and men essentially different before the law. However, the general human rights protection cannot be built on premises favoring one of the sexes.

The goal of this combined theoretical framework could be said to be a just and universal human rights system.

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<sup>53</sup> Cf. The goal of justice pointed out in 2.1.2 and the ideas of universality in 2.2.2.



## 3 Protection of Women Prisoners

Only a small minority of the world's prison population is women. However, the amount of women prisoners is growing fast in comparison with the amount of male prisoners. Research show women have a particularly vulnerable situation in prison and partly suffer from different problems than male prisoners.<sup>54</sup> The international regulation on women prisoner constitutes a clear example of when the UN dual strategy is used, with the SMR as a male centered document, the Bangkok Rules as a women specific instrument and the Mandela Rules as a document where efforts have been made to mainstream women's rights into general human rights framework. In the following, the situation for women in prison will be described together with the legal framework for protection of women prisoners. Both legal instruments and soft law instruments will be considered.

### 3.1 Women in Prison

Because of the conditions and practices in prison and due to their small numbers, the situation for women in prison is challenging. There are certain characteristics differing women prisoners from male prisoners. Women are more often imprisoned for petty crimes related to their poor economic situation, for example smaller thefts or drug crimes. In difference from men, women are rarely imprisoned for violent crimes. Women who are imprisoned also more often have a background of mental illness, sexual assault, drug or alcohol abuse or other factors making them particularly vulnerable.<sup>55</sup>

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<sup>54</sup> The Bangkok Rules; The Mandela Rules; Standard Minimum Rules for the Protection of Prisoners; UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, 2008, p 2 ff..

<sup>55</sup> Bastick, Townhead, *Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, 2008, p 1 ff.; Gainsborough, *Women in Prison: International Problems and Human Rights Based Approaches to Reform*, 2008, p 271 ff.; Penal Reform International, *Women in the Criminal Justice System: Key Facts*, 2016; UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, 2008, p 2 ff..

The situation where women in prison makes out such a small minority (around 2-9% of the world's total prison population) also creates problems for the protection of their rights. One example is that women prisoners often get treated as having a higher security classification than they actually have. The small numbers of women prisoners gives that there are often only one, or a small number of security classes in the women prisons, which means that women who have a small risk of attempting escape or violence can still be kept together with, and under the same restrictions, as maximum security prisoners. Women are also more likely to be placed far from their homes and families, since there are few options for female prisoners due to their small numbers. This despite the fact that women are more likely to be the main caretaker of children. Hence, the imprisonment of women often has an effect also on the lives of children. A specific problem related to this is the situation for children who are living in prison together with their imprisoned mothers.<sup>56</sup>

Also after release, the imprisonment has other consequences for women than for men. The re-establishment in society is often more difficult, and the stigmatization is often graver for imprisoned women than it is for men in the same situation, hence they may not get accepted by their communities when they return from prison.<sup>57</sup>

Apart from this, there are also gender-specific health issues, and special conditions for women who are pregnant, have just given birth, are breast feeding or in other ways care physically for infant children. Women are also more vulnerable for sexual abuse, both before and during their imprisonment,

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<sup>56</sup> Bastick, Townhead, *Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, 2008, p 1 ff.; Gainsborough, *Women in Prison: International Problems and Human Rights Based Approaches to Reform*, 2008, p 271 ff.; Penal Reform International, *Women in the Criminal Justice System: Key Facts*, 2016; UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, 2008, p 2 ff.; UN Department of Economic and Social Affairs, *Sixth UN conference on the prevention of crime and the treatment of offenders*, 1980, p 12 f..

<sup>57</sup> Bastick, Townhead, *Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, 2008, p 1 f..

therefore strip searching, opposite sex prison staff and gender-mixed prisons can be particularly problematic for women.<sup>58</sup>

### 3.2 Standard Minimum Rules for the Treatment of Prisoners

The International Covenant on Civil and Political Rights (ICCPR) states that prisoners should be treated with respect for their human dignity.<sup>59</sup> The main international protection of the human rights of prisoners is however found in the Standard Minimum Rules for the Treatment of Prisoners (SMR) that was adopted by the first UN Conference on the Prevention of Crimes and the Treatment of Prisoners in 1955 and two years later approved by the Economic and Social Council.<sup>60</sup> The document does not hold legal status, but has been reaffirmed by the UNGA at several occasions and is often used to interpret legally binding regulations such as the ICCPR art 10. However, the implementation of the rules have not been deemed satisfactory by the UN, and in an effort to remind the member states and give new life to the rules, the UNGA passed a resolution in 1990 reconfirming the fundamental principles behind the rules. This noticeably shorter document, outlines the eleven basic principles that the SMR details. In the preamble to these principles, the UNGA acknowledges the importance of the SMR. The UNGA in 1988 also adopted a set of 39 principles called the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, that includes provisions on treatment of prisoners, however far from as detailed as the SMR.<sup>61</sup>

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<sup>58</sup> Bastick, Townhead, *Women in Prison: A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners*, 2008, p 1 f.; UNODC, WHO Europe, *Women's Health in Prison*, 2009, p 8 ff.

[http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0004/76513/E92347.pdf](http://www.euro.who.int/__data/assets/pdf_file/0004/76513/E92347.pdf)

<sup>59</sup> ICCPR art 10.

<sup>60</sup> UN Standard Minimum Rules for the Treatment of Prisoners

<sup>61</sup> Pollard, Rodley, *The Treatment of Prisoners Under International Law*, 2009, p 381 ff.; UN General Assembly, *Resolution 45/111: Basic Principles for the Treatment of Prisoners*, 1990.

## 3.3 Bangkok Rules for the Treatment of Women Prisoners

### 3.3.1 Background on the Bangkok Rules

The United Nations Rules for the treatment of Women prisoners and non-custodial measures for women offenders (the Bangkok Rules) was adopted by the UN general Assembly in 2010.<sup>62</sup> This was the culmination of long-term work within the UN towards the protection of women prisoners. The initiative to the document was taken in response to the growing female prison population worldwide.<sup>63</sup> In 1980 the sixth UN Conference on the prevention of Crime and the Treatment of Offenders in Venezuela passed a resolution regarding the specific needs of women in prison. The resolution stated that women often suffer discrimination, and due to their limited numbers, often don't get the attention needed to see to their special requirements.<sup>64</sup> The rapidly growing female prison population throughout the world created initiative for more specified documents covering the needs of women prisoners, amongst them a handbook for prison managers and policymakers on women and imprisonment developed by UN Office on Drugs and Crime in 2008.<sup>65</sup> The specific conditions for women in prison have been mentioned in a number of UN reports and resolutions over the years, and in 2003 the first initiative to create the Bangkok Rules was taken.<sup>66</sup>

The Bangkok Rules are not legally binding, but are, through their adoption in UNGA, a central document for the UN in the treatment of women prisoners. The preamble and the preliminary observations of the rules acknowledges that the rules cannot be applied equally in all places at all times but encourages states to adapt their legislation and practices after the rules. The preamble also

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<sup>62</sup> The Bangkok Rules.

<sup>63</sup> Limsira, *The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)*, 2011, p 241 f.

<sup>64</sup> UN Department of Economic and Social Affairs, *Sixth UN conference on the prevention of crime and the treatment of offenders*, 1980, p 12 f..

<sup>65</sup> UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, 2008

<sup>66</sup> Bangkok Rules, Preliminary Observations p 5.

expresses an ambition for UN-agencies and other intergovernmental organization as well as NGOs to work with the implementation of the rules.<sup>67</sup>

### 3.3.2 Scope of the Bangkok Rules

#### 3.3.2.1 General Content

The Bangkok Rules contains, apart from the preliminary observation and the introduction, 70 supplementary rules to the SMR and the Tokyo Rules (on non-custodial measures). The Rules are divided into four parts, Rules of general application, Rules applicable to special categories and Non-custodial measures and a part concerning research, planning, evaluation and public-awareness-raising. Some of the Bangkok rules are clarifying rules in the SMR, while others contain new areas. The Bangkok rules are in most parts not formulated as rights of women prisoners, although some of them could be applied in such a way.<sup>68</sup>

The mandate for the working group that developed the rules was not to replace the SMR, but to supplement them with rules specifically concerning women. Hence, the working group decided to concentrate on rules regarding women prisoners, and to avoid adding rules concerning male prisoners.<sup>69</sup> However it is stated in the preliminary observations in the Bangkok Rules that some rules, particularly the rules regarding parents, could also be applicable to men. Although the main focus of the rules are on women prisoners and their children, it is acknowledged that both parents are important for children why men are also somewhat covered by some of the rules.<sup>70</sup> Throughout the rules, they are directed towards women prisoners, and the rights of fathers are not mentioned at any further point than in the preliminary observations.<sup>71</sup>

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<sup>67</sup> The Bangkok Rules, Preamble and Preliminary Observations.

<sup>68</sup> The Bangkok Rules, Preliminary Observations p 3.

<sup>69</sup> UNODC, *Report on the meeting of the expert group to develop supplementary rules specific to the treatment of women in detention and in custodial and non-custodial settings held in Bangkok from 23 to 26 November 2009*, 2009, p 21.

<sup>70</sup> The Bangkok Rules, Preliminary Observations p 12.

<sup>71</sup> The Bangkok Rules.

### 3.3.2.2 Material Provisions

#### 3.3.2.2.1 Part I - Rules with General Application

The first part of the rules are for general application to both prisoners and women in custody or held under other non-custodial measures. It begins with establishing a view later picked up by the Mandela Rules – the anti-discrimination provision of the SMR should not be interpreted to say that special measures taken to protect women prisoners because of their particular needs, would amount to discrimination. Following this provision are rules that complement the SMR regarding registration, personal hygiene, health-care services, safety and security, contact with the outside world and institutional personnel. Apart from this, the Bangkok Rules also adds two areas that are not in the SMR, Allocation and Juvenile Female Prisoners. Regarding allocation it is stated that women should be placed close to home considering her caretaking responsibilities and her individual preference. Several of the provisions refer to the caretaking responsibilities of women, and the best interest of their children, whether they are still at home or if they live in prison with their mothers.<sup>72</sup>

Another category of rules is the rules concerning special needs of women regarding pregnancy, breast feeding, menstruation and other gender-specific health care issues. In addition to this, there are several rules that are strengthening the protection of women prisoners in areas where they have shown to be particularly vulnerable, such as mental health, drug dependency and trauma caused by sexual abuse. Rule 6 provides that women should get a comprehensive health screening when they are admitted to prison, which should amongst other things, investigate the above mentioned possible problems and give adequate care if the woman is suffering from any of these.<sup>73</sup> There are several rules covering areas of mental health care, HIV-prevention and treatment and substance abuse programs.<sup>74</sup> There are also rules regarding searches, to ensure that these are carried out with respect for

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<sup>72</sup> The Bangkok Rules; The Mandela Rules.

<sup>73</sup> The Bangkok Rules, Rule 6.

<sup>74</sup> The Bangkok Rules, Rule 12-15.

the woman's dignity and alternatives to strip search and invasive body searches should be developed.<sup>75</sup> Furthermore it states that women prisoners should never be prohibited family contact as a disciplinary sanction.<sup>76</sup> If women prisoners report abuse, rule 25 states that their complaint should be handled confidentially with competency by independent authorities.<sup>77</sup> Regarding prison staff, there are rules on training in gender-specific issues, mental health, HIV etc., but in addition to this there are also rules saying women staff should be treated fair and equal with male staff.<sup>78</sup>

### **3.3.2.2 Part II – Rules Applicable on Special Categories**

The second part of the rules is divided into different parts applicable to different categories of women prisoners. In the following, only the part concerning prisoners under sentence will be covered. A central area of this part is the rules on classification that prescribes that risk-assessment and classification of prisoners should be gender-sensitive and for example take into account that women generally pose a lower risk to others while isolation can have harmful effects on them. It also includes a set of rules complementing the SMR provisions on aftercare and social relations, where it is stated that the prison should make efforts to organize visits to women since and that the prison authorities have a responsibility to ensure social reintegration of women prisoners after their release.<sup>79</sup> In addition to this, there are further rules regarding pregnant women, breastfeeding mother and women with children in prison, on foreign nationals and on women prisoners from minorities and indigenous peoples since they often suffer from multiple forms of discrimination.<sup>80</sup>

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<sup>75</sup> The Bangkok Rules, Rule 19-21.

<sup>76</sup> The Bangkok Rules, Rule 23.

<sup>77</sup> The Bangkok Rules, Rule 25.

<sup>78</sup> The Bangkok Rules, Rule 29-35.

<sup>79</sup> The Bangkok Rules, Rule 43-47.

<sup>80</sup> The Bangkok Rules, Rule 48-55.

### **3.3.2.2.3 Part III - Non-custodial Measures**

One important part of the Bangkok Rules is the ambition to find other alternatives to imprisonment of women, which is clearly stated in the preliminary observations of the rules. This in order to minimize negative impact of imprisonment of women who have committed less serious crimes, and on their families and communities. Hence, the entire third part of the rules is dedicated to the non-custodial measures.<sup>81</sup>

### **3.3.2.3 Language of the Bangkok Rules**

The Bangkok Rules are not completely free-standing, but is in most parts referring to the SMR. Generally, they are not written in relation to male prisoners, with the exception of a few provisions. The language of the rules can roughly be divided into seven categories

- Rules referring to pregnant women, breastfeeding women, women living with their children in prison, and to the children of those women.
- Rules referring to prison staff, with emphasis on staff training and non-discrimination of female prison staff.
- Relative rules, where it is stated that women should have a particular right or possibility to the same extent as male prisoners. This is rare and only occurs in two rules.
- Rules referring to the particular vulnerability of women, for example, because of their disproportionate experience of domestic violence or their particular risk of abuse in prison.
- Rules concerning gender-specific services, for example, health care of particular relevance to women.
- Rules prescribing gender-sensitive procedures, considering the particularly harmful effects some procedures can have on women. For example, programmes designed for women.

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<sup>81</sup> The Bangkok Rules, Rule 57-66.



- Rules giving that women's distinctive needs should be considered. What the women specific needs are is not detailed in the rules.

The rules are in a few places referring to the rights of women, but are generally not written as rights. The rules are rather taking the form of a checklist for staff and authorities.<sup>82</sup>

### 3.4 The Mandela Rules

In 2015 a further step towards implementation of the SMR was taken by the Economic and Social Council, when it passed a revised version of the SMR which aims to reflect the scientific development and current best practices. This new set of rules, commonly known as the Mandela Rules in honor of Nelson Mandela, was adopted by the UNGA which also strengthened its central role within the UN system.<sup>83</sup>

As in the Basic Principles, and the old set of SMR, the focus of the Mandela Rules is the UN ambition for a humane justice system where all prisoners are treated with respect for their human dignity. The Mandela Rules cover areas of the conditions in prison, regarding for example accommodation, physical environment, personal hygiene, possibilities for recreational activities, adequate staff training, health-care services and regulation of how, when and which disciplinary sanctions may be used. The rules also cover the right for prisoners to make complaints, the rights for prisoners to keep in contact with their friends and families and the responsibility of the prison authorities for the prisoner's reintegration in society after release.<sup>84</sup>

The main difference between the previous set of SMR and the Mandela Rules is the addition of an extensive part on health-care services that replaces the previous rules on medical services in order to detail and strengthen the

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<sup>82</sup> The Bangkok Rules.

<sup>83</sup> The Mandela Rules; UNODC, *"Mandela Rules" passed, standards on the treatment of prisoners enhanced for the 21<sup>st</sup> century*, 2015.

<sup>84</sup> The Mandela Rules.

prisoner's rights to sufficient health-care services to the same standards as in the community outside prison.<sup>85</sup> Also, the rules regarding restrictions, discipline and sanctions have been developed as a further safeguard of prisoners. For example the prohibition of solitary confinement under certain circumstances has been detailed.<sup>86</sup> Furthermore, rules on searches of prisoners and cells, and internal investigations of events in prison have been added.<sup>87</sup>

### 3.4.1 Women Prisoners in the Mandela Rules

The protection of female prisoners is not a specific focus in either the previous SMR or in the new Mandela Rules. On the contrary, the rules have been criticized for not taking sufficient consideration of women's perspectives.<sup>88</sup> Both the previous SMR and the Mandela Rules have an anti-discrimination rule, stating that the rules should be applied impartially, without discrimination on the grounds of, amongst other factors, sex and that prisoners religious and moral beliefs should be respected. In the Mandela Rules it has also been added that prisoners with special needs should have those needs seen to, without that being considered discrimination, which is similar to the wording in the Bangkok Rules, but without the specific mentioning of gender equality or female prisoners.<sup>89</sup>

The Mandela Rules have in a few places brought in ideas from the Bangkok Rules. However, the Bangkok Rules are only mentioned in two places in the Mandela Rules – in the preamble and in Rule 45(2) on solitary confinement. The preamble states that special attention should be given to the specific

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<sup>85</sup> The Mandela Rules, Rule 24-35; UN Standard Minimum Rules for the Treatment of Prisoners.

<sup>86</sup> The Mandela Rules, Rule 36-46; UN Standard Minimum Rules for the Treatment of Prisoners.

<sup>87</sup> The Mandela Rules, Rule 50-53, 71-72; UN Standard Minimum Rules for the Treatment of Prisoners.

<sup>88</sup> Penal Reform International, UKaid, *Women in criminal justice systems and the added value of the UN Bangkok Rules*, 2015, p 1.

<sup>89</sup> The Bangkok Rules, Rule 1, The Mandela Rules, Rule 6; UN Standard Minimum Rules for the Treatment of Prisoners, Rule 6.

situation of women in prison as called for in the Bangkok Rules, but it does not elaborate in which way the documents relate to each other. In article 45(2), on the other hand, it says that, even though solitary confinement can be allowed in exceptional cases under the Mandela Rules, the prohibition of the use of such means on women stated in the Bangkok Rules should be respected.<sup>90</sup>

In the Mandela Rules, some essential changes on the rights of female prisoners have been made. The new rules have exchanged all “he” and “his” referring to prisoners, to “he or she” and “his or hers”. The same change of language has been made regarding prison staff and directors. More emphasis is put on the mental health of prisoners, which is especially important for female prisoners since they have shown to have high numbers of mental health problems in their background and in connection with the imprisonment. Also other parts of the rules on health-care in the Mandela Rules are to a further extent taking into consideration conditions that have been pointed out as particularly common amongst female prisoners, such as substance abuse. A strengthened right to contact with the family is also new in the Mandela Rules, both regarding allocation, where it says the prisoners should be placed close to their home if possible, and in detailing the means of communications that should be provided for the prisoner. A new provision, possibly inspired by the Bangkok Rules, is also that the Mandela Rules states that women should be able to exercise possible rights to conjugal visits on an equal basis with men.<sup>91</sup>

In the SMR a certain level of protection for infants who stayed in prison with their mothers was stated in rule 23(2). This protection has been developed in rule 29 of the Mandela Rules, to have a similar, however less detailed, protection of children living in prison with their parents as in the Bangkok Rules. It states that these children should never be treated as prisoners and

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<sup>90</sup> The Bangkok Rules; The Mandela Rules, Preamble, Rule 45(2).

<sup>91</sup> The Bangkok Rules; The Mandela Rules, Rule 58(2), 59; Penal Reform International, UKaid, *Women in criminal justice systems and the added value of the UN Bangkok Rules*, 2015, p 6.

that access to qualified childcare and child-specific healthcare should be ensured. The wording has also changed from children living in prison with their *mother*, to children living in prison with their *parent*.<sup>92</sup> However, the Mandela Rules have kept the limited protection of pregnant women/women giving birth, provided already in the SMR, without further development. This protection is limited to stating that the concerned women should get access to appropriate care before and after birth, that the childbirth should be arranged out of prison if possible.<sup>93</sup> The only addition to this is that the Mandela Rules also gives that instruments of restraint should not be used on women during labour, childbirth or immediately after childbirth, a provision also found in the Bangkok Rules.<sup>94</sup>

### 3.5 Legal Framework on Women's Rights

Women prisoner are also protected by general documents on women's rights. The first, fundamental documents on human rights, the UDHR, ICCPR and ICESCR are, as previously mentioned, written in a gender-neutral language – the rights are aimed at both women and men. The instruments also include provisions on protection against gender-based discrimination. Similar provisions are included in many human rights documents. However, it was first in the 1979 the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted. CEDAW is commonly known as the Women's Convention, and is seen as the base for the protection of women's rights. A large number of the world's countries have ratified the convention, even though several of them have issued reservations against parts of the convention.<sup>95</sup>

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<sup>92</sup> The Mandela Rules, Rule 29; UN Standard Minimum Rules for the Treatment of Prisoners, Rule 23(2).

<sup>93</sup> The Mandela Rules, Rule 28, UN Standard Minimum Rules for the Treatment of Prisoners, Rule 23(1).

<sup>94</sup> The Bangkok Rules, Rule 24; The Mandela Rules, Rule 48(2).

<sup>95</sup> UDHR; ICCPR; ICESCR; CEDAW; OHCHR, *Webpage: Committee on the Elimination of Discrimination Against Women*, 2016.

CEDAW contains 30 articles, on civil and political rights as well as on economic, social and cultural rights. The first part of the convention gives a general framework for anti-discrimination. States should take both legislative, and other necessary measures to ensure gender equality and women's human rights. CEDAW also gives that temporary measures for the advancement of women's positions are not regarded discriminatory, but that they should end as soon as the goal of equality is reached in order to not constitute discrimination.<sup>96</sup>

An important part of CEDAW is its provisions against gender stereotypes. States should not only work towards formal equality, but also against gender roles and prejudices. For example, it is explicitly stated in CEDAW that, in the interest of the children, men and women have a shared responsibility for childcare.<sup>97</sup>

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<sup>96</sup> CEDAW.

<sup>97</sup> CEDAW, art 1-5.

# 4 Justice, Universality and the Protection of Women Prisoners

## 4.1 Analysis

In the following the research questions will be discussed, with the starting point in the example of the international regulation on the protection of women prisoners, and the theoretic foundation laid down in chapter 2.4. An analysis of the advantages and disadvantages of the current UN dual strategy approach will be followed by ideas for alternative strategies that could be more sustainable and more compatible with the notion of universality.

### 4.1.1 The Dual Strategy and Feminist Legal Theory

The first research question posed - *What are the positive and negative aspects of gender-specific regulations?* – intends to raise a discussion on the current UN strategy to protect women's rights. The dual strategy chosen by the UN, where women's rights are both mainstreamed into general human rights documents and protected in gender-specific regulation<sup>98</sup>, seems to be the obvious choice. However, the possible long-term effects of the strategy has not been fully discussed and evaluated in the discourse on gender equality. As raised in the theory chapter, permanent gender-specific regulations can be supported by some feminist theories.<sup>99</sup> In the following the first research question will be analyzed with the starting point in feminist legal theory. Does the dual strategy lead to a sufficient protection of women's rights? This will be analyzed with the base in the area of protection of prisoners' rights. Firstly the effects of the dual strategy in the field of prisoners' rights will be

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<sup>98</sup> Cf. 2.3.

<sup>99</sup> Cf. 2.1.4.

discussed, then the content of the Bangkok Rules will be given particular attention in a discussion of the long-term effects of the dual strategy.

#### **4.1.1.1 The Dual Strategy in Protection of Prisoners**

That women prisoners is a group particularly vulnerable to human rights violations is commonly acknowledged.<sup>100</sup> The first documents written on protection of prisoners, the SMR, is written from a male perspective, even explicit throughout the document. Over the past few decades the particular situation for women prisoners, and the need for strengthened protection of them, has been a topic for discussion within the UN. In 2010 the Bangkok Rules was introduced as a, at least in some contexts, warmly welcomed instrument for the protection of women prisoners.<sup>101</sup> Another few years later the SMR was updated and became the Mandela Rules, which is, at least at a glance, gender-neutral.<sup>102</sup> This seems to be a textbook example of the UN dual strategy for protection of women's rights. The specific conditions for women prisoners are now protected in both a gender-specific instrument and are mainstreamed in to the general framework for protection of prisoners.

There are obvious advantages to this system from a women's rights point of view. The specific protection of women prisoners offered in the Bangkok Rules is only reflected to a limited extent in the Mandela Rules, even though the Mandela Rules were adopted well after the Bangkok Rules.<sup>103</sup> This could be an effect of disinterest in the protection of women's rights in the general human rights framework that makes the ambition of gender mainstreaming unsuccessful. If that is the case, the Bangkok Rules most certainly have a role to play in the protection of women prisoners. However, the situation could also be the opposite – that the Bangkok Rules filled the gaps in the protection of women's rights making it seem as unnecessary to include these provisions also in the general rules regarding protection of prisoners. The gender-

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<sup>100</sup> Cf. 3.1.

<sup>101</sup> Cf. 3.2, 3.3.1.

<sup>102</sup> Cf. 3.4.

<sup>103</sup> Cf. 3.4.

specific regulation could then be used as an excuse not to mainstream women's perspectives into the general human rights work.

To revise the SMR and make the language of the Mandela Rules gender-neutral, without integrating the rules that has previously been deemed essential to women prisoners, hides injustices or gender inequalities rather than solving them. It gives formal equality, but the actual equality is highly questionable. Feminist legal theories started off with working towards gender neutrality in the legal system, but have now turned to rather advocating gender-sensitive legislation. Gender neutrality in a system that is built on male norms, tend to hide the needs of women rather than helping them.<sup>104</sup> The UN is officially supporting gender-sensitive legislation<sup>105</sup>, but it is questionable if they live up to it, considering the adoption of a document as the Mandela Rules.

#### **4.1.1.2 Long-term Effect of the Dual Strategy**

That mainstreaming of women's rights is needed is not debated by many. It seems clear that the human rights regulations were originally formed from a male point of view<sup>106</sup>, and to provide a full human rights protection women's views needs to be included. The idea of gender-specific documents is however more controversial.<sup>107</sup> There is a risk of cementing existing inequalities and injustices by singling out women from the general framework, at least if it is done carelessly. The Bangkok Rules can serve as an example of such a situation.

The content of the Bangkok Rules reflect the social structures of society and the gender roles that are deeply rooted in them. Women are supposed to take care of the children and men are not equipped to take care of children themselves, men on the other hand are abusive and take advantage of women

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<sup>104</sup> Cf. 2.1.4

<sup>105</sup> Cf. 2.3.

<sup>106</sup> Cf. 2.1.3, 2.3.

<sup>107</sup> Cf. 2.1.3, 2.1.4.



in vulnerable positions.<sup>108</sup> These structures are in many cases reality, hence it is understandable that the rules are taking them into consideration. Nonetheless, they are reflecting, and enhancing, gender stereotypes. CEDAW, the most fundamental of all women's rights instruments, is clearly stating that gender stereotypes are precarious, and that states should take all possible measures to change them.<sup>109</sup> How can the Bangkok Rules, created decades after CEDAW, not only have their starting point in stereotypes the UN have worked against for so long, but also rather reaffirm than challenge them?

The UN encourages states to eliminate prejudice and gender roles since they make universal enjoyment of human rights impossible. The Bangkok Rules aim at strengthening the protection of women prisoners, but the long-term effect could, through the enhancement of gender stereotypes, instead be a contribution to systematic violation of women's rights. This type of long-term effects does not seem to be sufficiently discussed in feminist legal theory. If gender-specific regulations cement gender stereotypes, at least sameness feminists should strongly oppose such regulations.<sup>110</sup>

### **4.1.2 Gender and Universality**

The second research question posed - *Are gender-specific regulations compatible with the universality of human rights?* – regards the relation between the idea of universalism, and human rights protection that is limited to certain groups. A discussion on the example of the Bangkok Rules and its possible effects on universality will be followed by some general remarks regarding the relation between gender-specific regulation and the notion of universality.

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<sup>108</sup> Cf. 3.3.

<sup>109</sup> Cf. 3.5.

<sup>110</sup> Cf. 2.1.2.

#### 4.1.2.1 The Bangkok Rules and Universality

As previously mentioned, the discussion on the Bangkok Rules is supposed to complement the, somewhat outdated, SMR. However, a more thorough analysis of how the rules relate to the remaining human rights framework or to the notion of universalism, does not seem to exist.<sup>111</sup> This does, undoubtedly, need to be discussed in a broader context of how the UN has chosen to protect women's rights, but also in that perspective, the discussion has been scarce.

If the premise is that universalism gives that men and women are essentially the same – are the Bangkok Rules at all relevant? The Bangkok Rules contains rules that protect women on basis of biological differences between men and women, such as rules on pregnancy and breastfeeding. In addition to this the rules include a vast protection based on socially constructed differences.<sup>112</sup> These rules can be divided into two categories, rules that should be equally relevant to men, and rules that should not have to exist. Rules that should be equally relevant to men are for example the ones that regard parenthood, health services (gender-specific and general) and effective handling of prisoner's complaints. The second category, the rules that should not have to exist, are the rules that aim at protect women from abuse, for example the provisions stating that women prisoners should not be left alone with male prison staff. In a just society where men and women were equally respected, there would be no need for that type of regulation. If there were, from some moral view, a request for same-sex prison staff, it should from a Universalist point of view be the same rules for women and men, but in a just society there should be no need to add extra rules for women in order to protect them from abuse from men in power – general rules on prohibition of abuse and violence should be sufficient.

There are sections in the Bangkok Rules regarding women prisoners as caretakers of children. Women prisoners should be provided possibilities to

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<sup>111</sup> Cf. 3.3.

<sup>112</sup> Cf. 3.3.

take care of their children in an adequate way in prison or at least be allocated in a place not far from home in order to continue their role as caretakers from prison. Provisions banning punishments through isolation from family is also included in the rules.<sup>113</sup> In passing, in the introduction to the rules, it is mentioned that the rules regarding parenthood are also applicable to men, however male prisoners are not mentioned again through the document.<sup>114</sup> The Mandela rules, created well after the Bangkok Rules, supposed to give a broad protection of prisoner's rights, and applicable to both men and women, have left out almost all of these rules<sup>115</sup>, why it can be questioned to what extent the gender-neutral intention in the introduction to the Bangkok Rules is nothing more than nice language. If the UN really aimed at strengthening the protection of children and *both* their parents, they would surely have included these provisions in a gender-neutral document like the Mandela Rules, rather than in a gender-specific one like the Bangkok Rules.

Most of the content of the Bangkok Rules certainly have a role to play in the protection of women prisoners. To create a separate, gender-specific framework for these rules does, however, not seem motivated. The rules could be protected equally effectively in a general document that took sufficient consideration of women's perspective.

#### **4.1.2.2 Gender-specific Regulation and Universality**

The UN human rights system was built in a time where "human" was still in the political arena synonym with "man". A strong women's rights lobby managed to make the UN human rights instruments seemingly gender-neutral, but still far from gender-sensitive. The UN has acknowledged the first human rights documents as built on a male perspective, aiming first and foremost at protecting men and their rights. It took decades before the states of the world fully realized the particular situation for women and the rights

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<sup>113</sup> Cf. 3.3.2.

<sup>114</sup> Cf. 3.3.2.1.

<sup>115</sup> Cf. 3.4.

protection it required.<sup>116</sup> The dual strategy the UN has chosen to protect women's rights is, as previously mentioned, problematic. To claim the human rights are universal, and then "gender mainstream" is to pull the carpet out from under the notion of universalism. A truly universal human rights system does not need gender mainstreaming – it already protects the rights of every individual no matter their gender identity.<sup>117</sup> An even more questionable approach from a Universalist perspective is the other half of the dual strategy, the gender-specific regulation. To introduce human rights documents that only covers half of the population and has no aim of including the other half, cannot be justified in a universal human rights system.<sup>118</sup>

### 4.1.3 Alternative Strategies

The third research question - *How can women's rights be effectively protected in human rights law in a manner that is compatible with universalism and sustainable over time?* – aims at starting a discussion on alternative strategies to the current UN dual strategy for the protection of women's rights that aims at a just and universal human rights system. In focus for the following discussion is how to avoid a marginalization of women's rights, a cementation of negative gender stereotypes and an illogical human rights framework. Also here, the Bangkok Rules, states an example.

#### 4.1.3.1 Gender-sensitive and Universal Human Rights

To create a protection that effectively meet both biological and socially constructed differences between men and women and without devaluing the concept of universality it is essential to consider both female and male perspectives in the general human rights framework.<sup>119</sup> Regarding prisoners' rights, a natural conclusion could be that the Mandela Rules, introduced after

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<sup>116</sup> Cf. 2.3.

<sup>117</sup> Cf. 2.4.2.

<sup>118</sup> Cf. 2.4.3.

<sup>119</sup> Cf. 2.4.

the Bangkok Rules, would be the type of document which gives a full protection of prisoner's rights no matter their gender identity. The Mandela Rules are to its appearance, undoubtedly, gender-neutral. The language has changed from an explicitly male perspective to a seemingly gender-neutral one.<sup>120</sup> However, the disregard of essential parts of the Bangkok Rules in the creation of the Mandela Rules signals that the rules have got cosmetic changes, but still holds their base in male needs.

If the Mandela Rules had included all parts of the Bangkok Rules that are meant to exist over time, no matter if they are mostly relevant to women or men, the rules would have challenged the male norm in international human rights law and provided a fairer protection of all prisoner's rights.<sup>121</sup> That rules are differently relevant to women and men should not exclude them from universal instruments. Provisions on human rights will always be differently relevant to different groups and different individuals, but they can still be universal. The fundamental justifications for universality, about a common human good, human reason and autonomy, never claims that humans are identical and have the exact same needs, it only suggests that all humans are entitled to the same human rights protection.<sup>122</sup> *If* a provision is ever relevant to an individual in a certain situation, that individual should not be excluded from its applicability because of their gender identity. That does not give that every human rights provision *must* be applicable to every individual at all times.

#### **4.1.3.2 Temporary Gender-specific Regulations**

A general human rights framework that lived up to standards of universality and did not presume either male or female perspectives, would not be in conflict with the central ideas about gender equality and women's rights in feminist legal theory.<sup>123</sup> However, if introduced today, such regulation might

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<sup>120</sup> Cf. 3.4.

<sup>121</sup> Cf. 2.1.3, 2.3, 2.4,

<sup>122</sup> Cf. 2.2.2, 2.4.

<sup>123</sup> Cf. 2.1.

not be deemed sufficient in order to meet the structural inequalities created through history. Hence, a viable way forward might be a combination between such regulations and a temporary gender-specific regulation. If the gender-specific regulation was clearly intended to be taken away when structural inequalities between men and women were defeated, it could be compatible with the aim of a just and universal human rights system.<sup>124</sup>

When revising the SMR, the UN had an excellent opportunity to create this sort of framework. Rules that are only included in the Bangkok Rules to compensate injustices that has created a particularly vulnerable situation for women, such as the rules on female staff in women prisons, could advantageously be excluded from the Mandela Rules and remain in the Bangkok Rules. With this setting the Bangkok Rules could exist alongside the Mandela Rules for the time needed, but with a temporary status that would clearly mark that it is not acceptable that women are in these sort of vulnerable positions and that it is something that the UN should fight and not accept as a standing premise for the international legal framework.

This type of system would still have a dual strategy, but the gender-specific framework would be explicitly temporary. It would give the same type of extra protection for women as the current system, but would be more reasonable to justify from a Universalist perspective.<sup>125</sup>

#### **4.1.3.3 Anti-stereotype Regulation**

The UN has been very clear in the ambition to work against gender stereotypes since they inflict negatively on the fulfillment of women's human rights. The UN has not just put upon itself to fight these stereotypes, but is also promoting active work towards eliminating them from its member states.<sup>126</sup> With this in mind, it is intriguing to see that relatively recent

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<sup>124</sup> Cf. 2.4.

<sup>125</sup> Cf. 2.4.

<sup>126</sup> Cf. 3.5.

regulation introduced by the UN is still having a clear gender role basis.<sup>127</sup> In a regulation sustainable from both a justice perspective and a Universalist perspective, these gender roles must be neutralized. Of course we need to be aware of the particular effects certain legislation have on the different genders, but neither from a feminist nor a universal perspective is there reason to create regulation only applicable to one gender in an area that is typically dominated by that gender, but that is not closed to persons from other genders.<sup>128</sup> If a just and universal human rights system is sought regulation should not attribute individuals with presumptions on their needs based on their gender identity, but rather create a protection based on common human good that is applicable to everyone in case they need it.

#### **4.1.3.4 Regulation on Neutral Ground**

A fundamental problem posed in the crossing between feminist legal theory and the theories on universalism is the starting point for human rights regulation. Traditionally, the starting point has been male, but to create a human rights framework that promotes truly universal values and provides a protection for all human beings, no matter gender identity, the system must have a truly neutral foundation.<sup>129</sup> This gives that any regulation, gender-specific or gender-neutral, should avoid relative statements.<sup>130</sup> An example of such a statement is the rule included in both the Bangkok Rules and in the Mandela Rules regarding conjugal visits which women should have the right to enjoy to the same extent as men.<sup>131</sup> It would not take much effort to change this to a gender-neutral statement, however, there is no effect with just changing the language if the underlying values are the same. This goes also for gender-neutral language. Gender-neutral language should be used, but the language is not in itself very important, the importance lies in what the rules

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<sup>127</sup> Cf. 3.3.

<sup>128</sup> Cf. 2.4.

<sup>129</sup> Cf. 2.1.3, 2.4.

<sup>130</sup> Cf. 2.1.4.

<sup>131</sup> Cf. 3.4.1.

are based on. A male perspective in the rules is not solved solely by a gender-neutral language.<sup>132</sup>

## 4.2 Concluding Remarks

### 4.2.1 The Need for Theoretical Justification

To build a universal human rights framework that works in all cultural contexts and offer sufficient protection to vulnerable groups and individuals is a challenge – not least to a political organization as the UN. If the system should be sustainable over time, it is however essential that the system has a well-founded theoretical basis. A system without a proper justification risks being watered down over time through political negotiations.<sup>133</sup>

A part of the reason why the UN does not have a firm theoretical foundation for the human rights system is most likely fear of what effects such a discussion would have.<sup>134</sup> The many states that have agreed to the system have different motivations for doing so, some moral, some religious, some purely tactical or political.<sup>135</sup> If these justifications and motivations were scrutinized, the result might be that the seemingly robust human rights system shows to be quite fractured, with a worrying fragility as an effect. However, this is somewhat of a catch 22 for the UN. If they move to establish a theoretical justification of the human rights system the weakness of the system might become paramount, but if they carry on without a theoretical fundament the system risk to become more apparently illogical and internally contradictory by the day and eventually fall apart.

Fundamental for a just and universal human rights system is that the protection of particularly vulnerable groups, such as women, is sturdy and

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<sup>132</sup> Cf. 2.1.4.

<sup>133</sup> Cf. 2.4.

<sup>134</sup> Cf. 2.3.

<sup>135</sup> Cf. 2.2.1.



sustainable.<sup>136</sup> A central part of that is to eliminate gender stereotypes, which are in conflict with both feminist ideas and the notion of universality, a battle the UN has initiated, but is not following through on.<sup>137</sup> The UN works as a meeting point for different states' cultures, and its bodies can, if playing their cards right, take on a role as global leaders and role models. If the UN introduces regulations that are based on, and possibly even reinforce, gender stereotypes it is difficult to see that states will do differently. Until the UN internally manages to live up to the provisions on gender stereotypes set out in CEDAW it is difficult to see we will ever have a human rights protection that is just and gives the same opportunities to, and protection of, men and women. The UN is taking an easy way out where injustices are covered up by gender neutrality and fine phrases on gender equality, rather than taking lead in fundamentally challenge injustices.

However, it is essential to keep in mind that, although important, the most central role for the UN is not to push human rights policy, but rather to ensure a full human rights protection worldwide. In parts of the world a gender-specific instrument like the Bangkok Rules could be an important instrument for the realization of women's rights. This thesis has kept to the purely theoretical aspects of gender-specific regulations, in which such regulations are problematic. That does not mean they do not play an essential role in the human rights protection of today. It is also of relevance to point out that this thesis is produced in Sweden, a country with relatively robust gender equality. To a certain extent theorizing on human rights is a luxury only relatively privileged people, without immediate threat of human rights violations in their surroundings, can afford. Perhaps the conclusions would be different if the issue was viewed from another angle. The aim of this thesis is however to bring a critical perspective to a discussion on human rights, gender equality and universality. To that discussion critical perspectives are fruitful, even

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<sup>136</sup> Cf. 2.4.

<sup>137</sup> Cf. 3.5.

though the discussion in itself can seem irrelevant or misplaced in a situation where human rights are directly threatened.<sup>138</sup>

## 4.2.2 A Just and Universal Human Rights System

Fundamental to the concept of human rights is their universality. The justifications for human rights are closely intertwined with the justifications of universality.<sup>139</sup> One gives the other. In a universal human rights system it is inherent that women must be truly included, to live up to that, the system needs to meet both socially and naturally constructed differences between the gender in a way that considers the importance of both justice and of universality. The system needs to be built in a way that does not relate different groups to each other, but that has an individual and just focus.<sup>140</sup> Human rights regulations also needs to meet historically created structural inequalities between genders, if necessary by creating temporary gender-specific document, but then always with the long term aim of universality.

It is not given which way is best for the UN to go, they are bound by political interests from different states which limits their possibilities, but in the soft law processes they have more room to be daring. Will the UN take that chance, and change a system in order to reach justice and gender equality, or will they try to maximize the protection of women within the frames of the current system that is built on male premises? Both directions are challenging, but from a feminist and a Universalist perspective, the choice seems obvious. The UN should guard the universality of human rights – without it the human rights lose their relevance – and rather than losing pace in endless work towards gender neutrality and gender equality focus should be kept clear on the goal of a just and universal human rights protection.

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<sup>138</sup> Cf. 2.4.3

<sup>139</sup> Cf. 2.2.2.

<sup>140</sup> Cf. 2.4.

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