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# MASTER THESIS

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„Dis-ordering womanhood –  
The role of gender in preventive detention in Austria“

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### **List of Acronyms and Abbreviations**

CPT	Committee for the Prevention of Torture
CRPD	Convention on the Rights of Persons with Disabilities Committee on the Rights of Persons with Disabilities
DSM	Diagnostic and Statistical Manual of Mental Disorders
ICD	International Statistical Classification of Diseases and Related Health Problems
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
UN	United Nations

## 1. Introduction

### 1.1 Research interest

The right to liberty and security is one of the most fundamental human rights and as such protected under regional and international human rights law. Depriving someone of their liberty is a particularly drastic interference with their regular lives and therefore only legitimate under very specific circumstances. The European Convention of Human Rights (ECHR) for instance, lists six grounds,<sup>1</sup> one of them being: ‘(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of *persons of unsound mind*, alcoholics or drug addicts or vagrants’.<sup>2</sup> With the outdated and discriminatory term<sup>3</sup> ‘persons of unsound mind’, international law provides for the possibility of detaining persons with psychiatric diagnoses who committed a crime as a preventive measure due to the assumed danger they might pose to society or themselves.

The persons concerned therefore are neither perceived as ‘regular’ criminals, nor as ‘normal’ patients but are located at the intersection of the two.<sup>4</sup> Criminality as well as illness are constructed as very distinct social concepts and laden with a range of associations. Historically, behaviour deviating from social norms, be it in regard to criminal law or mental health, was interpreted and reacted to differently, depending on a person’s gender.<sup>5</sup> The association of criminality with manhood and ‘mental illness’ with

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<sup>1</sup> The others cover (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority and (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

<sup>2</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5, Article 5 (*emphasis added*) (European Convention on Human Rights).

<sup>3</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 1, Article 12: Equal recognition before the law*, CRPD/C/GC/1, 19 May 2014, para. 13 (CRPD GC No. 1).

<sup>4</sup> see e.g., A. Rogers and D. Pilgrim, *A Sociology of Mental Health and Illness*, 5th ed., Maidenhead, England, Open University Press, 2014, chapter 10.

<sup>5</sup> see e.g., A. Neuber, ‘Die Schmerzen des Freiheitsentzugs – für Frauen anders?’, in B. Meier and K. Leimbach (eds.), *Gefängnisse im Blickpunkt der Kriminologie*, Berlin, Heidelberg, Springer Berlin Heidelberg, 2020, pp. 111-113.

femininity continues up until today if one looks at the population in prisons and hospitals as well as the societal discourse in that regard.<sup>6</sup> As women tend to be hospitalised and men criminalised, the system of controlling deviating behaviour is clearly gendered at its roots already. Recognising that mechanisms of social control are informed by conceptions of femininity and masculinity, is crucial to understanding and improving the situation of persons deprived of liberty.

The deprivation of liberty is usually executed in closed institutions under the responsibility of the state. Person within such institutions thus depend on the state to ensure their safety and well-being, which puts them in a situation of particular vulnerability. Acknowledging this vulnerability, regional and international human rights mechanisms issued a set of standards on the treatment of persons deprived of liberty (e.g., Mandela Rules,<sup>7</sup> European Prison Rules<sup>8</sup>).

When looking at the overall landscape of persons in detention facilities, the vast majority are men. They make up over 90 per cent, whereas women form the remaining minority of less than 10 per cent.<sup>9</sup> Therefore, it is not surprising that the prison system is primarily tailored to the characteristics and interests of male detainees. Recognising the male bias in the practice of detention and in the respective facilities as well as in reaction to the growing numbers of imprisoned women, international and regional organisations along with states, started introducing specific standards for female detainees.<sup>10</sup> While this step towards adapting the practice of depriving persons of their liberty to gender-specific lived realities is certainly commendable, both these regulations and the practice of detention

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<sup>6</sup> see e.g., P. Carlen and A. Worrall, *Analysing Women's Imprisonment*, Cullompton, Devon, Portland, Or., Willan Pub., 2004; J. Feest and B. Pali (eds.), *Gerlinda Smaus: „Ich bin ich“, Beiträge zur feministischen Kriminologie*, 1<sup>st</sup> ed., Schriftenreihe des Strafvollzugsarchivs, Wiesbaden, Springer Fachmedien Wiesbaden, 2020.

<sup>7</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Res A/RES/70/17517, December 2015 (Mandela Rules).

<sup>8</sup> Council of Europe Committee of Ministers, Rec(2006)2, *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*, 11 January 2006 (European Prison Rules).

<sup>9</sup> R. Walmsley, *Women and girls in penal institutions, including pre-trial detainees/remand prisoners*, World Female Imprisonment List, 4<sup>th</sup> ed., 2007.

<sup>10</sup> United Nations General Assembly Res A/RES/65/229, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 21 December 2010, preamble (Bangkok Rules).



are likely to reproduce the stereotypical assumptions in regard to gender, social deviance and social control mentioned above.

To a certain extent, persons in preventive detention subvert these gender specific conceptions of social deviance by being labelled criminal as well as ‘mentally ill’ at the same time. Their deprivation of liberty therefore presents an interesting case to assess how far legal standards on the deprivation of liberty of women are applicable to the individuals’ lived realities. The major question is whether legal and practical provisions are primarily perpetuating gendered assumptions or instead reflecting on and differentiating between historically grown gender-specific conceptions and the actual life circumstances of women in conflict with the law.

This master thesis precisely tackles this issue on the basis of a selected Austrian detention facility for persons with psychiatric diagnoses who committed a crime and are deprived of their liberty as a preventive measure.<sup>11</sup> The main research questions guiding this thesis therefore are:

*How far do conceptions of femininity shape the preventive detention of persons with psychiatric diagnoses in Asten correctional facility in Austria?*

*To what extent does Asten implement international, regional and national standards regarding the treatment of women in detention?*

The reasons why conducting research on these questions is important are manifold. First of all, the topic of preventive detention is located rather at the fringe of scientific, political and media interest. As a result, the lived realities of the persons concerned receive little attention, and efforts to improve their detention conditions often go unheard. This is even more so in regard to gender specific experiences. Due to their small number, the experiences of women in detention are frequently side-lined. Yet, this number has more than doubled in the last decade,<sup>12</sup> rendering having a conscious look at the situation of

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<sup>11</sup> Throughout this thesis the term ‘preventive detention’ refers to the deprivation of liberty of all persons under para. 21, despite the fact that those under para. 21/1 are technically not *detained* since they were not sentenced by a court.

<sup>12</sup> Based on official statistics by the Ministry of Justice made available to the author on 5 July 2020.

women in preventive detention a pressing need to ensure that their fundamental rights are safeguarded.

While the aim of this thesis is to offer an insight into the lived realities of women in preventive detention, the author neither claims to provide a comprehensive picture of the role of gender in preventive detention nor intends to give decision-makers recommendations on how to improve the current system. Looking at an individual Austrian case through a gender and human rights lens, this thesis is rather meant to offer entry points for further scientific and practical work in this field.

## **1.2 Methodology and structure**

To answer the research questions outlined earlier, semi-structured qualitative interviews were conducted with seven staff members of Asten correctional facility. The choice of having Asten as the research subject was guided by the fact that it is the only correctional facility in Austria responsible for the accommodation of male *and* female persons in preventive detention. This circumstance offers the unique opportunity to gain an insight into the conceptions of femininity and masculinity which are at work in the daily lives of the persons concerned. Since the power relations in places of detention are by definition unequal, with the staff holding significantly more power than detainees,<sup>13</sup> the perceptions of the personnel are likely to impact the practical organisation of preventive detention and thus, the lived realities of the persons subjected to it. The interviews were authorized by the Austrian Ministry of Justice, which further provided detailed statistics on persons in regular and preventive detention in Austria. These are referred to throughout the thesis, especially in the Chapters 4.1 and 5.

To prepare the ground for research, the following chapter introduces the concepts and theories underpinning the research. This includes elaborating on the relevant social categories (gender and mental disorder) as well as on the meaning and function of closed institutions from a sociological perspective. Chapter 3 comprises a critical analysis of the discourse on femininity and criminality as well as of the relevant legal standards regarding the deprivation of liberty of female offenders. Chapter 4 presents the findings

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<sup>13</sup> G. Sykes, *The Society of Captives* (first published 1958), Princeton, Princeton University Press, 2007, p. xxxii.

of the empirical research after contextualising them by outlining the institutional and societal framework of preventive detention in Austria. Chapter 5 joins the outcome of the preceding chapters in an exploration of the role of femininity in the preventive detention of the women in Asten. In closing, Chapter 6 presents final conclusions drawn from the research and possible ways forward.

## **2. Theoretical and conceptual framework**

Examining the situation of persons in preventive detention from a gender perspective requires gaining an understanding of the most relevant concepts in this context, namely mental disorder, gender and criminality. In particular, this chapter serves to contextualise these concepts by providing a short overview of their discursive construction and historical development. Therefore, the first section explores the construction of mental disorder, particularly in relation to ‘dangerousness’ and legal responsibility. The second section introduces some of the essential theories regarding the meaning and function of criminal justice systems.

### **2.1 The construction of ‘mentally abnormal offenders’ and gender**

The construction of mental disorders is tightly interwoven with a wide range of other social concepts. These include class, ethnicity, age, sexual orientation and gender, just to name a few.<sup>14</sup> While emphasizing the importance of acknowledging the intersectionality of these, and many more, this section is limited to deconstructing gender as it is the core subject of this thesis.

The ensuing critical analysis of the conceptualisation of mental disorders, also in relation to ‘dangerousness’ and legal capacity, as well as of gender provides the foundation for referring to these concepts throughout the thesis. While the use of these constructs reaffirms and reproduces their existence and relevance, it enables the exploration of the social processes and power relations producing these categories as well as the deconstruction of the normative assumptions associated to them.<sup>15</sup> Thus, when referring to any of these concepts in the course of this thesis, it is done so in their function as

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<sup>14</sup> see e.g., Rogers and Pilgrim, chapter 3-5.

<sup>15</sup> L. McCall, ‘The Complexity of Intersectionality’, *Signs*, vol. 30, no. 3, 2005, p. 1773, (accessed 27 July 2021).

analytical instead of essentialist categories and fully aware that these categories cannot subsume all the different experiences and identities related to them.

### *2.1.1 Deconstructing mental disorders*

The two authoritative instruments defining and classifying mental disorders are the Diagnostic and Statistical Manual of Mental Disorders (DSM)<sup>16</sup> developed by the American Psychiatric Association and the International Statistical Classification of Diseases and Related Health Problems (ICD)<sup>17</sup> published by the World Health Organization.<sup>18</sup> Both are representative of biological psychiatry, the dominant paradigm in the field, which seeks to construct a ‘disease model’ similar to medicine: specific ‘abnormalities’ can be identified according to specific symptoms and treated with specific measures.<sup>19</sup> However, unlike physical illnesses, most ‘mental illnesses’<sup>20</sup> lack evidence of specific neurobiological dysfunctions or deficiencies, let alone causal determinants that could explain a certain psychological state or behaviour.<sup>21</sup> As a consequence, diagnosing a mental disorder has to do without objective laboratory tests, but must rely on highly subjective verbal indicators and behaviour observation instead.<sup>22</sup>

Therefore, psychiatric diagnoses are no objective truths discovered by the scientific methods of an atheoretical psychiatry but the result of the discursive practice of

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<sup>16</sup> American Psychiatric Association, *Statistical Manual of Mental Disorders*, 5<sup>th</sup> edition, 2013.

<sup>17</sup> World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders*, Genève, Switzerland, World Health Organization, 1993.

<sup>18</sup> The latest version of DSM describes a mental disorder as: ‘[A] syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above’ (American Psychiatric Association, p. 20).

<sup>19</sup> B. Lewis, *Moving beyond Prozac, DSM, and the New Psychiatry: The Birth of Postpsychiatry*, Ann Arbor, University of Michigan Press, 2010, pp. 47-48; Rogers and Pilgrim, p.1.

<sup>20</sup> From 1980 on the term ‘mental illness’ was substituted by the term ‘mental disorder’.

<sup>21</sup> Rogers and Pilgrim, pp. 2-3; S. Knappe and H.-U. Wittchen, ‘Diagnostische Klassifikation psychischer Störungen’, in S. Knappe and J. Hoyer (eds.), *Klinische Psychologie & Psychotherapie*, 3<sup>rd</sup> ed., Berlin, Heidelberg, Springer Berlin Heidelberg, 2020, pp. 33-34.

<sup>22</sup> Knappe und Wittchen, p. 34.

psychiatry.<sup>23</sup> They are not merely descriptive but rather constitutive of mental disorders as the diagnostic instruments, such as the clinical interview, are:

constructed to elicit the objects (or elements) of discourse so that she [the psychiatrist] can put them together into a conceptual grid or schema of psychiatric disorder. The conceptual schema drives the new psychiatrist's questions and her perception of the answers. It selects the signs and symptoms and organizes them into disorders.<sup>24</sup>

The classification systems thus establish a framework where persons can be placed in certain positions in relation to predetermined behaviours and experiences deemed as 'abnormal' or 'normal'.<sup>25</sup> Instead of doing justice to the continuum, where each individual can be located between the categories of 'health' and 'illness', the classification systems tend to portray them as dichotomous poles.<sup>26</sup> The line between these poles is drawn where a certain behaviour or emotion cannot be explained by '[a]n expectable or culturally approved response to a common stressor or loss (...)'.<sup>27</sup> The decision what is considered 'normal' thus lies with the societal consensus at a certain point in time. By regularly revising the classification systems in order to meet the prevailing social norms and scientific status-quo, representatives of the fields of clinical psychology and psychiatry themselves understand mental disorders as temporary constructs to facilitate the clinical practice of diagnosing and treating pathologized states.<sup>28</sup> However, they explicitly reject their participation in constructing the societal framework and portray the diagnoses themselves as neutral entities,<sup>29</sup> stating that '[s]ocially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society

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<sup>23</sup> I. Parker, E. Georgaca, D. Harper et al., *Deconstructing Psychopathology*, London, Thousand Oaks, California, New Delhi, Sage Publications, 1995, pp. 39, 60; Lewis, pp. 46-60.

<sup>24</sup> Lewis, p. 56.

<sup>25</sup> Parker, Georgaca, Harper et al., p. 39.

<sup>26</sup> Rogers and Pilgrim, pp. 6-7.

<sup>27</sup> American Psychiatric Association, p.20.

<sup>28</sup> H.-U. Wittchen, S. Knappe and J. Hoyer, 'Was ist Klinische Psychologie? Definitionen, Konzepte und Modelle', in S. Knappe and J. Hoyer (eds.), *Klinische Psychologie & Psychotherapie*, 3<sup>rd</sup> ed., Berlin, Heidelberg, Springer Berlin Heidelberg, 2020, pp. 7-8.

<sup>29</sup> Rogers and Pilgrim, p. 7.

are not mental disorders’.<sup>30</sup> Excluding certain forms of socially deviant conduct by locating them in the sociological realm decontextualises the behaviour in question.

Thus, this approach masks the historical development of mental disorders as a concept as well as the socio-political interests linked to it. For one thing, psychiatric diagnoses can serve as a disguised form of social control by pathologizing and as such delegitimising unwelcome opinions.<sup>31</sup> Further, labelling persons with psychiatric diagnoses situates problems ‘within the individual by blaming biochemical changes or “thinking errors” (...)’<sup>32</sup> and thus, liberates society from any responsibility for external circumstances producing negative feelings, thoughts or actions.<sup>33</sup> Finally, several researchers have linked the continuous increase of psychiatric diagnoses and lowering threshold for already existing ones to the interests of the pharmaceutical industry.<sup>34</sup> It does not only produce a remedy for each newly arising problem but can determine a diagnosis, since receiving a specific medication frequently requires being diagnosed with a certain disorder.<sup>35</sup>

### *2.1.2 The interlinkage of mental disorders, dangerousness and legal responsibility*

The understanding of socially deviant behaviour has varied considerably over time and geographical area.<sup>36</sup> It was only in the 18<sup>th</sup> century that ‘abnormal’ persons were considered ‘mentally ill’ and therefore in need of treatment and care.<sup>37</sup> The latter would be provided to them in a ‘special hospital’, which, de facto, confined them in order not to transmit their ‘madness’ to the rest of the population.<sup>38</sup>

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<sup>30</sup> American Psychiatric Association, p. 20.

<sup>31</sup> Parker, Georgaca, Harper et al., p. 71.

<sup>32</sup> *ibid.*, p.71.

<sup>33</sup> *ibid.*, pp. 61, 71.

<sup>34</sup> *ibid.*, p. 7; B. Lewis, pp. 56-59; Rogers and Pilgrim, p. 16.

<sup>35</sup> G. S. Malhi, ‘DSM-5: Ordering disorder?’, *Australian & New Zealand Journal of Psychiatry*, vol. 47, no. 1, p. 8-9, (accessed 26 July 2021).

<sup>36</sup> While in Ancient Greece ‘abnormal’ behaviour was explained by the different deities demanding different actions, it was linked to the maritime climate, where fine water droplets made bodies weak and therefore prone to ‘madness’ in the Middle Ages. As the Enlightenment pronounced the superiority of rationality, persons behaving irrationally had to be disciplined and segregated from the rational (see Parker, Georgaca, Harper et al., pp. 5-9).

<sup>37</sup> *ibid.*, p. 6.

<sup>38</sup> *ibid.*, p. 6.

This association of ‘mental illness’ and dangerousness was reinforced in the 19<sup>th</sup> century, when ‘mental abnormality’ was used to explain criminal behaviour.<sup>39</sup> For one thing, the shift from punishment to treatment of criminals (see Chapter 2.2) required understanding their minds. Secondly, a growing number of terrible crimes that lacked any kind of apparent motive led to the construction of ‘moral insanity’.<sup>40</sup> Psychiatry stepped in to make these seemingly incomprehensible crimes understandable.<sup>41</sup> The entrance of psychiatry into the legal field had two major consequences: on the one hand, it allowed for persons committing a certain type of crime to be attributed a severe illness that required their institutionalisation, which, unlike regular detention, tended to be open-ended.<sup>42</sup> On the other hand, persons with specific psychiatric diagnoses were ascribed the inherent possibility of committing atrocious crimes without prior warning, requiring their confinement to protect society from their alleged ‘dangerousness’.<sup>43</sup> To a certain extent both of these aspects are still valid today since the preventive detention of persons with psychiatric diagnoses is justified with their ‘dangerousness’ and, as the ECtHR noticed, ‘offences which are not common, or have uncommon traits, are considered in themselves as reflecting a personality disorder, which is automatically equated to a sign of dangerousness’.<sup>44</sup> Further, persons with psychiatric diagnoses tend to be arrested more easily than those without such a diagnosis, even if they commit similar offences.<sup>45</sup>

However, being diagnosed with a mental disorder has implications on a person’s treatment by the criminal justice system on a legal level as well. Similar to other European countries, a key factor in the Austrian system of preventive detention is the assessment

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<sup>39</sup> Parker, Georgaca, Harper et al., p. 76.

<sup>40</sup> *ibid.*, pp. 76 – 77.

<sup>41</sup> S. Krauth, ‘Hirnforschung und der gefährliche Mensch, Zur neurowissenschaftlich begründeten Abwesenheit des freien Willens’, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, no. 91, vol. 3, 2008, p. 308 (accessed 21 April 2021); Rogers and Pilgrim, p. 147.

<sup>42</sup> Krauth, p. 308; Rogers and Pilgrim, p. 147.

<sup>43</sup> R. Müller-Isberner and S. Eucker, ‘Psychische Störung und Kriminalität’, in R. Müller-Isberner and S. Eucker (eds.), *Praxishandbuch Massregelvollzug, Grundlagen, Konzepte und Praxis der Kriminaltherapie*, 2<sup>nd</sup> ed., Berlin, Medizinisch Wissenschaftliche Verlagsgesellschaft, 2012, pp. 55-68; Rogers and Pilgrim, pp. 149, 163; M. Foucault, *Überwachen und Strafen: Die Geburt des Gefängnisses*, 15<sup>th</sup> ed., Frankfurt am Main, Suhrkamp, 2015, p. 386.

<sup>44</sup> ECtHR, *Kuttner v. Austria*, no. 7997/08, 16 October 2015, ‘Partly concurring and partly dissenting opinion of judge Pinto de Albuquerque’, para. 6.

<sup>45</sup> Rogers and Pilgrim, p. 149.

of a suspect's legal responsibility.<sup>46</sup> As one of the core principles of contemporary criminal law legal responsibility describes a person's capacity to act in accordance with the law. Legal norms can only apply to persons who can respond to them, meaning those who are able to comprehend the norms and refrain from acting against them.<sup>47</sup> Therefore, if a person that has reached the age of discretion breaks the law and this act does not represent an 'expectable or culturally approved response'<sup>48</sup> to a certain event, the person concerned is negated this normative responsiveness.<sup>49</sup> Instead, as mentioned above, a mental disorder can serve to explain the irrational behaviour by attributing the criminal conduct to a bodily condition instead of a rational mind.<sup>50</sup> For example, the impulsive and 'immoral' behaviour of perpetrators of violence is traced back to their inability to predict the consequences of their acts due to reduced activity in the frontal lobe. The 'cold' and 'calculating' crimes by 'psychopaths', on the other hand, are explained by lesions in the hippocampus that prevent conditioning of the negative consequences of an action with fear.<sup>51</sup> Since these persons can supposedly neither be deterred from committing a crime nor reformed by treatment, none of them can be governed by criminal law and consequently require detention.<sup>52</sup>

At the same time their assumed neurobiological determination resulting in an inability to foresee or control their behaviour, exempts the persons concerned of responsibility for their acts. This practice of negating a person's legal capacity due to their mental condition is strongly condemned by the Committee on the Rights of Persons with Disabilities (CRPD).<sup>53</sup> In their General Comment on Article 12: Equal recognition before the law the Committee:

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<sup>46</sup> Criminal Code, para. 21.

<sup>47</sup> Criminal Code, para. 11; Krauth, pp. 303-304.

<sup>48</sup> American Psychiatric Association, p. 20.

<sup>49</sup> Krauth, pp. 304-305.

<sup>50</sup> *ibid.*, p. 310.

<sup>51</sup> W. Gratz, *Im Bauch des Gefängnisses, Beiträge zur Theorie und Praxis des Strafvollzuges*. 2<sup>nd</sup> ed., Wien, Graz, NWV – Neuer Wissenschaftlicher Verlag, 2008, pp. 26-28; Krauth, pp. 304, 319-320;

<sup>52</sup> Krauth, p. 320.

<sup>53</sup> The Committee is responsible for monitoring the implementation of the Convention on the Rights of Persons with Disabilities, whose personal scope includes persons with 'psychosocial, intellectual and other cognitive disabilities' (Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3).



reaffirms that a person's status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12.<sup>54</sup>

It explains its view by setting out the distinction of legal and mental capacity. Whereas the former describes a person's ability to hold and exercise rights and duties, the latter concerns an individual's competence to make decisions. Consequently, denying someone legal capacity based on deficits in their mental capacity, usually called 'unsoundness of mind', is deemed illegitimate and discriminatory.<sup>55</sup>

### 2.1.3 *The formation of gender*

Gender is commonly understood as consisting of two binary poles: masculinity and femininity. They are constructed as ontological categories that are dichotomous in their essence, which means that one requires the opposite other to exist.<sup>56</sup> The corresponding contrasting pairs include mind/body, culture/nature, rationality/emotionality, activity/passiveness, peacefulness/aggressiveness, dominance/devotion, strength/weakness, just to name a few.<sup>57</sup> Yet, the relation between the two categories is not only one of distinction but also of dominance, which, in a patriarchal society, means that the male is superior and the norm, whereas the female is inferior and abnormal.<sup>58</sup>

The development of two distinct sexes can be traced back to the rise of capitalism, which relies on gendered division of labour. Before the 18<sup>th</sup> century, women were practically understood as incomplete men, whose genitalia remained inside of their body instead of growing outwards. The sexual characteristics were not conceptualised as immutably defining a person's gender though but depending on the individual's lifestyle and social status they could move either way on the continuum of femininity and masculinity. In the 18<sup>th</sup> century, this 'one-sex-model' was substituted by the currently hegemonial 'two-sex-

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<sup>54</sup> CRPD GC No. 1, para. 9.

<sup>55</sup> *ibid.*, para. 13-15.

<sup>56</sup> J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (first published 1999), New York, Routledge, 2007, p. 25; R. Connell, *Der gemachte Mann: Konstruktion und Krise von Männlichkeiten*, 4<sup>th</sup> ed., Wiesbaden, Springer Fachmedien, 2015, p.120.

<sup>57</sup> F. E. Lutze, 'Ultramasculine Stereotypes and Violence in the Control of Women Inmates', in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, pp. 184-185; G. Ludwig, *Geschlecht, Macht, Staat: Feministische staats-theoretische Interventionen*, 1<sup>st</sup> ed., Leverkusen-Opladen, Verlag Barbara Budrich, 2014, p. 15.

<sup>58</sup> Connell, p. 10.

model'. This model stipulates women and men having a distinct 'nature', determining their behaviours and competences.<sup>59</sup> Therefore, the 'qualities' attributed to women by virtue of their femininity, such as passiveness, irrationality, obedience and weakness, serve to legitimise their subordination and exclusion from the economic and political sphere where positions of power and decision-making are located. Instead, they are assigned to the allegedly apolitical private sphere and unpaid reproductive labour.<sup>60</sup>

Simone de Beauvoir rejects such a determinist approach that naturalises women's inferior position in society by distinguishing biological sex from cultural and social gender as a product of socialisation.<sup>61</sup> Judith Butler's critical reflection on this sex-gender-distinction results in an understanding of both sex and gender being culturally constructed.<sup>62</sup> After all, also the concept of a biological sex is based on a constructed binarity informed by heterosexual normativity. The latter assigns a person to one out of two immutable genders based on primary and secondary sex characteristics. However, already the perception of certain biological differences is guided by a societal desire for such a distinction and only gains meaning in a specific cultural context. Within this cultural context a person's gestures, body, clothes and way of speaking are expressions that allow their assignment to one of two binary genders.<sup>63</sup> Therefore, gender is a performance in which a person can choose to act in accordance or divergence with notions of femininity and masculinity.<sup>64</sup> It can be understood as a social practice that structures social reality and is reproduced in day-to-day actions by individuals.<sup>65</sup>

It is further important to note that also the gender differences legitimised by findings from the authoritative fields of genetics and neuroscience are less determining than public

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<sup>59</sup> Ludwig, pp. 12-15.

<sup>60</sup> Connell, p. 127; Ludwig, pp.12-15.

<sup>61</sup> S. de Beauvoir, *The Second Sex* (first published 1949), New York, Vintage, 1973.

<sup>62</sup> Butler, pp. 9-11.

<sup>63</sup> G. Lindemann, *Das paradoxe Geschlecht*, 2<sup>nd</sup> ed., Wiesbaden, VS Verlag für Sozialwissenschaften, 2011, pp. 29-30.

<sup>64</sup> Butler, pp. 9-11.

<sup>65</sup> Connell, p. 10.

discourse on the topic suggests, since they as well are mediated by interpretations of individuals embedded in the prevailing socio-cultural context of meaning.<sup>66</sup>

## **2.2 Sociological perspectives on the criminal justice system**

Understanding the lived realities of women and men in preventive detention further requires exploring the construction of criminal law and its enforcement mechanisms. Like the concepts outlined above, neither of them is a natural fact or neutral practice but the result of socio-political processes and interests.

### *2.2.1 The purpose of criminal law and closed institutions*

The premise for critically reflecting on the function and meaning of criminal law and closed institutions is to understand that criminality is not an ontological category. An act only becomes criminal when decision-makers attach this label to it by including it into the respective criminal code.<sup>67</sup> Thus, the meaning of criminality can change significantly over time since it is rooted in the social norms prevailing in a certain period.<sup>68</sup> At the same time, declaring an act to be criminal serves to affirm social norms,<sup>69</sup> which ‘once implanted, do not thrive without replenishment and the punishment of the offender symbolizes anew the immorality of the deviant act’.<sup>70</sup> Therefore, the function of criminal law is not only to protect citizens from violations of their rights and stabilise behaviour expectations but to establish and uphold the status of a society desired by those in power.<sup>71</sup>

Secondly, the concept of criminal law itself is not a given fact but the outcome of the authorities’ conscious decision to enhance the social control of their citizens. In his classic

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<sup>66</sup> see e.g., C. Fine, *Delusions of Gender: The Real Science behind Sex Differences*, London, Icon Books Ltd., 2011; S. S. Richardson, *Sex Itself: The Search for Male and Female in the Human Genome*, Chicago and London, University of Chicago Press, 2013.

<sup>67</sup> G. Schmaus (a), ‘Das Strafrecht und die Frauenkriminalität’, in J. Feest and B. Pali (eds.), *Gerlinda Smaus: „Ich bin ich“, Beiträge Zur Feministischen Kriminologie*, 1st ed., Wiesbaden, Springer Fachmedien Wiesbaden, 2020, pp. 92-93.

<sup>68</sup> J. Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy*, Cambridge, Mass., MIT Press, 1996, pp. 28-41; M. Lanier, S. Henry, and D. J. M. Anastasia, *Essential Criminology*, 4th ed., Boston, Massachusetts, Credo Reference, 2014, pp. 13-18; G. Schmaus (c), ‘Soziale Kontrolle und das Geschlechterverhältnis’, in J. Feest and B. Pali (eds.), *Gerlinda Smaus: „Ich bin ich“, Beiträge Zur Feministischen Kriminologie*, 1st ed., Wiesbaden, Springer Fachmedien Wiesbaden, 2020, p. 132.

<sup>69</sup> Habermas, pp. 28-41; B. Meier, ‘Konzeptionelle Grundlagen des Strafvollzugs’, in B. Meier and K. Leimbach (eds.), *Gefängnisse im Blickpunkt der Kriminologie*, Berlin, Heidelberg, Springer Berlin Heidelberg, 2020, pp. 15-17.

<sup>70</sup> Sykes, p. 38.

<sup>71</sup> Habermas, pp. 66-68; Lanier, Henry and Anastasia, pp. 18-20; Meier, p.17; Schmaus (a), p. 94.

‘Discipline and Punish’, Michel Foucault locates the birth of criminal law as we know it today in the 18<sup>th</sup> century. Until then, the deprivation of liberty of offenders had predominantly served a retributive purpose, meaning that the person had to be punished for the harm they had caused. The second half of the century, however, saw a gradual humanisation of the penal system with rehabilitation as the main goal.<sup>72</sup> According to Foucault, the deprivation of liberty was now guided by seven fundamental principles:<sup>73</sup> betterment,<sup>74</sup> classification,<sup>75</sup> flexibility of punishments,<sup>76</sup> work as a duty and right,<sup>77</sup> education,<sup>78</sup> technical control of detention<sup>79</sup> and post-release institutions.<sup>80</sup>

What the general discourse celebrates as the victory of rationality and humanity over barbaric torture rituals is countered by Foucault as he examines the development of the modern criminal justice system in a larger socio-political context. In detail, he outlines how the reform of the penal system to be milder and more humane was not so much motivated by the enlightened society’s dismay in light of the cruel and irrational public torture of an offender’s body but the endeavour to make systems of social control more efficient and economic.<sup>81</sup> Foucault traces this development back to the rise of capitalism, when the growing wealth of parts of the population was accompanied by an increase in society’s overall concern about security. While criminality used to be perceived as potentially originating from anyone due to a personal interest or emotion, it was now seen to be rooted in a person’s social class. The lower-class criminal was then not only considered guilty of the harm they have caused to their victims, but more importantly of deviating from the capitalist social norm and as such harming the entire society.<sup>82</sup>

The development of modern criminal justice systems therefore marks the shift from focusing exclusively on the criminal act to inspecting the circumstances and intention of

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<sup>72</sup> Foucault, pp. 17, 93-95, 99-104.

<sup>73</sup> *ibid.*, pp. 346-348.

<sup>74</sup> Referring to the rehabilitation and re-socialisation of detainees.

<sup>75</sup> Referring to the separation of detainees by the type of offence, ‘disposition’ and required treatment.

<sup>76</sup> Referring to the option to modify the sentence according to the detainees’ conduct.

<sup>77</sup> Referring to work in prison as important to equip detainees with the necessary skills to take up a job after release.

<sup>78</sup> Referring to the provision of general and vocational education during imprisonment.

<sup>79</sup> Referring to specialised personal controlling, facilitating and supervising the detainees’ betterment.

<sup>80</sup> Referring to the social control and treatment of detainees in specified institutions upon release.

<sup>81</sup> Foucault, pp. 101-104.

<sup>82</sup> Foucault, pp. 118, 128-129, 354-356.

this act. Foucault argues that this additional layer in the practice of sentencing, namely the examination of a suspect's 'nature' and biography, constitutes the birth of the concept of delinquency: an individual's inherent tendency to commit offences.<sup>83</sup> Consequently, the predominant function of the criminal justice system became to reform the individual's way of thinking and acting so that they would refrain from committing crimes in the future and become a valuable part of the work force instead.<sup>84</sup>

Yet, an even more efficient way to prevent crime is to have persons disciplining themselves even *before* they break the law. To that end, the state expanded, adapted and refined its disciplinary mechanisms to every aspect of its inhabitants' lives. By instilling them with the belief that they could be surveilled at any given moment, the individuals would be forced to maintain self-discipline and in doing so become part of the disciplinary machinery. Foucault exemplifies this principle with boarding schools, military barracks, factories, hospitals and detention facilities. He further notes that the biography of 'delinquents' tends to run through all of these mechanisms.<sup>85</sup>

### 2.2.2 The 'nature' of total institutions

In his essay on the characteristics of total institutions Erving Goffman elaborates on the meaning that the subjection to such disciplinary measures has for the affected persons. According to him, central characteristics of such institutions are not only the restricted access to the outside world but that the usual practice of carrying out the main daily activities, namely sleeping, working and playing in distinct places is abandoned and all three areas of life are performed in the same place, under the same authority, with the same persons, according to a rational plan. Therefore, Goffman claims, upon entering a total institution a person loses their autonomy and to a large extent their social identity too. They do so by not only being deprived of their liberty but of the social environment and the activities that support the construction of a sense of self.<sup>86</sup> According to Gresham M. Sykes, the five fundamental symbols of status, the deprivation of which constitute the 'pains of imprisonment', are liberty, desirable goods and services, heterosexual

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<sup>83</sup> *ibid.*, pp. 323-325.

<sup>84</sup> Sykes, p. xxxi; Foucault, pp. 118, 159.

<sup>85</sup> Foucault, pp. 181-209, 220-221, 258-260, 386-388.

<sup>86</sup> E. Goffman, *Asyle: über Die soziale Situation psychiatrischer Patienten und anderer Insassen* (first published 1961), 19th ed., Frankfurt am Main, Suhrkamp, 2014, pp. 15-17, 24-27.

relationships, autonomy and security.<sup>87</sup> Goffman describes the loss of autonomy and the civil self as resulting from a wide range of humiliations and disciplinary measures the detainees are subjected to. These include arbitrary inspections of their bodies, belongings or rooms, enforcing a uniform look, controlling their social interaction and regulating every day restrictively.<sup>88</sup>

The most obvious disciplinary measure are punishments. They are one of the fundamental ordering principles in the prison world; privileges are the other. The two are closely interlinked, as a punishment is usually the withdrawal of a primarily granted privilege.<sup>89</sup> The system of punishments and privileges is not necessarily, as most detainees experience it, the mere result of the officials' cruelty and hatred towards them but in fact the staff's only opportunity to control the prison population, who outnumber them by far, without regularly using excessive force.<sup>90</sup> The system of privileges does not only comprise being allowed small comforts like a cigarette, but more importantly, is linked to release and work. Detainees quickly learn that certain actions can, on the one hand, shorten or lengthen their stay in prison, and, on the other hand, have them work and sleep in more or less pleasant places.<sup>91</sup>

The official principles of punishments and privileges are accompanied by a range of informal structures in organising life in detention. To cope with the humiliating and disintegrating situation and regain some form of social status, detainees develop their own patterns of social interaction between each other.<sup>92</sup> The resulting subculture provides the detainee with a certain degree of orientation and stability in the otherwise unpredictable prison world. It is structured by distinctive social roles and a specific jargon, which enable detainees to find a new sense of self as part of a social group they can identify with.<sup>93</sup>

Goffman argues that this sense of being a community of the oppressed is cause and effect of the stark divide between staff and detainees. They are constructed as two worlds that

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<sup>87</sup> Sykes, pp.63-83.

<sup>88</sup> *ibid.*, pp. 149-156; Goffman, pp. 27-45.

<sup>89</sup> Goffman, pp. 54-57.

<sup>90</sup> Sykes, p. 32.

<sup>91</sup> *ibid.*, p. 28; Goffman, pp. 57-59.

<sup>92</sup> Sykes, pp. 82-83, 106-108; Goffman, p. 59.

<sup>93</sup> Sykes, chapter 5; Goffman, pp. 60-61.

have as little points of contact as possible and try to keep distance from each other since each of the groups distrusts the other and holds hostile stereotypes.<sup>94</sup>

### *2.2.3 Failure and success of the penal system*

Yet, officials and detainees have at least one aspect in common: both are subjected to society's expectations of what prison has to achieve and how this should be done.<sup>95</sup> However, these expectations are contradictory and ambiguous. On the one hand, the criminal justice system is supposed to safeguard the general population's security by preventing disorder, revolts and escapes. On the other hand, it is expected to treat detainees in the spirit of rehabilitation and re-socialisation, which does not allow for any additional punishments on top of the deprivation of liberty.<sup>96</sup> This dilemma is also reflected in the architecture of detention facilities, often the only aspect of prison life visible to outsiders, which oscillates somewhere between transmitting security and discomfort by the use of high walls, barbed wire and bars, and a more 'homey' living environment to support detainees' rehabilitation.<sup>97</sup>

Between contradicting societal demands and a system that does not have the means (financially and in terms of expertise) to meet them, the staff is forced to construct a functioning regime.<sup>98</sup> According to Gratz, the aim of this regime is neither to treat nor to punish, but to make detainees conform and maintain order.<sup>99</sup> The result is a complex social system of informal patterns of communication and behaviours agreed upon by officials and detainees.<sup>100</sup> The staff 'buys compliance or obedience in certain areas at the cost of tolerating disobedience elsewhere'.<sup>101</sup> Thus, contrary to public's perception and expectation, the criminal justice system is not a static, trivial machine that simply

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<sup>94</sup> Goffman, pp. 18-19, 61.

<sup>95</sup> Gratz, pp. 180-181

<sup>96</sup> *ibid.*; Foucault, pp. 318, 345-346; Meier, pp. 27-28.

<sup>97</sup> M. Schweder and S. Thümer, 'Gefängnisarchitektur – Zwischen Funktionalismus und Symbolismus', *BAG Report*, no. 16, 2014, p. 14; G. Schmaus (b), 'Reproduktion der Frauenrolle im Gefängnis', in J. Feest and B. Pali (eds.), *Gerlinda Smaus: „Ich bin Ich“, Beiträge Zur Feministischen Kriminologie*, 1st ed., Wiesbaden, Springer Fachmedien Wiesbaden, 2020, p. 111.

<sup>98</sup> Sykes, p. 39.

<sup>99</sup> Gratz, p. 173.

<sup>100</sup> Sykes, pp. 56-57; Gratz, pp. 174-178.

<sup>101</sup> Sykes, p. 57.

translates the demands of society into practice but a living system continuously struggling to maintain itself.<sup>102</sup>

As a consequence, several scholars claim that the penal system misses its target to transform criminals into law-abiding, productive citizens and deter further criminal behaviour by pointing at crime trends and recidivism rates.<sup>103</sup> Quite the opposite; in fact, it (re)produces criminality in several ways. On the one hand, the harsh discipline might trigger the detainee's desire to take revenge for their negative experiences in detention by rather breaking that abiding to legal norms upon release.<sup>104</sup> The shared misery of a large number of detainees further provides a fertile ground for finding accomplices for future offences.<sup>105</sup> On the other hand, the criminal justice system continuously undermines a detainee's chances to rehabilitate and re-socialise. The erosion of a detainee's self-efficacy and autonomy<sup>106</sup> leads to 'de-culturation', where the person concerned unlearns, or fears to have unlearned, the necessary abilities to navigate the world outside of prison.<sup>107</sup> Even if a detainee regains and assumes self-determination and autonomy after release, the stigmatization related to detention inhibits their chances to re-socialize by taking up employment and rebuilding a social network.<sup>108</sup>

As much as prison appears to fail in meeting its official aims, as much it seems to succeed in fulfilling the informal role it was assigned by the state. According to Foucault the criminal justice system is not supposed to suppress offences but to differentiate and order them according to the state's interests. The reproduction of delinquency, re-offenders and criminal networks serves to ensure the power of the ruling class.<sup>109</sup> Wolfgang Gratz argues that prison's success is rooted in the way it deals with this task:

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<sup>102</sup> Sykes, p. 13; Gratz, p. 174-175, Foucault, p. 299.

<sup>103</sup> Gratz, pp. 67, 182; Foucault, pp. 341-342; Meier, p. 18.

<sup>104</sup> Sykes, p. 22; Foucault, pp. 343-344; Goffman, pp. 61-62.

<sup>105</sup> Foucault, pp. 342-344; Goffman, p. 61.

<sup>106</sup> Y. Jewkes, M. Jordan, S. Wright et al., 'Designing 'Healthy' Prisons for Women: Incorporating Trauma-Informed Care and Practice (TICP) into Prison Planning and Design', *International journal of environmental research and public health*, vol. 16, no. 20, 2019, p. 8, (accessed 28 April 2021).

<sup>107</sup> Goffman, pp. 24, 74; Schmaus (b), p. 122.

<sup>108</sup> Goffman, p. 75; Foucault, pp. 344-345.

<sup>109</sup> Foucault, pp. 350-356.



It lives up to the requirements of a constitutional state, has a strong punishing arm as well as a small helping prothesis, swallows everyone it is served without objection, mostly gets its work done discreetly, but also delivers failures, which provide for thrill, indignation, food for the media and political capital'.<sup>110</sup>

With these theories on mental disorders (including its relation to dangerousness and criminality), gender and closed institutions in mind, the next chapter examines the gendered conceptions in the theory and practice of deprivation of liberty.

### **3. Analysis: The gender dimension of detention**

In the context of deprivation of liberty, the conception of gender outlined above (see Chapter 2.1.3) has considerable consequences on numerous aspects of the lived realities of women and men. As socially deviant behaviour is interpreted and often experienced differently depending on a person's gender, the authorities' responses to this behaviour vary accordingly to some extent.<sup>111</sup> This does not only mean that there are gender-specific forms of social control, such as prisons or hospitals, but also that these closed institutions are organised based on assumed gender-specific characteristics and needs. While Chapter 3.1 explores gender-specific patterns in women's and men's socially deviant conduct and experiences in closed institutions, Chapter 3.2 investigates the role of these gender-specific conceptions in international, regional and national standards on the treatment of female offenders as well as their implementation in practice.

#### **3.1 Gender specific patterns and experiences**

Looking at the worldwide prison population paints a very asymmetrical picture in regard to gender. Men make up over 90 per cent, whereas women form the remaining minority of less than 10 per cent.<sup>112</sup> There is a variety of hypotheses to explain this large imbalance, some of which will be presented in this section. The following pages will further present and critically reflect on theories regarding the role of gender on several levels of the criminal justice system.

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<sup>110</sup> Gratz, p. 182, (*author's translation*).

<sup>111</sup> Neuber, p. 112.

<sup>112</sup> Walmsley.

### 3.1.1 Looking for reasons why women commit crimes

A very common argument is that women are less inclined to commit a crime than men.<sup>113</sup> This notion is deeply rooted in the long-standing association of masculinity with crime, and femininity with innocence, moral and virtue. Therefore, women in conflict with the law are perceived as ‘unnatural perversions of normal femininity’.<sup>114</sup> While men are judged for deviating from the legal norm, women are condemned for not acting in accordance with the law and, in addition, their ‘female essence’ of being passive caregivers.<sup>115</sup> Failing their ‘duties’ as caring wives and mothers, female offenders are deemed even more blameworthy. In the addition, because there are so few women in detention, those who are, are construed as having committed disproportionately severe offences.<sup>116</sup>

To make sense of this mismatch and reduce the discrepancy between ideal and reality, female offenders are likely to be framed as victims of stressful life circumstances or (neuro)biological factors, thus lacking responsibility for their acts.<sup>117</sup> Within this framework, only men are assigned the ability to actively chose to transgress a norm, whereas women are denied the necessary capacity to act independently and make their own choices.<sup>118</sup>

Therefore, women tend to be attributed mental disorders to explain their criminal conduct, because contrary to committing a crime, a person cannot be held accountable for suffering from an illness.<sup>119</sup> In fact, illness, particularly in relation to the psyche, has historically been considered a female experience and associated with weakness and incompetence.<sup>120</sup> If a woman displays a socially deviant behaviour, it is more likely to be framed as

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<sup>113</sup> Schmaus (a), pp. 83-84.

<sup>114</sup> Carlen and Worrall, p. 2.

<sup>115</sup> *ibid.*, pp. 2, 9; E. Comack and S. Brickey, ‘Constituting the Violence of Criminalized Women’, *Canadian Journal of Criminology and Criminal Justice*, 2007, p. 2, (accessed 2 May 2021); Neuber, p. 113.

<sup>116</sup> Comack and Brickey, p.2; Schmaus (b), p. 121.

<sup>117</sup> Carlen and Worrall, p. 97; Neuber, pp. 113, 122; Schmaus (a), pp. 98-99.

<sup>118</sup> Neuber, p. 113; Schmaus (a), p. 100.

<sup>119</sup> M. Michels, ‘Straffällig gewordene Frauen’, in B. Maelicke and S. Suhling (eds.), *Das Gefängnis auf dem Prüfstand: Zustand und Zukunft des Strafvollzugs*, Edition Forschung und Entwicklung in der Strafrechtspflege, Wiesbaden, Springer Fachmedien Wiesbaden, 2018, p. 383; Comack and Brickey, p. 3; Schmaus (c), pp. 135-140.

<sup>120</sup> Comack and Brickey, p. 13; Schmaus (c), p. 137-141.

resulting from a mental disorder which requires treatment in a psychiatry<sup>121</sup> instead of mere confinement in a detention facility.<sup>122</sup> With perceiving women in need of rehabilitative rather than punitive measures, female criminality is constructed as an expression of their helplessness and an individual pathology.<sup>123</sup> Historical and contemporary examples include kleptomania, the pathological impulse to steal,<sup>124</sup> the battered woman syndrome as an explanation of a woman murdering her abusive partner, and postpartum depression as a reason for mothers to kill their new-borns.<sup>125</sup> By labelling female offenders as ‘mentally ill’, their adult status and thus the responsibility and rights linked to it are questioned.<sup>126</sup> This infantilisation prevents acknowledging women’s agency and understanding their violence potentially as an act of power.<sup>127</sup>

Another way to deny women’s responsibility for their criminal act is tracing both the conduct itself as well as the potentially underlying mental disorder back to detrimental life circumstance before imprisonment.<sup>128</sup> Indeed, one of the common characteristics of female prisoners is their history of physical and sexualised violence, often from their childhood on.<sup>129</sup> In addition, many lack a stable family background, reflected, for instance, by their parents being substance abusers, unemployed and violent, or having

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<sup>121</sup> This ‘psychiatrisation’ or ‘hospitalisation’ manifests in the numbers of women in mental health institutions, which, unlike the under 10 per cent in prisons, lies at over 50 per cent on average (D. Van Zyl Smitvan and S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights*, 1<sup>st</sup> ed., Oxford, Oxford Univ. Press, 2009, p. 59).

<sup>122</sup> Schmaus (a), p. 96.

<sup>123</sup> Comack and Brickey, p. 8.

<sup>124</sup> T. Whitlock, ‘Gender, Medicine, and Consumer Culture in Victorian England: Creating the Kleptomaniac’, *Albion: A Quarterly Journal Concerned with British Studies*, vol. 31, no. 3, 1999, pp. 413-437, (accessed 12 April 2021).

<sup>125</sup> Comack and Brickey, p. 3; M. Krabbe and P. H. van Kempen, ‘Women in prison: A transnational perspective’, in P. H. Kempen and M. Krabbe, *Women in Prison: The Bangkok Rules and beyond*, International Penal and Penitentiary Foundation, Cambridge, Intersentia, 2017, p. 27.

<sup>126</sup> Schmaus (a), p. 100.

<sup>127</sup> Comack and Brickey, p. 12; Michels, p. 383.

<sup>128</sup> Comack and Brickey, p. 8; United Nations Office on Drugs and Crime (UNODC), *Handbook for prison managers and policymakers on Women and Imprisonment*, Criminal Justice Handbook Series, United Nations Publication, Vienna, 2008, p. 82; Michels, p. 388.

<sup>129</sup> B.H. Zaitzow, ‘“Doing Gender” in a Women’s Prison’, in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, p. 22; UNODC, pp. 8-10; E. M. Wright, P. van Voorhis, E. J. Salisbury et al., ‘Gender-Responsive Lessons Learned and Policy Implications for Women in Prison’, *Criminal justice and behavior*, vol. 39, no. 12, 2012, pp. 1615-1616; Michels, p. 387; V. Hofinger and A. Fritzsche, *Gewalt in Haft, Ergebnisse einer Dunkelfeldstudie in Österreichs Justizanstalten*, Institut für Rechts- und Kriminalsoziologie (IRKS) Wien, Wien, LIT VERLAG GmbH & Co. KG, 2021, pp. 48-52.

passed (parts of) their childhood and youth in state institutions.<sup>130</sup> While such pre-imprisonment experiences can certainly have a severely negative impact on the survivors' physical and mental health, it is framed as the main or even exclusive cause for the women's criminal behaviour.

Apart from supposedly having suffered various forms of abuse, women are portrayed as victims of harsh socio-economic conditions, burdening role expectations (e.g., as working mothers) as well as the lack of power, status and recognition.<sup>131</sup> Therefore, the alleged cause for breaking the law is their disadvantaged social position and more of a necessity to survive this adverse situation and support their family than an intentional illegal act.<sup>132</sup> Traditionally, women were not considered responsible for providing for their families financially but indeed for nurturing them. Thus, if the male 'breadwinner' failed to supply the necessary financial resources to do so, women had no choice but to steal – particularly when considering their historical absence in the productive sphere.<sup>133,134</sup>

### 3.1.2 *The role of gender in sentencing*

The notion that women commit crimes only to ensure their families' and their own survival is supported by the fact that incarcerated women tend to be sentenced for minor economic and non-violent crimes, so-called 'crimes of poverty'.<sup>135</sup> These encompass drug handling (rather as mules than ringleaders), theft and shoplifting of cheap items as well as forgery, social welfare fraud and embezzlement.<sup>136</sup> Since men, in contrast, are in prison mainly for violent acts and burglary, another explanation for women being

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<sup>130</sup> Carlen and Worall, p. 42.

<sup>131</sup> UNODC, pp. 43, 82; P. Bauer and C. Knörschild, 'Frauen im Maßregelvollzug', in R. Müller-Isberner, S. Eucker, P. Bauer et. al. (eds.), *Praxishandbuch Massregelvollzug, Grundlagen, Konzepte und Praxis der Kriminaltherapie*, 2<sup>nd</sup> ed., Berlin, Medizinisch Wissenschaftliche Verlagsgesellschaft, 2012, p. 174.

<sup>132</sup> G. Landsberg, *Serving Mentally Ill Offenders: Challenges and Opportunities for Mental Health Professionals*, Springer Series on Family Violence, New York, Springer, 2002, p. 160; Lutze, pp. 183-184; Penal Reform International, p. 11.

<sup>133</sup> Schmaus (c), p. 134.

<sup>134</sup> This does not apply to women from the working class.

<sup>135</sup> UNODC, p. 81; Krabbe and van Kempen, p. 20

<sup>136</sup> B.H. Zaitzow, "Doing Gender" in a Women's Prison', in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, p. 21; UNODC, p. 81, 19; Michels, p. 387; United Nations Human Rights Council, *Women deprived of liberty, Report of the Working Group on the issue of discrimination against women in law and in practice*, 15 May 2019, A/HRC/41/33, paras. 30-31.

underrepresented in prisons is them being sentenced for less severe offences.<sup>137</sup> In addition, whether one receives a prison sentence or is granted a more lenient measure depends on their legal history. Relying on the fact that women are statistically more likely to be first-time offenders and pose less risk to society than men due to the non-violent nature of their offences, women are more frequently sentenced to non-custodial measures.<sup>138</sup>

Moreover, the practice of sentencing varies as judges take different aspects of a suspect's background into account, depending on their gender. Traditionally, for a woman this meant an inspection of her performance as a wife and mother, her sexual respectability and her mental health. The contrary goes for men, where citizenship and employment status used to be most relevant.<sup>139</sup> As a consequence, women were more likely not to be sentenced to prison if they were mothers, based on the assumption that they could not rely on their spouse to take over the caring responsibilities.<sup>140</sup> Thus, the fear was that 'their children at home could be expected to suffer all kinds of mental, emotional and psychological damage as a result of their mothers' imprisonment'.<sup>141</sup> Fathers in prison, on the other hand, were assumed to be able to count on their wives to take care of their common children.<sup>142,143</sup> In contrast, research shows that women tend to be arrested and severely sanctioned for crimes contradicting the traditional idea of womanhood, particularly in regard to their sexuality, for instance sex work, and their roles as wives and mothers, such as killing their abusive partner, adultery, infanticide, or substance abuse.<sup>144</sup>

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<sup>137</sup> Carlen and Worrall, p. 39; D. Oberlies and J. Elz, 'Lesarten: Kriminalität, Geschlecht und amtliche Statistiken', in G. Temme and C. Kunzel, *Hat Strafrecht ein Geschlecht?: Zur Deutung und Bedeutung der Kategorie Geschlecht in strafrechtlichen Diskursen vom 18. Jahrhundert bis heute*, Bielefeld, transcript-Verlag, 2010, pp. 231-235, 239.

<sup>138</sup> Carlen and Worrall, p. 29; Oberlies and Elz, p. 236.

<sup>139</sup> Lutze, p. 183-184; Carlen and Worrall, pp. 30-31; United Nations Human Rights Council, para. 19.

<sup>140</sup> Comack and Brickey, p. 6; UNODC, p. 17.

<sup>141</sup> Carlen and Worrall, p. 17.

<sup>142</sup> Zaitzow, p. 32.

<sup>143</sup> A study showed that 90 per cent of male detainees themselves expect their partners to care for the children while they are in prison, whereas only 25 per cent of female detainees do (Carlen and Worrall, p. 37).

<sup>144</sup> Landsberg, p. 174; Lutze, pp. 183-184; Schmaus (a), p. 96.

### *3.1.3 Gender-specific forms of social control*

Notably, all of these crimes except for substance abuse are linked to the private sphere since they concern ‘family matters’: the sexual conduct of a woman, a man violently enforcing his dominance, or the treatment of children. Thus, if a woman breaks with the respective social norms, the informal social control failed and the state has to intervene in the private sphere, which it does not touch as a general rule. Feminist scholars argue that there are historically grown gender-specific modes of social control. Women were controlled informally outside the criminal justice system by gender role expectations, above all their roles as wives and mothers, and the overarching patriarchal power dynamics enforcing and reproducing compliance with these expectations. Due to the lack of similar informal control mechanisms, men had to be subjected to the formal control of the criminal justice system instead.<sup>145</sup>

Therefore, as Schmaus claims, criminal law was historically tailored to men and their function in the productive sphere. A significant part of criminal law sanctions the appropriation of goods and capital without offering something in return, be it work or money. However, as criminal law has served to maintain the existing social order, it mainly criminalised acts committed by lower- or middle-class men: theft, burglary and robbery. Due to their historical exclusion from the productive sphere, where economic crimes take place, women were not in the position to break any of these laws. This androcentrism was only breached in order to control women in their supposed responsibility to reproduce society (e.g., termination of pregnancy). Criminal law therefore is not only a product of a patriarchal society but also a mechanism that reproduces male dominance.<sup>146</sup>

### *3.1.4 Gender-specific functions of detention*

This gendered separation of the public/productive sphere on the one hand and the private/reproductive sphere on the other hand can also be observed in the symbolic function of prisons. As closed institutions do not (only) serve to punish a certain criminal act but to rectify socially deviant behaviour in the long term, men were historically

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<sup>145</sup> Carlen and Worrall, p. 12, 29; Schmaus (c), pp. 141-145.

<sup>146</sup> Schmaus (a), pp. 94-97; Schmaus (c), pp. 132-133, 141-145.

supposed to be turned into solid participants in the workforce, whereas women should be (re)transformed into reliable housewives and mothers. Hence, the focus of programs in women's prisons was not on skills ensuring employment after release but on domestic skills, like cooking, cleaning and sewing, supporting female offenders to return home as better wives and mothers.<sup>147</sup>

With the shift from punishment to treatment (see Chapter 2.2.1), the cause for committing a crime was no longer the intentional act of breaking the law but a pathological mind that cannot make reasonable and rational choices.<sup>148</sup> Today as well, cognitive-behavioural programs held in prison, such as courses for dealing with criminal behaviour and substance addictions, aim to modify detainees' understanding of society and themselves.<sup>149</sup> They are supposed to realise that their own minds are the problem instead of disadvantaged (and gendered) social structures.<sup>150</sup> Claiming that such a realisation is for the person's own good serves as a legitimisation for this kind of paternalism. It is framed as a chance for detained women to take a break from the daily problems and excessive demands they face outside of prison, such as an abusive partner or caring responsibilities, and instead concentrate on personal development and maturation. This includes reflecting on their dependence, be it in regard to a partner or substances, as well as developing the self-confidence and ego-strength necessary to break with these negative patterns and lead a self-determined life.<sup>151</sup>

Indeed, detainees seem to respond well to the efforts to transform them into 'better' persons. Some said to value the 'self-discovery' taking place during detention and expressed their desired future to include employment, financial security, a family and, for women, being a good mother.<sup>152</sup>

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<sup>147</sup> Lutze, p. 191; Carlen and Worall, p. 67; Schmaus (c), pp. 135.

<sup>148</sup> Comack and Brickey, p. 14.

<sup>149</sup> UNODC, p. 46-47.

<sup>150</sup> Comack and Brickey, p. 14.

<sup>151</sup> Carlen and Worrall, p. 17; Zaitzow, p. 28; Hofinger and Fritsche, p.291.

<sup>152</sup> B. Krucsay, *Bedürfnisse männlicher und weiblicher Strafgefangener vor und nach der Entlassung Bericht zur Fragebogenerhebung im Rahmen des Projektes „Schritt für Schritt“*, Institut für Rechts- und Kriminalsoziologie, Wien, 2007, p. 14; Comack and Brickey, p. 27; Michels, p. 390.

### 3.1.5 Gender-specific experience of detention

However, imprisoned women's femininity is not only restored by targeted programmes but by the overarching organisation of the prison system. Detention facilities are inherently masculine systems subjecting individuals to paternalistic control, harsh discipline and a male-dominated authority structure.<sup>153</sup> For men, this treatment equals emasculation as they are stripped of everything that defines manhood: independence, power, access to goods and employment as well as heterosexual relations.<sup>154</sup> While the detention of women is embedded in the same masculine model, its characteristics have a different meaning to them. Since femininity is traditionally everything that masculinity is not, the emasculating environment does not take away but reinforce their womanhood. Historically, women were denied independence, power, access to goods and employment as well as a self-determined sexuality already outside of prison.<sup>155</sup> Therefore, detention facilities can be seen as reproducing and intensifying 'female' experiences of infantilisation, subordination, dependence, weakness and obedience.<sup>156</sup>

On the other hand, imprisonment also deprives women of major aspects constituting femininity: interpersonal relationships, support networks, and their families.<sup>157</sup> Unlike men, who are said to concentrate on ways to get their 'time done' as safely and bearably as possible, many imprisoned women continue to play a role and take part in the lives of their children and those taking care of them while their mother is in prison.<sup>158</sup> Therefore, women are described as suffering from more acute emotional stress upon entering the detention facility due to the separation from their children, families and communities as well as potential feelings of being 'bad' mothers.<sup>159</sup>

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<sup>153</sup> Carlen and Worrall, p. 84; N. de Viggiani, 'Trying to be Something You Are Not: Masculine Performances within a Prison Setting', *Men and Masculinities*, vol. 15, no. 3, 2012, p. 275 (accessed 21 March 2020).

<sup>154</sup> Lutze, p. 186-187; Viggiani, p. 274.

<sup>155</sup> E. Heffernan, 'Gendered Perceptions of Dangerous and Dependent Women: "Gun Molls" and "Fallen Women"', in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, p. 63.

<sup>156</sup> Lutze, p. 187.

<sup>157</sup> Zaitzow, p. 25; Lutze, p. 187.

<sup>158</sup> Zaitzow, p.26

<sup>159</sup> *ibid.*, p. 29; Comack and Brickey, p. 26; UNODC, p. 60; Bauer and Knörschild, p. 177; Michels, p. 387.



Consequently, both women and men are stripped of central components forming part of their identity. Ironically, this results in prison reproducing traditional conceptions of femininity and masculinity as it requires detainees to perform their gender even more strongly in order to maintain their sense of self.<sup>160</sup> Thus, detainees develop a variety of strategies to cope with said psychological disintegration and impotence faced during imprisonment, the most important of which is the establishment of a 'prison subculture' (see Chapter 2.2.2).<sup>161</sup> However, research suggests that the purpose and quality of these relationships varies between the genders. While men 'team up' with fellow detainees to look out for each other in order to navigate the prison world safely, women form affective relationships. Life in a women's prison is described as less violent and competitive but collaborative and solidary. Taking up caregiving roles and forming relatively stable dyadic or family like relationships allows detained women to reassure their femininity. These 'quasi-families', frequently constructed as mother-daughter relationships, offer female detainees warmth, security, emotional support and a sense of belonging.<sup>162</sup>

Yet, the underlying gender-specific conceptions might prompt researchers to not even look into supposedly atypical aspects of the detention of women and men. On the one hand, even if less explicit and visible than in male prisons, relations among female detainees are structured hierarchically as well.<sup>163</sup> In addition, violence is as much part of female detainees' lives as of male ones, only that the predominant form of violence is psychological (e.g., mobbing, defamation, intimidation, or insults).<sup>164</sup> In return, status and relationships in men's prisons are more nuanced as well since men too form friendly relations with other detainees.<sup>165</sup>

This also applies to the claim that women adapt better to imprisonment because they make the custodial environment their own, for example, by decorating their room rather than

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<sup>160</sup> Lutze, p. 186-187; Michels, p. 389;

<sup>161</sup> Zaitzow, p. 27; Carlen and Worrall, p. 90.

<sup>162</sup> Zaitzow, p. 27-30; R. S. Jones and T. J. Schmid, 'Parallels in the Prison Experiences of Women and Men', in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, pp. 168-169.

<sup>163</sup> Zaitzow, p. 30.

<sup>164</sup> Hofinger and Fritsche, p. 146.

<sup>165</sup> Y. Jewkes, 'Men Behind Bars, "Doing" Masculinity as an Adaptation to Imprisonment', *Men and Masculinities*, vol. 8, no. 1, 2005 (accessed 6 April 2020); Neuber, p.106.

defying it.<sup>166</sup> They are said to be more cooperative than men when they experience stress, and to adhere to the rules.<sup>167</sup> The notion of women being obedient and conformist, is, at first sight, challenged by the fact that female detainees actually account for *more* rule violations than men. However, these infractions tend to be less serious than those committed by male detainees. Eventually, the association of femininity with obedience and immaturity results in women being predominantly disciplined for disrespect, cursing, not eating up, or talking while queuing.<sup>168</sup>

Since women are socialised to direct negative feelings inwards instead of externalising them, the stress they experience often manifests in self-harm.<sup>169</sup> Consequently, there is a higher prevalence of self-injury among female than male detainees.<sup>170</sup> The repressive environment of a prison promotes this self-harming behaviour in two ways. On the one hand, the system's oppressive and abusive character triggers severe stress and aggression. On the other hand, it prevents women from resisting this oppression as it expects and rewards (feminine) obedient behaviour.<sup>171</sup>

### *3.1.6 Applicability to preventive detention*

Finally, the fact that the subject of this thesis, namely the preventive detention of persons with psychiatric diagnoses who committed a crime, varies from regular detention, raises the question how far the theories and findings explored in this chapter possibly apply to preventive detention in Austria too. First and foremost, persons detained as a preventive measure are not primarily detained for the offence they committed but for their assumed 'dangerousness'. Thus, mental disorders are not used for excusing women's criminal behaviour but as a reason for it. Since this applies to men as well, persons in preventive detention subvert the traditional association of criminality with manhood, and 'mental illness' with femininity. Being labelled particularly 'dangerous' and violent, women are

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<sup>166</sup> A. García Basalo, 'The Design of Women's Prisons, An architectural perspective on gender-specific needs and realities of female prisoners and main requirements for improvement', in P. H. Kempen and M. Krabbe, *Women in Prison: The Bangkok Rules and beyond*, International Penal and Penitentiary Foundation, Cambridge, Intersentia, 2017; p. 196; Neuber, p. 106.

<sup>167</sup> Bauer and Knörschild, p. 176; García Basalo, p. 182.

<sup>168</sup> Zaitzow, p. 25, 29; Lutze, p. 193; Carlen and Worrall, p. 41; Wright, Van Voorhis, Salisbury et al., pp. 1614–1615.

<sup>169</sup> Zaitzow, p. 29; Carlen and Worrall, p. 40; UNODC, p. 10.

<sup>170</sup> Penal Reform International, p. 75.

<sup>171</sup> Zaitzow, pp. 28, 37; Lutze, 192; Michels, p. 393.

ascribed rather unfeminine traits. In contrast, men's capacity to make rational decision, attributed to them by virtue of their gender, is questioned by their 'mental illness'. Accordingly, both men and women in preventive detention might be sanctioned for deviating from the gender norm. Yet, also within this framework, some traditional gender-specific patterns emerge, suggesting that conceptions of femininity and masculinity impact the practice of detaining persons with psychiatric diagnoses as a preventive measure as well. While women also represent a minority in preventive detention, they are overrepresented among those who are deprived of liberty according to para. 21/1<sup>172</sup> (lacking legal responsibility; see Chapter 4.1.1). In line with the association of femininity and 'mental illness' these persons are detained solely due to their alleged 'dangerousness', which is being traced back to their mental disorder (see Chapter 4.1.1). Further, the indefinite nature of preventive detention might impact women's and men's motivation to form relationships inside the detention facility and uphold the connection to the outside world. Findings from the empirical research presented in Chapter 4 seek to shed light on these matters.

### **3.2 Gender-specific treatment of detainees in theory and practice**

While the previous section provided an overview of theories on gender-specificities in the context of detention, the subsequent pages turn to looking at the topic from a more practical perspective. On the one hand, this section critically analyses to what extent normative standards guiding the treatment of women in detention facilities rest upon the gender-specific conceptions identified above. On the other hand, some aspects of their implementation in practice, primarily with regard to the accommodation of female detainees, are highlighted.

#### *3.2.1 International standards by the United Nations*

The only international instrument dedicated entirely to women deprived of liberty are the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules) adopted in 2010. They were conceptualised as complementing the United Nations Standard Minimum Rules for the Treatment of Prisoners from 1955, which contained only one rule referring to the

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<sup>172</sup> Strafgesetzbuch (Criminal Code), BGBl I 60/1974 idF BGBl I 154/2020, para. 21/1.

treatment of female detainees independently of their relation to men (separate accommodation, same-gender staff), namely Rule 23.<sup>173</sup> With this rule providing for specific pre- and post-natal measures, the UN discourse on women in conflict with the law reproduced the seemingly natural link between womanhood and maternity from the very beginning.

Initiatives to address the situation of women in detention at the level of the United Nations (UN) gained momentum in the early 2000s, when several countries, particularly the United States, introduced tougher criminal justice policies. Especially the criminalisation of minor substance-related offences resulted in a significant increase of women in detention.<sup>174</sup> The subsequent effort by the UN to identify ‘distinctive needs of women prisoners’<sup>175</sup> resulted in the determination of the main areas where women were considered to require particular consideration due to their distinct backgrounds, the type of crimes they commit, their familial ties, their mental health and the effect imprisonment has on them.<sup>176</sup> These include gender-specific health care, above all in regard to maternity/pregnancy, classification and gender segregation, contact with family members, specific programmes as well as social reintegration.<sup>177</sup> This selection was reiterated and refined in the subsequent years by meetings and reports leading up to the adoption of the Bangkok Rules in 2010.<sup>178</sup>

Consequently, also the Bangkok Rules predominantly refer to women in their reproductive function and as (potential) mothers; be it in regard to bodily aspects like pregnancy, breastfeeding or menstruation, or external circumstances such as contact with

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<sup>173</sup> 23. (1) In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate. (2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers (SMR).

<sup>174</sup> Between 1977 and 2004 their number grew by 757 per cent (compared to 388 per cent for men) (UNODC, pp. 2-3).

<sup>175</sup> Bangkok Rules, rule 1.

<sup>176</sup> Penal Reform International (PRI), *Women in detention: Putting the UN Bangkok Rules into practice*, London, Penal Reform International, 2017, p. 11.

<sup>177</sup> Tenth United Nations Congress on the Prevention of Crime, *Women in the criminal justice system, Background paper for the workshop on women in the criminal justice system*, Vienna, 10-17 April 2000, A/CONF.187/12.

<sup>178</sup> PRI, p.12.

their children.<sup>179</sup> The reason why female detainees require ‘specific’ attention seems to be that ensuring their well-being does not only benefit the women themselves but also the children, families and communities depending on them (and their unpaid labour). A working paper issued in preparation of the rules explicitly confirms this understanding by stating that ‘the imprisonment of the woman as an individual cannot be considered in isolation. Her incarceration will have secondary implications for her family and dependents, as well as further implications for wider society’.<sup>180</sup> Therefore, besides potentially meeting the required security level better, non-custodial measures allow to ensure that families are kept together and children are taken care of.<sup>181</sup>

The question, what women in detention ‘need’ is thus not necessarily answered by themselves but ‘based on what those with power and authority assume about what women need, and what those in power want to see happen in their communities and nation-states.’<sup>182</sup> It is undeniable that a several imprisoned women are primary caregivers, depending on drugs, diagnosed with mental disorders, and survivors of domestic and/or sexualised violence. Yet, by framing these characteristics as representing women’s ‘special needs’ the rules portray female offenders as vulnerable, powerless and fragile subjects in need of protection, rather than as active right-holders.<sup>183</sup> Further, even if the preliminary observations acknowledge the structural power relations detention is embedded in, they stay on the micro level of women as individuals and the material conditions surrounding them.<sup>184</sup> Neither do they put sufficient emphasis on the importance of actively promoting a gradual change in the attitudes and practices of staff as well as having more women in decision-making positions, nor do they tackle the problem that women’s detention facilities are given little priority in prison budgeting.<sup>185</sup>

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<sup>179</sup> e.g., rules 5, 15, 18, 22-23, 25-26 33, 39, 42, 48-52, 64, 68.

<sup>180</sup> United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 56th session, *Administration of Justice, Rule of Law and Democracy, Working paper by Florizelle O’Connor on the issue of women in prison*, 9 July 2004, E/CN.4/Sub.2/2004/9, para. 16.

<sup>181</sup> Bangkok Rules, rule 57-58; Krabbe and van Kempen, p. 13; Penal Reform International, p. 27.

<sup>182</sup> R. Barberet and C. Jackson, ‘UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules): A Gendered Critique’, *Papers*, vol. 102, no. 2, 2017, p. 223, (accessed 18 May 2021).

<sup>183</sup> Barberet and Jackson, p. 219, 223.

<sup>184</sup> Bangkok Rules, para. 9.

<sup>185</sup> United Nations Commission on Human Rights, para. 37-38.

Finally, the rules do not reflect on their consequences for persons falling outside of their scope. On the one hand, there is no section on persons not conforming to the conception of a cisgender and heteronormative woman.<sup>186</sup> In fact, the expert group preparing the rules had explicitly turned down a proposal to include ‘that prisoners who identified themselves as bisexual, lesbian, transgender or transsexual should be entitled to be treated in a non-discriminatory manner’, because ‘many representatives indicated that discussing the proposal was beyond the mandate of the expert group’.<sup>187</sup> On the other hand, the entire endeavour to develop such rules is based on the premise that women are fundamentally different from men. The traditional association of femininity with softness, weakness and obedience, and masculinity with violence, aggression and invulnerability, are reproduced by stating that women are not suited for the masculine prison system. This implicitly suggests that men are by nature dangerous and violent, and thus require being disciplined and controlled rather than protected from violence themselves.<sup>188</sup> It negates and ignores male experiences of abuse, emotionality and desire to maintain familial relationships.

### *3.2.2 Regional standards by the Council of Europe*

In parallel and yet distinctively, the Council of Europe developed its own standards regarding the treatment of prisoners. These standards evolved in a continuous interplay between three entities of the Council of Europe: the European Committee for the Prevention of Torture (CPT), the Committee of Ministers as well as the European Court of Human Rights (ECtHR).<sup>189</sup> The first European Standard Minimum Rules for the Treatment of Prisoners were adopted by the Committee of Ministers in 1973 in order to adapt the United Nations Standard Minimum Rules for the Treatment of Prisoners to the European context and go beyond them by integrating the socio-political changes since 1955.<sup>190</sup> With the same intent, namely to adjust the rules to more progressive times, they

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<sup>186</sup> Barberet and Jackson, p. 225-226.

<sup>187</sup> Twelfth United Nations Congress on Crime Prevention and Criminal Justice, *Outcome of 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*, Salvador, Brazil, 12-19 April 2010, A/CONF.213/17, para. 4.

<sup>188</sup> Barberet and Jackson, p. 225.

<sup>189</sup> see e.g. Murdoch, pp.31-52, 30-37.

<sup>190</sup> Council of Europe Committee of Ministers, Res (73)5, *Standard Minimum Rules for the Treatment of Prisoners*, 19 January 1973.

saw three revisions up until today: in 1987,<sup>191</sup> in 2006<sup>192</sup> and in 2020.<sup>193</sup> This process also brought about increased attention to female detainees: the revised rules from 2006, next to covering women's sanitary needs<sup>194</sup> and issues related to staffing,<sup>195</sup> contain a separate provision on women in prison.<sup>196</sup> The three sub-paragraphs prompt authorities to 'pay particular attention to the requirements of women such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention', to facilitate access to special services for detainees who experienced abuse as well as to guarantee adequate treatment of women giving birth.<sup>197</sup> Compared to a set of 70 rules, this provision seems rather limited. However, the annexed commentary, which elaborates on the meaning and scope of each of the rules in detail, frequently makes reference to the two main bodies complementing, refining and reinforcing the standards set out by the Committee of Ministers: ECtHR case law and CPT standards.

The latter dedicated a section of their 10<sup>th</sup> General Report (2000) to '[w]omen deprived of their liberty'.<sup>198</sup> Very much in line with the Bangkok Rules, the report deals with the areas of staffing, separate accommodation, activities, ante- and post-natal care as well as hygiene and health care. However, it does not fail to mention findings contradicting gender-specific norms, such as allegations of women on women abuse.<sup>199</sup> The report further welcomes options for men and women to participate in joint activities in case the persons concerned agree to do so.<sup>200</sup> Even if the standards normalise the role of female detainees as mothers and caregivers, they (also) do so from the perspective of ensuring women's rights instead of their children's ones. For example, they recommend making arrangements for institutional or partly extramural child-care by family members in order

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<sup>191</sup> Council of Europe Committee of Ministers, Rec(87)3, *Recommendation No. R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules*, 12 February 1987.

<sup>192</sup> European Prison Rules (n 8).

<sup>193</sup> Council of Europe Committee of Ministers, Rec(2006) 2-rev, *Draft Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules*, 1 July 2020.

<sup>194</sup> European Prison Rules, rule 19.7

<sup>195</sup> European Prison Rules, rule 81.3, 85.

<sup>196</sup> European Prison Rules, rule 34.

<sup>197</sup> *ibid.*

<sup>198</sup> Committee for the Prevention of Torture (CPT), *Women deprived of their liberty*, Extract from the 10th General Report of the CPT, 2000, CPT/Inf(2000)13-part.

<sup>199</sup> CPT, 2000, para. 24.

<sup>200</sup> *ibid.*

to enable imprisoned mothers to participate in activities and work inside the respective facility.<sup>201</sup> Further, the report confirms that the association of women with the domestic sphere continues to influence the treatment and conditions for women in prison. During some of their country visits the CPT found instances where female detainees were offered training in classical ‘feminine’, low-skilled and low-paid jobs, instead of high-skilled, well-paid employment that would ensure their (financial) independence after release. In fact, the CPT goes as far as to consider denying female detainees equal access to programmes as potentially constituting degrading treatment.<sup>202</sup> The same goes for the failure to provide menstruating women with adequate sanitation and hygiene products.<sup>203</sup>

A factsheet issued on ‘Women in Prison’ published in 2018 reiterates several of the points made in the previous report but also introduces some new ones. On the one hand, the factsheet reproduces stereotypical assumptions in regard to imprisoned women by naturalising healthy mother-child relationships and claiming that their contact would support ‘the development of her ability to assume responsibility for herself and her child’.<sup>204</sup> On the other hand, the CPT considers the practice of permitting ‘men and women to share an accommodation unit in pursuit of “normalcy”’ a ‘laudable approach’<sup>205</sup> and points out that many of the issues addressed in the factsheet may be applicable by analogy to, inter alia, transgender detainees.<sup>206</sup>

Finally, guidance on the treatment of female detainees on a European level can be found in the case law of the ECtHR. The complaints lodged in the context of detention mainly refer to Article 3<sup>207</sup> of the European Convention on Human Rights (ECHR). For instance, the Court endorsed the requirement for women to be searched only by female staff and protected from abuse by male detainees and staff, as laid out in the CPT standards as well as in the European Prison Rules, in a number of judgements delivered under Article 3.<sup>208</sup>

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<sup>201</sup> *ibid.*, para. 29.

<sup>202</sup> *ibid.*, para. 25.

<sup>203</sup> *ibid.*, para. 31

<sup>204</sup> CPT, *Factsheet, Women in Prison*, January 2018, CPT/Inf(2018)5, p. 5.

<sup>205</sup> CPT, *Denmark: Visit 2014*, CPT/Inf (2014) 25 | Section: 17/51 | Date: 17/07/2014 B. Prison establishments / 2. Ill-treatment, para. 31.

<sup>206</sup> CPT, 2018, p. 2.

<sup>207</sup> Article 3: The prohibition of torture, inhuman or degrading treatment or punishment.

<sup>208</sup> ECtHR, *Valašinas v. Lithuania*, no. 44558/98, 24 July 2001, para. 117; ECtHR, *Iwańczuk v. Poland*, no. 25196/94, 15 November 2001, paras. 56-59; ECtHR, *Yankov v. Bulgaria*, no. 39084/97, 11 December



Other than that, the case law leaves a lot to be desired in strengthening the rights of female detainees. The guide on the case-law of the ECHR on prisoners' rights from 2020 refers to women only in the section 'Women with infants and minors' and in judgements where male detainees claimed being discriminated against compared to female detainees.<sup>209</sup>

To take account of the developments in ECtHR case law and the CPT standards since 2006, the European Prison Rules were reviewed in 2020. In that context, among others, the provisions relating to women were updated. This update reinforced the role of women as caregivers, victims of abuse and mothers.<sup>210</sup> The heavy reliance on imprisoned women's role as mothers makes the alleged reason for introducing a new section on female detainees in the first place seem well-intentioned at best:

It is important to recognise that women's special needs cover a wide range of issues and should not be seen primarily as a medical matter. For this reason too, the provisions dealing with pregnancy and childbirth and facilities for parents with children in prison are removed from the medical context and placed in this and the following rule.<sup>211</sup>

### *3.2.3 National Standards by the Austrian Ministry of Justice*

As a member state to both the United Nations and the Council of Europe, Austria's provisions for the treatment of female detainees reflect many of the aspects discussed above. In other words, the focus on women as mothers is also visible in the Austrian context. Like on the international and regional level, the only rules referring exclusively to women do so in their reproductive function, such as arrangements for pre- and post-natal care.<sup>212</sup> Other than that, the Austrian Prison Act reiterates the principles of separate accommodation of female and male detainees as well as searches to be conducted by staff members of the same gender only.<sup>213</sup>

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2003, paras. 166-76; ECtHR, *Wainwright v. the United Kingdom*, no. 12350/04, 26 September 2006, para. 42.

<sup>209</sup> ECtHR, *Guide on the case-law of the European Convention on Human Rights, Prisoners' rights*, 31 December 2020.

<sup>210</sup> Council of Europe Committee of Ministers, 2020, Rule 34.2-34.3, 51.1h, 60.6a, 68.7.

<sup>211</sup> European Prison Rules, p. 60.

<sup>212</sup> Strafvollzugsanpassungsgesetz (Prison Act), BGBl. Nr. 424/1974 idF BGBl. I Nr. 159/2021, paras. 5 (2), 74, 131 (3), 156 (2).

<sup>213</sup> *ibid.*, paras. 8 (4), 101 (5), 102 (2).

More comprehensive guidance can be found in a decree issued in 2016 by the Ministry of Justice, outlining the minimum standards for women in Austrian detention facilities.<sup>214</sup> These standards include substantive provisions on accommodation of and programmes for female detainees. It states that, as a general rule, women should be detained in flat-sharing communities ('Wohngruppenvollzug') and rooms should remain unlocked. Further, female detainees should be offered low- and high-skilled training courses as well as the option to rotate between different jobs. Ideally, employment should take place in a mixed-gender setting.

The decree further contains provisions on the amount and nature of supervised and unsupervised leisure activities as well as on compulsory annual training for staff working at women's sections. On closer inspection, the decree challenges gender-stereotypical norms by providing 'unfeminine' educational and leisure activities as examples (e.g., obtaining a forklift driving licences or playing table football). In addition, enabling women to develop computer skills is emphasised while women's reproductive functions take up comparatively little room.

The mere fact that there have been efforts on the international, regional and national level to improve the situation of women deprived of liberty entails that there are several shortcomings in the practice of detaining women in conflict with the law. While the standards seek to give guidance on how these flaws should be rectified, some of the provisions are conflicting, vague, difficult to implement or do not cover certain aspects. Consequently, the reality of disciplining female offenders is at times quite different from the overarching normative framework.

#### *3.2.4 Gender-specific accommodation*

Probably one of the most fundamental questions in the context of women's deprivation of liberty is how female detainees should be accommodated. First and foremost, several human rights mechanisms and scholars advocate for finding alternatives to detention for

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<sup>214</sup> Bundesministerium für Justiz (Ministry of Justice), Mindeststandards für den Frauenvollzug in österreichischen Justizanstalten, Generaldirektion, 2016.

women convicts because of their low risk-potential and their caretaking responsibilities.<sup>215</sup>

However, if alternatives to imprisonment are not applicable, authorities face a dilemma: they can either build separate detention facilities for female detainees or add sections for women to men's prisons. The main problem with the former is that due to the small number of convicted women, there are very few and small facilities. This means that women tend to be, on the one hand, located far from their home communities and thus isolated from their social networks, and, on the other hand, offered a very limited number of programmes and work opportunities within the detention facilities.<sup>216</sup>

Both of these problems could be mitigated by keeping female detainees in an annex to an institution for male detainees. Not only are their chances to be close to home higher, but they can benefit from the larger offer of work and other activities offered in larger men's prisons. In reality, however, this is not necessarily the case as, for example, in a visit to an Austrian detention facility the National Preventive Mechanism found that women were only sporadically given cleaning tasks instead of full-time jobs.<sup>217</sup> In addition, due to the overarching gendered power relations, women are at particular risk of gender-based physical or verbal violence and sexual harassment when accommodated in men's detention facilities.<sup>218</sup> For imprisoned women, many of which have experienced abuse prior to detention, contact with male staff or detainees can lead to re-traumatisation.<sup>219</sup>

Authorities thus face an additional dilemma with regard to shared facilities. They can either entirely separate female from male detainees to prevent abuse and re-traumatisation, or mix genders in order to have life in prison resemble life outside prison as much as possible. In terms of staff, the common practice is to have mixed-gender staffing, particularly due to the perceived benefits of having female officers. The reasons given are that the presence of female staff would support 'changing the male dominated

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<sup>215</sup> UNODC, pp. 88-90; Bangkok Rules, rules 57-58; Krabbe and van Kempen, p. 13; Penal Reform International, p. 27.

<sup>216</sup> UNODC, pp. 15-17; Bangkok Rules, p. 39; Penal Reform International, p. 14.

<sup>217</sup> Volksanwaltschaft, *Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2018*, Band Präventive Menschenrechtskontrolle, Wien, 2019, p. 138;

<sup>218</sup> United Nations Commission on Human Rights, paras. 31-32.

<sup>219</sup> *ibid.*, para. 50

culture of the prison system', which in turn would have 'a calming and positive effect on men'.<sup>220</sup> Further, having a certain number of female officers allows for implementing the provision of persons being searched solely by same-gender staff.<sup>221</sup> In contrast, employing male officers in women's detention facilities is perceived to carry 'particular risks that outweigh any advantages'.<sup>222</sup> Clearly, these conceptions are based on the association of men as potential perpetrators and women as potential victims.

When it comes to mixing female and male detainees, there are more converse points of view. Most literature and standards, some of which were mentioned earlier, are in favour of offering mixed-gender courses.<sup>223</sup> Others advocate for preventing involuntary contact of women with men and that where 'kept in close proximity female prisoners should be protected from verbal abuse by male prisoners e.g. by the use of screens'.<sup>224</sup> Some claim that audio and visual contact should be avoided so that women who had been dependent on men for the most part of their lives are not distracted by perceiving men as 'potential love objects'.<sup>225</sup> Either way, in line with gender-specific notions, women are seen to be directly or indirectly in need of protection from men.

It has already been outlined above that detention facilities were built for men and that their organisation, equipment, staff and disciplinary measures are shaped accordingly. Referring to women's different backgrounds and needs, policymakers and experts agree upon the fact that many facets of a men's prison are not suitable for women.<sup>226</sup> One of these aspects are security measures: because women tend to be imprisoned for minor, non-violent crimes, and probably to some extent due to the association of womanhood with harmlessness and obedience, there is said to be no need for the excessive security measures and harsh discipline prevailing in facilities for male detainees.<sup>227, 228</sup> This claim is based on the conception that women are less likely to escape and assault other

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<sup>220</sup> UNODC, p. 36.

<sup>221</sup> see e.g., European Prison Rules, rule 54.4; Bangkok Rules, p. 32.

<sup>222</sup> UNODC, p. 36.

<sup>223</sup> see e.g., Ministry of Justice, 2016; CPT, 2000, para. 24.

<sup>224</sup> C. Wetten, *The European Prison Rules: A Gender Critique*, Brussels, Quaker Council for European Affairs, 2006, p.10.

<sup>225</sup> Michels, p. 391.

<sup>226</sup> Bangkok Rules, p. 2; Barberet and Jackson, p. 226; Michels, pp. 319-321; Neuber, p. 110.

<sup>227</sup> Bangkok Rules, rule 41; García Basalo, p. 171.

<sup>228</sup> Another certainly relevant question is whether the majority of imprisoned men require them either.

detainees<sup>229</sup> but pose a heightened risk to themselves by acts of self-harm. Thus, instead of the punitive environment of men's prisons, a rehabilitative orientation allegedly suits women's characteristics and needs better.<sup>230</sup>

The respective security level is mirrored in facilities' architecture and design. The architecture of prisons has the symbolic function of conveying security from and control over dangerous individuals. In addition, contrary to the core principle of human rights that the deprivation of liberty shall be the only punishment suffered, large parts of society still expect detainees to live under harsh conditions as a retribution for their wrongdoing. This notion is achieved by walls, fences and gun towers, visible from the outside, as well as grids and long corridors with identical cells lining up on the inside, among others.<sup>231</sup>

Since women are perceived as neither dangerous nor culpable (see Chapter 3.1.1) and predominantly as mothers, there is more acceptance of accommodating them in a less repressive custodial setting and providing a custodial environment that supports the detainees' recovery and rehabilitation instead.<sup>232</sup> At their core, all 'good practices' for the accommodation of female offenders identified by scholars and practitioners feature small units with a limited number of persons instead of one large-capacity facility.<sup>233</sup> These units might take the form of a university-campus-like setting or cottages organized in a village-like style with spacious green areas in between them.<sup>234</sup> The aim is to make the environment in which imprisonment takes place more 'homey' and encourage women's autonomy, for instance by including a kitchen where the detainees can prepare their own meals.<sup>235</sup> Where children are staying with their detained mothers, both should be accommodated in mother-child-units, which are ideally placed in houses outside the main area in a less prison-like environment.<sup>236</sup> Contact with children living outside the

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<sup>229</sup> However, in a study conducted in Austria in 2020 women were found to be as likely as men to get into fights with fellow detainees (Hofinger and Fritsche, p. 208).

<sup>230</sup> Wright, Van Voorhis, E. J. Salisbury et al., pp. 1617-1618.

<sup>231</sup> Schweder and Thümer, pp. 14-15.

<sup>232</sup> Jewkes, Jordan, Wright et al., p. 10.

<sup>233</sup> United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning, Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016, p. 46; García Basalo, p. 167.

<sup>234</sup> *ibid.*, García Basalo, p. 137.

<sup>235</sup> Schweder and Thümer, p. 17; Jewkes, Jordan, Wright et al., p. 12.

<sup>236</sup> García Basalo, p. 168.

facility should be facilitated by offering separate flats for visiting relatives or a visitor's centre with a location and design that has visitors feel comfortable.<sup>237</sup> However, the architecture of women's prisons should not only take into account the lower risk of escape and assaults but also the risk that female detainees pose to themselves. To prevent self-injury and suicide, the design and equipment of rooms should limit the opportunities for self-harm and the audio-visual conditions should allow for staff to notice self-endangering behaviour as soon as possible.<sup>238</sup>

While the design of a detention facility certainly influences its inhabitants' well-being, even comfortable furniture, friendly colours and 'softer' materials, such as wood and glass instead of concrete, are still only cosmetic improvements.<sup>239</sup> The attractive appearance might mask the repression, which:

is every bit as strong as in men's prisons; it is simply much more subtle. The social control in women's prisons is best described as "pastel facism" (sic!); control glossed over and concealed by a superficial facade of false benevolence and concern for the lives of inmates.<sup>240</sup>

Further, the emphasis on mother-child-units does not only restore the women's womanhood (see Chapter 3.1) but also idealises their family bonds, which, as mentioned above, are at times disrupted.

### **3.3 Concluding remarks**

This chapter offered insights into the gendered conceptions in the context of the deprivation of liberty of women as well as their role in the contemporary normative framework and practice. It showed that these historically grown notions continue to shape the detention of female offenders. Yet, this neither means that women are passive objects of gender-specific attributions nor that these conceptions are contrary to their actual experiences. On the one hand, women themselves reproduce or even make strategic use

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<sup>237</sup> *ibid.*, 170-171, Schweder and Thümer, p. 17; Wetten, p. 14.

<sup>238</sup> García Basalo, p. 171.

<sup>239</sup> Jewkes, Jordan, Wright et al., p. 2.

<sup>240</sup> Zaitzow, p. 24.

of the presented notions of femininity.<sup>241</sup> On the other hand, understanding gender as a social construct and examining its reproduction does not deny or condemn women's lived realities that are in line with these conceptions. Doing so would ignore the socio-political power structures the deprivation of liberty of female offenders is embedded in. Many women in prison might indeed see motherhood as a central component of their identity, engage in criminal activities to provide for their family, abuse substances and have suffered sexualised or domestic violence. The aim of analysing the role of gender in the criminal justice system has been to assess when its representatives simply base their actions on what they assume to be the female detainees' interests by relying on historically grown gender-specific stereotypes, or whether they do in fact respond to the lived realities of individual women in detention.

#### **4. Preventive detention in Austria: the case of Asten correctional facility**

The previous chapter outlined gender-specific conceptions in the context of social deviance and control, and how far these are represented in the international, regional and national normative framework of the deprivation of liberty of female offenders. The present chapter now relates the insights gained in Chapter 3 to a practical example. The case of an Austrian correctional facility serves to assess the standards' and theories' applicability to and relevance for the lived realities of women in a specific type of detention, namely preventive detention. To that end, the chapter commences with an overview of context of preventive detention in Austria before it briefly outlines the research process and finally turns to presenting selected aspects of the findings originating from empirical research.

##### **4.1 Contextualisation: legal, institutional and socio-political framework**

Since verbal (and nonverbal) expressions are not made in isolation but always as parts of and regulated by the respectively prevailing discursive systems,<sup>242</sup> this section discusses some aspects of the wider societal framework in which preventive detention in Austria

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<sup>241</sup> M. Bosworth, 'Gender, Race, and Sexuality in Prison', in B. H. Zaitzow and J. Thomas (eds.), *Women in Prison: Gender and Social Control*, Boulder, Colo., Lynne Rienner Publishers, 2003, pp. 142, 144; Neuber, pp. 117-119.

<sup>242</sup> C. Kammler, R. Parr and U. J. Schneider (eds.), *Foucault-Handbuch*, 2<sup>nd</sup> ed., Stuttgart, J. B. Metzler'sche Verlagsbuchhandlung & Carl Ernst Poeschel GmbH, 2020, pp. 274-277.

takes place. This facilitates locating the interview partners' statements in the larger legal, institutional and socio-political context.

#### *4.1.1 Legal framework*

In Austria, the preventive detention of persons with psychiatric diagnoses who committed a crime is regulated by para. 21 of the Criminal Code. If a suspect commits an offence that is charged with a term of imprisonment exceeding one year and the competent court assumes that a suspect might have been affected by a 'mental incapacity', it can order a psychiatric assessment of the person's 'degree of abnormality' and their illness-related 'dangerousness'.<sup>243</sup> Based on this assessment, the court decides if the person can be held responsible for the committed offence, in which case para. 21/2 is applicable. However, if the suspect is diagnosed with a 'mental disease, mental disability, serious disturbance of consciousness or in a similarly serious disturbance of the mind'<sup>244</sup> that renders a person unable to see the wrongdoing of an act and thus refrain from executing it, they cannot be held criminally responsible for the crime they committed. In that case a person can still be detained under para. 21/1 if there is a 'reason to believe that the persons affected by the mental or psychological abnormality will commit an offence involving serious consequences'.<sup>245</sup> The goal then is to provide them with psychiatric and therapeutical treatment to reduce their 'dangerousness' to an extent that allows for their release into society. With the same justification persons admitted under para. 21/2 can be detained for an indefinite time as a preventive measure in addition to their sentence. Since both paragraphs provide no definite and maximum length of detention, a regional penal court ex officio decides if the deprivation of liberty has to be continued or terminated on an annual basis.<sup>246</sup> The court's decision is informed by the opinion of an expert witness of psychiatry who assesses whether the level of 'dangerousness' that justifies their deprivation of liberty is still given or whether a conditional release is applicable.<sup>247</sup>

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<sup>243</sup> Criminal Code, para. 21 (*author's translation*).

<sup>244</sup> A. Schloenhardt and F. Höpferl (eds.), *Strafgesetzbuch/Austrian Criminal Code*, Vienna, Graz, NWV Neuer Wissenschaftlicher Verlag, 2016, p. 26.

<sup>245</sup> *ibid.*, p. 36.

<sup>246</sup> Criminal Code, para. 25.

<sup>247</sup> Volksanwaltschaft, *Bericht der Volksanwaltschaft an den Nationalrat und an den Bundesrat 2019*, Band Präventive Menschenrechtskontrolle, Vienna, Volksanwaltschaft, 2020.



Regulating the execution of the court decision, the Prison Act is another relevant legal standard. As outlined in Chapter 3.2, it includes specific provisions for the treatment of female offenders and is complemented by a decree issued by the Ministry of Justice stipulating minimum standards for women in Austrian detention facilities. The Prison Act further contains regulations regarding the treatment of persons in preventive detention.<sup>248</sup>

#### *4.1.2 Institutional framework*

In Austria, the Ministry of Justice is the competent authority to manage the preventive detention of persons with psychiatric diagnoses who committed a crime. Its decision regarding which detention facility a person is admitted to is based on a classification of the person concerned, meaning that a detainee's characteristics are sought to match with the facility's focus.<sup>249</sup> The jurisdiction of the ECtHR requires a clear separation between regular detention and a preventive detention measure ('Abstandsgebot').<sup>250</sup> Therefore, persons with psychiatric diagnoses must be detained either in the forensic-psychiatric department of a hospital,<sup>251</sup> a designated part of a prison<sup>252</sup> or a specialized detention facility.<sup>253</sup> The latter are primarily intended for accommodating persons admitted under para. 21/1, whereas women and female juveniles under either paragraph are only to be housed in Asten.<sup>254</sup> If a person is on conditional release or interrupting their detention in preparation of their release, ('Unterbrechung der Unterbringung')<sup>255</sup> they are placed in privately run extramural facilities that are contracted by the Ministry of Justice.<sup>256</sup>

As of 01 June 2021, 1362 persons are in preventive detention, out of which approx. 60 per cent (811 persons) are deprived of liberty according to para. 21/1 and approx. 40 (511

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<sup>248</sup> Prison Act, paras. 165-166.

<sup>249</sup> Bundesministerium für Justiz (Ministry of Justice), *Strafvollzug in Österreich*, Bundesministerium für Justiz, Vienna, January 2020, p.16.

<sup>250</sup> ECtHR, *K. v. Germany*, no.61827/09, 7 September 2012.

<sup>251</sup> In Austria these are the clinics Christian Doppler Klinik, Kepler Universitätsklinikum, LK Mauer, LKH Graz II, LKH Hall and LKH Rankweil.

<sup>252</sup> In Austria these are the correctional facilities Garsten, Karlau, Wien-Mittersteig and Stein.

<sup>253</sup> In Austria these are the correctional facilities Asten and Göllersdorf.

<sup>254</sup> Ministry of Justice, 2020, p. 17.

<sup>255</sup> Prison Act, paras. 165-166.

<sup>256</sup> Rechnungshof (Court of Auditors), Bericht des Rechnungshofes, Maßnahmenvollzug für geistig abnorme Rechtsbrecher, Vienna, 2010, pp. 99-100.

persons) under para. 21/2.<sup>257</sup> While women only make up 5,4 per cent (30 persons) of detainees under para. 21/2, their number is almost three times larger when it comes to para. 21/1 (13,8 per cent; 112 persons). Further, the percentage of female detainees is significantly higher for preventive detention (10,43 per cent) than for regular detention (5,7 per cent).

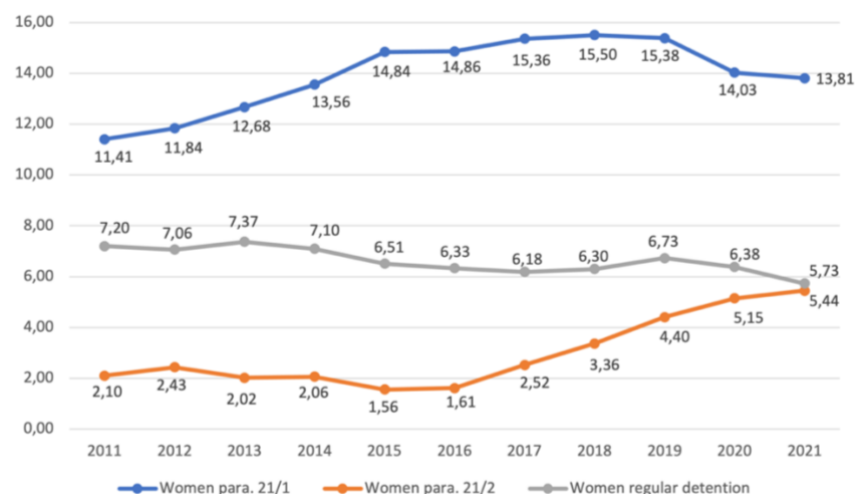


Figure 1: Percentage of women in detention broken down by paras. from 2010 to 2021<sup>258</sup>

As the figure above shows, there is an overall tendency of increasing relative numbers of women in preventive detention in respect to both paragraphs. Their percentage in regular detention, on the other hand, has been decreasing slightly over the last decade. In absolute numbers the women under para. 21/1 almost doubled (from 56 to 112 persons), whereas those under para. 21/2 even tripled (from 10 to 30 persons). In contrast, in 2021 there were 444 less women in regular detention than still in 2011.<sup>259</sup> As the figure below indicates, a similar trend can be observed in the number of men. In regular detention their number decreased by 4172 persons from 2011 to 2021, while in preventive detention it increased from 902 to 1220 (which equals a plus of 35 per cent).

<sup>257</sup> Unless indicated otherwise, all the numbers are extracted from official statistics by the Ministry of Justice made available to the author on 5 July 2021. Numbers referring to 2021 were retrieved on 01 June 2021.

<sup>258</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.

<sup>259</sup> This sharp decrease, which took place primarily from 2019 on, can probably be traced back to the Ministry's effort to reduce the number of detainees to prevent the spread of Covid-19 in detention facilities.

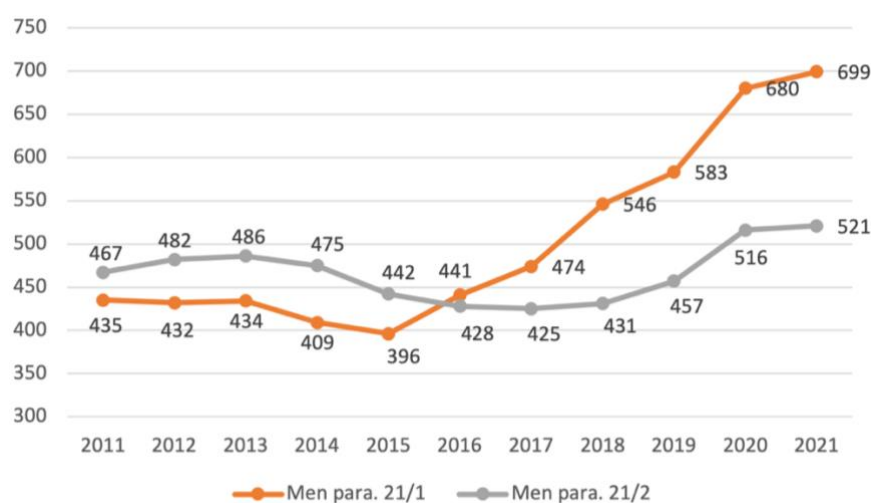


Figure 2: Absolute number of men in preventive detention broken down by paras. from 2010 to 2021<sup>260</sup>

The offences for which persons are admitted to preventive detention vary depending on paragraph as well as on gender. The figures below show that in fact the types of offences committed differ a lot more between persons under the distinct paragraphs than between men and women under the same paragraph. However, when interpreting these numbers, one has to keep in mind that the population of men detained according to both paragraphs is many times larger than that of women.

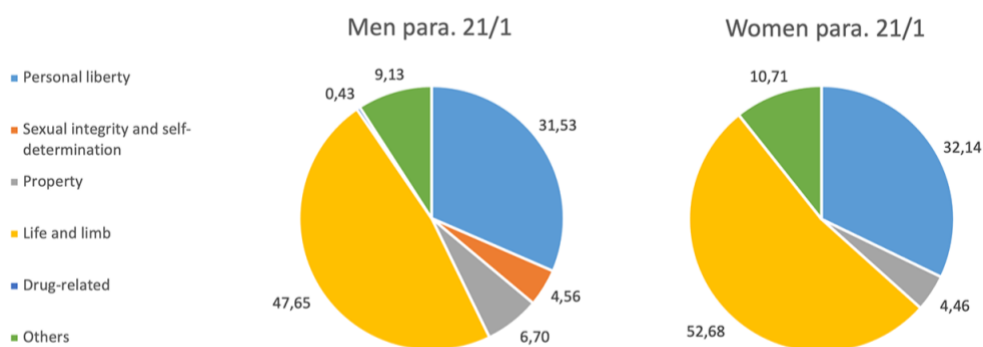


Figure 3: Distribution of offences among men and women under para. 21/1 as of June 2021<sup>261</sup>

<sup>260</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.

<sup>261</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.

Women under para. 21/1 account for over 50 per cent in the section of offences against life and limb. These include homicide as well as varying severe forms of bodily harm;<sup>262</sup> the ratio among female detainees being approx. fifty-fifty. Crimes against personal liberty<sup>263</sup> represent about one third, encompassing primarily dangerous threat and grievous duress. The remaining quarter comprises offences against third-party property<sup>264</sup> (namely robbery) as well as other offences (particularly arson<sup>265</sup>). For men under 21/1 the distribution is similar except that there is a small number of persons that committed crimes against sexual integrity and self-determination<sup>266</sup> (mainly rape) and drug-related offences.<sup>267</sup>

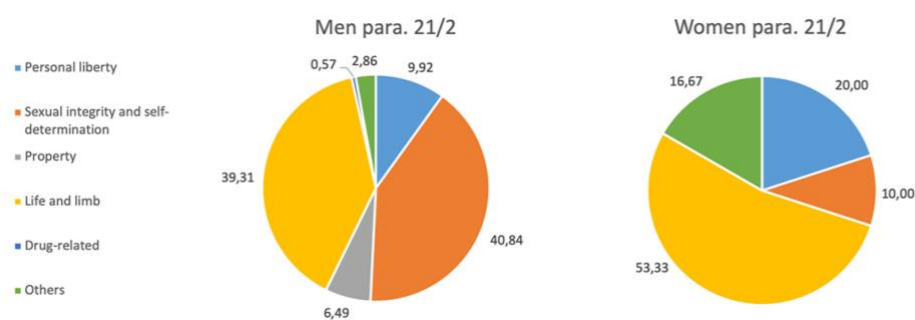


Figure 4: Distribution of offences among men and women under para. 21/2 as of June 2021<sup>268</sup>

The most striking difference between the offences committed by persons deprived of liberty under para. 21/1 and those under 21/2 is the comparatively large share of crimes against sexual integrity and self-determination for both genders. Especially among men, where they register over 40 per cent (the majority for rape or serious sexual abuse of minors) and are thus at par with offences against life and limb. In contrast, crimes against personal freedom are a lot less common among men under para. 21/1 as they represent slightly under 10 per cent. With regard to women under 21/2, offences against life and

<sup>262</sup> Criminal Code, paras. 75-87.

<sup>263</sup> *ibid.*, paras. 105-107c.

<sup>264</sup> *ibid.*, paras. 142-143.

<sup>265</sup> *ibid.*, para. 169.

<sup>266</sup> *ibid.*, paras. 201-207b.

<sup>267</sup> Suchtmittelgesetz, BGBl. I Nr. 112/1997 idF BGBl. I Nr. 37/2018 (Narcotic substances act).

<sup>268</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.

limb form the vast majority with over 50 percent. One third is shared equally between crimes against personal liberty and other offences, whereas the remaining 10 per cent represent offences against sexual integrity and self-determination.

According to the Ministry of Justice, the staff in the overall penal system encompasses three major groups: prison guards (81 per cent), in-house specialised services (10 per cent) as well as externally contracted specialised staff<sup>269</sup> (two per cent).<sup>270</sup> While prison guards are mainly in charge of order and security, specialized staff is responsible for offering adequate support and treatment to the detainees. It includes health care professionals, namely nursing staff, psychologists, psychiatrists, doctors, a range of therapists as well as social workers and pedagogues. Women account for 17 per cent of prison guards, 66 per cent of in-house specialised staff and 63 per cent of externally contracted staff.<sup>271</sup>

#### *4.1.3 Socio-political framework*

The current legal basis the deprivation of liberty of persons with psychiatric diagnoses as a preventive measure is based on (see Chapter 4.1.1), was established in 1975 in the framework of a reform of the Criminal Code. Its introduction can be understood as a shift from punishing to treating the persons concerned (see Chapter 2.2.1), but also an increased security interest as it sought to ‘significantly strengthen the general public’s protection from serious criminality by mentally abnormal, addicted or repeatedly recidivistic offenders’.<sup>272</sup> At the time, the idea was to establish a facility dedicated entirely to persons in preventive detention, who in the meantime should be accommodated in hospitals but remain under the responsibility of the Ministry of Justice. Even if by today there are three such facilities (Asten, Göllersdorf, Wien-Mittersteig), almost half of the persons detained as a preventive measure under para. 21/1 are accommodated in

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<sup>269</sup> Contracted staff encompasses doctors, nursing staff, psychologists, social workers, social assistants, ergo therapists, physiotherapists and pedagogues (Ministry of Justice, 2020, p. 40.)

<sup>270</sup> Ministry of Justice, 2020, pp. 39-40.

<sup>271</sup> *ibid.*

<sup>272</sup> Arbeitsgruppe Maßnahmenvollzug, *Bericht an den Bundesminister für Justiz über erzielte Ergebnisse*, Vienna, Bundesministerium für Justiz, BMJ-V70301/0061-III 1/2014, 2015, p. 10, (author’s translation), (AG Maßnahmenvollzug).

psychiatric clinics, whereas several persons sentenced under para. 21/2 are distributed in special departments of regular detention facilities.<sup>273</sup>

An essential reason for these facts is the continuously growing number of persons in preventive detention mentioned above, which has resulted in an overcrowding of the respective facilities.<sup>274</sup> The increasing number, in turn, can be traced back to several factors. For one thing, the institutions preceding and following preventive detention, especially psychiatric clinics and aftercare facilities, do not have sufficient capacities to take care of those looking for their support.<sup>275</sup> In their report from 2019 the Austrian Ombudsman Institute criticized the massive supply gap in psychosocial support services and also the Minister of Justice at the time himself acknowledged the shortcomings in this area.<sup>276</sup> On the other hand, society's need for security appears to have grown rather than dropped over the last 45 years as the overall rise can primarily be traced back to increased admission of persons who committed moderately severe crimes.<sup>277</sup> In addition, as outlined in Chapter 4.1.1, the decision whether someone is admitted to or released from preventive detention relies significantly on the report of an expert witness of psychiatry assessing the person's 'dangerousness'. However, the practice and quality of these assessments have been criticised heavily for being disproportionately negative and lacking uniform quality standards.<sup>278</sup>

Recently though, a couple of positive developments could be observed. In 2014 the Minister of Justice, Univ.-Prof. Dr. Wolfgang Brandstetter, commissioned a working group consisting of experts from various backgrounds tasked with assessing the situation of preventive detention in Austria.<sup>279</sup> After years of postponing the implementation of the group's recommendations, the current Minister of Justice, Alma Zadić, presented the reformed law in May 2021. The draft law incorporated some of the working group's

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<sup>273</sup> Court of Auditors, pp. 83-89.

<sup>274</sup> *ibid.*

<sup>275</sup> AG Maßnahmenvollzug, p. 54.

<sup>276</sup> Volksanwaltschaft, 2020; C. Jabloner, 3447/AB XXVI. GP, Anfragebeantwortung, Bundesministerium für Justiz, Vienna, 25 June 2019.

<sup>277</sup> AG Maßnahmenvollzug, p. 55.

<sup>278</sup> *ibid.*; Volksanwaltschaft, 2020.

<sup>279</sup> This decision was motivated by a case of a severely neglected person in preventive detention (AG Maßnahmenvollzug, 2015, p. 4).

recommendations. It further claims to have taken the legislation of the ECtHR on the topic into account, particularly since Austria has been found to have violated the right to liberty and security of persons in preventive detention in two cases<sup>280</sup> within the last six years.<sup>281</sup> Changes include raising the term of imprisonment foreseen for the offence in question to exceeding three years (except for specific types of crimes), special measures for juveniles and adults up to 21 years, as well as rephrasing outdated and discriminatory language.<sup>282</sup>

#### 4.1.4 Asten correctional facility

Since 2010, Asten correctional facility has been a detention facility for persons with psychiatric diagnoses who are deprived of their liberty as a preventive measure. Initially a branch of the Linz detention facility, it became an independent correctional facility in 2019.<sup>283</sup> Besides changes in the organisational structure, the facility has undergone a number of adaptations in the recent years. Most importantly, a new building was added in 2015 to increase the facility's capacity from 91 to 139 persons, and in 2017 a new section was established to accommodate female clients, as the staff in Asten refers to the detained persons.<sup>284</sup> By 2022 the facility will have space for another 100 persons in another new building. The buildings are located on approx. 10 hectares of land with meadows, trees and fields at the outskirts of the small town of Asten in Upper Austria.<sup>285</sup>

The initial concept for Asten was to be a forensic centre, instead of a classic detention facility, for persons deprived of liberty according to para. 21/1 who no longer require stationary psychiatric treatment. The idea was for these persons to be stabilised psychologically in a psychiatric clinic or a specialised detention facility before coming to Asten to take part in some therapies and social trainings before being released. Therefore,

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<sup>280</sup> A third case is currently being examined by the Court (*P.W. v. Austria*, no. 10425/19, 14 February 2019).

<sup>281</sup> ECtHR, *Kuttner v. Austria*, no. 7997/08, 16 July 2015; ECtHR, *Lorenz v. Austria*, no. 11537/11, 20 July 2017.

<sup>282</sup> Bundesministerium für Justiz (Ministry of Justice), *Ministerialentwurf betreffend Bundesgesetz, mit dem das Strafgesetzbuch, die Strafprozeßordnung 1975, das Strafvollzugsgesetz, das Jugendgerichtsgesetz 1988 und das Strafregistergesetz 1968 geändert werden (Maßnahmenvollzugsanpassungsgesetz 2021)*, 128/ME XXVII. GP, 26 May 2021.

<sup>283</sup> Interview with Expert 4, Asten/Vienna, 30 June 2021.

<sup>284</sup> AG Maßnahmenvollzug, p. 10; C. Jabloner, p. 9.

<sup>285</sup> Interview with Expert 4, Asten/Vienna, 30 June 2021.

Asten was planned as a small facility with only 90 clients. However, the concept did not work for long, as the nationwide number of persons admitted to preventive detention increased continuously (see Chapter 4.1.2).<sup>286</sup> In Asten, the overall number of clients under paras. 21/1 and 21/2 almost doubled from 123 to 243 persons between 2016 and 2021.<sup>287</sup> Starting from 123 men in 2016, their number grew up to 224 clients until 2020, before it dropped to 209 in the first half of 2021. The number of women went up rapidly in the three and a half years from seven persons in January 2017 to 34 in June 2021, representing a fivefold increase.

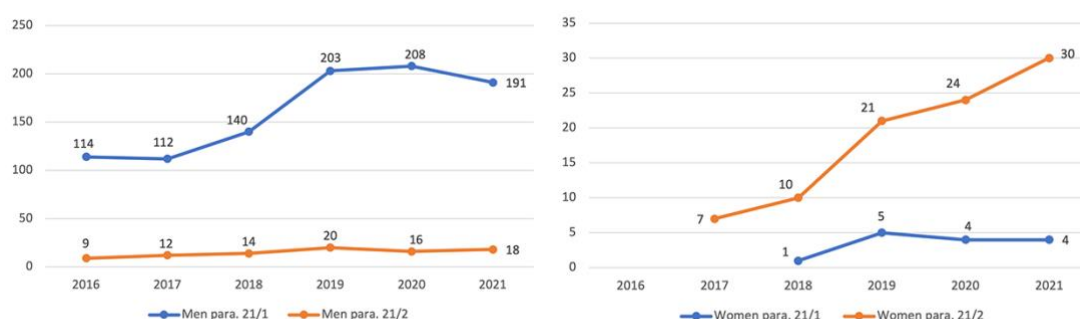


Figure 5: Number of clients in Asten broken down by paragraph and gender from 2016 to 2021<sup>288</sup>

Thus, as of 01 June 2021, Asten holds a total of 243 persons as a preventive measure out of which 209 are male and 34 are female. Among the women four are detained according to para. 21/1 and 30 according to para. 21/2. In regard to male clients the ratio is reversed with 191 persons being deprived of liberty under para. 21/1 and only 18 under para. 21/2.

<sup>286</sup> Interview with Expert 7, Asten/Vienna, 9 July 2021.

<sup>287</sup> The numbers exclude the small number of persons in regular detention in Asten.

<sup>288</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.



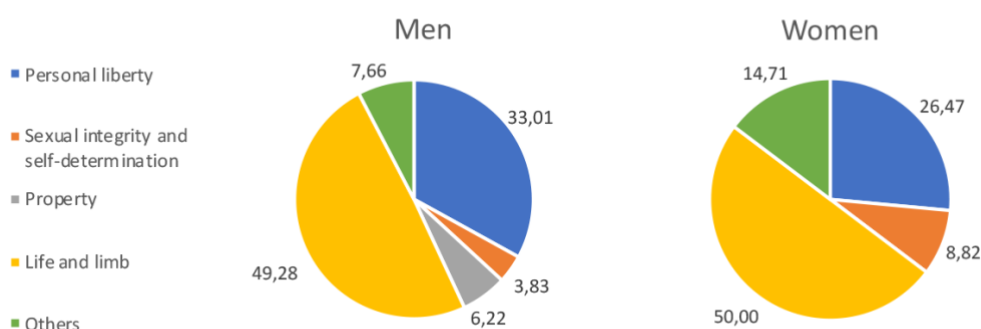


Figure 6: Distribution of offences committed by male and female clients in Asten as of June 2021<sup>289</sup>

The figures above show that the clients in Asten, women and men, almost perfectly reflect the overall picture of the nationwide distribution of the offences broken down by paragraph and gender (see 4.1.2). Half of the female clients, who are all but four persons under para. 21/2, were admitted to preventive detention for a crime against life and limb (17 persons). Crimes against personal liberty represent one quarter (six women), whereas three women committed an offence against sexual integrity and self-determination, and the remaining five, other offences. Similarly, among the male clients, over 90 per cent of which are deprived of liberty according to para. 21/1, almost 50 per cent (103 persons) committed a crime against life and limb, whereas offences against personal liberty represent a little over one third (69 persons). While crimes against sexual integrity and self-determination account for significantly less per cent than for the female clients (four percent; eight persons), their graphic features an additional offence, namely against third-party property (6,22 per cent; 13 persons). The remaining 7,66 per cent (16 persons) comprise other crimes.

The entire facility is organized in flat-sharing communities hosting between 10 and 25 persons each. The individual communities are grouped in units, which are in turn located in one of three major areas: the clinical, the social-therapeutical and the integrative-therapeutical area. The clinical area serves to psychologically stabilize male clients and treat them medically. They are allowed to move freely within the area during the day,

<sup>289</sup> Author's graphic based on statistics provided by the Ministry of Justice on 5 July 2021.

whereas at night they must stay in their own community. This equally applies to the social-therapeutical area, which is meant to support male clients in their preparation for a life outside the detention facility by granting gradual relaxations of detention. Finally, the integrative-therapeutical area, which focuses on offering a daily structure and psychotherapy to persons diagnosed with personality disorders, consists of one unit with three flat-shares: one for men and two for women. This unit accommodates female and male clients deprived of liberty under both paragraphs, which means that this is where the few men under para. 21/2 live, and who are considered to have a particularly high potential for aggression. The clients are only allowed to stay within their flat-share communities during daytime and are locked in their rooms overnight.<sup>290</sup>

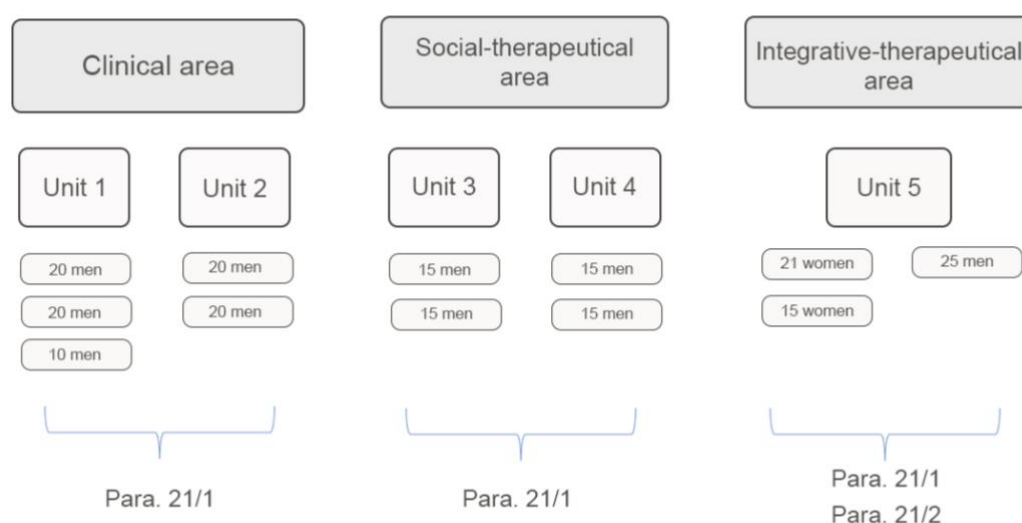


Figure 7: Organisational structure of Asten<sup>291</sup>

The clients are further classified according to a system of five levels: the first level is dedicated to treating harmful behaviour towards oneself and/or others. Once a person no longer poses serious danger to themselves or others, they are placed in level 2, which works towards having clients attend therapy in a meaningful way. The third level aims to

<sup>290</sup> Interview with Expert 1, Asten/Vienna, 28 June 2021; Interview with Expert 2, 29 June 2021; Expert 4, 30 June 2021.

<sup>291</sup> Author's graphic based on interviews.

treat a malfunctioning behaviour control, whereas the levels 4 and 5 deal with impaired emotional experience and problem specification.<sup>292</sup>

A key characteristic of Asten is the interdisciplinary composition of the staff. Unlike most detention facilities, guards make up only around 30 per cent<sup>293</sup> and, except for the integrative-therapeutical area, are exclusively responsible for exterior security.<sup>294</sup> The vast majority of employees have a background in Social Work or Health Care and the clients' daily routine is similar to those of patients at a psychiatric clinic.<sup>295</sup> The day starts at 7 am and ends at 8 pm. In between, there are various therapies, in which each client participates according to the individualised therapy plan developed by an interdisciplinary team of professionals working at the respective unit. Depending on the day and client, medical examinations, a medical round, group activities or shopping might take place.<sup>296</sup> Work opportunities are limited to simple remunerated tasks on the ward itself, such as cleaning, and in the on-site workshop, garden or agriculture. In terms of education, clients can participate in online German classes as well as in preparatory classes to complete compulsory schooling.<sup>297</sup>

#### **4.2 The research process**

To gain insight into the daily lives of the persons working and living in Asten and to answer the research questions, semi-structured qualitative interviews with staff members were conducted. Namely, these were the head of the facility, the deputy head and coordinator of two of the areas described above, a social pedagogue, a social worker, a psychiatrist, a health care professional and a prison guard. The composition of this sample was guided by the predetermined criterium of collecting a variety of perspectives from persons with different professional backgrounds. Upon request, the head of the facility provided a list of potential interviewees. By resorting to snowball sampling, some of them

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<sup>292</sup> Expert 1.

<sup>293</sup> Before Asten was turned into an independent correctional facility the number of guards was significantly lower (Interview with Expert 7, Asten/Vienna, 09 July 2021).

<sup>294</sup> Interview with Expert 5, Asten/Vienna, 30 June 2021.

<sup>295</sup> Expert 4.

<sup>296</sup> Expert 1; Expert 4; Expert 6.

<sup>297</sup> Expert 1; Expert 2; Interview with Expert 3, Asten/Vienna, 29 June 2021; Expert 4; Expert 6.

were contacted to ask them either directly for an interview or for referral to colleagues who have expertise in the areas relevant to the research.

Once scheduled, the interviews took place between 28 June and 16 July 2021 via video and phone calls, lasting between one and two and a half hours each. The questions posed covered general information about the interviewee and the facility, the daily routine of male and female clients as well as gender-specific aspects regarding the clients' contact with the outside world, detention conditions, treatment and personal characteristics. Since all interviews were conducted in German, the quotes were rephrased to English by the author. The interview transcripts were then subjected to a qualitative data analysis according to Mayring<sup>298</sup> by means of MAXQDA, a tool for qualitative data analysis. Accordingly, in a first step, each of the interview transcripts was paraphrased and abstracted to their substantial meaning. The next step constituted the selection of paragraphs considered relevant to answering the research questions. Subsequently, the remaining paraphrases were coded deductively and finally combined into overarching categories.

### **4.3 Findings**

The analysis of the interview transcript resulted in a number of categories, which subsume statements on a certain topic. It is important to note that the majority of the statements only refer to the population of and situation in Asten correctional facility. As mentioned in Chapter 4.1.4, Asten has a selected population of male and female detainees, namely predominately women deprived of liberty under para. 21/2 and men under para. 21/1. Therefore, drawing inductive conclusions about the general situation of male and female persons in preventive detention should be done with great caution; even less so since in several cases the interview partners relativise their statements by emphasising that they only apply to a handful of the women in Asten as well. To maintain the anonymity of the interview partners to the largest possible extent, they will be referred to by the gender-neutral pronoun 'they' instead of 'he' or 'she'.

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<sup>298</sup> U. Flick, E. von Kardorff and I. Steinke, *Qualitative Forschung: ein Handbuch*, 8<sup>th</sup> ed., Reinbek bei Hamburg, Rowohlt Taschenbuch Verlag, 2010, pp. 409-413.

#### *4.3.1 Challenges when working with female clients*

All interviewees emphasise the challenging nature of working with the female clients. While most of the statements refer explicitly to the individuals accommodated in Asten, one expert states that forensic women's departments in general have a reputation of being difficult, and another interview partner claims that women admitted to preventive detention according to para. 21/2 are generally 'the most difficult clientele that exists in Austria'.<sup>299</sup> The interviewees specify the female clients' 'difficulty' by pointing to their high potential for aggression, which manifests in self-harm as well as in assaulting others. Expert 3 mentions that Asten is known among other correctional facilities for an extremely high number of assaults, most of which happen in the section for female clients and are directed against staff members as well as fellow clients. Some interview partners mention dramatic incidents, such as a client throwing a mixer into another woman's face or running with their head against a wall on purpose.<sup>300</sup> As a consequence, the section where the women are accommodated is the only one where prison guards are positioned inside the living area.<sup>301</sup>

The interviewees relate the assaults and acts of self-harm to the emotional lability and impulsivity that come with the female clients' diagnosis of dissocial personality disorder with Borderline symptomatology.<sup>302</sup> It is said that the smallest things might trigger a serious crisis, because of which the staff must constantly be attentive to the interpersonal dynamics and the clients' individual condition.<sup>303</sup> The interview partners are aware of the danger they expose themselves to every day, but some say they took the job precisely because it is challenging, in addition to being diverse, interesting and fulfilling.<sup>304</sup> Expert 1 notes that the team now consists only of staff who knows what to expect and is motivated to work with the female clients.

The expert recounts that there was a significant turnover of staff when the section for women was introduced in 2017, because if one worked their entire life with clients who

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<sup>299</sup> Expert 4; Expert 7.

<sup>300</sup> Expert 2; Expert 5.

<sup>301</sup> Mentioned by all interview partners.

<sup>302</sup> Expert 1; Expert 2; Expert 4; Expert 5.

<sup>303</sup> Expert 2; Expert 3; Expert 5; Expert 6.

<sup>304</sup> Expert 3; Expert 6.

could be treated well with medication, it could be very challenging to suddenly deal with persons who might escalate at any time and whose disorder could not be managed primarily by medication but is ‘very hard and very time consuming and very complex’.<sup>305</sup>

Therefore, applying the usual practice proved to be insufficient or, as Expert 4 describes: ‘a complete flop’. The group dynamic was characterised by fights, assaults, insults and mutual theft among some clients, while the other women who were stable enough to work with constructively were side lined.<sup>306</sup> New concepts had to be developed, and the process is an ongoing one, since the facility has not attended to a comparable clientele before.<sup>307</sup> This includes finding new constellations to separate certain clients and training staff in dealing with Borderline symptomatology. However, again the interview partner do not necessarily perceive the challenges, which the arrival of the female clients brought, as negative per se. Expert 4 appreciates the fact that it highlighted defects in the previous system and made the organisation of the facility more professional. Several times, the interviewees emphasise that responding to these challenges requires really getting to know the women as well as close cooperation in the interdisciplinary team, which, according to them, works very well.<sup>308</sup>

The interview partners state that the women’s aggressive behaviour is particularly challenging due to its unpredictability. As mentioned earlier, the outbursts of violence can occur anytime and Expert 5 states that even if a client apologises and sincerely promises not to do it again, another assault might take place soon after.<sup>309</sup> The expert explains the difficulties in having the female clients cooperate and abide by agreements with their supposedly immature emotional experience and childlike cognitive structures. Getting some of the women with more severe forms of personality disorders to adhere to basic rules, which corresponds to the second stage of the treatment plan (see Chapter 4.1.4), requires working in small steps and basic commitments and can therefore take

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<sup>305</sup> Expert 1.

<sup>306</sup> Expert 4.

<sup>307</sup> Expert 1; Expert 5.

<sup>308</sup> Expert 2; Expert 3; Expert 4.

<sup>309</sup> Expert 5.

several years.<sup>310</sup> Accordingly, clients are described as ‘children in the body of a grown up’<sup>311</sup> and their behaviour like in a ‘kindergarten for grown ups’.<sup>312</sup>

#### *4.3.2 Specific accommodation and treatment conditions*

The challenges outlined above have a major impact on the organisation of the female clients’ lives, ranging from spatial features to the activities offered.

The female section is located in a separate building at the edge of the compound. Since the part of the premises around this building is not sufficiently securitised, the women are only allowed to go there accompanied by a staff member. This means that the female clients can only get fresh air by themselves in the courtyard.<sup>313</sup> The little availability of outdoor space is one of the aspects criticised by the interviewees regarding the characteristics of the building. Expert 5 emphasises how important it would be to have a space for the women to storm out and scream, if this is what calms them down. Further, the building is described as old, cold, unhygienic and unfriendly.<sup>314</sup> The staff’s office is a modified cell, which is a small room with no safety door and poor visibility of the living area.<sup>315</sup>

Recently, the main flat-share community was divided into two smaller units to better manage and take care of the clients.<sup>316</sup> Most importantly, the existence of two distinct communities allows for certain women to be separated if, according to the staff, the dynamic between them requires it.<sup>317</sup> For the same reason, the women within one unit are further divided into three groups: A, B and C; a system developed specifically for the female clients.<sup>318</sup> While the male clients in the clinical and social-therapeutical area can be moved between the flat-share communities, of which there are five and four respectively, if some are not getting on well with others, ‘handling’ the women requires a much more elaborate and structured approach due to the limitation to two flat-share

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<sup>310</sup> Expert 1; Expert 5.

<sup>311</sup> Expert 5.

<sup>312</sup> Expert 4.

<sup>313</sup> Expert 1.

<sup>314</sup> Expert 4.

<sup>315</sup> Expert 1; Expert 2; Expert 3; Expert 6.

<sup>316</sup> Expert 3; Expert 6.

<sup>317</sup> Expert 1; Expert 6.

<sup>318</sup> Expert 1; Expert 3; Expert 4; Expert 7.

communities.<sup>319</sup> This limitation further does not allow to differentiate between the female clients according to their progress in terms of accommodation, whereas men can be separated relatively easily by having them move between the clinical and the social-therapeutical area.<sup>320</sup>

Depending on the group a woman is assigned to at a given moment, she is allowed to be outside of her room for eight, four or two hours a day.<sup>321</sup> According to the interview partners, the groups are 'open' in turns, so that certain persons are prevented from having contact with each other and the staff may concentrate on the ones that are outside of their rooms.<sup>322</sup> If a client assaults someone, she is 'downgraded' to a group with more time being locked up.<sup>323</sup> A few interviewees say that locking someone up for more hours a day does not only protect other clients and staff but gives the woman time to 'cool down'.<sup>324</sup> According to Experts 1 and 3, sometimes the women themselves see it this way and do not mind being locked up. To allow the staff to restrict a client to her room as well as to give the person herself the option to take a break from the others, the whole section consists of single rooms.<sup>325</sup>

The system of having only single rooms is considered very important by the staff and one of the main aspects mentioned by the interviewees when asked what would be particularly important for the accommodation of the female clients. Furthermore, they emphasise small group sizes, a lot of access to fresh air and time-out rooms.<sup>326</sup> The latter are conceptualised as rooms for a client to calm down. To that end, Expert 4 suggests providing external stimuli such as light chains or music to distract the client from her internal crisis. In addition, a video screen would enable the staff to communicate with the client and de-escalate without being at risk or using force to restrain the person.<sup>327</sup>

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<sup>319</sup> Expert 1; Expert 4.

<sup>320</sup> Expert 4.

<sup>321</sup> Expert 1.

<sup>322</sup> Expert 1; Expert 4; Expert 6.

<sup>323</sup> Expert 1; Expert 2; Expert 3.

<sup>324</sup> Expert 1; Expert 3.

<sup>325</sup> Expert 1; Expert 2; Expert 3.

<sup>326</sup> Expert 1; Expert 2; Expert 3; Expert 4; Expert 5.

<sup>327</sup> Expert 4.



The new building will provide some of these features. There will be a larger outdoor area, units of max. 16 persons and time-out rooms outside of the living units.<sup>328</sup> The interview partners agree that even smaller group sizes and a larger outside area would be an advantage. However, Expert 5 explains that one has to be realistic and take the state provisions on how a detention facility must be built. Also other ‘good practices’ (see Chapter 3.2.4) could not be implemented in Asten realistically due to lacking financial and human resources: the expert acknowledges that having the clients live in small houses would probably be beneficial to their well-being, but their extremely high need for supervision and support would require a lot more staff than available.

Already now, the facility’s management has increased the overall number of employees to be able to offer the women adequate care.<sup>329</sup> Due to their ‘difficulty’ outlined in the section above, the female clients are attended by proportionally more staff than the men.<sup>330</sup> Besides their different number, personnel working at the female section have a greater variety of professional backgrounds. In addition to the already mentioned prison guards, the women are cared for by a social worker, a social pedagogue, a social support worker and a health care professional at each of the flat-share communities.<sup>331</sup> The interdisciplinarity of the team allows a more individualised treatment from a health care perspective, while from a security perspective it enables closer supervision of the often-problematic dynamics between some clients. As mentioned earlier, both are closely interlinked since paying more attention to a client and getting to know her well facilitates preventing assaults and self-harm.<sup>332</sup>

According to the interview partners, persons with the personality disorder prevailing among the women in Asten need a lot of daily structure.<sup>333</sup> Therefore, every day is planned in detail and there are weekly fixed points (e.g., shopping is done on Monday, bed linen is changed on Tuesday). In addition, a daily schedule of therapies and activities

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<sup>328</sup> Expert 5.

<sup>329</sup> Expert 4.

<sup>330</sup> Expert 5.

<sup>331</sup> Expert 3; Expert 4.

<sup>332</sup> Expert 3; Expert 6.

<sup>333</sup> Expert 1; Expert 4; Expert 6.

is drawn up.<sup>334</sup> The case management team sets up the schedule for each client individually.<sup>335</sup> The women are free to solicitate changes, and the team says to do its best to accommodate the clients' preference within the given framework. In general, the staff tries to offer the women as many activities as possible, inter alia, accompanied walks to counterbalance the above-mentioned limited opportunities to go outside on their own.<sup>336</sup>

Initially, there was too little occupation for the female clients, so that the staff focused on setting up more. Today, the women can choose from a broader range of activities than the men. Apart from common groups like ergotherapy, relaxation techniques or dog-therapy, the women can participate in a module on body awareness.<sup>337</sup> Expert 1 explains that the staff put up an extra full body mirror for the female clients, among who there are some with overweight, can become aware of their physical limits. The other ways to leave the room also during the lock-up period and earn a little money is working in the therapy business, where clients assemble pens or cables for some companies, the workshop, the garden or the agriculture mentioned earlier. Furthermore, the women can carry out small tasks in the flat-share communities such as cleaning, doing laundry or handing out food.<sup>338</sup> Expert 1 claims participating in these activities to have an astonishingly positive effect on the female clients, including them learning to take over responsibility. According to Expert 3, the outdoor activities are 'absolutely the right thing for the women. They are, for instance, not made for a task like in the therapy business, putting things together or cutting things out'. The given reason is that the female clients' supposed lack of necessary motor skills, precision and endurance.<sup>339</sup> Even if the women apparently want to work all day in the garden or agriculture, they are too exhausted after one or two hours.<sup>340</sup> On the other hand, Expert 3 holds the opinion that the women are harder to motivate and less active than the men. Yet, in a way, Expert 7 states the exact opposite by saying that persons admitted according to para. 21/2 are very resilient and motivated to work, whereas the inverse applies to those under para. 21/1. The general tone is a

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<sup>334</sup> Expert 1; Expert 6.

<sup>335</sup> The same applies to the male clients.

<sup>336</sup> Expert 1; Expert 6.

<sup>337</sup> Expert 1; Expert 2.

<sup>338</sup> Expert 1; Expert 2; Expert 4; Expert 6.

<sup>339</sup> Expert 2; Expert 3.

<sup>340</sup> Expert 2; Expert 3; Expert 5.

mixture of these two perceptions. The female clients are described as being keen to participate in activities and not being allowed to go to therapies is in fact a punishment for assaulting others.<sup>341</sup> After all, any activity means less time locked up in their rooms without anything to do. If the women want to go back to having therapies, they even have to write a motivational letter.<sup>342</sup> When asked whether the offer of activities is sufficient, the answers are ambiguous: on the one hand, the interview partners advocate for more diverse options.<sup>343</sup> On the other hand, they acknowledge that expanding the offer and contracting additional personnel would not be feasible due to the clients' limited capacity to make use of this offer.<sup>344</sup>

#### *4.3.3 Interpersonal aspects*

As explored above, the relation between the female clients as well as to the staff members is a key factor in the day-to-day routine of the women. The combination of being accommodated in single rooms, not being allowed to go to other flat-share communities and only being free to leave their room at certain times considerably limits the women's opportunities to be in touch with other clients. As outlined earlier, this restriction is on purpose, as it facilitates controlling the sometimes-difficult dynamics among the female clients recounted by the interview partners on several occasions. Yet, the above-mentioned violent incidents do not appear to be the norm, since Experts 2 and 6 state that in general, the women would get on well, or as Expert 2 puts it: 'you just need to see who you have the least problems with, and then these are simply your friends'. Similar to other involuntary communities (e.g., school classes), the individuals form groups and take up certain roles: there are leaders, and those completing tasks for them. While Expert 3 feels that women are more inclined to form such hierarchical groups, Expert 4 describes similar patterns in the male section. However, unlike the women, the male clients have a broader choice who to befriend and can escape negative dynamics more easily by going to other flat-share communities in their area.<sup>345</sup> Expert 4 further claims that men work better in a big group than women, 'that's what you might have in your private life as well. There is

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<sup>341</sup> Expert 2; Expert 3; Expert 6.

<sup>342</sup> Expert 2; Expert 6.

<sup>343</sup> Expert 1; Expert 3.

<sup>344</sup> Expert 1; Expert 4; Expert 5.

<sup>345</sup> Expert 4.

a clash and then things are fine again.’ The female clients, on the other hand, are said to engage in mobbing and intrigues.<sup>346</sup> Expert 3 describes them as insidious and that ‘you cannot believe 90 per cent of what they are saying’. However, the interview partners do not fail to mention that in most cases only two individual clients argue about small things, especially the few who are rather explosive due to their disorder.<sup>347</sup> The interviewees explain that generally, the diagnosis of a personality disorder with Borderline symptomatology comes with severe difficulties in maintaining a positive and healthy interaction style.<sup>348</sup> Expert 1 exemplifies this challenge with romantic relationships among the female clients, the volatility of which would make it difficult to identify who was an actual couple. Since some women seem to be unable to handle neither the relationship itself nor the breakup, certain clients might be divided into different groups. According to Expert 1, this allows them to focus on their personal development as well as to practice separations, since they will be confronted with disrupted relations on the outside as well.

For similar reasons, most interview partners consider the practice of strictly separating female and male clients from each other necessary. Apart from the aspect of preventing emotionally and psychologically destabilising encounters and the prohibited exchange of goods,<sup>349</sup> several experts refer to potential sexual interactions between the clients explicitly or implicitly.<sup>350</sup> Initially, the therapies and other activities were mixed-gender and there used to be a so-called ‘client café’, where both genders could linger. However, the staff soon noticed that there were insufficient personnel to control this situation and ensure that no female and male clients disappeared together.<sup>351</sup> By now, the men and women only see each other briefly at church, when groups cross for guided walks or when they are waiting in line for an appointment.<sup>352</sup> Yet, a couple of interviewees acknowledge that there would be benefits to having mixed-gender activities as well.<sup>353</sup> According to

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<sup>346</sup> Expert 2; Expert 6.

<sup>347</sup> Expert 1; Expert 3; Expert 6; Expert 7.

<sup>348</sup> Expert 1; Expert 5; Expert 7.

<sup>349</sup> Expert 2; Expert 3; Expert 4.

<sup>350</sup> Expert 1; Expert 4; Expert 6; Expert 7.

<sup>351</sup> Expert 1; Expert 4; Expert 6.

<sup>352</sup> Expert 3; Expert 4.

<sup>353</sup> Expert 1; Expert 4; Expert 7.

Expert 1, 'we, as men and women, can always learn from each other, how to deal with things, or how not to deal with them'. Expert 4 puts it that way: 'If I look at it from a mere professional perspective, I think it is good that they separate them strictly. Of course, from a human perspective, they have needs, [like,] that women also want to chat with a man for a change, something trivial'. Expert 7 also sees the enforced separation posing a significant challenge in the clients' re-socialisation process when women and men are suddenly mixed in extramural and aftercare facilities – especially when there are a lot more men than women. Because if male clients were used to having women around only as supervisors for five or six years, they no longer know how to meet women on equal footing, according to the interviewee. Therefore, women need to be protected from a group of 'socially famished' men, also but not only in terms of sexual relations. Pointing to the fact that there are also homosexual relationships among clients and that these relationships can bring great problems as well, Expert 7 does not necessarily see the 'problem' solved with separating men and women.

Upon inquiry, some interview partners note that the separation by gender helps to prevent sexualised abuse, be it physical or verbal. Expert 6 worries that the women might get into situations that would remind them of negative experiences with men in the past. Other than that, sexualised violence is rather considered as something that might take place between a staff member and a client.<sup>354</sup> Therefore, a staff member of one gender is never allowed to be alone with a client of another gender, which applies to the female and male sections equally.<sup>355</sup> According to Expert 3, this 'unspoken law' prevents false accusations by the women that 'would be out for saying, yes, sexual harassment or staring [happened]. These defamations certainly exist'. Expert 4, on the other hand, expresses his respect to all the women who do this job, because very often there are young female colleagues and 'of course the clients are looking, right. (...) there were stupid comments, a bit of sexualised comments, but no one got physical, well, that someone grabbed someone'.

In general, staff and clients appear to get along well. The clients know and accept the dual role of personnel as those who have the power to decide and punish, and the ones who

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<sup>354</sup> Expert 3; Expert 4.

<sup>355</sup> Expert 2; Expert 3; Expert 4.

offer care and support.<sup>356</sup> From the interview partners' perspective, most of the clients have a positive attitude towards the staff members and approach them when they wish to do certain activities or talk to someone.<sup>357</sup> Experts 3 and 4 agree that it is beneficial to have a mixed-gender team. In the female section, the presence of a male guard is said to have a stronger impact alone for their body size than of a female guard.<sup>358</sup> In regard to the male section, Expert 4 argues that women frequently have a better connection to and intuition for a client, and thus might be able to de-escalate where a man might be at loss. Expert 7, on the other hand, claims that the male clients have issues to combine their urge for dominance with the fact that women are their supervisors.

#### *4.3.4 Relation to the outside world*

Regarding relationships to persons outside the facility, it appears to be the same for female and male clients: one half gets visited regularly and by the same persons, the other half receives no visits at all.<sup>359</sup> The latter are either foster children who have no contact to their foster parents, or come from a social network they do not want to be in touch with anymore.<sup>360</sup> In some cases, the family does not want any contact since the crime involved the family,<sup>361</sup> or conversely, staff impedes contact with family and peers due to their supposedly negative influence on the client.<sup>362</sup>

Those who get visited are usually seen by their parents.<sup>363</sup> According to Expert 3, the female clients receive strikingly little visits of friends. Expert 6, on the other hand, says that the women can count on support from parents, grandparents, friends, siblings, aunts and uncles. Out of the women who have children, depending on the interview partner these are very few, many or about half of them, some are in good contact with their children, whereas others are in no contact at all.<sup>364</sup> Their children tend to be cared for by

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<sup>356</sup> Expert 1; Expert 3; Expert 6.

<sup>357</sup> Expert 4; Expert 6.

<sup>358</sup> Expert 3.

<sup>359</sup> Expert 2; Expert 3; Expert 4.

<sup>360</sup> Expert 2; Expert 3.

<sup>361</sup> Examples include murdering their mother, or having intended to do so, or setting the family home on fire (Expert 4).

<sup>362</sup> Expert 4; Expert 5; Expert 6.

<sup>363</sup> Expert 2; Expert 3.

<sup>364</sup> Expert 2; Expert 3; Expert 4; Expert 6.

foster families or the clients' mothers.<sup>365</sup> According to Expert 7, a few men are fathers, but the children do not seem to mean as much to them as to the mothers. The latter are usually worried how to regain contact with their children after being released, whereas men tend to accept the fact that there is no contact anymore.<sup>366</sup>

The social network a client can count on, is even more important once a person is released from preventive detention. According to Expert 2, some clients who have no relatives say:

I don't know what to do outside, I don't know anyone. Where should I work, where should I live, who should I meet, who should I talk to, if even already in here I have no one who supports me from outside? How am I supposed to find someone outside, if I am on my own already in here?

In general, clients are not released directly into their former social environment anyhow but stay in aftercare facilities for another five to 10 years.<sup>367</sup> Yet, the staff usually tries to find an institution that is close to the clients' social environment.<sup>368</sup> This is particularly challenging for female clients since there are fewer options. Firstly, due to their diagnoses, the women used to require more intensive support structures.<sup>369</sup> Secondly, some institutions reject the female clients for the lack of suitable personnel for the treatment of persons with medium severe personality disorders.<sup>370</sup> Expert 1 acknowledges that providing and finding the right aftercare for this clientele is 'still in its infancy, because we are still at the beginning with these seriously disturbed women; we don't know where the journey goes, no idea'. The question whether clients, male or female, would be able to be employed after release is again answered inconsistently. Expert 4 claims that at best they would be unskilled workers doing simple tasks, like helping to move or renovate a house supported by a personal assistant. Expert 2 thinks that the clients could maybe find a job in the intermediate job market or with a charity organisation. However, said interviewee states that many are too busy with their

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<sup>365</sup> Expert 2; Expert 3; Expert 6.

<sup>366</sup> Expert 7.

<sup>367</sup> Expert 2; Expert 4.

<sup>368</sup> Expert 4; Expert 6.

<sup>369</sup> Expert 1; Expert 2.

<sup>370</sup> Expert 1; Expert 6.

offence or disorder to have a chance to work or are on early retirement. In contrast, Expert 7 states that persons with personality disorders have a realistic chance of re-entering the regular labour market with the necessary support structures.<sup>371</sup>

#### *4.3.5 Sexuality, body and self-awareness*

As mentioned previously, sexuality is primarily hinted at when legitimising the strict separation of female and male clients. Experts 4, 5 and 7 also refer to homosexual relations among men; whether female relationships include intercourse is not mentioned. Generally, sex does not appear to play a major role among the male clients either. Expert 4 describes that men frequently look for bodily contact, such as holding hands or caressing each other's shoulders. Expert 5 explains that due to their disorder and/or medication, the men feel no immediate desire for sex. Women, on the other hand, are attributed sexual desire and activity by Expert 2 who states that long-term visits are only granted if the relationship has existed before coming to the facility, otherwise 'the women would get a lot of visits and we would always have the problem with contraception'. By 'the problem with contraception' the expert refers to pregnancy being counterproductive and therefore, speaking about contraception before release is also considered an important, gender-specific aspect in the area of preventive detention.

Sexuality is further tackled by Expert 5, who speculates about the relation of certain behaviours of the clients and their sexuality, biological sex and gender. In the expert's opinion, sexuality primarily plays a role in acts of self-aggression. There are said to be female clients who injure their secondary sexual characteristics, and men who might want to cut off their penis. The interviewee traces this behaviour back to the person feeling uncomfortable with their biological sex and hate for being a woman or a man. The expert describes how a woman might go to the hairdresser to have her hair done nicely and a minute later, in a flush of anger, tear her hair. Expert 5 comments: 'That's where you see the drama. The basic need [of] who you would want to be. But as soon as the other [part dominated by the disorder] hits, the split off, aggressive [part], then everything (...) beautiful is destroyed, and the being-a-woman in general [is destroyed]'. The expert further suggests that the body does not only become instrumental in acts of self-harm but

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<sup>371</sup> Expert 7.



is used as a 'provocative instrument' as well. In specific cases, male and female clients might get completely naked and run around the unit. Particularly women whose diagnosis includes paranoid-grumbling symptomology might undress in a room and present their nakedness, knowing that the room has video-surveillance, to irritate the system.<sup>372</sup>

Not assuming such an intentionality, Expert 3 claims that women have very little sense of shame. They run around half naked, also the overweight ones, 'where one might think, normally they would never like to show themselves that naked so much'.<sup>373</sup> The expert recounts how the female clients walk to the washroom with their blood-stained underwear without embarrassment, also in front of young male guards. Expert 5 further mentions that the women heavily neglect their hygiene and require a lot of assistance, for instance regarding their menstruation. According to Expert 3 too, the women are less neat than the men and need more guidance in personal hygiene and keeping their rooms clean. In a way, Expert 7 makes contradicting statements when saying that persons diagnosed with schizophrenia, which is the majority of male clients, have problems with hygiene and cleanliness, whereas this pattern is not per se part of a personality disorder, the predominant diagnosis among the female clients.<sup>374</sup>

Expert 5 already introduced some theories regarding the clients' sense of self by exploring their relation to their biological sex. Yet, another question is how far the clients themselves see and accept the diagnosis they are attributed and the offence they committed. According to Expert 7, persons with a personality disorder are generally able to develop an acceptance of the disorder if they want to. They need to acknowledge that they are, to a certain extent, responsible for their 'unfortunate life', the expert argues. This insight is particularly important since they will be confronted with similar difficulties after being released.<sup>375</sup> Persons diagnosed with schizophrenia, on the other hand, Expert 7 explains, are almost unable to gain full acceptance of their disorder because this would mean accepting that their whole existence is disturbed. It is enough if they accept parts of it, such as having to take medication and going to the doctor regularly.<sup>376</sup> Seeing their

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<sup>372</sup> Expert 5.

<sup>373</sup> Expert 3.

<sup>374</sup> Expert 7.

<sup>375</sup> Expert 7.

<sup>376</sup> Expert 7.

wrongdoing is easier to achieve, since it does not question their entire being as such, in the interview partner's opinion. Expert 1 thinks that it is easier for the female clients to see that they have committed a crime than to accept their diagnosis, because with a personality disorder a person feels that the disorder is normal and a part of themselves. Whether the female clients accept their disorder or see it as a normal part of their identity, they seem to see the wrongfulness of their *acts*. As mentioned earlier, the interview partners claim that the women themselves want to be locked up if they are in rage in order to calm down, and that they often feel sincerely sorry for the harm they have caused once the rage is over.<sup>377</sup>

#### *4.3.6 Explaining female deviance*

In order to understand why the female clients ended up in preventive detention in the first place, the interview partners raise two main aspects: a person's diagnosis and biography, which are inseparably intertwined.

The experts unisono consider the former to be key, since the diagnosis is the reason for a person being admitted to preventive instead of regular detention. Within the framework of preventive detention, it further plays a crucial role in the decision to hold a suspect legally responsible or not (see Chapter 4.1.1). According to Expert 7, persons diagnosed with a personality disorder will hardly ever be exempted from criminal responsibility 'because there is not really a reason why one should not know what is prohibited and [what is] allowed'. In contrast, with schizophrenia one is likely to be considered irresponsible for one's acts as it entails a severely disturbed consciousness, especially since the crime usually happens when the disorder is getting more severe, the expert explains.

When it comes to understanding the precise connection between the diagnosis and the crime, or better said, the reason for the different numbers of women and men deprived of liberty under each of the paragraphs and compared to regular detention, the picture is highly complex and therefore can only be explored in a very simplified way in this context.

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<sup>377</sup> Expert 1; Expert 3; Expert 5.

Expert 1 explains the fact that nationwide there are more women under para. 21/1 than 21/2 as follows. When one commits a crime and is diagnosed with schizophrenia, one is more likely to be admitted to preventive detention (under para. 21/1) since the initial manifestation of schizophrenia usually comes with such a serious and violent offence that it will be identified as being related to a severe mental disorder, which requires preventive detention instead of regular detention, right away. In contrast, if a suspect is diagnosed with a personality disorder, the chances for them to be admitted to preventive detention (under para. 21/2) are lower since they are not considered as ‘dangerous’ as to require admission to preventive detention instead of regular detention.<sup>378</sup> Expert 5 explains the low number of women in preventive detention with the statement that compared to men with psychiatric diagnoses women are less likely to assault others due to their lower level of testosterone. In addition, for sociological reasons women tend to pass through more other psycho-somatic institutions before ‘ending up’ in preventive detention than men.<sup>379</sup> In a similar vein, Expert 7 claims that there are significantly more women deprived of liberty under para. 21/1 than in regular detention because ‘women practically don’t commit homicide without being ill’. Schizophrenia multiplies the chance of a women to commit homicide by 20, whereas it is 10 for men,<sup>380</sup> and therefore levels the ‘natural’ difference in aggressiveness.<sup>381</sup>

Referring to the growing number of persons admitted to preventive detention, Expert 7 states that neither the number of persons diagnosed with schizophrenia nor the number of homicides as the offence leading to admission has increased since the 90ies. However, there was a rise in schizophrenia in combination with drug abuse and personality disorders as well as in persons being detained as a preventive measure for minor crimes. Because these are the crimes women are admitted for disproportionately, their number

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<sup>378</sup> Expert 1.

<sup>379</sup> Expert 5.

<sup>380</sup> With certain types of schizophrenia, for instance, paranoid schizophrenia, an increased severity means that the person perceives to be pursued by more and more persons and in their panic to find a way out they kill the person they consider to be responsible for the increase, which tends to be a relative, mostly the mother (Expert 7).

<sup>381</sup> Expert 7.

has been rising disproportionately compared to those of men over the last 15 years as well, as the expert elaborates.<sup>382</sup>

Besides the narrow framework of psychiatric reasoning, the interview partners further resort to broader sociological factors. Looking at the clientele in Asten, there are several parallels in the women's biographies, they argue. Many had a difficult or even traumatising childhood experiencing severe forms of violence, including sexualised violence.<sup>383</sup> Some grew up in a children's home or with a foster family,<sup>384</sup> and some were neglected, particularly in comparison to the biological children of foster parents.<sup>385</sup> The family environment was often characterised by 'alcohol, drugs, changing partners'.<sup>386</sup> Consequently, in their childhood the clients concerned lacked a stable attachment figure.<sup>387</sup> As mentioned earlier (see Chapter 4.3.4), also the female clients' own children tend to be cared for in a foster family while their mothers are in detention.<sup>388</sup> Expert 2 states that enabling contact between mothers and their children is complicated due to the reluctance of the state child and youth welfare system; according to Expert 7 the same applies to regaining parental custody after release.

According to the interview partners, several female clients themselves turned towards alcohol and drug abuse, had no regular job and maybe even lived on the streets.<sup>389</sup> The women predominately belong to a marginalised group, so that Expert 3 recounts how the story of a female client from a well-off middle-class family, who had studied at a prestigious university, left her speechless. Expert 5 puts it that way: 'The problem is, we have a couple of very very broken women, who are rather broken in their life story, (...) where simply everything went wrong. (...) they simply lacked everything that could be lacking'.

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<sup>382</sup> Expert 7.

<sup>383</sup> Expert 1; Expert 4; Expert 5.

<sup>384</sup> Expert 1; Expert 2; Expert 3; Expert 6.

<sup>385</sup> Expert 1.

<sup>386</sup> Expert 1.

<sup>387</sup> Expert 1.

<sup>388</sup> Expert 2; Expert 3.

<sup>389</sup> Expert 2; Expert 321; Expert 4; Expert 5.

The other common denominator in the clients' biographies is their continuous or recurring institutionalisation already before being admitted to a detention facility.<sup>390</sup> According to Expert 7, it is not a rare thing for clients to have passed their entire lives in state institutions, 'children's home, psychiatry, assisted living, preventive detention', and Expert 5 explains that the women end up in Asten because 'no other psychosocial institution in this country could hold them (...) because no one can think of anything else anymore'. Thus, the expert argues, women might take a different route than men, since they spend more time in psycho-somatic institutions before, but once in preventive detention they come with the same problems as the male clients.

## **5. Discussion**

The previous two chapters looked at the deprivation of liberty of women from different perspectives. On the one hand, it is embedded in a framework of social and legal norms. This includes historically grown conceptions surrounding women in conflict with the law as well as standards for their treatment in detention (see Chapter 3). On the other hand, the lived realities of the persons concerned are a lot more diverse and complex than any theory or set of rules can cover. Alone due to the different social categories intersecting within a person their experience of detention will vary depending on their ethnicity, age, gender or (dis)ability, just to name a few.

Joining the insights gained so far, this chapter explores the intersection of the latter two in the context of Asten correctional facility. However, it is important to reiterate that Asten must not be understood as representative of preventive detention in general due to the very specific composition of its clientele (see Chapter 4.1.4). The subsequent observations, therefore, can only be taken as an impulse to think about and look into the role of gender in preventive detention on a more general level.

### **5.1 Being a woman in preventive detention**

The answer to the question what it means to be a woman in preventive detention, according to the staff in Asten, seems to be: it does not matter. Several times, the interview partners point out that the living conditions and behaviour of the female clients is

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<sup>390</sup> Expert 3; Expert 5; Expert 6; Expert 7.

exclusively defined by their mental disorders instead of their gender. In fact, the distinction between biological sex and gender (see Chapter 2.1.3) can be well observed in Asten. From a biological point of view, the clients are clearly women, their performance, however, is described as contradicting traditional notions of femininity (see Chapter 4.3).

Explicitly or implicitly the interviews suggest that the only aspect clearly differentiating the female clients from men is their reproductive function: unlike the male clients they menstruate and can get pregnant. Yet, they are described as not being able to deal with both of these aspects like adult women. They require ‘assistance’ with the hygiene during their period<sup>391</sup> and should not become pregnant because it is perceived as being counterproductive,<sup>392</sup> presumably to their betterment and development. Therefore, in *handling* their biological womanhood, female clients appear to deviate from the social norm. A female interviewee expresses her disbelief in the light of the women’s conduct, such as openly carrying their blood-stained underwear to the washroom or not hiding their naked bodies, especially if they do not meet the current beauty standards (see Chapter 4.3.5).<sup>393</sup> By not feeling ashamed of their menstruation or body (shape), they do not conform to traditional notions of femininity. Interestingly, this way the female clients seem to be perceived as ‘unnatural perversions of normal femininity’<sup>394</sup> rather due to their mental disorder than because of breaking with the social norm of women not committing crimes (see Chapter 3.1.1).

However, in contrast to what the literature on gender in the context of detention suggests (see Chapter 3.1.5), the female clients do not seem to feel the urge to restore their supposedly questioned femininity. On the contrary, one expert even speculates that they engage in self-destructive behaviour targeting their secondary sexual characteristics because they ‘hate’ their womanhood.<sup>395</sup> Either way, the potential loss of their womanhood apparently does not compromise their identity. The much more salient category that questions, or rather say endangers their identity, is the disorder attributed to

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<sup>391</sup> Expert 5.

<sup>392</sup> Expert 2.

<sup>393</sup> Expert 3.

<sup>394</sup> Carlen and Worrall, p. 2.

<sup>395</sup> Expert 2.

them (see Chapter 4.3.5). Consequently, according to one of the experts, the female clients are more likely to understand that they have committed a crime (which could question their femininity), than accept being diagnosed with an ‘illness’ (which could in turn assert their womanhood).

The interview partners themselves, in turn, resort to this traditional way of making sense of women breaking the law (see Chapter 3.1.1) to a certain extent. Exploring illness as such a component might seem highly redundant in a setting where persons are detained precisely *because* their mental disorder is considered to have played a crucial, if not the defining role in them committing a crime (see Chapter 4.1.1). However, within this overarching framework, the staff reproduces the idea of women ‘usually’ not becoming offenders without some (neuro)biological imbalance. Some interviewees explain that the naturally low potential of aggression and inclination of women to break the law is dramatically increased by their disorder,<sup>396</sup> because ‘after all, women practically do not commit homicide without being ill’<sup>397</sup> (see Chapter 4.3.6). This argumentation is in line with the tendency to trace a woman’s criminal conduct back to factors outside of her control, such as developing an illness (see Chapter 3.1.1). The interview partners resort to this conception in order to explain the nationwide comparatively high proportion of women in preventive detention according to para. 21/1 (13,8 per cent) as opposed to regular detention (5,7 per cent), as well as the fact that on a national level there are more women in preventive detention under para. 21/1 than para. 21/2 (5,4 percent) (see Chapters 4.1.2 and 4.3.6). This means that women are disproportionately deprived of their liberty without being held accountable for the committed offence (see Chapter 4.1.1). As outlined in Chapters 2.1.2 and 3.1.1 not being held accountable entails denying the person concerned the capacity to act independently and make their own choices.

However, in Asten this nationwide proportion of female clients under para. 21/1 and para. 21/2 is reversed since there are significantly more women deprived of liberty according to para. 21/2 than para. 21/1 in the facility (see Chapter 4.1.4). Consequently, the majority of the women living in the facility are not exempted of responsibility for their criminal

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<sup>396</sup> The diagnosis schizophrenia is an example for the concept of “delinquency” as it aligns a “disposition” with a certain type of offence, namely homicide, as well as the required treatment.

<sup>397</sup> Expert 5; Expert 7.

behaviour legally. Yet, the staff relativises the female clients' personal responsibility to a certain extent by frequently citing detrimental life circumstances prior to preventive detention. Referring to women's biographies in order to explain their criminal behaviour and their mental disorder is a common practice identified in academic literature (see Chapter 3.1.1). While most interview partners do so implicitly, one of them explicitly states:

The family was broken already before, and then the son or daughter committed an offence because there was no familial support. Or in the worst case he was battered by the parents, abused, we have a lot of those. The social environment was already that damaged that you don't have to be surprised that he is in preventive detention.<sup>398</sup>

The aspects mentioned by the expert are reiterated by other interview partners, so that the picture of a 'classical' biography of the women in Asten arises. On the one hand, most of the female clients are said to have experienced various forms of violence, including sexualised violence, from childhood on. Further, their social environment is described as having been characterised by drugs and alcohol, be it by the parents or, later on, the women themselves (see Chapter 4.3.6). Several academics and practitioners cite both of these components as being characteristic for women in conflict with the law in general. They further name a history of institutionalisation as a common denominator among female offenders, who tend to have spent parts of their childhood and youth in state institutions and been to psychiatries several times (see Chapters 3.1.1 and 3.2). This pattern is indeed reflected in the biographies of the female clients in Asten as well. According to the staff, many women grew up in a childcare institution or with a foster family and the vast majority has stayed in a psychiatry at least once before arriving at Asten (see Chapter 4.3.6). In fact, the way that one interview partner strings together children's home, psychiatry, assisted living and preventive detention to one single strand in the biography of many clients,<sup>399</sup> strongly reminds of Foucault's concept of the 'disciplinary career' of a 'delinquent'.<sup>400</sup> According to Foucault, the concept of

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<sup>398</sup> Expert 4.

<sup>399</sup> Expert 7.

<sup>400</sup> Foucault, p. 387.



‘delinquency’, the inherent potential to commit a crime, allows to mark persons from a lower social class in order to justify depriving them of liberty (see Chapter 2.2.1). Interestingly, also the women in Asten, who are detained because of their risk potential, are described as forming part of a marginalised group, so that a client coming from a well-off family is considered exceptional.<sup>401</sup>

Taking external circumstances into account and not removing the individual from their social context could mean acknowledging society’s responsibility in (re)producing disorders and crimes to some extent (see Chapter 2.1.1, 2.2 and 3.1). Yet, only two interview partners move beyond referring to the direct social environment of the individual clients to the larger socio-political context (see Chapter 4.3.6). On expert argues that preventive detention is being discovered to take over the role of the large-scale psychiatric facilities that were disintegrated in the 90s with the goal to de-institutionalize mental health care.<sup>402</sup> Now those persons who are too ‘severely ill’ to live independently outside of an institution are eventually admitted to preventive detention,<sup>403</sup> as ‘the last total institution that is not regular detention’ instead.<sup>404</sup> Indeed, while the number of persons in regular detention decreased over the last 10 year, the number of those in preventive detention registered an almost continuous increase (see Chapter 4.1.2). While this is true for both genders, women tend to end up in preventive detention later than men for spending more time in preceding psycho-social institutions.<sup>405</sup> One interview partner hints at sociological factors playing a role in this trends,<sup>406</sup> probably referring to the societal reluctance to put women in detention due to the historically grown conception of femininity being equated with innocence and virtue (see Chapter 3.1.1). Either way, the sociological theory that women are rather hospitalised than criminalised (see Chapter 3.1.3) seems to be reflected in the practice of admitting persons to preventive detention as well. This equally applies to the popular belief that the few women that end up in detention must have committed particularly severe crimes (see Chapter 3.1.1), or in

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<sup>401</sup> Expert 3.

<sup>402</sup> Expert 7.

<sup>403</sup> Expert 7.

<sup>404</sup> Expert 5.

<sup>405</sup> Expert 5.

<sup>406</sup> Expert 5.

this case, in addition suffer from the most serious disorders, since some interviewees claim that the female clients in Asten are ‘the most disturbed’<sup>407</sup> (see Chapters 4.3.1 and 4.3.6).

Even if the biographies of the female clients are understood as playing a crucial role in their current behaviour, the staff emphasises the women’s need to take over responsibility for both their past and their future. In fact, the treatment is centred around developing and strengthening the clients’ ability to take over responsibility (see Chapter 4.3.5). This approach bears certain resemblance to cognitive-behavioural programmes held in regular prisons, which claim to help detainees to develop the necessary self-confidence and ego-strength to break with negative patterns as well as reflect on their life circumstances (see Chapter 3.1.4). Accordingly, one interview partner states that ‘it is about replacing external attributions with internal ones and demonstrate in the psycho-therapeutic process how far the unfortunate life path involves own responsibility’.<sup>408</sup> This wording suggests that the women themselves resort to external circumstances to justify their behaviour and by that actively take part in being perceived as victims rather than self-determined agents. The staff’s aim appears to be to support the female clients in becoming exactly these self-determined agents who can assume responsibility for their choices. While this approach recognises the women’s agency and potential to make such choices, the interview partners implicitly or explicitly seem to portray the female clients as children who need to be turned into adult women. They are supposed to learn how to deal with their emotions and how to take over responsibility; to ‘practice it in a dry run’ as one interview partner puts it.<sup>409</sup> With methods of classical behavioural therapy the female clients need to be trained to adhere to commitments in ‘very small steps’, because their emotional experience and cognitive basic principles are ‘rather at the level of an infant, with who no cooperative behaviour over a longer timeframe is possible’<sup>410</sup> (see Chapter 4.3.1).

In fact, in other instances too, the women in Asten are referred to as children or treated as such to some extent. This is very much the case when it comes to the classic organising

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<sup>407</sup> Expert 5.

<sup>408</sup> Expert 7.

<sup>409</sup> Expert 1.

<sup>410</sup> Expert 5.

principles of closed institutions: privileges and punishments (see Chapter 2.2.2). As Goffman points out, '[p]unishments, how severe they might be, the inmate only knows from home as something that children and animals receive'.<sup>411</sup> He further describes punishments as the de facto withdrawal of a primarily granted privilege.<sup>412</sup> The group system, which for organisational reasons is only in place in the female client's section, is exemplary. The women are by default in group A, which allows for the most time outside of their room. This privilege will be taken away if a client does not work well in the group by displaying aggressive behaviour. She is then either 'sent to her room', or rather locked in it for a certain period of time, or downgraded to a group where she generally has to spend more time alone in her room, equalling 'house arrest' (see Chapter 4.3.2). The interview partners stress that they do so not to punish the women but to give them time to cool down. Recounting that some clients welcome being locked in their rooms for a bit to become calmer, the staff can frame locking them up as being for their own good. It does not only protect the clients from hurting themselves, but also from the honest regret they feel after having assaulted others (see Chapter 4.3.2). This benevolent paternalism is another pattern cited in academic literature on the treatment of female offenders:

The prison – represented by officers, staff, and administrators – acts as a punitive “parent” imposing rules and sanctions to control a “child.” For instance, women have shared accounts of having angered authorities and, as a consequence, being moved from a choice living unit and/or job but being told that such actions were “for their own good.”<sup>413</sup>

As is the function foreseen for the system of punishments and privileges, the group system helps fulfilling the main goal of all closed institutions: to maintain order and have detainees/clients conform (see Chapter 2.2).

This aim is further achieved by the disproportionate presence of staff, including prison guards, at the women's flat-share communities, which allows to supervise the women and their interaction close enough to prevent harmful behaviour even without a centrally

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<sup>411</sup> Goffman, p. 56, (*author's translation*).

<sup>412</sup> Goffman, pp. 54-55.

<sup>413</sup> Zaitzow, p. 28.

located watch room (see Chapter 4.3.2). This harmful behaviour can take several forms. In line with research on the topic, the women tend to engage in self-injury (see Chapter 3.1.5). However, they do not only direct their aggression towards themselves but also outward. The interview partners repeatedly stress the female clients' extremely high potential for aggression and recount highly dangerous assaults on fellow clients and staff (see Chapters 4.3.1 and 4.3.3). Their ascribed 'dangerousness' is in stark contrast to the traditional association of femininity with peacefulness, softness and prosocial behaviour (see Chapter 2.1.3 and 3.1.1). Accordingly, the women in Asten are not in detention for 'classic feminine' crimes, namely minor economic and non-violent crimes (see Chapter 3.1.2), but primarily for offences against life and limb (e.g., various degrees of personal injury) and against freedom (e.g., dangerous threat, coercion or persistent pursuit) (see Chapter 4.1.4).

Next to serious physical attacks the dynamic between the female clients is described as characterised by quarrels, mobbing and intrigues. Perceiving the interaction of the female clients as highly problematic and scheming supports the insinuation of women being complicated, manipulative, irrational and 'very very deceitful'.<sup>414</sup> By comparing the interpersonal dynamic at the women's flat-share communities to a 'kindergarten',<sup>415</sup> they are further infantilised. Therefore, the female clients also contradict the notion that of life in a women's prison being far less violent and tense than in a facility for men. While they also seem to primarily form dyads, which is defined as characteristic for women in detention (see Chapter 3.1.5), the affective relationships they form are neither described as stable nor as providing security. Quite the contrary, according to one interview partner the risk of destabilising the female clients might require separating certain persons from each other by moving them to the other flat-share community in the unit.<sup>416</sup> Therefore, also intervening in the women's private lives is framed as being for their own good (see Chapter 4.3.3).

On the other hand, the collaboration and solidarity identified by research on female prison subcultures (see Chapter 3.1.5), appear to exist in the female communities as well, as the

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<sup>414</sup> Expert 3.

<sup>415</sup> Expert 4.

<sup>416</sup> Expert 1.

interview partners' accounts of exchange deals among the women suggest.<sup>417</sup> Further, right after naming mobbing and quarrels as defining feature in the female clients' interaction, some interview partners claim that the women in general get on well with each other (see Chapter 4.3.5).<sup>418</sup>

These seemingly contradicting observations are exemplary for how the interview partners portray the women. They frequently relativise their description of the female clients by stressing that many of their statements only refers to a handful of the women and that the majority is less challenging. This then raises the question why the staff decides to focus on those few 'extreme' cases. One could speculate that these are the cases opposing traditional notions of femininity the most and therefore enable making a strong point for the conception that gender does not play a significant role. However, this section highlighted that the perception of the female and male clients' lived realities is, to a certain extent, indeed informed by an interplay of gender-stereotypical and -atypical elements. The next section will discuss what these varieties in gender-specific conceptions might mean for the practical conditions of the accommodation of women in preventive detention.

## **5.2 Conditions and treatment of female clients in Asten**

As outlined in Chapter 3.2 national, regional and international standards on persons deprived of liberty include specific provisions for female detainees in order to meet their 'special needs'. These are mainly located in the areas of health care, especially in regard to (potential) maternity, classification and gender segregation, contact with the family, work and educational programmes as well as social reintegration.

However, the relevant bodies first and foremost recommend refraining from detaining women in conflict with the law altogether and advocate for granting non-custodial measures instead. The reasons given are the supposedly lower risk potential of female offenders as well as their role as primary care givers, because '[b]y keeping women out of prison, where imprisonment is not necessary or justified, their children may be saved

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<sup>417</sup> Expert 3.

<sup>418</sup> Expert 2; Expert 6.

from the enduring adverse effects of their mothers' imprisonment (...)''.<sup>419</sup> The comparatively small number of female detainees means that detention facilities often cannot classify them according to their de-facto risk potential and thus subject them to a stricter security regime than necessary (see Chapter 3.2.4).

These aspects only partly apply to the female clients in Asten. Most importantly, these women are kept in a detention facility precisely *because* they are considered dangerous to their social environment, rendering non-custodial measures void (see Chapters 4.1.1, 4.3.1 and 4.3.2). Their potential for aggression is described as significantly higher than that of the male clients, so that the female section is listed as one of two 'critical' flat-share communities by the Ministry of Justice, registering 10 assaults on staff and two assaults on fellow clients between September and December 2019.<sup>420</sup> For that reason, the unit where the women live is in fact the most securitised area of the entire facility, as it is the only one where prison guards are present. In addition, unlike in the two areas for men, their rooms are locked overnight and parts of the day (see Chapters 4.1.4 and 4.3.2). This practice is not in line with the minimum standards for women in Austrian detention facilities (see Chapter 3.2), but in fact from a legal perspective too, the female clients' gender is of secondary importance compared to their diagnoses. Thus, the standards for women in correctional facilities are overrode by special provisions for persons with a psychiatric diagnosis.<sup>421</sup> However, again, the body of female clients and its reproductive function are given a special status: 'of course we conform [to the decree] what concerns hygiene provisions' one staff member says, very likely referring to women's hygiene 'needs' during menstruation.<sup>422</sup>

The international, regional and national standards do not only focus on women's ability to be potential mothers but on *being* mothers already (see Chapter 3.2). For example, Bangkok Rule 26 holds that '[w]omen prisoners' contact with their families, including their children, (...) shall be encouraged and facilitated by all reasonable means', be it by granting non-custodial measures or providing for options to have babies and infants stay

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<sup>419</sup> Bangkok Rules, p. 43.

<sup>420</sup> C. Jabloner, pp. 2-3.

<sup>421</sup> Expert 5.

<sup>422</sup> Expert 5.

with their mothers. The latter requires special structures such as mother-child-units, a nursery or a kindergarten on site as well as specialized health care services and staff. If neither of the two options are available, the facilities should make efforts to facilitate familial contact, for instance, by providing for child-friendly visiting areas (see Chapter 3.2.4).

While the interviews do not make quite clear how many of the female clients in Asten are mothers, the little room the topic takes up during the interviews suggests, that even if they do, it does not define the women's day-to-day life much. About half of those who have children, are said to be in no contact with them at all and at least one client had her children taken from her already before detention. In fact, staff members recount complications in trying to uphold contact between mothers and their children during detention due to the reluctance of the state child and youth welfare. The latter further seems to complicate the female clients regaining parental custody after release (see Chapter 4.3.4).<sup>423</sup> It appears that the state does not necessarily share the opinion of CPT, which claims that '[g]ood contact between mother and child is in the interest of both of them'.<sup>424</sup>

This raises the question which repercussions the preventive detention of the female clients in Asten really has on their social networks and wider society. From the interviews it seems that about half of the women receive no visits and have a rather weak social network or one that is even considered to have a negative impact on them. The other half is said to be able to rely on the support of a variety of relatives, most importantly their parents (see Chapter 4.3.4). Maintaining contact to these persons can be challenging though, because, as explained in the various standards and publications on women deprived of liberty:

the small proportion of women prisoners worldwide and the resource implications of building sufficient women's prisons to ensure that women offenders are imprisoned close to their homes, give rise to a situation in which women may either

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<sup>423</sup> Expert 2; Expert 7.

<sup>424</sup> CPT, 2018, p. 5.

be housed in annexes of male prisons, close to their places of residence or in women's prisons, which are most often situated at a long distance from home.<sup>425</sup>

The female clients in Asten in fact face both of these problems at the same time: they are not only accommodated in an annex to an institution for men but very likely to be housed far from their usual social environment due to the fact that Asten is the only detention facility for women deprived of liberty under para. 21/2 in the entire country (see Chapter 4.1.2).

This might not necessarily change right after release, when being close to one's social network is crucial to effectively support re-socialisation, since adequate aftercare facilities for the female clients are very limited (see Chapter 4.3.4). According to the interviewees there is a lack of facilities that can provide the women with the required support and treatment. They refer to a highly structured and intensive treatment, as well as staff that is able to 'handle' the female clients' potential for aggression. The scarcity of such facilities cannot only result in the women staying far from their home but also in a prolonged detention, as one staff member explains:

Because after all they are released *conditionally*, and in the [court's] instructions the confirmation for a spot is written and this is why they all need a fixed spot. Eventually, everything needs to be tested (...) and then they cannot try out all these things without having the confirmation of a spot. And then we cannot advocate for a conditional release though, because we don't know how they behave and how they react to the liberty.<sup>426</sup>

Another interview partner explains these difficulties with the fact that they simply have too little experience with female clients (under para. 21/2) to have adequate solutions and structures ready for them after release.<sup>427</sup>

Consequently, being a woman in a predominately male system entails disadvantages, irrespective of whether it is regular or preventive detention. Realizing that the usual concepts cannot simply be applied to this minority, authorities and staff experiment with

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<sup>425</sup> Bangkok Rules, p. 39.

<sup>426</sup> Expert 2.

<sup>427</sup> Expert 1.



finding new ones (see Chapter 3.2 and 4.3). Another example for this, is the classification of female clients according to their risk potential in Asten. Whereas the men can move from the stricter clinical area to the socio-therapeutical area, where they enjoy greater freedom, all female clients are accommodated in the same section regardless of their status (see Chapter 4.3.2). Like that, in Asten too, some women might be subjected to harsher security measures and more surveillance than necessary due to the overall low number of female clients.

Yet, the women in Asten can profit from their small number in at least one aspect as well.<sup>428</sup> There are not only more personnel, namely prison guards, to supervise and control them, but also a bigger number of specialized staff to care for them (see Chapters 4.1.4 and 4.3.2). This allows paying more attention to the individual women and making sure that each staff member takes over the task they are best qualified for. The professions present at the unit to support the female clients in different aspects of their day-to-day life therefore include social work, social assistance as well as social pedagogy. In contrast, in the male areas their tasks are primarily under the responsibility of nursing staff (see Chapter 4.3.2). The interaction between staff members and clients in Asten does not appear to be in line with Goffman's assumption that 'each of the two groups sees the other through glasses of narrow, hostile stereotypes'.<sup>429</sup> Quite the opposite, as mentioned earlier, the staff is continuously present in the flat-share communities and the clients approach them if they want to e.g., play a game or talk. In fact, one interview partner mentions the necessity to remind clients that their relationship is merely of a professional nature and cannot be mistaken for a friendship. In that sense, by drawing a clear line between themselves and the clients, the staff confirms Goffman's argument that 'as general rule there is a big and often formal prescribed social distance'.<sup>430</sup> This can happen on an explicit level, like in the example just mentioned and with the rule to only address clients by their surname (see Chapter 4.3.3). However, also implicitly the staff constructs an in-group of themselves and the author as opposed to the out-group of the clients. They do so by stating that the clients 'experience these things always much more dramatic than

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<sup>428</sup> Expert 4.

<sup>429</sup> Goffman, pp. 18-19, (*author's translation*).

<sup>430</sup> Goffman, p. 19, (*author's translation*).

the likes of us’<sup>431</sup> or referring to the high-skilled labour market comprising jobs that ‘are the normal ones. The jobs that we have’.<sup>432</sup> Maybe in addition the notable reference by one interviewee to the female clients as ‘ladies’ can be interpreted as a strategy to establish distance as well (see Chapter 4.3).

In all areas the staff consists of male and female professionals, which is considered very positive by the interview partners. Relying on gender-specific conceptions of masculinity as authoritative and femininity as especially skilled at an interpersonal level (see Chapter 4.3.3) the interviewees implicitly support the claim that ‘the employment of women in men’s prisons has its advantages in (...) changing the male dominated culture of the prison system and, as asserted by many prison experts, having a calming and positive effect on men’.<sup>433</sup> More importantly, however, this constellation should serve to prevent sexualised violence between staff and clients. As prescribed by international, regional and national standards (see Chapter 3.2), in Asten no staff member is ever allowed to be alone with a client from the other gender (see Chapter 4.3.3). Reiterating the premise of these standards, namely that men are perpetrators and women are victims, the interview partners’ statements strongly suggest that they have the protection of female clients and staff from the abuse of male staff and clients in their mind when speaking about this issue. Interestingly, the female clients, who are usually seen as lacking the supposedly feminine qualities of vulnerability, weakness and fragility that would require protection, are suddenly in this position by virtue of their biological sex. However, compared to the great importance the relevant international bodies and national authorities attribute to the protection of female detainees from abuse, the interviewees only reflect on this subject when directly asked about it. Yet, it is not merely this lack of attention, which suggests that sexualised violence is not considered to be relevant for life in Asten by its staff. Moreover, some interview partners frame abuse as something that is only there in theory but not in practice (see Chapter 4.3.3). One interview partner refers to false allegations by female clients of sexual harassment by male guards,<sup>434</sup> whereas another one

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<sup>431</sup> Expert 1.

<sup>432</sup> Expert 2.

<sup>433</sup> UNODC, p. 36.

<sup>434</sup> Expert 3.

emphasises that female staff members ‘only’ receive ‘sexualised comments’ by male clients, but they never touch the women inappropriately.<sup>435</sup> Notably, sexual harassment appears to be exclusively understood as a physical act, instead of a verbal one.

In fact, when the interview partners speak about sexual practices, they seem to refer to *desired* rather than enforced sexual encounters. Unlike some of the literature and NGO-statements mentioned in Chapter 3.2, who oppose mixed-gender programmes due to the risk of re-traumatisation or abuse of female detainees/clients by the male ones, the staff in Asten dismisses mixing female and male clients for a very different reason. The mixed-gender events and groups had to end because the staff could not control if a man and a woman would disappear together, making reference to supposedly consensual sexual encounters between the women and men (see Chapter 4.3.3). The interviewees explicitly and implicitly suggest that the issue primarily lies with the female clients whose attachment problems and emotional lability would have the situation getting out of hand. Therefore, the staff seems to be more in line with literature that claims that:

in the emotionally highly charged period of detention any contact with men as potential love object distracts several women (...) from themselves. For that already visual and auditive contact are sufficient, also co-educative measures are always to the disadvantage of the participating women.<sup>436</sup>

Then again, some interview partners themselves relativize this heteronormative premise by pointing at homosexual relations among female and male clients as well.<sup>437</sup> Their potential for destabilising the clients is explicitly outlined when describing the volatile and short-lived romantic relationships among female clients (see Chapters 4.3.3).<sup>438</sup> Further, the interviews suggest that sexual relations in general do not play a significant role. Especially the men, who are said to have little sexual desire due to their disorder and/or medication and engage in physical expressions of affection such as holding hands or caressing each other (see Chapter 4.3.5), defy classical conceptions of prison masculinities (see Chapter 3.1.5).

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<sup>435</sup> Expert 4.

<sup>436</sup> Michels, p. 391, (*author's translation*).

<sup>437</sup> Expert 5; Expert 7.

<sup>438</sup> Expert 1.

The interviewees further resort to gender-specific conceptions when elaborating the benefits mixed-gender activities could, in theory, entail. For one thing, already inside of the facility the men and women could learn from one another how to approach certain issues and might prefer conversations with someone from another gender once in a while.<sup>439</sup> The statements insinuate a dichotomy of male and female, where each side is associated with distinct qualities (see Chapter 2.1.3). On the other hand, one interview partner claims that the discrepancy between the strict divide of women and men inside the facility and the mixed-gender reality outside is likely to make the re-integration into society even more difficult, since the deprivation of contact to the opposite gender on equal footing apparently has the clients ‘unlearn’ how to interact with one another ‘reasonably’, especially men with women (see Chapter 4.3.3).<sup>440</sup>

However, the lack of joint activities does not mean that the female clients suffer any disadvantage in regard to programmes in the facility. In Asten the men and women can participate in the same range of therapeutical, occupational and educational activities. The latter two are available in a very limited scope though. Occupational activities encompass small household chores, gardening, small-scale farming or handicraft (see Chapter 4.1.4 and 4.3.2). These activities are meant to be of therapeutical nature rather than generating economic output or offering vocational training, since the focus of preventive detention lies on psycho-social rehabilitation, instead of preparing the clients to (re-)enter the labour market upon release.<sup>441</sup> In fact, according to the interview partners, many of the clients would not even be able to complete a regular day of work due to their disorder and did not have a (steady) job before (see Chapter 4.3.4). The fact that in Asten neither men nor women have actual employment or vocational training renders theories of detention facilities serving the aim to produce workers (see Chapter 2.2.1) void. In addition, it is likely to reduce the importance attributed to equal work opportunities for male and female detainees by the relevant normative standards (see Chapter 3.2).

When it comes to other activities though, there appears to be a certain gender bias. While as a general rule the male and female clients are offered the same group activities (e.g.,

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<sup>439</sup> Expert 1; Expert 4.

<sup>440</sup> Expert 7.

<sup>441</sup> Expert 1.

ergotherapy, walking groups, relaxation), there is one module available only to the women. This ‘women-specific’ module includes groups on mindfulness and body awareness training. The staff explains this reproduction of the traditional association of femininity with corporality (see Chapter 2.1.3) by the fact that there are more overweight women than men and that there must have been a demand for these groups by the female clients themselves (see Chapter 4.3.5). While the interviews suggest that the staff in Asten seeks to design the framework conditions according to the women’s individual ‘needs’, be it by offering specific programmes or adapting the timeframe of assessing the treatment agreement to the female clients reduced ability to adhere to commitments (see Chapter 4.3.1), it is left open who decides on what these ‘needs’ are – the staff or the clients themselves.<sup>442</sup>

Next to the daily schedule, the clients’ lived realities are shaped by the architectural design of the facility. Consisting exclusively of shared living-communities, Asten lives up to the Austrian minimum standards, which foresee this form of accommodation for all women (see Chapter 3.2.3), as well as to some of the ‘good practices’ mentioned in literature on the topic (see Chapter 3.2.4). The same applies to the provision of housing women in small units in order to facilitate management and improve the coexistence. In Asten the two flat-share communities for female clients have room for 15 and 21 women respectively, and in the new building they are conceptualised as units of 16 persons each (see Chapter 4.1.4 and 4.3.2). The staff in Asten emphasises the importance of this design since it allows for the individualised treatment and closer supervision outlined above. In addition, according to an interviewee, the female clients themselves found smaller units to be a lot better and the atmosphere more relaxed.<sup>443</sup>

In many other aspects, however, the female clients’ diagnoses, or rather the potential for aggression associated with it, inhibit the implementation of suggested gender-specific designs (see Chapter 3.2.4). For instance, accommodating the women in small cottage-like houses in a village-like layout would require a lot more staff than is available to guarantee the necessary support and supervision. While these concepts of independent

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<sup>442</sup> See also Chapter 3.2 on the controversial conception of ‘specific needs’.

<sup>443</sup> Expert 3.

living might work for some women in regular detention, the female clients in Asten are considered to lack the abilities for living independently.<sup>444</sup> The interviews suggest that in several aspects the female clients differ significantly from the premises that these ‘good practices’ for women in detention are built on. These include supposedly feminine qualities like making efforts to make their environment prettier and homier instead of defying it altogether, which would allow for ‘designs different from the prison-like, vandal-proof type’<sup>445</sup> (see Chapter 3.2.4). Quite the opposite is the case for the female clients in Asten, who, in fact, very much need a vandal-proof environment. Since violent assaults or self-aggressive behaviour are prone to happen anytime, the interior design is primarily guided by the intent to minimize the options for hurting oneself or others.<sup>446</sup> Instead of using ‘softer’ materials ‘for creating more pleasant (...) custodial environments’,<sup>447</sup> the interior needs to be void of anything that could be used as a weapon, which includes having heavy, fixated furniture with round edges and made from plastic.<sup>448</sup> In addition, one interview partner claims that the women would not be able to deal with a nice, homey, high-quality environment because it represents everything they never had in their lives and thus has to be set on fire, destroyed, smashed or flooded all the more.<sup>449</sup>

As a consequence, the opinion ‘that it is preferable to have several small facilities located across the territory (...) rather than a single facility with large capacity’<sup>450</sup> held by scholars in regard to detention facilities for women is almost the opposite of what seems to be suitable and feasible for the female clients in Asten. Their high potential for aggression, repeatedly emphasized by the interview partners, is likely to make accommodating the women in a large-capacity hospital-like building with specialized staff at hand the more adequate option for both the safety of others as well as their own. Further, in light of their history of institutionalisation (see Chapter 4.3.6) such a setting might even feel more familiar and reflect the design of their ‘usual’ environment better

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<sup>444</sup> Expert 5.

<sup>445</sup> García Basalo, p. 169.

<sup>446</sup> Expert 1.

<sup>447</sup> Jewkes, Jordan, Wright et al., p. 10.

<sup>448</sup> Expert 1.

<sup>449</sup> Expert 5.

<sup>450</sup> García Basalo, p. 167.

than small cottages. The interviews suggest that the ideal accommodation for the female clients most importantly would have many options for the women to calm down in moments of overwhelming emotions. These encompass single rooms, so-called time-out-rooms with a safe and soothing interior design as well as a lot of space inside and outside the facility. The outside should feature open areas, green spaces, places to linger and maybe playing options (see Chapter 4.3.2). At the moment, however, the women are accommodated in an old building, described as absolutely inadequate by the interview partners,<sup>451</sup> at the fringe of the premises, which represents exactly the practice of keeping female detainees in ‘an addendum to the adult male estate’<sup>452</sup> criticised by academics and human rights bodies alike (see Chapter 3.2.4). However, a new building, where also the female clients will be moved to, is under construction. This allows to take the women’s lived experiences into consideration already in the planning phase and will indeed offer them many of the aspects mentioned above (see Chapter 4.3.2).

### **5.3 Concluding remarks**

This chapter explored how far the characteristics and lived experiences of the female clients in Asten correspond to those of women in regular detention stipulated in the literature on the topic as well as by international, regional and national standards (see Chapter 3). What emerged is a diverse picture, which proves that lived realities can hardly be captured by general theories and concepts. On the one hand, the interview partners’ accounts give off the impression that the women in Asten are rather the opposite of how women in detention are generally described. In contrast to the endeavour of international organisations and academics to raise awareness for the ‘distinct needs’ of female offenders, the staff in Asten explicitly denies a fundamental difference between the clients due to their gender as it understands the lived experiences of the women and men inside the correctional facility as almost exclusively defined by their diagnoses. On the other hand, a range of their observations and statements are informed by and reproduce

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<sup>451</sup> Because of their growing number the women were moved from the modern main building this building as an ‘emergency solution’ until the new building was going to be done. Since the house was built for persons with a significantly lower risk potential, its design jeopardizes the safety of clients and staff as its spatial conditions hardly allow for the staff to notice behaviour endangering others or oneself as soon enough to prevent major damage (Expert 4, 16 July 2021).

<sup>452</sup> Jewkes, Jordan, Wright et al., p. 3.

traditional conceptions of femininity and masculinity. As a consequence, the provisions foreseen by normative standards for the deprivation of liberty of women in conflict with the law are partly applicable to the female clients in Asten as well; however, to a large extent they do not seem to be of rather little relevance for their lived realities. The subsequent and final chapter will reflect on the overall findings of this thesis in order to answer the research questions posed in Chapter 1.1 and conclude with thoughts on ways forward.

## **6. Conclusion**

While women in conflict with the law receive increasingly more attention from researchers and political bodies, female experiences in the context of the deprivation of liberty are far from being captured in their diversity. Yet, gaining an understanding of the diverse realities of women in detention is key to making sure that their human rights are respected, protected and fulfilled. At the outset of this thesis stood the intention to explore a niche of this overarching framework, namely the deprivation of liberty of persons with psychiatric diagnoses who committed a crime, as a preventive measure. More specifically, the research aimed at understanding how far conceptions of femininity shape the practice of preventive detention in general and what this means for the lived realities of the women accommodated in the Austrian correctional facility of Asten.

The defining feature of this form of detention is that the persons concerned are primarily or even exclusively deprived of their liberty due to their assumed danger to society and themselves. Their ‘dangerousness’ is determined by them having committed a crime, on the one hand, and being diagnosed with a mental disorder, on the other hand. The justification for detaining them is not only the protection of other citizens and themselves, but more importantly the reduction of their ‘dangerousness’ to an extent that allows for their release into society. The latter requires successfully treating the person’s mental disorder (see Chapter 4.1.1).

It is therefore not surprising that the psychiatric diagnosis of a client is understood as defining them and their behaviour to a significant extent. However, the staff in Asten understands the lived experiences of the women and men inside the facility as almost exclusively defined by their diagnoses (see Chapter 4.3). The highly distinct standing of



female and male clients with regard to their legal capacity and psychiatric diagnoses, makes it extremely difficult for the staff to discern how far differences in the conditions and treatment of the men and women in Asten can be traced back to their gender at least to some degree.

However, the interviews reveal that this explicit rejection of the relevance of gender is at times accompanied by the implicit reproduction of socially shared conceptions of femininity (see Chapter 5.1). For instance, the interview partners frequently deny gender having any impact by stressing how *unfeminine* the female clients are. They are described as neither willing or able to practice personal hygiene, nor to hide their naked bodies or blood-stained underwear during menstruation. A female staff member comments that ‘as a woman one often cannot even believe this [behaviour]’<sup>453</sup> (see Chapter 4.3.5). Also, the fact that the women even are in preventive detention is explained by mental disorders practically ‘overriding’ their femininity. Some interview partners claim that the existence of a mental disorder compensates for women’s ‘naturally’ lower level of testosterone and the associated potential for aggression of women (see Chapter 4.3.6). Therefore, the interview partners resort to the historically grown notion that women, as opposed to men, are not criminal ‘by nature’ (see Chapter 3.1.1). They only commit crimes if forced by circumstances outside of their control, for instance, a ‘mental illness’ or detrimental living conditions such as the female clients’ ‘broken lives’ (see Chapter 4.3.6).

This reasoning is problematic insofar as it implicitly denies women the capacity to make conscious, rational choices for themselves (see Chapter 5.1). Historically, only men were attributed the ability to think reasonably and act independently. This notion goes hand in hand with negating the adult status of women and rather treating them as children (see Chapter 3.1.1). In fact, this tendency can also be observed in Asten. On the one hand, the interpersonal dynamics between the women are described as a ‘kindergarten for grown-ups’, where one wilfully does something to the disadvantage of another. On the other hand, the female clients are explicitly compared to infants in their emotional experience and cognitive structure, which is explained by their diagnosis. Consequently, they need to ‘learn’ and ‘practice’ certain adult behaviours, such as adhering to commitments, in

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<sup>453</sup> Expert 3.

small steps (see Chapter 4.3.1). In a similar vein, emphasising that the women are sometimes happy to be locked into their rooms during an acute thrust of overwhelming emotions triggering aggression, reminds of the kind of benevolent paternalism identified by academic literature on the topic as well (see Chapters 3.1.4, 4.3.2 and 5.1).

This further applies to interventions in rather intimate areas of the clients' lives. Based on the assumption that the women themselves cannot decide independently over the reproductive function of their bodies, the staff feels the need to convince them to use contraception after conditional release because they consider a pregnancy counterproductive (see Chapters 3.1.3 and 4.3.5). Further, the female clients are separated from the male clients primarily to prevent heterosexual as well as emotionally destabilising romantic relations. The latter sometimes can also be the reason for dividing two women by moving one to another flat-share community (see Chapter 4.3.3). In their day-to-day lives the female clients are moreover disciplined to a greater extent than the men. Justified by their heightened risk potential, there is a disproportionately high share of staff, including prison guards, present at the unit. This potential for aggression as well as the small number of female clients additionally results in significantly more restrictions regarding their freedom of movement than is the case for the male clients. Since there are too few women to establish different units, they can only move around their own flat-share community, whereas the majority of men are free to move between the units inside the area their flat-share is located in (see Chapter 4.1.4). Even within the communities, the female clients are further segregated by a group system, which only allows them to leave their rooms for a certain amount of time at specified hours during daytime (see Chapters 4.3.2).

Therefore, the living conditions and treatment of the women in Asten are primarily shaped by the 'dangerousness' resulting from their high potential for aggression. This approach is very much in contrast to international, regional and national standards, which put a great focus on women's reproductive functions and motherhood (see Chapter 3.2). While both aspects are mentioned by the staff in Asten as well, they take up a rather small

fraction of the interviews. Therefore, biological sex,<sup>454</sup> even if it does play a role in the distinction of female from male clients in the eyes of the interview partners, is not attributed much importance either (see Chapter 5.1). Motherhood, which is a crucial concept in the construction of femininity, likewise does not seem to be of great relevance to the women's lives, as the staff describes that half of those who are mothers have no contact with their children. However, it remains open whether this is by their own choice or not, since one interview partner recounts difficulties in establishing contact between a mother and her child due to the little cooperativeness of the child and youth care service. This in turn, suggests that in this case, the authorities do not necessarily share the view of international standards that contact between mother and child is for the benefit of both. In addition, the assumption that the detention of women has enormous repercussions on the lives of their relatives and communities, as is suggested by the standards, might not apply equally to the female clients who are said to lack a strong social network (see Chapters 3.2 and 4.3.4).

This understanding renders the argument that female offenders should preferably be granted non-custodial measures to mitigate the negative impact of their detention on her social environment less persuasive (see Chapter 3.2.4). More importantly however, making use of non-custodial measures in the case of the female clients in Asten does not seem to be a realistic option in light of their high potential for aggression. Thus, the claim of international, regional and national standards, that female offenders have a low risk-potential and can therefore be subjected to more lenient security measures does not seem to apply to the women in Asten. Quite the opposite; as mentioned earlier, the female clients are in fact subjected to stricter security measures than the men (see Chapter 4.3.1). Unlike stipulated by international and regional human rights mechanisms, that describe being sentenced for non-violent and minor economic crimes to be characteristic for women in conflict with the law (see Chapter 3.2), the women in Asten have primarily committed severe bodily injury (see Chapter 4.1.2).

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<sup>454</sup> This represents an interesting case for the sex-gender-distinction (see Chapter 2.1.3). As Butler suggests, the gender of the women seems to be interpreted independently of the biological sex, since the staff challenges the women's gender without questioning their biological sex.

However, in other aspects the female clients in Asten conform with the common denominators identified by research on the topic (see Chapter 3.2). This applies, for instance, to their biographies, which are characterised by experiences of violence, including sexualised violence, and a history of institutionalisation, both often from childhood on. Further, many clients appear to have a low social and economic status and depend on substances (see Chapter 4.3.6).

The standards on the treatment of detained women consequently put a great focus on taking the women's experiences of abuse into account. This includes treating the effects of past experiences and preventing re-traumatisation as well as further abuse within the detention facility. Relying on the traditional perception of men as perpetrators and women as victims, the provisions include body searches only being conducted by female staff (see Chapter 3.2). Also staff members in Asten can never be alone with a client of a different gender, and male and female clients are strictly separated from each other as well (see Chapter 4.3.3). However, the interviews suggest that the reason for this gender-specific separation is less to protect the women from abuse by male clients, but, as already pointed out above, to prevent presumably consensual heterosexual contact (see Chapter 5.1). In fact, some statements create the impression that rather the men need to be protected from getting caught up in the women's extreme and at times paranoid emotional experience.

This tendency to experience emotions rather strongly and to turn them into aggressive behaviour towards themselves or others, also impacts the design of the female clients' environment. Their heightened need for supervision and support renders housing them in small cottage-like houses spread over the premises, as envisaged for the accommodation of female offenders in publications on the topic, hardly possible, but makes it more feasible to accommodate them in a part of a larger hospital-like building (see Chapters 3.2.4, 4.3.2 and 5.2). According to the interview partners, the most important aspect when it comes to accommodating the female clients in Asten is preventing violent assaults and self-harm by offering spaces for the women to calm down when overwhelmed by extreme emotions. This includes having single rooms, a lot of open areas, especially outside, as well as time-out-rooms (see Chapter 4.3.2).

While most of these features are already given in Asten or will be incorporated in the new building under construction, there are too few specialised aftercare institutions that can offer this kind of infrastructure. Therefore, finding adequate aftercare facilities for the women can be challenging (see Chapter 4.3.4). Since women in preventive detention are a rather new phenomenon and still form a very small minority of five to 14 per cent of the nationwide population of persons in preventive detention, the relevant institutions have too little experience to ensure that the female clients are treated adequately (see Chapters 4.1.2 and 4.3).

Thus, when defining women by their assigned biological sex, being a woman undeniably plays a role in preventive detention, since it determines whether one is placed in the majority group, which the system is tailored to, or assigned to the minority, for which suitable solutions are still to be developed. Some interview partners acknowledge the role of biological sex and/or gender in the processes preceding and following the detention, such as the fact that women tend to spend more times in psycho-social institutions before eventually being admitted to preventive detention (see Chapter 4.3.6).

During their time in Asten however, the staff claims, being a woman does not make any difference. They prove their point by describing the striking deviance of the clients in Asten from traditional conceptions of femininity and masculinity (see Chapter 5.1). As outlined above, the women are portrayed as significantly more aggressive and dangerous than the men, heavily neglecting their appearance, including basic body hygiene, and having extremely poor interpersonal skills. Yet, the interview partners relativise these statements by repeatedly emphasising that in fact they only apply to very few of the female clients (see Chapter 4.3). Thus, focusing on these few ‘extreme’ cases might indeed serve to support the argument that gender does not matter. The cited cases further create the impression that the women themselves do not perceive femininity as an important part of their identity. At least in the staff’s view, their ‘unfeminine’ behaviour certainly does not help in restoring their womanhood, which is presumably questioned by them having committed a crime (see Chapter 5.1). Yet, one interview partner gives a more nuanced account of the female clients’ relation to their own gender. The expert speculates that the women oscillate between hating being a woman and wanting to be one, as

exemplified by them having their hair done nicely at the hairdresser's and destroying the hairstyle right away in the next acute phase of overwhelming emotions and self-aggressive behaviour (see Chapter 4.3.5)

With such differentiated observations being the exception, the staff seems to reflect very little on the potential role of gender. This might suggest that once attributed a diagnosis, 'it no longer seems to make sense to consider the gender or race of someone who is being diagnosed'.<sup>455</sup> However, this 'gender blindness' constantly holds the risk of basing the treatment of female clients on what one assumes to be their interests relying on historically grown gender-specific stereotypes (see Chapter 3.1), instead of responding to the lived realities and interests of individual women. Consequently, one has to be cautious not to use the seemingly objective diagnosis of a mental disorder (see Chapter 2.1.1) to justify ignoring other aspects of their lived reality.

It cannot be emphasised often enough that the scope of the findings of this thesis is very narrow. It was clear from the outset that focusing on one specific facility would not allow drawing conclusions regarding the role of gender in the system of preventive detention in general. This belief was reinforced in the research process when it turned out that the male and female clients in Asten are not only divided by their gender, but also sharply in regard to their diagnosis. As mentioned several times throughout this thesis, the vast majority of female clients in Asten were admitted according to para. 21/2 and are diagnosed with a personality disorder, whereas the male clients are predominantly attributed schizophrenia and were admitted according to para. 21/1 (see Chapters 4.1.4, 4.3.5 and 4.3.6). It is noteworthy though, that the comments of one interview partner on the general characteristics of persons under each of these paragraphs and with each of the relevant diagnoses are in a stark contrast to the described behaviour of the female and male clients in Asten (see Chapter 4.3). Potentially, this could mean that the diagnosis is not the only defining element of the clients' behaviour after all.

Consequently, much more needs to be done to have a clearer picture of the impact of gender-specific conceptions on the deprivation of liberty of persons with psychiatric

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<sup>455</sup> Parker, Georgaca, Harper et al., p. 37.

diagnoses as a preventive measure. As the number of women in preventive detention continues to rise, it is of uttermost importance to understand how far the concepts and structures that were developed for men respond to the women's lived realities as well.

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## 8.3 List of interviews

Since the sample consisted of very few experts, all of which from a single facility, their personal data, including professional background, will not be disclosed to safeguard their anonymity.

Expert 1, Interview, Asten/Vienna, 28 June 2021.

Expert 2, Interview, Asten/Vienna, 29 June 2021.

Expert 3, Interview, Asten/Vienna, 29 June 2021.

Expert 4, Interview, Asten/Vienna, 30 June and 16 July 2021.



Expert 5, Interview, Asten/Vienna, 30 June 2021.

Expert 6, Interview, Asten/Vienna, 01 July 2021.

Expert 7, Interview, Asten/Vienna, 09 July 2021.

## **9. Appendix**

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### **9.2 Abstracts**

#### *9.2.1 English version*

This Master's Thesis explores the role of gender in the context of detention. More specifically, it focuses on the detention of persons with psychiatric diagnoses who committed an offence and are therefore deprived of liberty as a preventive measure in the Austrian correctional facility of Asten. The legal justification for depriving the affected persons of one of the most fundamental human rights is the assumed danger they pose to society and themselves. In Austria, persons in preventive detention form a minority in relation to the overall population in correctional facilities. Therefore, their situation tends to be paid little attention by decision-makers, researchers, and society at large.

Similar to detention in general, women make up a very small percentage of persons in preventive detention. Historically, behaviour deviating from social norms has been interpreted differently depending on a person's gender. Due to the association of masculinity with criminality and femininity with illness, men were more likely to be admitted to prison than to a psychiatric clinic, while for women the inverse was true. Since women continue to be underrepresented in detention facilities but overrepresented in health care institutions, these gender-specific conceptions of socially deviant behaviour remain relevant for practices of social control today. To some extent, however, persons

in preventive detention question this stereotypical divide as women are labelled as 'dangerous' and men are defined as 'mentally ill' as well.

As a consequence, at least partly, women in preventive detention do not conform to the assumed characteristics and 'needs' of female offenders upon which the international, regional and national standards are based. Yet, this does not mean that the treatment of women in preventive detention is not informed by traditional conceptions of femininity. Even if the interviewed staff working in Asten rejects the idea of gender playing an important role in the practice of detaining persons with a psychiatric diagnosis, the interviews reveal a range of gender-specific presumptions with regard to the clients' lived realities. At times the female clients' experiences seem to be in accordance with what the normative standards on the treatment of female offenders stipulate, whereas in other instances their lived realities are described as diverging from those of women in regular detention. Therefore, a conscious look at the situation of women in preventive detention is crucial to ensure that the deprivation of liberty is indeed the only human right interfered with.

#### *9.2.2 German version*

Diese Masterarbeit widmet sich der Rolle von Gender im Kontext des Straf- und Maßnahmenvollzugs. Der Fokus liegt dabei auf der Unterbringung von straffällig gewordenen Personen mit psychiatrischen Diagnosen in der österreichischen Justizanstalt Asten. Die rechtliche Grundlage für diesen Eingriff in eines der fundamentalsten Menschenrechte bietet die diagnostizierte Gefährlichkeit der betreffenden Person für die Allgemeinheit sowie für sich selbst. In Österreich stellen im Maßnahmenvollzug untergebrachte Personen im Vergleich zur allgemeinen Gefängnispopulation eine Minderheit dar. Ihre Situation erhält daher in der Regel wenig Aufmerksamkeit vonseiten der Entscheidungsträger:innen, Wissenschaftler:innen und Gesamtgesellschaft.

Ähnlich dem regulären Strafvollzug, stellen Frauen einen relativ kleinen Anteil der im Maßnahmenvollzug untergebrachten Personen dar. Historisch gesehen wurde von der sozialen Norm abweichendes Verhalten abhängig vom Gender der jeweiligen Person unterschiedlich interpretiert. Aufgrund der Assoziation von Männlichkeit mit Kriminalität und Weiblichkeit mit Krankheit, kamen Männer eher ins Gefängnis als in

eine psychiatrische Klinik, während bei Frauen das Gegenteil der Fall war. Da Frauen nach wie vor in Justizanstalten unterrepräsentiert und in Gesundheitseinrichtungen überrepräsentiert sind, scheinen diese gender-spezifischen Vorstellungen von Formen sozialer Kontrolle auch heute noch relevant zu sein. Allerdings stellen im Maßnahmenvollzug untergebrachte Personen diese stereotype Trennung zu einem gewissen Grad infrage, indem auch Frauen als ‚gefährlich‘ und Männer als ‚psychisch krank‘ gelten.

Folglich entsprechen Frauen im Maßnahmenvollzug den angeblichen Merkmalen und ‚Bedürfnissen‘ straffällig gewordener Frauen, auf denen internationale, regionale und nationale Richtlinien basieren, nur zum Teil. Nichtsdestotrotz ist die Behandlung von im Maßnahmenvollzug untergebrachten Frauen nicht frei von traditionellen Weiblichkeitsvorstellungen. Selbst wenn das in Asten tätige Personal die Annahme, Gender würde im Maßnahmenvollzug eine wichtige Rolle spielen, zurückweist, zeigen sich in den Interviews eine Reihe gender-spezifischer Annahmen in Bezug auf die Lebensrealitäten der Klient:innen. In manchen Aspekten scheint das Erleben der Klientinnen mit dem von normativen Standards für die Behandlung von weiblichen Gefangenen angenommenen, übereinzustimmen. In anderen Belangen hingegen, werden die Lebensrealitäten im Maßnahmenvollzug untergebrachter Frauen als sehr unterschiedlich zu jenen weiblicher Strafgefangener wahrgenommen. Es ist daher zentral, sich gezielt mit der Situation von Frauen im Maßnahmenvollzug auseinanderzusetzen, um sicherzustellen, dass der Entzug der Freiheit tatsächlich den einzigen Eingriff in die Menschenrechte der Betroffenen darstellt.