Progress and challenges in the Costa Rican penitentiary system on the specific needs of LGBTI persons deprived of liberty

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Abstract

Purpose — Despite the restricted interpretation of the principle of equality and non-discrimination made by some members of the prison staff in Costa Rica, most of the authorities and policymakers are committed to the express prohibition of unjust treatments on grounds of gender identity and sexual orientation. Notwithstanding, there is a gap between the normative framework and the reality of the detention facilities in the country. This paper aims to present the progress and challenges in the Costa Rican penitentiary system on the specific needs of LGBTI persons deprived of liberty, from a human rights perspective.

Design/methodology/approach — This paper is the result of the analysis conducted by United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) from the data collected and systemized during a qualitative study, led by the same institution in 2016, regarding the situation of Lesbian, Gay, Bisexual, Trans and Intersex Persons (LGBTI) persons deprived of liberty. These findings and a review of the actions implemented recently by the competent authorities to protect the rights of these population groups allowed to present an approach of the current situation of the Costa Rican penitentiary system.

Findings — While acknowledging the gravity of the violations of fundamental rights of LGBTI people in prison, they are far from showing a systematic pattern of aggression or discrimination against those people. What they do indicate is a penitentiary system that reproduces and exacerbates the marginalization and discrimination experienced by these populations in society. Despite the implementation of some measures to meet the particular needs of these groups, there is also evidence of an institutional culture that tolerates and normalizes certain levels of verbal violence and non-lethal aggression perpetrated by some system staff and by other individuals deprived of liberty.

Practical implications — Visualize the discrimination faced by some of the most invisible prisoners in the penitentiary system. Highlight some of the challenges that might be addressed to protect the rights of certain groups of prisoners affected by structural discrimination provide key data to identify the task list that should be guiding the actions to strengthen human rights guarantees for LGBTI people in prison. Present some good practices implemented by the Costa Rican penitentiary system, which might be useful for some other countries of the region.

Originality/value — There is a lack of information in Latin America about the rights situation of people that, besides the imprisonment, faced some other conditions of vulnerability, such as gender identity or sexual orientation. In a region where overpopulation, precarious living conditions and the critical situation of the prisons are no longer news, this paper pretends to draw attention to the progress and challenges of the penitentiary system concerning some of the most marginalized people in prison. In that regard, this document constitutes also a way of vindication of their rights.

Keywords Latin America, Human rights, Prison system, LGBTI, Persons deprived of liberty, Sexual diversity

Paper type Case study

I. Introduction

Perhaps one of the most significant challenges facing penitentiary authorities in any country in Latin America and indeed throughout the world is reconciling the paradox of the
assumption of the origins of prison as an institution of punishment – intended to exact vengeance and cause pain – with the requirement, as emerges from international human rights law, to develop standards on attending to and protecting imprisoned individuals.

As stated by Zaffaroni, the criminal justice system has selectively focused mainly on the criminality that is easiest to prosecute: crimes committed crudely, usually by marginalized sectors of society and individuals who do not have access to the legal and financial tools to deal with the justice system. Thus, is constructed the stereotype of the criminal – disseminated through social communication – as an individual belonging to the lower reaches of society, with limited financial resources and little education (Zaffaroni et al., 2000, p. 6).

Consequently, those individuals facing multiple conditions of vulnerability – understood as the degree of disadvantage that must be overcome to fully exercise rights – are exposed to multiple situations of discrimination and greater risk of criminalization, as is the case of individuals who do not meet society’s heteronormative expectations.

Imprisonment, therefore, also constitutes a condition of vulnerability (HRC, General Comment 21, 1992, para. 3; CESCR, General Comment 20, 2009, para. 27; 100 Brasilia Regulations Regarding Access to Justice for Vulnerable People, 2008), considering that the state is in the position of protector of those individuals in its custody. This obligation is enhanced in the case of groups that, in addition to imprisonment, face other situations of structural discrimination due to their sexual orientation, gender identities, age, national or ethnic origin, disability or any other social condition (Inter-American Court of Human Rights, Case of Ximenes Lopes v. Brazil, Concurring opinion of judge Sergio García Ramírez., Judgment of July 4, 2006, para. 17). However, penitentiary systems have historically treated all imprisoned individuals the same and in some cases, such measures are justified based on a distorted understanding of the principle of equal protection and non-discrimination. In fact, in interviews conducted with the health personnel of the Costa Rican penitentiary system, one individual stated that trans persons were attended in the same way as the rest of the prison population. In that person’s view differentiated care would represent an unacceptable privilege in the framework of the right to equal protection in the treatment and care that must be guaranteed to every one deprived of liberty (CEJIL; ILANUD, 2017).

Thus, given the poor condition of the vast majority of detention centers in Latin America in particular, characterized by deficient infrastructure, limited access to basic services to guarantee decent living conditions and the demonstrated failure of penitentiary practices, but in view of the pressing reality of prison: What action should be implemented to address the situation of excluded groups such as LGBTI persons? These are the reflections that will guide the structure of this article, which will present some general considerations on the scope of the right to equal protection and non-discrimination with regard to LGBTI persons deprived of liberty and then move on to consider the situation of these populations in the Costa Rican penitentiary system. The article will then refer to some of the relevant measures adopted in Costa Rica to address the situation of these imprisoned individuals, and, finally, will comment on some work that remains pending to close the gap between the law and the on-the-ground reality in Costa Rican penitentiaries.

For the purposes of this article, the expression “detention center” shall be understood to refer to penitentiary institutions, and therefore, the terms “jail, prison or detention center” are used as synonyms.

In addition, throughout this document, the group comprising lesbian, bisexual, trans and intersex persons will be referred to with the acronym “LGBTI,” using as a reference the nomenclature used by the Inter-American Commission on Human Rights (“IACHR”) on the creation of its Rapporteurship on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons. This terminology is not intended to be exhaustive and under no circumstances seeks to categorize or dismiss other possible expressions considered appropriate for referring to individuals who do not identify themselves using heteronormative standards.
1.1 Scope of the right to equal protection and non-discrimination with regard to LGBTI persons deprived of liberty


However, the multiple forms of discrimination that affect persons deprived of liberty are exacerbated in the case of individuals with diverse sexual orientations and gender identities held in state custody. In this regard, in its report on violence against LGBTI persons (IACHR, 2015, para. 145), the IACHR expressed concern at the frequent acts of violence that affect these populations deprived of liberty in the Americas. Similarly, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that homosexual, lesbian and transsexual individuals deprived of liberty are, among other segments of the penitentiary population, subject to double discrimination and vulnerability (IACHR, Office of the Rapporteur on the Rights of Persons Deprived of Liberty. Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, 2008, para. 75).

Although at this time there are no binding provisions in international human rights law on persons deprived of liberty, there are documents that provide fundamental guidelines for approaching these populations. Thus, the universal system has adopted the Standard Minimum Rules for the Treatment of Prisoners (UN, “Mandela Rules,” 2015), the Basic Principles for the Treatment of Prisoners (UN, 1990a, 1990b) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN, 1988). For its part, the Inter-American System has adopted the principles and best practices on the Protection of Persons Deprived of Liberty in the Americas (ICHR, 2008).

Furthermore, in view of the greater vulnerability affecting certain groups within the penitentiary population, documents like the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UN, 1990a, 1990b), and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, known as the “Bangkok Rules” (UN, 2009) develop guidelines to orient the approach to these populations, in accordance with their specific needs for protection.

Although specific guidelines have not been adopted to explicitly address the situation of each segment of the prison population, the Mandela Rules establish in rule 2.2 that:

In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory. (Emphasis added)

Without prejudice to this, as regards LGBTI persons, it is worth looking at the provision established in the Yogyakarta Principles on the Application of International Human Rights Law in relation to sexual orientation and gender identity. This document was prepared by a group of experts on human rights, sexual orientation and gender identity at the request of the United Nations High Commissioner of Human Rights. The final document was published in 2007. In 2017, the principles were revised and a supplement to them was published under the title “Yogyakarta Principles plus 10, 2017.” The principles are not a binding instrument in a strictly legal sense; however, they provide a useful reference by developing legal standards contained
in provisions with which states are required to comply. Particularly, Principle 9 on the situation of LGBTI populations deprived of liberty offers recommendations aimed at preventing these groups from greater exclusion due to sexual orientation or gender identity and promoting access to adequate health services and medical care. It also indicates that, where possible, these individuals should participate in the decisions on their place of detention. The principles also indicate that when measures of protection are adopted for these populations, they must not place significant restrictions on their rights. As regards conjugal visits, they must be guaranteed under the same conditions as for other persons deprived of liberty. The principles note that independent monitoring of detention centers is important, and finally, they highlight the need to implement programs for penitentiary system staff to provide training and raise awareness on the rights of these populations.

Additionally, when addressing the specific needs of persons deprived of liberty, penitentiary authorities must consider that the eventual intersection of these causes of discrimination (such as in the case of an inmate who is a foreigner and trans) has an additional effect resulting from the accumulation that likewise requires a differentiated approach. In this regard, the concept of intersectionality must be understood in the terms of the Inter-American Court of Human Rights when addressing the multiple factors of vulnerability and risk of discrimination that led to the particular impact on the rights of a victim due to her status as a girl, her socioeconomic status and as a person living with HIV (Inter-American Court of Human Rights, Case of Gonzales Lluy et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs, judgment of September 1, 2015, para. 290). In sum, different treatments can only be considered discriminatory when the distinction is based on prejudices or stereotypes. Thus, allowing – for example – a trans woman to receive hormonal treatment does not constitute arbitrary preferential treatment; on the contrary, it guarantees the right to health pursuant to the particular needs for care and protection of a certain sector of society.

1.2 Situation of LGBTI persons in the Costa Rican penitentiary system

Pursuant to official information published recently by the Ministry of Justice and Peace of Costa Rica, currently, almost 16,000 people are deprived of liberty in the country and according to data provided in 2020 to the ILANUD by the ministry’s Research and Statistics Unit, in September 2019, 211 imprisoned LGBTI persons had been identified. This figure is approximate, as – according to the information – it is compiled mainly based on the perception of detention center staff.

Taking into account that imprisonment restricts the effective enjoyment of certain rights and that the situation disproportionately affects some segments of the penitentiary population facing structural discrimination, in 2016, the ministry supported the elaboration of a “diagnostic of the situation of LGBTI persons and other vulnerable individuals deprived of liberty.” This document was prepared in the framework of the project “toward an inclusive Costa Rican society: Promoting the protection of LGBTI persons in a context of deprivation of liberty,” a project headed by the Center for Justice and International Law (CEJIL), with the financial support from the European Union.

The research, conducted by the ILANUD, jointly with the CEJIL and coordinated by one of the authors, enabled the collection of evidence to identify, which individuals face the most adverse conditions while imprisoned, along with their specific needs and what actions should be taken to help safeguard their rights. Its main findings indicated that the situation of violence and exclusion affecting individuals who do not meet the heteronormative standards in Costa Rican prisons is similar to what the LGBTI population experiences in countries such as Colombia and Guatemala (Colombia Diversa, 2013, 2014; Red Nacional de la Diversidad Sexual y Virus de la Inmunodeficiencia Humana (VIH) de Guatemala (REDNADS), 2015, 2016), where similar research has been conducted.
Three years later, between June and July of 2019, an ILANUD’s intern conducted some interviews at the penitentiary system and to some other key actors to keep track of the experiences and situation of LGBTI people in prison. Consequently, the information presented in the following sections is also the result of the analysis conducted by the authors of the data collected and systemized under ILANUD’s internship program.

2. Methodology

2.1 Diagnostic of the situation of LGBTI persons and other vulnerable individuals deprived of liberty in the Costa Rican prison system

The approach of the study conducted in 2016 was mainly qualitative, and it focused on identifying critical situations that limited the effective exercise of the rights of people deprived of liberty. Although the study looked at the situation of a variety of disadvantaged groups, this article will look only at the findings relevant to LGBTI populations.

Three qualitative information collection techniques were applied, namely, semi-structured interviews, focus group and observation.

A total of 153 interviews were conducted with prisoners, chosen at random from the total prison population, in 6 prisons located in different regions of the country – of a total of 12 operating at that time – over a period of 4 months. In Costa Rica, these institutions are known as Institutional Attention Centers (Centros de Atención Institucional). Besides, 48 interviews were conducted with other key actors, such as justice operators, prison system officials, representatives of academia, of social organizations and human rights defenders.

Considering that the violence and discrimination faced by these groups is exacerbated during imprisonment, it was thought that conducting a census to identify these populations was not desirable, as it would pose a greater risk of victimization by further exposing these individuals among the penitentiary community. Also, in view of the temporal and geographic limitations of the study, the constant changes to the penitentiary population and considering that, fundamentally, self-identification is crucial for recognizing an individual as an LGBTI person, it was concluded that the most significant contribution this investigation could make would be to gather evidence on the obstacles affecting the guarantee of their fundamental rights.

In addition to the systematization of information, the research technique of documentary review was used, through which national and international norms were consulted, as well as studies on the subject and reports generated by bodies of the United Nations and the Inter-American Human Rights System.

Three years later, in the framework of the internship program of ILANUD, some interviews were conducted in the Costa Rican prison system, between June and July 2019. The data was collected and systematized by Jacinta Astles, a master’s student in gender and peacebuilding of the United Nations University for Peace, based in Costa Rica. The study was approved by the Ethics Committee of the University for Peace.

A total of four semi-structured interviews were conducted in two prisons to lesbians, gays, trans woman and MSM, lasting approximately 1 h each one.

Eight activists, from different LGBTI groups based in San José, were also interviewed, as well as eight members of the prison staff and the Presidential Commissioner for LGBTI Affairs to collect information on the current initiatives and priorities of the government.

2.2 Main findings

The information collected indicated that of the 153 individuals deprived of liberty that were interviewed, 105 identified as heterosexual men, 9 identified as heterosexual women and 23 identified as a member of some LGBTI group.
In response to the question “Who do you believe has it worse in prison?” 39 respondents said trans women, gay men and lesbian women face the hardest circumstances during imprisonment and suffer a variety of forms of discrimination. This is an indication that the discrimination facing these populations is evident to other segments of the penitentiary population, not only those identifying as LGBTI persons.

When asked about detention conditions, one trans woman commented: “we are given two sentences, one from the court and one when we come here.” In general, the trans women interviewed are aware that the penitentiary environment can be more hostile due to the mere fact of their gender identities or sexual orientations, but at the same time they recognize that the situation is a reflection of what they experience in society. In this regard, a certain normalization of verbal and non-lethal violence was found that particularly affected gay men, men who have sex with other men (“MSM”) and trans women. Some of the individuals interviewed commented that in certain cell blocks, trans women and gay men are rejected by their fellow inmates for being bad luck.

In the case of gay men and MSM, it was commented that they are victims of verbal aggression and, in many cases, blackmail. It was likewise indicated that these individuals are vulnerable to penitentiary staff or their fellow inmates revealing their sexual orientations or sexual practices to their relatives or partners outside the prison, a situation that gravely impacts their fundamental rights to dignity and privacy.

It was also commented that, although some trans women and people with diverse sexual orientations perform sex work in the prison, these individuals were more exposed to becoming the victims of sexual violence and pressured for sexual favors.

Some women deprived of liberty in the Buen Pastor Institutional Attention Center[1] also described the situations of violence experienced by lesbian and bisexual women, especially verbal violence and undue interference in their privacy by penitentiary staff.

From the 17 interviews conducted in this center, 5 women said they considered themselves lesbians and 3 bisexual. No individual self-identified as a trans man, although the staff identified one of the women interviewed as such, as her gender expression was socially perceived as masculine. These figures contrast with what was found in the 132 interviews conducted in men’s prisons, during which only 4 individuals self-identified as homosexual men, 3 as bisexual men and 8 as trans women.

In several interviews, it was emphasized that the degree of vulnerability and violence experienced particularly by trans women and gay men is accentuated when added to other circumstances such as poverty, the lack of a support network outside the prison, problematic drug consumption or individuals who are also living with HIV. In this regard, in several interviews, it was commented that these individuals are often forced by other prisoners to bring drugs, SIM cards or even cell phones into the prison inside their anal cavities.

This situation, of which the system’s staff is broadly aware, has often led to abuses of authority during searches of trans women and gay men, with the excuse that they use their bodies to bring prohibited items into the prison.

Lesbian and bisexual women are also affected by a number of forms of violence – mainly verbal – inflicted by other prisoners, incidents that are often tolerated by system staff members, who also occasionally take part in these forms of violence. According to the views of several individuals interviewed, 90 per cent of women deprived of liberty are or “will become” lesbians or bisexuals (no reference was made to trans men) during imprisonment. It was suggested that this was because such populations face a lesser social sanction from other women deprived of liberty.

As far as measures adopted to protect individuals who are victims of aggression because of their sexual orientation or gender identity, it was commented that the measures often
increase victimization when they involve taking the victims to single-inmate cells with limited access to basic services. These decisions are frequently justified, even by the inmates themselves, who recognize that the poor penitentiary infrastructure limits authorities’ options for relocating them.

While acknowledging the gravity of these findings, they are far from showing a systematic pattern of aggression or discrimination against LGBTI persons in the Costa Rican penitentiary system. What they do indicate is a system that reproduces and exacerbates the marginalization and discrimination that these populations experience in society. The interviews also indicated the existence of an institutional culture that tolerates and normalizes certain levels of verbal violence and non-lethal aggression perpetrated by some system staff and by other individuals deprived of liberty.

2.3 Special needs of trans persons

Issues such as social name, access to hormone therapy, allowing personal items in accordance with gender identity and location of placement within the prison were some of the issues to which attention was called during the interviews conducted when asked about differentiated treatment that sometimes limits the fundamental rights of mainly trans women.

In terms of their social names, it was noted that trans persons are generally called by the name of their choosing. Some individuals commented that security staff use their legal names as a form of aggression and not solely for performing official duties, as is recommended in principle.

Regarding hormone therapy, according to the requirements set forth by the public health service, a prior diagnosis of gender dysphoria must be made before the treatment is provided. In practice, the majority of trans women smuggle hormone treatments into the detention center. Only one trans woman commented that she was authorized by penitentiary authorities to bring her hormones in, at her own cost. She also said the penitentiary provided her with medical supervision.

Regarding personal items, it was noted that staff often have broad discretion to decide, which objects are considered reasonable for defining individuals’ gender expressions. Some trans women commented that they are often prevented from bringing in women's underwear and accessories, with no explanation. One woman, whose gender expression is perceived as masculine, said that she was occasionally prevented from bringing in clothing because, according to the security staff, it was too big for her.

As regards location within the prison, only one activist trans woman, who had been deprived of liberty previously, said that trans women should be placed in women’s prisons or dedicated cellblocks, mainly to prevent them from becoming victims of sexual assault. All the other trans women deprived of liberty who were interviewed stated otherwise, indicating that for fundamentally financial reasons, they preferred to be placed in men’s prisons, where they had more opportunities to generate income through sex work and in other ways, such as washing clothing and personal utensils or cutting hair. These justifications suggest that it is precisely the situation of vulnerability that influences these individuals’ decision to prefer housing options that pose a greater risk to their physical integrity.

2.3.1 Some relevant measures adopted to improve care and protection of imprisoned LGBTI persons. In 2019, as stated above, the ILANUD provided support and assistance in conducting 21 interviews of persons deprived of liberty who did not identify with heteronormative gender standards; of penitentiary system staff; of human rights activists and of a government employee.

The material collected enabled us to trace the measures adopted in the penitentiary system and identify some tasks that remain pending in the system as regards guaranteeing the
rights of sexually diverse populations. An overview of the analysis of this information is provided in the following sections.

The institutional support for the aforementioned study on the situation of LGBTI persons and other disadvantaged populations in the Costa Rican penitentiary system, carried out in the second half of 2016, further moved forward the adoption of concrete measures aimed at addressing the impact on the rights of these individuals during their imprisonment. These measures, which will be presented briefly hereinafter, indicate that among LGBTI persons, imprisoned trans women face a disproportionate risk of harm to their rights as a consequence of societal prejudices and trans phobia.

2.4 Legal developments

2.4.1 Circular 05–2017 on body searches. In 2017, the Ministry of Peace and Justice, through the National Criminology Institute, adopted Circular 05–2017 on measures to protect the trans population in contact with the penitentiary system. Its aim was to avoid discriminatory body searches based on sexual orientation or gender identity. With this circular, trans persons are able to request that the review be carried out either by a man or a woman from the detention center’s security staff.

2.4.2 Circular 01–2018 on procedures for attending to and protecting the trans population in the penitentiary system. In January 2018, a new circular was approved reaffirming national and international standards on equality and non-discrimination. Therein, the competent authorities from the aforementioned ministry established a multi-disciplinary committee to draft a proposal for attending to the trans population. In this document, the institution recognized that trans persons in the penitentiary system are the victims of physical, psychological, economic and sexual violence due to their sexual orientation and gender identity. The circular focused on aspects like the intake into the prison, the support phase and the outtake phase.

As regards intake, it was explicitly mentioned that the intake interview must be conducted by trained professionals with an awareness of gender and sexual diversity issues. It also indicated the importance of referring to individuals by their social name or surnames, even if the name appearing on identity documents is still used for official procedures. A period of no more than eight days is given for deciding on an individual’s placement location after assessing the individual to identify their level of risk and specific security needs. The importance of taking into account a trans person’s opinion to decide where to place them based on their gender identity was noted, except for when it is advised otherwise for personal and institutional security. A process was also established for individuals who disagree with the space assigned to them to be able to appeal the decision through an administrative procedure. Additionally, it noted the importance of participation and support provided to trans populations by social organizations from the moment they enter a detention center.

Regarding the support phase, it was reiterated that trans persons are able to use clothing and accessories in accordance with their gender identities. It was indicated that these populations will be allowed participation in education and training processes without discrimination and a commitment was expressed to expand the offerings of training for trans persons. Penitentiary staff were urged to be trained and educated to work with these segments of the population deprived of liberty and for such purposes, the penitentiary training school must make the pertinent adjustments. It was reiterated that the process of body searches must be respectful and take into account the trans person’s request as to the gender of the security staff in charge of the search. Reference was also made to situations of violence, which will not be tolerated, noting that regardless of whether they are formally reported, the pertinent measures of protection will be activated for the victim.
As to the outtake phase, the circular underscores the importance was underscored of institutional and public-private partnerships to help with external support for the process to reintegrate trans persons to society.

2.4.3 Circular 1–2019 compiles previous provisions on attending to and monitoring the LGBTI population in the penitentiary system. In 2019, it was decided to make adjustments to the circulars issued in previous years by combining the guidelines on attending to and protecting LGBTI persons into a single document. In general terms, the text reiterates that equal protection and non-discrimination is a fundamental human rights principle and references the national and international legal framework that safeguards these populations. The circular is organized into two chapters. The first focuses on general provisions on attending to the LGBTI population, while the second addresses procedures for attending to and following up on these individuals in the penitentiary system. A final section addresses key concepts and definitions with regard to issues of sexual diversity.

In interviews with penitentiary system staff on the reasons for adopting this circular, which basically restated other provisions issued previously on the subject, they highlighted the importance of having an integrated document that provided clear guidance to avoid excessive dispersion of the regulations on an issue in which training and education of the penitentiary community was still lacking.

Another issue that was mentioned that could have led to the adoption of this circular was a negative experience in placing a trans woman in a women’s penitentiary, following a request by the woman and after an order was issued by a judicial authority. It was stated that this trans woman, who had drug problems, had problems getting along and was involved as an attacker in incidents of sexual violence in the cellblock where she was located.

In sum, the provision restates the duty to respect and guarantee the human rights of LGBTI persons and specifies several procedures related to the imprisonment conditions for these groups.

Among other things, the guidance on where to locate the trans population stands out. They indicate that this decision must be made on a “case-by-case” basis, without ignoring the opinion of the individual in question, but based on their personal circumstances and the center’s capacity to attend to their personal safety, their integrity and the safety of the other individuals deprived of liberty. It was also established that the placement of these individuals is to be reviewed at least twice a year.

Another new aspect of this provision is the creation of the “committees for attending to and supporting the LGBTI population.” This document orders the establishment of the aforementioned committees in all the centers that are part of the different levels and units of the National Penitentiary System. The committees must be comprised of health, psychology, labor, social, orientation, law and education professionals, as well as the penitentiary police force. It establishes that these individuals must be trained and educated to work with these sectors of the population. The established functions of these committees include: offering support and follow-up to LGBTI persons, performing a comprehensive assessment of the trans individuals who request to be placed in a center in accordance with their gender identities and coordinating training and educational processes for both system staff and the population deprived of liberty, with support from other public institutions and social organizations.

3. Conclusion: some tasks that remain pending to close the gap between the requirements of the law and the reality in penitentiaries

The penitentiary system is an essentially masculine and patriarchal institution that has erased – among the most excluded – individuals facing multiple situations of risk, which, in turn, exacerbates their vulnerability during imprisonment. Therefore, progress in the
recognition of the rights of populations that have historically been excluded by society requires a cultural shift involving the entire penitentiary community: not just system staff but also the prison population itself.

The legal changes and adjustments are necessary because they make it possible to specify the obligations of state agents with regard to safeguarding the rights of imprisoned individuals and reveal the specific needs of certain groups. Costa Rica has without question made progress in this regard, for which reason the challenges to consolidating the effective protection of these populations are increasingly complex.

Prisons concentrate the prejudices and discrimination experienced in society, and therefore, changes to the institutional culture will only be sustainable if they correlate to the social transformations that the country must undergo. The aim is not to suggest that the system has discharged its responsibility as far as the required protection of marginalized groups, just the opposite. The penitentiary system is facing even greater challenges that require better coordination with other public agencies to use diverse strategies to promote raising awareness among different social actors on the discrimination experienced by individuals who do not meet society's heteronormative expectations.

Prisons, which in Latin America already have limited resources to guarantee the minimum conditions of a life with dignity to imprisoned individuals, must meet the penitentiary community's need for training and education. This path is a difficult one to take for authorities, staff and the prisoners themselves because it requires more than the political will to pass a regulation: it involves implementing sustained processes that go beyond resource limitations to inform individuals of their rights, guaranteeing they are enforceable, specifying the scope of system staff's obligations, acting with due diligence and punishing the infractions committed in a timely manner.

Also, another pending task is to prepare databases on the prison population that enable the identification of the groups facing the most risk, but without exposing them to further discrimination or affecting their right to privacy. Thus far, this information has been collected based mainly on the perceptions of security staff, who have the most contact with the penitentiary population. The results, as noted by one of the woman staff members interviewed, reflect extensive bias and an undercount of these populations. Progress on this challenge requires increasing the visibility of certain groups, such as trans men and bisexual individuals, which would make it possible to promote awareness on their rights and on the mechanisms for demanding them. Consequently, this is not limited to simply sorting data on the date of intake to the center. It also involves the needs of these individuals whose sexuality produces new experiences during their imprisonment.

Promoting visits to penitentiaries by independent agencies, social organizations and experts on the rights of persons deprived of liberty and the rights of LGBTI persons will also enable the systematic monitoring of the rights situation of these populations and promote partnerships to implement programs aimed at addressing the special needs of these individuals.

The design of protocols or guidelines for action aimed at prison staff is another key tool for specifically addressing the protection of the fundamental rights of LGBTI persons deprived of liberty. Costa Rica, as presented in the previous section, has made progress in this regard. Notwithstanding, the following challenge for the penitentiary authorities is aimed at closing the gap between regulatory frameworks and the reality of the detention facilities.

Deprivation of liberty is a radical experience of coexistence with a profound impact on the socialization of individuals and on fundamental areas such as sexual and reproductive rights. Imprisonment also makes clear the lack of knowledge on sexuality and exacerbates social, religious and cultural prejudices and stereotypes about it. Sexuality is perceived as a static part of life, but prison shows the opposite: that it is mobile and dynamic. In this context, and despite the indisputable progress made toward recognizing the rights of
sexually diverse populations, for these individuals, their sexual orientation or gender identity entails an additional punishment when they come into contact with the penitentiary system.

Note

1. The name of this center changed recently to Vilma Curling Rivera Institutional Attention Center.

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Further reading


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