



SOCIAL REINTEGRATION AS A HUMAN RIGHT

Alternative Report for the Committee of Civil and
Political Rights

ARTICLES 10, 25 AND 26 OF THE INTERNATIONAL
COVENANT OF CIVIL AND POLITICAL RIGHTS

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Executive Summary

The alternative report presented by Asistencia Legal por los Derechos Humanos A.C (Legal Assistance for Human Rights) focuses on the importance of recognizing social reintegration as a human right as a first step to guarantee its exercise and protection for all persons deprived of their liberty. Specifically, the report addresses social reintegration based on two elements: the right to vote of persons deprived of liberty and the general conditions of detention in the Mexican prisons.

In Mexico, the right to vote is explicitly prohibited by constitutional mandate for convicted persons who are in detention. The lack of proportionality, reasonableness and objectivity of the restriction to vote has meant a serious impairment in the opportunities for social reintegration of persons deprived of liberty, who are already excluded from any public sphere and whose voice has ceased to be listened for a long time.

Regarding the conditions of detention, the panorama isn't any good either: there are multiple rights violations, as well as a clear pattern of deviation from what all the national and international standards dictate. Confinement, lack of access to health services, overcrowding, overpopulation, torture and ill-treatment, lack of attention to the special needs of the female population and abuse of imprisonment measures, are just some of the most worrying aspects of the situation of Mexican prisons. The need for the State to guarantee a dignified prison system is the minimum that must be done in order to protect the integrity of each and every single person deprived of liberty in Mexico.

The arbitrary impairment, both of the right to vote and a dignified stay in prisons, makes the right to social reintegration unrealizable and will remain only written on paper, without the possibility of making it effective through a correct implementation of the new criminal justice system.

1. Introduction

Legal Assistance for Human Rights A.C. (AsiLegal)¹ is a civil society organization focused on defending the human rights of people in conflict with the criminal law, especially in relation to access to justice and the correct implementation of the Accusatory Criminal System. Specifically, AsiLegal works with governmental and non-governmental actors to achieve the improvement and dignification of the Penitentiary System through the proper application of the National Law of Criminal Enforcement (LNEP) as well as international standards. The report presented is the result of the work done by the entire team of AsiLegal.

Although the constitutional reforms of 2008 and 2011, the first on the justice system and the second on human rights, raised a shift in the operation of the state apparatus based on the respect and protection of human rights, many of the safeguards introduced have yet to be materialized. Reaffirming that, in Mexico, the gap between the provisions of the law and the reality remains considerable.

One of the laws created after the reform was the National Law of Criminal Enforcement (LNEP, for its acronym in Spanish), which purpose is to regulate the stage of criminal enforcement, especially regarding the protection of the human rights of persons deprived of liberty, the dignification of prisons and the procurement of means to achieve social reintegration. With the introduction of social reintegration as the ultimate end of the criminal process, a justice and penitentiary system is created, no longer aimed at mere punishment, but at ensuring that the person in conflict with the criminal law can be inserted into society, once released.

Despite the fact that such law came into force in 2016, the practices that have been developed in the exercise of public power within the justice and prison system since historical times have been obstacles to each of the provisions contained in the new regulations, as well as to guarantee the right to social reintegration under the terms established in the second paragraph of article 18 of the Political Constitution of the United Mexican States and by article 10.3 of the International Covenant on Civil and Political Rights (ICCPR).

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National legislation understands social reintegration as a guiding principle of the prison system for it is defined as the “*restitution of the full exercise of freedoms after the fulfillment of a sanction or measure executed with respect to human rights*”², and at the same time it is considered as a goal that is achieved through “*respect for human rights, work and training, education, health and sport*”³.

The Mexican prison system is extremely distressing. The imposition of the criminal sanction deprives people, not only of their freedom, but also arbitrarily restricts or completely eliminates a series of additional rights such as intimacy, privacy, free development of personality, civil and political rights, as well as personal integrity and security. In addition to lifting barriers, both material and non-material, that deeply isolate people from the outside. As the Human Rights Committee has already indicated, persons deprived of liberty should not be subjected to hardships or additional constraints to those resulting from the deprivation of liberty⁴ and the State has the obligation to guarantee that persons deprived of liberty have access to the same rights, without distinction or differentiation, than other people⁵; mandate that is violated at all times since the country's prisons are well-known torturing and degrading environments⁶, where people are deprived, from their entry, of all autonomy, as well as of any possibility of subsequently integrating, as subjects of rights, into society.

Therefore, it is necessary to recognize social reintegration as a human right related at all times with the right to the free construction of a life plan; this concept is based on personal fulfillment and an existential value that gives meaning to the lives of people and whose elimination “*objectively abridges freedom*”⁷. In this sense, the construction and development of the penitentiary system must be directed, not only towards retribution⁸, but always towards respecting human rights, and specifically, understanding that effective reintegration can only be achieved when the conditions of detention are capable of ensuring a dignified life, both inside and once liberty is recovered.

² Article 4 of the National Law of Criminal Enforcement

³ Article 18, second paragraph of the Constitution

⁴ HRC. General Comment No. 21, Article 10 (Humane treatment of persons deprived of their liberty), par. 3.

⁵ Rules 3 and 5.1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)

⁶ Inter-American Court of Human Rights. Case Espinoza González V. Perú. (Preliminary objections, merits, reparations and costs, Judgement of November 20, 2014, par. 7.

⁷ The concept of “Life Plan” has been extensively developed by the jurisprudence of the Inter-American Court of Human Rights; See: Case Loayza Tamayo v. Perú. Reparations and costs. Judgement of November 27, 1998. par. 148; Also: Case Gutiérrez Soler v. Colombia, Judgement of September 12, 2005, Separate Opinion of Judge A.A. Cançado Trindade.

⁸ HRC. General Comment No. 21, par. 10

The conditions within the Mexican Social Reintegration Centers are far from being respectful of the dignity or the physical and psychological integrity of persons deprived of liberty. And, also, the negative effects that result from it, invariably have an impact on the person, his or her family and society far beyond the effective duration of the private measure. This is brought to the extent that deprivation of liberty brings arbitrary and disproportionate restrictions to other rights, while continuing to ignore persons deprived of liberty as subjects of rights, thus making the right to social reintegration solely utopic.

All of the above mentioned represents a permanent violation of article 3.1 of the Covenant and, according to the Human Rights Committee, can represent an arbitrary detention⁹. Hence, it can be concluded that, if the fulfillment of the rights detailed subsequently is not observed, one cannot speak of a full exercise of the right to social reintegration.

2. The right to vote for people deprived of their Liberty as a guarantee of the human right of social reintegration (article 25 of the ICCPR)

The Mexican Constitution provides a specific prohibition for persons deprived of liberty to exercise their right to vote. Article 38 states that the rights or prerogatives of citizens are suspended, among other causes: a) Because the person is subject to a criminal process for a crime that deserves the penalty of imprisonment, from the moment a formal prison order is issued¹⁰; b) for serving a penalty of prison, for the entire duration of the sentence; and c) by means of a sentence that imposes the suspension of civil and political rights as a penalty, that is, as an autonomous penalty.

On February 20th of 2019, the Electoral Court of the Federal Judicial Branch (TEPJF) decided, through file SUP-JDC-352/2018 and its accumulated SUP-JDC-353/2018, that persons who were subject to pretrial detention, therefore being inside a penitentiary centre, had the right to vote according to the principle of presumption of innocence. Derived from that resolution, the Court ordered the National Electoral Institute (INE) to implement a program that guarantees the vote for every person in pretrial detention for the 2024 elections.

The Court's argument was at all times aimed at guaranteeing the principle of presumption of innocence that any person in conflict with the criminal law owns. This is relevant because

⁹ HRC. General Comment No. 35, Article 9 (Liberty and security of person), par. 14

¹⁰ It is important to note that the figure of the formal prison order does not exist anymore as a result of the 2008 justice system reform, however, article 38 has not yet been harmonized in accordance with such reform. Thus, jurisprudence understands that figure only for the purpose of pretrial detention, that is, regardless of the name used to define it, the effect is that the person is deprived of liberty without having a sentence.

from the said constitutional article it follows that a person who is deprived of liberty under a formal prison order has not yet been convicted.

Thus, the current situation in the country in relation to the right to vote of persons deprived of liberty is as follows: The protection of the right to universal suffrage only protects those persons in pretrial detention, but not those who already have been convicted.

The decision of the Court attending the principle of presumption of innocence to grant the vote to people in process is rather pertinent, however, the issue remains as to why does the Mexican State continue to nullify such fundamental right for all persons convicted to prison?

THE RIGHT TO VOTE

In general, political rights are contained in articles 34, 35, 36 and 38 of the Constitution, as well as in article 25 of the ICCPR and according to the above provisions, their exercise must be guaranteed for all people in conditions of freedom and equality.

Voting plays a fundamental role in any democratic society; the exercise of political rights is an end in itself and is a vitally important means for guaranteeing all other human rights¹¹. This right implies not only a recognition of the people's citizenship, but also an act of belonging to the community, since it is closely related to the principle of popular sovereignty, as a way in which citizens elect their representatives and participate in decision-making processes.

In theory, the right to vote as an essential element in a democracy, is universal and has the capacity to grant legitimacy to the government in turn, however, in Mexico people serving prison convictions are not covered by these principles. It is important to emphasize that the moment when a specific group of people is arbitrarily deprived of this right, the State automatically loses the capacity to act as a legitimate representative¹², thus, an effective representation is no more. At least not from a State that supposedly represents everyone.

As will be mentioned in the next chapter, the general prison conditions are extremely precarious and systematically undermine the integrity and dignity of people. The prison population, in spite of the numerous regulations that protect them, is still not considered as a subject of law and is a victim of restrictions of additional rights to the privative nature of the

¹¹ Inter-American Court of Human Rights. Case of Norín Catrimán et al. (leaders, members and activist of the Mapuche indigenous people) v. Chile, Judgment of May 29, 2014. Merits, reparations and costs, par. 383; Also: Weberry v. Sanders, 376 U.S. 1, 17 (1964).

¹² Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 2002 SCC 68. Párr. 34

penalty imposed despite the existence of express prohibitions on such limitations, being the right to vote one of them.

In this context, the right to vote is a valuable tool for people to have a real impact on the decision-making process that can impact these conditions, as well as to promote a change in the penitentiary policies that affect them. The arbitrary act of denying them the voice and the recognition of their belonging to society perpetuates a selective "democratic" system that seeks to invisibilize a particular group of people, which is already in a special state of vulnerability; situation that deepens their stigmatization and aggravates their social exclusion regarding the issues that concern them, greatly impeding their possibility of building a life project and, consequently, violating Article 10.1 of the ICCPR regarding the right to dignity of all people in prison.

Thus, convicted persons deprived of liberty are involved in a stigma that only identifies them as such: persons deprived of liberty, not so, as citizens. They are torn off the possibility of identifying themselves and being identified in another way that breaks with the social conceptions assigned to the prison environment.¹³

PROPORTIONALITY, NECESSITY AND REASONABLENESS OF THE MEASURE

Although the right to vote is not absolute, any restriction to its exercise must be legitimate and meet at all times, as established by the ICCPR, the criteria of proportionality, necessity and reasonableness.

The Human Rights Committee has been emphatic that reasonableness obliges States not to act beyond what is necessary and proportionate to achieve their legitimate interest¹⁴. For its part, the IACHR has established on numerous occasions that the purposes for which restrictions on rights are established must be legitimate and in accordance with the purpose for which they have been established.¹⁵ In this sense, no restriction or suspension of rights may threaten their "hard core", that is, against its essential and irreducible content.¹⁶

¹³ Electoral Court of the Federal Judicial Branch (TEPJF). SUP-JDC-352/2018 and its accumulated SUP-JDC-353/2018. p. 13 Available: https://www.te.gob.mx/Informacion_juridiccional/sesion_publica/ejecutoria/sentencias/SUP-JDC-0352-2018.pdf

¹⁴ HRC. Hebbadj v. France. CCPR/C/123/D/2807/2016. 17 October 2017, par. 7.17.

¹⁵ IACHR. Advisory Opinion OC-6/86. The word "Laws" in article 30 of the American Convention on Human Rights. May 9, 1986, par. 18-b) y 22

¹⁶ García Ramírez, S. (2004). Crime and prison in the new Millennium, *Mexican newsletter of Comparative Law*, Mexico City, Mexico, New series, year XXXVII, no. 110, p. 577. Available: <http://www.revistas.unam.mx/index.php/bmd/article/view/10577>

In this case, the State seeks to justify the restriction of the right to vote under three arguments: a) by the nature of the prison sentence; b) for breaching the social order; and c) to achieve social reintegration.

Regarding the first argument, the criteria of the national courts have indicated that the suspension of the right to vote is inadmissible *"if the sanction does not affect personal liberty"*¹⁷ or when the person *"receives a criminal substitutive"*¹⁸. These criteria make it clear that the restriction of the right to vote has more to do with the physical and material limit that deprivation of liberty entails, and not so much with an issue related to the commission of the crime itself.

If the restriction responds to being a natural consequence of the prison conviction, then the only reason it is imposed is because of the material impossibility to exercise the right to vote - because persons deprived of liberty cannot go to the ballot boxes to vote -, in which case it is the obligation of the States to carry out the actions and implement the necessary mechanisms to guarantee their effective exercise. This means that the impossibility of exercising the vote entails, as the Human Rights Committee has already mentioned, a *"positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty"*¹⁹, that is, an obligation of doing by the State, which, in its special role of guarantor,

[...] must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable.²⁰

However, from the fact that the restriction only operates concomitantly with the prison conviction, an absurdity is necessarily reached, where the foundation of the prohibition is the prison itself and not the criminal conduct. Since the nature of the restriction is automatic and

¹⁷ Theses: XX.2o.56 P. Ninth period. Judicial Weekly of the Federation and its Gazette, May 2006, p. 1882

¹⁸ Theses: I.4o.P. J/13. Ninth period. Judicial Weekly of the Federation and its Gazette, June 2010, p. 861. See also: Theses: 1a./J. 74/2006. Ninth period. Judicial Weekly of the Federation and its Gazette, December 2006, p. 154

¹⁹ HRC. General Comment No. 21, Op. Cit., par. 3

²⁰ Inter-American Court of Human Rights. Case of the "Juvenile Reeducation Institute" v. Paraguay. Judgment of September 2, 2004, Preliminary Objections, Merits, Reparations and Costs, series C, No. 112, par. 153

absolute²¹, insofar as it applies to all convicted persons deprived of liberty, it cannot be considered objective and much less reasonable.

Additionally, there are numerous mechanisms to replace or modify the prison conviction, especially those that allow a payment of a monetary amount. Taking into account that the restriction to vote only operates when the person is effectively deprived of liberty, the right is subordinated to the economic capacity of the people. This situation disproportionately affects those who do not have the means to pay the required amount. Thus, for the same conduct, a person who has financial resources and can buy his or her freedom may continue to vote, while the person who does not have resources must go to prison and will not be able to vote. This directly undermines the right to equal and effective protection of the law, as well as the right to non-discrimination under socioeconomic distinctions, stated by article 26 of the Covenant.

As for the second argument, the legislators who created that constitutional norm justified the restriction as a "*natural civic education*" to "*determine a slow selection of individuals trained to exercise the right to vote.*"²² If the restriction to the vote is based on the fact that people in conflict with criminal law broke the order and attempted against society, therefore, abandoning their right to make decisions, restricting the vote to instill democratic values has precisely the opposite effect, for the exercise of a right of such importance for participation and for generating a sense of social and democratic responsibility is being impeded.²³

It is important to note that human rights are not optional for their protection and are not granted by the State as a privilege or merit, in the same way that they cannot be withdrawn or nullified under the same arguments. Thus, taking into account the notions and justifications that gave rise to the constitutional restriction, it seeks to arbitrarily withdraw the right to vote for those who have breached their role as citizens, a situation that is not acceptable in a system that respects human rights, for the guarantee of every right is not subject to the behaviour of the person or to the values and categorizations that are socially reproached to certain groups, but rather lie in the inherent dignity of every person.²⁴

²¹ European Court of Human Rights. Case Hirst v. United Kingdom (No. 2) Application no. 74025/01, 6 October 2005, par. 76 y 82.

²² Debate Journal of the Constitutional Congress of 1917, p. 602. Available: http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/DD_Constituyente.pdf

²³ *Sauvé v. Canada*, Op. Cit., Par. 24 y 37.

²⁴ Regional Office on Drugs and Crime for Central America and the Caribbean. Advisory Opinion No. 005/2013. Right to participation of people deprived of their Liberty in Panamá, p. 4. Available: https://www.unodc.org/documents/ropan/TechnicalConsultativeOpinions2013/Opinion_5/Opinion_Consultiva_005-2013.pdf

In this way, the restriction is not able to achieve the objective of instilling those democratic values, so it must be labelled as ineffective and, therefore, cannot be qualified as suitable²⁵, reasonable or proportionate.

Finally, respecting the third argument, it is important to point out that social reintegration is a legitimate goal recognized by both the Constitution and international regulations²⁶, however, the means to achieve that end is not, in short, the restriction of the right to vote. This is due to the fact that there is no direct or logical relationship between the suspension of the vote and its probable effect on the achievement of social reintegration. On the contrary, it can be argued that the effects of the restriction are more negative than positive.

It is important to note that constitutional article 38 has not been amended or modified since its original writing in 1917. This is of vital importance to the argument made in this report because the values and context of the Mexico that conceived that law are radically different. Contrary to the principle of progressiveness of rights, in Mexico there is still a constitutional mandate that resulted from considering the main goal of the prison system to be the regeneration of people and it was agreed that the *“offender is not really a being who has fallen in the world to punish humanity, but that He is a sick person”*.²⁷

It is worth mentioning that said Constituent Assembly was the same who determined that *“under the conditions in which Mexican society is found, there is no need to grant the vote to women”*.²⁸

For the above reasons, the restriction does not find support in a respectful system of human rights, since, in addition to being based on obsolete and retrograde notions, it is not suitable, for it is not capable of contributing to the realization of the constitutional purposes²⁹, nor reasonable, for there is no logical or proportional relationship between the ends and the means.³⁰

²⁵ HRC. CCPR/C/101/D/1410/2005. Communication No. 1410/2005. Par. 7.4 y 7.5. Also: Inter-American Court of Human Rights. Case of Fontevecchia and D'amico V. Argentina, Judgment of November 29, 2011, Merits, Reparations, and Costs, Series C, No.238, par. 53.

²⁶ Article 10.3 of the ICCPR and 5th principle of the Basic Principles Treatment of Prisoners.

²⁷ Recovered from the Debate Journal of the Constitutional Congress of 1917 when the right to suffrage was discussed. Op. Cit. Pág. 655.

²⁸ *Ibidem*, pág. 602

²⁹ Inter-American Court of Human Rights. Case of Fontevecchia and D'amico V. Argentina, Judgment of November 29, 2011, Merits, Reparations, and Costs, Series C, No.238, par. 53.

³⁰ Rasmussen v Denmark A 87 (1984); 7 EHRR 371

EQUALITY AND NON-DISCRIMINATION

The right to equality and non-discrimination imposes on the States the obligation to “*abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of the population when exercising their rights*”³¹. Being the active vote the way in which people can participate in public activity, equality becomes a mere utopia when there is no possibility to decide freely and without discrimination on one's own way of life³², especially since this distinction deepens the situation of inequality and disadvantage that persons deprived of liberty suffer in comparison to the rest of the population³³.

The denial of the vote generates inequality in the exercise of the political rights of a group that is already at a disadvantage for being a systematic victim of human rights violations and is also subject to special interaction with the State³⁴. By generally and automatically excluding that sector of the population from its ability to participate as citizens under obsolete and unjustifiable criteria in a democratic society, the Mexican State perpetuates actions that directly undermine the dignity of persons deprived of liberty and, therefore, configure a violation of article 10.1 of the ICCPR.

Additionally, the issue acquires special nuances when it comes to doubly vulnerable population, that is, that their particular characteristics and profiles aggravate the discrimination of which they are victims already. The case of women and the right to vote is a significant example of how the gender condition intersects with the condition of incarceration and generates even greater exclusion in the exercise of that right.

The Mexican context of violence against women, as well as the presence of unequal power relations in every aspect of life, are situations that have prevented women, since historical times, from accessing public spaces on equal terms. Prisons are just another area where violence and exclusion are perpetuated and where, with all the additional restrictions on imprisonment, their rights are severely diminished.

³¹ Inter-American Court of Human Rights. Case of López-Álvarez v. Honduras Judgment of February 1, 2006, Merits, Reparations and Costs, series C, no. 141, par. 170

³² Cfr. Electoral Court of the Federal Judicial Branch (TEPJF). Op. Cit., p. 41

³³ Filippini, L. and Rossi, F. (2012), New contributions for the recognition of the right to vote of convicted persons. *Legal Magazine of the University of Palermo*. Año 13, No. 1. p. 202. Available: https://www.palermo.edu/derecho/revista_juridica/pub-13/JURIDICA_07FILIPPINI.pdf

³⁴ Inter-American Court of Human Rights. Case of the “Juvenile Reeducation Institute” v. Paraguay, Op. Cit., par. 152

It has already been recognized on many occasions by international organizations that women do not have equal access to human rights, compared to men and, being prisons a primarily male environment, women are completely invisibilized. Regarding the vote, women have the opportunity to exercise it to make visible their alienation and exclusion from public affairs and advocate for the improvement of their conditions of detention, which have been subsumed by the interests of the male-ruled prison population.

Finally, because the restriction operates only for convicted persons who are effectively deprived of liberty and not for the criminal conduct itself, the discrimination is configured as long as the exclusion of the vote is for a group that meets particular characteristics derived directly from imprisonment, which implies a violation of articles 2.1 and 26 of the ICCPR.

SOCIAL REINTEGRATION

Since social reintegration is a recognized human right at the constitutional level, and by serving as the primary purpose of the criminal and prison systems, any penalty or restriction of rights that derives from a criminal process must always be aimed at guaranteeing and fulfilling that right.

The prison conviction is in itself distressing, especially since it entails a breaking of social and family ties, as well as a social exclusion that transcends even the duration of the penalty specially because of the stigma and rejection with which people have to carry for having been deprived of liberty.

For all that the prison implies, social reintegration is still a pending matter in Mexico, however, imposing infamous and degrading additional penalties only makes it increasingly difficult to achieve it. Thus, for this right to be effective, mechanisms that guarantee participation and attachment to the community are necessarily required.

The participation channels must be allowed to open to hear the voices of persons deprived of liberty, who belong to the community on the same terms as the rest of the population.³⁵

The more rights are restricted to persons deprived of liberty, the lower their possibility of reintegration. Especially since a situation of restriction rights marks a differential abyss

³⁵ Giacomello, Corina, (2016), Women deprived of liberty and the right to vote. From law objects to citizenship subjects. TEPJF. Mexico; p. 105. Available: <https://www.te.gob.mx/genero/media/pdf/6b94bfb20a6c563.pdf>

between those who are in prisons and those who are not, violating the principle of normality³⁶ established by Rule 5.1 of the Mandela Rules and principle 60.1 of the Minimum Rules for Treatment of Prisoners, in the sense that life in prison is not guaranteed to have the minimum degree of difference with the outside life, especially in order to facilitate the process of social reintegration and protect the dignity of people.

The right to vote is of such importance that it must be protected through all means, especially in conformity with the principles of maximum protection and progressivity of human rights. Thus:

[A]ny conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage³⁷

To expressly prohibit that a social group will not have the capacity to participate in the conformation of the government of the country of which it is a part of, is contrary to the new principles established by the reform of the Mexican justice system and is in every sense a violation of articles 2.1, 2.2, 10.1, 10.3, 25 and 26 of the ICCPR.

3. General conditions of prisons as a guarantee of the human right of social reintegration (article 10 of the ICCPR)

The National Human Rights Commission in 2015 noted that:

“[T]he situation of the detention centres is conducive to the transgression of the fundamental rights of these people, due to a series of irregularities in terms of facilities, food, medical care, technical and security personnel; labour, educational and sports activities; overcrowding and overpopulation conditions, lack of separation between men and women; abuse; differences in living conditions in detention between women and men, particularly due to the lack of equal access to facilities and

³⁶ UNODC. Advisory Opinion No. 001/2013. p. 6. Available: https://www.unodc.org/documents/ropan/TechnicalConsultativeOpinions2013/Opinion_1/Vestimenta_para_las_personas_privadas_de_libertad_en_Panama_OTC_2013-001.pdf

³⁷ Hirst v. United Kingdom. Op. Cit., par. 62.

services, as well as adequate and necessary goods for the healthy development of their children who remain with them ”³⁸.

In 2018, 6,881 complaints filed with local human rights bodies for violations of rights within the prison system were reported nationwide, of which only 13 ended in a recommendation³⁹.

In the country there are currently 304 prisons that house 200,753 persons deprived of liberty, of which 94.79% are men and 5.21% are women. Of the total imprisoned population, in the common jurisdiction, 37.56% are in process and 62.43% already have a conviction; while in federal jurisdiction 42.09% are prosecuted and 57.9% convicted⁴⁰.

As various international bodies have already denounced it, the abuse in the application of pretrial detention is a systematic element in Mexico that is used as the general rule and not as an exceptional measure⁴¹. Situation that, in addition, has been aggravated by virtue of a constitutional reform in 2019 to article 19 that increased the number of crimes for which pretrial detention is applied automatically, that is, crimes whose perpetrators are not entitled to an evaluation on the necessity or proportionality of the measure, and are, therefore, automatically incarcerated.

The entities that house the largest number of people in pretrial detention are the State of Mexico (10,615), Jalisco (8,421), Mexico City (5,103) and Baja California (4,818).⁴²

It's important to note that, in comparison to men, pretrial detention disproportionately affects women. In both jurisdictions (local and federal) 45.71% of women are still in process, while that measure currently affects only 37.86% of men⁴³. Regarding the duration of pretrial detention, the limit established by the Constitution is two years, but according to the National Survey of Deprived Population of Liberty (ENPOL), 27% of convicted women mentioned that

³⁸ National Human Rights Commission (CNDH), 2015, Special report by the National Human Rights Commission about women deprived of Liberty in penitentiary centres in the Republic of Mexico, p. 5. Translated by the authors from the original text in Spanish, available: https://www.cndh.org.mx/sites/all/doc/Informes/Especiales/2015_IE_MujeresInternas.pdf

³⁹ CNDH. National Analysis of Penitentiary Supervision, 2018, p. 512. The violations claimed were mostly related to the right to legality and legal certainty, the right to health and the right to receive a humane and dignified treatment. Available: https://www.cndh.org.mx/sites/default/files/documentos/2019-04/DNSP_2018.pdf

⁴⁰ Decentralized Administrative Body of Prevention and Social Readaptation (OADPR). Monthly Notebook of National Penitentiary Statistical Information. June 2019.

⁴¹ HRC. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E. Méndez on his mission to Mexico. A/HRC/28/68/Add.3. 29 December 2014 par. 85.

⁴² OADPR, op. Cit.

⁴³ idem

their process had lasted longer⁴⁴. On the other hand, in the case of processed women, 51% said that their process took more than two years⁴⁵.

In addition to placing people in torture environments, one of the direct consequences generated by the abuse of pretrial detention is the prison overpopulation. The states with the worst and most serious overpopulation numbers in the period from 2010 to 2016, are Michoacán, with 313%, Nayarit with 240% and the State of Mexico with 188% of overpopulation. In that same period, regular overpopulation at national level grew 62%, while critical overpopulation increased 71%⁴⁶.

The levels of overpopulation and overcrowding represent an obstacle to life in detention, especially because they hinder access to goods and services, as well as hygienic, healthy and dignified stays. It has already been recognized that, exceeding the installed capacity of prisons puts the health and physical integrity of persons deprived of liberty at risk⁴⁷. For example, according to data from the National Human Rights Commission (CNDH) from 1990 to 2015, 15,102 complaints about the prison system were filed, of which 2,802 were related to violations of the right to health⁴⁸.

DISCIPLINARY ISOLATION SANCTIONS

The application of disciplinary sanctions consisting of temporary isolation is a common practice in the country's prisons, which has become the general rule and favourite punishment of the prison authorities⁴⁹, instead of meeting the criteria of exceptionality and last resort⁵⁰; in addition to that they constitute excessive and disproportionate sanctions for implying isolation of up to 23 hours per day⁵¹. The isolation regime consisting in a total separation from the rest of the population, as well as from contact with the outside and

⁴⁴ National Institute of Statistic and Geography (INEGI); National Survey of Population Deprived of Liberty (ENPOL) 2016. Available: <http://www.beta.inegi.org.mx/proyectos/encotras/enpol/2016/>.

⁴⁵ Idem.

⁴⁶ INEGI. Statistics on the State Penitentiary System in Mexico, 2017. Available: http://www.cdeunodc.inegi.org.mx/unodc/wp-content/uploads/2018/01/en_numeros2.pdf

⁴⁷ CNDH, 2015, Special report by the National Human Rights Commission about women deprived of liberty in penitentiary centres in the Republic of Mexico. Op. Cit., par. 114.

⁴⁸ CNDH. The right to health of persons deprived of liberty in Penitentiary Centres of the Republic of Mexico. Pronouncement of 2015, p. 16. Available: https://www.cndh.org.mx/sites/all/doc/Informes/Especiales/Pronunciamento_20160329.pdf

⁴⁹ This situation is widespread and has been denounced both by Mexican civil society organizations and by the IACHR itself in its report on the Situation of Human Rights in Mexico in 1998 and in the 2016 follow-up report, paragraphs 245 and 330, respectively.

⁵⁰ CNDH. General Recommendation No. 22 about isolation practices in prisons in the Republic of Mexico. Mexico, 2015, par. 24 y 38. Available: https://www.cndh.org.mx/sites/all/doc/Recomendaciones/generales/RecGral_022.pdf

⁵¹ IACHR. Situation of Human Rights in Mexico, 2015. OEA/Ser.L/V/II, par. 330. Available: <http://www.oas.org/en/iachr/reports/pdfs/mexico2016-en.pdf>

suspension of any type of stimulus for prolonged periods is a violation of article 7⁵² and 10.1 of the Covenant⁵³.

Considering the importance of contact with the outside, both for social reintegration and for a dignified and respectful treatment of human rights⁵⁴, the State must guarantee that the conditions within the Penitentiaries allow the maintenance of social ties through either correspondence, telephone, family or intimate visits; only then would the State be fulfilling its international obligations⁵⁵. It is important to emphasize that on many occasions people serve their time in places far from their homes, as a result of involuntary transfers⁵⁶, so family visits are scarce or even void. For example, in just a period of 5 months, AsiLegal documented the involuntary transfer of 15 women and 79 men, in just one federative entity (Baja California).

The situation is aggravated when isolation is imposed as a disciplinary measure, since it is impeded that people maintain these ties of such great importance for social reintegration. Derived from interviews conducted by the AsiLegal team to people who recently regained their freedom after serving a custodial conviction, it was concluded that the support networks of family or friends abroad are decisive to achieve their reintegration into society.

Prolonged isolation also has serious repercussions on the health and physical and emotional well-being of persons deprived of liberty, not only because of their afflictive nature, but also because medical and psychological care is not guaranteed for persons subject to that regime⁵⁷, leaving them in an aggravated state of vulnerability.

Additionally, the norms of due process are not guaranteed, nor the right to a hearing and adequate technical defence in the imposition of disciplinary sanctions⁵⁸, even though there are normative provisions that enforce respect for said rights⁵⁹, a situation in violation of articles 14.1. and 14.3 of the Covenant. Finally, AsiLegal has documented that many of these sanctions are imposed based on discriminatory criteria, especially because of their sexual orientation and/or gender identity. In many penitentiaries in the country, affective

⁵² HRC. General Comment No. 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), par. 6

⁵³ HRC. Case Polay Campos v. Perú. Comunicación No. 577/1994. 9 January 1998, par. 8.7

⁵⁴ CNDH. General Recommendation No. 33/2018 on the right to maintain links with the outside of persons deprived of liberty in the prisons of the Republic of Mexico. Mexico City, 13 August 2018, par. 9

⁵⁵ HRC. General Comment No. 21, Op. Cit., par. 12. Also: CNDH. Op. Cit., par. 227

⁵⁶ IACHR. Situation of Human Rights in Mexico. Op. Cit., par. 340

⁵⁷ CNDH. General Recommendation No. 22. Op. Cit., par. 45.

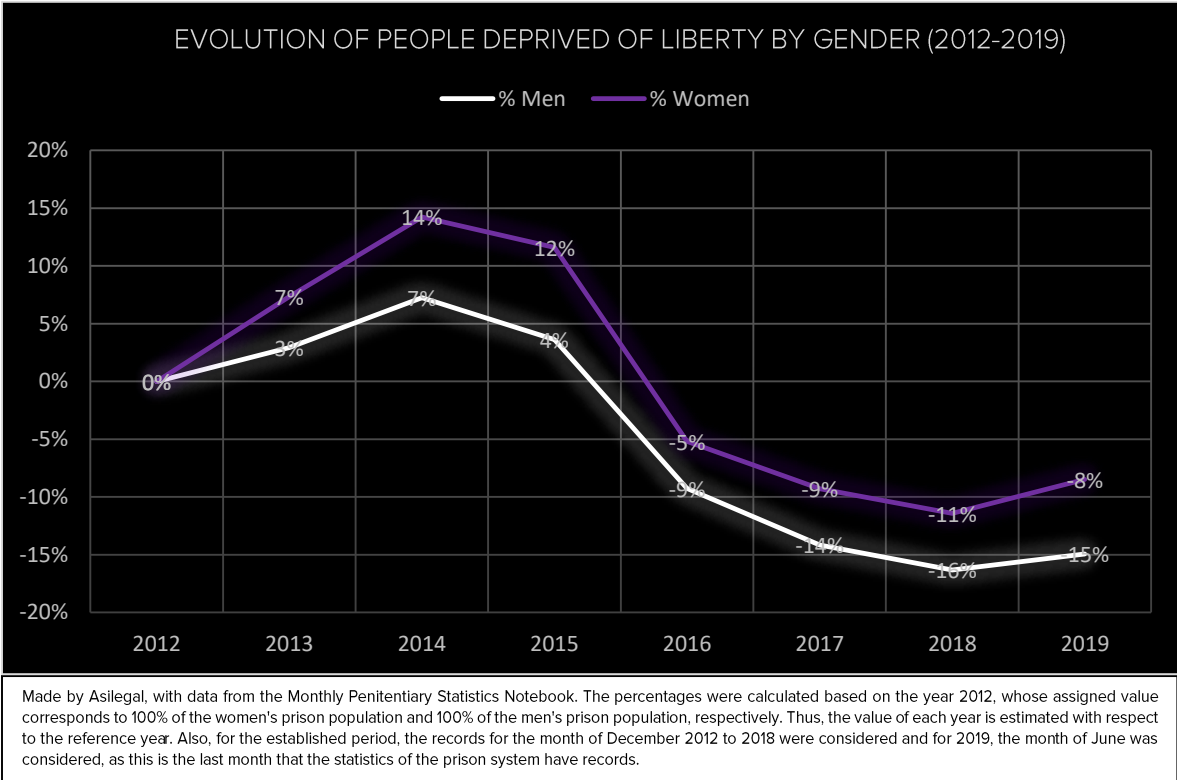
⁵⁸ CNDH. Op. Cit., par. 147

⁵⁹ Article 46 of the National Law of Criminal Enforcement.

relationships between people of the same sex are punished for being "acts contrary to morality or good customs."

WOMEN

Since prisons have been designed and built by and for men, women are in a hostile environment where their needs are daily invisibilized. It's relevant to emphasize that the increase in the population deprived of liberty has been, in proportion, higher in women than in men, despite them being a minority. Taking 2012 as the base year, as shown in the following graph, towards 2013, the percentage of the population of women increased by 7%, and the following year by 14%; while that of men increased by 3% in 2012 and the following year by 7%. Although a downward trend is shown, the curve corresponding to men is 7 percentage points below that of women, that is, from 2012 to date the percentage of women deprived of liberty only decreased 8%, while that of men decreased 15%. Similarly, it can be observed how, in the 2016-2018 period, the male population decreased by 7% while the female population decreased by only 6%. As for the increase of the last year, the percentage of women was 3%, compared to that of men, which was 1%.



On the other hand, it is also known that the processes, both of deprivation of liberty and of social reintegration, acquire particular nuances and have a differentiated impact on women. According to INEGI, over 80% of women deprived of liberty are mothers and about 60% of their children are under 18⁶⁰. National legislation recognizes the right for the sons or daughters of women deprived of liberty to remain in the penitentiaries with them, however, this is not guaranteed, since, according to official figures, only 11% of the Penitentiaries have the adequate facilities for the children's stay⁶¹. Of the women deprived of liberty who have their minors in the Penitentiary, 34.4% said that their child did not have a medical service, 66% did not have psychological care, 57.6% did not have medication, 58% reported that they are not provided with food, and 80% do not have a school education whatsoever⁶².

Additionally, women are not only victims of violence against them within the prison system and are subject to torture, humiliation, sexual assault, forced nudity and other ill-treatment⁶³, but also suffer, for the most part, a profound abandonment by their relatives and support networks⁶⁴, among other reasons, because of the stigma with which they carry for being in conflict with the criminal law.

LGBTTTI POPULATION

The few official figures available on the number of LGBTTTI persons deprived of liberty report that in 2018 they represented 1% of the total prison population.⁶⁵ It is common for prison authorities to lock up LGBTTTI people in separate cells from the rest of the population for discriminatory reasons, which creates an obstacle to access health care services⁶⁶, work or recreational activities, violating the rights contained, among other regulations, in the International Covenant on Civil and Political Rights (in article 10.1). In this regard, the Executive Commission of Attention to Victims (CEAV) indicated that 18.18% of people perceive that they were isolated or have been isolated in detention centres because of their LGBTTTI status⁶⁷.

⁶⁰ (INEGI); National Survey of Population Deprived of Liberty (ENPOL) 2016; Open Data, Op. Cit.

⁶¹ INEGI. Statistics on the State Penitentiary System in Mexico, 2017, Op. Cit.

⁶² (INEGI); National Survey of Population Deprived of Liberty (ENPOL) 2016. Op. Cit

⁶³ Cfr. IACHR. Situation of Human Rights in Mexico. Op. Cit., par. 301.

⁶⁴ CNDH. A model of post-penitentiary care. Context, bases and implementation strategies, p. 46. Available: <https://www.cndh.org.mx/sites/default/files/documentos/2019-07/Modelo-Atencion-Postpenitenciaria.pdf>

⁶⁵ CNDH. Pronouncement about the protection towards LGBTTTI persons in penitentiary centres. 2018. Par. 7

⁶⁶ Asistencia Legal por los Derechos Humanos A.C. (2011) LGBTTTI persons deprived of Liberty. LGBTTTI Community without rights? Diagnose about the situation of the right to health and justice of the LGBTTTI persons deprived of liberty in the Federal District. Mexico. p. 65. Available: <http://asilegal.org.mx/wp-content/uploads/2018/10/Personas-privadas-de-la-libertad-de-la-comunidad-LGBTTTI.pdf>

⁶⁷ Executive Commission for Victim Assistance (CEAV), 2015, Investigation on the assistance of LGBT persons in Mexico. p. 248. Available: <http://www.ceav.gob.mx/w18.18p-content/uploads/2016/06/Investigaci%C3%83%C2%B3n-LGBT-Documento-Completo.pdf>

Similarly, almost half of LGBTTTI persons deprived of liberty have been verbally assaulted⁶⁸. In Mexico City, for example, approximately one third of the people reported having been hit and more than 1 in 6 people reported having been victims of sexual violence, both by staff and by other inmates⁶⁹. Despite the existence of data generated by both government institutions and civil society organizations, the absence of registration of LGBTTTI persons in prison prevents being able to investigate and punish acts of violence that are perpetrated against them because of their sexual orientation and/or gender identity or expression.

On the other hand, trans people are in a special situation of vulnerability since according to the United Nations Human Rights Council, they are more likely to be victims of violence when placed with the general prison population⁷⁰ additionally their right to identity and free development of personality is constantly violated

PRELIBERATION BENEFITS

Preliberation benefits are figures contemplated by the law that, with their correct implementation, help depressurizing prisons, while serving as tools to promote and facilitate social reintegration, for they replace or extinguish privative penalties in advance.

It is important to note that, any measure depriving liberty should be subjected to a periodic examination which analyses whether the reasons that justify it are still valid⁷¹, as well as to verify that the objectives and goals are effectively being achieved. However, in Mexico, there is still a slow implementation of the new justice system in this regard, for there is still a high use of custodial measures and a low concession of preliberation benefits⁷². According to official figures, in 2017, only 1,090 cases of granting of either early or preparatory release were reported, distributed only in 8 entities⁷³.

The reasons why these measures are not granted respond to various factors, such as the lack of knowledge of the LNEP by public and private lawyers, the excessive workload of public defenders, as well as the lack of a gender and human rights approach in the analysis of cases by public servants, particularly judges. For the prison system to be compatible with its new

⁶⁸ *Ibidem*, p. 254.

⁶⁹ Federal District Human Rights Commission (CDHDF), Anex II of Recommendation No. 13/2015, p. 22. Available: https://cdhdf.org.mx/wp-content/uploads/2015/10/reco_1513_anexo2.pdf.

⁷⁰ HRC. Report of the United Nations High Commissioner for Human Rights. Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. A/HRC/19/41. November 17 2011. Par. 34

⁷¹ HRC. A. v. Australia, CCPR/C/59/D/560/1993, April 3 1997, par. 9.4.

⁷² México Evalúa. 2017 Findings, p. 128. Available: <https://www.mexicoevalua.org/wp-content/uploads/2018/08/Hallazgos2017.pdf>

⁷³ INEGI. National Census of State Justice Delivery, 2018.

purpose, i.e. social reintegration and respect for human rights, it is vitally important to leave behind the notions that justify mass incarceration and benefit non-custodial measures.

The effect that could have the privilege of preliberation benefits would be enhanced if, apart from increasing the figures for granting these measures, a public policy of release is generated that helps to make visible or lessen the negative and disproportionate effects that the prison has on certain people, as is the case of women, who derived from the context of violence and inequality, are often victims of exclusion and marginalization even before imprisonment.

In this regard, the vast majority of women have economic dependents abroad, often minors, so that the principles of the best interests of the child and social reintegration acquire special relevance, in accordance with Article 24.1 of the ICCPR and the Bangkok Rules and Tokyo rules. The effects of imprisonment, not only for persons deprived of liberty, but also for their families, are very serious and affect the integrity, dignity and free development of personality.

Although there is a constitutional prohibition that penalties should not be transcendent (article 22), the reality is that they end up negatively impacting the lives of many other people besides the convicted persons. *“The boys and girls of people in prison have no control over their situation. They are imprisoned between the violence of the State and the probable or proven criminal responsibility of their adult referents”*.⁷⁴

With the granting of benefits, the post-prison system acquires special relevance, which in many states of the country is non-existent or extremely precarious. According to official figures, only 13 entities have regular advice or assistance to the liberated population; 6 entities have collaboration agreements with companies to employ the newly released population and only 13 have programs to continue the treatment of addictions⁷⁵.

Because Mexican prisons are not the ideal means to guarantee the right to social reintegration, it can be inferred from a reasonable analysis that favoring non-custodial measures can, to a greater extent, guarantee the attainment of that right by which the entire justice system in our country was reformed.

⁷⁴ Giacomello, Corina, Op. Cit., p. 159.

⁷⁵ INEGI. National Census of Government, Public Security and State Penitentiary System, 2018.

4. Recommendations to the Mexican State

- That the State eliminate items II, III and VI of article 38 of the Political Constitution of the United Mexican States, as well as the derived legislation that establishes the restriction to the vote of the persons deprived of liberty
- The State must recognize social reintegration as a fundamental right and carries out the necessary actions to guarantee it in conditions of equality and non-discrimination
- The State has to dignify the Social Reinsertion Centers so that they cease to be torturing environments and violators of the rights of persons deprived of liberty.
- The State must favor the granting of pre-liberal benefits contemplated by the legislation.
- The State must abandon public policies that consider mass incarceration as the ideal solution to the problem of citizen security and crime, and move towards policies that favor alternate exits, non-custodial measures and alternative dispute resolution mechanisms, which are consistent with the new constitutional standards of respect for human rights and ensure that the final goal of the prison system is social reintegration.



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