

Advancing Human Rights through International Prison Reform: A gendered approach from the Americas

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While women deprived of liberty in the Americas still represent just under five percent of the total prison population,¹ they face a series of differentiated risks and obstacles that relate to the historic social and economic inequality between women and men, which systematically places them at a disadvantage in a variety of ways.

As an important first point, the data on women deprived of liberty in the region of the Americas is not strong. We know very little about the number of women incarcerated, the reason for their incarceration, their experiences prior to, during and after their incarceration, including violations of their human rights, and the long-term impact of this incarceration on women, and in particular on their families.

That said, we do have a general profile of incarcerated women:

- Globally, according to the Institute for Criminal Policy Research, since 2000, the incarceration of women has grown by 51.6 percent, faster than any other region in the world except Asia, and much faster than the rate of incarceration of men.²
- In the Americas, between 60 to 80 percent of women in prisons are incarcerated for drug-related crimes, and large number of these women are actually in pre-trial detention rather than prison.³ These tend to be low-level, non-violent offenses related to micro-trafficking, small-scale sales, trying to bring drugs into penitentiary centers, transporting money and other similar acts.⁴
- Incarcerated women are mainly poorer, less educated and living in precarious economic and social circumstances. These circumstances often force them – either through economic necessity, some type of coercion from male family or other community member, or a combination of the two – to participate in these low-level offenses.⁵

¹ ICPR and Birbeck. *World Prison Brief*. Institute for Criminal Policy Research and Birkbeck, University of London. Accessed on 1/16/18: <http://prisonstudies.org/world-prison-brief-data>

² ICPR (2016). *World Female Imprisonment List*. London: Institute for Criminal Policy Research. Available at: http://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_third_edition_0.pdf

³ IACHR (2017). *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*. Washington, DC: Inter-American Commission of Human Rights, Organization of American States. Available at:

<http://www.oas.org/en/iachr/reports/pdfs/PretrialDetention.pdf>

⁴ CIM/OAS (2013). *Women and drugs in the Americas: A policy working paper*. Washington, DC: Inter-American Commission of Women, Organization of American States. Available at:

<http://www.oas.org/en/cim/docs/WomenDrugsAmericas-EN.pdf>

⁵ WOLA, IDPC, DeJusticia and CIM/OAS (2016). *Women, Drug Policies and Incarceration: A Guide for Policy Reform in Latin America and the Caribbean*. Washington Office on Latin America, International Drug Policy Consortium, DeJusticia and Inter-American Commission of Women, Organization of American States. Available at:

<http://www.oas.org/en/cim/Docs/WomenDrugsIncarceration-EN.pdf>

- Incarcerated women are frequently single mothers with sole or primary responsibility for the maintenance of their households and families. Their incarceration thus affects not only them, but the children and other persons for whom they are responsible, which may include elderly, ill and/or disabled family members.⁶
- When a woman is incarcerated, there are limited options for her children and other dependent family members – children are either they are placed in prison with their mothers (generally up to the age of about 5 years old), in the care of another (usually female) family member, such as a grandmother, aunt or older daughter, or institutionalized by the State.⁷
- While it is clear that incarceration of a father has less impact on children than the incarceration of their mother, we have little concrete information on what happens to children – psychologically, socially and economically – when their parents, and particularly their mothers, are incarcerated.⁸ A recent study by Church World Service and Gurises Unidos points to the multiple human rights that are placed at risk when a child’s parent or parents are incarcerated, including the fact the lack of documentation of their vulnerability and the lack of coordination between State judicial, penitentiary and child protection systems. The incarceration of women leaves the persons under their care vulnerable to poverty, marginalization, and neglect, which can, in turn, have long-term consequences, such as their involvement in criminal organizations or even institutionalization.⁹

A lot of the evidence that we have on the violations of the human rights of incarcerated women is anecdotal – which is not to minimize its importance, because there is an enormous amount of anecdotal evidence – but to call attention to the need for a more rigorous and systematic approach to identifying, documenting and above-all, responding to these violations. A recent study from the Inter-American Commission on Human Rights at the OAS on the use of pre-trial detention in the Americas¹⁰ points to the “...disproportionately serious hardships and adverse consequences that affect women who are deprived of liberty, include[ing]: (a) lack of female-only detention centers, (b) inadequate prison infrastructure bearing in mind their gender and the development of their mother-child relationships, (c) lack of gender appropriate medical treatment, (d) greater difficulties with social reintegration, (e) absence of a gender perspective in data-gathering on their deprivation of liberty, and (f) subjection to forms of violence, including sexual abuse by prison staff.” This situation is exacerbated by the fact that incarcerated women have even less access to recourse than women in the general population when their rights are violated, subjected as they are to the “complete control and power of State agents.”¹¹

This is particularly worrying in the multiple and widespread cases of physical and sexual violence against female inmates, which are common but occur with almost complete impunity. A recent report from

⁶ Ibid.

⁷ Church World Service and Gurises Unidos (2015). *Invisibles: ¿hasta cuándo? Una primera aproximación a la vida y derechos de niñas, niños y adolescentes con referentes adultos encarcelados en América Latina y el Caribe* [Invisible Until When? A first approach to the life and rights of children and adolescents with imprisoned adult referents in Latin America and the Caribbean]

⁸ Ibid.

⁹ IACHR (2017), op.cit.

¹⁰ IACHR (2017), op.cit.

¹¹ Ibid.

Equis Justitica in Mexico¹² presents the results of a series of interviews with women inmates that highlight some of the violations to which they are subjected, including but are not limited to:

- physical violence such as near-asphyxiation with plastic bags, beatings and other forms of physical torture, which may result in incapacitation and often miscarriage;
- forced nudity, such as being observed while in the shower or using the toilet, and invasive body searches by male prison guards, other forms of sexual torture and rape, including penetration with both penises and other foreign objects, of women throughout arrest, pre-trial detention, trial, sentencing and incarceration, most often at the hands of prison guards and other agents of the State;
- forced prostitution or exchange of sex for “favours,” which can include simply an absence of physical and sexual violence, increased access to contact with family members, or material benefits such as improved accommodations;
- lack of access to or denial of health care services, or specific violations committed during the provision of health care services, including the shackling of pregnant women to their beds during labour and delivery, lack of access to contraceptives and HIV prevention tools despite the presence of sexual violence against female visits or their inability to negotiate sex with their partners during conjugal visits;
- forced nudity and invasive body searches by male prison guards of women who visit male partners or other male or female relatives and friends in penitentiary centers;

As we have seen globally in recent months, violence against women in general is underreported. These violations committed against female inmates are even more significantly underreported, as they are often committed by the very people responsible for taking these reports and guaranteeing the health and safety of female inmates. While the physical consequences of this violence, including injuries, forced miscarriages, and forced pregnancy, among others, often go undocumented and unattended, it is the psychological trauma and stigma attached to sexual violence that the women interviewed referenced most frequently. This trauma and shame often leads to their own self-isolation and withdrawal from contact with their families, as well as to a general lack of confidence in institutions of the State.

A number of countries in the region have taken concrete steps to address the situation of incarcerated women, including programs that: guarantee special protection for women and other persons belonging to different groups in vulnerable circumstances (Colombia); take into the specific rights of women deprived of liberty and grant special protection to pregnant women and mothers (Mexico); adopt a “National Policy of Assistance to Women Deprived of Liberty and Released from Prison,” which seeks to prevent all forms of violence against women deprived of their liberty and to humanize their conditions of detention (Brazil); and incorporate a gender perspective in the use of alternatives to incarceration by prioritizing their use with women defendants and taking into account both the situation of special risk in which they would be placed if they were deprived of their liberty, and the consequences that their incarceration would have on their children and persons under their care, such as people with disabilities and older persons (Brazil, Costa Rica, Ecuador, Mexico, and Peru).

¹² Equis (2017). *Políticas de drogas, género y encarcelamiento en México: Una guía para políticas públicas incluyentes* [Drug Policy, Gender and Incarceration in Mexico: A Guide to Inclusive Public Policies]. Mexico City: Equis Justicia. Available at: <http://fileserv.idpc.net/library/poitic-as-de-drogas-genero-y-encarcelamiento-en-mexico-una-guia-para-politic-as-publicas-incluyentes.pdf>

In addition to the limited but growing body of international law that explicitly or implicitly protects the rights of people deprived of liberty, in this context, there are several tools at the international and inter-American level that can assist States in strengthening the gender perspective of their prison reform efforts, including:

- The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* (Belém do Pará Convention), which establishes violence against women as a violation of their human rights, including when it is perpetrated or tolerated by the State and its agents, and created a State obligation of due diligence for the investigation, punishment and reparation of crimes of violence against women;¹³
- The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (usually known as the “Nelson Mandela Rules”),¹⁴ which although not specifically designed for women do include provisions on housing male and female inmates separately, the availability of specific and adequate health care services in women’s prisons, the prohibition of the use of solitary confinement on women and children, the use of restraints on women during labour, childbirth and immediately afterwards, access to conjugal visits for both women and men, gender balance among prison staff and external inspection teams, and the use of female-only staff in women’s prisons.
- The *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (usually known as the “Bangkok Rules”),¹⁵ which give guidance to policy-makers, legislators, sentencing authorities and prison staff to reduce the imprisonment of women, and to meet the specific needs of incarcerated women. The Bangkok Rules address admission procedures, access to health care (which is broadly understood to include treatment for substance abuse, psychological care to prevent suicide and self-harm, and preventive health care), humane treatment, search procedures, and children who accompany their mothers into penitentiary centers;
- The decision of the Inter-American Court of Human Rights in the case of *Miguel Castro-Castro Prison v. Peru*,¹⁶ which among other standards established that the use of physical violence and sexual abuse by agents of the State, in this case the Peruvian National Police and Peruvian military, as well as the denial of health services to pregnant inmates, constituted both violence against women, under the Belém do Pará Convention and torture, under the terms of the Inter-American Convention to Prevent and Punish Torture;
- Resolution AG/RES. 2907 (XLVII-O/17) of the OAS General Assembly, which among other things requested the OAS General Secretariat to examine “...the implementation of alternatives to incarceration, special treatment initiatives, and evidence-based social reintegration programs, bearing in mind the increasing number of women in the region who have been deprived of their liberty for drug use or minor drug-trafficking offenses, and the enormous family, social, economic, and institutional repercussions thereof.”¹⁷ This resolution joins a series of previous resolutions that address issues of drug policy and incarceration from various perspectives, with a specific focus on human rights and, to an increasing degree, gender equality.

Even in the context of the limited, though growing, body of data on the situation of incarcerated women, a number of concrete policy and programmatic recommendations are possible:

¹³ Available at: <http://www.oas.org/en/mesecvi/convention.asp>

¹⁴ Available at: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

¹⁵ Available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

¹⁶ Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf

¹⁷ AG/RES. 2907 (XLVII-O/17) “Advancing Hemispheric Security: A Multi-dimensional Approach” (paragraph 79)
Available at: <http://www.oas.org/en/47ga/>

- Adopt a gender perspective in the design, implementation, and follow-up of legislative and policy reforms on the issue of penal reform, in particular to take into account: (a) women's unique and historically disadvantaged position in society; (b) their history of victimization, which may be particularly extreme in the case of women convicted of offenses; (c) the absence of aggravating factors in the commission of the offense, and (d) the differentiated and incremental impact of custodial measures on;¹⁸
- Consider the use of alternative sentencing, non-custodial measures such as house arrest, and other measures for women accused of low-level, non-violent offenses, taking particular note of the potential impact of incarceration on women's dependent family members, including children, people with disabilities and older persons. Establish procedures and mechanisms to monitor the implementation and follow-up of these measures.
- Prioritize the implementation of economic and social reintegration programs for incarcerated women that will, on the one hand, minimize the impact of incarceration on their families and persons under their care and, on the other hand, provide them with concrete tools to build their own economic autonomy on leaving prison, reducing their risk of recidivism.
- Employ an intersectional and intercultural approach to prison reform that takes into account the additional risks and obstacles faced by afro-descendant persons, indigenous persons, LGBTI and older persons, people with disabilities, and children and adolescents. These risks include additional or aggravated violations of human rights.
In particular, as the IACHR has pointed out,¹⁹ the needs of trans persons should be taken into account, and these persons should be consulted, in deciding whether to place them in penitentiary centers designed for a population whose gender is not that with which the trans person identifies – for example, trans women housed in prisons for the male population or vice versa.

¹⁸ IACHR (2017), op.cit.

¹⁹ IACHR (2017), op.cit.