

AN ANALYSIS OF THE EXERCISE OF SEXUAL AND REPRODUCTIVE RIGHTS BY WOMEN INCARCERATED IN THE AMERICAS

Monteiro Y

Faculty of Law, University of São Paulo, Brazil

Abstract: The present article addresses the exercise of sexual and reproductive rights by women incarcerated in the Americas. The State, through the use of police power, has the legitimacy to restrict the freedom of individuals who have violated laws. However, such restrictions on freedom not only serve the corrective function of penalties but also impact the reproductive and sexual rights of women prisoners. This is due to the construction of prisons, which disregards female bodies and their needs. The need for adequate apparatus and infrastructure to address women's health demands, the exclusion of women's sexual rights in many prisons, and the precarious nature of maternity in prison were studied. The article is based on a critical analysis of repressive criminal law, prioritizing imprisonment over alternative sentences, and disregarding the serious consequences of incarceration for women, especially considering the gender roles to which they are conditioned. The analysis focused on key situations, including intimate visits, breastfeeding, pregnancy, abortion, menstrual poverty, among other specific women's health issues within the context of women's prisons. The research employs an intersectional approach to study gender, race, social class, sexual orientation, religion, and other vulnerability factors. The main methodology adopted was qualitative bibliographical research, in order to build critical thinking through the analysis of the works of the main authors dealing with the subject.

Keywords: Gender-based violence, social justice, gender norms, abuse, patriarchy, South Africa

Introduction

Prisons are traditionally conceived, designed and structured from an androcentric perspective directed toward a masculine population deprived of liberty for violent crimes. Because of this, they lack an adequate infrastructure capable to address the special needs of women. Prisons are not conceived to accommodate demands like pregnancy, birth, postpartum and breastfeeding. However, most women incarcerated are in their peak of reproductivity, between the ages of eighteen and forty-four (Laufer, 2019). In this scenario, women in prison are placed in a vulnerable situation, which affects specially their sexual and reproductive rights.

The deprivation of liberty imposed by a sentence can't result in restriction on other fundamental rights. For this to happen, according to the UN Special Rapporteur against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, different imprisonment, policies, services and infrastructure are required to address women's needs and ensure their protection in prison.

The aim of this article is to analyze the main critical points relating to the exercise of the sexual and reproductive rights of incarcerated women in the Americas, and to identify the problems and good practices found in the region.

The analysis carried out adopted an intersectional approach and considered the inequalities between man and women and the roles of gender and their impact. The reason for that is because a big part of those women incarcerated are accused of non-violent offenses due to the vulnerable social condition that they were before.¹ Those women, in the majority, live in poverty, have little schooling and are responsible for taking care of their children (87% of them have kids), as well as of other family members that need assistance (UNGA, 2016). Usually, they have been exposed to diverse forms of abuse and violence. It's remarkable, in this sense, that social markers such as race, economic class,

¹ It's important to notice that the social context of marginalization of people has a direct influence in the commitment of a crime.

religion, nationality, among other factors of vulnerability are present and must be taken into consideration.

Women's prisons designed for male bodies.

The percentage of women incarcerated in the Americas increased by more than 50% in the past 20 years (IACtHR, 2022).² Nevertheless, criminal policies didn't incorporate a gender perspective. Otherwise, since women represent a historically lesser imprisoned population,³ prisons have traditionally been conceived, designed, and structured for men. The fact that the prison structure is thought from an androcentric perspective means that it lacks the adequate infrastructure that meet women's needs and, this situation seriously threatens their dignity, neglecting their human rights (OAS and IACHR, 2023; Van Den Bergh *et al.*, 2011).

It's important to notice that imprisonment, *per se*, amounts to heavier consequences in women's lives, considering their roles in their social, family and community context (ITTC, 2013). In this sense, it's remarkable that a high percentage of imprisoned women are the primary cares of children and other dependents or are the heads of single-parent households, as a consequence of gender roles and gender inequality (IACtHR, 2022). Hence, imprisonment of women be considered only when all other alternatives are unavailable or unsuitable. This is even more important for pregnant women and women with young children. Instead of imprisonment, the use of community corrections programs can protect public safety and reduce recidivism (Van Der Bergh, 2011).

Furthermore, most of the women prisoners committed non-violent crimes, mainly related to drug trafficking (between 40% and 75% of cases). The majority of those women are in prison for non-violent offenses due to the diverse forms of abuse and violence to which they were subjected and due to poverty. Generally, they are women with little schooling, living in poverty and who are responsible for taking care of family members (IACtHR, 2022). Hence, imprisonment should be the last measure adopted to punish those women.

When it is indispensable, imprisonment should not lead to the restriction of rights other than those for which it is strictly intended. However, the lack of a gender perspective in prison infrastructure in the Americas amounts to a restriction of the fundamental rights of these women (Van Der Bergh, 2011). Among the factors that indicate the lack of a gender perspective in prisons, the Inter-American Commission on Human Rights points out:

“i) the limited number of female detention centers or sections exclusively for women, with the result that they are located far away from their families; ii) the failure to adapt prisons to women's needs; iii) challenges in effective separation; and iv) obstacles to housing trans women due to the lack of spaces that are respectful of their gender identity” (OAS and IACHR, 2023, p. 69).

There is an urgent need to reformulate women's imprisonment and treatment policies, services, and infrastructures in order to address women's distinct needs and ensure their protection (UNGA, 2016; IACtHR, 2022).

Most vulnerable situation

Some situations can place women in a heightened situation of vulnerability, because their lives and physical integrity may run a greater risk. Between those situations, it's possible to mention pregnancy, birth, postpartum and breastfeeding (Diuana *et al.*, 2016; IACtHR, 2022). In the case

² In Brazil, the number of women incarcerated tripled between 2000 and 2014, nevertheless, there has been no expansion or adaptation of the penal infrastructure (Diuana *et al.*, 2016. p. 2042).

³ “Women and girls constitute a small proportion of the total prison population; in about 80% of prison systems worldwide, the proportion of women varies between 2% and 9%” (Van Den Bergh *et al.*, 2011. p. 690).

Manuela et al v. El Salvador, The Inter-American Court of Human Rights (IACtHR) recognized that pregnant women incarcerated are in a special situation of vulnerability, because they require specific services, like pre and postpartum care and because they may be victims of prejudicial practices and specific forms of violence, such as obstetric violence (IACtHR, 2021).⁴

In general, pregnant and postpartum women receive the same treatment as other prisoners, which is based on the parameters of male prisoners (Kotlar *et al.*, 2015). Often, a differentiated approach that addresses their specific conditions is not adopted (Van Der Bergh, 2011). One situation that can be mentioned as an example is the transport of women prisoners, who are shackled even when they are pregnant or in labor, since this would be the standard procedure established based on the adoption of a masculine reference for inmates' behavior (Kotlar *et al.*, 2015).

In the Americas, the main problems faced by pregnant and postpartum women in prison are related to:

“i) the scarcity of appropriate programs and spaces; ii) deficient pre- and post-natal health care; iii) inadequate nutrition; and iv) the use of coercive methods. In addition, pregnant women face the lack of access to appropriate clothing and challenges relating to labor in childbirth” (OAS and IACHR, 2023, p. 83-84).

Another factor that makes women in prisons more vulnerable is that they generally have a previous history of inadequate health care. In this sense, many of them have had “no contact, or very limited contact, with health services in the community before they were detained in prison” (Van Den Bergh *et al.*, 2011, p. 689). The reason for this is related to the fact that women prisoners usually come from marginalized and disadvantaged backgrounds and no rare they have histories of violence, physical and sexual abuse (Van Der Bergh *et al.*, 2011). Because of this, access to health services in prison is of vital importance, as well as its quality.

Some issues relating to the structure of prisons also place women in a situation of greater vulnerability, such as the fact that women's prisons are usually located a long distance from women's homes or places of origin, making it impossible for them to have contact with their families, which affects their mental health (IACtHR, 2022). In addition, in some places, women are held in mixed prisons, running the risk of being victims of violence both at the hands of men deprived of liberty and male officers exercising supervisory functions (OAS and IACHR, 2023).

It is important to point out that the risks of suffering violence in prison are even greater for trans women, including sexual violence committed as a reprisal for their gender identity (OAS and IACHR, 2023).

Sexual and Reproductive Rights

As already mentioned, a large part of women's rights that are limited and violated in prisons are their sexual and reproductive rights. According to the IACtHR, sexual⁵ and reproductive⁶ health is a

⁴ According to the Inter-American Commission of Human Rights, some of the violences that women are subject in prisons are: i) rape as a means of coercion to obtain a confession, humiliate them, or exercise power over them; ii) forced nudity; iii) sexual exploitation through “sexual services” that women are required to provide in exchange for being able to exercise their rights; and iii) sexual exploitation through forced participation in prostitution networks run by prison staff, particularly harmful to trans women (OAS; IACHR, 2023, p. 70; IACtHR, 2022).

⁵ Sexual health, according to the definition of the World Health Organization (WHO) is “a state of physical, emotional, mental and social well-being in relation to sexuality.” (WHO, 2010)

⁶ Reproductive health refers to the ability to reproduce and the freedom to adopt informed, free and responsible decisions on procreation. It also includes the access to a series of information, goods, establishments and reproductive health services that would allow people to adopt informed, free and responsible decisions on reproductive behavior (United Nations. 1994).

component of the right to health and is related to “reproductive autonomy and freedom with respect to the right to take autonomous decisions regarding their life plan, their body and their sexual and reproductive health, free of all violence, coercion and discrimination” (IACtHR, 2022, p. 51). Sexual and Reproductive rights also refer to access to information, to education and to the means to allow the exercise of those rights (IACtHR, 2022).

Below, some relevant questions about the exercise of sexual and reproductive rights by incarcerated women will be analyzed.

Sexual Rights

The exercise of sexual rights by incarcerated women is crossed both by social norms and moral values relating to gender and reproduction and by prison regulations (Diuana *et al.*, 2016). Intimate visits are essential for women prisoners to exercise their sexual rights. However, these visits are often not authorized in women's prisons, are granted as a form of benefit to a few inmates or are conducted in inappropriate areas, not equipped for this purpose, such as cells or areas destined for interaction between women and their lawyers (OAS and IACHR, 2023).

It is very important that women prisoners are provided with information about contraceptive methods and that they can choose whether or not to use them, and that they can also choose between a temporary and a permanent method. It is important to raise awareness about the importance of preventing sexually transmitted diseases (Oliveira *et al.*, 2019; ITTC, 2013), especially among homosexual couples in prison who, due to not running the risk of becoming pregnant, often end up not preventing the transmission of sexually transmitted diseases (Oliveira *et al.*, 2019).⁷

In addition, it is essential that there is a form of support for women prisoners who have been victims of sexual or physical violence, before or during their imprisonment (Van Den Bergh *et al.*, 2011).

Reproductive rights

First, it should be noted that reproductive rights should not be mentioned as a synonym for reproductive freedom, because reproductive choices are made under conditions of inequality in terms of gender, class, culture and other factors. It would be impossible to talk about "individual freedom" in isolation from the entire context in which it is inserted. It is therefore worth pointing out the state's responsibility to promote conditions that enable women to make reproductive choices (Diuana *et al.*, 2016).

One of the criteria for guaranteeing women's reproductive rights is to ensure that they experience motherhood in a human rights context, in other words, voluntarily, safely, socially supported and in accordance with gender equality, preserving the fundamental rights to life, liberty and personal security, health and non-discrimination (Mattar and Diniz, 2012). It is therefore essential for the exercise of voluntary motherhood that the right to abortion is guaranteed and that forced sterilizations end (Mattar and Diniz, 2012).

In addition, specialized medical care in gynecology or mastology must be provided to meet women's health demands (OAS and IACHR, 2023). The absence of access to medical check-ups brings a higher percentage of serious health conditions that weren't addressed at the beginning. Also, it is essential that the nutrition offered in prisons meet pregnant women's needs and that women in prison don't be discouraged from breastfeeding because it may interfere with the prison routine (Van Der Bergh, 2011).

⁷ It can be observed that the choice of homosexuality during the period of imprisonment is recurrent, motivated not only by institutional and bureaucratic obstacles to intimate visits with their partners, but also by the need for sexual and emotional fulfillment (Oliveira *et al.*, 2019, p. 100).

Furthermore, the frequent occurrence of obstetric violence severely violates the reproductive rights of women in prison⁸. Obstetric violence is often committed as a way of punishing women for being seen as "offenders" (Diuana *et al.*, 2016, p. 2048). In this sense, the IACtHR considers that

"violence exercised on women during pregnancy, childbirth and after childbirth is a gender-based form of violence, particularly obstetric violence, which is contrary to the Convention of Belém do Pará" (IACtHR, 2022).⁹

Another serious and frequent situation is the application of coercive measures against pregnant and postpartum women, especially during transfers for outside visits as well as at the time of birth and immediately thereafter (Diuana *et al.*, 2016). In this sense, the Inter-American Commission has already stated that shaking women who are pregnant, in labor or postpartum is a situation that violates women's rights, putting them and the fetus at risk of suffering damage to their health (OAS and IACHR, 2023). In addition, this situation causes intense physical and moral suffering, and can lead to discrimination against these women in the hospital (Diuana *et al.*, 2016).

Considering that the deprivation of liberty amounts to a greater vulnerability and specific needs, States must adopt measures to guarantee that women inmates can fully exercise their sexual and reproductive rights (IACtHR, 2022).

Reproductive Hierarchies

Women in prison often have their motherhood delegitimized by society. They are judged for exercising their sexual and reproductive rights (Diuana *et al.*, 2016). It is impossible to ignore the fact that the exercise of reproduction and sexuality are mediated by power relations. As a social phenomenon, motherhood is marked by social, racial, ethnic and gender inequalities. Because of these inequalities, not all maternities are considered acceptable by society (Mattar and Diniz, 2012).

Therefore, the maternity that is admired is the one that is in accordance with socially prescribed standards. In this excluding and discriminatory context, motherhood exercised by black women, from lower economic classes, outside heteronormativity or carried out in the absence of a (male) partner will be rejected. The socio-economic aspects in which a woman is inserted combine to determine the degree to which motherhood will be socially accepted, composing classification factors for determining a reproductive hierarchy (Diuana *et al.*, 2016). In this sense, motherhood practiced by incarcerated women is excluded and seen as not legitimate by society, since women prisoners would have contradicted the so-called "feminine nature", that of a passive and caring person, who would never transgress (Mattar and Diniz, 2012).

Sexual and reproductive rights in the Americas

According to the Inter-American Development Bank, 87% of the women imprisoned in the Americas have children, and the majority of them are mothers of an average of three children (IACtHR, 2022). Despite this data, the reality faced by women incarcerated in the Americas does not allow them to fully exercise their maternity rights, nor their sexual and reproductive rights in general. The challenges and advances observed in the region with regard to the guarantee of the sexual and reproductive rights of incarcerated women will be analyzed next. Subsequently, we will look at the

⁸According to the Inter-American Commission on Human Rights, the concept of obstetric violence encompasses "all situations of disrespectful, abusive, neglectful treatment or denial thereof that take place during the pregnancy, childbirth or postpartum period, in private or public health facilities." (IACHR, 2019, para. 181).

⁹The Belém do Pará Convention obligates States to prevent and to abstain from acts of gender- violence during access to reproductive health services, including childbirth, with an increased duty in the case of women deprived of liberty (IACtHR, 2022, p. 57)

recommendations made by the Inter-American Court and the Inter-American Commission on Human Rights in order to ensure greater protection of these rights in the region.

Main regional challenges to sexual and reproductive rights

According to the Report on Women Deprived of Liberty in the Americas, the region's prison systems lack programs focused on comprehensive care for the needs of pregnant and postpartum women, with a widespread absence of suitable spaces for breastfeeding (OAS and IACHR, 2023). Also, a deficient health care is noticed in the region, with the absence of specialized service to address pregnancy or related to reproductive health services, especially in Colombia, Nicaragua, Guatemala and El Salvador. In some prisons in Colombia and Argentina, specialized services are outsourced, so they are not provided frequently, and they take time, which prevents urgent cases from being treated promptly. About this, it's notable the failure to standardize care in prisons of the same country, the few prenatal medical check-ups done, and the widespread absence of adequate spaces intended for the placement of pregnant or postpartum incarcerated women (OAS and IACHR, 2023).

Furthermore, the use of coercive methods against pregnant and postpartum women during transfers, or at the time of birth and immediately thereafter is a widespread violation of women's rights in the region (Diuana *et al.*, 2016; OAS and IACHR, 2023). This happens despite the existence of international and national rules prohibiting those measures from being applied against pregnant or postpartum women.¹⁰ It is worth noting that the use of restraint on women during labor and immediately after birth is a routine in the USA (Laufer, 2019), which has already been addressed with concern by the UN Committee against Torture (United Nations, 2006).

In the case *Manuela v. El Salvador*, the Inter-American Court ruled that the use of instruments of physical coercion on women that are giving birth or that just did it amounts to a violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment established in Article 5(2) of the American Convention (IACtHR, 2021).

In the USA, the overruling of *Roe v. Wade* made the access to abortion in prisons even harder (Sharfstein, 2022). Before *Dobbs v. Jackson Women's Health Organization* (2022), the access to abortion to inmates was hardly dependent on the state rule, and on the prisons or jails official or unofficial policies. In a lot of prisons, the cost of the procedure, the transfer and the payment of the security guards was a heavy burden imposed on women who desired to make an abortion (Laufer, 2019). Hence, the right wasn't indeed guaranteed for those women behind bars. With the overruling, the legal recourse to plead for an abortion is no longer a possibility (Sharfstein, 2022). Nevertheless, even before, few women historically were able to obtain abortions while incarcerated through judicial recourse. In addition, the right to a safe abortion faces many obstacles in the region, as it is prohibited in many countries.

As mentioned above, women incarcerated should have access to contraception methods, and to information on those methods. In this sense, the use of contraception must be an option, and not an obligation. The provision only of permanent contraception methods in some prisons and jails of the USA amounts to a violation of the right to reproductive health and decision (Wuandt and Wang,

¹⁰ Rule number 22 of the Bangkok Rules states that "Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison". About national rules, "Bolivia specifically prohibits the punishment of solitary confinement for women with children when nursing. Chile regulates in Article 86 of the Prison Rules that placement in a solitary cell is prohibited for pregnant women and during six months after giving birth, for nursing mothers and for those who have their children with them. Panama establishes that pregnant women deprived of liberty have the right to be excused from any treatment incompatible with their state, forty-five days before and six months after childbirth. Peru, in Article 30 of the Sentencing Code establishes prohibitions to apply the punishment of solitary confinement to pregnant women and those who have children with them" (IACtHR, 2022, p. 51).

2021). The situation also happens in other countries, in Brazil, for example, the mandatory use of injectable contraceptives amounted to a violation of reproductive rights too (Diuana *et al.*, 2016).

The lack of access to hygiene items for sexual and reproductive health care, especially sanitary pads in the necessary quantities, is also a problem in the region, especially in Brazil, Chile, Colombia, El Salvador, the USA and Mexico (OAS and IACHR, 2023; Lauder, 2019). There is also a lack of appropriate clothing for pregnant women, which increases the risk of falls and stumbles (OAS and IACHR, 2023).

Regional best practices

Some practices adopted in the region resulted in significant progress in protecting the sexual and reproductive rights of women in prison and should be mentioned as examples for other countries to adopt. Some of them will be mentioned here in a non-exhaustive approach.

In some countries in the region, prisons have adapted spaces for women who are breastfeeding or pregnant. For example, in Costa Rica, women who have been pregnant for more than six months and women who live with their young children in prison are housed in a mother-child module, with adequate facilities for their needs. This is also the case in Honduras, at the National Women's Penitentiary for Social Adaptation, and at the Bluefields Penitentiary Facility in Nicaragua (OAS and IACHR, 2023).

The Inter-American Commission on Human Rights highlights some measures adopted by countries in the region to provide appropriate programs and spaces for women who are pregnant, breastfeeding or postpartum, taking into account differential standards of treatment, care, and attention:

“i) laws on the subject of treatment for pregnant women in prison and during the postpartum period in the state of Massachusetts in the United States and in Brazil; ii) provisions guaranteeing health care for pregnant women and postpartum women and for babies in Brazil; iii) regulations establishing that childbirth must occur in maternity services in Argentina; iv) prison protocols on care for pregnant women in Argentina; v) administrative agreements between various organization for comprehensive care of pregnant and nursing women in Colombia; vi) resolutions governing the transfer and custody of pregnant women in Chile; and vii) programs providing bonuses to pregnant women that include a nursing subsidy in Bolivia.” (OAS and IACHR, 2023, p. 85).

In Brazil, there are daycare centers in prisons to house children over 6 months and under 7 years old whose caregiver is in prison. Regarding sexual rights, a resolution adopted nationally in 2011 considers intimate visits between men and women prisoners with their partners to be a constitutional right that must be enforced (Diuana *et al.*, 2016; Oliveira *et al.*, 2019).

Recommendations

The Inter-American Court of Human Rights states that it is an obligation of states to ensure that women in prison have access, without discrimination, to quality sexual and reproductive healthcare. Also, it is a State's duty to eliminate the practical barriers that prevent the full realization of their sexual and reproductive rights (IACtHR, 2022).

The Court highlights several actions that states must take to achieve this. These include the provision of information and means for contraception and the prevention of sexually transmitted diseases. In addition, it is essential to provide initial care when women enter prison, to identify their health status, to check whether they have experienced sexual and physical violence and to provide them with the necessary care, including psychological treatment. Specialized medical care must always be available, as well as information about the woman's health, guaranteeing the privacy and confidentiality of the

patient. In addition, all necessary personal hygiene items should be provided, as well as suitable clothing for pregnant, lactating and postpartum women (IACtHR, 2022).

States must ensure that female prisoners are transported during pregnancy, pre-partum, childbirth, postpartum or breastfeeding without handcuffs or shackles. In addition, the right to have a female companion whom the prisoner trusts during labor must be guaranteed, as well as the right to a care plan that is sensitive to cultural practices (IACtHR, 2022).

An effective and independent complaints' mechanism must be provided. In addition, access to justice must be guaranteed for these women, including women who have suffered obstetric violence (IACtHR, 2022).

The Inter-American Commission states that:

“in the case of pregnancy resulting from sexual violence, States must eliminate all obstacles hindering this population's access to the sexual and reproductive health services they need, including services to interrupt the pregnancy free of charge and under safe conditions”. (OAS and IACHR, 2023, p. 78).

Materials and Methods

The research followed the methodology of a qualitative literature review. Journals, papers, books and reports were analyzed, as well as relevant international legislation on the chosen subject.

Results and Discussion

The article aimed to discuss the extent to which the sexual and reproductive rights of incarcerated women in the Americas are currently protected. To this end, the main critical points for the effectiveness of these rights were analyzed.

As a result, it was possible to observe that the female prison population in the Americas has been historically invisibilized and faces a large gap in the guarantee of their rights, especially sexual and reproductive rights. Nevertheless, there are good practices adopted by countries in the region that point to a path of progress in the development of public policies and internal measures to ensure that women prisoners can exercise these rights. At the same time, the production of international protection standards continues, indicating that these issues are gaining visibility and are being seen with greater importance by bodies that promote human rights regionally and nationally.

Conclusion

Based on the data analyzed, it is possible to conclude that, historically, an idea of public security has prevailed in the Americas that is incompatible with preserving the human dignity of those seen as offenders. Women, in this sense, are the victims of an even bigger violation of their rights when they are incarcerated, since most prison structures are not designed or adapted to their specific needs, since they are designed for male bodies. In this context, women's sexual and reproductive rights suffer serious violations, either through the lack of specific and necessary health services or through the active violation of these rights (through discriminatory and violent conduct).

The patterns of discrimination and violence faced by women inside prisons are not an isolated fact, but rather a reflection of a broader context of violence and gender inequality in society. As mentioned, there are several factors that result in the violation of the sexual and reproductive rights of incarcerated women in the Americas, embedded in a logic that reinforces the existence of reproductive hierarchies.

In this sense, it is essential that states act actively not only to stop violating the sexual and reproductive rights of imprisoned women, but also to ensure that they are complied with, through public policies and measures that are in line with international standards for the protection of these rights.

Declaration of Interest Statement

The author declares that she has no conflict of interests.

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