INTIMATE VISITS IN LATIN AMERICA: A BRIEF ANALYSIS OF LEGISLATION

VISITAS ÍNTIMAS NA AMÉRICA LATINA: UMA BREVE ANÁLISE DA LEGISLAÇÃO

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Abstract: Intimate visits are usually a controversial topic, and information about its treatment globally is scarce. However, some published research show that the practice is widespread in Latin America, and legislation in the regions formally regulate the matter. Therefore, in this initial work, we briefly analyse the legislation of four countries in the region—Brazil, Colombia, Mexico, and Argentina—in order to identify similarities and differences. Hopefully this will shed light on this topic, contributing to further debate and exchange of experiences.

Keywords: Latin American legislation; intimate visits; comparative research; human rights.

Resumo: Visitas íntimas geralmente são um tema controverso, com escarças informações sobre seu tratamento global. No entanto, pesquisas indicam que a prática é comum na América Latina, com as legislações formalmente regulamentando a sua prática. Dessa forma, nesse trabalho inicial, as legislações de quatro países da região são brevemente analisadas — Brasil, Colômbia, México e Argentina — a fim de identificar semelhanças e diferenças. Espera-se que esse artigo lance luz sobre o tema, contribuindo para futuros debates e trocas de experiências.

Palavras-chave: legislação latino-americana; visitas conjugais; pesquisa comparada; direitos humanos.

1. Introduction

Intimate visits are usually a controversial topic, with the scarce information available pointing to few countries in the world officially allowing and regulating the practice (**Bosworth *et al.***, 2018; **Goetting**, 1982), although informal practices may exist. They are a widespread practice in Latin America, sometimes having been implemented to some extent even before it was regulated by law (**Colombaroli; Braga**, 2014, p. 130-131; **Goetting**, 1982, p. 407). Nowadays, the terms and requirements for this practice change according to the different legislations, with some jurisdictions adopting a more progressive and inclusive approach, whereas others might put more restrictions in place, such as requiring the parties to be married or not recognising the same rights to same-sex couples.

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Motivated by the curiosity of different legal and cultural practices, and to further explore how this region of the world regulates intimate visits, we have conducted research on the current legislation of four countries in Latin America—Brazil, Colombia, Mexico, and Argentina. Since this is a short and exploratory paper, it is limited to analysing the legislation of such countries, divided into some basic themes, and therefore informal practices, judicial interpretation, and other aspects that fall outside of this scope will not be addressed[1].

2. Legislation analysis

The first aspect noticed when conducting literature review and analysing the legislation is that Latin American authors and legislations tend to treat the matter of intimate visits through rights-based lenses instead of a utilitarian approach (to understand these different approaches, see the discussion in **Vladu *et al.***, 2021, p. 359), albeit with different levels of protection[2]. This differentiation and the rights-based approach adopted are relevant to the discussion of access to intimate visits, as within this perspective the restriction of rights will always demand justification, what does not necessarily happen with an approach that views such policies as instrumental.

Every domestic legislation analysed has a provision for visits or intimate visits in federal law, which is then regulated and detailed by other legal instruments.

Colombia dedicates article 112 of its Prison Code (Law 65/1993, *Código Penitenciario y Carcelario*) to the right to visitation and establishes that the "intimate visit" will be regulated by the general regulations according to principles of hygiene and security. This piece of legislation is complemented by Resolution 6,349/2016, by the National Penitentiary and Prison Institute (*Instituto Nacional Penitenciario y Carcelario*, INPEC), which states that every person deprived of liberty has the right to intimate visitation (art. 71).

Brazil, in art. 41, X, of its Penal Execution Law (Law 7,210/1984, *Lei de Execução Penal*, LEP), determines that it is the prisoner's right to receive visits from their spouse, partner, family members, and friends on specific days. When it comes to intimate visitations, it is currently complemented by Resolution 23/2021, from the National Council for Criminal and Prison Policies (*Conselho Nacional de Política Criminal e Penitenciária*, CNPCP)[3].

Argentina establishes the right specifically to intimate visits in art. 167 of its Prison Execution Law (Law 24,660/1996, *Ley de Ejecución De La Pena Privativa De La Libertad*, LEPPL), when it states that prisoners who do not have permission to leave prison to strengthen and improve family ties may receive intimate visits from their spouse or partner. It is complemented by Regulatory Decree 1,136/1997.

In Mexico, the right of the person deprived of liberty to receive visits is recognised under art. 9, VIII, of the Mexican National Law on the Execution of Criminal Sentences (*Ley Nacional de Ejecución Penal de Mexico*, LNEPM, from 2016). This provision expressly refers to art. 59 of the same statute, which classifies conjugal visits as one among several forms of visitation, alongside individual, family, religious, humanitarian, and assistance visits. The conjugal visit is also recognised in some regulations in Mexican states, which appear to coexist with federal law. Examples include the Regulation of the Preventive and Social Readaptation Centres of the State of Mexico (Regulation 3,011/1992, *Reglamento de los Centros Preventivos y de Readaptación Social del Estado*, RCPRSE, art. 71), the Regulation of the South–Southeast Regional Comprehensive Justice Centre of the State of Jalisco (*Reglamento del Centro Integral de Justicia Regional Sur-Sureste del Estado de Jalisco*, RCI-JRSEJ) (art. 53 and 54), and the Internal Regulations of the Social Rehabilitation Centres and Preventive Detention Centres of the State of Nuevo León (*Reglamento Interior de los Centros de Readaptación Social y de los Centros Preventivos de Reclusión del Estado de Nuevo León*) (art. 62).

Regarding who is allowed intimate visitation, all the legislations establish that it is every prisoner. Some seem to be particularly careful in prohibiting discriminatory measures, such as those based on sex, gender or sexual orientation (art. 1, of the revoked Res. 4/2011 from Brazil; and art. 4, LNEPM). This is in line with the Mandela Rules (Rule 58.2), which establishes that

> "[w]here conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men [...]."

It is important to highlight that these rights are not always enforced, and intimate visits are susceptible to violations and acts of discrimination, as we see with so many institutes in different criminal justice systems. As examples, we can refer to a case brought before the Federal Criminal Court in Argentina (*Tribunal Oral en lo Criminal Federal n. 1 de La Plata*) by the partner of a female detainee, with the collaboration of the activist organisation *Comunidad Homosexual Argentina*. The case dealt with the matter of the right to intimate visits by lesbian couples and saw the Penitentiary Prosecutor's Office intervene as *amicus curiae* in favour of the recognition of this right (**Argentina**, 2009a). In 2009, the application was judged favourably, in a landmarking ruling that declared unconstitutional the denial of conjugal visits for same-sex couples, considering the principles of equality before the law and non-discrimination (**Argentina**, 2009b, p. 284-285).

Colombia was also tried for not guaranteeing the right to intimate visits to a lesbian prisoner; the case reached the Inter-American Commission of Human Rights, which found th e State responsible for violating the rights to equal protection, non-discrimination, private life, judicial guarantees, and humane treatment, all based on the **Inter-American Convention of Human Rights** (2018).

Furthermore, we can see some restrictions in place depending on the marital status of the couple: in Brazil (art. 2, *caput*, Res. 23/2021), Mexico (art. 71, RCPRSE) and Argentina (art. 167, LEPPL), the parties must be married or in a civil partnership; whereas in Colombia there is no such restriction (see art. 72 of the INPEC Resolution; reinforced by Ruling T-002/18 of the Constitutional Court of Colombia). In all these cases, however, the countries' legislations allow one registered person for intimate visitations at a time (and in Brazil, since 2021, a minimum period of 12 months is required until the prisoner is allowed to register a new person; see art. 1, §2, Res. 23/2021).

Other clearly stated restrictions include sex workers and occasional relationships (art. 71, RCPRSE); and the use of intimate visitations for the provision of services or sexual favours of any kind (art. 4, *caput*, Res. 23/2021). When both people involved in the intimate visits are imprisoned, Brazil forbids it since 2021 (art. 2, §4, Res. 23/2021), whereas Colombia states that it is subjected to specific authorisation when transfer is needed (art. 72, INPEC Resolution). Mexico and Argentina both allow intimate visits between prisoners, with Argentina requiring good prison

behaviour and that they undergo tests to prove they do not have any infectious diseases (art. 73 and 76, Decree 1,136/1997). Furthermore, prisoners in specific regimes can have intimate visits restricted or denied, such as in Colombia, when a transfer is needed to enable the intimate visits, and the prisoner to be transferred was arrested for extradition or is level 1 security (art. 72.6, INPEC Resolution); in Mexico, in stricter special regimes, intimate visits can be more restrictive to prisoners who require special surveillance measures, although the law is not clear as to the extent of this restriction (art. 37, VI, LNEPM)[4].

When it comes to the frequency of visitation, in Brazil the legislation states it should be preferably monthly (the previous resolutions said they should be at least monthly, which is the Colombian rule too; see art. 71 of the INPEC Resolution); Argentina (art. 57, Decree 1,136/1997) and Mexico (art. 59, LNEPM) establish the frequency of at least every two weeks.

In no legislation is the right to intimate visitations absolute, and it can be suspended. In Argentina, it can be partially suspended when the prisoner commits a serious disciplinary offense (art. 87, LEPPL), or if the visitor violates their duties (art. 23, Decree 1,136/1997). In Mexico, committing disciplinary offenses may lead to restrictions on visiting hours (art. 41, LNEPM). In Brazil, Res. 1/1999 and 4/2011 used to allow the suspension of intimate visits in the case of a disciplinary offense related to the exercise of this right (art. 4 of both Resolutions); since 2021, however, this has been broadened, and art. 6 of the Res. 23/2021 states that the access to intimate visits presupposes the regularity of the prisoner's prison conduct and the fulfilment of the duties of discipline and collaboration with prison order, and it may be suspended, for a specific period, if the prisoner commits a disciplinary fault that proves itself incompatible with the maintenance of rewards (in accordance with art. 55, LEP). This new provision once more highlights the difference between treating intimate visits as rights or privileges, especially regarding the protection of such rights and the limits imposed to its restriction.

3. Final considerations

Intimate visitations are still very under-researched, not only in terms of what are the principles that underpin it, but also in terms of empirical data that could inform policymaking. There should be more discussions regarding how they are regulated, what purposes they serve, how they are conducted in reality, and if regulations and practices are appropriate. This should be done from a rights-based approach, in which fundamental rights such as the right to intimacy, privacy, family life and the free expression of sexuality are at the centre of the discussion and maximising them is guiding our concerns.

This approach is aligned with the content of international human rights law developed by the Inter-American System of Human Rights (IASHR) and to which countries such as the ones analysed in this article have committed to. Indeed, precedents of the IASHR, such as the case of Juvenile Reeducation Institute vs. Paraguay, decided by the Court, already recognised that the deprivation of liberty invariably affects rights other than personal liberty, such as the rights to personal privacy and to the privacy of family life; however, such restrictions of rights "must be kept to an absolute minimum since, under international law, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare" (§154; see also **Rosa**, 2021, p. 140-142).

To enable this approach, we understand that intimate visitations should be recognised as a right and not as a privilege or a matter that can be discretionarily decided by the prison management or the State. This means any restrictions on it should always be justified, and the burden of proof of the necessity of such restrictions should always lie on the State. Access to this right should not be subject to discrimination of any kind, such as those due to sex, gender, sexual orientation, gender identity, etc. Furthermore, it should not have its enforcement conditioned on any external, utilitarian concern, but rather it should be recognised as a right in itself.

Additional information and author statements (scientific integrity)

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Notes

[1] Indeed, we do not ignore that, as frequently happens with the criminal justice system, there can be a gap between law and reality. In the case of intimate visits, there are relevant gender aspects to be considered—e.g., in Brazil, intimate visitation was allowed for men before they were for women; and to this day there are many states that still have not put in place the necessary measures for it in female detention centres; additionally, Argentina and Colombia have faced debates regarding the rights of lesbian couples to intimate visits (Argentina, 2009; IC-mHR, 2015). These aspects deserve in-depth analysis and research, and therefore they fall outside the scope of this paper.

[2] For example, the Brazilian literature presents conjugal visits as a right but questions their effectiveness when it comes to women in prison (Guimarães, 2015, p. 66; Lima, 2006, p. 18).

[3] The CNPCP has had 2 previous Resolutions dedicated to the topic—Res. 1/1999 and 4/2011, both revoked. Although the new Resolution 23/2021 (still in force) is more detailed, it is also more restrictive than previous ones. Res. 1/1999 and 4/2011 recognised intimate visits as a right, but Res. 23/2021 states it is a privilege (*regalia*). Despite the more restrictive approach of the new Brazilian regulations, which deserves criticism, we cannot affirm it adopts a utilitarian more approach to intimate visits—however, the impact of affirming it as a privilege is noticeable.

[4] According to Calveiro (2010, p. 67-68), visits in maximum-security facilities in Mexico take place in glass cubicles around a table, which restricts family contact. The study suggests that conjugal visits are unfeasible under stricter regimes, as the author contends that prisoners' sexuality is either virtually absent or limited to self-gratification.

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