Removing Legal Barriers to Prison Health and Human Rights: Legal Training for African Lawyers

Unique challenges of vulnerability in detention LGBT Persons

Holiday Inn, Sandton, Johannesburg - 13 March 2017
Presenter: Ricky Nathanson – Trans Research, Education & Advocacy [TREAT], Bulawayo, Zimbabwe
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“We should all be outraged when people suffer discrimination, assault and even murder – simply because they are lesbian, gay, bisexual or transgender”

Ban Ki-moon, the Secretary-General of the United Nations – April 2012

Oslo Conference on Human Rights, Sexual Orientation and Gender Identity

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‘[LGBT persons] are often considered as a sub-category of prisoners and detained in worse conditions of detention than the larger prison population. The Special Rapporteur has received information according to which members of sexual minorities in detention have been subjected to considerable violence, especially sexual assault and rape, by fellow inmates and, at times, by prison guards. Prison guards are also said to fail to take reasonable measures to abate the risk of violence by fellow inmates or even to have encouraged sexual violence, by identifying members of sexual minorities to fellow inmates for that express purpose....

The Special Rapporteur on Torture

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Risk factors and situations
Types and situations of risk are numerous for persons from sexual minorities in contact with the criminal justice system. While all persons in police custody are at risk because torture and other ill-treatment most frequently occur in the early stages of detention, LGBTI people are even more exposed to all types of abuse, whether homosexuality is criminalised or not (although where it is, these risks are even more acute). Psychological violence, forced confessions, and rape by fellow inmates or law enforcement officials have been documented.
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Interrogations
Risks are greater for sexual minorities, as additional threats may be used by law enforcement officers to extort a confession. For example, police officers may threaten to reveal the detainee’s sexual orientation to family members, friends or colleagues to obtain a confession or a transgender person may even be brought to the police station on a false pretext in order to ask them for money or sexual favours in exchange for their freedom. Bribes and extortion by the police may occur not only for the purpose of extracting a confession, but also as a way of securing the person’s release.....
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Allocation of transgender detainees

In 2011, the Special Rapporteur on Violence against Women described a case in El Salvador in which a transgender woman was placed in a male-only prison and detained in a cell with gang members, where she was raped more than 100 times, sometimes with the complicity of prison officials.
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Body searches

Body searches are a particularly sensitive issue for LGBTI persons, especially if the person arrested is openly lesbian, gay or bisexual, or if the person cross-dresses or has undergone/is undergoing treatment for gender reassignment. Searches can magnify the risk of humiliation, abuse and discrimination as they may imply nudity and physical contact.
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Violence amongst detainees

• The experience of being deprived of one’s liberty is harsh for any detainee, but LGBTI persons are more exposed to violence from fellow detainees. As the Special Rapporteur on Torture encapsulated well. ‘Within detention facilities, there is usually a strict hierarchy, and those at the bottom of this hierarchy, such as children, the elderly, persons with disabilities and diseases, gay, lesbian, bisexual and trans-gender persons, suffer double or triple discrimination.’

• The risk of sexual abuse as a form of inter-prisoner violence is particularly high for LGBTI prisoners. According to the US Bureau of Justice Statistics, 3.5 per cent of men who identified themselves as heterosexual had been sexually abused by another inmate, compared to 34 per cent of bisexual men, and 39 per cent of gay men.
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Abuse by prison personnel

However, cases have been documented of LGBTI detainees being exposed to physical violence, rape or other sadistic behaviours and insults from prison personnel. For example, in US prisons, approximately half of all sexual abuse is committed by staff, not by inmates.
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Anti sodomy laws
Sodomy is punishable by law in Namibia, Swaziland, Zimbabwe, Zambia, Malawi and Botswana. Sodomy is defined as anal sexual intercourse between men, whether consensual or not. It also does not take into account whether the sexual intercourse takes place in public or private. In countries where “practicing sodomy” can lead to imprisonment, sodomy is one of the offences for which a person might be arrested without a warrant, merely on the basis of assumption regarding their sexual orientation.

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Trans* Persons in conflict with the law: the prison system

• The anti-sodomy law is particularly problematic for the prison system because it is used as an excuse for the non-distribution of condoms in prisons. This is justified under the argument that it would encourage sodomy amongst inmates. It is common that officials deny and insist that man-to-man sex does not take place in prisons, although there is widespread evidence that the practice is common, and therefore the inevitable spread of HIV.

• According to previous research [based in the United States of America], nearly one in six transgender people [16%] [including 21% of transgender women] have been incarcerated at some point in their lives, far higher than the rate of the general population – one in seventy four men and one in 800 women.
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Physical and Sexual Assault in prisons of Zimbabwe

• 8 cities and towns – 134 respondents
• Physical assault [inmates]: - 21%
• Sexual assault [inmates/staff]:- 4%
• 25-27 years reported the highest incidence of physical assault in prison [50%] by other inmates or by staff.

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What needs to be done??

Action to address violations against LGBTI persons and for the establishment of an appropriate mechanism to study, document and report to the Human Rights Council human rights violations, barriers and challenges on the basis of sexual orientation, gender identity and for intersex persons

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Owing to their regular visits to places of deprivation of liberty and subsequent reports to the authorities, monitoring bodies – including National Preventive Mechanisms (NPMs) – can play a pivotal role in helping to ensure that LGBTI detainees are protected and treated on an equal basis with other detainees.

- But in our context how possible or feasible is this???
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In the meantime........

1. Interrogation. Important safeguards include clear procedures on how to conduct interviews, recording (or ideally video-recording) of the interrogation, written records with names of all persons present, and the presence of the detainee’s lawyer.

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2. Allocation of trans detainees. Their placement in units and cells, should be determined with great caution, and the detainees concerned should be consulted on whether they want to be detained in a male or female facility. Decisions regarding their placement and protection while in detention should be taken with their informed consent.
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3. Violence amongst detainees. Given the fear of reprisals if they denounce such acts of violence to the authorities, detainees should also be given the option of confidentiality when reporting sexual abuse in prisons through both an internal and external complaints procedure. Inmates who are victims of sexual abuse should receive timely medical treatment and counselling.
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4. It is essential for monitoring bodies to assess whether LGBTI detainees are subject to any kind of violence, or are discriminated against by prison staff. Monitors should also check whether an internal policy condemning discriminatory attitudes exists and whether there is a confidential and independent system of complaints in place. Where no such policy exists, monitoring bodies should consider making a recommendation.
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Conclusion

‘States shall [...] [e]nsure, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity; put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression; and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population.’

*Yogyakarta Principle 9 (C-D), The right to treatment with humanity while in detention*