



Poder Judiciário

Conselho Nacional de Justiça

RESOLUTION No. 348, OF OCTOBER 13, 2020.

Establishes guidelines and procedures to be observed by the Judiciary, in the criminal scope, regarding the treatment of the lesbian, gay, bisexual, transsexual, transvestite, or intersex population that is in custody, accused, defendant, convicted, deprived of liberty, in compliance with penal alternatives or electronically monitored.

THE PRESIDENT OF THE NATIONAL COUNCIL OF JUSTICE (CNJ),
in use of his legal and regimental attributions;

WHEREAS the Federal Constitution of 1988 establishes as fundamental objectives of the Federative Republic of Brazil the construction of a free, fair, and solidary society and the promotion of the well-being of all, without prejudice of origin, race, sex, color, age, and any other forms of discrimination (art. 3, I and IV);

WHEREAS the Federal Constitution of 1988 ensures, in its art. 5, that no one must be subjected to torture or to inhuman or degrading treatment (section III), that there must be no cruel punishment (section XLVII, "e"), that the penalty must be served in different establishments, according to the nature of the crime, the age, and the sex of the convicted person (section XLVIII), and that respect for their physical and moral integrity must be guaranteed (section XLIX);

CONSIDERING the human rights principles enshrined in international documents and treaties, in particular the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Protocol of San Salvador (1988), the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001), the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders — "Bangkok Rules" — the United Nations Standard Minimum Rules for the Treatment of Prisoners — "Nelson Mandela





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Rules" —, and the United Nations Standard Minimum Rules for Non-Custodial Measures —
"Tokyo Rules"—;

CONSIDERING the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta, 2006), whose Postulate 8 proposes the implementation of awareness-raising programs for justice system actors on international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity, and whose Postulate 9 recognizes that every person deprived of liberty must be treated with humanity, respect, and recognition of self-determined sexual orientation and gender identity as well as indicating obligations to States with respect to combating discrimination, guaranteeing the right to health care, the right to participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity, protection from violence or abuse on grounds of their sexual orientation, gender identity or expression, ensuring as far as is reasonably practicable that these protective measures do not entail greater restriction on their rights than those already affecting the general prison population, ensuring conjugal visits and independent monitoring of detention facilities by the State and non-governmental organizations;

CONSIDERING the decision of the Inter-American Court of Human Rights (IACHR), which in Advisory Opinion OC-24/7, of November 24, 2017, requested by the Republic of Costa Rica, expressly asserted that sexual orientation, gender identity and gender expression are categories protected by art. 1.1 of the American Convention on Human Rights, therefore prohibiting any discriminatory norm, act or practice based on sexual orientation or gender identity (item 68) and that, furthermore, the Inter-American Court asserted that, among the factors that define a person's sexual and gender identity, the subjective factor takes precedence over their physical or morphological characteristics (objective factor);

WHEREAS the Inter-American Court of Human Rights Resolution of November 28, 2018, in its Provisional Measures decreed in the case of the Curado Penitentiary Complex, which ordered the Brazilian State to adopt, as a matter of urgency, the necessary measures to ensure the effective protection of LGBTI persons deprived of their liberty;





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CONSIDERING, the glossary adopted by the United Nations in the Free and Equal movement, which indicates the terms referring to the LGBTI population and concepts of sexual orientation and gender identity;

CONSIDERING the provisions of Federal Law No. 7,210/198 — “Criminal Enforcement Law”, in particular the duty to respect the physical and moral integrity of convicted and provisional prisoners (art. 40) and the rights of the imprisoned person (art. 41);

CONSIDERING the publication of Decree No. 8,727/2016, of the Presidency of the Republic, which provides for the use of the social name and the transsexual people within the scope of the direct federal public administration, autarchic and foundational;

WHEREAS the Joint Resolution No. 1/2014, of the National Council for Combating Discrimination (CNCD/LGBTI) and the National Council for Criminal and Prison Policy (CNPCCP/MJ), which establishes parameters for the embracing of LGBTI people deprived of liberty in Brazil, published on April 17, 2014;

CONSIDERING the Technical Note No. 9/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, which deals with procedures regarding the custody of LGBTI people in the Brazilian prison system, according to international and national regulations;

CONSIDERING the national parameters of the National Policy for Integral Health of LGBTI people, instituted by the Ministry of Health through Ordinance No. 2,836/2011, and the National Policy for Integral Health Care of People Deprived of Liberty in the Prison System (PNAISP), instituted by Interministerial Ordinance No. 1/2014;

CONSIDERING the report "LGBTI in Brazil's prisons: diagnosis of institutional procedures and incarceration experiences", published by the Ministry of Women, Family and Human Rights, in 2020;

CONSIDERING the decision handed down in Direct Action for the Declaration of Unconstitutionality No. 4275, in which the Supreme Court recognized to





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transgender persons the possibility of altering their civil register without changing their sex, and the decision handed down in Extraordinary Appeal No. 670,422;

CONSIDERING the decision handed down by the 2nd Panel of the Supreme Court in *Habeas Corpus* No. 143,641/SP;

WHEREAS the National Council of Justice is responsible for the inspection and normatization of the Judiciary Branch and the acts practiced by its bodies (art. 103-B, § 4, I, II and III, of the Federal Constitution);

WHEREAS the CNJ Resolution No. 270/2018, which provides for the use of the social name by trans, transvestite, and transsexual users of judicial services, members, civil servants, interns, and outsourced workers of Brazilian courts;

WHEREAS the CNJ Resolution No. 306/2019, which establishes guidelines and parameters for the issuance of civil documentation and for the biometric civil identification of persons deprived of their liberty;

CONSIDERING the deliberation of the CNJ Plenary, in Normative Act Procedure No. 0003733-03.2020.2.00.0000, at the 74th Virtual Session, held on October 2, 2020.

DECIDES:

Art. 1. To establish procedures and guidelines related to the treatment of the lesbian, gay, bisexual, transsexual, transvestite, and intersex (LGBTI) population that is in custody, accused, defendant, convicted, deprived of their liberty, in compliance with penal alternatives or electronically monitored.

Art. 2. The objectives of the present Resolution are:

I — the guarantee of the right to life and to the physical and mental integrity of the LGBTI population, as well as to their sexual integrity, body safety, freedom of expression of gender identity, and sexual orientation;

II — the recognition of the right to self-determination of gender and sexuality





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of the LGBTI population; and

III —the guarantee, without discrimination, of study, work, and other rights provided for in legal instruments and conventions concerning the population deprived of liberty, in compliance with penal alternatives or electronic monitoring in general, as well as the guarantee of specific rights of the LGBTI population in these conditions.

Art. 3. For the purposes of this Resolution, and based on the United Nations glossary, it is considered:

I — transgender: term used to describe a wide variety of gender identities those appearances and characteristics are perceived as atypical, including transsexual people, transvestites, cross-dressers , and people who identify themselves as a third gender; being:

a) trans women: they identify themselves as women, but were designated men at birth;

b) trans men: they identify themselves as men, but were designated women at birth;

c) other trans people do not identify at all with the binary gender spectrum; and

d) that some transgender people want to undergo surgery or hormone therapy to align their body with their gender identity; others do not;

II — intersex: people who are born with physical or biological sex characteristics, such as sexual anatomy, reproductive organs, hormonal and/or chromosomal patterns that do not fit the typical definitions of male and female; whereas:

a) these characteristics can be apparent at birth or emerge during life, often during puberty; and

b) intersex persons can have any sexual orientation and identity of gender;

III — sexual orientation: physical, romantic, and/or emotional attraction to one person in relation to another, whereby:

a) gay men and lesbian women: they are attracted to individuals who are of the same sex as them;

b) heterosexual people: they are attracted to individuals of a different sex of them;

c) bisexual people: they may be attracted to individuals of the same sex or of different sex; and

d) sexual orientation is not related to gender identity or sexual characteristics;





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IV — gender identity: the deeply felt and lived sense of a person's own gender, considering that:

- a) all people have a gender identity, which is part of their identity as a whole;
- and
- b) typically, a person's gender identity is aligned with the sex they were assigned at birth.

Art. 4. The recognition of the person as part of the LGBTI population will be made exclusively through self-declaration, which must be collected by the magistrate in a hearing, at any phase of the criminal procedure, including detention control hearing, until the extinction of punishability by the completion of the sentence, guaranteeing the rights to privacy and integrity of the person declaring.

Sole paragraph. In cases where the magistrate, by any means, is informed that the person in court belongs to the LGBTI population, they must notify the person about the possibility of self-declaration and tell them, in accessible language, the rights and guarantees to which they are entitled, under the terms of this Resolution.

Art. 5. In case of self-declaration of the person as part of the LGBTI population, the Judiciary will record this information in its computerized systems, which must ensure the protection of their personal data and the full respect for their individual rights and guarantees, notably intimacy, privacy, honor, and image.

Sole paragraph. The magistrate may, *ex officio* or at the request of the defense or the interested person, determine that this information is stored in a restricted manner, or, in the cases provided for by law, declare the self-declaration to be confidential.

Art. 6. Self-declared persons part of the LGBTI population undergoing criminal prosecution have the right to be addressed by their social name, according to their gender identity, even if different from the name appearing on their civil registration, as provided in CNJ Resolution No. 270/2018.

Sole paragraph. It will be the magistrate's responsibility, when requested by the self-declared LGBTI person or by the defense, with the express authorization of the interested person, endeavor to issue documents, pursuant to art. 6 of CNJ Resolution No. 306/2019 or to rectify the person's civil documents.





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Art. 7. In case of imprisonment of a self-declared LGBTI person, the place of deprivation of liberty will be determined by the magistrate in a reasoned decision after consultation with the person about their choice, which may take place at any time during the criminal procedure or execution of the sentence, and the possibility of changing the place must be ensured, in attention to the objectives set forth in art. 2 of this Resolution.

§ 1. The possibility of choosing the place of deprivation of liberty and of changing it must be expressly informed to the person who is part of the LGBTI population at the moment of self-declaration.

§ 2. For the purposes of the *caput*, the self-declaration of the person as part of the LGBTI population may give rise to the rectification and issuance of their documents when requested to the magistrate, under the terms of art. 6 of CNJ Resolution No. 306/2019.

§ 3. The allocation of a self-declared LGBTI person in a prison, as determined by the judge after hearing the person concerned, may not result in the loss of any rights related to penal execution in relation to other persons held in the same establishment, especially as to access to work, study, health care, food, material assistance, social assistance, religious assistance, cell conditions, sunbathing, visitation, and other routines existing in the unit.

Art. 8. In order to make possible the application of art. 7, the magistrate must:

I — clarify in plain language about the structure of the prison establishments available in the respective locality, the location of male and female units, the existence of specific wings or cells for the LGBTI population, and the consequences of this choice on coexistence and the exercise of rights;

II — ask the person self-declared as part of the transsexual, transvestite and intersex population about their preference for custody in a female, male unit or specific cell, if any, and, in the chosen unit, preference for detention in the general community or in specific wards or cells, if any; and

III — ask the self-declared member of the LGBTI population about their preference for custody in the general living environment or in specific wards or cells.

§ 1. The procedures set forth in this article must be observed when a detention control hearing is held after the arrest *in flagrante delicto* or the serving of an arrest warrant, when a sentence is handed down, as well as in a hearing in which the deprivation of liberty of a self-declared LGBTI person is ordered.





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§ 2. The detention location preference declared by the person will be expressly stated in the judicial decision or sentence, which will determine its compliance.

Art. 9. In case of violence or serious threat to the self-declared LGBTI person deprived of their liberty, the magistrate must give preference to the analysis of requests for transfer to another establishment, subject to prior request by the interested person.

Art. 10. The rights guaranteed to women must be extended to lesbian, transvestite, and transsexual women and men, as applicable, especially with regard to:

I — exceptionality of preventive detention, especially for pregnant and nursing women, mothers, and guardians of children under 12 years of age or persons with disabilities, in accordance with arts 318 and 318-A of the Code of Criminal Procedure and the decision handed down by the 2nd Panel of the Supreme Court in HC No. 143,641/SP; and

II — release to less restrictive prison regimes under the terms of art. 112, § 3, of the Penal Execution Law.

Art. 11. In prisons where there are self-declared LGBTI persons deprived of their liberty, the judge of penal execution, in the exercise of their supervisory powers, must ensure that material, health, legal, educational, social, and religious assistance is guaranteed, without any form of discrimination on the basis of sexual orientation or gender identity, and must take into consideration, in particular:

I — about health care:

a) compliance with the parameters of the National Policy for Integral LGBTI Health and the National Policy for Integral Health Care of People Deprived of Liberty in the Prison System (PNAISP);

b) the guarantee to the person self-declared as part of the LGBTI population deprived of liberty or in compliance with penal alternatives and electronic monitoring of the right to hormone treatment and its maintenance, as well as the specific health monitoring, especially to the person living with HIV/TB and co-infections, besides other chronic and infectious diseases and disabilities, or demands resulting from the needs of the transsexualization process;

c) the guarantee of testing of the person deprived of liberty or serving penal alternatives and electronic monitoring in relation to infectious diseases such as HIV/TB and co-infections, as well as other chronic and infectious diseases and disabilities;





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d) the guarantee of psychological and psychiatric care, considering the worsening of the mental health of this population, especially aimed at suicide prevention, as well as specialized gynecological, urological, and endocrinological treatment for transsexuals, transvestites, and intersex persons during their entire period of deprivation of liberty;

e) the guarantee, with isonomy of treatment, to the distribution of condoms;
and

f) the guarantee of confidentiality of information and diagnoses contained in medical records, especially in cases of serological information and other sexually transmitted infections, safeguarding the constitutional right to privacy;

II — about religious assistance:

a) the guarantee to the person self-declared as part of the LGBTI population the right to religious assistance, conditioned to their express consent, in the terms of Law No. 9,982/2000, and other norms that regulate such right;

b) the guarantee, under equal conditions, of freedom of religion and worship and respect for the objection of the self-declared LGBTI person in prison to receive a visit from any religious representative or priest, or to participate in religious celebrations;

III — as to work, education, and other policies offered in prisons:

a) the guarantee of non-discrimination and the offering of opportunities under equal conditions in all initiatives carried out within the prison establishment, whereby eventual isolation or allocation to specific living spaces may not represent an impediment to the offering of vacancies and opportunities;

b) the guarantee to self-declared LGBTI people, under equal conditions, of access and continuity to their educational and professional training under the responsibility of the State; and

c) the prohibition of humiliating work due to gender identity and/or sexual orientation;

IV — as to self-determination and dignity:

a) the guarantee to transsexual men the right to wear clothing socially read as masculine and breast compression accessories as a tool to maintain their gender identity;

b) the guarantee to transsexual and transvestite women the right to wear clothing socially read as feminine, keep their hair long, including fixed hair extension and controlled access to hair clips and make-up products, guaranteeing their secondary characters according to their gender identity; and





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c) guaranteeing intersex people the right to wear clothing and controlled access to utensils that preserve their self-recognized gender identity;

V — as to the right to visitation:

a) the guarantee that social visits must be carried out in an appropriate space, respecting integrity and privacy, avoiding visits in the pavilions or cells;

b) the absence of discrimination of visits from people belonging to the LGBTI population, considering the declared socio-affective relationships, not limited to those officially declared and including friends;

c) the guarantee of exercise of the right to intimate visits under equal conditions, in terms of Ordinance No. 1,190/2008, of the Ministry of Justice, and Resolution No. 4/2011, of the National Council on Criminal and Prison Policy, including in relation to spouses or companions who are in custody in the same prison establishment;

VI — as to the place of detention:

a) the guarantee that the specific living spaces for people who self-declare themselves to be part of the LGBTI population deprived of liberty are not used to apply disciplinary measures or any coercive method against them or other detainees, ensuring internal movement that guarantee their access to environments where health, educational, social, religious, material, and work assistance are offered;

VII — as to general procedures:

a) the guarantee of the prohibition of compulsory transfer between surroundings as a form of sanction or punishment due to the condition of the self-declared person as part of the LGBTI population;

b) the guarantee of the right to psychosocial care, consisting of continuous actions directed also to visitors, to ensure respect to the principles of equality and non-discrimination and the right to self-recognition, including in relation to sexual orientation and gender identity; and

c) guaranteeing free of charge issuance and rectification of civil documents for the LGBTI population.

Art. 12. The person self-declared as part of the LGBTI population, when complying with penal alternatives or electronic monitoring measures, must be guaranteed respect for the specificities listed in this Resolution, in the first service and throughout compliance with the judicial determination, in all spheres of the Judiciary and services for monitoring the measures, seeking support from services such as the Integrated Centers for





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Penal Alternatives, Electronic Monitoring Centers or partner institutions where the applied measure is carried out.

Art. 13. The courts must maintain a register of units with information regarding the existence of specific units, wards or cells for the LGBTI population, in order to instruct the magistrates for the operability of art. 7.

Art. 14. The guidelines and procedures set forth in this Resolution apply to all people who self-declare as part of the LGBTI population, noting that identification may or may not be unique, as well as vary over time and space.

Sole paragraph. The guarantees foreseen in this Resolution extend, as far as, when applicable, to other forms of sexual orientation, gender identity and expressions other than cisgenerity and heterosexuality, even if not expressly mentioned in this Resolution.

Art. 15. This Resolution will also be applied to adolescents apprehended, processed for committing an infraction or serving a juvenile justice measure who self-determine themselves as part of the LGBTI population, as applicable and while their own normative act is not prepared, considering the condition of the developing person, the principle of absolute priority, and the appropriate adaptations, as foreseen in the Child and Adolescent Statute.

Art. 16. To comply with the provisions of this Resolution, the courts, in collaboration with the Schools of Magistrates, may promote courses aimed at the permanent qualification and functional updating of the judges and employees who work in the Detention Control Hearing Centers, Criminal Courts, Special Criminal Courts, Courts for Domestic and Family Violence against Women, and Criminal Execution Courts in relation to guaranteeing the rights of the LGBTI population in custody, accused, defendant, convicted, deprived of liberty, serving alternative sentences or being electronically monitored.

Art. 17. The Department for Monitoring and Inspection of Prison and Socio-Educational Systems of the National Council of Justice will elaborate within ninety days, a handbook to guide the courts and magistrates on the implementation of the measures set forth in this Resolution.





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Art. 18. This Resolution becomes effective 120 days after its publication.

Justice **LUIZ FUX**

