

**LGBTI People in
the Penal System –
Booklet for the
Implementation of
CNJ Resolution
348/2020**





SERIES FAZENDO JUSTIÇA

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BRASÍLIA, 2024

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Deputy-Coordinator (technical team): Talles Andrade de Souza

Hub 3 Coordination (technical team): Pollyanna Bezerra Lima Alves

Hub 3 Deputy-Coordinator (technical team): Francine Machado de Paula

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FOREWORD

The National Council of Justice (CNJ), in partnership with the Ministry of Justice and Public Security (MJSP) and the Brazilian office of the United Nations Development Programme (UNDP Brazil), develops the Program Fazendo Justiça (Doing Justice) establishing a significant milestone in the search for innovative solutions in the field of criminal and juvenile justice.

The program works to qualify structures and services, promotes training, supports the drafting of regulations and public policies, and develops informative documents. These materials include guides, manuals, researches and models that combine technical and normative knowledge with the reality experienced in different places across the country. These products identify good practices and offer guidance to facilitate the immediate and effective implementation of interventions.

The program is aligned with the decision of the Supreme Court in the Claim of Non-Compliance with a Fundamental Precept Lawsuit (ADPF) No. 347, which in October 2023, recognized that Brazilian prisons are in an unconstitutional state of affairs and demanded national and local plans to overcome this situation. The program also carries out various actions in the juvenile justice field, following the principle of absolute priority guaranteed to adolescents and young people in the country's norms and laws.

At present, 29 initiatives are being carried out simultaneously, taking into account challenges considering the complete cycle of criminal and juvenile justice, as well as cross-cutting initiatives. Among them is the International Articulation and Protection of Human Rights, which facilitates the exchange of experiences between Brazil and other countries in public policies related to the criminal and juvenile justice cycle.

We recognize that each country faces unique contexts and challenges. We also believe in sharing knowledge and experiences as a tool for collective transformation. To this end, titles selected from the program's different collections have been translated into English and Spanish, such as this publication.

The strategy behind international articulation also includes support for events, courses, and training in collaboration with international partners, as well as the translation into Portuguese of standards and publications aligned with the topics worked on by the program. This promotes a necessary exchange of ideas and practices for a future in which dignity and respect for fundamental rights are common values for all of us.

Luís Roberto Barroso

President of the Supreme Court and the National Council of Justice



INTRODUCTION

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On October 13, 2020, the National Council of Justice (CNJ) issued Resolution 348, which establishes guidelines and procedures to be followed by the Judiciary in relation to the treatment of lesbian, gay, bisexual, transsexual, transvestite, or intersex individuals who are in custody, accused, defendants, convicted, deprived of liberty, in compliance with alternative penalties, electronically monitored, represented in the process of investigating an infraction, or undergoing juvenile justice measures. Subsequently, the CNJ published the Handbook Resolution 348/2020 – Procedures for LGBTI individuals who are accused, defendants, convicted, or deprived of liberty. The purpose of this handbook is to facilitate the implementation of the guidelines and procedures outlined in the resolution. It is part of the Series *Fazendo Justiça* and is available on the CNJ website.

This text is based on the aforementioned Resolution and its Handbook, and it serves as an additional tool for effectively implementing these guidelines. It provides a concise overview of the main provisions concerning the protection of the rights of accused, defendants, convicted, deprived of liberty individuals in compliance with alternative penalties or electronically monitored who belong to the LGBTI population.



**IMPORTANT
CONCEPTS**

2. IMPORTANT CONCEPTS¹

Naming correctly is the first step towards respect!

2.1. Sexual orientation

Sexual orientation corresponds to an individual's physical, romantic, and/or emotional attraction to others, regardless of their gender identity or sexual characteristics.



Gay men and lesbian women are attracted to individuals of the same gender, namely men and women, respectively;



Heterosexual individuals are attracted to people of a different gender than their own;



Bisexual individuals have both romantic and sexual attractions to people of more than one gender.

2.2. Gender identity

It refers to how individuals identify themselves as female, male, or with another gender expression they use.

¹ The following concepts are based on CNJ Resolution 348/2020 (art. 3) and its Handbook.



Cisgender: a person whose gender identity aligns with the gender assigned to them at birth.



Transgender: a person who does not identify with the gender assigned to them at birth.

- **Trans women: individuals who identify as women but were assigned male at birth;**
- **Trans men: individuals who identify as men but were assigned female at birth;**
- **Non-binary or gender fluid people: individuals who do not identify exclusively with the binary gender spectrum.**





While some transgender individuals desire to undergo surgeries or hormonal therapy to align their bodies with their gender identity, others do not. The right to self-determination is personal and does not permit public authorities to impose the requirement of bodily interventions or any external criteria on a person's gender identification.

2.3. Intersex individuals

Intersex individuals are born with sexual characteristics that do not align with the typical definitions of male and female, such as their sexual anatomy, reproductive organs, and/or hormonal and/or chromosomal patterns. These characteristics may be visible or not.

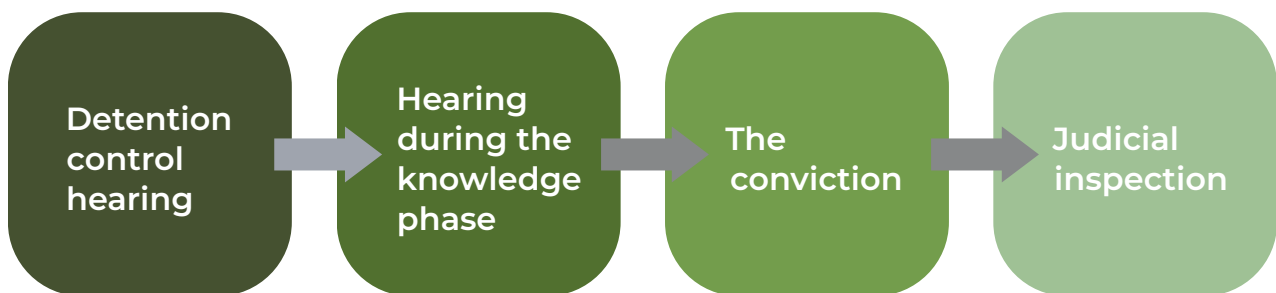
There is a variety of acronyms used to encompass the diversity of gender identities and sexual orientations. CNJ Resolution 348/2020 has adopted the acronym "LGBTI," which refers to "lesbian, gay, bisexual, transgender, transvestite, and intersex" individuals, aligning with the definitions of the United Nations.



**AND WHAT ABOUT
THE RIGHTS OF THE
LGBTI POPULATION?**

3. AND WHAT ABOUT THE RIGHTS OF THE LGBTI POPULATION?

Throughout the entire Criminal Procedure, from the detention control hearing to the execution and in the services accompanying the sentence, it is important to observe the guarantees and rights of LGBTI individuals. We highlighted below the main stages of the judicial process in which judges can verify and ensure these rights for LGBTI individuals:

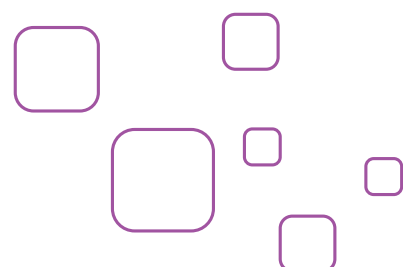


It is important to have the support of a multidisciplinary team in the judicial procedures that address the demands of self-declared LGBTI individuals deprived of liberty at any stage of the legal process. This support aims to guarantee a comprehensive understanding and attention to the complex subjective and social nuances of the issue, without imposing any conditions or pathologizing the demands presented by the LGBTI population. The role of the multidisciplinary team is to provide technical support for accessing programs, services, and public policies related to the rights of the LGBTI population.

The judge may also seek support from services such as Integrated Centres for Alternatives to Imprisonment, Electronic Monitoring Centers, or partner institutions where the imposed measure is enforced.

3.1. What are the rights that need to be upheld throughout the entire penal cycle?

We highlight some of them below.





3.1.1. Self-declaration and protection of personal data

The recognition of an individual as part of the LGBTI population will be exclusively based on self-declaration, collected by the judge during a hearing (art. 4 of CNJ Resolution 348/2020), at any stage of the knowledge process, penalty enforcement or alternative measures.

In cases where the judge becomes informed, through any means, that an individual belongs to the LGBTI population, the magistrate must provide accessible and respectful guidance regarding the possibility of self-declaration and the rights and guarantees that apply to them (art. 4, sole paragraph, of CNJ Resolution 348/2020).

In situations involving restricted liberty, information about sexual orientation and gender identity can pose risks and difficulties for the person making the declaration. Therefore, it must be recorded, treated, and protected as sensitive data in respect of the right to privacy and intimacy (art. 5 of CNJ Resolution 348/2020). Consequently, the judge may, either on his/her own initiative or at the request of the defense or the interested party, determine that the information is stored with restricted access or, in cases provided by law, decree the confidentiality of the self-declaration.



Self-declaration should not be used to unnecessarily complicate the identification process or be used as evidence against the person making the declaration. The purpose of oral self-declaration, which can be recorded by a professional rather than the declarant, is to ensure the rights of individuals belonging to the LGBTI population.



3.1.2. Social name and civil documentation

Transgender, transvestite, and transsexual individuals must be allowed to use their social name, as defined by CNJ Resolution 270/2018, which is the name by which they identify themselves and are socially recognized. This right applies even if their social name is different from their registered name in civil records (art. 1, sole paragraph, CNJ Resolution 270/2018, and art. 6, CNJ Resolution 348/2020). This guarantee of rights must also be extended to non-binary or gender-fluid individuals.

If the name provided is not listed on the Mittimus Order to the prison unit, the necessary measures must be taken by the competent authority, including the court responsible for criminal execution. However, regardless of any corrections made to the civil documentation, the declared social name must be recorded and prominently displayed in systems and documents in addition to the individual's legal name.



3.1.3. Determination of the place of incarceration

The allocation of self-identified LGBTI individuals in correctional facilities must be done with great care, ensuring that these individuals are adequately informed about the different conditions in each facility and then consulted regarding their preferred location.

The Inter-American Court of Human Rights (IACHR), in Advisory Opinion 29 (OC-29), established that the placement of an LGBTI person within an institution for deprivation of liberty must take into account the particularities of each individual and their specific risk situation, while considering the principles of respect for gender identity and expression, the participation of the person involved, and protection against any form of violence. Furthermore, it prohibits any measures that, in practice, result in isolation, lack of communication, treatment inferior to that provided to other detainees, or exclusion of LGBTI individuals from unit activities.

3.2. What information should the judge provide to ascertain the preference of the LGBTI individual?

- **The structure of the facilities available in the respective area;**
- **The location of male and female units;**
- **The existence of specific wings or accommodations for the LGBTI population;**
- **The implications of the choice on coexistence and the exercise of rights (art.8, I of CNJ Resolution 348/2020), which should not imply the exclusion of access to rights granted to other individuals in the same establishment.**



This inquiry must be made whenever necessary at any stage of criminal prosecution and the execution of the sentence, and it must be possible to change the place of custody at any time, provided that it is never imposed as a punishment.

Although this inquiry can be made at any time, it is up to the judge to carry it out within the criminal justice system. The preference for a specific location must be formally included in the decision or judicial sentence that determines the enforcement of the established measure (art. 8, §§ 1 and 2 of CNJ Resolution 348/2020, respectively).

3.3. This inquiry by the magistrate is particularly relevant in the following situations:

- **Detention control hearings conducted after an arrest in flagrante delicto or in compliance with an arrest warrant;**
- **When delivering a guilty verdict;**
- **During hearings where deprivation of liberty is ordered, or even during instruction hearings in the case of a detained defendant.**

It is important to note that, besides consulting the magistrate, the defense may also request the allocation of an LGBTI individual in a specific location or their transfer at any time.

In this regard, self-declared transgender individuals, including transvestites who identify as either male or female, must be asked about their preference for custody in a female, male, or specific unit, if one exists in the region². Once the unit is determined, they may express their preference for detention in the general population or in specific wings or accommodations, where applicable.

² Based on the decision rendered by the Brazilian Supreme Court (STF) in Case ADPF 527/2021, the following summary is provided:

Summary: RIGHTS OF LGBTI PEOPLE. CLAIM OF DISCHARGE OF FUNDAMENTAL PRECEPT TRANSSEXUALS AND TRANSVESTITES. RIGHT TO CHOOSE TO BE KEPT IN FEMALE OR MALE PRISON UNITS, IN THE LATTER CASE, IN SPECIFIC WINGS THAT GUARANTEE THEIR SAFETY.

1. The rights of transsexual women and transvestites to serve their sentences in conditions compatible with their gender identity are recognized. This is based on the application of the rights to human dignity, autonomy, freedom, equality, health, prohibition of torture and inhuman or degrading treatment (Brazilian Constitution of 1988, art. 1, III, and art. 5, III). It is also supported by international norms and the Yogyakarta Principles. Precedents: ADI 4275, with Justice Edson Fachin as the Rapporteur; RE 670,422, with Justice Dias Toffoli as the Rapporteur.

2. The matter has been matured through institutional dialogue established between the Executive Branch, the Judiciary, and representative entities of civil society. A report from the Ministry of Women, Family, and Human Rights, as well as a Technical Note from the Ministry of

Likewise, self-declared individuals from the gay, lesbian, bisexual, or intersex population must be asked about their preference for custody in the general population or in specific wings or cells.



3.3.1. Protection in cases of violence or serious threats

In the face of a report of violence suffered by a self-identified LGBTI person, all necessary measures must be taken to cease the violence and fully repair the harm suffered. OC-26 of the Inter-American Court of Human Rights emphasizes the duty to adequately record and produce data on situations of violence against LGBTI persons deprived of liberty. CNJ Resolution 348/2020 specifies that if there is a request for the testimony of the interested person, the analysis of any request for transfer to another facility must be prioritized (art. 9). It is important to note that any potential transfer cannot be carried out as a sanction, punishment or retribution (art. 11, VII, “a” of CNJ Resolution 348/2020).

Whenever any person deprived of liberty becomes a victim of any type of violence, they must immediately receive medical, psychological, and social assistance, as well as any other necessary measures. It is important to note that the victim must also have the option of confidentiality when reporting abuses, especially sexual abuses, in prison facilities (art. 5 of CNJ Resolution 348/2020 and the General Data Protection Law – LGPD).

Furthermore, the importance of implementing CNJ Resolution 414/2021 is emphasized, as it establishes crucial guidelines for cases involving indications of torture and other forms of cruel, inhuman, or degrading treatment.

Justice and Public Security, indicate a significant evolution in the Executive Branch’s understanding regarding the treatment of transsexual individuals and transvestites identifying as female within the prison system.

3. Both documents recommend, following an individual assessment of the transsexual person or transvestite, their transfer to a female or male correctional facility, respectively, with the latter case providing a separate wing to ensure their safety. This accommodation is necessary to address both gender identity issues and established affectionate relationships and/or survival strategies that minimize the suffering of a profoundly vulnerable and stigmatized group.

4. Interim measure is adjusted for transsexual women and extended to transvestites.

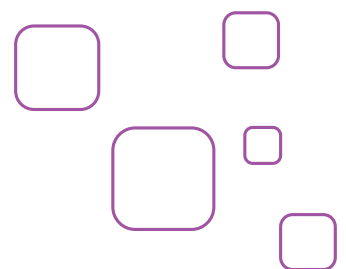


3.3.2. Highest level of exceptionality to imprisonment in cases of pregnancy and maternity

In the Collective Habeas Corpus 143,641/SP, the Supreme Court (STF) established the highest level of **exceptionality for pre-trial detention of pregnant women, postpartum women, mothers of young children, individuals with disabilities, and the conversion of such detention into house arrest**. The only limiting conditions for this exceptional measure are if the crime was committed with violence, serious threat or against their own descendants. Subsequently, the Code of Criminal Procedure consolidated the requirements for pre-trial detention.

Resolution 348/2020 of the National Council of Justice (CNJ), in its art. 10, reaffirms the exceptional nature of provisional detention in these cases, including LGBTI individuals, and imposes that these rules must be observed for **lesbian women, transgender women, transvestites and transsexuals, and transgender men** as well. Similarly, it also determines that release to less restrictive prison regimes must be observed in accordance with art. 112, § 3 of the Penal Execution Law.

In line with the exceptional nature of detention, it is also worth noting that children and individuals with disabilities who lack maternal care and are under the responsibility of their incarcerated fathers or other individuals became the subject of Habeas Corpus 165,704/DF. In this case, the effects of Habeas Corpus 143,641/SP were extended to determine the **substitution of pretrial detention for parents and guardians of children and individuals with disabilities**, with the exceptions already mentioned. This context also requires attention to be given to the LGBTI population incarcerated.



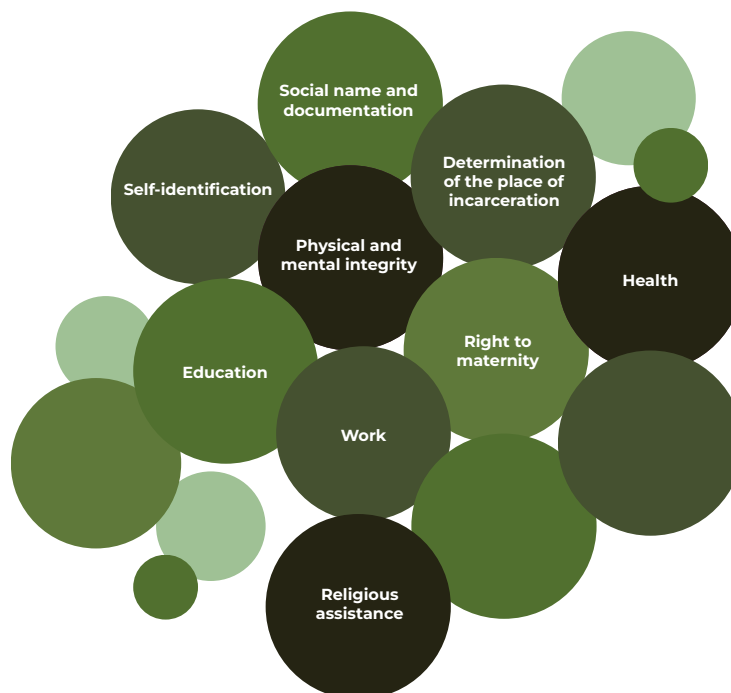


3.3.3. Safeguarding the rights of LGBTI individuals deprived of liberty

In addition to all the rights already highlighted above, art. 11 of CNJ Resolution 348/2020 stipulates that the judge responsible for penal execution, in their supervisory capacity, must ensure that individuals self-identified as part of the LGBTI population deprived of liberty in prison or juvenile justice facilities are provided with material, health, legal, educational, social, and religious assistance, without any form of discrimination based on sexual orientation or gender identity.



The placement of individuals self-identified as part of the LGBTI population in a prison facility must not result in the loss of any rights, particularly regarding access to work, education, healthcare, food, material assistance, and others (art.7, § 3).



- **Access to education and other social policies:**

Individuals who self-identify as LGBTI and are serving custodial sentences must have equal access to education, leisure, sports, culture, and other opportunities without facing any form of discrimination. It is important to emphasize that any isolation or specific allocation of individuals based on their sexual orientation or gender identity must not be considered as punishment, nor must hinder their access to social rights. This includes the provision of spaces and opportunities (art. 11, III, a, b – CNJ Resolution 348/2020).

- **Access to employment:**

The judge has the responsibility to ensure the inclusion of incarcerated individuals who self-identify as LGBTI in professional training, work, and income-generating opportunities provided by the National Penitentiary Department. This aims to facilitate their insertion or reintegration into the job market upon their release from prison. It is worth noting once again that any isolation or specific allocation of individuals based on their sexual orientation or gender identity must not be considered as punishment or hinder their access to job openings and any other social rights.



It is prohibited to subject individuals to degrading work conditions based on their gender identity and/or sexual orientation (art. 11, III, c – CNJ Resolution 348/2020).

• **Access to healthcare:**

Self-identified LGBTI individuals must have access to healthcare services as outlined in the National Policy of Integral Healthcare for Persons Deprived of Liberty (PNAISP). The following provisions are highlighted (art. 11, I, c, d, f – CNJ Resolution 348/2020):

- I) **Ensuring testing for infectious diseases such as HIV/TB and co-infections, as well as other chronic, infectious, and disabling conditions;**
- II) **Ensuring access to psychological and psychiatric care specifically focused on suicide prevention³;**
- III) **Ensuring access to specialized gynecological, urological, and endocrinological treatment for transgender, transvestite, and intersex individuals throughout their period of incarceration;**
- IV) **Ensuring confidentiality of information and diagnoses documented in medical records.**

• **Hormone therapy and transgender process:**

Self-identified LGBTI individuals who are deprived of liberty must be granted hormone therapy and its maintenance, as well as access to the transsexualizing process, whenever they express their formal desire and consent.

³ It is important that the psychological and psychiatric care provided in correctional facilities to self-identified LGBTI individuals is directed towards mental healthcare, particularly addressing the prejudice and discrimination they experience, as well as other subjective matters presented. Under no circumstances should this care pathologize the sexuality of the LGBTI population. In other words, these services should never define a person's sexual orientation or gender identity, nor should they promote practices that violate human rights by attempting to reverse self-identification or the affirmation of gender identity or sexual orientation, such as the controversial "gay conversion therapy."

It is guaranteed to the LGBTI individuals deprived of liberty access to the National Policy for Integral Health Care for Lesbians, Gays, Bisexuals, Transvestites, and Transsexuals - LGBT, as outlined in Ministry of Health Ordinance 2,836/2011, in accordance with the National Policy of Integral Health Care for Persons Deprived of Liberty in the Prison System – PNAISP (Interministerial Ordinance 1/2014). This process is ensured by the Unified Health System – SUS.



Not all transsexual, transvestite, and intersex individuals wish to undergo hormone therapy or other bodily interventions, as gender identity is solely personal and independent of external validation. However, the possibility of accessing such procedures must be guaranteed to those who request them.

- **Access to religious assistance:**

Self-identified LGBTI individuals must have access to religious assistance and their choice to refuse visits from any representative or participate in religious worship must be respected, if they desire, and subject to their explicit consent (art. 11, IV, of CNJ Resolution 348/2020).

- **Right to self-determination and dignity:**

Self-identified LGBTI individuals must be guaranteed the right to wear clothing, accessories, and other secondary characteristics that align with their gender expression (art. 11, IV, of CNJ Resolution 348/2020):

A) Transgender men are guaranteed the right to wear clothing socially perceived as masculine and to use chest compression accessories as a means of maintaining their gender identity.

- B) Transgender women and transvestites are guaranteed the right to wear clothing socially perceived as feminine, maintain long hair, including fixed hair extensions, and have controlled access to tweezers for hair removal and makeup products, ensuring their secondary characteristics align with their gender identity; and**
- C) Intersex individuals are guaranteed the right to wear clothing and have controlled access to utensils that preserve their self-recognized gender identity.**

- **Right to Visitation:**

Social visits to LGBTI individuals must be conducted in appropriate spaces, taking into consideration respect for privacy and the integrity of individuals, and in order to safeguard non-discrimination, even for self-identified LGBTI visitors. As for intimate visits, they must be conducted on equal terms for self-identified LGBTI individuals compared to other individuals deprived of their liberty, including spouses or partners who are detained in the same correctional facility (art. 11, V, of CNJ Resolution 348/2020). Furthermore, the strip search of visitors must not be degrading, and no differentiated procedures must be carried out based on the relationship with the LGBTI population.



Specific living spaces for self-identified LGBTI individuals should not be used for disciplinary sanctions or any other form of punishment (art. 11, VI, a). Additionally, compulsory transfers between environments as a form of sanction, punishment, or retribution due to being a self-identified LGBTI person are prohibited (art. 11, VII, a).

3.4. Finally, it is worth highlighting the responsibilities of the Courts for the effective implementation of CNJ Resolution 348/2020:

1

- **Maintaining an updated register of establishments with information regarding the existence of specific units, wings, cells, or accommodations for this population. This will guide judges, when necessary, in the implementation of the provisions set forth in CNJ Resolution 348/2020.**

2

- **Promoting courses aimed at qualifying and updating judges and court officials on guaranteeing the rights of the LGBTI population.**



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