

Intimate Body Searches of Women Visitors to Prisons: Normatively Non-Human Lives

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Abstract: The objective of this article is to reveal the logic of social norms of intelligibility and recognition that allows gender violence against women visitors to prisons to continue in Brazil by stipulating who counts as a recognizable and livable human life. In legal terms, the discourse that justifies the vexatious intimate body searches is deconstructed through the analysis of the corporal punishment of these women and the violation of the principal of the individual character of a sentence. The problem is then analyzed by applying theoretical categories of performativity, framing and precarity developed by Judith Butler. The analyses allow concluding that the institutionalized violence to which these women are subjected results from the fact that their lives are not recognized as normatively human and livable, considering the depletion of the very condition of existence and grief.

Keywords: Precarity; Livable life; grieving; Framing; Vexatious body searches.

Revista íntima de mulheres visitantes em presídios: vidas normativamente não humanas

Resumo: No presente artigo, objetivamos desvelar a lógica das normas sociais de inteligibilidade e reconhecimento que permite a continuidade da violência de gênero contra mulheres visitantes em estabelecimentos prisionais no Brasil ao estipular quem conta como vida humana reconhecível e vivível. No aspecto jurídico, o discurso justificador da revista íntima vexatória é desconstruído por meio da análise da penalização corporal dessas mulheres e da violação do princípio da pessoalidade da pena. Após, o problema é analisado a partir da aplicação das categorias teóricas de performatividade, enquadramento e precariedade, desenvolvidas por Judith Butler. As análises permitem concluir que a violência institucionalizada a que são submetidas decorre do fato de a vida dessas mulheres não ser reconhecida como normativamente humana, diante do esvaziamento da própria condição de existência e luto.

Palavras-chave: precariedade; vida vivível; luto; enquadramento; revista vexatória.

Revisión íntima de las mujeres visitantes en las cárceles: vidas normativamente no humanas

Resumen: El trabajo tiene como objetivo develar la lógica de las normas sociales de inteligibilidad y reconocimiento que permiten la continuidad de la violencia de género contra las mujeres visitantes en las prisiones de Brasil, al estipular quién cuenta como vida humana reconocible y viable. En el aspecto legal, el discurso justificativo de la búsqueda íntima vejatoria se deconstruye a través del análisis del castigo corporal de estas mujeres y la violación del principio de la personalidad de la pena. Posteriormente se analiza el problema a partir de la aplicación de categorías teóricas de performatividad, encuadre y precariedad desarrolladas por Judith Butler. Los análisis permiten concluir que la violencia institucionalizada a la que son sometidas resulta del hecho de que la vida de estas mujeres no es reconocida como normativamente humana, dado el agotamiento de su propia condición de existencia y luto.

Palabras clave: precariedad; vida vivible; luto; encuadre; búsquedas corporales vejatorias.

Introduction

If the humanities has a future as cultural criticism, and cultural criticism has a task at the present moment, it is no doubt to return us to the human where we do not expect to find it, in its frailty and at the limits of its capacity to make sense.
(Judith BUTLER, 2004a, p. 151)

Although in purely normative terms vexatious intimate body searches of women visitors to prison facilities constitute an exception, they are regularly practiced by correctional officers, and endorsed by prison directors, who argue that they are complying with the necessary security requirements for these locations. Although the practice is conducted on visitors of both sexes, vexatious intimate body searches affect women more significantly, considering that they are the majority of visitors to prisons. The way that these searches are conducted subjects women to distressing situations, since in most cases they must expose their naked bodies, even in front of their sons and daughters, forcing them to perform uncomfortable and humiliating movements, like squatting on top of a mirror, to expose the genitalia to correctional officers.

Public authorities justify vexatious searches as a way to prevent the entrance of prohibited objects into prison facilities. However, a study conducted by the Rede de Justiça Criminal [Criminal Justice Network], based upon documents from the Secretariat of Penitentiary Administration of the State of São Paulo, demonstrated that only .03% of visitors carried items considered to be prohibited, or three visitors out of every ten thousand,¹ and in none of the cases was an attempt to enter with weapons registered.

Vexatious intimate searches are even more unreasonable considering that they can be conducted electronically. This issue is the subject of Projeto de Lei [bill] 7.764/2014 (BRASIL, 2014), which aims to alter the Lei de Execução Penal [Penal Code] to determine that personal searches be conducted with electronic equipment. Although the proposed law is not exactly innovative, considering that some Brazilian states already have regulations that curb vexatious intimate searches, the practice is still conducted in prisons, which argue that they cannot afford electronic equipment, and repeatedly assert the need to maintain security.

This public stance compels an analysis of the reasons that this degrading practice against women visitors to prison facilities continues. Legal research about this practice commonly focuses on the violation of human and fundamental rights, including the dignity of the human individual, the protection of the right to privacy, honor and personal image. We can see this viewpoint in the Federal Supreme Court decision that recognized its Repercussão Geral [General Repercussion] (Topic 998) (BRASIL, 2018), emphasizing the need to analyze the “illegality of intimate searches conducted within the prison system,” since it involves a constitutional issue that is relevant “to bring to light the existence of vexatious, inhuman and degrading practices and regulations.”

The Supreme Court’s approach is important; however, we ventured to go beyond this analysis of the topic from the common vantage point of human dignity, to question whether the people who visit prison facilities and are subjected to vexatious intimate searches, especially women, are considered by socially recognized norms as being human, because, if they are not even considered as recognizable human lives, then discourse about dignity does not apply. This is done by analyzing the problem from the perspective of critical criminology and then by using Judith Butler’s gender studies and recognition theory.

Using a critical criminology viewpoint, the vexatious search of women visitors in prison facilities is analyzed considering the broader context of exclusion and denial of the human condition, not only of those entering the prison system, but also of people who maintain family or emotional ties with them – the extension of the figure of the *enemy* in the penal system. The article also analyzes the violation of the constitutional principle of the individuality of the sentence (article 5, XLV, Federal Constitution of 1988) (BRASIL, 1988), because female visitors to prisons, who have emotional ties with incarcerated people, suffer bodily from the extension of the state’s punishment.

Beyond this legal approach, the theme is then analyzed considering the theoretical perspective of social recognition developed by Judith Butler (2009; 2004a) – especially in the works *Frames of War: When is Life Grievable?* (2009) and *Precarious Life: The Powers of Mourning and Violence* (2004a) – to verify how the framing of a livable human life occurs in our society. We intend to demonstrate that framing as human is realized through a reiteration of the norms that constitute subjects and determine what and who is a human life and even what life is livable and grievable.

Although other theories could be used to analyze this topic, we adopted a Butlerian perspective since it helps demonstrate how persons are constituted and social relations form in accordance with norms that previously establish which lives will be human and recognizable as livable lives. In other words, more than merely a subjective approach to the constitution of subjects – from a psychoanalytic and recognition theory perspective – Butler manages to align these perspectives to the objective reality of the power relationships that are constitutive of subjects and of the norms that establish the framing of who will be recognized as human.

¹ Available at <https://www.conectas.org/noticias/governo-fora-da-lei>. Accessed on 29/12/2019.

Thus, through an analysis of the concrete situation of vexatious intimate searches of women visitors in Brazilian prisons, Butlerian theory reveals the subjective (subjectification) and objective (performativity) aspects of gender violence perpetrated in this practice and to identify subversive possibilities of norms that frame lives so precarious that they do not merit the *status* of livable and grievable life.

The corporal punishment of women visitors in prisons

Brazilian penitentiaries and prisons are where sentences involving the loss of liberty in a closed prison regime are served,² and also have custody of provisional prisoners (artigo 87, *caput*, e parágrafo único, da Lei 7.210/1984 – Lei de Execução Penal) (BRASIL, 1984). This is the most important portion of the punitive penal system, fundamentally based upon the expiatory response to the commission of a criminal offence, since the architectural design and disciplinary model of these spaces, which are types of total institutions, insert individuals into a reality completely different from that experienced outside of prison. They are called total institutions because the most important part of an individual's daily activities is conducted in closed space (Eugenio Raúl ZAFFARONI, 2002).

Notwithstanding theoretical efforts to attribute sentences involving the deprivation of liberty in a closed regime to positive preventive ends, especially resocialization, atonement is at the origin and core of the deprivation of liberty – involving penitence, purification, and compensation for the error committed, through suffering. Beyond mere retribution for the gravity of the wrongdoing, that is, punishment and expiation, it can be said that prison sentences served in most Brazilian prisons meet a perverse socioeconomic demand, in which the state renourishes criminality (Alessandro BARATA, 2019, p. 183-184).

Thus, the state, by imposing prison sentences, does not fulfill the mythical task of resocialization and, more than this, as Augusto Alvaro de Sá (2007, p. 112) emphasizes, “it specifies, formalizes and consecrates a relationship of antagonism between the convict and society,” beginning with the practice of criminal conduct:

By committing a crime, the individual concretizes a confrontation with society. By penalizing them with prison, the state concretizes the antagonism between him and society. His “recuperation” will be a recuperation for society, that is, it will be a social reintegration, and will only be possible through the resolution of this antagonism and by overcoming this confrontation. On the one hand, therefore, the prison sentence brings, as a consequence, the escalation of the confrontation and antagonism between the prisoner and society, through the effects of imprisonment. On the other hand, the social reintegration of the prisoner will only be viable through the elective, technically planned and assisted participation of society and the community.

But the negative effects of incarceration, both those related to poor administration of a public institution, which stems from a lack of political interest in the *humanization*³ of prisons, as well as the inherent effects of the privation of liberty itself (SÁ, 2007), are not restricted to the individual upon whom directly falls the execution of the sentence. Imprisonment affects the entire community in which an incarcerated individual is inserted, especially those persons who have close ties with the individual.

In this context, this study highlights women who maintain a personal bond with prisoners, especially mothers, wives, companions, girlfriends, and daughters, and who frequent the prison establishment on regular legally entitled visits, since, as mentioned, the majority of visitors are women (Helena Salgueiro LERMEN; Martinho Braga Batista e SILVA, 2018) and, as such, are the victims of a specific gender violence, consistently present in vexatious intimate searches.

In the Brazilian prison system, visitors must undergo a search procedure, a personal inspection, to prevent the entry of objects not allowed in these spaces and which could jeopardize the security of the locale, pursuant to article 3 of Law 10.792/2003 (BRASIL, 2003). In an insipient way, this measure requires penitentiary facilities to acquire and use metal detectors, but does not provide details regarding personal search procedures, which leaves room for abuses, such as the practice of vexatious intimate searches. One example is the procedure for searching visitors to prisons in the state of Paraná, which is governed by the guidebook to security procedures in penal facilities in Paraná.⁴ For those visiting inmates the vexatious intimate searches, called “searches for visual verification”, are conducted in the following manner (José Roberto Rodrigues SANTOS, 2011, p. 89-90):

6.3.6.1 Search procedures for visual verification

The prison official should ask the visitor to:

² Although establishments dedicated to serving sentences under a semi-open regime can be integrated to a penitentiary complex, as annexes to the main penitentiary, the restrictions on liberty and the structure of these places do not have the same characteristics as the closed regime.

³ The word *humanization* is italicized because we consider the prison space to be incapable of true humanization. However, this is the expression used to categorize the proposals that aim at improving the quality of life inside prisons.

⁴ Available at http://www.espen.pr.gov.br/arquivos/File/caderno_seguranca.pdf. Accessed on 20/01/2020.

- a) stand in front of the prison official and remove clothing and shoes, leaving on just underwear (if no irregularity is noted, go to the next item);
 - b) sit on the metal detector stool and, if it detects any irregularity, inform the immediate supervisor to take action;
 - c) pass and/or pat hands on the hair, covering the entire head, and if a satisfactory view is not possible (for example, the nape of the neck), ask that they lower the head, throwing the hair forward, and then, again, pass and/or pat hands through the hair, over the entire head;
 - d) open the mouth wide and lift the tongue, examining them;
 - e) stand on the side to check ear openings and behind the ears;
 - f) tilt the head back to check nostrils;
 - g) raise arms to check armpits;
 - h) open hands and separate fingers, checking them on both sides;
 - i) if applicable, lift body folds, and if female, the breasts;**
 - j) if no irregularity is noted, ask that they remove the underwear;**
 - k) if male, lift the scrotum for verification, as well as the penis (if necessary, including the entire glans);**
 - l) lower the mirror;**
 - m) place one leg on each side of the mirror;**
 - n) squat, slowly, three times facing front, if male, and three times facing back, if female, in both cases, remain squatting for about 10 seconds;**
 - o) remove the mirror;**
 - p) put on underwear;**
 - q) stand with their back to the correctional official and, bending the knees, show the soles of the feet so they can be observed, as well as the spaces between the toes;
 - r) go to the side to verify that they are not hiding anything that may have been thrown on the floor before or during the search;
 - s) put on remaining clothes and shoes.
- Additionally:
- a) in female visitors, when they are using tampons or sanitary napkins, ask them to change them for one provided by the facility;
 - b) examine the removed clothing, in accordance with article 6.7.3, letter "i";
 - c) examine the removed shoes, in accordance with article 6.7.3, letter "j";
 - d) verify if the visitor uses a prosthesis so that it can be examined, in accordance with article 6.7.3, letter "k";
 - e) use metal detector on the person searched, and/or X-rays on clothes, shoes or objects the person is wearing, as needed (emphasis added).

The description transcribed above of the intimate search or visual verification procedure unequivocally demonstrates its vexatious and invasive nature to the privacy of visitors to prisons. This form of inspection, in addition to being ineffective at impeding the entrance of prohibited objects, fosters abusive conduct by correctional officers (Pedro Austin ALVES; Aline ALBULQUERQUE, 2015).

Having noted the problem, it is necessary to ascertain, initially in legal terms, the normative violations inherent to this practice so that they can be definitively curbed. This analysis, aligned with questions of gender, is oriented here from a critical criminology perspective, so that, in legal terms, it can reveal that the procedure for vexatious intimate searches constitutes an illegal and inadmissible extension of the criminal sanction to women who maintain emotional ties with incarcerated individuals, violating the constitutional principle of the individuality of a sentence, consecrated in article 5, XLV, of the Federal Constitution of 1988 (BRASIL, 1988).

According to this principle, penal sanctions cannot extend beyond the condemned individual, the author or participant of the criminal offence, reaching, for example, their family or any other third party, because the punishment is imposed on the basis of individual culpability, on the individual considered as a being responsible for their own actions (José Eduardo GOULART, 1994; Luiz Regis PRADO, 2019; René Ariel DOTTI, 2018). Affirming the individuality of the sentence removes the possibility of punishing an individual for unconnected events (Eugenio CUELLO CALLÓN, 1953). It should be noted that the principle of individuality or personal criminal responsibility has two more dimensions, in addition to the prohibition of imposing a punishment on third parties unrelated to the crime. There is also: "restriction of criminal responsibility to the author of the typical action or omission; denial of any form of objective criminal responsibility (*sine culpa*) or that of solidarity" (Salo de CARVALHO, 2018, p. 263).

Thus, the principle of the individuality of a sentence aims to curb the extension of the afflictive character of the criminal sanction of loss of liberty to third parties who are not responsible for the crime. In this manner, vexatious intimate searches can be understood as a consequence of the privation of liberty punishment being applied to another, in violation of the principle in question, since it is a corporal insertion, that is, a state action that falls upon the bodies of visitors to prisoners.

It can be argued that vexatious intimate searches are not effectively a criminal sanction, but rather a control or security mechanism of prisons and those under custodianship. However, what actually underlies this execrable procedure is the corporal punishment of those who

maintain emotional ties with prisoners, mainly mothers and companions, fulfilling a dual function: a) to secondarily penalize the mothers and companions of incarcerated people, since, in a phallogocentric society, it is believed that they had failed in their traditional feminine *mission* to provide moral support to their sons, daughters and companions; and b) discourage visitation and maintenance of the emotional bond and contact with the person deprived of liberty with the external environment, since the prison must eliminate as much as possible the *human* coefficient from the subject – who has been marginalized and selected to not live.

The selectivity of the penal system has always been an object of study in criminology, especially critical criminology. According to Zaffaroni, to identify an individual as an *enemy*, which reflects the selectivity of the penal system, implies denying this individual the very condition of being a person (ZAFFARONI, 2019). In this sense, the punishment of the privation of liberty is one of the instruments of power created and used to eliminate (through destruction or death) the exception (the enemy) constituted by the power itself. As Achille Mbembe (2003, p. 16) explains: “power (and not necessarily government power) continually refers and appeals to the exception, the emergence and the fictional notion of the enemy. It also works to produce the same exception, emergence and fictional enemy.” Therefore, it is not only a matter of selecting those who are or are not possessors of positive individual guarantees (like the principle of individuality of punishment, the right to privacy and honor). In fact, “it is not the quantity of rights that someone is deprived of that nullifies their status as a person, but rather the reason upon which this deprivation of rights is based” (ZAFFARONI, 2019, p. 18). In the case of the incarcerated individual, at whom the selectivity of the penal system is directed – the *enemy* – their human condition is denied to them because they are considered a *dangerous* being.

Women visitors to Brazilian prisons and penitentiaries, considered accomplices in the crime committed by their companions or sons, or at least colluders, are, by extension, considered *enemies* of society or *strangers*. It is a project of personal annihilation based on race and class discrimination (Juliana BORGES, 2019) that from a gender perspective, also reveals a form of institutionalized gender violence.

Given the relevance of the problems faced by women visitors to prisoners, it is important to emphasize that the discussion about the unconstitutionality of vexatious intimate searches reached the Federal Supreme Court (STF), which recognized the Repercussão Geral [General Repercussion] in the following terms:

CONSTITUTIONAL. PENAL. INTIMATE SEARCH TO ENTER PRISON FACILITIES. VEXATIOUS PRACTICES AND RULES. PRINCIPLE OF THE DIGNITY OF THE HUMAN INDIVIDUAL. PRINCIPLE OF THE PRIVACY, HONOR AND IMAGE OF PERSONS. OFFENSE. ILLEGALITY OF EVIDENCE. RELEVANT ISSUE FROM A SOCIAL AND LEGAL STANDPOINT. RECOGNIZED GENERAL REPERCUSSION. The adoption of vexatious practices and rules related to the intimate search for entrance to prison facilities is a constitutional theme worthy of being submitted to the general repercussion classification (BRASIL, 2018).⁵

This involves an extraordinary appeal, presented in response to the decision by the Court of Justice of the state of Rio Grande do Sul, which rejected an extraordinary appeal filed by the Public Ministry [state attorney] against the ruling of acquittal by that court. In the judgment, the court acquitted a woman accused of drug trafficking because the proof obtained by means of vexatious intimate search was determined to be illicit, violating the principles of dignity and privacy.

It is worth mentioning that the federal Superior Court of Justice (STJ) timidly affirmed the illegality of vexatious intimate searches, when questioned regarding the legality of the proof obtained by this procedure, ruling out the unconvincing and fallacious argument that allows the right of security to prevail:

SPECIAL APPEAL. DRUG TRAFFICKING. INTIMATE SEARCH. ILLEGALITY OF EVIDENCE OBTAINED. APPEAL DENIED. 1. The accused was subjected to an intimate search based solely upon an anonymous accusation, on the day in question, to the prison informing them that she would try to enter the prison with drugs, without carrying out, apparently, other inquiries beforehand to support the veracity and plausibility of this information. 2. In this case, there was only an “anonymous accusation” regarding possible trafficking committed by the defendant, which, therefore, by itself was inadequate to establish well-founded suspicions to justify conducting an intimate search. **3. If there were no well-founded suspicions for the execution of a search of the accused, it is not possible to admit that the mere finding of a flagrant situation – the location of a narcotic substance in the interior of the vagina (45.2 grams of marijuana) – after the search, justifies the measure, under penalty of depriving the individual their constitutional right to privacy, honor and image.** 4. Despite the possible good faith of the corrections officers, **there were no objective and rational elements that would justify conducting an intimate search.** For this reason the evidence obtained through the invasive

⁵ BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Agravo em Recurso Extraordinário n. 959.620. Agravante: Ministério Público do Estado do Rio Grande do Sul. Relator: Ministro Edson Fachin. Jurisprudência do Supremo Tribunal Federal. Brasília-DF. Diário de Justiça eletrônico em 15 de junho de 2018.

measure is illegal, as well as all others deriving from it (by virtue of the theory of the fruit of the poisonous tree), which determines the acquittal of the accused, for lack of material evidence of the crime. 5. Special appeal not granted (BRASIL, 2019).⁶

In terms of the relevance of this decision, it is essential to discuss the issues that underlie the very existence of this vexatious and invasive procedure. In the case referred to above, the legal discussion in the federal Supreme Court of Justice (STJ) was limited to an assessment of the evidence obtained from the search, and its illegal execution, because it was based on an anonymous accusation. But, by affirming that “there were no objective and rational elements that justified the execution of an intimate search,” the judge issued a value judgment: it would be possible to justify conducting vexatious intimate searches in other circumstances. We understand, however, that no “objective and rational elements” exist capable of legitimizing this procedure.

Although the judgment of the Supreme Court of Justice has not been concluded, there is a tendency of that court to permit, in some situations, intimate searches, according to the thesis signed in a dissenting vote by Judge Alexandre de Moraes:

The intimate search for entry into prison facilities will be exceptional, properly motivated for each specific case and will depend upon the visitor’s consent, and may only be conducted according to pre-established protocols and by persons of the same sex, who must be doctors in the event of invasive exams. Excess or abuse in the use of the invasive search will result in the public official or doctor being held responsible and the illegality of any evidence obtained. In case the visitor does not agree, the administrative authority can prevent the visit from taking place.

Considering the concrete case presented above, it is clear that the issue of vexatious intimate searches cannot be limited to a merely formal legal analysis regarding the illegality of evidence, as done by the Supreme Court of Justice (STJ). It is necessary to expressly recognize that the procedure is invasive, degrading and humiliating, as well as unnecessary, since there are other ways to identify the entrance of any illicit object into prisons – for example, the use of electronic means, an issue addressed in the next section. The insistence on the use of vexatious intimate searches, even as an exception, in the general terms proposed in the thesis being voted on by the Federal Supreme Court, constitutes an extension of the prison sentence applied against the convict, to women with whom they had personal conviviality, companions and family members, in clear violation of the principle of the individuality of the sentence. Their bodies and privacy end up belonging to the state as much as the bodies of their incarcerated partners.

Bill 7.764/2014: the exception still underlies the rule

As we have affirmed, vexatious intimate body searches of women visitors in prisons are an unjustifiable practice, considering that they can be conducted electronically. This necessitates a succinct analysis, considering the objectives of this study, of Projeto de Lei [bill] 7.764/2014 (BRASIL, 2014) – which addresses this topic – to understand the terms of the proposed regulation and if it is capable of ending the gender violence to which these women are subjected, or, if, on the contrary, it reifies this violence.

This bill aims to alter the penal code to regulate, as a general rule, personal searches using electronic equipment, through the insertion of articles 83-A and 83-D. Article 83-A of the bill contains the main regulatory content, steering the rules that make up the other provisions, since this article determines the prevalence of the use of electronic mechanisms in personal searches. In addition, it expressly forbids any form of inhuman or degrading treatment, which makes any hypothesis for the use of vexatious intimate searches completely unviable, in the following terms:

Article. 83-A. The personal search – to which all those wanting to have access to prison facilities must submit to maintain direct or indirect contact with a prisoner or to provide services, even if they exercise a public office or function necessary for the security of prison facilities – will be conducted with respect to human dignity, and any form of denudation or inhuman or degrading treatment is prohibited.

Sole paragraph. The personal search should take place through the use of electronic equipment, metal detectors, X-ray machines or similar devices, or even manually, preserving the physical, psychological and moral integrity of the person searched, and as long as there is no denudation, total or partial.

Regarding the possibility of manual search, article 83-B establishes a restrictive definition, prohibiting that it be conducted using denudation, the use of mirrors, performing repetitive movements or the introduction of any objects into the body cavities of the person being searched.⁷ However, it is too imprecise regarding the nature of the official’s manual physical contact on the

⁶ BRASIL. Superior Tribunal de Justiça (Sexta Turma). Recurso Especial n. 1.695.349. Recorrente: Ministério Público do Estado do Rio Grande do Sul. Relator: Ministro Rogério Schietti Cruz. Jurisprudência do Superior Tribunal de Justiça. Brasília-DF. Diário de Justiça Eletrônico em 14 de outubro de 2019.

⁷ Art. 83-B. A manual search is considered to be any inspection conducted through physical contact of the competent public agent’s hands on the clothing of the person searched, with a prohibition upon total or partial denuding, the

clothing of the person being searched. We recall that to qualify as an illicit practice of sexual violence, it is not necessary to require undressing or to introduce objects into body cavities. For this reason, it is essential to also prohibit direct manual contact with intimate parts (genitals and anal cavity) of the visitor, even if properly dressed.

The need to guarantee the humane, dignified treatment of the visitor during manual searches is reinforced in the paragraphs of article 83-B, which establishes that it “will be conducted by a qualified employee and always the same sex as the person searched, guaranteeing respect for human dignity” (§2). If the searched individual wishes, the manual procedure must be conducted individually, in an appropriate room separate from the location of the electronic search, without the presence of third parties (§3). This last provision is intended to remove the vexatious nature of the manual search that, although without physical contact with intimate parts, can cause embarrassment. This is an important measure, but it is necessary that these locations be effectively made available in practice. In addition, if corrections officers do not receive specialized and humanized training to handle this kind of situation, the individualized manual search may not guarantee human dignity, and become an instrument for the reiteration of the violence that the bill intends to avoid.

The interpretation of article 83-C of Projeto de Lei [bill] 7.764/2014 (BRASIL, 2014) allows inferring that the regulatory proposal ascribes a character of exceptionality to the manual search:

Art.83-C. A manual search will be allowed in cases where:

- I – the state of health or physical integrity prevents the individual to be searched from submitting to certain electronic search equipment;
- II – after conclusion of the electronic search, there subsists a well-founded suspicion of the carrying or possession of objects, products or substances whose entry is prohibited.

Item I of the referenced provision clearly demonstrates that a personal search using electronic means is preferred; it should be the *rule*, except in cases of impediment due to the health conditions of the person searched, since these devices use X-rays. However, in item II, the provision envisions that a manual search may be conducted after the execution of an electronic search, if there is a “well-founded suspicion” of the existence of illicit objects or substances. Use of the expression “well-founded suspicion” overly expands the discretion of the corrections officers. The suspicion of the existence of prohibited objects or substances must stem from concrete circumstances, such as the impossibility to identify something present in the body of the person being searched, even after repeating the electronic search.

Article 83-D of the bill suggests, as an alternative to the manual search, that the visit be conducted in a visitor’s room or similar space, which prevents physical contact between the inmate and the visitors. This solution should be used when the suspicion of possession of illicit objects persists after the electronic and manual searches, or when the visitor refuses to undergo a manual search.⁸ This article clarifies, therefore, that the visitor may disallow a manual search when there is “well-founded suspicion”.

The systematic interpretation of the proposed provisions (article 83-A to article 83-D) reveals that the intent of Projeto de Lei [bill] 7.764/2014 (BRASIL, 2014) is to regulate the use of electronic equipment in prisons as the principle means of searching people visiting prisoners and all those needing to have physical access to those locations. However, by authorizing the execution of manual searches in exceptional cases, without expressly prohibiting touching the clothed individual’s intimate parts, the bill fails to prevent a procedural practice that is also invasive and vexatious, which can mainly impact women visitors of inmates. As such, it creates the possibility for the exception – that is, the vexatious manual search – to continue to be, in practice, the rule.

Therefore, the regulations for personal searches in prisons must establish the obligatory use of electronic means in all prisons. The manual search is an exceptional measure, under the terms of the bill in question, to be conducted in the following situations: 1) if the visiting person cannot have physical contact with the electronic search equipment for health reasons; 2) if the electronic search equipment by scanning the image is unable to identify some suspicious object or substance, even after repeating the procedure; in this situation, the visiting person may refuse to undergo a manual search, in which case the visit should be conducted in a separate visitors room. With regard to the manual search procedure, in addition to prohibiting denuding, the legislation must expressly prohibit intimate touching through the visitor’s clothing.

The aforementioned bill has spent more than seven years in deliberations; this delay in its approval is a strong indicator of the lack of political interest in the issue of vexatious intimate body searches of women visitors in prisons. The intimate search, of a vexatious and invasive nature, is only

use of mirrors or repetitive physical exertions, as well as the introduction of any objects into the body cavities of the person being searched.

⁸ Art. 83-D. If the suspicion of carrying or possessing objects, products or substances whose entry is prohibited persists after the use of electronic equipment or the execution of a manual search, or if the visitor does not wish to submit to this, the visit may be conducted in a room similar to a parlor, as long as there is no physical contact between the visitor and the inmate.

one of the instruments used by the state to destroy the *human* in these women and constitute them as *non-human*. Therefore, the problem under discussion calls for an analysis that goes beyond the normative legal aspects, guided by the perspective of gender relations and recognition theories, to reveal the logic behind the power relationships that perpetuate this gender violence.

Unrecognizable human lives

The analysis undertaken up to this point demonstrates that the practice of vexatious intimate searches of women in prisons is based upon a fallacious discourse of the need for security at these locations. If, as seen, the number of cases of apprehension of illicit objects in vexatious intimate searches is truly minimal, the nude exposure of the body and intimate parts, mostly of women, as well as vexatious movements, in reality, aims to hide the fact that both the incarcerated individuals, as well as the people with whom they maintain a social relationship – such as mothers, companions and daughters – are not considered human by norms of social recognition, according to the terms of the Butlerian theory examined in this section. According to this analytical perspective, they are also not considered to have any rights and, in accordance with this perverse logic of the social norms of framing, can be subjected to all sorts of embarrassing and degrading situations, because, if there is no recognizable human life, there is no dignity to be defended.

For this reason, this study does not analyze the situation experienced by these women considering as the starting point human dignity, a category already established and affirmed within the national legal framework. This is because if the women who are subjected to this vexatious practice are not framed by society as even being human, it does not make sense to try to break this oppressive system using a defense based on a previously established legal concept of human dignity. If these people do not even exist in our system according to the rules of framing, the legal norm in question does not apply to them and does not allow them to oppose the violence to which they are subjected. Therefore, if the critical analysis is not based upon a perspective that goes beyond already determined concepts, or that is incapable of redefining the concept of human dignity itself, the debate becomes an exchange of opinions among those with similar positions, making it impossible for the criticism to insert itself into the public sphere of debate to effectively transform the situation of gender violence.

Thus, it is first necessary to expose the precarious condition of these women, which makes a *livable life* unfeasible – a term used by Judith Butler (2009; 2004a), especially in two works involving the theme: *Frames of War* (2009) and *Precarious Life* (2004a). This precarious condition stems from social norms of framing that establish in advance which lives are human and, consequently, which lives are capable of being recognized and grieved.

In these works, the author analyzes contemporary wars, mainly wars waged by the United States against the proclaimed *terrorism* of Arab and Muslim peoples, applying to social struggles her concepts of *performativity* and *subversion* – previously developed in other works, most notably in the book *Gender Trouble: Feminism and the Subversion of Identity* – (BUTLER, 1990) which will be used in this study to analyze gender violence in vexatious intimate body searches of women visitors to prisons. To these categories Butler adds the concepts of *precarious life* and *precarity*, as well as *framing*, *livable life* and *grievable life*. Notwithstanding the specific analytical context Butler addressed, that is, contemporary wars, the concepts referred to are applicable to the subject matter of this work, since it also involves the analysis and understanding of the situation of women made vulnerable, framed as non-human and as ungrievable lives.

To develop these categories, Butler (2004a, p. 57) works with the following hypothesis, which also orients this study: to what extent is there a framing through which some lives are seen and judged in such a way that they are considered less than human or as not part of the recognized human community? Thus, working with the hypothesis that there exists a framing of recognizable, livable and grievable lives, then the conditions that make some human lives no longer eligible for human rights must be verified.

The discovery of these conditions requires a return to the concept of *performativity* developed by Butler (2005, p. 17), according to which, we are “constituted from cultural norms that precede and exceed us, given over to a set of cultural norms and a field of power that condition us fundamentally” (BUTLER, 2004a, p. 45). In these terms, performativity refers to the complex constitution of subjects by means of the reiteration of imposing norms, representative of power relations, which establish the limits of what will be considered an intelligible formation of the subject within a given historical context. The term *intelligibility* is understood as “the general historical schema that establish domains of the knowable” (BUTLER, 2009, p. 06). Therefore, far from being a sole expression of will, subjects are formed performatively, that is, they are compulsorily constituted by a complex reiteration of norms which hide the oppressive content of power relations. It is worth noting that the idea of power relations used in Judith Butler’s studies follows the Foucaultian line (Michel FOUCAULT, 2015, p. 150) of the genealogy of power, that is, of the productive character of power relations in establishing life and its processes (*biopower*).

This finding demonstrates the constitutive and compulsory dimension of these norms for the knowable formation of individuals. However, Butler (2002, p. 93) emphasizes that these normative criteria should not be understood merely as epistemological impositions, but as the specific social regulatory ideals through which subjects are formed, establishing the limits of what will be considered an intelligible formation of the subject. The norm, as Judith Butler clarifies (2004b, p. 42), “governs intelligibility, allows for certain kinds of practices and action to become recognizable as such, imposing a grid of legibility on the social and defining the parameters of what will and will not appear within the domain of the social”. However, since subjects never fully comply with the norms that impose their materialization and identification, Butler’s affirmation that the subject is constituted in a matrix of rules of power relationships does not mean that the subject is determined and that identity is totally artificial and arbitrary (BUTLER, 2004b, p. 145). The norm does not produce the subject as a necessary effect, nor is the subject completely free to disregard the norm that inaugurates their reflexivity, explains Butler (2005, p. 19).

Thus, subjects establish a relationship with these norms that repeatedly affect them during the subjectivation process. From a Butlerian perspective, subjectification is defined as “the process by which the subject produces themselves in a slow and never-ending task of establishing their relationship with the set of prescriptions and values in force in their culture” (Hermán García ROMANUTTI, 2015, p. 300). In this continuous and unstable process, the subject assimilates, questions and resignifies these same norms, which, in Butlerian theory, opens room for processes that subvert the oppressive logic of power relations. In other words, because it is a performative process, that is, the constitution of the subject, which is never determined, complete and stable, gaps open up that represent the constitutive instability of the constructions.

The unveiling of this instability and the deconstitutive possibility inherent to the process of repetition of norms that constitute the subject represent Butler’s *subversive* proposal (2004b, p. 29) for the transformation of social reality, by expanding the frontiers of what is, in fact, culturally intelligible. The possibilities for re-materialization opened up by these processes, Butler emphasizes (2002, p. 18), mark a space where the power of the regulating law can turn against itself and produce re-articulations that question the hegemonic power of these regulatory norms, indicating a possibility for subversion.

With this subversive proposal, Butler initially sought to develop a theory capable of articulating the political terms of the agency of subjects, that is, when the subject themselves turns against the norms that constitute them, exposing the fictitious nature of this constitution, re-signifying these norms and opening a new horizon of social intelligibility. However, mainly considering the contemporary crisis of democratic processes, Butler developed a theory of power and recognition in which these concepts of performativity and subversion are applied beyond the individual sphere, in order to articulate the political terms of a social agency.

Thus, in the social aspect, Butler (2004a, p. XIV) clarifies that power relations operate by means of *framing norms* to “produce and maintain certain exclusionary conceptions of who is normatively human.” In other words, these framing norms determine, a priori, who counts as a human life and what life will be livable and grievable, which denotes the performative character of the human in our social reality.

For this reason, Butler (2005, p. 29) considers that the recognition of someone as a livable and grievable human presupposes the *framing*, that is, a previous frame of references to answer ethically, for example, which life is viable for recognition. Accordingly, to be recognized and offer the recognition as livable human life, Butler (2005, p. 25) explains, is possible only by means of a set of norms that govern recognizability, also denominated by Butler as *conditions of recognition*. These general conditions, upon which the recognition could take place, require another previous dynamic field, understood as *schemas of intelligibility*, that is, the conceptions that establish, a priori, the domains of the knowable, what and whom will be considered a human life.

In this field of perceptible reality (schemas of intelligibility), the notion of a recognizable human is formed and reiterated “over and against what cannot be named or regarded as the human – a figure of the non-human that negatively determines and potentially unsettles the recognizably human” (BUTLER, 2009, p. 64). In this way, Butler (2009, p. 64) clarifies that the response to the pain of the Other (grief) and the way that moral criticisms are formulated and political analyses are articulated depend upon the previous establishment of a certain field of perceptible reality.

When developing the critique of these frames of recognizability and schemas of intelligibility, Butler (2004a, p. 31) denounces that the imbricated necessity for a relationship with the Other, who constitutes me, is due to the *precarity* of life itself, that is, the condition of common human vulnerability that emerges with life itself. In other words, Butler (2004a, p. 31) works with the idea of *precarious life* to demonstrate that, since the beginning of life, we are given over to the Other, therefore, vulnerable to the violence of those on whom we depend.

Precisely because we are vulnerable, we depend upon the relation with others so that the minimal social, political and economic conditions that make our existence viable are

guaranteed. The absence of these conditions implies what Butler (2009, p. 03) denominates a *precarious condition*. Regarding this point, Butler affirms that all lives are precarious, but not all lives are placed in a precarious condition. That is, life is precarious because we are all vulnerable, however, some are recognized as livable lives and will have access to conditions that ensure their existence; others will not be recognized and will be denied these conditions, becoming ungrievable lives. In the words of Butler (2009, p. 21):

To say that life is precarious is to say that the possibility of being sustained relies fundamentally on social and political conditions, and not only on a postulated internal drive to life. Indeed, every drive has to be propped, supported, by what is outside itself, which is why there can be no persistence in life without at least some conditions that make a life livable. [...]. Indeed, the one who decides or asserts rights of protection does so in the context of social and political norms that frame the decision-making process, and in presumptive contexts in which the assertion of rights can be recognized.

Thus, we find in our social reality, that schemas of intelligibility decide beforehand who will be considered human and, afterward, the frames of recognizability establish which lives will have access to the conditions of a *livable life* and which lives will be denied and lost without being grieved. This reflects a *derealization* of the Other, which means that "it is neither alive nor dead, but interminably spectral" (BUTLER, 2004a, p. 33).

In this context, if violence – understood here not only as physical violence, but mainly, as the denial of the minimal conditions for existence of some lives – is practiced against people considered normatively unreal, there would be no violation, since these lives have already been negated by schemas of intelligibility. These lives also cannot be grievable in the frames of recognizability "because they are always already lost or, rather, never 'were', and they must be killed, since they seem to live on, stubbornly, in the state of deadness" (BUTLER, 2004a, p. 33). But, if a life is not grievable, Butler (2004a, p. 34) asserts that "it does not qualify as a life and is not worth a note". This demonstrates the perverse side of these schemas of framing, because they deal with a dehumanization that establishes the limits of human intelligibility and of the recognizability of human lives.

This framing process applies perfectly to women visitors to prisons because the practice of vexatious intimate searches to which they are subjected is a violence and, it should be emphasized, institutionalized violence. Violence not only physical and moral, but violence that reduces these women to less than human: a complete draining of the very condition of existence and grievable life. And why is this kind of violence against these women permitted? Because of a false security argument, which gives rise to another question: why does the supposed public security issue override the privacy and dignity of these women?

If the applicability of the theory developed so far is considered from a Butlerian perspective, the answer would be because these women's lives are not intelligible, are not considered human lives, in accordance with the rules of framing, because, in some way, they are involved with lost lives, that is, incarcerated people. As a result, all of the lives of these women and inmates do not deserve, according to frames of recognizability, to have access to the minimal conditions of a livable life. They are people who are not exactly alive, that is, they are living in a state of suspension between life and death (a spectral state), since they do not fit in schemas of intelligibility. They are treated as less than human or, in fact, are not seen at all (BUTLER, 2004a, p. 141). If they are not human, they are not recognizable lives to which conditions of existence must be guaranteed. If they are not recognizable as livable lives, they are not holders of dignity and human rights. If they do not detain rights, then the violence inflicted upon them contains no violation of any kind, according to these perverse rules of framing.

Thus, the normative schemas of intelligibility establish what will and will not be human. These normative schemas operate "not only by producing ideals of the human that differentiate among those who are more and less human"; they also produce framings "of the less than human, in the guise of the human, to show how the less than human disguises itself and threatens to deceive those of us who might think we recognize another human there" (BUTLER, 2004a, p. 146). Yet, these normative schemas can act in the opposite direction, that is, "providing no image, no name, no narrative, so that never was a life, and there never was a death" (BUTLER, 2004a, p. 146).

In this way, it is clear that a limited and limiting cultural framing is used to understand what it is to be human. For this reason, Butler (2004a, p. 90) proposes to re-signify the term human capable of overcoming a universal conception of human rights, since its supposed universality does not have the intended reach:

We make a mistake, therefore, if we take a single definition of the human, or a single mode of rationality, to be the defining feature of the human, and then extrapolate from that established understanding of the human to all of its various cultural forms. [...] To come up against what functions, for some, as a limit case of the human is a challenge to rethink the human. And the task to rethink the human is part of the democratic trajectory of an evolving human rights jurisprudence.

This rethinking requires challenging the framings that are based upon restrictive conceptions of the human – implicitly of a racial, religious, ethnic, class and gender nature. This, according to Butler (2004a, p. 90), does not signify having a common idea of what is human, given the heterogeneity of human values. It is a conception that is “a concrete and expansive conception of the human”, in the terms of a global community, which is capable of generating coalitions from the understanding of the common condition of the precariousness of life and of distortions that generate the precarious condition of life (BUTLER, 2004a, p. 90). If we want to expand the social and political claims about human rights, we must first be supported by a new ontology that is capable of “the rethinking of precariousness, vulnerability, injurability, interdependency, exposure, bodily persistence, desire, work and the claims of language and social belonging” (BUTLER, 2009, p. 02).

If the schemas of intelligibility establish what is human and the frames of recognizability establish which lives will be livable and grievable, the performative character of these constructions opens space for the subversion of these frames. Such frames are only a reference for recognition to take place or for the norms that govern the recognition to be contested and transformed. It is necessary to question “norms, social and political that have developed historically in order to maximize precariousness and minimize precariousness for others” (BUTLER, 2009, p. 03). Therefore, the criticism regarding the precarious condition of life “forms the point of departure for both a rethinking of bodily ontology and for progressive or left politics” (BUTLER, 2009, p. 03).

Thus, the Butlerian proposal is not about replacing a set of idealized norms to understand the *human* with another hegemonic culture, but to unmask the dehumanizing norm that restricts the perceptible, through a critique of its inherent violence because it denies the conditions for a livable life. By uniting this revealing theory of the human within society with practice, Butler (2009, p. 147) considers that social struggles for transformation of these oppressive frames occur both in the individual realm and the social realm. In the individual realm, it is through the agency of the subject themselves who has been made vulnerable, by contesting and re-signifying these norms in the constitution of self. In the social realm, it takes place through the agency of coalitions (assemblies) of subjugated groups (BUTLER, 2015, p. 11) – such as women and inmates – to form an opposition to state and other regulatory policies that promote exclusions, rejections, partial or complete suspension of citizenship, subordination and degradation of lives.

Conclusion

In light of the analysis conducted in this study, it is possible to conclude that vexatious intimate searches of women visitors to prison facilities are not really mechanisms for the control or security of these places. What actually underlies the vexatious procedures adopted is the corporal punishment of those who maintain emotional ties with persons who are condemned or accused of breaking the law – mainly mothers and companions. It follows that the vexatious intimate searches to which they are subjected constitute an illegal and unacceptable extension of the penal sanction to women who have emotional ties with inmates, violating the constitutional principle of the individuality of the sentence.

Faced with the institutionalized violence experienced by these women, this study seeks to establish a critique that goes beyond the more common analyses of the topic conducted in legal studies, that is, from the perspective of human dignity. Going beyond this popularly accepted position found in legal debates about the problem of vexatious intimate body searches of women visitors in prisons, we apply categories developed by Judith Butler in her social critique and theory of recognition to unmask the logic of the subjectification process and of the social norms of recognition that confer support to the corporal punishment of these women. This alternate approach proposed in this study is based on the fact that these women are denied any possible recognition of their lives as being dignified, or, in a broader sense, are not even recognized as humans in Brazilian society.

This proposed analysis is based upon theoretical categories developed by Judith Butler, since they allow the verification of how power relations, which constitute individuals, establish the limits of intelligibility and recognition regarding what is considered normatively human and which lives are livable and grievable.

Thus, we used the concept of performativity presented by Butler to elucidate the complex process of the constitution of subjects through the reiteration of compulsory norms, which are representative of power relations, and that establish the limits of what will be considered an intelligible formation of the subject within a given historical context. In this process, power relations operate through what are called framing norms to determine beforehand who counts as a human life and which lives will be livable and grievable, which denotes the performative character of the human in our social reality.

These framing norms employ, on the one hand, schemas of intelligibility to decide, in advance, who will be considered human and, on the other, the frames of recognizability to

establish which lives will have access to the conditions of a livable life and which lives will be denied this access and will be lost without grief.

In turn, these frames of recognition and schemas of intelligibility are based upon two other concepts: precarity and precarious condition. The first concept, precarity, represents the common human vulnerability that arises with life itself, that is, from the beginning of life people need interrelationships for survival, which means that they are vulnerable to the violence of those upon whom they depend. In this way, all life is precarious, but not all life will be considered human and recognized as livable and grievable. This stems from the fact that the vulnerability of life creates the dependence of the subject upon others to guarantee the minimal social, political, and economic conditions to enable their existence. The absence of these conditions implies what Butler calls a *precarious condition*.

Thus, it can be asserted that life is precarious because everyone is vulnerable; however, some will be recognized as livable lives and will have access to conditions that ensure their existence; others will not be recognized and will be denied these conditions, becoming un-grievable lives; while still others, brutally, will not even be considered human. This framing process applies perfectly to women visitors to prisons, because the institutionalized violence to which they are subjected reduces them to less than human, completely draining away the very condition of existence and grievable life.

Therefore, the answer to the problem that gave rise to the analysis of this work, is that the lives of these women are not intelligible; according to the rules of framing they are not considered human lives, since they are involved in some way with lost lives, that is, with the incarcerated. Consequently, all these lives considered as non-human, of these women and these inmates, do not deserve, according to the frames of recognizability, to have access to the minimum conditions for a livable life. They are treated as less than human, or, in fact, are not seen at all.

Therein lies the importance of publicizing, exposing, and unmasking this barbarity that classifies lives as human or non-human and, even, as livable, and non-livable. It is necessary to question these framing norms, since they can be changed, according to Butler's subversive proposal. According to this perspective, since it involves a performative process – that is, the constitution of subjects, which is never definitive, complete and stable – gaps open up that represent the constitutive instability of the constructions. Given that in this continuous and instable process the subject assimilates, questions and re-signifies these norms, gaps open up for processes to subvert the oppressive logic of power relations. Since theory and practice are intertwined, this deconstruction, in the theoretical field, can also contribute to the cessation of the practice of vexatious intimate body searches of women visitors in prisons by pointing out the subversive possibilities of the framing norms and allowing individual and collective mobilization, in the practical field, of the agency of people excluded from the condition of being human in our society.

Thus, in the Butlerian proposal, it is not a matter of replacing a set of idealized norms to comprehend the human, but of regaining a sense of ethical indignation, and revealing a dehumanizing norm that restricts the perceptible, by critiquing its inherent violence because it denies the conditions for a livable life.

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AUTORSHIP CONTRIBUTION

Samia Moda Cirino: Bibliographical survey of Judith Butler's theory supporting the normative framing of livable human lives. Analysis of the main categories of Butlerian thought: precarious lives, precarity, livable lives, grievable lives, framing, frames of recognition and schemas of intelligibility. Verification of the applicability of these categories to the reality experienced by women visitors to Brazilian prison facilities.

Bruna Azevedo de Castro: Analysis from a critical criminology perspective of the legal norms that address the intimate body searches of women visitors in prisons in Brazil.

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