

GENDER, SEXUALITY AND RACE IN THE ANALYSIS OF THE RIGHT PRISONERS TO CONJUGAL VISITS



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ABSTRACT

This article analyzes the deprivation of liberty sentence in Brazil, focusing on its implications for the rights of inmates, especially the right to conjugal visits. Punishment, while intended to deprive freedom of movement, continues to impact other dimensions of the individual's life, including their family relationships and sexuality. Brazilian legislation guarantees the right to visits, but does not explicitly provide for the right to conjugal visits, creating a gap that undermines the integrality of the prisoner's social reintegration. Based on existing norms, such as the Penal Execution Law and resolutions of the National Council for Criminal and Penitentiary Policy, the text discusses the importance of conjugal visits for the emotional and social well-being of inmates. Despite the advances promoted by Resolution No. 04/2011, which includes the LGBT population in conjugal visits, the absence of a clear legal provision continues to generate uncertainties. The article argues that the sexual rights of prisoners should be recognized as fundamental, arguing that deprivation of liberty should not extend to sexuality. The analysis concludes that, in order to ensure the full exercise of the sexual rights of inmates, it is imperative that the State not only recognize, but also facilitate and effectively regulate the right to conjugal visits, guaranteeing dignity and respect for the individuality of those in custody.

Keywords: Conjugal visit, Gender, Race, Sexuality.

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INTRODUCTION

The deprivation of liberty sentence in Brazil has been the main form of punishment for those who commit acts considered criminal since corporal punishment was abandoned by the Brazilian State as a punitive means. And since its adoption, the custodial sentence has undergone changes. However, it still stigmatizes those who comply with it, during and after prison.

Although this penalty has come to replace the penalties that fell directly on the body, it is still a punishment on the body, because when freedom is deprived, one no longer has total dominion over one's own body. However, unlike what happened with body punishments, both have a different logic. According to Foucault (2008), with the current system of punishment, the body becomes an intermediary and no longer a support for punishment. He is placed in a system of privations, interdictions and obligations.

When starting the execution of the sentence in a closed regime, one of the first changes that occur in the life of the convict is that he no longer lives with the people with whom he has ties, whether family and/or friends, but they start to maintain constant and close contact with people he does not know, whether they are other inmates or prison employees. Thus, to avoid the rupture of these family ties, the right to visit was established for the inmates, as established in article 40, item X of the Penal Execution Law (Brasil, 1984).

It should also be remembered that the deprivation of liberty sentence aims to deprive the freedom of movement of those who serve it, but cannot totally and unrestrictedly deprive them of family life. Just as the sentence cannot transcend the person who was convicted by virtue of item XLV, of article 5 of the Federal Constitution (Brasil, 1988), in this way the family members must be affected as little as possible by the fulfillment of the sentence. As far as possible, contact should be maintained between the convict and the people with whom he had ties before incarceration.

THE RIGHT TO VISIT THE PRESSO

The prisoner's right to receive visits is legally provided for, and does not generate controversy, either from the point of view of its legal validity or its effectiveness as a positive factor in the process of reintegration of the convict. And even in the strictest regime of serving sentences, the differentiated disciplinary regime, which is applied to prisoners who have committed serious misconduct and in other cases, the right to visitation is not

abolished given its importance and legal certainty. In the differentiated disciplinary regime, the prisoner is kept in an individual cell, being able to retire for two hours a day of sunbathing. However, at least the weekly visit of two people, lasting two hours, is ensured, without taking into account the children who are not included in this count (Brasil, 1984). This demonstrates the importance that family visits have in the logic of serving the sentence.

Although the simple visit – it will be called that from here on so that there is no confusion with the conjugal visit – is a reality in the daily life of prisoners and a right of prisoners crystallized by law, the same cannot be said of the conjugal visit.

Another of the limitations that the custodial sentence imposes is related to the sexual rights of the convict, as he no longer has control over how the satisfaction of his libido will take place (when, how and where). However, the deprivation of sexuality cannot be total, since the purpose of the deprivation sentence is to deprive freedom of movement and not sexual freedom. When dealing with the issue of the exercise of sexuality during the execution of a sentence, one should remember the homosexual portion of the prison population, as the LGBT population is already marginalized without going through the prison system. Thus, it should be remembered that, according to Goffman (2015) and Weinberg (1942), values, ideologies and prejudices are brought from the outside world into the prison both by the inmates and by the management team, and within the prison they will be reproduced. Therefore, the LGBT prison population that suffers discrimination outside the prison walls, continues to suffer it when entering the penitentiary.

In order for the prisoner to have the exercise of his sexuality guaranteed, the conjugal visit was created. The institute of conjugal visits does not have an express provision in law. The Law of Penal Executions states in its article 41, item X, that it is the right of the prisoner to visit his spouse, partner, friends and relatives on certain days (Brasil, 1984). Therefore, a careful reading of the aforementioned article shows that the assured visit is not the intimate one, but the simple visit. For those who comply with socio-educational measures, in article 68 of the law that regulates it, there is an express provision: "The right to conjugal visits is guaranteed to the adolescent who is married or who is proven to live in a stable union" (Brasil, 2012).

THE (NON) PROVISION OF THE RIGHT TO CONJUGAL VISITS

Initially, before dealing with the details of the conjugal visit itself, it is necessary to construct and delimit the legal norm that guarantees it to individuals deprived of liberty. According to Padovani (2011), this legal norm would be the one provided for in the legal text cited above. However, such a statement is not correct, as a little more careful reading of the provision is enough to understand that it does not provide for the right to conjugal visitation, but the right to simple visitation, to which the convict is entitled. The purpose of the visit recommended in this legal diploma is for the prisoner to maintain ties with the people who were part of his circle of coexistence before his arrest, an objective that is different from the objective of the conjugal visit, which aims to ensure that the person who is deprived of liberty can have sexual relations with his or her partner, Considering that this is one of the aspects of the affective bond.

This provision also refers indistinctly to friends and relatives, in the same sense, according to the recurrent practice in prisons, reaffirmed by Padovani (2011) and Araújo et al. (2016) and also provided for in Resolution No. 4 of 2011 of the National Council for Criminal and Penitentiary Policy, only one person at a time can be registered for conjugal visits. Thus, friends and relatives would not be able to visit the inmates intimately, that is, to have a sexual act with them inside the prison. Thus, it is even clearer that in this provision there is no provision for conjugal visits as a subjective right of the convict.

Still in order to demonstrate that the right to conjugal visits of the prisoner is not provided for in the Law of Penal Executions and more specifically is not disciplined in article 41, item X, it is necessary to analyze what is provided for in Law No. 12.594/12, which established the National Socio-Educational Service System and regulates the execution of socio-educational measures. This normative instrument, in its article 68, expressly provides that: "The right to conjugal visits is guaranteed to the adolescent who is married or who is proven to live in a stable union" (Brasil, 2012). From the reading of this provision, it is clear that the wording of this provision is notably different from what is established in the Penal Execution Law, which does not refer to conjugal visits.

Thus, it is necessary to conclude that the Law of Penal Executions, although considered by Oliveira and Santiago (2014) and Cardoso (2009) as one of the most advanced and guarantor laws in matters of Penal Execution among Western legal systems, fails to provide for the guarantee of the sexual freedom of prisoners, a guarantee embodied in the right to conjugal visits.

However, there is a resolution of the National Council for Criminal and Penitentiary Policy (CNPCCP) that deals, including in detail, with the right to conjugal visits. Resolution No. 04, of June 29, 2011, establishes conjugal visits, without discrimination of sexual orientation, which goes beyond the provisions of the previous resolution, Resolution 01/1999 of the CNPCCP. The 1999 resolution makes no mention of the possibility that homosexual prisoners may receive conjugal visits. This portion of the prison population is not even mentioned throughout the text of this resolution.

Among its provisions are: in article 3, the minimum number of conjugal visits to be received in a given period of time (at least one visit per month); in its articles 1 and 5, the conditions of the place where the conjugal visit will be carried out, which will have to be in a clean place, within the prison establishment and where the inviolability and privacy of both the convict and the partner are ensured; in its article 4, the impossibility of removing the conjugal visit for sanctioning purposes, except for the infraction having been related to conjugal visits. It also establishes procedural issues, such as the time when the name of the person who will perform the intimate visit must be indicated.

Although it has brought many advances, it still has marks of a society that is still conservative on some aspects, such as the fact that the convict can indicate only one person at a time for the intimate visit, which clearly violates the sexual freedom of the convict himself. However, in relation to what was previously stated, the progress is undeniable.

This resolution was innovative and came in the wake of other substantial changes in the treatment of sexual rights, especially those related to the homosexual population, especially the paradigmatic decision of the Federal Supreme Court (Brasil, 2011), which established that the homosexual relationship enjoyed the same rights and prerogatives, of any nature, including social security, as the stable union and marriage of heterosexual people. It is from this extraordinary appeal judged with general repercussion that same-sex marriage was authorized through an act of the National Council of Justice.

After the decision of the Federal Supreme Court, a little more than a month has passed since the issuance of the current resolution of the CNPCCP that regulates conjugal visits – the decision of the Supreme Court is dated May 5, 2011 and the resolution of the CNPCCP was published on June 29, 2011. This demonstrates that the edition of this resolution was carried out so that there would be no prejudice, due to a possible delay in its publication, to homosexual convicts who were in the prison system, preventing the release

or not of conjugal visits to this portion of the prison population from being at the discretion of the penitentiary administration. This concern is even more evident when compared to Normative Act No. 175 of the National Council of Justice, which forced notary offices to perform same-sex marriages, it was only published in 2013, two years after the STF's decision, which demonstrates even more clearly how quickly the resolution was published.

It is undeniable that the edition and publication of this resolution represented a great advance with regard to conjugal visits, especially in the express inclusion of homosexual relationships as being eligible and apt to give rise to the subjective right to conjugal visits. However, Resolution No. 04/2011 of the CNPCP has a blemish, from the point of view of legal technique. It does not establish norms, in fact, it does not establish legal norms, for reasons that will be explained below.

SEXUAL RIGHTS AND CONJUGAL VISITS AS FUNDAMENTAL RIGHTS OF THE PRISONER

In order to build the norm that guarantees conjugal visits, it is necessary, first of all, to visit the agenda of sexual rights. Sexual rights are controversial from a legal point of view, and they are not mentioned from a positive point of view, they are not affirmed, they are simply not denied. In this sense, Petchesky (1999) draws attention to the situation that the unfolding, even if initial of what sexual rights would be and what they would be, could only be carried out in a negative way, that is, palliatively by making explicit the right not to be a victim of sexual abuse or exploitation. She questions why it is simpler to declare sexual freedom in a negative and protectionist way, rather than in an emancipatory way, and why it would be easier to reach consensus on the guarantee of not being abused, exploited, trafficked or raped, and yet it seems to be so difficult to debate and declare "the right to fully enjoy one's own body". For the author, it is necessary to develop sexual rights in the direction of a broad positive concept, which goes beyond the fight against discrimination and abuse suffered by sexual minorities. Thus, sexual rights should explicitly encompass what she calls affirmative entitlements, since both positive and negative forms are related: it would not be possible to live sexuality fully if there is a constant submission to the terms of suffering some kind of abuse.

The Brazilian legal system deals with sexual rights precisely because of this paradigm, that of treating them in a negative way, and not in an emancipatory way. Carrara and Vianna (2008) state that the Federal Constitution was the result of the political clashes

of various groups and social movements that wanted to bring issues previously considered private to the public sphere. And in some cases the changes were significant, such as gender equality, a clear victory for feminist groups and women's movements. However, other agendas, such as the non-inclusion of sexual orientation or gender identity as situations to be fought by the government, represented the difficulty of the political context for these groups. However, even though the Constitution has been silenced on this point, its general structure committed to Human Rights has allowed the public power, especially the Judiciary, to unfold its principles to guarantee certain rights. Moreover, it should be considered as a fundamental framework from which sexual and reproductive rights could be implemented in Brazil.

Thus, even if not explicitly and by negative titles, the Federal Constitution guarantees the exercise of sexual rights. It brings several individual rights and guarantees, including freedom, intimacy, physical integrity, freedom of expression and non-discrimination. All these rights have ramifications with regard to sexuality. Understanding that everyone has the right to be free, therefore, they can freely choose their sexual partners, and fully live their sexuality, and still choose not to have sexual relations; having the right to preserve their intimacy, therefore, not concerning others, nor the State, how and with whom their sexuality is lived, as long as it is a free and consented choice of all parties.

The right to freedom of expression that unfolds in the guarantee that one can freely express one's sexuality and sexual orientation, and cannot be discriminated against for that. In view of all these factors, it is evident that the Federal Constitution of 1988 protects sexual rights even if this is not explicit in its text. However, it cannot be denied that this could have been done in a more liberating way, clearly demonstrating this protection of sexual rights.

Willeman (2011) states that the right to conjugal visits could be restricted, first on the grounds that the right to conjugal visits would not be fundamental and in fact would only be a perk offered by the penitentiary administration. And second, it may not even be granted by the State. Contrary to what he claims, conjugal visits are a subjective right of the prisoner, and should be ensured and not restricted by the Government.

The custodial sentence should not deprive the prisoner of all his freedom, but only his freedom of movement, so the prisoner's sexual freedom would not be included therein. The Federal Constitution (Brasil, 1988) – in its article 5, item XLIX – as well as the Law of Penal Executions (Brasil, 1984), guarantees the right to physical and moral integrity of the prisoner. The guarantee of this right necessarily involves the full sexual exercise of the

convict, if he so wishes. In addition, article 226 of the Federal Constitution establishes that the family owes special protection from the State. However, the family must be interpreted here in its purest sense, as a group of people that is brought together through affection and solidarity.

Another point to be taken into consideration is that in its article 5, item XLV, the Federal Constitution provides that no penalty can pass from the person of the convicted, so the person with whom the prisoner establishes affective and sexual relations, cannot also be penalized. If conjugal visits were not guaranteed, there would be something like a penalty of celibacy for these people, which is not in line with the constitutional treatment given to the subject.

Brazil is also a signatory to the Minimum Rules for the Treatment of Prisoners, the Mandela Rules (CNJ, 2016), an International Treaty that deals with Human Rights, approved before Constitutional Amendment 45 of 2004. This Amendment provides that this type of International Treaty that is approved in each House of the National Congress, in two rounds, by three-fifths of the votes of the respective members, will be equivalent to constitutional amendments. However, Mandela's rules have not been ratified by Brazil, which does not imply that they do not serve as instituting principles that must be followed by Brazil. Finally, the Mandela Rules establish in its Rule 3 that:

Incarceration and other measures that exclude a person from living with the outside world are distressing because of the very fact that they are deprived of their right to self-determination when they are deprived of their liberty. Therefore, the prison system should not aggravate the suffering inherent to such a situation, except in incidental cases, in which separation is justifiable, or in cases of maintenance of discipline (CNJ, 2016).

Thus, taking into account that all people have the right to fully exercise their sexuality and that the convict should only have his freedom of movement (and also political rights) curtailed, and the sentence cannot transcend the person of the convicted; and that the suffering caused by incarceration must be minimized as much as possible, conjugal visits become a right guaranteed to all prisoners, and this right must be guaranteed by the State, even because those taken to prison establishments are in custody, therefore, a state responsibility.

Thus, from these constitutional and international texts, it is possible to affirm that there is a legal norm that guarantees conjugal visits, and because it is a norm that deals with fundamental rights and guarantees, it has full and immediate effectiveness, by virtue of

paragraph 2 of article 5 of the Federal Constitution, being a norm of full legal effectiveness, along the lines proposed by Silva (2003). However, it should be noted that there is no text that clearly provides for conjugal visits, which would resolve existing controversies and put an end to possible problems. However, the lack of regulation should not be used as a subterfuge so that the conjugal visit is not carried out. Because it is a fundamental right that has full effectiveness and, therefore, immediate application.

In fact, conjugal visits must also be ensured to homosexual prisoners, as the Federal Constitution provides in its article 3, item IV, that the good of all must be promoted without discrimination of any kind. Thus, it is not possible to think that homosexual prisoners did not have the same right guaranteed to heterosexual couples. Not least because the Federal Supreme Court (Brazil, 2011) has established the understanding that homosexual couples have equal rights between homosexual and heterosexual couples.

In addition, the Minimum Rules for the Treatment of Prisoners (CNJ, 2016) provide in its rule 58 that:

Where conjugal visits are permitted, this right must be guaranteed without discrimination, and women prisoners shall exercise this right on the same basis as men. Procedures must be established, and places must be made available, in order to guarantee fair and equal access, respecting safety and dignity (CNJ, 2016)

Thus, it cannot be understood that the right to conjugal visits does not apply to homosexual prisoners, in view of the equal rights that there should be, regardless of sexual orientation. Conjugal visits should be offered on equal terms to everyone, whether LGBT or heterosexual.

Constructed in this way, the norm that guarantees conjugal visits is legal, along the lines proposed here, first of all it obeys the deontic modals: it is mandatory for penitentiary administrations to ensure its implementation; prisoners are allowed to enjoy this right; and it is, therefore, forbidden for prison management bodies to prevent conjugal visits. It is also possible to envision a sanction, if this rule is not complied with: the convicts may appeal to the Judiciary to have their rights enforced, and it may be determined that prison administrations compensate the prisoners for hindering their right.

FINAL CONSIDERATIONS

The conjugal visit of persons deprived of liberty in Brazil lacks express legal norms capable of not raising doubts about its character as an undisputed right of prisoners. What

currently exists are some infra-legal rules, such as decrees and ordinances that regulate conjugal visits. There is no provision for conjugal visits in the Penal Execution Law, nor in state laws, which would be sufficient in the absence of a federal rule, as provided for in the third paragraph of article 24 of the Federal Constitution.

There are also rules issued by the National Council for Criminal and Penitentiary Policy that have advanced provisions regarding conjugal visits. However, despite the good regulation it has given to the subject, it suffers from an insurmountable problem: it does not have binding force for prison administrations. This resolution, Resolution No. 04, of June 29, 2011, consists only of a recommendation, and as such does not obey one of the deontic modals that are typical of legal norms, as demonstrated throughout this study, which means that this resolution, although it may be a norm, is not a legal norm.

But, despite all this, conjugal visits cannot be restricted and access to this right limited. Every human being has the fundamental right to fully exercise his sexual potential, and these sexual rights should not be seen simply as a form of protection from abuse, as a way of guaranteeing that his body will not be sexually violated. Rather, as positive rights, where people have the right to exercise control over their own bodies and use them in the way they wish in order to satisfy their libido.

It is not up to the State to regulate and restrict sexual rights, not even those who are in its custody, such as prisoners. The role of the state is, in fact, to ensure that there is no obstacle to the exercise of these sexual rights, and not only as a negative right, but also as a benefit right, in order to guarantee that these rights can be exercised freely and with the minimum conditions necessary for full control of their own sexuality.

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