

THE PRIVATE VISIT – RIGHT OR COMPENSATION

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Abstract

The connection of the person deprived of his/her liberty with the family is an important aspect to be kept in the prison environment both for him/her and for the family. This connection is accomplished in particular by the right to private visit as provided within the legal regulations. Identifying the origins of the right to private visit and establishing the nature of this private right represent a goal, given that its peculiarity is that although it is regarded as a right, its implementation seems to be closer to the concept of reward.

The radiography of the concept „private visit” is trying to identify both the willingness of the legislator that regulated this right, but also the realities from the prisons in terms of concrete realization of this right, considering both the legal provisions and the concrete situations in prisons.

Keywords: rights, private visit, family, penitentiary, compensation

Introduction

The deprivation of the persons' freedom, as a result of the imposition of a sentence or of the disposition of the preventive custody, inevitably leads to their separation from society, and especially from the family environment. The physical closeness between the prisoner and the family members is affected with priority when they are separated, especially the possibility of preserving a private life between the partners when one of them is imprisoned.

The lack of contact between the prisoners and their partners can lead to abnormal behaviour, taking into account that, in addition to the sentence imposed, the prisoners suffer from other penalties not mentioned in the court decisions of conviction.

The work aims to highlight the pros and cons regulating this right, or to clarify to what extent, in its current form, the right to private life of the prisoners can be regarded as a right or as a compensation (possibly a conditional right).

Thus, the intended purpose in achieving this objective is of particular importance, because if it proves that the right to privacy of the convicted person is not in fact a law, the conclusions drawn can be taken into consideration by the legislator in order to harmonize the existing legislation with the concept of the rights.

Thus, this study supplements the existing literature by making an objective analysis of the provisions governing the right to privacy of the prisoners, presenting also the specific issues arising in the process of implementing them, trying to identify the weaknesses.

The work is based on the systematic analysis of the Romanian legislation represented by laws and regulations, which regulated the right to private visit (Law no. 275/2006, Law no. 254/2013 and their implementing regulations), the Constitutional Court Decision no. 222/2015, Case Gaciu against Romania, the relevant matters, and the transposition of the legal rules in the form of standard procedures at the level of prisons.

The right or the compensation are two concepts with different meanings, resulted from their definitions.

“Right = Power, legal prerogative recognized to a person to have a certain conduct, to enjoy certain privileges etc.”¹.

„Compensation = what is or is given in order to reward someone for the committed action; reward; gratification”².

From the definition of law it can be extracted its essential characteristic, namely that the right person is a recognized power, without being subject to any conditionality.

On the other hand, the concept of compensation reflects a benefit due to the implementation of other activities. Hence, a compensation exists prior to a performed activity that gives rise to a reward. As such, the reward is conditional.

The private visit, new concept in the prison system, was first granted as an experimentally compensation in 1995 and starting with 2006 it was introduced as a legal right³.

Content

The enactment of this concept was developed through the Implementing Regulations of Law no.

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¹ The Romanian explanatory dictionary.

² The Romanian explanatory dictionary.

³ Ioan Chiş and Alexandru Bogdan Chiş, *The execution of the criminal penalties*, (Bucharest, Universul Juridic, 2015) page 395.

275/2006 on the execution of the punishments and measures ordered by the court in criminal proceedings (hereinafter REG 1). Within art. 43-45 of REG1 it is defined who can benefit from the private visit, the conditions and procedure for granting this right. Currently, the right to the private visit is regulated by Law no. 254/2013 on the execution of the sentences and custodial measures ordered by the court in the criminal proceedings, which repealed Law no. 275/2006 on the execution of the punishments and measures ordered by the judicial bodies during the criminal trial.

The need to regulate this concept through REG 1 results from the importance of its existence for people deprived of their freedom and for their partners.

The private visit, as stipulated in REG 1 (article 43 paragraph 1), allowed the meeting between the convicted person and the husband/ wife, partner/partner, quarterly, for 2 hours. An exception was also foreseen if the marriage was officiated in prison in the first year of marriage, the private visit being paid monthly (article 43 paragraph 1).

In order to grant this right, it was necessary that the convicted person to meet certain conditions established by law.

It is at least peculiar as for achieving a right, it was necessary to comply with certain conditions. Analyzing also other rights of the convicted persons for example, the right of access provided for in art. 38, the right of petition provided for in art. 50 or right to correspondence mentioned in art. 51, it is noted that for exercising these there were not required certain conditions. The law regulated the existence of such rights, for which the administration of the prison had to take certain measures, by no means imposing conditions on the persons convicted.

Introducing the private visit, even conditionally, it was just normal considering the fact that within the Constitution, among the rights recognized to the citizens it was set out in art. 26 para. (1) the right to private family and private life, such as "*The public authorities shall respect and protect the family and private life*".

It is true that the convicted person must bear the consequences of his antisocial actions, but it is required that the government to create optimal conditions for serving the sentence without restricting the convicted other rights which have not been limited by the sentence.

By Law no. 254/2013 on the execution of the sentences and of the custodial measures ordered by the court during the criminal trial, which repealed Law no. 275/2006 on the execution of the punishments and measures ordered by the court during the criminal trial, the right of the private visit was introduced as free-standing law.

It is worth mentioning that the old regulation regarding the private visit was stipulated in REG 1, now this right is provided within the Law regarding the enforcement of the sentences in art. 69 - Chapter V entitled "Rights of the convicted persons".

According to this article, in order to benefit from the right of the private visit of the persons convicted must meet certain conditions, cumulatively:

- a) They have been convicted and are distributed in a regime of enforcement of custodial sentences;
- b) It is under trial as a defendant;
- c) There is a marital relationship, as evidenced by the certified copy of the marriage certificate or, where appropriate, a partnership relationship similar to the relations established between the spouses;
- d) They have not benefited in the last 3 months preceding the request for the private visit, from permission out of prison;
- e) They were not disciplinary sanctioned over a period of 6 months prior to the request of the private visit, or the sanction was lifted;
- f) Actively participates in educational programs, psychological and social assistance or working;

(2) The married convicted person can only benefit from the private visit of the spouse.

(3) For granting the private visit, partners must have had a similar relationship with the relations established between spouses prior to the date of receipt in prison.

(4) The proof of the partnership relation is done by affidavit, authenticated by a notary.

(5) The director of the prison can approve private visits between the convicted under this article.

(6) The number, frequency of the visits and procedure of carrying out private visits shall be determined by the implementing regulation of this law".

The text of the legislation mentioned above made no significant changes compared to the previous regulation, concerning the conditions for granting a right to visit intimate and the categories of persons to whom it recognizes this right.

What it is worth mentioning is that if in the previous regulation, the convicted and their partners were not married, they had to prove the existence of a relationship similar to that of a marriage in the last 6 months prior to the request for the intimate visit, the main evidence representing the visits under art. 40 of REG 1, as in the new regulation this period is not foreseen anymore and neither the proof of this relationship through the visits.

A new aspect of the new legislative text is the possibility that the governor approves private visits between the convicted under the same conditions as those laid down by Art. 69 of the law.

The rules of implementation of the Law no. 254/2013 (hereinafter REG 2) transposes the obligation regulated in art. 69 para. (6) of the Law, so that the number, frequency and procedure of conducting the intimate visits.

Analyzing the right to visit as foreseen in REG 2, we could say that it provides a significant change in the

art. 69 para. 1 letter b). Thus, art. 145 par. (1) letter a) in REG 2 states that the persons "*who are convicted and are sent in a regime of enforcement of custodial sentences, and they are remanded during the trial*" have the right to intimate visit.

The necessity of this change was imposed by decision no. 222/2015 of the Constitutional Court which, upholding the exception of unconstitutionality, reflected that the provisions of art. 69 para. (1) b) of the Law are not constitutional.

Thus, the Constitutional Court was hearing a plea of unconstitutionality in terms of the fact that the right to intimate visit does not apply to people in custody.

In the exception invoked it was mentioned that the existing provision in art. 69 para. (1) letter b) of Law no. 254/2013 - *There are not under trial as defendant* – the persons in custody are exempted from the right to intimate visit.

The Court by its Decision, motivated also by the decisions of the European Court of Human Rights (Case *Varnas against Lithuania*, Case *Moiseyev against Russia*), upheld the exception of unconstitutionality and found that the difference in legal treatment regarding the right to intimate visits as it is provided in the art. 69 para. (1) letter b) and art. 110 para. (1) letter b) of Law no. 254/ 2013, when regulating the enforcement regime of the custodial preventive measures and the final criminal punishments, it has no objective and reasonable justification and are not based on considerations of security activities in the detention centers. Therefore, this difference discriminates the persons remanded in relation to those sentenced to deprivation of liberty, *being likely to contravene the provisions of article 16 of the Fundamental Law, related to those of article 26 of the Constitution*⁴.

The Constitutional Court decision came shortly before Romania would be condemned by the European Court of Human Rights, Tuesday 23rd of June 2015, in Case *Costel Gaciu against Romania*, for discrimination and violation of the right to respect family life, establishing that the authorities applied on the plaintiff differential treatment when they refused his request to receive conjugal visits from his wife during remand.

The new regulation represents normalization of the present situation in prisons because, for example, it was not fair that a person sentenced to imprisonment for two years to be given the right to intimate visit and a person who spent the same period in custody not to have the same rights. One should not lose sight of the fact that the person who is not definitively convicted still benefits from the presumption of innocence. So it was quite unnatural as a person who was found guilty to have a right recognized, which implies a strong emotional involvement and other who hadn't the "chance" to be condemned not to have this right recognized. Moreover, the court ruled definitively on

the crime committed by the convicted, but in terms of a person in custody, the court found that the evidence results in the reasonable suspicion that one committed a crime.

It can be concluded that the Constitutional Court decision restores, if allowed, a balance in the rights of the persons deprived of their liberty.

The conditions imposed (article 69 letters a-f of the Law) in order to benefit from this right determines the special status of the right to intimate visit compared to other rights. The text of the law requires both positive and negative circumstances.

The connection of the imprisoned with the outside world can represent that opportunity to motivate in an attempt to overcome the difficult situation they are in.

The new regulation still left unsettled the possibility of the unmarried or single detainees to benefit from intimate visit. This positive condition in para. 1 letter c) art. 69 of the Law sets out the categories of the persons to whom this right applies.

Even the doctrine⁵ stated the fact that barring the right to intimate of the young and unmarried individuals not involved in a long-term relationship, is still a type of discrimination. It is quite true that you can have an intimate life even if you're not in a relationship, moreover if you are a young person. Therefore, the lack of intimate activity can affect people depending on their lifestyle and not on their marital or civil status.

It would probably be very interesting to find out what were the reasons envisaged by the lawmaker at the time of regulating this right in its current form.

Hypothetically, if the lawmakwer chose to establish this right to preserve the matrimonial ties or a stable relationship and avoid its collapse, it would still not justify the exclusion of other categories of persons from benefiting from it.

Thus, it is really important to preserve the links between the persons deprived of their liberty and their partners, for physical and mental health of both parties. An additional reason is the fact that the partner of the person deprived of liberty should not be brought into the situation to serve the sentence imposed on the convicted.

However, as far as preserving the links was the main reason for recognizing this right, young and unmarried people should have been included as beneficiaries of this right, just to facilitate the links that may have the gift to temper the aggressive behaviour of the persons imprisoned.

The studies conducted on animals and humans emphasizes an interdependence, although uneven, between high testosterone and aggression. At biological level this fosters competition in order to adapt to the environment, but in case of humans it is

⁴ Decision of the Constitutional Court no. 222 on 2nd of April 2015.

⁵ Ioan Chiş and Alexandru Bogdan Chiş, *The execution of criminal penalties*, (Bucharest, Universul Juridic, 2015) pag. 395.

associated with antisocial behaviour (domestic violence, DUI)⁶.

In prison, such a behaviour can foster abuse and violence. Besides the aspect related to the discrimination between people, according to the Declaration from Geneva, the right to marital life could have a beneficial effect in order to reduce psychological tension and homosexuality in prison⁷.

Since 1959 these reasons are supported by literature data, when an American psychologist stated that not only sexual satisfaction should be taken into account, but also the possibility of reuniting with the family, of keeping marital relations or cohabitation and finally the prisoner can foresee a future after the imprisonment⁸.

The emotional discharge achieved through intimate activities can normalize the behaviour of people, especially of the young who have much higher hormonal disorders due to age.

If the reason for introducing this right represented an attempt to maintain a balance between the health of the person deprived of his liberty and his partner or to avoid changes in the sexual orientation as a result of the physical contact deprivation with your partner/ spouse, restricting the access of other persons to this right is not justified. Young people who before imprisonment had an active private life may be more frustrated by the loss of this possibility by imprisonment. It is true, as stated above, that by imprisonment, the person must be taken out from the environment where he/ she committed the offense, for his/ her own good, and especially for the society but this does not mean deprived of other rights that were not mentioned in the sentence. The rights whose exercise may be restricted to imprisoned are strictly stipulated by law and individualized by the court in order to personalize each sentence separately. If all imprisoned, regardless of the offense committed, who *ab initio* would have been restricted from all rights benefiting from as free people, it would create a too heavy situation and certainly with no positive consequences. So, irrespective of the act committed, in addition to the sentence imposed, the person would lose all rights and this would have had a devastating impact on him/ her and he/ she would get frustrated and, besides the less serious situations, the persons concerned would be tempted to commit more serious offenses that would produce some of the same consequences.

Often, the imprisoned who are young or who are involved in stable romantic relationships are tempted to rebel more easily since, in most cases this is the only way to suppress, and that their behaviour affects not only them.

It is true that it is difficult to establish a friendship, maybe stable between the persons in detention and the

people at large, but it is not impossible, however this can not be a reason for restricting the right to benefit from when knowing someone with whom you can establish a relationship even later after leaving the prison.

The communication with the outside world is much easier today, given the fact that through the Internet connections between people on a very large physical distance can be preserved.

However, communication without physical contact, even occasionally, is a form without substance, and as Titu Maiorescu said "*The second nature, and most important, that we must focus on, is this: the form without substance is not only useless, but it is truly corruptible*"⁹.

Based on the reasoning set out, it can be appreciated that the exclusion of the persons mentioned above from the right to intimate visit is not justified and moreover leads to discrimination.

Going back to the analysis of the legal texts, one should mention that the first negative condition, also preserved in the law in force, is that in the last three months preceding the request to intimate visit, the detainee must not have permission to get out of prison.

Restricting the right to intimate visit compared to the right to visit can be noticed more clearly in this condition. Thus, only the right to intimate visit is subject to permission, not necessarily the right to visit. The reason for different treatment between the two rights is not easily identifiable. If one of the reasons for limiting the intimate visit is that in the last 3 months there was a meeting between the imprisoned and the partner, when granting the permission to leave the prison for a certain period, it is difficult to understand why it is not applied the same treatment as to the right to visit. Why the permission as measure ordered by the prison administration does not affect the frequency of the right to visit, and only granting the intimate visit?

The differential treatment between those two rights generates natural questions. It is important for the detained person to have the right to visit or the right to intimate visit? Why should it be distinctive?

The right answer is difficult to be given because for some people the lack of closeness to family, partner, may be more painful than the lack of intimacy with your partner. At the same time there are people who give a greater significance to privacy and the deprivation of this right is deeply felt.

In an attempt to understand the cause of establishing the circumstances for exercising the right to intimate visit, one can assume that the lawmaker found that the intimate visit has a value equal to or greater than the right to visit the detainee and it can be conditioned without unpleasant consequences.

⁶ Archer John "Testosterone and human aggression: an evaluation of the challenge hypothesis" *Neuroscience and Biobehavioral Reviews* 30 (2006) 319-345.

⁷ Cavan.R.S., Zeemans E.S. „Marital Relationship of Prisoners” *J.Crim.L.Criminology&Police Sci.* 50 (1958-1959): 50-57.

⁸ Cavan.R.S., Zeemans E.S. „Marital Relationship in Twenty-Eight Countries” *J.Crim.L.Criminology&Police Sci.* 49 (1958-1959): 133-139.

⁹ Titu Maiorescu, *Against Today's Direction in the Romanian Culture, Works*, 1978, p. 153.

On the other hand, the answer could be on the opposite, the right to intimate visit being more important and

conditioning it as a deprivation of the detainee to those that would have been benefited from if he was free, showing him again the consequences of his actions.

It is true that by imprisonment, the person loses the exercise of several rights that benefited from when free, however regular exercise of some of these rights may lead to the idea of suppressing the punishment nature of the penalty imposed by the court.

Thus, we can conclude that this condition does not justify the existence of the right to the intimate visits.

The second negative condition established in letter e) of para. (1) article 69 of the Law is the lack of disciplinary sanctions for a period of six months preceding the request for the intimate visit.

The right to intimate visit arises especially under these circumstances. According to this condition, the right to intimate visit is granted if the imprisoned has not a behaviour that needs to be punished. So, the detainee is "rewarded" for his behaviour, namely he is rewarded because he was not sanctioned.

The same conclusion is extracted from the last condition laid down in art. 69 para. 1 letter f) of the Law, otherwise positive condition. This condition aims the behaviour of the imprisoned that must *actively participate in educational, psychological and social assistance programs or working*.

These last conditions seem to be the most restrictive of all. While the other conditions are, to a certain extent, independent of the imprisoned person's will, the last two are referring to his will.

All the conditions established for obtaining the right for an intimate visit, and, above all, the last two, are turning it into one closer to a reward.

The right to a visit, being the closest notion to the one referring to an intimate visit, does not require to meet certain conditions in order for it to be applied. There are conditions stipulated for its denial and interruption, mentioned in the art. 141 from Reg. 2. It is only natural for a right to be denied as long as manifesting that right is threatening the order and security. In the art. 141 from Reg. 2, denying the right for a visit applies for: a) guns, ammunition, hallucinogenic substances, drugs, medicines or any other objects that are forbidden for the visitors to have on them and which they hadn't declared before the security check; b) the visitors may have a negative influence on the convicted person's behaviour; c) the visitors are under alcohol use; d) there is proven information that the visitors might trouble the security, order or discipline of the conviction area; e) the visitors do not comply with the specific check.

In case of an intimate visit, prior to signing a marriage contract, which lasts 48hrs, it can be interrupted for maximum 24 hrs for reasons related to

the administration of the conviction place, without shortening the 48 hrs, according to paragraph no 2 and 3, art. 146 from Reg. 2.

The difference between the right for an intimate visit and other rights, especially the ones related to visits, to which it is mostly related, comes from the fact that if the right for visits does not imply respecting certain conditions, and not only in special situations stipulated by law can be restricted, the right to an intimate visit is conditioned right from the beginning. Altogether, the intimate visit in the case that is referred to in art. 146 paragraph 3, can be interrupted for different reasons that the law did not specify. It is clear the fact that the right for an intimate visit has a particular judicial status. It seems to be a "taming" method for the convicted, by giving them certain benefits if they behave according to the requirements. The convicted themselves perceive it as a reward, especially that such a reward exists, which is immoral and inadequate for a serious institution as the prison¹⁰.

The ambiguity of the notion referring to the intimate visit is also given by the procedures of implementation for the legislation regarding giving the right for the intimate visit, elaborated by the prisons. According to the procedures, giving the right for intimate visits involves more stages, such as:

- offering information for the implementation of the procedure
- filling in the forms for applying for an intimate visit by the convicted persons and submitting the documents proving the relationship. In the form it has to be specified the person with whom they want to have a personal visit, no other than the husband/ wife, male/ female partner.
- disseminating the information related to the implementation procedure and processing staff, with representatives of the chamber and all imprisoned and informing the tutors.
- analyzing the request and approving it by the departments. The analysis is done by the personnel from the visiting sector, education and psychosocial assistance, labor organization, staff that keeps track of the detainees and of the work organization, the discipline committee secretary, the rewards committee secretary and crime prevention in the prison environment that make notes on the request form, depending on the activities the convicted has conducted.
- checking the request and final resolution given by the director responsible for the security and prison regime, who may or may not approve of the visit.
- approving the intimate visit and filling in the declaration form;
- filling in the documents, making notes in the register, in the form for giving the right and in the electronic system.

The time consuming procedure and the multitude of filters through which the convicted person's request

¹⁰ Ioan Chiș and Alexandru Bogdan Chiș, *The execution of criminal penalties*, (Bucharest, Universul Juridic, 2015) pag. 395.

is analysed in order to get the right for an intimate visit, don't have an explanation. The consequences of the penalty are not diminished by the existence of the intimate visit right. There are plenty of deprivations so that the reason of the penalty takes effect, so much so giving the unconditional right for an intimate visit cannot create the illusion of lenience in the imprisonment system.

All these activities, and especially the effective procedure of verification for meeting the conditions and the large amount of factors that have to approve the request, prove what has been highlighted in the law text, namely the right for an intimate visit, even though it is regulated in the chapter regarding the rights for the convicted persons, is nothing but a reward.

Conclusions

After the systematization of the above presented data, it can be stated that the right for an intimate visit, even though regulated in the Law 254/2013, is far from being a right. All the aspects that refer to this notion

show that this is a rewarding way for the convicted persons and at the same time a confining one for their behaviour. Conditioning the approval of this right, restricting the access of other persons apart from the ones already established by the law and presenting this right as an "exchange method" turns what is desired to be a right into a new form of punishment, creating space for certain abuses.

The analysis realized through this study conducts to the idea that the existence of the right for an intimate visit is a consequence of the development of the society that understands and should understand the human psychology and that correcting the behaviour of people is realised rather through understanding, communication, physical contact, than through oppression.

In order to clearly establish whether the current form of the right to intimate visit is beneficial for physical health, mental and moral development of the imprisoned or the consequences would be undoubtedly others if they had regulated as a true right and not a right compensation as today still remains a goal.

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