EUROPEAN AND CANADIAN PROVISIONS ON KEEPING CONTACT BETWEEN THE PERSON DEPRIVED OF HIS LIBERTY AND HIS FAMILY, DIFFERENCES AND SIMILARITIES

Iulia POPESCU[*]

Abstract

Every democratic society seeks to create a stable environment for its members, trying to identify the needs of citizens, in all aspects, creating legal norms to ensure the proper functioning of society as a whole is one of the needs. The family as an institution, but also as a form of people's approach, requires maintaining a balance in the family relations, a desideratum pursued by both society and its members. Situations where a family member is deprived of liberty following a final court decision raise various questions about the family situation and the links between the family and the person in custody. The European states, as well as Canada, have recognized the importance of the family in the life of a person deprived of liberty by adopting rules in the field of penitentiary that contribute to the desideratum of the proper functioning of the family. But these rules also present, carefully scrutinized.

Keywords: *family, convicted, Canada, European states, rules.*

Introduction

Man and the satisfaction of his needs have always been objectives pursued by each democratic society for its members, both in identifying needs and in meeting them.

The testimony of the efforts made by the European states and not only, in the attempt to establish as general rules, the rights considered as fundamental and on which the EU Member States report in the creation of the general framework of the rights of their citizens, stands "THE FUNDAMENTAL RIGHTS OF A EUROPEAN UNION" proclaimed by the European Commission, the European Parliament and the Council of the European Union on 7 December 2000 at the Nice European Council[1].

Since the Preamble to the Charter, the direction that the European states want to embrace, namely "the peoples of Europe, establishing an ever closer union among them, have decided to share a peaceful future based on common values", the common values representing even the fundamental rights in the Charter, which concern inter alia the right to live, respect for private and family life, marriage and the founding of a family, family life and freedom and the principle of non-discrimination in accordance with Union law and international law established by international conventions to which the Union or all the Member States are parties, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the constitutions of the Member States.

The existence of the principle of non-discrimination shows the equal treatment

[*] PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest, Judge (e-mail: iulia.tudor@yahoo.com, iuliapopescu35@gmail.com).

[1] https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=PT.

that the European Union, through its states, applies to its citizens with regard to the rights they enjoy, irrespective of the legal situation in which they are in the state of liberty or imprisonment.

The need for behavioral recovery of prisoners has far greater valences than just in respect of whom are personally need to be pursued and the impact of their actions on their families and society in general.

Just as society in its essence is constantly moving and evolving, the legal and behavioral norms must follow its course through periodic changes and improvements in order to shape its citizens' behavior to create a climate of order and safety.

It is true that in most cases the state of affairs determines the normative changes, but trying to identify the norms with the best and obvious results in different legal systems can lead to the creation of a new and adapted idea that will result in beneficial changes in the field under consideration.

The rationale for choosing Canadian legislation alongside the European one as regards the existence of the rights of detainees to stay in touch with the family was based on the recognition of the Canadian system with extensive democratic valences, from which new elements could be identified to ensure respect for the rights of individuals incarcerated, as well as identifying good practices in a non-European state. The study of the European and Canadian legal provisions relating to keeping contact between the person deprived of his liberty and his family in identifying the differences and similarities between them could support the need to recover the imprisoned persons and to maintain their families united.

European Provisions

I. On 1 September 2015, 1 483 126 people were imprisoned in the prisons on the territory of Europe[2] according to the Annual Penal Statistics Center, but according to the same source, the number of imprisoned persons increased to 2016.

The presence of so many incarcerated persons as well as the tendency to increase their number arises the interest of companies in identifying the situations and conditions that favor the increase of crime in order to counter this phenomenon as well as the negative consequences generated for the society in its whole as well as on each individual individual.

Man is a social being (Aristotle, Politics)[3], for which his isolation as a result of committing antisocial deeds, though necessary, produces in himself confused feelings that can seriously affect him sometimes without possibility of recovery.

At European level, over the years, there has been identified the need to establish rules that directly address the situation of imprisoned persons, in relation to their large number, and the fact that after the incarcerated there are many more people who are subject to conditions of suffering as a result of the incarceration of a family member.

Thus, on January 11, 2006, at the 952nd Meeting of Delegates Ministers, the Committee of Ministers adopted the RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE MEMBER STATES, REGARDING THE EUROPEAN PENALTY RULES OF REC (2006) 2[4].

In addition to the general principles, rules on health, order and safety etc., and conditions of detention have been

[2] https://www.coe.int/en/web/prison/space- Council of Europe Annual Penal Statistics SPACE I – Prison Populations Survey 2015 UPDATED ON 25TH APRIL 2017.

[3] https://www.scribd.com/doc/146325879/Man - human being.

[4] https://rm.coe.int/16804c8d9a.

established, being inserted in Art. 24 even in Title II, where the detainees were allowed to keep in touch with the outside.

According to art. 24 detainees will be allowed to communicate, as often as possible, by mail, telephone or other means of communication with their families, third parties and representatives of outside bodies, and receive visits from such persons, so that any restriction or oversight of the communication or visits, however, allow a minimum acceptable contact level.

At point 4 of art. 24 states that "*The arrangements for making visits should allow detainees to maintain and develop their relations with their families as normally as possible*", which shows the recognition of the importance of family life in the prisoner's life and vice versa, as also confirmed by the following of the same art. 6. „*The detainee should be immediately informed of the death or serious illness of a close relative. 7. Whenever possible, the detainee should be allowed to leave the prison either under escort or free to visit a sick relative, attend funeral or other humanitarian reasons. 8. Detainees should be allowed to immediately notify their families of imprisonment or transfer to another prison as well as of serious illness or injury. 9. Even if the detainee requests or not, the authorities will immediately inform the detained spouse of the detainee / detainee or close relative or a person previously designated by the prisoner of death, illness or serious injury or transfer of the detainee to a detainee, another penitentiary or a hospital*".

Conscious of the natural differences between men and women, in full compliance with the principles of equality before the law, the European states have included special rules on the situation of women and children in REC (2006) 2 Recommendation on detention conditions.

Thus, Article 34 provides that *1. In addition to the specific provisions of these rules, the authorities must respect the needs of women in detention, paying particular attention to physical, occupational, social and psychological needs, when making decisions that affects the aspects of their detention. 2. Particular efforts must be made to allow access to special services to those with special needs, such as those who have suffered physical, mental or sexual violence. 3. Detainees will be allowed to give birth outside the penitentiary, but if a child is born in the penitentiary, the prison management will provide the necessary support and facilities.*

The Member States' interest in specifically regulating the right of women to benefit from private, physical, occupational, social and psychological needs does not constitute a violation of the principle of equal treatment between men and women under the Charter of Fundamental Rights of the European Union, from the physiological and anatomical point of view, the two genres are different and implicitly have different needs in certain situations.

The regulation of the possibility of the child's birth within the penitentiary can only be seen as a normality situation that was required to be mentioned, given the human condition.

It is worth noting that the normative act contains special provisions regarding the small children, specifying in the art. 36 that "*Small children may remain in prison with a detained parent only if it is in their best interest. They will not be considered "inmates". 2. When a young child can stay in the penitentiary with one of the parents, there must be a nursery with qualified staff, where the child can stay when the parent participates in an activity that is not allowed for small children. 36. 3. A special infrastructure must be set up to protect young children.*

The normative text is intended to keep the child with one of the parents, not

necessarily with the mother, as can be seen from par. 1 and 2 of art. 36, where it is mentioned that a small child can stay in the penitentiary with one of the parents if it is in his / her best interest.

Under such circumstances a nursery with qualified staff must be provided.

This provision is of particular importance, once again applying the principle of equality between men and women, in this case between father and mother, as is the role of both parents in the child's life.

However, some cases call for the need to regulate certain categories of persons, in particular juveniles, so that in Art. 35 of Recommendation Rec (2006) 2 provides for special conditions applicable to persons under the age of 18. *"In exceptional cases where children under the age of 18 are imprisoned in an adult penitentiary, the authorities will ensure that in besides the services available to all inmates, detained children will have access to social, psychological and educational services, religious education and recreational programs or their equivalent available to children in the community. 2. All child prisoners enrolled in the compulsory education process will have access to it. 3. Additional assistance will be provided to the prison-released children. 4. In exceptional cases where children are imprisoned in an adult penitentiary, they shall be accommodated in a separate area from that visited by adults except in cases where this is not in the interest of the child.*

The special treatment applicable to minors in providing access to social, psychological and educational services, religious education and recreational programs can only be regarded as a necessary norm for their harmonious development despite the special situation in which they are at the time of execution punishment.

The execution of punishments must not interfere with the compulsory schooling stages, but instead the penitentiary system must make efforts to maximize the time spent by the juvenile in custody for its education and re-socialization.

The child's superior interest should be the primary motivation in everything that concerns the minor both in the penitentiary and after the release from the penitentiary, given the fragile balance generated as well as the possible family deficiencies.

The additional assistance mentioned in the normative act should be considered more than merely counseling but should consist in the effective monitoring of children who have been identified with more serious behavioral problems as well as those from families where there is no sound morally or material support.

The special situation of life in the penitentiary has demonstrated the need for direct regulations of the way of life and the execution of the punishment, as well as the ongoing transformation of the way in which the existing society must be approached at the level of a penitentiary.

Even at the end of REC (2006) 2, it is stated that *"European Prison Rules need to be reviewed regularly"*, recognizing the need for frequent changes in how to address the situation of people deprived of their liberty.

Continued concern over the situation of people deprived of their liberty following the execution of a prison sentence led to the European Parliament's elaboration of resolutions on prison systems and prison conditions.

European Parliament resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) (2018 / C

346/14) The European Parliament[5] (hereinafter referred to as the Resolution) contains guidance to Member States on the link between detainees and their families, as well as the situation of imprisoned women or imprisoned minors.

Thus, in paragraph 26 of the Resolution, it is proposed that Member States pay particular attention to the needs of women in prisons during pregnancy but also after they have given birth by providing adequate facilities for skilled and specialized breastfeeding and care, reiterating that it is necessary to analyze the application of alternative models that take into account the living conditions of prison children, considering that automatic separation of the mother of a child creates major emotional disturbances in children and can be considered as an additional punishment affecting both the mother and the child.

By their very nature, women are created to give birth, but also nurture the newborn, being essential for the baby's harmonious development of close proximity to the mother and the nutrition she provides by breastfeeding.

The mother's ability to keep her child along with her during the execution of the punishment must first be seen as a necessity for the well-being of the child and ensuring a normal development, the sanction being applied only to the mother in the execution of a punishment, not to the newborn.

At the same time, the possibility of keeping the child by the mother can also benefit from its behavior, leading to the adoption of appropriate behavior to social norms and thus creating the premises of release from the prison depending on the circumstances of each case.

Paragraph 28 of the Resolution demonstrates that family life in detainees' lives is of particular value and states must be encouraged to create the conditions necessary to keep in touch with the family.

Member States are therefore encouraged to ensure that detainees have regular contacts with their families and friends, giving them the possibility to execute their sentences in establishments near their homes and by promoting visits, phone calls and the use of electronic communications, subject to authorization to the judge and under the supervision of the prison administration, in order to maintain family ties.

The law maker, through these recommendations, does not lose sight of the fact that the notion of a family should not be seen in the strict sense, but in its broad sense, concluding that it was intended to create the possibility for detainees to keep in touch with persons with whom they did not necessarily have a blood link or as a result of the conclusion of civil acts.

This approach is quite natural, as reality confirms that the notion of family is in a continuous transformation or rather a complement, in such a way that the limitation of the access of detainees to certain persons, whom civil law qualifies as part of the notion of "family," would prevent them from being able to keep in touch with people with whom they developed strong relationships but who can not fit into the "classical" family notion.

However, the way to set up legal rules is to give people the opportunity to exercise their rights in accordance with law and good morals but without creating unnecessary constraints and not resulting from the consequences of committing crimes, a lack of attention or legal indifference.

Also in support of maintaining the connection between the detainee and the

[5] https://eur-lex.europa.eu/legal content/RO/TXT/PDF/?uri=OJ:C:2018:334:FULL, Official Journal of the European Union C343 Year 61 27 September 2018 European Parliament Resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) 2018 / C 346/14, p. 94".

family, paragraph 29 of the resolution states that the policy of placing detainees in prisons dispersed in the territory is condemned, as this is an additional punishment for their families, some of which may even constitute an infringement of Article 8 of the European Convention on Human Rights (right to respect for private and family life).

Points 30-37 continue to provide guidance to Member States on the situation of minors in prisons.

Thus, it is reiterated the importance of ensuring that children are treated in prison taking into account their superior interest, by separating adults from the mainstream, in order not to be exposed to the risks of abuse and violence or negative behavioral patterns, trying not to be deprived of specific care that such a vulnerable group needs, including during transfers of detainees, giving them the right to maintain contact with the family, unless there is a judgment to the contrary, and mentioning the need to create special teenage centers.

Life in the penitentiary is more difficult as minors do not have a life experience to help them identify hazards, so that without markers they become safe victims in the hands of "life-spanning" adults.

Each child should receive care, protection and all the necessary personal assistance - social, educational, vocational, psychological, medical and physical - which it may need depending on age, gender and personality, encouraging Member States to promote centers closed-school education to provide pedagogical and psychological support to minors, rather than resorting to deprivation of liberty.

Regular and meaningful contacts with parents, family and friends are encouraged through visits and correspondence, both to help the child not to feel ashamed, but also to identify possible harmful family environments in order to be able to act on them and subsequently release the minor and reintegration into the family, identifying problems and finding solutions.

It is reiterated the importance of paying full attention to minors in terms of their emotional and physical needs, and it is necessary to apply programs to prepare them in advance to return to their communities, to manage relationships with their families, in those situations where problems in the support family have been found, identifying opportunities for tuition and employment, as well as socio-economic status.

It has not been forgotten that there are situations where children whose parents are in custody are discriminated against by other members of society simply because they have their parents in custody, so that these children have to be monitored to strengthen social integration and build a fair and inclusive society.

This resolution recognizes the right of children to maintain direct contact with their detained parent and, at the same time, reiterates the right of the inmate to be a parent, considering, in this regard, that prisons should be provided with adequate childcare facilities, where they should be supervised by well-trained guards, social workers and volunteers from NGOs who can help children and their families during their visits to prisons.

In other words, the detainees' right to keep in touch with the family and to be present at important moments in the education of their children is recognized, thus protecting the interests of minors, but also the right of the family to keep in touch with the person imprisoned.

It is natural to think of this, especially since the family, especially children, should not be punished for the deeds of their parents, nor should they be subjected to the loss of a parent by being imprisoned and away from the family.

Another recommendation made by the European Parliament in the above-mentioned resolution is concerning detained persons in a Member State other than the State of residence which encounters more difficulties in maintaining contact with their families and it is necessary to have electronic communication facilities with families, to give them opportunities, even if less, to keep in touch with the family.

Canadian Provisions

II. At Canadian level, the regulation of the fundamental rights and freedoms of persons is found in the Canadian Charter of Rights and Freedoms of 1982, which mentions fundamental rights, democratic rights, movement rights, legal rights and the right to equality for Canadian citizens.

It is worth noting that the protection of the rights mentioned in the Charter is ensured only in cases of violation of rights by state institutions, not in cases where citizens' rights are violated by other individuals or private institutions[6].

Canada being a constitutional monarchy, consisting of 10 provinces, according to the Correctional Law and conditional release[7], a proper regime for the execution of sentences, so that detainees serving a prison sentence of 2 years or more are held in federal penitentiaries, while those serving prison sentences of less than 2 years remain in state detention centers.

The rights of detainees are also provided under the Correctional and Exempting Law[8], which includes the right of the imprisoned persons to keep in touch with children, the right to leave the penitentiary under escort or [9] to temporarily leave the penitentiary without escort, and the right to family visits without the use of barriers.

At the same time, in 1995, the Canadian Correctional Service, an institution responsible for overseeing the execution of punishment by the detainee and ensuring its re-socialization, implemented the Mother-Child Program, which allowed children under 4 years of age to remain with their mothers in the penitentiary permanently, while for those aged 4-6 the program provided the possibility of spending a half-hour program in their mother's company.

According to art. 71 of the Correctional and Exemplary Law, detained persons have the right to keep contact with the society, to receive visits and to make correspondence with family, friends, and other persons outside the penitentiary.

At the same time, the same normative act in art. 77 provides the particular rules applicable to imprisoned women as regards the application of specific programs for women as well as working groups with other women.

As a novelty and peculiarity of the Canadian system to European regulations, there is a system of volunteers in Canada that engages in the social recovery of detained persons, facilitating the keeping of links between detainees and their families as well as between parental detainees and their children.

The right to be visited by the family allows detainees to spend time with them for up to 72 hours inside the penitentiary.

The Canadian Correctional Service[10] plays a key role in the Canadian enforcement system, which, from the time the person is placed in prison (in the case of those serving

[6] https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada.
[7] https://laws.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-30.
[8] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-31.
[9] https://laws-lois.justice.gc.ca/eng/acts/C-44.6/Corrections and Conditional Release Act, S.C. 1992.
[10] https://www.csc-scc.gc.ca/correctional-process/002001-1000-eng.shtml.

the sentence in federal prisons), draws up a correctional plan based on the information provided by the detainee, police officers, courts, detainees' family and other detainees, as appropriate.

It can be noticed that in the Canadian system, the attempted remodeling behavior of the incarcerated individual is based on his individual supervision, both during and after punishment, for the purpose of liberating a balanced person into society that can reintegrate into system and in public life.

While there is a right in the Canadian state's legislation to the detainees' right to visit, correspondence and contact with family and close relatives, it is worth mentioning that the attempt to resocialize the detainee, both in society and in the family, relies heavily on oversight institutional behavior of the detainee, both by specialists and by volunteers, than on the support of family presence and contact.

What also needs to be mentioned is that the detainees' supervision system includes special provisions for female prisoners for the purpose of including them into programs and activities specific to the female nature.

A peculiarity in the Canadian law system is given by the existence of the population and the category of aborigines, which led to the introduction in the Correctional Law and conditional release of certain articles for this category, so that in Articles 70-84 the notion of aboriginal (as indian, inuit or metis) as well as the aboriginal community is defined.

It is foreseen that between the Minister of Public Security and the aboriginal communities, agreements can be concluded to provide specific corrective services to aboriginal detainees, such as the creation of special programs addressing the needs of aboriginal detainees.

At the same time, the legal rules regulate the fact that in those situations where an aboriginal detainee executes a sentence in federal jails and he demands transfer to a community prison, he may be granted this right.

In order to identify the needs of the aboriginal persons who were imprisoned, the National Aboriginal Advisory Commission was established, which advises the Community Correctional Service to identify the needs of aboriginal persons.

Conclusion.

The attempt of the society to maintain a balance between its protection against the antisocial acts committed by the offenders who were later incarcerated and the need to reform those persons and to maintain their connection with their families and the outside environment of prison life is not easy to achieve.

However, the attempt continues to identify the needs of imprisoned persons and their families in different forms, either as a result of maintaining family-owned contact at a level that can bring behavioral and developmental benefits to those involved (the European system) or through continuous monitoring of the prisoner, both during and after the execution of the punishment (Canadian system), using the institution of volunteering, can only be necessary to maintain a functioning society, benefiting both the detainee and the family in particular, as well as for the society of which the detainee and his family are in general.

From the analysis of the systems that were at the bottom of this paper, it can be concluded that a mixture of the two types could be beneficial, as maintaining the link between the detainee and the family can only have beneficial effects (in those situations where no disruptive elements are identified at the family level), the more so as the family should not be penalized for the offense

committed by its member and isolated from it, but also the supervision of the detainee during the execution of the punishment and more, after the release, in order to ensure that he understood the consequences of his actions and changed, can only be necessary for the protection of the society and, why not, the person of the detainee.

References

- https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12012P/TXT&from=PT https://www.coe.int/en/web/prison/space- Council of Europe Annual Penal Statistics SPACE I – PrisonPopulationsSurvey 2015 UPDATED ON 25TH APRIL 2017.
- https://www.scribd.com/doc/146325879/Man-Human-Being.
- https://rm.coe.int/16804c8d9a.
- https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=OJ:C:2018:334:FULL, Official Journal of the European Union C343 Year 61 27 September 2018 European Parliament Resolution of 5 October 2017 on prison systems and prison conditions (2015/2062 (INI)) 2018 / C 346/14, p. 94".
- https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada.
- https://laws.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-30.
- https://laws-lois.justice.gc.ca/eng/acts/C-44.6/page-9.html#h-31.
- https://laws-lois.justice.gc.ca/eng/acts/C-44.6/Corrections andConditionalRelease Act, S.C. 1992.
- https://www.csc-scc.gc.ca/correctional-process/002001-1000-eng.shtml.