

The Conjugal Visit from The Perspective of Health As A Human Right And Fundamental

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ABSTRACT: This work has as object the conjugal visit in prisons of the State, whereas the right to health under the constitutional and humanitarian perspective. The justification of the thematic relevance is in compliance with the constitutional guarantees and the Charter of human rights. The inclusion and maintenance of prisoners in penal institutions shouldn't break the family ties, especially since the family has your guaranteed constitutional unit. Moreover, it is provided to prisoners respect for the physical and moral integrity. The research methodology used is bibliographical and field. One of the objectives of this work: to expand the debate on the subject in order to collaborate with the expansion of management measures to ensure the implementation of the rights in comment; discuss ideas and understand the historical evolution of human rights achievements in this area. One of the conclusions of this study, highlighted that the custody in the prison system without the right to conjugal generates high affectation of psychophysical integrity of prisoners, subjecting them to the evils that are not limited to deprivation of liberty. The expression of sexuality is one of the items in the broad concept of integrity and completeness of the human person, directly related to the right to health.

KEYWORDS: conjugal; right to health; human rights.

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I. RESUMEN

Este trabajo tiene como objeto la visita conyugal en las cárceles del estado, mientras que el derecho a la salud bajo la perspectiva constitucional y humanitaria. La justificación de la relevancia temática es el cumplimiento de las garantías constitucionales y la carta de los derechos humanos. La inserción y mantenimiento de los reclusos en instituciones penales no deberían romper los lazos familiares, especialmente desde que la familia tiene su unidad constitucional garantizada. Además, se proporciona a los presos el respeto a la integridad física y moral. La metodología de investigación es bibliográfica y de campo. Uno de los objetivos de este trabajo: ampliar el debate sobre el tema con el fin de colaborar con la expansión de las medidas de gestión para garantizar la aplicación de los derechos de comentario; discutir ideas y entender la evolución histórica de los logros de los derechos humanos en esta área. Una de las conclusiones de este estudio, destacó que la custodia en el sistema de prisión sin derecho a conyugal genera alta afectación de la integridad psicofísica de los prisioneros, sometiendo a los males que no se limitan a la privación de la libertad. La expresión de la sexualidad es uno de los elementos en el amplio concepto de integridad y integridad de la persona humana, directamente relacionadas con el derecho a la salud.

Palabras clave: conyugal; derecho a la salud; derechos humanos.

II. INTRODUCTION

The Brazilian penitentiary system, one of many recurring problems, faces a peculiar, here addressed and of the utmost importance in respect of rights indispensable to the dignity of the human person: the right of conjugal.

Initially, it should be stressed that the *apenado* should not break its ties with family and friends, because they are beneficial, especially because the family, the basis of society, have your constitutionally guaranteed unit.

Is that article 226: "the family, the basis of society, have special protection of the State (...); paragraph 4 also means, as a familiar the community formed by either parent and their descendants".

Also, article 5, section LXIII of the Federal Constitution, assures the prisoner the family assistance. The restrictions of visits bring with it a real rupture to the saluting development of marital relations or companionship.

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The present work deals with the right to health, more specifically on the intimate visit in the prisons of the Brazilian state, under the constitutional and humanitarian perspective. The justification lies in the failure to observe the constitutional guarantees and the Human rights Charter. In addition, the prisoners are assured of respect for physical and moral integrity. The expression of sexuality is one of the items of the broad concept of integrity and integrality of the human person, directly related to the right to health.

The distation caused by the prohibition of visits, thus, and by itself, would have as a direct harmful effect the disruption of family relations. The erroneous devaluation of the attached, devoid of concern for his citizenship reaches his family, without the obvious positivation of the personality of the penalty.

The individual was no longer a father, son, wife or husband to become simply the "delinquent". They are shaken not only their affective relationships, but also any possibility of resocialization of the attached.

What is observed in practice are administrative measures (ordinances) that extrapolate the legal limits, violating the principles of legality and the hierarchy of laws. The prohibition of social and intimate visits to inmates from abusive criteria is often prohibited.

The principle of legality inscribed in art. 5 °, item II, of the Federal Constitution, and corroborated by the caput of art. 37, explains the subordination of the administrative activity to the law.

According to Hely Lopes Meirelles, "in the administration there is no freedom, no personal will. While in the private administration it is lawful to do all that the law does not prohibit, in the public administration is only allowed to do what the law authorizes. " (1992, p. 82).

Where the ordinance hurts in front of the law, the Regulation, the decree, the interpreter will immediately conclude for its illegality. Where the ordinance innovates, creating a disciplinary legal regime of an institute, is illegal and therefore susceptible of judicial censorship.

Based on human formation, the family unit suffers from seeing the prison take away one of its own. This anguish, however, must be fought. It imposes its critical approach, shining the centrality of the family and, simultaneously, recognizing its essential character to overcome the prison. Thus the deprivation will be closer to summing up to freedom, and the principle of personality of the penalty of taking real and righteous features.

GOALS

The general objective of this work is to demonstrate the legal basis guaranteeing the right of intimate visit in Brazilian federal prisons.

The specific objectives are: to expand the debate on the topic, in order to understand the historical evolution of rights achievements in this area as well as to collaborate with the expansion of administrative measures that ensure the realization of the right to health in these Establishments.

III. THEORETICAL FOUNDATIONS

It is serious the violation of human rights found in the everyday reality of Brazil, there is failure to observe such fundamental guarantees to a democratic state of law.

The violation of the right to intimate and social visits is one of the most important aspects for the maintenance of the mental health of detainees, protected by the Penal Enforcement Act, in its article 41.

It is said that a limited right because, in addition to the legal framework does not encompass any right of absolute character, suffers a number of restrictions, both in relation to the conditions that must be imposed for moral reasons, security and good order of the Establishment, as because it may be restricted by motivated Act of the Director of the establishment.

The one who is serving time suffers, necessarily, restriction of his rights, starting with the right of freedom and free locomotion, since such impediments do not confuse, nor could, with the right to intimate contact, expressly guaranteed by law, and Which is not among the effects of the criminal conviction sentence.

The Penal Enforcement Act, preventing the excessive or the deviation of the execution that could compromise the dignity and humanity of the execution, makes explicit the extension of constitutional rights to inmates and inmates.

It also assures conditions for them, due to their social situation with the removal of countless problems arising from incarceration.

The following constitutional rights are recognised as follows:

1. The right to life. (Art. 5th, Caput, of the Federal Constitution);
2. The right to physical and moral integrity (art. 5, III, V, X and XLIII, CF and art. 38 of the Penal code);
3. The right to property (material or intangible), although the prisoner may not temporarily exercise some of the owner's rights (art. 5, XXII, XXVII, xxviii, XXIX and XXX);
4. The right to freedom of conscience and religious conviction (art. 5, VI, VII, VIII of the CF, and art. 24 of the Law on criminal executions);
5. The right to instruction (art. 208, I and § 1 of the CF, and arts. 17 to 21 of the LEP);

6. The right of representation and petition to the public authorities, in defense of law or against abuses of authority (art. 5 ° XXXIX, A, of CF, and art. 41, XIV, of the LEP);
7. The right to dispatch of certificates required for administrative offices, to defend rights and clarifications of situations of personal interest (art. 5 ° XXXIX, B, LXXII, A and B, of the CF);
8. The indemnity for judicial error or imprisonment beyond the time set in the sentence (art. 5th LXXV).

In addition to the constitutional rights assured, the law of penal executions is a number of other rights conferred upon the sentenced or recognized by it:

1. The right to use the name itself (Art. 41, XI, of the LEP);
2. The right to food, clothing and accommodation, even if it has condemned the duty to indemnify the State to the extent of its possibilities for the expenses incurred by it during the execution of the penalty (art. 12; 13; 29, § 1, D; and 41, I, of the LEP);
3. The right to health care and medical treatment in general, as needed, still with the same duties of reimbursement (art. 14, Caput, and § 2 of the LEP);
4. The right to remunerated work (art. 39 of the CP; and 28 to 37 and 41, II, of the LEP);
5. The right to communicate privately with his lawyer (arts. 7, III, of Law n ° 8.906/1984; and art. 41, IX, of the LEP);
6. The right to social security, although with its own form (under the terms of art. 43 of Lops [31] and art. 91 to 93 of the respective regulation, and arts. 39 of the CP and 41, III, of the LEP);
7. The right to occupational accident insurance (art. 41, II, of the LEP, and, implicitly, art. 50, IV, of the LEP);
8. The right to protection against any form of sensationalism (art. 41, VIII, of the LEP);
9. The right to equal treatment except for the individualisation of the penalty (art. 41, XII, of the LEP);
10. The right to the special hearing with the Director of the establishment (art. 41, XIII, of the LEP);
11. The right to proportionality in the distribution of time for work, rest and recreation (art. 41, V, of the LEP);
12. The right to contact the outside world through reading and other means of information that does not compromise morals and good customs (art. 41, XV, of the LEP);
13. The right to visit the spouse, the companion, relatives and friends on certain days (art. 41, X, of the LEP).

As the sole paragraph of article 41, of the Penal Executions Act, the last three rights may be suspended or restricted by a motivated act of the Director of the penal establishment. Therefore, the others cannot be suspended or restricted by the penitentiary authorities or the judge.

Prisoners are assured of all rights not affected by the convicted penal sentence and their rights may only be limited exceptionally in cases expressly provided for by law.

The Penal Enforcement law expressly provides for occasions where rights may be limited within the prison.

In addition, the right must be guaranteed, not only because it is a legal commandment, but, above all, to prevent sexual abstinence for a prolonged period from contributing to the imbalance of the person, generating a tense climate in the correctionary establishment, For conducting, in most cases, homosexuality, in violation, as a consequence of the imposition of the sexual option, the right to the dignity of the human person, this, yes, of absolute character in our planning.

Moreover, although there is no norm disciplining the temporary removal of prisoners for visitation, fact is that there is no prohibition. In other words, in the absence of legal regulation, it is the magistrate's discretion to defer or not the request, with a view to the legal provisions referred to above, especially in regard to the limitations of the specific case.

Family, affective and social bonds are considered a solid basis to keep the convicts away from delinquency. There is no denying the need for the humanization of the deprivation of liberty, through a policy of education and assistance to the prisoner, which facilitates access to the means capable of allowing him to return to society in conditions of normal coexistence.

The modern penitentiary doctrine, with the right criterion, proclaims that the prisoner, even after the conviction, continues to hold all rights that were not affected by prison internment resulting from the condemnation sentence in which a penalty was imposed Private freedom.

The expression of human sexuality is one of the items of this broad concept of integrity and integrality of the human person. This condition is not withdrawn from the person submitted to the prison regime, on the contrary, it affects the prisoner a number of important issues when it comes to his sexuality.

Important data is presented by the researcher Ariane Cristina Silva When studying behaviors of people trapped in prisons in the state of Minas Gerais, saw that: "Despite the anatomical and physiological alterations, the major problem of sexual abstinence is to the extent that it means to refrain from more intimate contact with another person. In the case of inmates, this forced isolation, in addition to being against our own human nature, can result in serious psychic consequences, such as low self-esteem, melancholy, depression of difficult treatment and especially aggressiveness ".

The aforementioned study also presented the following conclusions demonstrating that, in addition to violence, there are side effects that affect the person in several ways:

- 18% of inmates said hunger increases with sexual abstinence;
- 28% of inmates said that anxiety increases with sexual abstinence;
- 25% of inmates said nervousness increases with sexual abstinence;
- 87% of inmates said that sleep decreases with sexual abstinence;
- 16% of inmates said the urge to smoke increases with sexual abstinence;
- 25% of inmates reported being sad and stressed due to sexual abstinence;
- 20% of inmates claimed to be more aggressive due to sexual abstinence;
- 20% of inmates claimed to be more depressed and isolated due to sexual abstinence.

It is noted the high affectation of the psychophysical integrity of the person who is estranged from his sexual exercise, a situation that is worrying about prisoners who do not have intimate visits.

Where there is no respect for the life and physical integrity of the human being, where the minimum conditions for a dignified existence are not assured, there will be no room for the dignity of the human person

The Criminal Enforcement Act imposes on all authorities the respect for the physical and moral integrity of the convicts and the provisional prisoners. Thus, they are protected as to the fundamental human rights of man (life, health, bodily integrity and human dignity), because they serve as support to others, who would not exist without them. That's what prescribes article 40.

It is also foreseen in the minimum Rules for the Treatment of Prisoners of the United Nations (UN), the principle that the penitentiary system should not accentuate the sufferings already inherent in the penalty of deprivation of liberty (item 57, part 2).

It is not acceptable, even if in the name of the principles of public safety and the social order, the Federal penitentiary system will act as a setback of the Constitution and treaties and conventions of human rights which Brazil is a signatory.

This is because, as much as public security is a very expensive value, it is imperative that the structural axis of the democratic state of law be predominant, which is the dignity of the human person.

IV. METHOD

The research methodology used is bibliographic: readings and researches in books and articles published on the Internet; and field research, considering the routine visits made to federal prisons as a result of acting in criminal law, which involves interviews and consequently the action in defense of Rights discussed herein and tainted in practice, Guaranteed by the legislation.

V. RESULTS

Among the conclusions of this study, it is highlighted that custody in the Federal penitentiary system without the permission of social visits and, specifically, intimate, is generating psychic and emotional damage, submitting the condemned to harm that is not limited to Deprivation of liberty.

The Brazilian constitutional system does not admit absolute rights and guarantees, but imposes that the limitations of legal order are destined on one side, to protect the integrity of the social interest and of others, to ensure the harmonious coexistence of freedoms.

It is unquestionable the seriousness of the psychological consequences generated by imprisonment and such, allied to sexual abstinence and deprivation of other rights affect the dignity of the human person.

In all the above, it is concluded that the harmonious coexistence of relevant constitutional values is not ensured. The fact is that the constant prohibitions of visits to detainees, contradicting the basic norms of our legal order, in most cases, exceed the measure of reasonableness.

It is evident that the right to intimate visit is related to health. This, in turn, is a fundamental, second-generation right. His disrespect macula a historical achievement, constitutionally guaranteed

VI. FINAL CONSIDERATIONS

The Constitution of the Republic, as a standard matrix, seals the adoption of cruel and perpetual sentences (art. 5, item XLVII, of the CF), ensures the individualization in the execution of the penalty (art. 5, item XLVIII, of the CF) and ensures the prisoners respect the physical and moral integrity (art. 5, XLIX, CF).

It is a guiding principle of the penitentiary system that the prisoner should not break his contacts with the outside world, not losing the bonds that bind them to relatives, friends, spouses/companions, because they are extremely beneficial ties to prisoners and facilitate the Process of re-socialisation and social reintegration in the community when it is put into freedom.

According to article 41 in its sole paragraph, the rights provided for in paragraphs V, X and XV may be suspended or restricted by a motivated act of the Director of the prison establishment.

In practical ways, there is a great discussion regarding the restriction of such rights. Under the legal perspective, there is enormous attribution of discretionary powers in the hands of the directors of prison establishments. This generates a series of illegality disguised as administrative discretionary.

Deciding on which right a person can enjoy is not simply to observe all the precepts concerning administrative acts.

Very common in practice, for example, the application of collective disciplinary sanctions in the penal execution. In order to apply the reproach due to the lack of commitment, it is essential to identify the author and to detail his/her conduct.

The sealing of collective sanctions stems from article 5, XLV, of the Federal Constitution, which provides that no penalty will pass from the person of the offender to attention to the principle of personal responsibility.

In another turn, the suspension of intimate visits may not take place for more than thirty (30) days in accordance with article 58 of the Penal Enforcement Act. And more at this point, the illegality perpetrated by the administrative agents is recurrent.

We must not and cannot withdraw rights at the cost of "doing justice" at the cost of health, physical and mental. We can't go on distorting justice and human rights. We must rule for justice, which is done in observance of strict legality.

Among the rights assured to the convicts is the one to fulfill the reproach imposed in prison establishment close to his family, as a way to maintain the affective bonds and ensure family, emotional and social assistance, contributing to the Harmonica social integration.

The removal of the prisoner from the social and family environment with the consequent disruption of family bonds known to be important for resocialization, can only be decreed when there is sufficient evidence that the prisoner actually fits or continues if Framing in the form of article 3 of Decree No. 6.877/2009, which, surely, with its renewal has to respect the exceptionality of art.10 of the Law 11.671/2008.

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