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Does the Provision for Irish Prisoners to Keep in Contact With the Outside Environment Require Reform?

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Table of contents

Situational analysis and introductory remarks.....	2
1. Irish Prisoners' Rights to retain connections with outside world.....	3
1.1. Right to visits.....	3
1.2. Rights to correspondence (to privacy, communicate and to freedom of expression), telephoning, voting.	7
2. Imperfection of prison law regarding the maintenance of connections by prisoners with the outside world.	10
3. Interpretation of results and possible reform in the current Irish prison law.	13
List of sources	15

Situational analysis and introductory remarks.

The law of the Republic of Ireland provides that prisoners' maintain rights in order to conduct connections with the outside world. It is important to mention that currently they are 3,747 people in Irish prisons¹. This population have rights before the law and they shouldn't be unreasonable deprived of rights or liberties.

By maintaining a connection with the outside world means that normal elements of the reintegration process can be maintained. This has a significant impact for further prisoner reintegration. It includes rights to visits, correspondence, voting, etc.

The main sources of law, which regulates prisoners' rights in that particular subject are:

- entitlements under the "Prison Rules"²,
- relative legislations,
- basic rights protected by the "European Convention on Human Rights"³,
- basic rights protected by the "Irish Constitution"⁴.

According to this, the main purpose of this essay is to answer the question: Does the provision for Irish prisoners to keep in contact with the outside environment require reform?

¹ *Irish Penal Reform Trust*, [online:] [<http://www.iprt.ie/prison-facts-2>], acc. 19.04.2015.

² *Prison Rules 2007*, [online:] [<http://www.irishstatutebook.ie/2007/en/si/0252.html>], acc. 20.04.2015.

³ *European Convention on Human Rights*, [online:] [http://www.echr.coe.int/Documents/Convention_ENG.pdf], accessed on the 20.04.2015.

⁴ *Constitution of Ireland* (In operation as from 29th December 1937), [online:] [<http://www.irishstatutebook.ie/en/constitution/index.html>], acc. 20.04.2015.

In this essay, the first chapter defines the main sources of the law that are relevant for prisoner's connections with the outside world. This is the longest section because the author takes into account all aspects of prisoner's communication with the world such as visits, opportunities for correspondence (privacy, communication and freedom of expression), telephoning and voting. These aspects are conditioned by the above legislations and rules.

The second chapter of the essay addresses the imperfections of prison law regarding the maintenance of connections by prisoners with the outside world. Here, the author presents case law which is significant to illustrate the problems of imperfections of prison law. This section also interprets the decisions made by the Irish courts, regarding prisoner rights and the current difficulties experienced by prisoners. The information provided in chapter two create the relevant database and sources for interpretation of results and the final conclusion.

The last chapter of this essay addresses the interpretation of results and possible reforms in the current Irish prison law/policy. It is based on the information analysed and interpreted in section one and two.

In this essay, the methodology of research and analysis is of integral importance. The author employs appropriate research methods recognised within the law and social sciences. During the analysis of law, acts, rules and the constitution, the most useful methods were institutional and legal ones. For explanation the Irish Prisoners right, very helpful were decision-making methods and some components of system analysis. For interpretation and results part, the most significant method were historical and comparative.

1. Irish Prisoners' Rights to retain connections with outside world.

1.1. Right to visits.

The rights of Irish Prisoners to retain connections with outside world can be found in a few sources of law which are already mentioned in Situation Analysis section. “Prison Rules” is a Statutory Instrument which regulates assorted aspects of prisons terms.

The Statutory Instrument delivers one of the most significant prisoner right: to visits. It is governed by rules 35 – 41 of the Statutory Instrument⁵. Table no. 1. illustrates how many visits prisoners can receive from friends or family members and also the duration of the visit.

Table No. 1. Analysis of prisoner’s visits (depends on prisoner type and age)

Type of Prisoner	Age of Prisoner	Min number of visits each week	Max number of visits each week	Length of visit
Sentenced	Over 18	1	Governor can decide	30 minutes
Sentenced	Under 18	2	Governor can decide	30 minutes
Remand	Any age	3	6	15 minutes

Source: Irish Council for Civil Liberties/ Irish Penal Reform Trust, *Know your rights Your Rights as a Prisoner*, [online:] [http://www.iprt.ie/files/ICCL_IPRT_Prisoners_rights1.pdf], acc. 21.04.2015.

As can be seen from the above table, the number of visits and duration of the visit for sentenced prisoner is regulated. However, it could be extended by an independent decision made by the Governor. He can decide to allow more visits and change their duration. Remands prisoners have rights to higher numbers of visits than sentenced one but the time is shorter.

⁵ *Prison Rules 2007*, op. cit.

Sentenced and remand prisoners can receive visits from family members, friends, etc. (rule 35.)⁶. Moreover, any person can apply directly to the Governor to get permission to visit specific prisoner (rule 35.8.). The decision is made within the Governor's discretion. It has to be taken into account that the prisoner may or may not accept the visit. According to Rule 36. the Governor has a legal right to restrict the visit in the cases of lacking ID, non-consent to search, and "order and security". Every visit is under observation and within the hearing of the prison guard, except for some special visits. Also, all visits are barriered by a screen in order to prevent physical interaction between visitor and prisoner. Every visit has to be conducted in the communal visit area. It is also worth considering other rules such as⁷:

- "Rule 37: Visit for prisoner committed in default of payment of money or in prison in default of bail
- Rule 38: Visit by legal adviser or relating to court appearance
- Rule 39: Visit to foreign national
- Rule 40: Visit by Probation and Welfare Officer relating to reports for court or other relevant purpose
- Rule 41: Visit by member of the Garda Síochána"

These visits can take place "at any reasonable time". The visits from the legal representative (rule 38.) or members of Garda Siochana (rule 41) are private and will take place out of any hearing.

The right to visit can be temporarily suspended. This can be caused by a disciplinary sanction (prohibition from receiving visits for 60. days) and the Governor has to provide relevant reason to the sanctioned prisoner.

It is important to mention that Irish prisons operate the Incentivised Regimes Policy⁸. This regulation implements "differentiation of privileges". It means that if a prisoner behaves in good and responsible way, he will receive an extra benefit. The Policy

⁶ Ibidem.

⁷ Ibidem.

⁸ *Irish Prison Service*, [online:] [<http://www.irishprisons.ie/index.php/regimes-directorate/77-untitled/118>], acc. 17.04.2015.

provides three different levels of privilege: enhanced (prisoners who meet specific criteria), standard (new prisoners) and basic (failure to meet required standard). The Incentivised Regimes Policy will be critically analysed in the third chapter.

Beyond the “Prison Rules”, the right to visit is also determined by the “Prisons Act 2007”⁹. In this piece of legislation, Section 13. (sanctions for breach of prison discipline.) provides the limit of the sanction not to exceed sixty days.

The European Convention on Human Rights has had a significant impact for the right to visit, especially under article 8¹⁰:

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This article mainly corresponds with family life, but also provides access to family visits and maintains the connection between husband and wife¹¹. Based on that interpretation, any restriction regarding a family visit can violate Article 8. of the Convention.

During the analyses of ECHR, the fundamental Prisoner’s Right under the “Irish Constitution” should be taken into account. Again, rights to visits is placed in article 41, which says that¹²:

The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

⁹ *Prisons Act 2007*, [online:] [<http://www.irishstatutebook.ie/2007/en/act/pub/0010/>], accessed on the 20.04.2015.

¹⁰ *European Convention on Human Rights*, [online:] [http://www.echr.coe.int/Documents/Convention_ENG.pdf], accessed on the 16.04.2015.

¹¹ S. Easton, *Prisoners' Rights: Principles and Practice*, New York 2011, p. 141-143.

¹² *Constitution of Ireland*, op. cit.

It means that prisoners have the legal rights to communicate with their family and children.

1.2. Rights to correspondence (to privacy, communicate and to freedom of expression), telephoning, voting.

Opportunities to correspond is another aspect of prisoner's communication with the world. This helps to maintain family relations and in other words – the right to family life.

This important right is placed in the “Prison Rules 2007”, Constitution and in the ECHR (art. 8.). Prison Rules under rules 43. – 45. provides an opportunity to prisoners to send and receive letters (first seven letters in any one week are free of charge) with no limits¹³. It is important to mention that all letters from and to prisoners can be examined in order to security, safety and crime prevention. Only correspondence from (or to): legal representative and prison authorities cannot be inspected. Correspondence entitlement can be suspended as a result of disciplinary sanction (prisoners still keep the rights to contact with legal representative and voting).

The Constitution of The Republic of Ireland recognise three rights according to correspondence¹⁴:

- Article 40.3.1^o: The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen – unenumerated rights such as: to privacy and to communicate,
- 40.6.1^o: The State guarantees liberty for the exercise of the following rights, subject to public order and morality: – i The right of the citizens to express freely their convictions and opinions – freedom of peaceful assembly.

These are Fundamental Rights of Irish prisoners. All citizens are equal before the law

¹³ *Prison Rules 2007*, op. cit.

¹⁴ *Constitution of Ireland*, op. cit.

Telephone calls are another way of contact with outside world. Rule 46. accords with this particular entitlement¹⁵ with a convicted prisoner having an opportunity to make one call minimum every week and for remanded prisoners minimum two calls per week minimum. It is also important to note that calls to a legal advisor can be made at any suitable time.

The calls can be intercepted in order for safety and security reasons (both sides are informed about that fact). The Governor can terminate calls if [rule 46 (8).]¹⁶:

- (a) is threatening in nature,
- (b) could cause serious offence or distress to the recipient of the call
- (c) could cause an interference with the course of justice,
- (d) the recipient of the call has informed either the Minister or the Governor that he or she does not wish to receive telephone calls from the prisoner,
- (e) would facilitate or encourage the commission of a criminal offence or hamper the prevention, detection, investigation or prosecution of a criminal offence,
- (f) could give rise to a legal action by a third party against the Governor or the Minister,
- (g) is contrary to the interests of national security,
- (h) is contrary to the interests of the security, good order and government of the prison or
- (i) infringes the rights and freedoms of another person (including the right to privacy of another prisoner).”

The Governor and Prison Officer, which is authorised by him, can make the decision about termination.

¹⁵ *Prison Rules 2007*, op. cit.

¹⁶ *Ibidem*.

The last privilege for Irish prisoners', which will be taken into account is the right to vote. The Constitution and the "Electoral (Amendment) Act 2006" determine this particular right¹⁷. Section 2. provides that:

- 2.— (1) The registration authority shall enter in the postal voters list the name of every elector who—
- (a) not later than the last date for making claims for corrections in the draft register applies to be so entered,
 - (b) satisfies the registration authority that the circumstances of the elector's detention in prison, pursuant to an order of a court, are such as to render it likely that he or she will be unable to go in person on polling day to vote at the polling place for the polling district, and
 - (c) satisfies the registration authority that he or she was ordinarily resident in the State prior to his or her detention in prison.

Also, the Irish Constitution in article 16.1.2^o, gives the right to vote to all Irish citizens¹⁸. It is also worthy to mention that article 33. of Protocol no. 1. to the Convention for the Protection of Human Rights and Fundamental Freedoms provides right to free elections¹⁹:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Based on Section 2. of the "Electoral (Amendment) Act 2006", Constitution and "Convention for the Protection of Human Rights and Fundamental Freedoms", prisoners can vote by post. This action gives an opportunity to participate in political life outside the prison. This means that they will not lost their fundamental rights.

¹⁷ *Electoral (Amendment) Act 2006*, [online:] [<http://www.irishstatutebook.ie/2006/en/act/pub/0033/index.html>], accessed on the 20.04.2015.

¹⁸ *Constitution of Ireland*, op. cit.

¹⁹ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed at Rome on 4 November 1950) as amended by Protocol No. 11*, [online:] [<http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm>], accessed on the 23.04.2015.

2. Imperfection of prison law regarding the maintenance of connections by prisoners with the outside world.

Imperfection of prison law regarding the maintenance of connections by prisoners with the outside world are analysed according to:

- right to visits,
- rights to correspondence (to privacy, communicate and to freedom of expression),
- voting.

Right to visits is not free of restrictions. First of these is the number of visits which is definitely too short. As can be seen from Table no. 1 (first section), sentenced prisoners which are over 18 have the right to only one visit per week. Of course this regulation could be extended, but it depends on the Governor's decision which could be not successful (according to prisoner behaviour or a security issue). The Governor has also the legal right to refuse a visit to bestow "order and security". The Governor's discretion can be very widely interpreted. There is no appeal mechanism for the Governor's decision/judgment.

Importantly, the Constitutional right to privacy is very limited. As was already mentioned, all visits are under observation and hearing. They are also screened for security and safety reasons. An important Irish case regarding the right of privacy is *State (Greene) v Governor of Portlaoise Prison*²⁰. Mr. Greene reported the breach of Article 41. of the Irish Constitution – right to privacy, where a prison guard monitored the visit with his family. Also in *Foy v Governor of Cloverhill Prison*, where the plaintiff Mr. Foy noted that all visits with his family members were screened by default²¹. The claimant did not have a chance of physical contact with his family. As in the previous case, Judge (Mr. Justice Charleton J.) emphasised that²²:

²⁰ *State (Greene) v Governor of Portlaoise Prison*, Unreported: High Court, 20th May 1977.

²¹ *Foy v Governor of Cloverhill Prison* [2012] 1 IR 37.

²² *Ibidem*.

When a person enters prison, this necessarily entails a restriction of family rights. The Governor has wide discretion as to the extent to which those rights may still be exercised.

According to above statement Mr. Foy was not successful with his claim.

It is important to note that during the imprisoning period, the prisoners' constitutional rights can be limited. The State (*McDonagh*) v *Frawley* (1978) case shows that some constitutional rights (Habeas corpus) can be suspended²³. Mr Justice, O'Higgins mentioned:

[...] while so held as a prisoner pursuant to a lawful warrant, many of the applicant's normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations [...]

One excellent example of an imperfection of Irish prison law is when the right to privacy is strongly akin with the right to Procreate and/or Conjugal Rights. In the Republic of Ireland, prisoners do not have a right to a conjugal visit. Married prisoners can communicate with the spouse, but with no privacy. In comparison, in Poland (another European Union country) "intimate rooms" where "well behaved" prisoners can receive conjugal or intimate visits from their partners are provided. In Irish prisons, visits (under rule 35.) are taken place in a communal area. A good example of this aspect is provided in the *Murray v Ireland* case, where the plaintiff required special facilities for conjugal visit (Article 41. of the Irish Constitution)²⁴. The claim was not successful, because Irish prisons do not have these kind of facilities (Mr. Justice Costello J). Similar judgment were in *Breathnach v Ireland* case²⁵.

As can be seen from the above examples, in some particular situations some of the rights (even constitutional) of individual prisoners can be suspended due to security reasons or prison discipline. Based on the above judgment of the Irish Courts it can be seen that the constitutional rights are not absolute and can be suspended by courts in

²³ *The State (McDonagh) v Frawley* [1978] IR 131.

²⁴ *Murray v Ireland* [1985] 1 IR 532; [1991] ILRM 465.

²⁵ *Breathnach v Ireland* [2001] 3 IR 230.

reasonable and relative circumstances. This process is determined by the actual offence and particular circumstances. This is another example of imperfection of prison law.

An important aspect, which is also important to analyse, is Article 8. of the European Convention on Human Rights²⁶. It provides rights to a family visit. Again, the decisions made by the European Court of Human Rights do not have the power to repeal the Supreme Court decisions. This has a significant impact as it shows that the European Court of Human Rights is not the court of appeal of unfavourable decisions made by national courts. ECtHR does not analyse or interpret the national law, but controls and monitors the commitments undertaken by European Convention on Human Rights (ECHR)²⁷. A good example of this is in the case of *Foy v Governor of Cloverhill Prison* case, which was already examined²⁸. Also, the case of the *Minister for Justice and Equality v BH* case, where rights of a child were affected²⁹ is a case in point. Again, in this case, the father's rights to see his baby were limited because of his extradition (in the matter of his European Arrest Warrant). The Judge decided that Article 8. in this case was not violated.

The right to correspondence can also be examined as an imperfection of the Irish prison law in the case of *Kearney v Minister for Justice* case³⁰. It is important to mention that during that time, Irish Prisons operated under the "Prison Rules 1947" (currently 2007.)³¹. Mr. Kearney claimed that his private correspondence was opened, read and destroyed. High Court Justices marked that constitutional right could be limited during imprisonment period, but letters should be delivered. A similar case to this was the case of the *State (Richardson) v Governor of Mountjoy Prison*³². However, in *Holland v Governor of Portlaoise Prison* case, the plaintiff's claim was approved by Mr. Justice McKechnie. Mr. Justice treated this as a violation of Constitution³³.

²⁶ *European Convention on Human Rights*, op. cit.; A. Berski, *Criminology assignment*, databases of the Dublin Institute of Technology, Dublin 2015.

²⁷ *Ibidem*.

²⁸ *Foy v Governor of Cloverhill Prison*, op. cit.

²⁹ *Minister for Justice and Equality v BH* [2013] IEHC 445.

³⁰ *Kearney v Minister for Justice* [1986] IR 116.

³¹ *Prison Rules 1947*, [online:] [<http://www.irishstatutebook.ie/1947/en/si/0320.html>], accessed on the 23.04.2015.

³² *The State (Richardson) v Governor of Mountjoy Prison* [1980] ILRM 82.

³³ *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573.

The final analyses regarding imperfections within the Irish prison law and the maintenance of connections with the outside world is a prisoners right to vote. The *Breathnach v Ireland* case is a good example of a system imperfection, where Mr. Justice Keane CJ held that Ireland has no obligation to provide means for voting.

3. Interpretation of results and possible reform in the current Irish prison law.

Based on the information analysed and interpreted in section one and two, it is not easy to give a straight answer to the question: is prison law fundamentally flawed and in need of reform? To analyse that, firstly it is important to explain what the main purpose of the prisons are³⁴:

The mission of the Irish Prison Service is: Providing safe and secure custody, dignity of care and rehabilitation to prisoners for safer communities.

According to that, the main functions are: custodial, coercive and punishment. To fulfill these objectives it is necessary that some Constitutional and fundamental rights are limited. The best example of this is the prison population, which increased by 400% from 1970 to 2011³⁵. If Legislators and Judges would not treat prisoners' rights as individual cases, the functions of the prisons would not be beneficial. A good example of this is the judgment in the *Kearney v Minister for Justice* case³⁶:

[w]hen the State lawfully exercises its power to deprive a citizen of his constitutional right to liberty, one of the consequences is a deprivation of the right to exercise many other constitutionally protected rights. Those that may still be exercised are those which do not depend on the continuance of his personal liberty and which are compatible with the reasonable requirements of the place in which he is imprisoned.

³⁴ *The Irish Prison Service Annual Report 2012*, [online:] [<http://www.irishprisons.ie/images/pdf/annualreport2012web.pdf>], accessed on the 23.04.2015.

³⁵ *Irish Penal Reform Trust*, [online:] [<http://www.iprt.ie/prison-facts-2>], accessed on the 23.04.2015.

³⁶ *Kearney v Minister for Justice*, op. cit.

The right to visit can be constructively criticised because it gives the Governor full discretion to allow or disallow potential visits. The visits can always be refused for “order and security” reasons. It is important to mention that there is no legal appeal procedure from the Governor’s decision. The possible reform of the “Prison Rules 2007” can limit Governor’s “wide discretion” and extend numbers and length of visits for Prisoners (especially family). The Legislators and Lawmakers can also consider the purpose of conjugal visits, which are very important to keep proper family – marriage connections. The right to procreate is a fundamental one, so prisoners should have an access to that.

I do not see a necessity to reform Rule 36. because physical contacts can be allowed in some circumstances.

The current prison visits system also has some advantages. One of those are Prison Rules 37 – 43., which give an opportunity to visits “at any reasonable time” and without listening in. The second positive aspect is Incentivised Regimes Policy (already analysed). This policy is currently developing in all Irish prisons and could be defined as a motivation system for extra privileges³⁷. Also, the right to voting has a very good impact for the prison and the Irish reclamation system. It also proves that the value of democracy is a priority for Irish society.

Prison rights that requires some more consideration is the right to marry whilst the person is in prison. For this situation, there is no relevant judgment because the Irish Courts have not decided yet, if prisoners will have this opportunity.

The right to correspondence is an entitlement, which in my opinion does not require reform.

There is no perfect legal and prison system in the world. The main function of the prison system should be punishment in order to prevent future crimes being committed. This is a very important point as it helps to protect the public and prevent

³⁷ *Incentivised Regimes*, [online:] [<http://www.irishprisons.ie/images/pdf/incentivisedregimespolicy.pdf>], accessed on the 23.04.2015.

future offences being committed. However, taking into account the findings from the first and second section, some current prisoners' rights need to be reformed³⁸.

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³⁸ A. Berski, *Prison Law assignment*, databases of the Dublin Institute of Technology, Dublin 2015.

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