

# CONJUGAL VISIT - RIGHT OR BENEFIT?

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## Abstract

*During the execution of custodial sentences, the conjugal visit enjoys a dual regulation: both as a right and as a reward. Between the two institutions, there are several differences that lead to the non-uniform application of legal provisions. The method of establishing the criteria for applying the reward is the subject of the present analysis and gives rise to a legitimate question: is the conjugal visit a right or a benefit?*

**Keywords:** execution of the sentence, conjugal visit, right, concubine, reward.

## 1. Introduction

The legal situation of incarcerated individuals involves strict regulation by the legislator, both in terms of establishing coercive rules to ensure the effect of custodial sentences and in terms of setting legal provisions to guarantee their corresponding rights and freedoms.

From the analysis of the provisions of Law no. 254/2013, we will observe that the conjugal visit benefits from dual regulation: one primary, within the provisions establishing the rights of convicted persons, namely within art. 69, and one secondary, when the legislator refers to the aforementioned provisions regarding the rewards that convicted persons may benefit from, according to the provisions of art. 98 para. (1) letter d) of the same legislative act.

The manner in which the legal provisions regarding the right to conjugal visit are applied, as well as the conditions that the convicted person must meet, are aspects that we will consider in the following analysis and which will outline the necessity of legislative changes in this regard.

## 2. Conjugal Visit - an Applicable Right (to Some) of Incarcerated Individuals

Depending on the severity of the offense committed and the social danger it poses, the perpetrator of the offense may spend a considerable period being deprived of liberty, which leads to the need to ensure a procedure whereby their rights are respected, and they can effectively benefit from them.

It is no coincidence that we referred to the „*perpetrator of the offense*” without granting them a specific procedural status because the legislator establishes distinct regulations when the person holds the status of a suspect, then that of an accused, and finally that of a convicted person.

The first procedural status that the active subject of the offense acquires is that of a suspect, in which case deprivation of liberty may occur exclusively for a period of 24 hours, in accordance with the regulations regarding the preventive measure of detention, specifically the provisions of art. 209 para. (3) CPP<sup>1</sup>. In such a situation, it is not necessary to analyse the incidence of the right to conjugal visit, as long as the period for which they are deprived of liberty does not affect in any way family relationships or the proper development of the individual.

The second procedural status is that of the accused, in which case we must consider the provisions regarding the most severe of preventive measures, namely pre-trial detention, as regulated by art. 223-240 CPP. If the initial duration for which it may be ordered is 30 days, according to the provisions of art. 233 para. (1) CPP<sup>2</sup>, this period may be extended for successive periods of 30 days up to the maximum duration set by the legislator for each procedural phase.

In the case of criminal investigation, the measure of pre-trial detention may be extended for a maximum of 180 days, according to art. 236 para. (4) CPP<sup>3</sup>, which implies that with the completion of the criminal

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<sup>1</sup> Detention may be ordered for a maximum of 24 hours. The time strictly necessary for transporting the suspect or accused to the premises of the judicial authority, according to the law, is not included in the duration of the detention.

<sup>2</sup> During the criminal investigation, the duration of pre-trial detention of the accused cannot exceed 30 days, except when extended under the conditions of the law.

<sup>3</sup> The total duration of pre-trial detention of the accused during the criminal investigation cannot exceed a reasonable term and cannot be longer than 180 days.

investigation phase, another term is regulated for the other phases of the criminal proceedings. Expressly, criminal procedural legislation benefits from such regulation, establishing that during the trial, the duration of pre-trial detention cannot exceed 5 years at any time.

If in the case of the preventive measure of detention, a violation of the right to conjugal visit could not be retained, given the short duration for which it can be ordered, in the case of pre-trial detention, we can no longer support the same assertion. The period of 30 days, which can be repeatedly extended due to the complexity of the criminal investigations, requires a distinct regulation of the right to conjugal visit.

From the analysis of the legal provisions, it appears that the legislator intended to grant this right to a restricted category of individuals deprived of liberty before the pronouncement of a final conviction. According to art. 69 para. (1) letter a) of Law no. 254/2013, the holder of the right to conjugal visit is the person under preventive arrest, who is already in the trial phase. It is true that the legal text does not distinguish between the two procedural moments that fall within the trial phase, namely the trial before the first instance and the trial before the appellate court. However, we start from the presumption that the provision is equally applicable to both procedural stages within the trial.

Nevertheless, we notice that the legal provisions regarding the execution of custodial sentences do not regulate in any way the possibility for the individual deprived of liberty to benefit from the right to conjugal visit during the pre-trial phase.

The rationale behind the legislator's decision to establish a differentiated regime regarding the exercise of the right to conjugal visit is based on logistical considerations, not on aspects concerning the respect of the rights and freedoms of the individual deprived of liberty. The manner in which a preventive measure depriving of liberty is executed during the pre-trial phase creates significant organisational difficulties.

While the execution of pre-trial detention during the trial phase, after the court has been seized with one of the two referral acts, is carried out in a penitentiary, during the pre-trial phase, this preventive measure is executed in detention centers organised at the level of each administrative-territorial unit. The lack of sufficient space, accommodation conditions, as well as the related procedures that should be carried out by the administration of detention facilities, were sufficient elements for the legislator to exclude the exercise of a right recognized by law in this procedural phase.

In addition to the aforementioned, it is necessary to analyse the other conditions provided by the provisions of art. 69 of Law no. 254/2013, conditions that must be cumulatively fulfilled for the proper exercise of the right to conjugal visit.

The relationship between the individual deprived of liberty and the one with whom they are to participate in the conjugal visit must be one of marriage or cohabitation, the legislator thus setting the limits for exercising the right to conjugal visit when the individual deprived of liberty is married. Therefore, there is no alternative possibility to exercise this right if the person with whom they are married refuses to participate in such a procedure.

The proof of the relationship between the two is established distinctly, depending on its nature: if the individuals are married, the proof before the administration of the place of detention is made based on a legalized copy of the marriage certificate, unlike the situation where the relationship is based on a legally unregulated partnership. In the latter case, a sworn statement authenticated by a notary is required, stating that the two had a similar relationship before the deprivation of liberty.

The next condition provided by law exclusively targets those who are serving a custodial sentence, meaning a final court decision has been issued. Thus, the right to conjugal visit may be granted to the convict who has not benefited from permission to leave the place of detention in the last 3 months. Such an exceptional situation is justified by the fact that the convicted person could have had the appropriate meetings with their partner during the permission to leave the place of detention.

The last condition concerns the conduct of the person deprived of liberty, with the legislator aiming for them not to have been subject to disciplinary sanctions or for a reason for lifting the sanction to have occurred. In this case as well, a distinction is made between the two forms of deprivation of liberty: in the case of convicted persons, the absence of sanctions must be for at least 6 months before the moment they request the right to conjugal visit, unlike the situation of persons in pretrial detention, where the term is reduced to 30 days before the moment of the request.

We also note the moment to which the legislator refers, namely the date of the request for the right to conjugal visit, without there being an additional provision regulating the situation in which the disciplinary

sanction occurs after the request has been made, but before the person deprived of liberty actually benefits from their right. In such a situation, the only way to restrict the exercise of the right to conjugal visit is through the application of a disciplinary sanction that meets legal requirements and leads to the prohibition of the right to conjugal visit. In the absence of such a situation, the law does not expressly establish the conditions under which the person deprived of liberty could still exercise their right.

Beyond the legal limits of exercising the right to conjugal visit, it is important to also consider the social purpose of such regulation. Family life, interpersonal relationships, and the constant interaction between the two partners who form a couple are essential aspects in the process of social reintegration and resonate in interaction with other members of society.

Specialised literature<sup>4</sup> has highlighted the role of the family and, implicitly, of the relationships developed even during the period when one of the partners is serving a custodial sentence.

The last condition provided by the provisions of art. 69 para. (1) letter e) of Law no. 254/2013 is also not devoid of importance, according to which the person deprived of liberty engages in educational or work activities, on the occasion of which the administration of the place of detention may observe a constant tendency towards rehabilitation.

In addition to the legal provisions mentioned earlier, it is important to highlight the condition provided in art. 147 para. (2) of the Implementing Regulation of Law no. 254/2013, which requires that individuals participating in conjugal visits, both the person deprived of liberty and their partner, must submit to the administration of the place of detention a declaration stating that they do not suffer from any sexually transmitted disease or AIDS.

A special situation is encountered, both in specialised literature and in judicial practice, when exercising this right involves two individuals deprived of liberty. Thus, the legislator has established a series of provisions applicable to cases where the partners are subject to pre-trial detention - either during the trial phase or already convicted to a custodial sentence.

In this regard, judicial practice<sup>5</sup> has established that if both partners are deprived of liberty, it is not sufficient for the request to exercise the right to conjugal visit to be made by only one partner; both partners must make the request jointly. This dual condition seems to exist only when both partners are deprived of liberty. The judge delegated with overseeing the execution of the sentence and, subsequently, the trial court, have noted that the mere expression of will by one of the partners is not sufficient.

Analysing the legal provisions, this simultaneous expression of will condition is not evident. It is necessary for the convicted person to file the request and for their partner to submit the necessary documents.

The interpretation of the court in the decision rendered following the appeal against the decision of the judge delegated with overseeing the execution of the sentence leads to the conclusion that the reasons for rejection took into account a strict analysis of the legal provisions regarding the exercise of the right to conjugal visit. We believe that in such a situation, it was not necessary to verify the condition regarding the filing of the request by the other partner, as long as both were in the same place of detention, and the agreement regarding the conjugal visit was expressed.

### 3. Conjugal Visit - a Reward

As mentioned at the beginning of this analysis, the conjugal visit represents a form of expression of the detained person, materialised in a right expressly regulated within the law on the execution of custodial sentences. However, the right to conjugal visit can be supplemented, as well as restricted, which is why it is necessary to focus our attention on the supplementary regulations within Chapter IX of Law no. 254/2013 - a chapter entitled „*Rewards, Infractions, and Disciplinary Sanctions*”.

The conduct of the detained person, constant involvement in activities organized at the detention facility, and diligence in work are some of the elements that the administration of the detention facility considers when rewards are granted. The conjugal visit is included in the category of these rewards, in the form of supplementing the right, when the convicted person meets the conditions provided by law.

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<sup>4</sup> I. Chiş, A.B. Chiş, *Execution of criminal sanctions*, 2<sup>nd</sup> ed., revised and completed, Universul Juridic Publishing House, 2021, p. 468-469.

<sup>5</sup> A.V. Iugan, *The Rights of Detained Persons*, Universul Juridic Publishing House, 2018, p. 92.

However, some mentions are necessary regarding the specific way in which this reward is granted, as the provisions within art. 212 of the Implementing Regulation of Law no. 243/2013 establish a mechanism whereby the convicted person effectively benefits from the reward.

So, the legal text makes a distinction between two moments: the first moment is when the administration of the detention facility concludes that the detained person should receive the reward regarding the supplementation of the right to conjugal visit, and the second moment is when the detained person benefits from the reward.

Between the two moments mentioned above, there is a maximum term of 3 months, a time interval during which there is a risk that the right may no longer be exercised, either for reasons attributable to the detained person - against whom disciplinary sanctions are applied, or for reasons not attributable to them - generated by the couple relationship they have or the inability of the partner to participate in such a meeting.

This gap that the legislator had in mind for organisational reasons raises questions about the real nature of the conjugal visit: is it a right or a benefit? If in the first part of the analysis we observed the necessary conditions for exercising the right to conjugal visit, and the regulation provides sufficient guarantees from which the certainty of exercising it results, in the case of rewards, the certainty of the supplementary exercise of this right does not present a certainty, which is why we believe that we are dealing with a benefit.

From a linguistic point of view, the notion of „benefit” also means „*advantage gained from a situation or activity*”, which seems to lead to the hypothesis I mentioned earlier: the premise is the existence of a deprivation of liberty, and participation in socio-educational programs is the precursor and foundation of the supplementation of the right to conjugal visit.

#### 4. Conclusions

The legal situation of a person deprived of liberty should not be an impediment to exercising the rights recognized by the fundamental law and even less by the special law regarding the execution of custodial sentences.

Interpersonal relationships, including those akin to romantic partnerships, are an essential part of each individual's development process. The period during which one is deprived of liberty, as a consequence of inappropriate and illicit behavior, can be navigated more easily when the person deprived of liberty is in a position to effectively exercise their rights, including the right to conjugal visits.

The legislative restrictions that impose that intimate relationships with persons deprived of liberty occur only in two situations (in the case of marriage or in the case of a pre-existing cohabitation relationship before the moment of deprivation of liberty) represent an indirect limitation of the right to conjugal visits, without any explanation provided in this regard.

The role of the legislator is not to unjustifiably limit the exercise of rights that it has regulated but to ensure a uniform and efficient application of legal rules- aiming to maintain the natural relationships that the individual has developed before the moment of deprivation of liberty or will be able to develop both during and after their release.

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