



## **LL.M. Program**

### **TITLE**

**Differentiated legal approach to prisoners who have children under the age of 18 and guarantees for their relations in RA**

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# Introduction

**“...Together let us build the global alliance to realize that goal,  
secure in the knowledge that in serving the best interests of  
children, we serve the best interests of all humanity”**

**Carol Bellamy**

Chair of the Board of the Global Community  
Engagement and Resilience Fund

The United Nations Convention on the rights of the child in its preamble recalls the Universal Declaration of Human Rights proclaiming that childhood is entitled to special care and assistance<sup>1</sup>. The authorities of states should establish the proper legal regulations to protect rights of a child and to build the environment in which the child can have the opportunity to develop his best individuality. Establishing its own governmental system and within that system the services working with target groups the state has to serve the rule that the child's best interests must be a primary consideration and the child's maximum survival and development must be ensured. In this context every time we have the procedure with the child participation, we have to put the child's interests in the first seat, and even making the restrictions come from to prospective of child's mental and physical security.

This paper is devoted to point the issues concerning child-incarcerated parent relations marking the huge significance of parental relations in child's life. It aims to highlight existing problems of the legislation in ensuring child's regular direct contact when his parent is incarcerated and create possible solutions concerning this issue After amending the Constitution of the Republic of Armenia in 2015, a huge period has started of developing domestic legislation and harmonizing it with international requirements of the conventions Armenia has ratified. RA Government Protocol Decree N 30 on the Strategic Program for the Protection of Children's Rights in Armenia for 2017-2021 is states in Paragraph 2 Point 9 that it aims to develop children's rights protection system in Armenia, to ensure the right of security for children, the right to develop in an equal and healthy environment. In the part dedicated to the Issues of the strategic program the Government points out that children rights protection is conducted by many governmental bodies and institutions and sometimes they show partial approach to the issue in the meaning that they work is connected with one part of the child's life and cooperation with other bodies sometimes fail. The aim is to establish system with flexible tools to guarantee the equal and proper

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<sup>1</sup> See The United Nations Convention on the rights of the child, link available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

protection without any form of discrimination.<sup>2</sup> Therefore, the obligations of governmental bodies working in his field should be interconnected and harmonized with one another to have the identical approach to the protective procedure. In this process it is must step to implement mechanisms and special legal tools to ensure the rights of children whose parents or one parent is incarcerated. European court of human rights (hereafter the Court) in his decisions have stated many times that in spite of the fact that States enjoy a wide margin of appreciation when taking the initial decision to separate children from their parents, however, stricter scrutiny is called for regarding any further limitations, such as restrictions placed on parental rights of access, and any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life.<sup>3</sup> The Court has stated that the margin of appreciation decreases with the amount of time children are separated from their parents, and state authorities should put forward strong reasons to support their decision to maintain the separation.<sup>4</sup> Therefore, while enforcing the criminal sentences the penitentiary system should be organized in a principle not to put restrictions on the convicts' and their children's rights to have regular direct relations, if these restrictions do not serve for the child's interests.

This paper stresses the issues of the domestic legislation concerning the incarcerated parent-children relations, presents the international requirements the Republic of Armenia is obliged to follow, points out the negative effects of parent incarceration in a child's life and brings suggestions of procedures and legislative amendments to make the legislation protect the right of a child to have direct regular relations with his parent in a new level.

The thesis consists of introduction, three chapters, a conclusion and bibliography. **Chapter 1** presents the domestic legislation regulating incarcerated parent-children relations, their contacts, meetings, grounds for putting limitations on that contacts, the procedure it is done. The Chapter offers analysis of these normative legal acts and shows the gaps we face when enforcing it. Chapter point out international Conventions declaring the child's family life and right if having regular relations with his parents and also presents analysis of Courts precedents about the issue. It uses guidelines of Article 8 of the European Human Rights Declaration, special and annual reports of the Human Rights Defender of the Republic of Armenia, commentaries of international documents and internationally accepted rules of the sphere, decisions of RA Constitutional Court and Cassation court. **Chapter 2** highlights the psychological effects of parental incarceration on a child's behavior, also

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<sup>2</sup> See Strategic Program for the Protection of Children's Rights in Armenia for 2017-2021, RA Government Protocol Decree N 30 of the session of July 13, 2017, link available at <http://www.irtek.am/views/act.aspx?aid=91088&sc=%20>

<sup>3</sup>See K. and T. v. Finland [GC], No. 25702/94, 12 July 2001, link available at <file:///C:/Users/User333-2/Downloads/002-10324.pdf>

<sup>4</sup> See Y.C. v. the United Kingdom, No. 4547/10, 13 March 2012, link available at [file:///C:/Users/User333-2/Downloads/002-10324%20\(1\).pdf](file:///C:/Users/User333-2/Downloads/002-10324%20(1).pdf)

presents the procedural issues we have in Armenia in correctional institutions concerning the health care and medical assistance showing importance of mental examination of a convict before organizing the contact with his children to avoid negative effects on a child. The Chapter discusses procedural issues presenting the view from the interview with the psychologist and also with the convict. **Chapter 3** discusses practicable solutions for pointed issues balancing it with domestic legislation and international requirements, discloses the tools which can be implemented to serve for protection of a child's certain rights. It highlights the importance of individual approach to each case while making restrictions on one's exercise of a right. **Conclusion** deduces analyzed issues and presents overall point of views about the issues and solutions discussed in the thesis.

## CHAPTER 1

### Review of relevant domestic law and international standards

#### *Review of domestic legislation*

The protection of the rights of children is a complicated and wide-ranging procedure to be conducted by the state to minimize the possible scope of any systematic regulation which can be harmful to this sphere. In 2015 the Republic of Armenia amended the Constitution of RA first time in history in the constitutional level declaring the state's active obligation to ensure child's regular personal relations and direct contacts with his or her parents.<sup>5</sup> The Article 16 of RA Constitution declares "Family — being the natural and basic unit of the society, the basis for the preservation and reproduction of the population, as well as motherhood and childhood — shall be under special protection and care of the State". The state accepts the importance of the childhood period for the individual to develop his physical and mental completeness and also for the whole society and gives special legal protection for it.

The Article 37 in part 2 of RA Constitution states "...In matters concerning the child, primary attention must be given to the interests of the child". This means that every time we have the contradicting public and private interests during certain procedures and actions and children participating in those procedures, we are obliged to take the child's interests in the first seat. The same article in Part 3 of RA Constitution declares "Every child shall have the right to maintain regular personal relations and direct contacts with his or her parents, except for the cases where pursuant to a court decision it is against the interests of the child. Details shall be prescribed by law". The restriction of the right of a child to have regular personal relations and direct contacts with parents should be made only if they come from the interest of the child and have the aim to protect the child's social life.

Moreover, these restrictions are aimed to ensure security for the child and in every case there is a need for individual approach to define whether we need this restriction for the child or not. However, nor in the constitutional level neither in lower normative legal acts we do not have the legal definitions of terms "regular relations" and also "direct contacts", so in every single situation we need to define whether the 'regular relations between parents and children' and 'direct contacts' can be declared to be ensured or the state has the complication in conducting its

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<sup>5</sup> RA Constitution, amended 06.12.2015

obligation to ensure them. Article 28 of RA Constitution declares general equality before the law stating “Everyone should be equal before the law”.

The fact of parental incarceration definitely should not be the base for discrimination and therefore the children of prisoners as well as detainees’ children should not be protected in other legal level, moreover special tools are needed to be implemented to ensure such children rights of regular relations and direct contact with their parents. In lower normative acts which are laws according to the Article 5 of RA Constitution there are no distinctive regulations concerning to the prisoners who have children under 18 and concerning their relations. Only exceptions are for the cases then the prisoner has the child under 3.<sup>6</sup> First Part of the Article 82 states that “If necessary, a children’s home may be established within the correctional institution, which shall offer proper conditions for children’s living and development. The convict may place his or her child under the age of three years in the children’s home of the correctional institution and may interact with his or her child during work-free hours without any restriction. The convict may be allowed to live together with the child”. In an answer to the Request 40/4-2934,18.04.2019 from the RA National assembly about the number of children who have stayed in “Abovyan” correctional institution from 2014 January to 2016 was stated that there were five children under 3 during these period who has lived in the correctional institution, and from 2017 till now there is no prisoner having child under 3. Stressing out the aim of Article 82 we need to point that the scope it covers is not as large as it could be and also the conditions and the age for children is not justified.<sup>7</sup> Paragraph 3 of the same Article states that based on the decision of the head of correctional institution the duration of staying in a children home can be extended until parent finishes the sentence provided that less than two years of the sentence are left.<sup>8</sup>

We have to point out that the decision is made by the head of the correctional institution without describing the procedure the decision, which have the huge impact on a child, will pass. There is no psychological examination or other process to pass to draw the objective impact of staying in correctional institution. The decision should be made based on the professional opinions by professional committee established by the law. It is not justified not to regulate the procedure of limiting person’s rights declared by the Constitution in a lower legal level as it is the decision of the head of correctional institution. Even if there is no doubt about its unlawfulness and contradictions, the procedure has to be described by the law. One of its decisions the Court declares that the national law must be clear, foreseeable, and adequately accessible. It must be sufficiently foreseeable to enable individuals to act in accordance with the law, and it must demarcate clearly the scope of discretion for public authorities<sup>9</sup>.

This basically means that the law should give the person the real description on which circumstances the rights can be limited and how the regulations works certain conditions. The Article does not describe the procedure by which the decision about extending or not extending the procedure is made and this makes the legal norm unclear. We do not see in the Article what reasons play the significant role in decision making process moreover we do not have the regulative norms to state the required facts to make such decisions.

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<sup>6</sup> Penitentiary Code of RA, adopted 24.12.2004, Article 82

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<sup>8</sup> Supra note Ref 2, Paragraph 3

<sup>9</sup> See Shimovolos v. Russia, application No 30194/09

The Penitentiary code of the Republic of Armenia which defines the procedure and conditions for executing criminal sentences and for enforcing and serving medical coercive measures combined with the execution of a sentence, to ensure conditions necessary for rehabilitation of convicts, and to protect their rights and freedoms in Article 5 declares the Principles of the penitentiary legislation stating “ The penitentiary legislation of the Republic of Armenia shall be based on the principles of humanism, lawfulness, equality of convicts before the law, differentiated and individualized execution of sentences, and combination of sentences and correctional measures”.

Consequently, every convict should have the individual differentiated approach to gain the purposes of punishment stated in the Article 48 of the Criminal code of RA<sup>10</sup> which are “...to restore social justice, to correct the punished person, and to prevent crimes.” Individual differentiated approach to the prisoners concerning the cases of restricting their rights is highlighted in the RA Human rights defender’s ad hoc public report on the rights to respect for private and family life, right to freedom of correspondence of prisoners and detained people removed to punishment cells. It is stated in the report that during the certain procedures in correctional institutions decisions concerning the restrictions of certain rights of prisoners are made by the administrative staff of the institution and here we lack the individual approach while discussing individual cases.<sup>11</sup>

Article 12 of the RA Penitentiary code in Part 1 Point 9 states that the convict shall have the right to “communicate with the external world, including to maintain correspondence, receive visits, and have access to telephone communication, literature and available news media”. As to the differentiation of the convicts who have children under 18 there are no specific regulations and mechanisms in the legislation to put in order the regular relations and direct contacts between parents and children and the relation is arranged in general manner as in case of other family members meetings and contacts. The children meet their parents in the same environment, in the same rooms together with other convicts and their visitors and this definitely makes bridges in inter-personal contact the child needs to create with his parents.

Article 92 of the RA Penitentiary code states the conditions and terminations of the contacts of convicts with their families and with the external world, Part 2 of the Article states:

“At least one short-term visit at least per month, for up to four hours, shall be granted to close relatives or others, except for the cases provided for by law. At least one long-term visit per two months, for up to three days, and including the right to stay together, shall be granted only to close relatives. Long-term visit shall also be granted to the person not married to the convict but having a common child with the latter. At the request of the convict, a long-term visit may be replaced with a short-term, except for the cases provided for by law. At least three short-term

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<sup>10</sup> Criminal code of RA, adopted 18.04.2003, Article 48

<sup>11</sup> RA Human rights defender’s ad hoc public report on the rights to respect for private and family life, right to freedom of correspondence of prisoners and detained people removed to punishment cells, page 3, available at

<http://www.ombuds.am/resources/ombudsman/uploads/files/publications/3023fb5c4845dda4caae9167e10a0eaf.pdf>



visits and one long-term visit shall be provided to persons sentenced to a certain period of imprisonment or life imprisonment for committing a particularly grave crime. This restriction shall be eliminated, if the convict has actually served the term of the sentence, which, according to the Criminal Code of the Republic of Armenia, is set for conditional release from the sentence. The procedure for granting short-term and long-term visits shall be defined by the internal regulations of correctional institutions”. All these regulations have come from the prospective of the rights and obligations of the convict and certain restrictions needed to execute criminal sentences. Moreover, the restrictions are made based exclusively on the type of the crime committed by the convict without taking into account the individual behavior and special needs of the convict.

The Penitentiary Code and the Law “On Keeping of Arrestees and Detained Persons” of the Republic of Armenia provide for exhaustive grounds for restricting visits to and receiving visits by persons deprived of their liberty<sup>12</sup>

But the rights of a child stated in the Constitution of RA and also in lower normative acts are not accounted. Part 2 of the Article 41 of RA Family code states “Each child has the right to live and be reared in a family, know his/her parents, feel their care, live with them, except for the cases when it is contrary to their best interests. A child also has the right to be reared by his/her parents, right of guarantees of his/her interests, multisided development, respect of his/her human dignity, as well as being provided with the necessary living conditions for full physical, mental and spiritual development.”<sup>13</sup>

Therefore, every time there is a restriction concerning the right of a child to have regular relations with his parents, the right of a child should be in the first seat and that restriction should come from the prospective of a child right of security and proper development. The law of RA on the child’s rights in Article 12 declares “Each child has the right to recognize its parents and to reside together with them, with the exception of those cases stipulated in the legislation of the Republic of Armenia, when by the Court order the separation of the child from the parent or

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<sup>12</sup> Annual report on the 2017 activities of Human rights defender of the Republic of Armenia acting as national preventive mechanism, page 56, available at <http://www.ombuds.am/resources/ombudsman/uploads/files/publications/df894378302323bf17a891b911cd4de4.pdf>

<sup>13</sup> RA Family code, Article 41 available at <https://www.arlis.am/>

parents is considered to be prerequisite for the sake of the child's interests. The state and its corresponding bodies are supporting the reconstitution of the families”<sup>14</sup>. We see that in every normative legal act the child’s interests are in higher level of legal protection and every restriction should be individually justified and should be derived from their rights. This means that every convict’s case having children under 18 should be discussed individually taking into account the type of the crime, the psychological description of the convict<sup>15</sup>.

We see that exact number of meetings is not defined in the above mentioned article of the Penitentiary code. And this can be accepted as the way to make the procedure more flexible taking into the consideration that the procedure is arranged by the internal regulations of correctional institutions.

RA Government by the Government decision N1543 verified the internal regulation of the correctional institutions<sup>16</sup> and places to keep suspects under detention and the Points 137-152 of the Regulation states the order the convicts and suspects under detention meet with their family and close relatives. The Point 137 of the Regulation states that meetings are given to the convicts and suspects under detention by the signed permission of the head of the correctional institution or by the head of the place of keeping suspects under detention or by his order by the deputy of the head of the correctional institution. Simultaneously the Point 139 of the abovementioned Regulation states that meetings more than the minimum amount stated by the Article 92 of the Penitentiary code are not arranged if the person convicted to the imprisonment is not described positively in behavior or does not have proper active participation in educational or other social events.

This means that meetings with children can be prohibited by the administrative staff of the correctional institution based on the subjective points taking into consideration only the behavior of the convict not the interests of the child and therefore not giving proper significance to the contact between the convicts and their children. These norms as well come from the prospective

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<sup>14</sup> RA Law on the child’s rights, Article 12 available at <https://www.arlis.am/DocumentView.aspx?docID=69115>

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<sup>16</sup> RA Government Decision N1543 adopted 03.08.2006 available at

<https://ced.am/3-%D6%85%D5%A3%D5%B8%D5%BD%D5%BF%D5%B8%D5%BD%D5%AB-2006-%D5%A9%D5%BE%D5%A1%D5%AF%D5%A1%D5%B6%D5%AB-n-1543-%D5%B6/>

of the convicts' rights and obligations but in this legal relations we have second party which is a child whose interests should be given the primary attention. RA Constitution in Article 78 declares: "When restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct." Moreover, the Constitutional court of RA in its decisions CC-1256<sup>17</sup> and CC-1293<sup>18</sup> has pointed out that it is obvious that any legal restriction as an ensuring and balancing mean among democratic institutions should be applied in severe exclusive situations. The means used to make restrictions among the basic rights and freedoms should be in balance with the legal aim following the restriction. In the scope of this work this means that limitations of the rights of convicts and their children to have regular direct relations should be justified by the certain goal and should be only used for their interests.

Administrative staff's decisions as individual normative acts to restrict the right to have meetings do not satisfy the requirements of abovementioned decisions and the procedure should be prescribed by the law. In this scope we have to mention the need of proportionality principle between the restriction and legal aim. RA Court of Cassation in its decision<sup>19</sup> has stated that the nature of the principle of proportionality is that the method chosen to restrict a certain right of a person should be useful and necessary for the purpose and should be in equivalent proportion with the purpose. There are no legislative provisions entitling detained persons to long-term visits: Paragraph 12 of Article 15 of the Law of RA "On Keeping of Arrestees and Detained Persons", - a detained person shall be entitled to receive visits from his/her close relatives, media representatives, or from other persons at least twice a month for up to three hours<sup>20</sup>.

### ***International standards***

International and national standards indicate that restrictions on the right to liberty should not result in a loss of freedom of contact with the outside world.

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<sup>17</sup> See the decision of the Constitutional court of the Republic of Armenia ՄԴՈ-1256, available at <https://www.arlis.am/DocumentView.aspx?docid=103975>

<sup>18</sup> See the decision of the Constitutional court of the Republic of Armenia ՄԴՈ-1293, available at <https://www.arlis.am/DocumentView.aspx?docID=107363>

<sup>19</sup> See the RA Court of Cassation decision ԵԿԴ/0056/11/17, available at <https://www.arlis.am/Publications.aspx>

<sup>20</sup> See RA Law On Keeping of Arrestees and Detained Persons, Article 15 <https://www.arlis.am/DocumentView.aspx?docID=43743>

The Universal declaration of human rights in Article 25 Paragraph 2 declares “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection”<sup>21</sup> Article 12 declares “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” By stating that every child should enjoy the same social protection the declaration indicates that there can not be any form of discrimination against children based on the conditions and they should have the same social protection. This means that incarceration of a parent can not be the ground to make restrictions which do not serve for the best interests of a child.

The United Nations Convention on the Rights of the child was signed, the United Nations, where consensus is as rare as unicorns, enshrined this childhood reality in their Convention on the rights of the child-the most widely ratified human rights treaty in history.<sup>22</sup> Article 9 of UNCRC declares “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence”.

This means that in every case the state separates a child from his or her parents there should be a unique and individual justification for the separation and general regulations do not cover all the cases. The separation should be necessary for the child first and for this reason many aspects of the case should be taken into account. These aspects are the type of a crime, the level of its social danger, the behavioral description of the convict and of course psychological stability of both sides. Paragraph 3 of the same article states “Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests”. If the separation was necessary according to the domestic legislation, however a state is obliged to ensure regular relations between the parents and children and restrictions should be initiated to satisfy the child interests. In this sense, when there is a restriction on the contact with a parent, the state’s decision should be reasoned and show the grounds for such decision. But from the analysis of domestic legislation we see that this restriction can be put without any required reasoning by the decision

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<sup>21</sup> See Universal declaration of human rights Articles 12, 25  
available at [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

<sup>22</sup> The United Nations Convention on the Rights of the child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

of the head of correctional institution. It is to mention that all these restrictions are made only taking into consideration the aspects only concerning the enforcement of the sentences and not the effect a long time period can have on the contact with children. Moreover, the restrictions can be made automatically as the circumstance of another administrative decision.

RA Law on keeping arrestees and detainees in Article 35 states that for violating the internal regulations not carrying out the responsibilities or carrying them out improperly, the penalties such as expression of official reprimand, transfer to disciplinary cell for up to ten days for adults and up to five days for juveniles can be imposed. And these penalties shall be applied by a decision of the head of the place of detention.<sup>23</sup> According to Paragraph 4 of Article 36 during their time in disciplinary cells, detainees shall not be allowed to conduct correspondence, have visitors except for defense lawyers, purchase additional food and articles of prime necessity, receive parcels, deliveries, send or receive money transfers etc.<sup>24</sup> This means while being in the disciplinary cells automatically the right of having regular contact with relatives and with children is restricted. Therefore the automatic approach will not allow examine every single case individually and in every case these restrictions will be put on. And if we discuss this issue in the principle that in every situation the best interests of a child should be in the first place while having the issue of balancing the contradicting interests, we have to mention that by this approach we can not ensure the exercise of this principle.

Paragraph 1 of Article 98 of RA Penitentiary code states that during their stay in punishment cell, convicts shall be prohibited from having visits, with the exception for the cases provided for by law, using the telephone, receiving and sending cash remittances, deliveries and parcels, maintaining correspondence.<sup>25</sup> Analyzing the provisions we face again the issue that decisions are made automatically and the lack of individual approach and risk level measurement exists in these regulations as well. Therefore, not taking into consideration the nature of the violation of regulations, the convict is forbidden to have contact with outside world and where is no connection between the violation and negative consequence we have. If the convict had some problems with cellmates for instance and was moved to disciplinary cell, he will not be allowed automatically to meet with his relatives or to have another form of connection, this violates the principles declared by the Constitution and other normative legal acts on the process of making restrictions of the right.

The right to respect for his private and family life is declared also in the Convention for the protection of human rights and fundamental freedoms in Article 8 Part 1 “Everyone has the right to respect for his private and family life, his home and his correspondence” and Part 2 of the same article states the basis when such interference can be considered as lawful “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 well-being 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

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<sup>23</sup> See RA Law on keeping arrestees and detainees, 06.02.2002, Article 35

<sup>24</sup>Supra note Ref 19, Article 36

<sup>25</sup> Supra note Ref 2, Article 98

others.”<sup>26</sup> Therefore, the restriction on the right declared by Article 8 is justified when having the legitimate and reasoned aims counted in Paragraph 2 of the same article.

The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence. This obligation is of the classic negative kind, described by the Court as the essential object of Article 8 member States also have positive obligations to ensure that Article 8 rights are respected even as between private parties. In particular, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life.<sup>27</sup> The right declared by the Paragraph 1 of the Article 8 can be limited only for the purposes clarified in the Paragraph 2 of the same article. The interference should be necessary to reach the legitimate aim of it, and it should be clear that without that interference the authorities would not be able to protect the contradicting rights. In the scope of the issue raised by the thesis if there are restrictions on the rights of a child to have regular direct contact with his parent, it should be obvious that the contact would somehow have negative effects on a child or for other legitimate aim for example the security.

In order to determine whether a particular infringement upon Article 8 is “necessary in a democratic society” the Court balances the interests of the state against the right of the applicant. In an early and leading Article 8 case, the Court clarified that “necessary” in this context does not have the flexibility of such expressions as “useful”, “reasonable”, or “desirable” but implies the existence of a “pressing social need” for the interference in question. It is for national authorities to make the initial assessment of the pressing social need in each case.<sup>28</sup> So while analyzing Article 98 of the RA Penitentiary code, and Article 35 of RA Law on keeping arrestees and detainees, we do not see the process of balancing the interests of convicts and their visitors and society as we do not have the procedure to decide in each case which interest prevails.

The same approach is declared in the European law. In the context of a state sanctioned separation resulting from, for instance, expulsion or imprisonment of a parent, state authorities act in furtherance of a protected interest, and must strike a fair balance between the interests of the parties and the obligation to ensure the best interests of the child. The right of children to maintain contact with both parents is applicable in both instances.<sup>29</sup> Therefore, having the

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<sup>26</sup> See the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8 available at <https://www.echr.coe.int/pages/home.aspx?p=basictexts>

<sup>27</sup> See Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, page 47 available at [www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](http://www.echr.coe.int/documents/guide_art_8_eng.pdf)

<sup>28</sup> See *Dudgeon v. the United Kingdom*, application No7525/76, link available at [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57473%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57473%22]})

<sup>29</sup> Handbook on European law relating to the rights of the child, 2018, page 78

procedure where restrictions are made without discussing the balance process of the interests is not justified in the scope of international requirements.

According to Rule 24.1 of the European Prison Rules, - Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organizations and to receive visits from these persons. While paragraph 24.2 states that, -Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.<sup>30</sup> So, the minimum contact with the outside world should be allowed and decisions should be based on reasonable grounds. Loss of liberty should not entail loss of contact with the outside world. On the contrary, all prisoners are entitled to some such contact and prison authorities should strive to create the circumstances to allow them to maintain it as best as possible. Contact with the outside world is vital for counteracting the potentially damaging effects of imprisonment. To adhere to the limits set by Article 8.2 of the ECHR on interference with the exercise of this right by a public authority, restrictions on communication should be kept to the minimum. The rules according to which restrictions are also imposed are also important: they must be spelt out clearly, “in accordance with law” as required by Article 8.2 of the ECHR and not be left to the discretion of the prison administration.<sup>31</sup> This means that every time we have limitations on the rights to have contact with the world, the decisions and the process of making that decisions should be clear and reasoned by the grounds stated in the legislation.

## Chapter 2

### **Parental incarceration as a social and psychological effect on a child’s behavior**

Child psychology deals not only with how children grow physically, but with their mental, emotional and social development as well.<sup>32</sup> Every event from social life is illustrated in child’s behavior and has a huge impact on its psychological growth. A child born of a marital relationship is ipso jure part of the “family” unit from the moment and by the very fact of his or her birth<sup>33</sup>.

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<sup>30</sup> See European prison rules, 24.1, 24.2, available at <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>

<sup>31</sup> See Revised commentary to recommendation CM/REC(2006)2 of the Committee of ministers to member states on the European prison rules, 2017, page 19, 20, link available at

<https://rm.coe.int/revised-commentary-to-recommendation-cm-rec-2006-2-on-the-european-pri/168073f68e>

<sup>32</sup>

How incarcerated parents lose their children forever, By Eli Hager and Anna Flag  
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at [https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever?fbclid=IwAR2FORJrMbQ2yEewyi-f9fiSpDS2yOMOmV\\_hAmI1X0cUEuowLZ1YvaUT4EY](https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever?fbclid=IwAR2FORJrMbQ2yEewyi-f9fiSpDS2yOMOmV_hAmI1X0cUEuowLZ1YvaUT4EY)

<sup>33</sup> See Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence, page 47 available at [www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](http://www.echr.coe.int/documents/guide_art_8_eng.pdf)

In psychology families are conditionally divided into two groups, favorable and non-favorable families for a child, and this division does not have anything in common with the financial status of the family. Favorable families are those which include all the social-psychological, pedagogical, moral factors to promote proper environment for a child to develop his individuality. There are types of non-favorable families one of which is socially non-complete families there one of the parents is absent because of divorce or for other reason. Mainly there is a low cultural-educational level in these families as one of the parents or both of them can not act in the direct rule of a parent because of internal or external issues in or out of the family.<sup>34</sup> Therefore, we see that every member of the family has its own rule in the first social community which is the family and absence of one player may cause a huge gap in the formation and accepting process of what is a family. In the scope of this paper the reason of incompleteness of the family is the incarceration of a parent. With current legal regulations the parent does not have the objective possibility to act in his parental rule. It is obvious that incompleteness of a family itself arises stressful frustrated manners in a child and becomes a source for many moral pedagogical problems overcoming from which is a huge and long-term work.<sup>35</sup> In the interview with psychologist Gayane Grigoryan from “Elbakyan” development centre<sup>36</sup>, the psychologist clarifies that “The child integrates to social life through the family. The family is the first microenvironment where the division of roles happens and where the child learns to become one part of a group. In the room there where are children who grow up in a complete family and children who grow up with the absence of one or both parents, the difference can be noticed obviously. We not only copy our parents but also identify ourselves with them and every treatment to them we identify with us. When the child witnesses ‘bad’ treatment towards his parent which can be incarceration, meaning for a child only keeping a person in a certain place, he accepts this as a treatment directed to him and shows certain reactions which can be anxiety, anger, isolation from the society etc.”.

This means that the child appears to be in the dissonance, in one side there is his parent and the other side is the society who is to blame for the incompleteness of his family. These emotional reactions can turn into severe behavioral problems, triggering conflicts between the child and others. Many children of incarcerated parents develop feelings of anger and aggression, leading to failed friendships in school. Some may also become depressed and anxious, bringing academic and social challenges. The child may have a difficult time socially, often when they approach adolescence.<sup>37</sup> The psychologist states another important issue, saying that “not in every case increasing the number of visits of a child to the prison to meet his parent the effects the child psychology in a positive way.

Definitely we have to take into account the convict’s mental stability and how properly he can have direct and regular relations with his child.” Therefore, the approach to this issue to provide legal regulations to ensure the regular direct relations between parents and their children should

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<sup>34</sup> “Legal psychology”, Sergey Arzumanyan, Elda Grin 2004, pages 73-79

<sup>35</sup> “Not favorable families as a cause of unique implications of a child”, A. S Arzumanyan, 2002, Yerevan, pages 37-38

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<sup>37</sup> See Robert T Muller PhD. “When a parent is incarcerated” available at <https://www.psychologytoday.com/us/blog/talking-about-trauma/201505/when-parent-is-incarcerated>



not be automatically and in this case again we have to impose individual medical examination for each convict before having a reasonable decision about the restriction of the right to have regular direct relation with his children. The mental health of the convict should be taken into consideration in every case and psychological examinations should be repeated in a certain period.

The authorities have the positive obligation to protect children from any possible violation directed not only to their physical but also mental health. The authorities, medical and social, have duties to protect children and cannot be held liable every time genuine and reasonably-held concerns about the safety of children *vis-à-vis* members of their families are proved, retrospectively, to have been misguided<sup>38</sup>.

This means that the interference in family members' relations can be considered lawful in the scope of Article 8 Paragraph 2 of the the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>39</sup>. In this scope before increasing and maximizing the possible ways to ensure the right of a child to have regular direct relations with his parents, the authorities for the security of the child not based on the gravity of crime committed by the convict but based on the physical state of mind should examine every individual case. The authorities have to do everything in their power to guarantee effective exercise of the convicts' rights of access to their children.

Therefore, the regular relations should have the positive impact on a child and should serve to legitimate aim. The European court of human rights in one of his decisions have stated "As for the necessity of the measure taken in this case, the Commission cannot ignore the fact that the prison authorities do not seem to have done everything in their power to guarantee the effective exercise of the applicant's right of access to his daughter. The Commission wonders whether greater efforts to move the applicant closer to his daughter's place of residence, bearing in mind, in particular, the child's mother's reluctance to let her meet her father, might not have been possible and compatible with the requirements of prison organization and security. However, taking into account the margin of appreciation enjoyed in such cases by the national authorities responsible for enforcing prison sentences, the Commission takes the view that the position adopted in this case by the authorities cannot be regarded as disproportionate in relation to the aim pursued". This means that every state enjoys the broad appreciation in enforcing the prison sentences, but with this appreciation the system should provide all the required conditions for the convicts to exercise their constitutional rights.

Hence, the restrictions in the regulations of prisons should reflect the criminal policy of the state being in accordance with the principles and rules of enforcing the criminal sentences. The margin of appreciation decreases with the amount of time children are separated from their parents and state authorities should put forward strong reasons to support their decision to maintain the separation<sup>40</sup>. This means that in spite of having broad margin of appreciation the enforcement of sentences should serve to the aim of punishment and during this whole procedure the rights of a convict and the rights of connected people to him should be protected.

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<sup>38</sup> See R.K. and A.K. v. THE UNITED KINGDOM (*Application no. 38000(1)/05*) available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-88585%22%5D%7D>

<sup>39</sup> Supra note Ref 15 Paragraph 2 of Article 8

<sup>40</sup> See Y.C. v. the United Kingdom, No. 4547/10

The opportunity to communicate with family and relatives, and the outside world is crucial for both mental state and the law-abiding behavior of persons deprived of and their reintegration into the society<sup>41</sup>.

The issues arise not only connected with the health care services available in correctional institutions, but also with long term visit rooms, the conditions the meetings are carried out and the general environment we have in the correctional institutions.

In “Nubarashen” penitentiary institution there was also a problem as follows: a detained person was denied of receiving a visit as he/she had been under restriction in the past and the decision of canceling said restriction did not reach to administration of the penitentiary institution. Restriction of the right of the person deprived of his or her liberty to contact with the outside world persisted due to the technical and organizational shortcomings, i.e. the absence of appropriate grounds<sup>42</sup>. This show that there are still problems in the administrative procedures by which the visits are being organized.

There are still no long-term visit rooms in "Yerevan-Kentron" penitentiary institution. Due to absence of appropriate rooms, persons deprived of their liberty are transferred to “Nubarashen” penitentiary institution for long-term visits.

The problems are conditioned by the current regulation ignoring the person’s risk levels, where permission to short-term leaves are granted only based on the gravity of offence; and other circumstances.

While speaking about the effects of incarceration of a parent and also the effects the child can have visiting his incarcerated parent, we have to mention the security service work of the correctional institution. For entering the correctional institution the child in spite of the age, is being inspected by the servants, which makes the child have the bad attitude to the place there he meets his parent. New developed way of inspection is needed to be implemented to carry the process in a more positive way.

## Chapter 3

### **Concerting RA legal regulations with international recommendations**

In the legislation having declared and defined the child’s right to have regular direct contact with his parents, the Republic of Armenia, definitely, from the prospective to ensure that right in the procedural level, has to develop already existing regulations in this sphere and to set up new legal tools to bring the protection of a child right in a new stage. Enjoying the wide appreciation while enforcing the criminal sentences, authorities have to act in the way to give separate definition to each case in the process. In spite of the fact whether the convict is in the disciplinary cell or not and also in spite of the gravity of the crime committed by him the restrictions on the contact with the outside world and principally with the children under 18, should be made only by individual approach.

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<sup>41</sup> Annual report on the 2017 activities of Human rights defender of the Republic of Armenia acting as national preventive mechanism, page 57, available at

<http://www.ombuds.am/resources/ombudsman/uploads/files/publications/df894378302323bf17a891b911cd4de4.pdf>

<sup>42</sup> Supra note Ref 6

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its report to Armenian Government on the visit to Armenia states:

The Committee reiterates its recommendations that the Armenian authorities take steps to ensure that

- all prisoners (whether sentenced to life imprisonment or not) are: - not subjected to a total prohibition on family contacts during placement in a disciplinary cell and that any restriction on family contacts as a form of punishment is imposed only when the offence relates to such contacts;
- offered at least one hour of outdoor exercise every day during placement in a disciplinary cell;
- - offered more frequent access to a shower, in the light of Rule 19.4 of the European Prison Rules<sup>43</sup>

Certain measures and legal tools have to be implemented in the legislation to harmonize it with ratified conventions and international requirements. RA Government presented to the standing committee on state and legal affairs of the National assembly of RA drafts of legal acts concerning the development of penitentiary system and enforcement of criminal sentences<sup>44</sup>.

The Government with the cooperation of Human Rights Defender of the Republic of Armenia, and based on the RA Human Rights Defender's annual report on 2018 activities as the national preventive mechanism and on the annual report on the activities of Human Rights Defender and the state of protection of human rights and freedoms during the year 2018, stipulates legislative amendments in the Penitentiary code of RA. Among other amendments in Article 6 is stated the new regulation which allows persons sentenced for dangerous recidivism or a serious crime, may be granted a short-term leave in exceptional circumstances (death or serious illness of a close relative, a natural disaster inflicting 59 serous material damage to the sentenced person or his or her family), as well as for social rehabilitation<sup>45</sup>. So, the legislation is developing in a way to set the restrictions not based on the gravity of crime committed by the convict, but ensuring the opportunity of short leave as for other convicts.

Certain measures and legal tools have to be implemented in the legislation to harmonize it with ratified conventions and international requirements.

For this aim in the scope of the thesis issue there are certain steps-amendments defined for the legislation to ensure the right of the child to have direct regular contact with his parent in a new develop level:

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<sup>43</sup> See Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 23 May 2014, Point 22, page 13, link available at [https://www.ecoi.net/en/file/local/1255079/1226\\_1422964689\\_2015-10-inf-eng.pdf](https://www.ecoi.net/en/file/local/1255079/1226_1422964689_2015-10-inf-eng.pdf)

<sup>44</sup> See the record of the session of standing committee of state and legal affairs of RA National assembly, 05.04.2019, Paragraph 1, Point 2, available at [http://www.parliament.am/committees.php?do=show&ID=111205&showdoc=2035&cat\\_id=registers&month=all&year=2019&lang=arm](http://www.parliament.am/committees.php?do=show&ID=111205&showdoc=2035&cat_id=registers&month=all&year=2019&lang=arm)

<sup>45</sup> See the Draft law on amendments of Penitentiary code of RA, the link is available at <http://www.parliament.am/drafts.php?sel=showdraft&DraftID=10223&Reading=0>

### ✓ **Implementation of risk level measurement for each convict: individual approach**

Family life provision's wording clarifies the content of the right, particularly the meaning of contact, which must occur on a regular basis; allow the development of a personal relationship; and be in the form of direct contact. There is, however, a caveat: the right of each child to maintain contact with her or his parents is limited by their best interests<sup>46</sup>. Therefore, the best interests of the child and the procedure to protect the right of having direct contact with his parents have to be examined in every separate case by the process of having individual approach to each case. The Human Rights Defender of the Republic of Armenia in a interview indicated that for developing the legislation of this sphere we should have the regulations which allow the convict to understand what kind of behavior he should have to be able to cut the duration of the sentence enforcement. This means that the convict should be sure that there is an individual approach in every case and these limitations are based on his behavior.

Risk level measurement for each convict can be conducted by examining the behavioral description of the convict, having regular interviews with the presence of special professionals, giving the opportunity to point personal issues concerning the enforcement of the verdict. Declaring the requirement to show individual approach to each convict and to have such measurement in the law not in lower normative legal acts such as Government Decree, will indicate the importance of the procedure for criminal policy of the state and moreover, will give legal protection from any possible subjective approach, allowing the same judicial protection procedure as for other rights stated in the laws.

Measurement of risk level of each convict will allow to put the child's rights on the first seat, as for separate case and for each child it will be decided and reasoned how the restrictions on the contact will be justified for separate cases. The process will give the chance to define whether the convict objectively can have regular relations with his child without causing negative effect on his development. Furthermore, the automatic restrictions on the contacts with family and relatives when the convict will be in the disciplinary cell will be illegal. Moreover, the number of visits will not be based on the gravity of the crime committed by the convict will be based on individual database holding in the institution. And while determining whether or not the convict can have regular visits with his child the ground will be personal information not automatic solutions. Only by this way in each case we can decide whether the right of a child to have regular direct contact with his parent should be ensured or for the child security the restrictions should be imposed. In this context the amendments are to be made to ensure that there are no automatic solutions during the enforcement of criminal sentences. As discussed in the Chapter 1 currently when the detainees and convicts are removed to disciplinary cells, automatically they are not allowed to have visits or other contact. The procedure should be set up in our opinion, to discuss whether or not the restriction is legitimate to put on the contact right or not, this should not be done automatically.

### ✓ **Personal database about each convict's mental health**

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<sup>46</sup> See Handbook On European law relating to the rights of the child, 2015, available at [https://www.echr.coe.int/Documents/Handbook\\_rights\\_child\\_ENG.pdf](https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf)

To have the opportunity to the individual approach the penitentiary system should establish personal databases for each convict through the whole period of his imprisonment. Taking into consideration the problems discussed in Chapter 2 of the thesis concerning the health care issues mainly the mental health issues, we should ensure psychologist's work in the correctional institutions with convicts. It should be stated in the legislation that every convict should have his personal "Record book on health issues" where all information about health issues will be recorded.

✓ Establishment of special children rooms in all correctional institutions

In-person visits play significant role in incarcerated parent-child relations, as the children have opportunity with their parents and to enjoy their presence for a while. These visits allow parents and children physically interact with each other, they help mitigate the effects of parental incarceration. Research on the effectiveness of different types of visits is limited, but many experts believe that contact visits conducted in supportive, safe, and child-friendly environments are likely the best option to help most families mitigate the harmful effects of parental incarceration. Further, a growing body of research supports the use of contact visits, which allow children to see that parents are safe and healthy while in prison or jail.<sup>47</sup> So, it is important to establish special rooms for children to meet their parents in correctional institutions. Stating the significance and huge impact of these visits, it will be great step of development to have such rooms in correctional institutions.

The environment has a great influence on a child and having improper conditions as discussed in the previous Chapter, can build a huge gap in parent-child relations and cause the feeling of discomfort and nervousness on a child. But if implemented improperly, parent-child visits can harm children. These visits should not give the feeling of a lack of privacy.

During the interview with the convict, he indicated that some parents do not welcome visits and accept them as harmful to their relationship with their children. They do not want their children to see them in a correctional setting and prefer to avoid in-person visits. So we see that not having the proper environment may cause gaps in the relations with parents but if we have such places to spend time with children, it will give the opportunity to bring these contacts in a new level.

✓ Family strengthening programs organized in the correctional institutions

This programs can include movie screening, staging little puppet theatres and other events to give the child the feeling that his parent has taken him to a place to enjoy like other parents he is used to know. This will be made to decrease a little bit the feeling of absence of a parent in child's life. The meetings which are organized now do not give the objective opportunity for a child to enjoy the time spent with his parent and these meetings do not serve for their purpose.

✓ Social (financial) assistance to the children of incarcerated parents

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<sup>47</sup> See Parent-child visiting practices in prisons and jails, Lindsey Cramer, Margaret Goff, Bryce Peterson, Heather Sandstrom, April 2017, page 7, link available at [https://www.urban.org/sites/default/files/publication/89601/parent-child\\_visiting\\_practices\\_in\\_prisons\\_and\\_jails.pdf](https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf)

RA Law on Social Protection of Children without Parental Care in Article 2 defines<sup>48</sup> the scope of people who can be considered as children without parental care. The article states that the children under 18 whose parents (a parent) are dead, whose parents' parental rights are terminated, whose parents are legally incapacitated, etc and among the cases the article does not include children within this scope whose parents are incarcerated. So when the child's parent is incarcerated he does not lose his legal capacity, but objectively loses the opportunity to work and to care for his child's social and financial needs. Having this regulation in the legislation to provide the financial assistance to convict's children, definitely, includes great risks and put huge financial obligations on state authorities, but without these regulations we have children who are factually without care and whose rights are not protected because of the incarceration of a parent. Therefore, we should implement possible and realistic instruments to protect the right of a child to have regular direct contact with his parents in proper environment. In each case putting restrictions on these rights we have to have individual decisions based on the individual examinations and behavior of a convict and having the procedural provisions of these processes in the law.

## Conclusion

In this paper I discussed issues concerning the protection of a child's right to have regular direct relations with his parents. I analyzed the issue in the conditions when the child's parents or one parent is incarcerated. The domestic legislation regulating the process of organizing the contact between incarcerated parents and their children was presented by highlighting the legislative gaps we face on concerning this issue. The international provisions were presented and discussed and the wide margin of appreciation of the state in enforcing the criminal sentences was debated in the scope of the thesis issue. The European Court's of Human Rights decisions were brought to compare the approaches of the domestic legislation with the legal approach the Court possesses. The psychological effects were stated as a cause of incarceration of a parent lining the significance of having proper environment and adequate legal solutions to make the contacts serve to their legitimate aim.

By pointing out and mentioning the steps made by the Government of the republic of Armenia to harmonize the domestic legislation with international requirement certain possible solutions were presented in the paper to ensure the objective exercise of the right of a child to have the regular contacts. These solutions were devoted to

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<sup>48</sup> See RA Law on Social Protection of Children without Parental Care, Article 2

- Have individual approach to each case and every time while putting restrictions on a convict's right to have contact with the world, use the risk measurement mechanisms to measure the risk level of the convict and afterwards make decisions based on these examinations, not to have automatic decisions.
- Have data bases for each convict to have the information about mental and physical health of the convict and based on these tests and examinations decide the duration and number of meetings the convict can have with his children.
- Establish special rooms to carry the meetings with children in correctional institutions and also organize family strengthening programs to create the environment the contact can serve to its aims.
- Set up legal provisions concerning the social assistance of the children of incarcerated parents.

The paper and research had a goal to find possible solutions of setting up the procedures to ensure the process for the state to find the fair balance between the interests of the society and the obligation to ensure the best interests of the child. When there is a dispute and children are involved in, the best interests of the child should be placed in the first seat. The authorities have to implement the legal procedures which will give the realistic opportunity to children to exercise the right of having regular direct contact with their children. And if we have cases when there is an objective need to limit this right, the procedure of making such decisions should be prescribed by law, not by the lower normative acts.

Having declared in the Constitution the right of a child to have the regular direct contact with his parents and the state' obligation to ensure the exercise of that right, also having ratified international conventions requiring to set up systems to exercise that right, the Republic of Armenia has to amend its legislation and harmonize it with the Constitution and internationally accepted requirements.

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