OPINION

of 13th June 2013
of the French Contrôleur general des lieux de privation de liberté

concerning the possession of personal documents by prisoners and their access to documents that can be made available for discovery and inspection

1/ Several different fundamental rights have to be taken into account with regard to the manner in which the possession of personal documents by prisoners is organised within penal institutions. The first of these rights is respect for private life, that is to say the "right to live out of public view". This right comprises two different aspects: that of the protection of documents of which the personal nature is established (correspondence, statements of facts, family documents, personal case files etc.) (European Court of Human Rights, 25th February 1997, *Z. v. Finland* no. 22009/93, § 95 sq.); and conversely, that of the possibility of access to data of a personal nature, in the possession of the authorities, in case of vital need (European Court, Grand Chamber, 13th February 2003, *Odièvre v. France*, no. 42326/98, § 42). The second of these rights concerns the protection of property: the right to dispose of one's property being one of the elements thereof (European Court – plenary –, 13th June 1979, *Marckx v. Belgium*, no. 6833/74, § 63; 24th October 1986, *Agosi v. United Kingdom*, no. 9118/80, § 48). Thirdly and finally, defence rights may also be involved, which means having the benefit of the guarantees necessary to one's defence and therefore the right of access to the documents required for this purpose, including one's own.

In the case of prisoners, these rights need to be properly balanced with the requirements of security and proper order within penal institutions: thus with regard to correspondence (European Court, 12th June 2007, *Frérot v. France*, no. 70204/01, § 59) and defence rights (European Court, Grand Chamber, 9th October 2003, *Ezeh and Connors v. United Kingdom*, no. 39665/98 and no. 40086/98, § 131). However, such restrictions made to these rights cannot go beyond what is called for by the intended goal.

2/ The importance that, for a prisoner, is attached to the possession of certain personal written documents cannot be understood unless one is aware of the fact that, in prison, everybody is on the lookout for information concerning other people, about whom one wants to find out everything, beginning with the reasons for their imprisonment. The protection that needs to pertain to documents is not only intended to ensure the protection of privacy in general but also, in a concrete manner, protection from bodily harm and psychological duress, since the misplaced disclosure of personal data can lead to insults, threats and assaults, in particular on the part of fellow prisoners, applied to those whose personality is judged, for various different reasons, not to correspond to the standards imposed by "prison morality". Discovery by a third party of the offence committed by a prisoner, in an administrative file or notification of a ruling, can lead to great difficulties for the latter in their daily existence, as often ascertained by the general inspectorate. In other words, the need to ensure that personal documents are kept out of view in prison also frequently involves the fundamental right of prisoners not to suffer torture and inhuman or degrading treatment.

3/ It is therefore highly important for the protection of personal documents to receive special attention within penal institutions, in order to ensure respect for the abovementioned fundamental rights.

It needs to be possible to protect from the view of third parties, subject only to the controls mentioned under articles D. 269, D. 274 of the Code of Criminal Procedure (*Code de procédure pénale*) and article 32-II of the model of house rules and regulations appended to article R. 57-6-18 of the Code of Criminal Procedure[1], personal documents:

- concerning any offence that the person may have committed or acted as an accomplice to or concerning the presence of the person in prison (article 31 of the model of house rules and regulations[2]) and in particular those mentioning the reasons for their imprisonment;
- concerning any administrative or judicial proceedings, including documents written by and for lawyers, administrative authorities and courts, whether the person concerned be plaintiff, defendant or simple witness;
- concerning private and family life, whatever the form of the written document, and photographs mentioned under articles 24-I and II of the model of house rules and regulations [3];
- concerning the management of private property in prison and outside (invoices etc.);
- arising from the exercise of teaching, professional and cultural activities and activities within associations, prior to imprisonment, or from any activity exercised in prison, including the instrument of engagement mentioned under article 33 of the Prisons Act of 24th November 2009 and the documents required for work defined under article 718 of the Code of Criminal Procedure;
- concerning the person's state of health and the reimbursement of treatment under the health insurance system or social security benefits, whatever the origin of such documents;
- relating to the exercise of spiritual assistance of which prisoners may have the benefit;
- written by the person concerned with a view to exercising an activity within the institution or solely for their own needs (diary, exercises, statements of facts etc.).

However, the prisons administration needs to have access to the documents that it requires in order to identify the person and make up their criminal case file and the files provided for under articles D. 155 and D. 156 of the Code of Criminal Procedure; as well as to the documents that it has to file at the property office (store) in accordance with current rules.

4/ The legislature has recently become aware of the importance of this protection. Article 42 of the Prisons Act of 24th November 2009, which mentions the "right to confidentiality" with regard to prisoners' personal documents, establishes a two-tiered system for the latter.

On the one hand, documents mentioning the grounds for committal must be filed at the registry, regardless of the prisoners' wishes in this respect. The latter cannot therefore avoid this obligation.

On the other hand, other personal documents can be handed over to the registry at the discretion of the person concerned. If they do not wish to entrust them to the registry, it is possible for prisoners to keep such documents in their cells.

[1] Former article D. 431 of the Code of Criminal Procedure (*Code de procédure pénale*).
[2] Former article D. 429 of the Code of Criminal Procedure.
[3] Former article D. 420 of the Code of Criminal Procedure.

This system was specified by articles R. 57-6-1 to R. 57-6-4 of the Code of Criminal Procedure, which provides for the optional filing of personal documents in sealed envelopes at the registry and sets out a procedure for the consultation of documents mentioning grounds of committal (though not of other documents that may have been entrusted to the registry) by prisoners; as well as by the ministerial circular of 9th June 2011.

5/ This system is unsatisfactory insofar as it does not guarantee the application of fundamental rights, by virtue of both the principles on which it is based and the practices that it implements. It therefore needs to be clarified and amended to this end.

Firstly, as far as documents mentioning grounds for committal filed at the registry are concerned, prisoners are, in principle, aware of their content, having at one time or another been notified thereof. However, in the first place, the latter cannot themselves easily gain access to these documents, since they have to apply to go to the registry in order to consult them, which is dependent on the (uncertain) rapidity and effectiveness of movement within the prison. In the second place, the registry may be unavailable, due to the activities of the officers and the uses made of the premises, and of the consultation room in particular. In the third place, they cannot obtain copies thereof for themselves, the administration considering this right to be prohibited by article 42 of the Act. Finally, more generally speaking, access to criminal case files may pose difficulties: either because, due to lack of staff, the documents constituting such files have not been properly gathered together; or because the administration wants to separate documents that can be disclosed from those that cannot before consultation by the prisoner, without having the time necessary for this task at its disposal (documents of judicial origin can only be made available for discovery and inspection by the courts – article D.77 of the Code of Criminal Procedure); or because the transformation of the file from physical to IT media (on digital "CD") poses difficulties of implementation or consultation; or finally because copies of documents required by the prisoner from the criminal case file, which can be made available for inspection and discovery, cannot be made within the procedural deadlines. As a result of these uncertainties, in a great many cases the persons concerned may have good reason to consider that they do not have the means at their disposal in order to prepare their defence in case of appeal to a higher court or to the final court of appeal.

Secondly, as far as personal documents voluntarily filed at the registry are concerned, they have to be taken there in a sealed envelope (which presupposes the availability of envelopes), the latter being opened for checks before being placed in the prisoner's file by the head of the registry. However, in the first place, practices are far from guaranteeing this process; in the second place, confidentiality of the prisoner's file is in no way ensured; in the third place, access to the registry is dependent upon authorisation for movement, which may or may not be granted; finally, and above all, although applications for copies of these documents are indeed authorised (as long as they are financed by the prisoner), the fact that they can often be made in front of or through the agency of a member of staff stands in the way of any confidentiality.

The general inspectorate has observed cases and collected numerous testimonies of this kind, from prisoners as well as from prison staff, in particular those assigned to the registries of institutions, who told of their difficulties in the application of article 42. The Act was intended to create protection for prisoners, in a traditional context in which all of the latters' actions are supposed to be open to scrutiny. However, paradoxically, this protection backfires on its beneficiaries, who see it as another manner of preventing them from having the documents that they require freely at their disposal, and a reinforcement of the prisons administration's suspicion in their regard.

6/ Nevertheless, there is no question of returning to the previous state of affairs, that is to say the depositing of confidential documents in the cell of the person concerned without any protection.

On the one hand, as far as grounds for committal are concerned, this approach, in common moreover with that taken under the current article 42, does not deal with information that members of staff could take from prison IT files (in which these grounds are included) and, for various different reasons, disseminate to fellow prisoners, in disregard of article 10 of the Code of Ethics applicable to them (decree [*décret*] of 30th December 2010).

On the other hand, searches of cells (article D. 269 of the Code of Criminal Procedure), conducted in the absence of the occupant or occupants, invariably lead to the reading or seizure of personal documents, whether or not protected by law or regulations (letters from lawyers, the general inspectorate etc.). In various different situations, fellow prisoners can also gain unwarranted access to such documents.

The current system therefore needs to be reviewed as far as the keeping of personal documents is concerned, from the double point of view of possession, on the one hand, and of making them available for discovery and inspection, on the other hand.

7/ All prisoners should be able to choose between keeping the personal documents that they have in their possession in their cells, to the exclusion of course of those prohibited in prison (identity papers, French national health care electronic insurance card (*Carte Vitale*) etc.), or of entrusting them to the registry of the institution, including documents mentioning grounds for committal. These documents cannot be subject to any checks, except when entering or leaving the institution, within the framework of current provisions.

8/ It is incumbent upon the prisons administration to ensure respect for the personal nature of documents, subject to the necessary checks, whether in cells or in the registry.

To this end:

- every prisoner should be able to obtain the accessories enabling protection of confidentiality (sealable envelopes, adhesive tape, ad hoc labels etc.) whether in prison shops or by the intermediary of visiting rooms, as well as in the form of free distribution for those unable to gain access thereto due to lack of adequate resources;
- all cells should be equipped with a number of small metal lockers corresponding to the number of occupants, in proper condition and locking with a key or a padlock placed at the prisoner's disposal; model lockers of this kind have already been designed and trialled; they should be brought into general use;
- documents found in these lockers, at the time of searches, should only be able to be examined, in the prisoner's presence, by officers or graded officers specially appointed by written note from the head of the institution (building head), for the sole purpose of verifying that no prohibited property or substance is concealed inside these documents, to the exclusion of any examination, and a fortiori any reading, of the documents themselves: the second paragraph of article 19-V of the model of house rules and regulations[4], which is clearly contrary to the principle set out under article 42 of the Prisons Act, should be rescinded; only documents sent outside of the institution or received from the exterior can be read and controlled under the conditions provided for under article 40 of the Prisons Act;

[4] Former article D. 444-1 of the Code of Criminal Procedure.

- in any case, no personal document, whether or not placed in the lockers, can be destroyed at the time of inspections and searches of cells.

9/ The documents that each prisoner entrusts to the registry should be placed in an individual, closed storage space, apart from individual administrative files of persons placed in custody and files made up of the documents passed on to the penal institution pursuant to the Code of Criminal Procedure; all documents belonging to a given person are separated in a sealed file, after the head of the registry, the sole person to whom access to the storage space is authorised, has been able to verify the contents of the document envelope in order to ensure that it does not conceal prohibited items or substances. It should be possible for the owners of documents to obtain or bring to an end this filing in the registry, at any time, by simple expression of their will.

10/ Each prisoner should be able to have access to personal documents of which they are the owner, as well as to documents concerning them, when they so desire.

However, it needs to be understood that personal documents entrusted to the registry should be regarded as property, to which the protection of the 1st article of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms is attached, access thereto therefore constituting a right, including for persons placed under the closed regime, in solitary confinement or in punishment cells, within registry opening hours.

Both consultation and copying of these documents (at cost price and at the prisoner's expense) should guarantee confidentiality, that is to say the impossibility of third parties gaining access to their content. The passing on of such documents and the issuing of copies thereof to the person concerned cannot give rise to any controls. All provisions should be made in order to ensure that consultation and copying take place without any third party being present. A reproduction tool should be provided for this purpose. The same provisions should apply to copies of personal documents not entrusted to the registry.

11/ Prisoners can gain access to non-personal documents of an administrative nature under the terms and according to the conditions determined by the Act of 17th July 1978 and, in cases presenting the character of data processing of a personal nature and in the absence of any provision to the contrary, in accordance with the provisions of articles 39, 40 and 41 of the Act of 6th January 1978 concerning data processing, data files and individual liberties. The application of these laws cannot be opposed by any specific decision. Such access shall take place within reasonable time, in an integral manner (subject to the legal precautions concerning personal documents) and can be freely used by the prisoner. Moreover, it is recalled that correspondence sent to or received from the president of the *Commission d'accès aux documents administratifs* [independent government agency with the role of facilitating and ensuring proper access to administrative documents] cannot be controlled (I - 9° of article D. 262 of the Code of Criminal Procedure).

Similarly, disclosure by staff to third parties of personal information contained in data handled concerning prisoners, whether or not in IT form, is prohibited, as provided for under article 34 of the Act of 6th January 1978 as well as by the aforementioned Code of Ethics. It is incumbent upon the administration in charge of handling such information to take the necessary measures in order to ensure compliance with this prohibition, disregard of which is punishable under articles 226-17 and 226-22 of the Penal Code (*Code pénal*).

All of the provisions of article L. 1111-7 of the Public Health Code (*Code de la santé publique*), concerning the disclosure of data of a medical nature, also apply to prisoners, including those regarding action on the part of third parties.

12/ Prisoners are entitled to have access to the rules applicable to them, in accordance with the provisions of article 2 of the Act of 12th April 2000. Such access applies not only to the specific rules of each institution, but also to national rules, whether issued by Parliament, the Government or the Minister of Justice. Exceptions can only be made thereto in the case of the documents mentioned under d) 2° of article 6 of the Act of 17th July 1978, that is to say documents whose disclosure is liable to prejudice security and proper order within the institution. Accordingly, a regularly updated compendium of documents of this character (including public circulars issued by the prisons administration) should be kept in each institution and placed at the disposal of persons placed in custody who so request, without any formalities, distinction or waiting time.

13/ The registries of courts of competent jurisdiction need to be organised in order ensure the diligent handling of applications sent to them by prisoners for the discovery and inspection of documents to which the latter can have access by decision of a member of the national legal service. When the original or a copy of the requested document is found within the penal institution, instructions may be issued to the registry of the latter to disclose them according to the procedures provided for above.

14/ Implementation of the rules recalled above, and in particular amendment of article 42 of the Prisons Act and revocation of paragraph 2 of article 19-V of the model of house rules and regulations, constitutes the only suitable means of ensuring respect for prisoners' fundamental rights in the field of written documents, as enumerated under section 1 of this opinion.

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