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Do prisoners have the right to create a family?

A comparative approach of the prisoners' access to assisted reproduction in the United Kingdom, France and Belgium

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Can everyone create their own family whether naturally or via medical techniques? That's the question we are asking when exploring access to assisted reproduction for prisoners. The World Health Organisation states that around 48 million couples and 186 million people are impacted by infertility in the world.¹ The opening of assisted reproduction to same sex couples and single women in many European countries makes it a very central and valuable technology for many families bearing in mind that it is even more complicated to conceive for detainees than for the rest of the population due to imprisonment.² Considering imprisonment strips detainees from their legal rights, it should not deprive them from their right to maintain family links and, by extension, their right to create a family. Hence, we have to envisage the possibility for detainees to access assisted reproduction as well as the rest of the general population.

Methodology of the research.

This article is the result of a research in Comparative Prison Law and penal policies that I conducted in the *Université libre de Bruxelles* as part of a project funded by the Fonds de la Recherche Scientifique and coordinated by Professor Damien Scalia.³ We studied the academic literature on assisted reproduction and the very little policy guidance which exist in the three countries (France, Belgium and the UK) on the specific topic of access to assisted reproduction by prisoners.

We aimed to collect empirical data in order to understand how the lack of written norms would impact the practical access to these technologies by detainees. Unfortunately, we encountered many difficulties. Indeed, most of the interviewees had nothing to say on that matter and were not even aware that detainees were allowed to access assisted reproduction. Moreover, we struggled to be granted access to conduct our research in prison in the three studied countries. Thankfully, we were able to access complaints to the French National Preventive Mechanism (NPM), the *Contrôleur général des lieux de privation de liberté*, which helped us to understand better the difficulties prisoners were facing. We also interviewed two prison governors, one *juge de l'application des peines*⁴ and one Criminal Lawyer in France. As for Belgium, we interviewed three organisations working in the prison field, four probation services and one prosecutor in the Brussels region. We managed to get information directly from interviewing staff at hospitals and clinics (only two hospitals in Brussels replied to us, unfortunately providing no conclusive answers). We were not granted access to English and Welsh prison governors and directors. However, we received helpful answers from the Human

¹ WHO, *facts sheet*, <https://www.who.int/news-room/fact-sheets/detail/infertility>

² For example, in December 2021, there were 75 881 male prisoners and 3211 female prisoners in England & Wales: Ministry of Justice, *Prisons data*, <https://data.justice.gov.uk/prisons>. At the same time, on the 1st of December 2021, there were 67 759 male prisoners and 2233 female prisoners in France: Ministère de la justice, *statistiques pénales de la population écrouée*, <http://www.justice.gouv.fr/prison-et-reinsertion-10036/les-chiffres-clefs-10041/statistiques-mensuelles-de-la-population-detenu-e-et-ecrouee-22209.html>.

³ The research project is called "Building a family across imprisonment" and it focused on the Law of union and filiation in prisons in France, Belgium and the United Kingdom. This research started in April 2021 and will end in April 2023.

⁴ The *juge de l'application des peines* is the magistrate in charge of the sentencing pathway of a sentenced individual in France.

Fertilisation and Embryology Authority, which is the competent authority in the field of assisted reproduction in the UK. Notwithstanding those tremendous barriers, this article will attempt to provide insights into the obstacles that detainees face when wanting recourse to assisted reproduction.

The Law of assisted reproduction in France, Belgium and the United Kingdom.

According to Article L. 2141-1 of the French *Code de la Santé publique*, "medically assisted procreation refers to clinical and biological practices allowing in vitro conception, conservation of gametes, germ tissue and embryos, embryo transfer and artificial insemination". This is also the definition which is given in Section 1 of the *Human Fertilisation and Embryology Acts (HFA) 1990 and 2008* to be applied in the UK and in article 2(a) of Belgian *Loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes*.

The new Article L. 2141-2-11 of *Code de la santé publique* recently opened up the scope of assisted reproduction to single women and same sex female couples. As for Belgium, Article 4§1 of the *Loi du 6 juillet 2007* enables any woman below 45 years of age to recourse to in vitro fertilisation (embryos implantation or gametes insemination). As for the UK, single women can have recourse to intrauterine insemination (also known as artificial insemination) and any couple is able to recourse to infertility treatment.⁵ These medical processes are generally lengthy and require constant medical monitoring. It is therefore not entirely unreasonable to imagine that a detainee on remand, who has started an assisted reproductive process with their partner prior to their imprisonment, would wish to continue it during their time in custody. Similarly, a detainee serving a sentence might wish to start this medical process during their time in jail, whether or not they have a partner or if their partner is also detained. Hence, this matter deserves consideration.

Research question and outline of the article.

Studies have already been conducted on the inequality for certain marginalised people to access fertility treatments. For example, Michelle Weldon-Johns applied Schiek's intersectional approach of Discrimination Law around the three nodes of "Race, Gender and Disability" when examining the access to assisted reproduction.⁶ According to Weldon-Johns, single women, people with special needs or ethnic and religious minorities seem to encounter various discriminations when accessing assisted reproduction techniques.⁷ This is also the case for people who are imprisoned. Exploring the access of assisted reproduction technologies by detainees enables us to examine the gap between the common principles of Family Law and their application to the prison environment. Moreover, opening assisted reproduction technologies to detainees raises an ethical question in light of its moral concern: can a detainee have the right to found a family? While the existence of this right has been ambiguously recognised by the European Court of Human Rights (I), its respect in domestic law meets numerous legal, financial, and material obstacles rendering it almost impossible (II). In light of the prisoners' frequent stigma as "bad parents",⁸ our research aims to question the extent of State intervention in the private lives of marginalised populations (III).

⁵ Section 42, *HFA*, 2008.

⁶ Weldon-Johns M. (2020). *Assisted Reproduction, Discrimination, And The Law*. Routledge, Coll. Routledge Focus; Schiek D., & Lawson A. (2011). *European Union Non-discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, (eds), Routledge; Schiek D. (2016). Intersectionality and the Notion of Disability in EU Discrimination Law, *CML Rev*, 53, 35-63.

⁷ See footnote 6.

⁸ Amado A., *op. cit.*, 2020, §598 and subs; Touraut C., *La famille à l'épreuve de la prison*, PUF, Coll. Le lien social, 2012; Cardi C., « Le féminin maternel ou la question du traitement pénal des femmes », *Pouvoirs*, 2009/1 (n° 128), pp. 75-86. ; Ricordeau G., *Les détenus et leurs proches, Solidarités et sentiments à l'ombre des murs*,

I. Questioning the prisoners' right to create a family

The loose protection of Article 8 of the ECHR. Article 8 of the ECHR protects the private and family life of all persons, whether or not they are detained.⁹ Imposing a double obligation on Member States, the authorities must not only ensure that the prisoners' family life is respected, but must also refrain themselves from interfering in it.¹⁰ Maintaining the detainees' family ties is also part of the scope of Article 8 of the ECHR, which explains that public authorities must protect the relationship that prisoners have with their children.¹¹

In the Grand Chamber case *Dickson v. United Kingdom* (4th of December 2007), the ECHR found the UK in breach of Article 8 for not allowing a detainee to recourse to assisted reproduction¹². In this case, one of the applicants was a detainee who had been denied access to assisted reproduction for which he claimed a breach of Article 8 and Article 12 of the ECHR. As sexual intercourse is prohibited in prison in the UK, unsupervised visits are not permitted.¹³ Given the length of his prison sentence and his wife's advanced age, the applicant alleged that they would be unable to start a family other than by means of assisted procreation. This application was refused on the grounds that the absence of a parent for a long period of time would have a negative impact on the child, as the best interests of the unborn child was at stake. The Grand Chamber of the ECHR found the UK in breach of Article 8. While the Strasbourg judges recognised that the prohibition of unsupervised visits in prison should be left at the Member states' discretion,¹⁴ they affirmed that this prohibition could not be such as to prevent a person from founding a family. If the interest of the child was the very object of the balancing exercise when measuring the interference with Article 8, it could not be used to deprive people of their right to procreate - especially as the second applicant was not imprisoned and could take care of the child alone while awaiting the end of her husband's prison sentence.¹⁵

At first, this case seems to reinforce prisoners' right to access assisted procreation under the scope of Article 8. However, on closer look, does this case really offer prisoners the right to found a family? Considering the very specific circumstances of the case, it is not possible to assert the existence of such a European right. Would this case apply to France, where prison rules allow prisoners to see their

Autrement, Coll. Mutations, 2008 ; Cardi C., « La “ mauvaise mère ” : figure féminine du danger », *Mouvements*, 2007/1 (n°49), pp. 27-37 ; Hannah-Moffat K., « Gendering Dynamic Risk : Assessing and Managing the Maternal Identities of Women Prisoners », in Hannah-Moffat K. et O'Malley P. (eds.), *Gendered Risks*, Londres, Glasshouse Press, 2007, pp. 229-247.

⁹ Concerning the guarantees of Article 8 of the ECHR on the prisoners' private and family life, cf. *Messina v. Italy*, 28th of September 2000, n° 25498/94; *Lavents v. Latvia*, 28th of November 2002, n° 58442/00; *Nowicka v. Poland*, 3rd of December 2002, n°30218/96. Amado A., *L'enfant en detention en France et en Angleterre, Contribution à l'élaboration d'un cadre juridique pour les enfants accompagnant leur mère en prison*, Coll. Bibliothèque des thèses, Mare et Martin, 2020, §81 and following; Simon A., *Les atteintes à l'intégrité des personnes détenues imputables à l'État*, Dalloz, Coll. Bibliothèque de la Justice, 2015, §23; Belda B., *Les droits de l'homme des personnes privées de liberté*, Bruylant, 2010, §52 and 53.

¹⁰ *Marckx c/ Belgique*, 13th of June 1979, n°6333/74.

¹¹ *Messina v. Italy*, 28th of September 2000, *op.cit.*; *Lavents v. Latvia*, 28th of November 2002, *op.cit.*; *Nowicka v. Poland*, 3rd of December 2002, *op.cit.*

¹² *Dickson v. United Kingdom*, Gd ch. 4th of December 2007, req. n° 44362/04, D., 2008, p. 1435, chron. J.-C. Galloux et H. Gaumont-Pratet ; RSC, 2007, p. 350, obs. P. Poncela ; AJ Pénal, 2008, p.47, obs. Herzog-Evans M.. Mulligan A., « Reproductive rights under article 8: the right to respect for the decision to become or not to become a parent », *The European Human Rights Law Review*, n°4, 2014, pp. 378-387.

¹³ Stevens A. (2017) « Sexual Activity in British Men's Prisons: A Culture of Denial », *The British Journal of Criminology*, pp. 1-27; Stevens A. (2015) « Sex in Prison: Experiences of Former Prisoners », *Report by the Commission on Sex in Prison*; The Howard League for Penal Reform. (2014) « Women in Prison: Coercive and Consensual Sex », *A Briefing Paper by Commission on Sex in Prison*; Banbury S. (2004) « Coercive Sexual Behaviour in British Prisons as Reported by Adult Ex-Prisoners », *Howard Journal of Criminal Justice*, n°43(2), pp. 113-30.

¹⁴ *Dickson v. United Kingdom* (2007), §81.

¹⁵ *Dickson v. United Kingdom* (2007), §76.

relatives in unsupervised visits? In the *Dickson* case, the applicants did not allege any infertility or serious genetic diseases. They were questioning the very impossibility, under English law, to start a family while serving a long sentence in prison without being eligible to release on temporary licence. Indeed, the Strasbourg judges made very clear that the refusal to authorise assisted procreation had to be assessed in the light of the lack of unsupervised visits. Consequently, this case does not confer to prisoners an absolute right to create a family under Article 8 of the ECHR.

II. Assessing the prisoners' access to assisted reproduction

A. Legal obstacles

The mediocre penitentiary health system – Belgium. As far as Belgium is concerned, the healthcare system in prison is still a penitentiary system independent from the national one for the rest of the population.¹⁶ Practically, this means that detainees are being treated differently to the rest of the people, with different means and separate doctors. As a result, detainees face a clear discrimination compared to other citizens since their medical treatments are extremely poor, mediocre and inadequate, even for daily basic health emergencies.¹⁷ Therefore, when I interviewed members of the Prison Service (Direction Générale des établissements pénitentiaires), organisations and probation officers (services d'aide aux justiciables), most of them had never heard of a female or male detainee trying to access assisted reproduction in prison. The only case that one organisation had seen was where a female detainee wanted to freeze her eggs during her sentence so to preserve her fertility. However, she confided to members of the organisation that she was feeling very lost about this wish as she had nobody to turn to or enquire about it with. The organisation had managed to facilitate an appointment with a gynaecologist but were unsure about the outcome. Indeed, it was interesting to observe that most interviewees were very surprised, if not shocked, by our questions as they explained the healthcare system was so poor that it was already tremendously difficult for detainees to get basic treatment for their health conditions, let alone for non-emergency procedures. In that case, it seems that access to assisted reproduction is very far from being possible for prisoners, leaving them unable to exercise their civil right to found a family.

The lack of information in France. In France, there exist no specific protocols like for HM Prison and Probation Service (HMPPS). This makes it very difficult for detainees to understand the process to access assisted reproduction. The NPM have received six complaints since 2011, some of which were requesting information. According to Article L. 2142-1 of *Code de la santé publique*, "biological activities for assisted procreation may only be carried out in accredited medical biology laboratories". As a result, these activities cannot be accessed within prisons, although an ambulatory care consultation unit is part of each prison. No specific prison rule or protocol has been enacted on that subject, which leaves no choice but to apply the rules on exceptional authorisations to leave and medical extractions. Aside from prisoners eligible for temporary release, which may also be left at the discretion of judges,¹⁸ individuals may be able to access assisted reproduction, whether on remand or

¹⁶ Article 87 and seq. of the *Loi de Principe du 12 janvier 2005* confirmed that the prisoners' healthcare had to be equivalent to the rest of the population. Hence they were entitled to public healthcare. However, the law never came into force due to a lack of public budget. Federaal Kenniscentrum voor de Gezondheidszorg - Centre Fédéral d'Expertise des Soins de Santé (KCE), « Le KCE propose des pistes de réforme pour améliorer les soins de santé en prison », *communiqué de presse*, <https://feditobxl.be/fr/2017/10/kce-propose-pistes-de-reforme-ameliorer-soins-de-sante-prison-kce/>

¹⁷ Thézé D., Saliez V. (2021) « L'urgence d'agir pour la santé des personnes détenues, constats et recommandations », *report*, I.care, mars, available online : [COMMUNICATION - OneDrive \(sharepoint.com\)](https://www.sharepoint.com/COMMUNICATION)

¹⁸ Art. D. 142-1 et seq. of the Code de procédure pénale. Bonis-Garçon E., Peltier V., *Droit de la peine*, Lexisnexis, 3rd edition, 2019, §1313-1314.

convicted, through two mechanisms: escorted authorisation to leave (*autorisation de sortie sous escorte*) or medical extraction.

B. Material obstacles

The complicated regime of exceptional escorts in France. Accused individuals are not authorised to leave the prison while on remand except in the event of a medical extraction or after having obtained an escorted authorisation to leave. Provided for in Articles 148-5 and 723-6 of the Code de procédure pénale, an escorted authorisation to leave is defined as a special and exceptional authorisation, issued by the competent authority, to allow individuals to attend a particular event. Individuals are then escorted by prison staff or police staff to the dedicated place. Although the grounds for issuing an escorted authorisation to leave permit had never been defined, the *Chambre de l'application des peines* stated that only "a seriously ill or deceased relative" constitutes a reasonable motive.¹⁹ It would therefore seem that assisted reproduction would not be included in this case law.

With regards to medical extractions which are open to remand and convicted prisoners, it could encompass sperm donation or in vitro fertilisation. Medical extraction is the transfer of a detainee to a health institution for a consultation, a medical examination that cannot be provided within the establishment, or a hospitalisation.²⁰ However, this measure must necessarily take place in the local public healthcare centre, which may render it very difficult if that particular centre does not carry out assisted reproduction techniques as provided for in Article L. 2142-1 of the *Code de la santé publique*.²¹ Will a sperm donation or an artificial insemination be considered as any of the above motives determined by Article D. 396 of the *Code de procédure pénale*?

Article L. 2141-10 of the *Code de la santé publique* specifies that applicants for assisted reproduction must first undergo several "specific interviews [...] with one or more doctors and other health professionals from the centre's multidisciplinary clinicobiological medical team". The process is very long and requires a substantial material investment on the part of the applicant. At the same time, medical extractions are extremely costly to the State as they require several police officers or prison guards and a specific vehicle for the entire time of the extraction. Prison medical extractions are also very difficult to match with the specificity of some medical techniques required, such as in vitro fecundation which requires hormonal treatments, ovaries stimulation and puncture based on the woman's cycle hence, meaning appointments often being changed at the last minute according that person's cycle. It is even more complicated considering that prisoners are normally never informed of their medical extraction prior to the day it happens, for security reasons to avoid any escape plan on their behalf. The interviews I conducted with lawyers, judges and the NPM lead me to understand that some people who attempted to access assisted reproduction from prison did not get authorised to be extracted on the basis that there were too many medical appointments involved.

C. Financial obstacles

Specific protocol to access fertility treatment in prison – UK. In HMPPS has a specific protocol to grant access to assisted reproduction techniques to prisoners.²² The enactment of a specific protocol indicates there to be an interest among the prison population to access assisted reproduction. It also enables the prison population to have better access to information via this specific protocol, in contrast to the French and Belgian systems which do not have such facilitated access to information. However,

¹⁹ Chap. Paris, 10 juillet 2017, n° 1704/190, *AJ pénal*, 2017, p. 454, obs. Herzog-Evans M..

²⁰ Art. D. 391 and ss. of the *Code de procédure pénale*.

²¹ Art. R. 6111-27 of the *Code de santé publique*.

²² *Prisoner Applications to Access Fertility Treatment Policy Statement*, available on the Freedom of expression request website, <https://www.whatdotheyknow.com/request/801152/response/1910980/attach/html/4/Policy%20Statement%20Prisoner%20Applications%20to%20Access%20Fertility%20Treatment%20March%202021.pdf.html>

difficulty still lies within the existing process. Indeed, it specifies that an application to access assisted reproduction must be made to HMPPS, who will evaluate it on a national level before deciding whether to approve it. It is hard to understand the criteria being used to evaluate such applications since there is no published information about them. However, we can already conclude that there is another level of complexity added to the generally lengthy and costly process for assisted reproduction techniques.

The impossible financial burden of fertility treatment – UK. The first condition set by HMPPS’ protocol states that all costs of the various techniques rest on the prisoner, as this is the case for the rest of the population. The National Health Service does not nationally cover the costs of the assisted reproduction techniques since local Clinical Commissioning Groups (CCGs) decide who is eligible to be funded for access, and who is not, across the UK.²³ Wales, as well as Northern Ireland and Scotland, make their own decisions regarding funding assisted reproduction.²⁴ Therefore, it could very well be that from one prison to another, depending on the detainees’ CCG, their artificial insemination or in vitro fertilisation may not be funded. One round of in vitro fertilisation costs around £5,000, aside from the hormonal treatments or the medical appointments, and people generally need to go through several attempts for it to be successful. Consequently, the cost of those techniques could amount to a tremendous amount of money for the detainee. In addition, the prisoner must also pay for staff resources (for example escort staff), transport (whether it be a prison vehicle or private hire vehicle) and, where applicable, a risk assessment of the hospital/fertility clinic.²⁵ Finally, fertility services are sometimes not provided to women aged 35 years or older, depending on the local CCG, which may render it even more impossible for some female detainees.²⁶ For those reasons, it seems hard to imagine that many detainees are able to access assisted reproduction in the UK.

III. Examining the social stigma of prisoners as future “bad parent”

The authorities’ discretion in prisoner’s ability to create a family. Whether it be for medical extraction or temporary release, the granting of such measure depends on the competent authority’s approval which very often will be shaped by moral and ethical subjective points of view about whether prisoners are “good parents”. In all three countries, approval also depends on the specifics of fertility services use - whether the English CCG’s assessment to allow funding of the technique, or the English, French and Belgian possibility for health institutions to refuse patients according to certain criteria. Some of the criteria involve the welfare of the child (including the need of that child to have supportive parenting) and of any other child who may be affected by the birth, as the Human Fertilisation & Embryology Authority make very clear.²⁷ Indeed, in Belgium, article 5 of the *Loi du 6 juillet 2007* affirms the fertility institutions’ clause of conscience in relation to allowing applicants to receive any kind of fertility services. Moreover, the hospitals and clinics I interviewed in Belgium explained that they would need to run an assessment of the incarcerated parent’s criminal background to determine if it could have an “incidence on their parenting ability” before allowing the application to proceed (“*une incidence sur leur parentalité*”). As for France, in addition to the aforementioned practical difficulties, the few complaints that have been made to the NPM indicate that hospitals and clinics may hide behind technical problems, to simply refuse to allow prisoners to start a fertility process, without trying to organise it in the first place. Others refuse to have handcuffed prisoners accompanied by police officers in front of other patients. In one case, a prisoner and their spouse could

²³ BPAS, *BPAS investigation into the IVF postcode lottery: an examination of CCG policy for the provision of fertility services report*, 2020, <https://www.bpas.org/media/3369/bpas-fertility-ivf-postcode-lottery-report.pdf>

²⁴ See footnote 23.

²⁵ Ministry of Justice, Disclosure team, *Freedom of Information Act (FOIA) Request on the access to fertility treatment for serving prisoners*, <https://prisons.org.uk/prisonerfertilityw.pdf>

²⁶ See footnote 23.

²⁷ In the UK, cf. Guidance Note 8 of the *HFEA Code of Practice*, pp. 99 – 103.

not get an unsupervised visit because there was too much demand for the number of unsupervised visit units. As they wished to conceive a child, they applied for the usage of an assisted reproduction technique which was refused by the fertility hospital doctor because the couple had to encounter fertility issues first, and to try for at least a year to conceive naturally, before applying for fertility services. Neither of the two conditions were satisfied by the couple. As for the *Dickson* case, this argument could be considered fallacious since prisoners are de facto in an unequal position compared to others when attempting to conceive naturally. Even though the law has changed since that specific doctor's answer (the infertility requirement no longer exists), one might conclude that authorities sometimes use legal arguments to mask ideological denials of Human rights. In an interview with a *juge d'application des peines* in France, we were explicitly told that she would never allow any prisoner temporary release for an assisted reproduction appointment in any circumstances on moral and ethical grounds.

Balancing the best interests of the unborn child and the prisoners' right to create a family? The reasons given in the ECHR's *Dickson* case already shed some light on the grounds on which such applications could be refused. In *Dickson v. United Kingdom* (2007), the English government justified its refusal to allow a prisoner access to assisted reproduction on the harmful effect that the parent's separation would have on the welfare of the unborn child. In response, the Strasbourg judges considered the welfare of the child to still be respected because one of the two parents would be physically present to take care of the them.²⁸ On the basis of this reasoning, the principle of the best interests of the unborn child could justify State interventionism in the family life of prisoners. It is even more surprising that one is dealing with a hypothesis of an unborn child since the child is yet to be conceived. State interventionism echoes the criminological theories according to which prisoners, and particularly female detainees, are stigmatised as 'bad parents'.²⁹ As a possible drift in the interpretation of this principle by judges, the best interests of the child could be diverted from its original meaning to control the births of marginalised groups of people, such as detainees.

²⁸ *Dickson v. United Kingdom* (2007), §76.

²⁹ Cardi C., *op.cit.*, 2009; Codd H., *In the Shadow of Prison, Families, Imprisonment and Criminal Justice*, Oxon, Routledge, 2008, p. 131; Hannah-Moffat K., *op.cit.*, 2007; Cardi C., *op.cit.*, 2007; Rostaing C., (1997). *La relation carcérale : Identités et rapports sociaux dans les prisons de femmes*, PUF, Coll. Le lien social; Carlen P., (1983). *Women's Imprisonment, A study in social control*. Routledge and Kegan, p. 155.