Belgian Advisory Committee on Bioethics

Opinion no. 46 of 19 January 2009 on infertility treatment on the request of a prisoner

Request for an opinion of 18.07.2005,
from Laurette Onkelinx, Minister of Justice

Content of the opinion

Question put to committee

On 18.07.2005, the Committee was sent a request for an opinion from Mrs L. Onkelinx, Minister of Justice, worded as follows:

"Prison medical services sometimes receive requests from prisoners faced with fertility problems.
The question then arises of determining the extent to which prison doctors collaborate within the framework of infertility treatment, the reversal of a sterilisation procedure and medically assisted procreation in prisoners and more specifically in those who have been given a long prison sentence.

Until recently, the point of view was taken that the task of the prison medical services was limited to dispensing medical treatment and to contributing to prevention in terms of health, sanitary protection and the reintegration of prisoners, based on their medical needs and not on their wishes. Requests which do not fall into these treatment categories - infertility treatment, for example - were refused.

Since the approval of the Belgian Prisons Act of 12 January 2005, it is fitting to adopt another approach in respect of these requests. The equivalence of medical care dispensed intra-muros and extra-muros, expressly provided in Article 88 of the Belgian Prisons Act, must be used as a guideline.

Consequently, the treatments available in free society must also, in principle, be able to be offered during time in prison depending on the specific needs of the prisoners.

Even more than doctors working in the prison environment, the prison medical services need guidelines likely to constitute a useful frame of reference for examining such requests. Indeed, they must also take account of specific criteria such as the context of imprisonment, the length of sentence, the possibility of receiving conjugal visits, prison leave, as well as the fact that prisoners cannot freely choose their doctor. Furthermore, medical treatment given during prison sentences is, in principle, free for prisoners.

The report attached, rendered anonymous, illustrates the delicate and complex nature of some requests.

Consequently, I would like to receive the opinion of the Committee on the question of knowing whether and to what extent prison doctors can collaborate in requests from prisoners aiming to benefit from treatment against sterility, particularly fertility treatments, the reversal of a sterilisation procedure and medically assisted procreation during their prison sentence. ".

The Belgian Advisory Committee on Bioethics has decided to take this request into consideration and has entrusted the 2006/1 commission with a more general consideration of the ethical questions raised by *infertility treatment on the request of a prisoner.*

CHAPTER I. Introduction and content of the opinion

The anonymised medical file of the particular case mentioned in the letter from the Minister can be summarised as follows. The request came from an imprisoned couple who got to know each other in prison during a transfer from the court, got married and enjoyed "conjugal visits". The wife requested in vitro fertilisation, given that her husband's sperm was unsuitable for fertilisation according to the medical examinations carried out. The man had been given a 15-year sentence. Being a repeat offender, he could only claim release on parole after 2/3 of his sentence. For her part, the woman had been given a 25-year sentence. As she had never been convicted before, she could be released after 1/3 of the sentence, i.e. almost three years after the IVF request.

Pursuant to the Belgian Prisons Act of 12 January 2005 on prison administration and the legal status of prisoners[1] (called the "Prisons Act" or the "loi Dupont"), the child has to leave prison at three years of age[2]. This age limit could have corresponded, in this specific case, to the remaining period before the provisional release of the child's mother.

During its works, the Committee also received, for information, two other files from the senior civil servant of the[3] Prison Health Service, who was added as an expert. In both cases, these were requests for de-sterilisation from female prisoners, submitted for the assessment of this senior civil servant. .

The first was a case of a woman sentenced to 20 years in prison for a crime of passion. Aged 42, she had already done 14 years of her sentence. After the birth of a son, this woman underwent forced sterilisation at the age of 20 upon the initiative of her mother and her uncle. A victim of mistreatment by her (ex-) husband, she would have suffered psychiatric problems related, according to her, to this mistreatment. She met her partner, also a prisoner, in prison. She requested de-sterilisation. The second was a case of a female prisoner whose husband was also a prisoner for murders committed with her on the person of their children. She was sterilised, divorced, then remarried another prisoner after 6 months of relations by correspondence. She wished to become fertile again.

Given that the mission of the Committee is not to rule on individual cases, it has decided to treat the problem in general and the term "infertility treatments" covers all requests for medical treatment (medically assisted procreation, reversal of sterilisation (fallopian tube reanastomosis for women or vasovasostomy for men) whose ultimate aim is, in any event, in the longer or shorter term, to give the possibility of giving birth to a child.

In Chapter II (Legal framework) the Committee has decided to start with a reminder of the European Recommendations (2.1.) combined with a case dealt with by the European Court of Human Rights (case of Dickson v. United Kingdom, 2.2). It then presents the recent Belgian

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[1] Belgian Prisons Act of 12 January 2005 on prison administration and the legal status of prisoners (Belgian Official Gazette 1 February 2005), such as amended by the Belgian Law of 23 December 2005 presenting miscellaneous provisions (Belgian Official Gazette 30 December 2005) and by the Belgian Law of 20 July 2006 presenting miscellaneous provisions (Belgian Official Gazette 28 July 2006, Ed. 2). This opinion will make reference to this Law using the following title "Belgian Prisons Acts of 12 January 2005" or more simply "Prisons Act".

[2] See Art. 15.2.3 of the Prisons Act.

[3] Dr Francis Van Mol, General Medicine Consultant at the Prison Health Service of the Directorate General of Prisons, Federal Public Service for Justice.

legislation (2.3.) in terms of the prison administration and the legal status of prisoners. It more specifically underlines the principles applicable in terms of healthcare as they may come into play for requests for the medical treatment of fertility problems. The Committee also mentions the rules in force in our country concerning conjugal visits, the birth and accommodation of children in a Belgian prison environment. Point 2.4 deals with the rights of the child - international conventions and Belgian regulations - which prevail in the case of children living with their imprisoned parent.

Chapter III deals with the Belgian prison environment, i.e. practices in force in Belgian prisons in terms of healthcare (3.1. & 3.2.), the code of medical ethics (3.3.), the psychosocial treatment of prisoners (3.4.), conjugal visits (3.5.), pregnancy in prison and childbirth (3.6.) and finally actual conditions of accommodating mothers with infants in Belgian prisons as well as certain alternative means of accommodation found in other European countries (3.7.).

Chapter IV starts with posing the problem such as it has been considered by the members; in this framework, three points of consideration emerge from the different facets of the ethical debate: the first develops the meaning of the ethical principle of equivalent (4.2.), the second deals with the interests of imprisoned intentional parents in respect of access to healthcare, medically assisted procreation or not, the parental plan, etc. (4.3.) and the third looks at the interests of the child who, in some cases, has to be born and stay in prison (4.4.).

Chapter V summarises the main points of the problems raised by the question of the Minister of Justice and explains more distinctly the positions of the members enhanced, this time, by the different aspects covered in the ethical debate. Although different and qualified, the opinions of the members are divided between two tendencies, one in principle unfavourable to *intra-muros* procreation in the name of the best interests of the child, the other in principle favourable, in the name of the principle of equivalence of healthcare, to procreation in prison *but* with conditions and depending on an analysis of the requests on a case by case basis. The arguments of both tendencies are accompanied by recommendations.

CHAPTER II. Legal framework

2.1. Recommendations of the Council of Europe

The Council of Europe has asked Member States to take account, when revising their legislation and in their practice in the domain of healthcare in a prison environment, of the recommendations it gives. We should cite Recommendation R(87)3 of the Committee of Ministers on the European Prison Rules, which help to guarantee minimum standards of humanity and dignity in prisons, updated by Recommendation Rec (2006)2[4]; Recommendation R(98)7 concerning the ethical and organisational aspects of healthcare in prison; Recommendation 1340(1997) on the social and family effects of detention and Recommendation 1469(2000) on Mothers and Babies in Prison, adopted by the Parliamentary Assembly respectively on 22 September 1997 and 30 June 2000. These recommendations take account of the principles contained in the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 8: Right to respect for private and family life and Art. 12 - Right to marry), as well as those contained in the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

These international acts, as well as case law of the European Court of Human Rights have inspired the Belgian legislator.

Recommendation Rec (2006)2 recalls that in respect of the execution of deprivation of liberty sentences and the treatment of prisoners, the "requirements of safety, security and discipline" must be combined with guarantees as to prison conditions. Not only must these not infringe human dignity, but they must also *"offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their reintegration into society"*.

Of the many fundamental principles which may be of interest to the problem, we will mention: "*Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody*" (Part I.2), "*Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed*" (Part I.3), "*Life in prison shall approximate as closely as possible the positive aspects of life in the community*" (Part I.5), "*All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty*" (Part I.6).

2.1.1. Health

These fundamental principles explained above inspire the recommendations of Part III, which concerns health. From the organisation standpoint, it is the principle of equivalence between healthcare in prison and healthcare in free society which prevails: integration and compatibility of the healthcare policy in prisons with the national public health policy (40.2), access to healthcare services offered in the country without any restriction based on the legal status of the prisoner (40.3), accessibility to the medical, surgical and psychiatric care required, including those available in free society (40.5).

The duties of the prison doctor are for their part mainly focused on providing curative

[4] adopted by the Committee of Ministers on 11 January 2006, during the 952nd meeting of the Ministers' Deputies.

treatment, necessary for the protection of the physical and mental health of prisoners taken individually and collectively (identification of the problems, supervision, inspection of sanitary conditions, etc.). His or her mission is to provide for the medical needs of prisoners, taking account of the specificity of the prison situation (42, 43, 44, 45).

As for the administering of treatment, it is recommended that prisoners are transferred to specialised institutions or civilian hospitals, when such treatment is not available in prison (46).

In terms of health, the text therefore recommends aligning healthcare needs in prison with those provided and "available" in free society ("without any restriction"). From this point of view, nothing is opposed in principle to infertility treatment being made available for prisoners, even if these treatments are only applied outside the prison. Concerning this last point, the commentary recommends incidentally *"close relations between the prison and the medical services of civilian society"*. The commentary of Part III of Rec(2006)2 of the Committee of Ministers to the Member States on the European Prison Rules stresses the need "*to create conditions which favour the well-being of inmates*"[5], and goes even further by stating that inmates have to be put "*in a situation of benefiting from the widest developments in treatments*"[6]. Access to free healthcare is also a fundamental standard, which does not prevent countries from making it possible for doctors to be consulted at the expense of the prisoners themselves[7].

However, we note that there is no specific recommendation targeting treatment requests outside everyday curative and preventative treatment such as the removal of visible tattoos, to take an example mentioned by one of the experts consulted by the Committee.

2.1.2. Contacts with the outside world

Requests for infertility treatment may increase due to the possibility, in Belgium, of benefiting from "conjugal visits". In this respect we will note that the European recommendations implicitly include the benefit of "conjugal visits" in Rule 24.4. One may in fact consider that this type of visit is part of the types of visits defined as allowing "*prisoners to maintain and develop family relationships in as normal a manner as possible*" (24.4). The commentary of Rule 24.4 - and not the Rule itself - indicates that the possibility of long term visits, including "conjugal visits", must be offered. This commentary specifies in fact that the term "family" should be understood in the widest and analogical sense. With regards untried prisoners, it is specified that they should be able to benefit, in addition to the normal visit for convicted prisoners, from "additional visits" (99.b).

2.1.3. Women

Insofar as the treatment of infertility or medically assisted procreation may lead to a birth *intra muros*, we will note that the Committee of Ministers recommends allowing prisoners to give birth outside prison, and, where appropriate, where a child is born in prison, the authorities shall provide all necessary support and facilities (34.3). Rule 34.1 stresses the respect of the "requirements" of women, and the commentary adds that "*the specific*

[5] Comm. rule 39.
[6] Comm. rule 40.
[7] *Ibid*.

requirements of women cover very diverse aspects and must not be considered as essentially medical in nature."

2.1.4. Child births and accommodation

It is also stipulated that infants (without specifying the age, in view of cultural differences and whether or not they are born in prison) can stay in prison with an imprisoned parent, only when it is in "the best interests of the child concerned" - see also the commentary of this Rule 36 -, and that they shall not be treated as prisoners (36.1.). Member States are recommended to offer infrastructures and qualified personnel for accommodating infants as well as for their welfare (36.2 and 36.3).

The rules which recommend offering the possibility of long term conjugal visits, providing for the specific and not necessarily medical requirements of women, providing the most favourable conditions to prisoners giving birth and offering appropriate services and infrastructures to infants can help to create a context more favourable to the desire for children and, consequently, an increase in the number of births in a prison environment. In this context, we can expect requests for fertility treatment or medically assisted procreation to increase.

2.2. European Court of Human Rights (ECHR): an example of case law [8]
Case of Dickson v. United Kingdom

2.2.1. Judgment of 18 April 2006, no. 44362/04

The claimants, Kirk and Lorraine Dickson, are British nationals born in 1972 and 1958 respectively.

In 1994, Mr Dickson was convicted of murder and sentenced to life imprisonment with a tariff of 15 years. He has no children.

In 1999, when he was in prison, he met Lorraine by correspondence through a prison pen pal network. In 2001, they married. Mrs Dickson already had three children from other relationships.

Mr and Mrs Dickson requested the possibility of using artificial insemination in view of having a child together, arguing that it would not otherwise be possible given Mr Dickson's earliest release date and Mrs Dickson's age. The Secretary of State refused their application. They appealed but were not successful.

They complained to the ECHR relying on Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family) of the European Convention on Human Rights. The Court judged, by four votes to three, that there was no violation of Articles 8 and 12.

Majority opinion

The Court revealed that the Secretary of State had carefully examined the situation of the

[8] The summaries of the judgments cited are taken from press releases from the Registrar of the ECHR.

claimants - including the fact they could probably no longer procreate after the release of Mr Dickson - before concluding that these elements had less weight than the other factors. Mentioned in particular were the nature and seriousness of the crime committed by Mr Dickson, as well as the welfare of any child likely to be conceived, given the prolonged absence of the father for an important part of his or her childhood and the manifest absence of material aid and a close support network for the mother and child.

In these conditions, the Court considered that it had not been proven that the refusal to authorise access to artificial insemination was arbitrary or unreasonable or that this decision had not struck a fair balance between the competing public and private interests involved. Consequently, there had been no violation in respect of the right of the interested parties to private and family life.

Minority opinion

The Judges Casadevall and Carlicki considered to the contrary that there had been a violation of Articles 8 and 12 of the Convention, insofar as, according to them, access to artificial insemination falls within the remit of the right to respect for private life (Art. 8) and that of founding a family (Art. 12), meaning by this a "right to procreate". According to them, refusing this access would be a limitation of this liberty. In their eyes, there was no difference between the fact of prohibiting conjugal visits and prohibiting access to artificial insemination. Access to both was part of the negative obligations of the State. Furthermore, these Judges felt that the penal policy approach invoked by the majority was, in the Dickson case where his wife was free, incompatible with the Convention: this was not a temporary limitation of their rights, but a complete and irrevocable destruction of the right to found a family to which this woman, and more widely this couple, was exposed in their future life.

The argument invoked (the nature and the seriousness of the crime of the first applicant) had the consequence of inflicting on him a punishment which no court would apply and which seemed absurd (*de facto* sterilisation until 2009 at least). The argument of the welfare of the child - threatened, according to the majority, by the absence of the father - clearly manifested that the second claimant, the potential mother, was forgotten in the case (independently even of the question of knowing who plays the most important role in the first years of a child's life). The reasons which founded this judgment should lead to adopting the same attitude for a couple wishing to have a child, of whom one of the parents is infected with a fatal disease. Furthermore, the apparent lack of material resources and support network for the mother and child seems a doubtful argument.

The case was referred to the Grand Chamber of the ECHR upon the application of the claimants.

2.2.2. Judgment of 4 December 2007 [Grand Chamber] no. 44362/04 [9]

The Grand Chamber of the Court, to which the case was referred, handed down judgment on 4 December 2007 and concluded, **by twelve votes to five,** on a violation of Article 8 of the European Convention on Human Rights unlike the first chamber. For the Court, the refusal of artificial insemination did indeed concern the private and family life of the claimants, which

[9] For an approving case law commentary, see N. GALLUS , "La procréation médicalement assistée et les droits de l'homme", R.T.D.H., 2008, 897.

included the right to respect for their decision to become genetic parents. For the Grand Chamber, the core issue was whether a fair balance had been struck between the public interests put forward by the Government and the private interests defended by the claimants. Now, it if was legitimate that, according to it, "authorities, when developing and applying the policy in question, should concern themselves, as a matter of principle, with the welfare of any child", and if, moreover, "the State had obligations to ensure the effective protection of children", however, "this could not go so far as to prevent parents from attempting to conceive a child in circumstances like those in the applicants' case, especially as Mrs Dickson was at liberty and could have taken care of any child conceived until her husband was released".

Further, according to the court, the policy used by the Government to enable access to artificial insemination in similar circumstances "placed an inordinately high burden on the applicants" as to the proof of the 'exceptional nature' of their case. First of all, the interested parties had to prove, as a condition prior to the application of the policy, that depriving them of artificial insemination could totally prevent any conception. Secondly, which is more important still, they had to prove that in their case the circumstances were 'exceptional' according to the other criteria of the policy".

The Court consequently felt that "[...] there was no evidence that, when fixing the policy, the Secretary of State sought to weigh the relevant competing individual and public interests or assess the proportionality of the restriction". The Court therefore found that a fair balance had not been struck between the competing public and private interests involved, in violation of Article 8 of the Convention.

2. 3. Belgian legislation

2.3.1. History and original motivations of the Belgian Prisons Act of 12 January 2005[10]

In the 1990s, the Belgian legislator recognised that there was no legal framework defining the external and internal legal status of prisoners and lamented the fact that their prison living conditions, as well as their release conditions, only depend on the prison administration and the Minister of Justice. The setting up of a legal framework, which further grants a place for the victim, was imposed.
In September 1996, the Minister of Justice entrusted to Professor Lieven Dupont[11] a mission which consisted of drafting a "Prisons Bill concerning prison administration and the enforcement of deprivation of liberty sanctions", which became the Prisons Act of 12 January 2005 on prison administration and the legal status of prisoners.
The bill was to contain the following principles:

- the basic principles governing the inmate system, in the spirit of the European Prison Rules[12] and requirements of the Convention on the Protection of Human Rights and Fundamental Freedoms;
- the purposes of the execution of the prison sentence;
- the basic principles related to the legal status of the prisoner in respect of the acts and decisions of the authorities likely to have an impact on the prisoner's life inside the prison (the internal material legal status of the prisoner);

[10] See note 1 of this opinion
[11] Professor of Criminal Law at KULeuven.
[12] see Recommendation no. R(87)3 adopted by the Committee of Ministers on 12 February 1987.

- legal provisions governing the interruption and end of the sentence (the external legal status of the prisoner) in which the judiciary must be seen to be assigned a major role;
- provisions governing the right to complain of prisoners.

In terms of external legal status, the Belgian law of 5 March 1998 on release on parole[13] replaces the former *loi Lejeune* of 31 May 1888[14] and entrusts the release decision to the Parole Boards set up by the Belgian Law of 18 March 1998[15].
The report by L. Dupont was completed at the end of September 1997. It anticipated the "Resolution on prison conditions in the European Union" which was approved by the European Parliament on 17 December 1998. Just like this Resolution, the works of L. Dupont took inspiration, on the one hand, from the general finding of the damaging effects of imprisonment and, on the other hand, the ethical concern to standardise prison conditions so as to make them compatible with human rights.

A Royal Decree of 25 November 1997 finally created a "Prisons Act on prison administration and the legal status of prisoners" Commission whose mission consisted of drafting a "bill" whose works were largely inspired by the L. Dupont report.

During the 5th session of the 50th legislature, L. Dupont summarised to the House of Representatives the thrust of his bill into 5 points. Only the first two concern us more specifically.

1. "The text is carried by the approach of the prisoner in his or her capacity as legal citizen, namely an approach whose main concern is the participation in the rights, the legal values in force, etc.";

2. "The approach starting from the legal status is itself part […] of a prison concept according to which the reduction of the damage caused by imprisonment is considered a *sine qua non* condition by the application of the principle of normalisation: a) in respect of convicted prisoners: targeting objectives to be individualised, based on the future... b) in respect of untried prisoners: by an effective respect of the principle of presumed innocence. ".

The text is based on 5 basic principles:

1. The *principle of legality*: implies that it is the responsibility of the legislator to define the content and scope of the deprivation of liberty. This restricts the right of the prisoner to move around freely. In her introductory explanation, the Minister of Justice says: "one might therefore, at the risk of simplifying things too much, summarise the response of the Dupont Commission into a single phase: the purpose of the prison sentence is limited to withdrawing or restricting the freedom to come and go, no more no less"[16].

2. The *principle of damage limitation:* the Commission is of the opinion that the prevention or at least the maximum limitation of the damage caused by imprisonment must constitute an

[13] Belgian Law of 5 March 1998 on release on parole and amending the Law of 9 April 1930 on social defence in relation to abnormal and habitual offenders, replaced by the Law of 1 July 1964 (Belgian Official Gazette 2 April 1998).
[14] Belgian Law of 31 May 1888 establishing release on parole in the penal system.
[15] Belgian Law of 18 March 1998 setting up Parole Boards (Belgian Official Gazette 2 April 1998).
[16] Parl. doc., Chamber, DOC 50 1076/001, p. 9.

imperative standard[17].

3. The *principle of normalisation*: can be considered a positive formulation of the principle of damage limitation. Without prejudice to the exemptions to normal life inherent in the deprivation of liberty, it is fitting to attempt to make living conditions inside the prison as similar as possible to living conditions in free society.

4. The *principle of accountability*: postulates that the sentence must be executed in conditions enabling the maintenance or improvement of the self-respect of the prisoner and encouraging individual and social responsibility.

5. The *principle of participation*: aims to consider prisoners as being an integral part of the decision-making processes concerning them.

During the discussion with the members of parliament, L Dupont further specified that the Convention on Human Rights also applies to imprisoned citizens[18].

2.3.2. Fundamental principles[19]

Before coming to the provisions which concern healthcare in prison and its repercussions on requests for infertility treatment, it is not inappropriate to recall two of the general fundamental principles of the Belgian Law of 12 January 2005, which could be invoked by prisoners in support of their request. Art. 5.1 provides that *"imprisonment or the deprivation of liberty measure is executed in psychosocial, physical and material circumstances which respect human dignity, allow for growth of the prisoner's self respect and appeal to his individual and social responsibility"*. Art. 6.1 adds that *"The prisoner is not subject to any limitation of his or her political, civil, social, economic or cultural rights other than the limitations resulting from his or her criminal conviction or the deprivation of liberty measure, those which are inseparable from the deprivation of liberty and those which are determined by virtue of the Law"*. Once again we can invoke Section II, chap. II, which in Art. 9.2. stresses the fact that the execution of the sentence is based, *inter alia*, "*on the rehabilitation of the prisoner and on the personalised preparation for his or her reintegration into free society*"[20].

In this chapter, we will mainly deal with the rights of prisoners in respect of healthcare, the preservation of relationships with their family and close friends, as well as corrective obligations of prisons.

2.3.3. Healthcare[21]

Articles 87, 88 and 89 are particularly important in that they contain the main guidelines for administering healthcare in prison, which comply overall with the recommendations of the

[17] *Ibid*., p. 10.
[18] *Ibid*., p.48.
[19] See Section II, Chap. I. of the Belgian Prisons Act.
[20] These provisions of Articles 5, 6 and 9 entered into force on 15 January 2007 by the Royal Decree of 28 December 2006, Art. 1.
[21] Section V, Chap. VII. of the Belgian Prisons Act.

Council of Europe (R(98)7)[22].

Art. 87 indicates that the following has to be included under the category of healthcare in prison: "*the services dispensed by the healthcare providers in view of promoting, determining, protecting, restoring or improving the physical and mental health of the patient*" (1), but also "*the contribution of healthcare providers to the social reintegration of prisoners*"(3).

The first part of the Article, if we refer to the report of the Commission[23], also includes the diagnosis, the psycho-medical curative treatment as well as the prevention of risks which may threaten the physical or mental well-being of prisoners. The second part of the Article adds that the mission of the healthcare providers is extended to care which may contribute to the reintegration into free society, for example dental and prosthesis treatment in drug addicts, the removal of tattoos.

Art. 88 states the fundamental principle of equivalence between healthcare accessible in free society and healthcare in a prison environment, and it adds, to support this equivalence, that account has to be taken of the specific requirements of prisoners. The general idea is that, as the equivalence of healthcare is of a qualitative type[24], to achieve it, the offering has to be adapted to the specific context of life in prison[25]. This is what the Commission's report presents as "special category" healthcare.

Art. 89 states the so-called principle of "continuity of healthcare". The equivalent continuity of a treatment or a medical follow-up started before imprisonment is a right of the prisoner; this right depends directly on the principle of equivalence stated above. This continuity must also be assured during imprisonment (for example, after transfer), and it is agreed that the doctor assigned to the prison will also ensure this continuity upon release from prison, by sending the appropriate information to the colleague who will take over the treatment.

Art. 91 states the provisions concerning the right to receive in prison visits from a doctor of one's choice as a patient right[26] and preponderant value of medical ethics, which helps to establish a relationship of trust between the patient and the doctor. The Article sanctions the right of the prisoner to have free recourse to *advice* from a doctor of his or her choice (1). This latter sends in writing to the doctor assigned to the prison his opinion on the diagnosis and also on the diagnosis examinations and the treatment proposed; in respect of *treatment in prison*, the prisoner can also make use of a doctor of his or her choice, as long as there are

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[22] *See* parliamentary discussion in commission, 3rd session of the 50th legislature, Parl. doc., Chamber, 2000-2001, DOC 51-0231/002, pp.99-100 - obviously does not mention Recommendation 2006 which has been examined above, but refers to a previous Recommendation (R(98)7) concerning the ethical and organisational aspects of healthcare in prison. However, Rec(2006)2 consulted here explicitly gives its approval to R(98)7 in the preamble.

[23] Report from the "Prisons Act on prison administration and the legal status of prisoners" Commission (hereinafter referred to as CLP), Doc. Parl., Chamber, 2000-2001, DOC 51-0231/002, pp. 99-100.

[24] CLP, *id.,* p. 165.

[25] On many occasions, the CLP underscores the fact that "medical requirements are barely different from those existing in free society" (*id*., p. 162).

[26] *See* Articles 5 and 6 of the Belgian Law of 22 August 2002 on patient rights: Art. 5. "The patient is entitled to receive, from the professional practitioner, quality services that meet his or her requirements, in respect of his or her human dignity and his or her autonomy, without distinction of any kind being made". Art. 6**.** "The patient is entitled to the free choice of the professional practitioner and is entitled to change his or her mind, save limits imposed in these two cases by virtue of the Law".

reasonable motives for this and provided the head of the prison's healthcare service authorises it 2)[27]. Point 3 provides that "*visiting conditions and the payment of the costs related to the opinion, to the treatment proposed by the freely chosen doctor as well as the treatment given by a freely chosen doctor*" are governed by Royal Decree[28].

As in free society, the principle of free choice is not absolute or unconditional: there are *de facto* limitations, as well as legal limitations. The commentary of the Prisons Bill fully develops this question[29]. Although the text of the law subscribes to this principle in respect of healthcare in prison, it introduces a legal limitation, by establishing a distinction between "advice" and "treatment", as the free choice of a doctor for a *treatment* is subject to the authorisation of the head of the prison's healthcare service. Indeed, the specific conditions of prison life - particularly the organisational constraints and those related to the protection of health - require prisoners who wish to be treated by doctors other than those assigned to their prison to make a substantiated request, whose merits are examined by the central administration.

Art. 93.1, stipulates that diagnostic examinations and recommended medically specialised treatments for which the prison does not have sufficient resources shall be practised outside prison, in a specialised prison, a hospital or healthcare establishment; the transfer shall take place upon the request of the doctor assigned to the prison - potentially after collaboration with the freely chosen doctor. Art. 93.2 and 93.3 provide that women having to give birth or those who ask for an induced abortion shall also be transferred to an appropriate hospital or healthcare establishment. All these transfers imply that the healthcare establishment or the hospital concerned are considered as "branches of the prison" (4).

Finally we will underscore that **Art. 96**.1 recalls that "*the healthcare providers keep their professional independence, and their assessments and decisions concerning the health of prisoners are based solely on medical criteria*".

2.3.4. Contacts with the outside world: visits [30]

Art. 58 defines the *minimum frequency* of visits which prisoners may receive: every day for convicted prisoners (1), at least three times a week "*divided over three days, of which at least one day shall be a week, and Wednesday afternoon*" for other prisoners (2).
The minimum duration of a visit is one hour (3).
Point 4 concerns conjugal visits: "*Save the exceptions provided for by the Law, each prisoner is entitled to receive one conjugal visit lasting a minimum of two hours, at least once a month, in the conditions and according to the terms laid down by the King*".

Art. 59 defines the category of visitors admitted upon simple proof of their identity (parents and direct relatives, guardian, partner, legal partner or *de facto* partner, brothers, sisters, uncles and aunts); other visitors are admitted after the authorisation of the prison governor.

In principle, exceptions to the right to have visits could only be justified for security type

[27] We should conclude that the final decision is that of the head doctor of the DG of Prisons.
[28] "This latter is not yet taken on the approval date of this opinion".
[29] *Commentary of the Belgian Prisons Bill..., House of Representatives, 3*rd session of the 51st legislature, designated Bill (*Parl. doc*., Chamber, 2000-2001, Doc 51- 0231/002), comm. art. 89, p. 99-100.
[30] Section V, chapter III.

reasons.

Art. 60 states the principles and a few rules which affect visiting conditions. Point 1 provides that the rules relating to visiting times, to the rooms and to the behaviour of prisoners and visitors shall be laid down by the internal rules of the prison.
Point 2 stipulates that "*the prison governor ensures that the visit can take place in conditions which maintain or reinforce the links with the emotional environment, particularly when this relates to minors visiting their parent*".

We should however specify that the aforementioned Articles must still subject to an implementation of the practical plan through an implementing Royal Decree, completed by potential ministerial decrees and explanatory ministerial circulars. On the day this opinion was issued, only a few Articles of the Belgian Prisons Act have entered into force through an implementing Royal Decree[31].

Circular 1715 on the maintenance of the emotional relationships of prisoners with their family circle

The maintenance of the emotional relationships of prisoners with their family circle targeted by Art. 60 of the Belgian Prisons Act of 2005 was, in 2000, the subject of a ministerial circular[32]. In the spirit of the general principles of the European Regulations and anticipating those which are the basis of the Belgian law - life in prison shall approximate as closely as possible to life in the community and facilitate the reintegration into free society -, this circular lays down the minimum rules aiming to assure the quality of the relations between the prisoner and his or her family and close friends.
In particular, it lays down the rules concerning conjugal visits and the protection of parent-children relationships.
The general provisions (A) of the circular provide for the intervention of the psychosocial service for examining the family situation of prisoners (A.1), and the support of outside professionals for monitoring this during imprisonment (A.4). These provisions greatly limit the possibility of depriving a prisoner of his or her family relationships: "*the deprivation or the restriction of family contacts can only constitute a disciplinary measure in cases where it penalises very serious negligence directly related to these contacts*".

Other than the provisions concerning the frequency and duration of visits, maintained in the Law of 2005, the Circular of 2000 specifies that, for visits in general (B), the best conditions of a welcoming environment should be assured, particularly through the choice of the welcoming and supervisory personnel and through the choice of the rooms assigned for visits.

Section C of the circular defines the rules concerning conjugal visits. These are reserved for prisoners over the age of 18 or emancipated by marriage who do not benefit from leave, "*at the earliest after a period of three months' detention*" (C. 1). They must be the subject of an express request sent to the governor by the prisoner and the visitor and these must be able to

[31] This is the case of Art. 62: "Point 1. Supervision is exercised during the visit in view of maintaining order or security. Point 2. An unsupervised visit is authorised in the conditions laid down by the King. This Article amended by the Belgian Law of 23 December 2005 entered into force on 15 January 2007. ".
[32] Ministerial circular no. 1715 on the maintenance of the emotional relationships of prisoners with their family circle, dated 5 July 2000, Ministry of Justice, Directorate Generate of Prisons, Measures unit.

prove "*a lasting emotional relationship*" - partner or companion, etc. - or else a serious relationship of at least six months (C.1.). We will note that the circular establishes conditions for access to this type of visit and to the assessment of the family situation of the prisoner - hence the three months prior to the possibility of submitting a request aim to permit "*a minimum observation of the interested party*" (C. 1). In this spirit, it provides for the involvement of the psychosocial service: in ordinary cases, this may inform the director so as to help him or her make a decision in full knowledge of the facts and, in special cases due to customs, make a multidisciplinary opinion mandatory (C. 5). Finally, it is important to note that the prison doctor is informed of the granting of the benefit of conjugal visits: he or she may thus take the provisions "*he or she deems appropriate in view of favouring the social reintegration of the prisoner*" (C. 7).

Section D of the Circular concerns the maintenance of parent-children relationships (or more specifically between the child and an imprisoned relative), which, according to the text, must be paid special attention. From the general principle - reduction of the damages which may result from imprisonment - emerges the obligation, for any establishment, to organise "*at least once a month an action whose specific purpose shall be to maintain this relationship*". Any imprisoned parent with a minor as a child must be able to have access to these actions - save exceptions provided for by the Circular -, whose nature is not specified by the text, but which must, as in the case of a conjugal visit, be the subject of a request sent to the governor. The psychosocial service may be advised of this request, and shall give a multidisciplinary decision, particularly on the personality of the prisoner, capable of informing the governor of potential contraindications to participation in these activities.

2.3.5. Women and infants

With the exception of Art. 93 of Chapter VII (healthcare), which provides for the transfer of women who have to give birth or undergo an induced abortion to a hospital or a specialised healthcare establishment, the "special" requirements of women evoked by the European Recommendations are not the subject of any specific provision in the Belgian Prisons Acts, apart from, naturally, Art. 15.2 which provides that specific prisons or sections of prisons are allocated to women.

Concerning the infants of prisoners, the same Article provides in point 2.3: "*prisons or sections of prisoners specifically designed to accommodate... prisoners staying in prison with their infant under the age of three*". The formulation of the Article does not specify that these accommodation provisions will be exclusively related to prisons for women; [the masculine plural "*détenus*" used in the French text of the Act could infer that men could also benefit from this system][33].

2.3.6. Access to medically assisted procreation (MAP): Belgian law of 6 July 2007

MAP has been incorporated by the Belgian legislator into healthcare that can be reimbursed by social security which facilitates its access for a higher number of people.

[33] Dan Kaminski, questioning in a critical manner the way in which the recent Prisons Act implements the principle of "normalisation" underscores that "apart from this text [Art. 15.2] Articles 59 and 60.2 [...] are the only ones to evoke explicitly a concern for normalisation in respect of the family life of the prisoner". See: D. KAMINSKI, "Droits des détenus et protection de la vie familiale", *in*: *Les Politiques sociales*, 3&4, 2006, p. 13.

All MAP treatments are subject to the Belgian Law of 22 August 2002 on patient rights, given the general nature of its scope. These treatments must indisputably be considered as medical acts entering within the realm of healthcare, with all the ensuing consequences in respect of patient rights. By virtue of Article 5 of the Belgian Law of 22 August 2002 the patient is "entitled to receive from the professional practitioner quality services that meet his or her requirements, in respect of his or her human dignity and his or her autonomy, without distinction of any kind being made".

The Belgian Law of 6 July 2007 on medically assisted procreation and the purpose of supernumerary embryos and gametes[34] not only provides for wide access to MAP for people wishing to become parents but also for the possibility for the doctor of the Treatment Centre to invoke the conscience clause (Art. 5) in cases where he or she would refuse access to a request.

This Law fully sanctions the autonomy of applicants in respect of access to MAP, which is placed under the responsibility of the medical team and not under the yoke of an imposed moral. The only limit which the legislator imposes as authority relates to age (Art. 4), which is justified by biological and psychosocial considerations. Further, one of the major options of the Belgian legislator, which contrasts sharply with French law, is not having imposed any restriction in principle as to the lifestyle of the applicant(s)[35].

Access to MAP is therefore very widely open to all couples as well as single women, including after the death of the partner. The Law does not cordon off any possibility but accepts the medical-ethical assessment: between dogmatism and relativism, the legislator opted for pluralism, proving neutrality compliant with the dogma of strict equality of people and couples which our legal order now promises[36].

The author of the parental plan is thus plainly defined as "any person who has made the decision to become a parent by means of medically assisted procreation". But this treatment centre[37], which must "demonstrate the utmost transparency as to (its) options in respect of accessibility to treatment" obviously has "the freedom to invoke the conscience clause in respect of the requests which are sent (to it)". It is therefore the medical team which assesses the legitimacy of the request, particularly depending on the personality of the MAP applicant and therefore, *inter alia*, his or her lifestyle. It if refuses to respond favourably, the centre must notify this in writing in the month following the decision indicating either the medical reasons for the refusal, or invoking the conscience clause, as well as, in the event the applicant has expressed the desire, the contact details of another centre to which they make go (Art. 5).

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[34] Belgian Official Gazette, 17 July 2007. Commentaries: M.-N. DERESE AND G. WILLEMS, "La loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes", *Rev.Trim.Dr.Fam.*, 2008, 279; G.GENICOT, "La maîtrise du début de la vie: la loi du 6 juillet 2007 relative à la procréation médicalement assistée", J.T., 2009, 24; H.NYS AND T.WUYTS, *R.W.*, 2007-2008, 762.

[35] See the developments of the opinion of the Council of State of 14 February 2006 (*Parl. doc.*, Senate, 2005-2006, no. 3-417/3, sp. no. 34-62 and 97-103), as well as that of 3 October 2005 on single-sex adoption and non-genetic parenthood (*Parl. doc.*, Chamber, 2003-2004, no. 51-393/2).

[36] See M.-N. DERÈSE AND G. WILLEMS, *op.cit.*, *Rev.Trim.Dr.Fam.*, 2008, 300-304 and the ref. cited; G. GENICOT, *op.cit.*, J.T., 2009, 24.

[37]MAP Centre, or any other hospital or outpatient unit performing sterilisation reversals for example. NB: the generic term "Treatment Centre" means all these units.

The Belgian Prisons Act of 12 January 2005 examined above (2.3.) recognises that prisoners, in terms of healthcare, have the same rights as free patients. It is deduced from this that the Belgian Law of 6 July 2007 should be applied to them in the same way: access to MAP cannot in principle be refused of them. They must have the possibility of submitting their request to a fertilisation centre, but this centre reserves complete freedom of evaluation and may decide whether or not to grant the treatment.

2.4. The rights of the child and prison: international conventions and Belgian regulations

In the context of the increase in the prison population, of a concern reaffirmed by international bodies (UN, EU) for human rights and those of children in particular, but also for the protection of the fundamental rights of prisoners - including the right to respect for private life and family life[38] -, the situation of children of imprisoned parents, including those in prison with their mother, is now being paid special attention, at least in the texts. Some of these texts target all parents - most often mothers - and their children. Hence:

"Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children. States Parties should report on facilities to ensure this and on medical and health care for such mothers and their babies"[39].

"In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate. […] When nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers"[40].

The *United Nations Convention on the Rights of the Child* (1989), approved by the competent Belgian authorities[41] is an important document, from which we shall underscore the following provisions:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".
[…]
"States Parties undertake to ensure the child such protection and care as is necessary for his or

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[38] L. AYRE, K. PHILBRICK, M. REISS (eds), *Children of Imprisoned Parents: European Perspectives on Good Practice*, Eurochips, Foundation B. van Leer, Paris, 2006, p. 17. Refer also to the *Dickson* case mentioned above.
[39] United Nations Human Rights Committee, General Comment no. 28 on Article 3, 68th session (2000).
[40] Minimum rules for the treatment of prisoners, rule 23 paragraphs 1 and 2, the so-called "Beijing Rules".
[41] The *Convention on the Rights of the Child,* adopted in New York on 20 November 1989, was approved by a) the Decree of 15 May 1991 of the Flemish Council, b) the Decree of 25 June 1991 of the Council of the German-speaking Community, c) the Decree of 3 July 1991 of the Council of the French-speaking Community, d) the Law of 25 November 1991. Belgium filed its ratification instrument on 16 December 1991.

her well-being, taking into account the rights and duties of his or her parents [...], and, to this end, shall take all appropriate legislative and administrative measures".
[…]
"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 [...], that such separation is necessary for the best interests of the child".
[…]
"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child [...][42]".

In Belgium it is, for the Flemish Community the *Kinderrechtencommissaris*[43], for the French-speaking Community, the Delegate-General for the Rights of the Child[44] and for the German-speaking Community a mediator who ensure the protection of the rights of the child. A recent cooperation agreement (dated 19 September 2005) including the State, all the communities and the regions, the common Community Commission and the French-speaking Community Committee, created a *National Commission for the Rights of the Child*, responsible for encouraging cooperation and a constant exchange of information between the different authorities and bodies looking after the rights of the child.

We will also refer to the European Recommendations already studied[45], but also to the *Havana Rules for the Protection of Juveniles Deprived of Their Liberty* (1990)[46], the only international rule or convention which concerns "directly the situation of infants imprisoned with their parents"[47], whose Article 93 provides that "children staying with their imprisoned parents must be given special care and arrangements, as these children have committed no crime".

In our country, the imprisonment of pregnant women or those with a nursing infant is governed by the provisions of the *General Regulations and General Instructions of Prison Administration*. This stipulates in its Art. 111 that "the governor cannot refuse committing to prison a woman accompanied by a child.... incapable of going without the care of his or her mother or a woman who shall shortly give birth in the prison", but also that "the governor does not admit infants who can be separated from their mother". Art. 112 indicates that "infants admitted with their mother may be cared for by the latter in her cell. They shall always have a separate bed there" and that "in large institutions, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers". We will note further that Art. 199 provides that "when an imprisoned woman gives birth in prison, the governor is authorised to have baby clothes purchased for the newborn child and, if the doctor feels this appropriate, to make use of a

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[42] Extracts from the United Nations Convention on the Rights of the Child.
[43] *Decreet van 15 juli 1997 houdende oprichting van een Kinderrechtencommissariaat en instelling van het ambt van Kinderrechtencommissaris,* B.S. 7-10-1997.
[44] Decree of 20 June 2002 establishing a Delegate-General of the French-speaking Community for the Rights of the Child, Belgian Official Gazette 19-07-2002.
[45] See point 2.1 of the opinion.
[46] See the website: http://www.hrni.org, as well the "Proposals of the Delegate-General of the French-speaking Community for the Rights of the Child related to the maintenance of personal relationships between children and their imprisoned parent" (1996), http://www.cfwb.be/dgde/gt_edp.htm.
[47] G. DE LAUBADERE, *Gestion de la relation mère-enfant en détention. Etude de droit comparé en France, Grande Bretagne et Australie*, mémoire de DEA de Droit Comparé de l'Université de Paris 2, dir. Prof. B. Ancel, 2003, p. 9.

person outside the prison to give the mother the appropriate care[48]".

CHAPTER III. Prison framework: healthcare, code of medical ethics, conjugal visits, accommodation of infants

3.1. Coverage of healthcare-related costs

In prison, persons do not benefit from the reimbursement of healthcare insurance services by the *Institut National d'Assurance Maladie-Invalidité* (INAMI - Belgian National Institute for Health and Disability Insurance): indeed, the person loses his or her capacity as policyholder during the preventative detention period or during the deprivation of liberty period[49]. The Federal Public Service (FPS) for Justice is therefore responsible for organising and financing the healthcare of prisoners in a prison. This applies both to prisoners in preventative detention and to convicted prisoners and inmates, for as long as they stay within the confines of a prison. We will add however that the entry in force of the Royal Decree of 16 March 2006 implementing Art. 56.3a of the Belgian Law on mandatory medical insurance and compensation coordinated on 14 July 1994 no longer leaves the Federal Public Service for Justice *solely* responsible for the financing of the healthcare of prisoners, since it now provides for financial intervention of the INAMI with the FPS Justice for:

a) the services stipulated in Article 34 of the same Law, granted at the time of an *admission into a hospital establishment* stipulated in Article 34.1.6, of the same Law, or *day hospitalisation*, provided on the request of a prison doctor for prisoners inside a prison[50];
b) the costs related to the provision of medications and the medical devices purchased by the Directorate General of Prisons to prisoners.

Consequently, insofar as medically assisted procreation and fallopian tube reanastomosis (for women) or vasovasostomy (for men) in prisoners require admission to a healthcare establishment or day hospitalisation, they would be paid for by the FPS Justice / the INAMI,

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[48] "Proposals of the Delegate-General of the French-speaking Community for the Rights of the Child related to the maintenance of personal relationships between children and their imprisoned parent" (1996), http://www.cfwb.be/dgde/gt_edp.htm.

[49] Art. 5 of the regulations implementing Art. 22.11 of the Belgian Law on mandatory medical insurance and compensation, coordinated on 14 July 1994 (Belgian Official Gazette 27 August 1994): "Healthcare services provided for by Law are refused as long as the beneficiary is remanded in custody or is detained in a social defence establishment. This refusal does not apply for healthcare services provided in the period during which the beneficiary, further to a decision from the competent authority, finds himself or herself outside prison or outside the social defence establishment, in application of the semi-liberty measure or electronic surveillance measure whose terms and conditions are laid down by the Minister of Justice".

[50] i.e.: 1. everyday treatment, 2. childbirths, 3. services requiring a specific qualification, 4. supply of glasses and other prostheses, 5. supply of medications, 6. hospitalisation, 6. the care required by functional re-education, etc. the treatment given by logopedists, podologists, dieticians, etc…..*26 treatment given to women within the framework of a "reproduction medicine" programme; gynaecologists authorised to carry out this treatment are either attached to the hospital or affiliated to the hospital for providing this treatment...*….(N.B. : these specific services stipulated in Art. 34.26 must also be the subject of an implementing Royal Decree).

as well as the medications and medical devices supplied in this framework.

3.2. Prison healthcare service

The prison healthcare service is responsible for organising a preventative healthcare policy, as well as the curative medical service. It is part of the Directorate General of Prisons of the FPS Justice, but enjoys a certain amount of autonomy in respect of the management of its own finances and the recruitment of doctors on an independent basis. The head doctor is responsible for the inspection and quality control of the services provided. The medical treatment, including medication, is free for the prisoner and the costs are fully borne by the FPS Justice, which is partially reimbursed by the INAMI on a fixed sum basis.

Priority in terms of treatment goes to curative treatment and the prevention of intra-prison health risks (for example, AIDS, hepatitis or tuberculosis). Requests for medical treatment based on personal preferences ("convenience medicine", for example, plastic surgery) are in principle refused. However, they may be granted in part if the non-curative medical treatment requested may favour the social reintegration of the prisoner. Let's take the example of a full dental prosthesis for a drug addict or the removal of a tattoo on a visible part of the body. A favourable opinion may be given by the head doctor of the health service, who shall encourage the prisoner to contribute to the costs of the treatment.

In prisons, basic medical treatment is assured by generalist doctors from the region, recruited by the prison health service. The prisons of Bruges and of Saint-Gilles (Brussels) have medical units with medical and nursing staff: these are the medical centre of Bruges (MC Brugge) and the medical-surgical centre of Saint-Gilles (CMC Saint-Gilles). These centres organise consultations in several medical specialities, with outside specialists who work within the prison, either on the basis of an individual contract (CMC Saint-Gilles), or within the framework of a cooperation agreement between the prison and a neighbouring hospital (MC Brugge and A.Z. St Jan, Brugge). The CMC Saint-Gilles mainly takes in patients from Brussels and the Walloon Region, as well as severe burns victims from the entire country (collaboration with the military hospital of Neder-over-Heembeek). The MC Brugge, specialised in haemodialysis, also takes in all women coming towards the end of their pregnancy and prisoners in the country.

For medical reasons, prisoners can be transferred for hospitalisation and treated in the different hospitals in Belgium. Since the start of 2006, the prison health service has a secure room of four beds at the CHR de la Citadelle in Liège hospital. Prisoners who do not match the criteria for treatment at the CMC Saint-Gilles or at the MC Brugge may be sent there.

Year 2007	CMC St-Gilles 2007	MC Brugge 2007
Number of patients treated	381	548
Number of beds	17	26
Duration of the stay (days)	-	27.46
Number of consultations	8504	+ - 5 700
Number of transfers to outside hospital	170	65

Source: Directorate General of Prisons

The Prison Health Service organises the medical treatment of the total population of prisoners, namely 9,535 people (daily prevalence in June 2006, 96% of whom men are 4% women) for 8,133 places available (353 of which designed for women).

3.3. Code of medical ethics in the prison environment

Doctors who work in prisons must respect the code of medical ethics and, in particular, doctor-patient privilege. In principle, patients must be able to benefit from the same treatment inside a prison as outside it, and if the treatment or medical care is impossible in the prison, the prisoner must be transferred to a civilian hospital. This principle of equivalence of treatment, which was not often respected in the past, has become a right for the prisoner since the Belgian Prisons Act, which delights prison doctors.

The freedom to choose a practitioner outside the prison, as is the case in civilian life, is impossible for prisoners. A prisoner may however submit a request to the prison governor in order to be *examined* by a doctor of his or her choice, which, in practice, will most often be granted. The prisoner will however have to pay for his or her consultation. The external doctor chosen by the prisoner has a consultant status in relation to the prison doctor who remains the practitioner. Only the prison doctor can change the treatment developed and, should there be a disagreement between the two of them, the opinion of a third party may be requested, also at the expense of the prisoner who makes the request.

If a prisoner has to be hospitalised in a civilian hospital, account shall be taken in principle, as far as possible, of his or her wishes in respect of the choice of practitioner or medical team. The same should apply in the case of medically assisted procreation.

3.4. Psychosocial service

Each prison relies on a multidisciplinary psychosocial team (psychiatrist, psychologist, social worker) which supports the prisoner during his or her imprisonment and prepares for his or her social reintegration. It makes diagnostic assessments of the personality and advices the prison authorities concerned.

3.5. Conjugal visits

Other than the aforementioned Belgian Prisons Act, which sanctions the right to conjugal visits in its Article 58.4, a ministerial circular[51] has helped to make the practices of conjugal visits uniform, which were previously very different from one prison to the next, thus putting prisoners on an equal footing in respect of this possibility.

As underscored by an interviewed expert[52], the provisions of this circular mainly target the maintenance and promotion of emotional relationships of prisoners, and it is in this perspective that it is fitting to understand the generalised organisation of conjugal visits: first of all this was not a question of offering prisoners a possibility of "satisfying their sexual desires". Naturally, a number of these visits, whose granting conditions are laid down by the

[51] Circular 1715, aforementioned in note 33 (in Chap. II, Legal framework).
[52] Mrs M.-F. Berrendorf.

circular (exclusion of minors in particular) and which take place in a room specifically arranged for this purpose, constitute the opportunity for sexual contact which, if the partners do not use contraceptives, is therefore likely to lead to the birth of a child, inside or outside prison walls.

At present, as it is the prison doctor who is informed of the granting of a conjugal visit, it is his or her responsibility to inform the prisoner about the possible contraceptive measures. In the room set aside for these visits, contraceptives are made available but experience shows that the persons concerned rarely make use of them.
Given the fact that conjugal visits are granted to prisoners who can prove that they have had a relationship by correspondence for at least six months - therefore partners who have sometimes never lived together - it would seem necessary to consider seriously the putting in place of information programmes on potential unwanted pregnancies and the usefulness of contraception. These programmes are imposed *a fortiori* on couples, one of whom still has a long sentence to endure.

3.6. Pregnancy in prison and childbirth

Monitoring pregnancies in prisons seems to be the responsibility of the prison doctor. In Bruges prison, and within the framework of the collaboration with Algemeen Ziekenhuis (AZ) Sint-Jan, the last two months of pregnancy are monitored by gynaecologists. Furthermore, the action of the ONE (*Office de la Naissance et de l'Enfance* - Belgian Office of Birth and Childhood) in the French-speaking Community and of *Kind en Gezin* in the Flemish Community proposes information, consultations and essentially preventative monitoring of pregnancies (see also 3.7.).

In the seventh month of pregnancy, pregnant prisoners (of both linguistic registers) are transferred to Bruges prison and they give birth at the AZ Sint-Jan de Bruges. They return to their original prison after giving birth.

Number of childbirths per year in Belgian prisons[53]:

Year	2000	2001	2002	2003	2004	2005	2006	2007
Number	2	9	4	9	7	12	8	13

3.7. Accommodation of infants in Belgian prisons (and indications on the other European countries)

Population and age

In Belgium, in the 1990s, there were usually, on average, 300 women prisoners and between 5 and 15 nursing infants accommodated with their mother. A census showed that between 1992 and 1997, 22 different infants were accommodated for an average period of 4 months - at this stage, i.e. well before the Belgian Prisons Act of 2005, the age limit for accommodating

[53] Source: Directorate General of Prisons

infants in prisons was around 18 months[54]. "Half were born during imprisonment. Three of them remained there for more than a year; only two came out before the end of their mother's sentence, towards the age of two[55]".

In March 2006, there were 10 infants detained with their mother: 2 in Lantin, 2 in Berkendael and 6 in Bruges[56]. In 2007, the average daily female population (excluding electronic surveillance) increased to 431 and the total number of babies in prison with their mother was 22.
According to the opinion of one of the experts consulted, few infants leave prison before the end of the sentence - therefore without their mother -; however, according to the same expert, infants born in prison are more the fact of women imprisoned for longer sentences. In the case of shorter sentences, women would tend to wait until their release before considering a pregnancy.

During in the 1990s, the population of infants with their mother in prison was, for 50%, children born outside who arrived with them when their mother was imprisoned and 50% were children born inside the prison. At present, hardly any infants come from the outside, whereas the number of births in prison has increased in the last years (see table 2000-2007, *supra, 3.6*). According to one of the experts consulted, the extended use of alternative sentences[57] and suspended sentences[58] - for convicted prisoners who are mothers of young children - explains the first trend; the generalisation of conjugal visits could partially explain the other trend.

Accommodation conditions

The accommodation of babies and infants in Belgian prisons obeys the model of the "closed system" or "flexible detention". A document published in 2004 by the ONE characterises this system as follows: "one or several cells are reserved for mothers and infants in a closed system within women's prisons", which has the consequence of isolating mothers from other prisoners. Furthermore, in this type of system, "the infants attend an outside nursery during the week. There is no special personnel. The regulations are adapted in accordance with local initiatives (decision of the governors or supervisors). There are no standards in terms of space, equipment, etc. The arrangement depends on the good will of the prison. Depending on the case, professionals will get involved (doctors, mother and child protection services or outside volunteers[59]".

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[54] M.-H. DELHAXHE-SAUVEUR,, *Vademecum des droits de l'enfant,* Kluwer, Brussels, p. 45 (chapter 6.II devoted to the child and his or her imprisoned parent. Partial text communicated by Mrs Delhaxhe-Sauveur).
[55] M.-H. DELHAXHE-SAUVEUR, "Naître et grandir en prison. Vers des pratiques positives pour le développement de l'enfant", report at the GROFRED seminar, Namur, 2006, p. 1.
[56] Response from Mrs L. Onkelinx, Minister, to Mrs V. Déom (PS), The Justice Commission, 14-03-2006, House of Representatives, CRABV 51 COM 888, 11, p. 15.
[57] The Belgian Law of 17 March 2006 on the external legal status of persons convicted with a deprivation of liberty sentence and on the recognised rights of the victim with the framework of the terms of execution of the sentence (Belgian Official Gazette of 15 June 2006): prison leave (art.6) limited sentence (art.21); electronic surveillance (art.22); community work sentence (art.87).
[58] Idem, release on parole (art.23).
[59] "Mères et enfants en détention. Pratiques positives observées, pratiques positives souhaitées", summary of the European meeting organised by EUROCHIPS (European committee for Children of Imprisoned Parents) in 2004, ONE, Subregional Committee of Liège, 2004.

The three prisons most capable of accommodating children are Bruges, Berkendael and Lantin[60]. The babies or infants are accommodated there with more or less complete equipment (crib, high chair, toys, etc.) which the mother has in the limited space of the cell, and find themselves in the same conditions as her (no hot water in particular). But these three prisons, unlike others, have special arrangements, such as playrooms, extra-cell areas, which enable the restricted space of the cell to be reserved for the mother during siestas and at night and where it is possible for mothers to prepare meals for the infants. Lantin prison, as well as Bruges prison, offer adequately equipped playrooms (recently renovated). Berkendael does not offer a playroom, but mothers have access to the inner courtyard where some games are available, and their cells are bigger. In Lantin, the cell, locked at night, stays open throughout the day, and the outer courtyard is accessible without restriction. The Bruges prison nursery is deemed the best equipped from a material standpoint, as well as from the point of view of psychological support: three rooms have been specifically set up - in addition to the day room and playroom, it offers a night room where the infants stay if the mother does not wish to keep them in the cell, as well as a refectory.

Health of women and of their infant

Just like the minimum material equipment, the healthcare is payable by the prison administration (and therefore the FPS Justice), and hence complies with the practices that govern the prisoner's access to healthcare - taking account of the fact that a Royal Decree of March 2006 now provides for the intervention of the INAMI for the treatments stipulated in Art. 34 of the Law.

In the French-speaking Community, the ONE has launched a consultations programme in Lantin and Berkendael: paediatrics and social nursing go there when they are notified that a baby is accommodated. Babies and infants therefore benefit from a minimum amount of monitoring by infancy professionals: medical-social workers, paediatrician, but also paediatric nurses from the nurseries potentially attended by the infant. The action of the ONE deals with monitoring pregnancies in prison, assures a specific preventative consultation in which all aspects of the health and development of the child may be taken into account and discussed and, finally, offers psychosocial support specifically focussed on providing concrete help to parenthood in a prison context.

In Flanders, the model is similar. Thanks to the collaboration between *Kind en Gezin* and the prison administration, a paediatrician and nurse regularly go into the mother-and-baby section of Bruges prison and offer consultations both for pregnant women (information and support, particularly on "becoming a parent" in prison) and for mothers with infants (information and concrete support in looking after babies, on a food plan, caring, health, safety, etc.). Collaboration is in the process of being put in place with Hasselt prison.

The medical consultations outside which provide, in principle, for the status of the free individual of the infant seem few and far between given that they depend on the release authorisations of the mother, her income or even the good will of people living outside.

[60] According to Doctor M. Debyser, de King en Gezin (West Vlaanderen) paediatric consultant, a mother-and-baby unit has just been set up in Hasselt prison. A young couple gave birth to an infant there in 2005.

Contacts with the outside world

Apart from the minimum material equipment and healthcare guaranteed both good and bad by the prison administration, the educational needs of the infant fall within community competencies. Hence, in the French-speaking Community, particularly in Lantin and Berkendael, some infants attend a nursery outside the prison; in Bruges, however, the nursery is situated inside the prison. Those who go to an outside nursery are driven there by volunteers from the Red Cross or from the not-for-profit association *Relais Enfants-Parents*. Babies go to nursery as of three-four months; the time spent in prison reduces in favour of the time spent in nursery. This approach, in the French-speaking Community, is part of a collaboration agreement entered into in the 1990s between the ONE, the Youth Assistance Service (SAJ, which contributes to nursery costs) and the prison administration. In the Flemish Community, it is the Youth Assistance Service which looks after the (limited) releases of the infant.

In the French-speaking Community, the ONE, by mediating between mothers and the prison administration, supports the interventions of professionals and volunteers outside the prison. The Office is also in contact with the not-for-profit association *Relais Enfants-Parents*, member of the European Network for Children of Imprisoned Parents (Eurochips), whose mission is to maintain links between imprisoned parents and their children, whether these are outside or inside the prison[61]. These initiatives have enabled an improvement of family outings, as well as visits from family and close friends to the prison (rooms sometimes separated, better laid out than the ordinary visiting rooms, extended visits).

Institutional framework

As has been seen, the French-speaking institutional framework for looking after babies in prison is constituted by the collaboration of the ONE, the SAJ and the prison administration, in connection with the associative sector (*Relais Parents-Enfants*). We will add the role of a working group in the 1990s formed around the Delegate General for the Rights of the Child, and a new working group set up in 2004 in view of analysing the entire environment of these infants, using an international comparative approach.

In the Flemish Community the *Kind en Gezin* working programme with prisons has three focuses:

— support to pregnant women (a nurse and in some cases a family carer discuss the themes falling under prenatal consultation);
— a prevention service in the mother-and-baby section of the Bruges prison complex (intervention of regional nurses with mothers in respect of health, treatment, food, safety, development and the education of the infants; support and information for pregnant women), in formal and informal collaboration with the prison board, the prison medical services, social services and with persons involved from the Flemish Community[62]. Monitoring is assured by the colleagues of *Kind en Gezin* after release

[61] Relais Enfants-Parents, a not-for-profit associated founded in 1985 with an award from the Houtman Fund (ONE). http://www.eurochips.org/partenaires.html. European Committee: http://www.eurochips.org

[62] The "trajectbegeleiders en beleidsmedewerkers" i.e. (unofficial translation): project supporters and strategic assistants.

from prison;
— upon the request of the Flemish Community, regular information sessions intended for parents (men and women) of infants, within the framework of which the *Kind en Gezin* range of services is presented to them and where parenthood in prison is discussed openly.

Through this action, *Kind en Gezin* is one of the major players "of the Flemish Community's strategic plan for the setting up of a prisoner support service" equivalent to the support services available in free society.

The Eurochips network, set up in Belgium *via* associative society, supports this international and comparative approach and endeavours to describe and promote the good practices observed in the partner countries. A recent seminar led to the publication of a European Good Practice Guide[63].

The accommodation of infants in the other European countries

When we look at the European point of view, we note that there is quite a large variability in the systems for accommodating infants in a prison environment, both from the point of view of the authorised age limit and from the point of view of the structures put in place.

Some countries are more restrictive than Belgium as to the age limit: France (18 months, exceptions up to 24 months max.), the United Kingdom (from 9 to 18 months depending on the prisons, exceptions up to 21 months max.), Ireland (12 months max.), the Netherlands (9 months max. in closed prisons). Other countries are extending the age limit to two or three years: Finland (2 years), Denmark, Poland, Spain, Belgium, Italy (3 years). Finally, some countries allow an extended stay beyond three years of age, sometimes because they offer special accommodation structures. Hence, the Netherlands and Germany or even Finland, which partially practice the "open prison system" (mother-child open houses) alongside a closed system, allow certain infants to stay with their mother until the age of 4 or even 6[64].

Alongside the "flexible detention" system, such as we know it in Belgium, some countries have put in place different structures, which correspond more to the criteria and standards (regulatory, material and supervisory) defined in the last few years by the professionals who have looked into the situation of infants living with their imprisoned mother[65]. Here we distinguish two models, the *Mother-Baby Unit* and the *Mother-Child House*, the first being closer to the "closed" system whereas the second is experimenting with the "open" system - which takes a greater step away from the traditional prison system.

The **mother-baby unit** is a specific section organised within prisons for women, designed for accommodating mothers with babies and pregnant women. Precise standards in terms of arrangement and equipment (minimum space for rooms, play areas, kitchen, hot water in the cells), as well as specific more flexible regulations (opening of doors, etc.) organise life within the unit. Babies are accommodated, depending on the case, in an internal nursery or in an external nursery during the daytime and are hence then under the responsibility of qualified personnel. There are partnerships with the social services and the child services.
France offers 66 places in mother-baby units out of a total of 25 prisons. ***United Kingdom***

[63] L. AYRE, K. PHILBRICK, M. REISS (eds), *op. cit.*, note 39.
[64] L. AYRE, K. PHILBRICK, M. REISS (eds), *op. cit.*, note 39., p. 75.
[65] *Ibid.*, chap. 7.

has created 5 specific units of this type which can accommodate up to 90 infants, within which the supervisors are specially trained volunteers, and where the welfare of the infant is regularly evaluated.

The **mother-child house** is a *building separate* from the prison and exclusively reserved for mothers and infants. In these houses they lead a community life, based on sharing tasks and rooms (living room, dining room, kitchen, playroom) whilst benefiting from an individual bedroom. *Unlike the prison model*, the building has no bars or locked doors; the decoration is thoughtful and the house comes with a garden - the atmosphere is light and pleasant; mothers are made accountable. The infants are under the responsibility of competent personnel while the mothers work. The *system* is *open* or *semi-open* with a certain number of authorised regular outings: shopping, walks, visits to the doctor. According to one of the experts consulted, who has visited houses of this type in the Netherlands and Germany, mothers seem to respect easily the timetables imposed, knowing that should they fail to respect them, they are likely to be sent back to a closed system, or even be forced to be separated from their child.

The supervisory personnel is selected and trained specifically, and the mothers benefit from psychosocial support aiming at their reintegration and a training programme (cooking, child education, etc.). The conditions of access to this open or semi-open system are clearly defined; the mother must make a request for it, and this will be examined in accordance with the interests of the child.

Spain inaugurated a mother-child house in Madrid in 1988. ***Germany*** put in place a system of this type in Vechta in 1997 (a regular evaluation of maternal skills and of the interests of the child is carried out there by social services which are responsible for looking after the accommodation of the child financially). The ***Netherlands*** have also put this system in place in Ter Peel (Sevenum).

CHAPTER IV. Ethical debate

4. 1. Introduction

4.1.1. Question of the Minister of Justice

As underscored in the letter from the Minister of Justice, the provisions of the Belgian Law of 12 January 2005 make, in principle, infertility treatments available to prisoners, in particular by virtue of the principle of equivalence between *intra* - and *extra-muros* healthcare. In reality, the question of knowing whether a prisoner can have access to medically assisted procreation (MAP) has only really been posed to the prison administration (as to external doctors in civil society) when this treatment has benefited from the financial intervention of the INAMI. Prison doctors who receive requests from prisoners then question if it is suitable to give them it: does the fact that these services are now reimbursed mean that they are necessarily due in prison?

According to certain members, it does not seem opportune that the prison doctor decides whether or not to give a favourable response to a request for treatment of this nature made by a prisoner. They feel that it should be the responsibility of the Treatment Centres to decide

whether to practice this type of treatment for prisoners, just as for free people.

However, the indirect intervention of prison services in cases of this kind raise questions from numerous players, beyond just those responsible in the Treatment Centres. Indeed, treatment requests must be relayed by the prison doctor, the release authorisations will be issued by the prison governor and the medical centre may ask for the information it deems appropriate from the prison doctor and from the psychosocial services.

4.1.2. Position of the problem and expansion of the ethical debate: MAP and conjugal visits in respect of the Belgian Prisons Act

The Minister's question targets the point of knowing whether it is fitting, in the prison context, to grant access to fertility treatment to intentional parents encountering fertility problems. According to the Committee, the treatment of this problem not only involves the question of healthcare. Indeed, the purpose of this type of treatment - the birth of a child - is obviously problematic in the prison context. For this reason, the Committee feels that it is fitting to reflect both on the interests of the intentional parents and on the best interests of the child.

Further, given that the ethical consideration focuses on the balance between the interests of the intentional parents and those of the child, it immediately encounters the analogical problem raised by the generalisation of conjugal visits. These visits, which aim to favour the relationships of prisoners with their family circle, but which are also granted to people who have only had a relationship by correspondence for at least six months, obviously entail the possibility of pregnancy, and therefore of a birth, in women prisoners.

In the prison context, the treatment of infertility, just like conjugal visits, seem to establish, if not a contradiction, at least competition between the rights and liberties of prisoners and the general principle of the best interests of the child. The parallel established between the two (access to MAP and conjugal visits) places at the centre of the debate the ethical principles which are the basis for the aforementioned Belgian Law of 12 January 2005: not only the principle of equivalence in terms of healthcare, but more generally the principle of "normalisation" of the prison inspired, *inter alia*, by the Convention on Human Rights. *In fine*, it appears that different opinions related to access to MAP - and also to conjugal visits - within the Committee can be interpreted as divergences related to the assessment of the scope of the Law, both with regards the ethical principles which are the basis for it and with regards certain rights that it grants to prisoners.

The chapter proposed here aims to add to the reflection of everyone by considering the many facets of the question; some elements introduced into the ethical debate which follows are not unanimously accepted by the members. But as they have enabled the positions presented in Chapter V to be presented, they are fully part of the reflection and are grouped together around three themes:

- Change in the opinion on delinquency and penal policies; explanation of the ethical principle of equivalence;
- Considerations on the interests of intentional parents;
- Considerations on the interests of the child.

4.2. The change in the opinion on delinquency and ethical principle of equivalence

4.2.1. Short history of opinion on delinquency

In the aftermath of the French Revolution, criminal law saw renewed interest for the "person" of the delinquent. This interest, coupled with the ideal of scientificity characteristic of the 19th century gave birth to a new science: criminology, whose main representative of the era was Cesare Lombroso. A doctor attached to Turin prison, he observed and described delinquents. He discovered in them anatomical and morphological anomalies which enabled him to postulate the thesis of the delinquent - or the born-criminal[66].

Although Lombroso's theory has been contradicted since, from time to time some speculations re-establish the premise of the innate or even biologically determined nature of the predisposition to delinquency. Still in Italy, Enrico Ferri, a trained sociologist, published a work on "*La Sociologie criminelle*"[67] and, whilst preserving Lombrosian theory, invoked the existence of added on social factors to explain the development of delinquency. In a favourable biological field, it is social factors which produce delinquents. In France, Alexandre Lacassagne would go further, claiming that "societies have the criminals they deserve[68]".

In England[69] and in Austria[70] medico-psychological theories of delinquency started to emerge at the end of the 19th century. The 20th century — S. Freud and M. Klein were not strangers to this movement - would see the development of theorisation on criminal psychology; in most European prisons, psychiatrists and psychologists were brought in to "treat" the delinquent tendencies of prisoners. In Belgium, other than the psychiatrist doctors attached to some prisons to treat cases of mental decompensation of some prisoners, or even to treat their mental illnesses, at the start of the 1970s, some prisons were given observation and treatment units comprised of social workers, psychologists and psychiatrists. These units have recently been turned into psychosocial services.

The fact remains that criminology is still influenced by sociologists, both from the statistics point of view and from the qualitative sociology point of view. In 1961, Erving Goffman published *Asylums*, a work which describes the pathogenic effects of totalitarian institutions on those staying in them. Whilst finding links between environmental social factors and criminality, more and more sociologists, far from looking to establish cause-and-effect links between these variables, show that society in fact punishes insecurity. Our criminal law mainly hunts down blue colour crimes and is only moderately interested in white colour crimes.

If the page of the born-criminal has not been turned once and for all and if doctors,

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[66] *Uomo deliquente* (1876). Eng. trans. *The criminal man. Anthropological and psychiatric study. Volume I* (1895).

[67] 1st ed. 1881, Eng. trans. *Criminal sociology*, 1905.

[68] In his Preface to the study of É.LAURENT (1861-1904) on *"Les habitués des prisons de Paris"* p.VII I, A LACASSAGNE quotes a maxim which he mentioned during the 1885 Congress of Rome which summarises his entire thought: *"In our era, justice is fading, prison corrupts and societies have the criminals they deserve"."*

[69] HAVELOCK ELLIS, *The Criminal* (1890).

[70] R. VON KRAFFT-EBING *Traité de médecine légale des aliénés* (1882).

sociologists and psychologists continue to produce explanatory theories on delinquency, we have been asking ourselves increasingly for a long time about the counter-productive effect of imprisonment on repeat offenders. Observing for a long time that "prison is the school of crime", criminologists and, in some European countries, the political powers increasingly often cast doubt on the validity of prison policies in respect of prisoners.

Whilst a prison sentence can play a role as a measure of reparation for victims and society, whilst it protects society from another potential crime, it only protects it for a very short time, since in most cases the convicted prisoner will be released from prison in the shorter or longer term. It is therefore essential, particularly for reasons of security, that the time in prison can be the opportunity for the delinquent to gain social conscience which protects him or her from repeat offending. Unfortunately, we have to state that in most of our so-called "developed" countries, prison is still a place of "soft law" where prisoners are subject to arbitrary practices: difficult in these conditions to develop responsible citizen attitudes.

We can consider that the fundamental principles which guide the European Recommendations (but also, in our country, the law of 12 January 2005) constitute both the fulfilment of the criminological and sociological reflection on the meaning and the negative effects of prison sentences and an attempt to procure legal tools to remedy this. We designate these principles under one name: "principle of equivalence" (also called, in Belgium, "principle of normalisation[71]").

4.2.2. The ethical principle of equivalence

The principle of equivalence of *intra-* and *extramuros* living conditions, - apart from the deprivation of liberty which is the essence of the sentence -, is now part of the ethical practices which govern the regulatory and legal provisions organising prison life[72]. It is by virtue of this principle that we find ourselves justified in granting prisoners a certain number of amenities and facilities, particularly those related to healthcare and contacts with the outside world (for example conjugal visits), some of which may have a more or less direct link with a parental plan or a desire for a child. This principle can also be adopted both as an end in itself - if we adopt a position invoking Human Rights for example - and as a means - if we adopt a more pragmatic position, essentially motivated by the concern for responding to numerous problems caused by the current prison conditions, in Belgium and elsewhere.

Whether they consider this principle in one way or another, or both at the same time, some members recognise that this principle of equivalence, or "normalisation"[73], constitutes an attempt to respond to numerous harmful effects of life in prison: desocialisation, social exclusion and lasting stigmatisation of individuals are widely recognised and studied processes, both by social and behavioural sciences and by numerous official reports. A consensus is being reached around the idea that reintegration into free society is seriously threatened by the current prison condition. For some of the most radical authors, it is the prison system in its very essence which produces these effects, and it is therefore this very system which has to be questioned, by renouncing the illusion of its improvement by

[71] Thus designated in the principles which define the orientations of the bill presented by the Commission chaired by L. Dupont during the 5th session of the 50th legislature. *See supra*, point 2.3.1. of the opinion.

[72] "Life in prison shall approximate as closely as possible the positive aspects of life in the community" (see *supra*, Ch. II, European Recommendations).

[73] See preparatory works of the Belgian Prisons Act.

humanitarian or legal means[74]. For other authors, it should be recalled that the social cost of imprisonment "for the person undergoing it *intra-muros* but also for those undergoing the consequences thereof *extra-muros"* is in no way attributable to the crime, but to the "political decision to punish by prison": it would therefore be fitting to question first of all the utility of using a prison sentence before even considering the actions to "normalise" the prison[75]. That this question remains open and must certainly be the subject of a political and public debate does not, in the meantime, exempt us from trying out all the measures likely to attenuate the harmful effects of prison; the ethical (and political) principle of equivalence or normalisation constitutes a guide for drawing up these measures.

This principle, present in all the texts but whose authority is still very fragile, marks a positive development in the conception of the sentence. If the meaning of this - the objectives assigned to the prison sentence or the social function given to it - remain highly controversial, we now seem - at least in terms of the spirit of the normative texts -, to agree on the idea that the deprivation of liberty of movement in itself suffices, and that we have to attempt to limit to the maximum the restrictions imposed on prisoners (i.e. normalise the prison). It is in the interest of society as a whole to organise prisons in such a way that the people released from them are capable of leading their lives in better conditions than before.

In the current context of an intensification of security debates and repressive practices (extended prison sentences and increase in the prison population), the ethical principle of equivalence which guides certain normative texts (despite the traps lying in wait[76]) can come to the help of a rational argument concerning the meaning and the effects of the sentence; *a contrario,* it invites us at least to reflect on what society is targeting through imprisonment. If it is difficult to respond to this question, this principle reminds us at least that it is the responsibility of society and the public authorities - but also of general interest - to help those who spend time in prison to build their existence on new bases and regain a place in society.

This ethical principle of equivalence is clearly indicated in the five basic principles of the Belgian Law of 12 January 2005. By limiting the scope of the deprivation of liberty to the sole right to come and go freely, by affirming the requirement of limiting the damage related to imprisonment and by approximating as closely as possible life in prison and conditions in free society - here we can consider that the so-called "principle of normalisation" is another

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[74] A. BROSSAT, *Pour en finir avec la prison*, La Fabrique, Paris, 2001. ZYGMUNT BAUMAN, "Le coût humain de la mondialisation", Hachette, Paris, 1999, p. 167-168: "Les prisons n'ont jamais permis de réhabiliter qui que ce soit. ("Prisons have never allowed anyone to rehabilitate".) Elles 'prisonnent' les détenus […] ("They "imprison" the prisoners [...]". La 'prisonnisation' est l'inverse de la 'réhabilitation', et elle constitue l'obstacle majeur au retour sur le droit chemin." ("Imprisonment" is the reverse of "rehabilitation", it constitutes the major obstacle to the return to the right track) ".

[75] DAN KAMINSKI, "Droits des détenus et protection de la vie familiale"*, in: Les Politiques Sociales*, 3 & 4, 2006, p. 12: "pour éviter les conséquences problématiques de l'incarcération, il suffit de ne pas y recourir" ("to avoid the problematic consequences of imprisonment, we simply should not use it"); "par normalisation, on entend le principe selon lequel la vie du détenu doit différer le moins possible de la vie en liberté" ("by normalisation, we mean the principle according to which the life of the prisoner must differ as little as possible from life in free society").

[76] As Dan Kaminski rightly underscores, the debate on rights may serve a "normalising aim (tool to fight and defend the interests of subjects, whether they are prisoners or not), but may just as well serve a "neo-rehabilitating or neo-correctionalist function of the prison, which has nothing to do with the facilitation of the life of prisoners"; hence the rights may "also become the tools of a penological objective". Likewise, the debate on rights may also give way to confusion "between normalisation of life in prison and normalisation of the prisoner" (*Ibid., p*. 17).

name for the "principle of equivalence" -, by reaffirming finally that the requirement to speak to prisoners as responsible citizens (accountability and participation), the fundamentals of the law very clearly aim to recall that the Convention of Human Rights applies in the same way to prisoners and free citizens alike[77].

4.3. The interests of intentional parents

4.3.1. Parental plan and reintegration

Just as one can imagine a couple relationship started during imprisonment can, in some cases, help a former prisoner to reintegrate into free society, *some members* have not stopped themselves from thinking that a parental plan, or, at the very least, a desire for a child, can also help a prisoner to look towards the future, to gain a sense of responsibility, etc. Examined from this angle, the parental project must be covered in the respect for the family and emotional life of everyone, given its importance for reintegration and life after prison[78]. A parental project coming from one or two prisoners *may* indeed, in some cases, contribute not only to the strengthening of emotional links with the family in the widest sense (close family and friends), but also, in this way, to social reintegration.

We know that this type of debate causes criticism according to which the child would only be a *means*, or that it would be contrary to his or her interest not to be treated as an "end in itself". Admittedly, the risk of seeing a prisoner "instrumentalise" a parental plan or a desire for a child - to conceive a child with the hope of getting out of prison quicker - must be taken into consideration. But, according to some members, this argument of instrumentalisation does not specifically hold for people convicted to prison sentences: in free society, the conscious or unconscious reasons for wanting a child and the implementation of the means to achieve this are multiple, and could fall under the same reproach - conceiving a child to mend, to consolidate as a couple, because you do not want to stay alone, etc.

Further, some members consider that having a child and raising him or her always entails a change in one way or another - in the life of free people, having a child means renegotiating, with oneself and with others, ones ways of working, eating, going out, organising; it also inevitably entails changing ones relationship with others, and in particular with other generations, etc. Do we have solid arguments to affirm that a prisoner will be less able than any other person in free society to do this "negotiation" when they are forced to do so?

In the cases where couples of prisoners, or couples of whom one of the partners is a prisoner, formulate a parental plan, these members think that it should be the responsibility of society to offer, inside the prison, appropriate responses to this plan. Competent professionals should collaborate with the prisoners, make them aware of their responsibilities and lead them to reflect on all the social, relational, pedagogic and practical problems related to this plan.

Other members agree that interventions aiming to favour the reintegration of prisoners into society must be proposed. However, as nothing proves that parenthood has such an effect and given the difficulties it faces in a prison environment, they feel that the reintegration argument

[77] These principles have been explained in the legal chapter: see *supra*, point 2.3.1. of the opinion.
[78] On this point, look at in particular Opinion no. 94 of the French National Advisory Committee on Ethics for Life Sciences and Health, related to "Health and medicine in prison" (Briefs of the National Advisory Committee on Ethics, no. 50/January-March 2007, p.3).

cannot be used to authorise and justify the conception of children in prison. Furthermore, these members take very seriously the temptation to use pregnancy and maternity as a means to enjoy significantly more advantageous conditions within the prison. The advantage linked to the presence of the child, particularly if the placement in an open institution or in a forced residence becomes a reality, would be likely, in their eyes, to encourage strongly the desire for a child; a policy resulting in fact in an increase in the number of children in prison would seem anything but prudent.

4.3.2. Principle of equivalence and social exclusion

The principle of equivalence is the idea according to which life in prison shall approximate as closely as possible the positive aspects of life in the community

For some members, the principle of equivalence can be regarded as even more necessary given that the prison conceals badly an obvious sociological fact: the prison population mostly comes from the most disadvantaged social groups[79]. In many respects, prisons operate like an intensification of exclusion and social discrimination. It therefore seems important to reflect on the effects of the social control it exercises *de facto*, directly or indirectly, on prisoners. Hence, a general and unconditional restriction (prohibition), for any prisoner, in accessing infertility treatments or more generally procreation would, through the *a priori* exclusion of part of the population outside the category of "competent parents", come back to using social exclusion and denial of recognition mechanisms. The perfectly legitimate requirements of our society in respect of living conditions and education of children should, on the contrary, be the subject of *collective* responsibility which alone may, by weighing on the living conditions of the intentional parents and children born, weaken the effects of social inequality[80].

Other members underscore the paradoxes which may result from the principle of equivalence. They state on the one hand that outside the prison, some women have to raise children in very uncertain situations, both socially and financially, and do not always benefit from adequate supervision and support. How can it then be justified that women imprisoned through their own fault would benefit, on the basis of the principle of equivalence, from better social and financial aid than women in free society? It is on the other hand obvious that the placement in an open institution may be a very attractive prospect. These members further feel that the principle of equivalence (between prison environment and free society) itself relies on a general principle of equality which must prevail for prisoners between themselves. If women who have a child - or who bring a child into the prison environment - enjoy more advantageous conditions than their co-prisoners who do not have children or who cannot have them, here we see a form of discrimination against the latter.

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[79] Which makes many observers and analysts, particularly from social sciences, say that prison, since the 19th century, accompanies a trend for the *criminalisation of poverty*. L. Wacquant, Professor of Sociology at the University of California-Berkeley thus stated "Deemed to provide a remedy for insecurity and uncertainty, it only concentrates them and intensifies them, but as long as it makes them invisible, we ask nothing more of it" ("Interview on *Prisons of Poverty*", R de Réel website, volume C (May-June 2000), http://rdereel.free.fr/volCZ1.html). See also L. WACQUANT, *Les prisons de la misère*, Editions Liber-Raisons d'Agir, 1999. And also, M.FOUCAULT, *Surveiller et punir,* Gallimard, 1975; A. Y. DAVIS, *Les goulags de la démocratie*, Au Diable Vauvert, 2006.

[80] If the means we have to correct the effects of the global market are highly insufficient, the administering of sentences and the management of prisons remain, up to new order, within the scope of a national political action and debate.

Other members further remark that social exclusion is a phenomenon favoured precisely by the fact of having a lot of children. If favourable conditions for having children are not found in free society, they will certainly not be in a prison environment. They emphasise that the rights and welfare of the child take precedence.

4.3.3. Medically assisted procreation and conjugal visits (without supervision)

Since the 2000s, conjugal visits have been generalised, thus giving *de facto* to prisoners the possibility of conceiving a child. We seem hardly worried by the fact that pregnancies, as well as births *intra muros* could result from the granting of these visits[81].

Faced with the eventuality of unwanted pregnancies, the Committee feels that information on contraception should be greatly improved, and that use of the means available should also be encouraged. Indeed, current rules provide that, when a conjugal visit is authorised, the prison doctor gives this information and ensures that contraceptives are available in the room; but we note that in practice, they are hardly used.

We will recall that Art. 58.4 of the Belgian Prisons Act provides that obtaining a conjugal visit is a right and that neither the ministerial circular of July 2000 nor the subsequent law make the use of contraceptives a condition for access to conjugal visits. However, the freedom to procreate in prison which results from these legal and regulatory provisions is not unanimously agreed upon by the members of the Committee.

1. *Some members*, whilst recognising the necessity of conjugal visits and therefore the principle of sexual relationships *intra muros*, do however have serious reserves in respect of the pregnancies and births which may result from them. Considering that the fact of giving birth in prison is contrary to the best interests of the child, they feel that the right conferred to prisoners by the law should, in practice, be subordinate to the acceptance of contraception if this is a female prisoner. It goes without saying that, for the same reasons, they feel it necessary to exclude in general recourse to infertility treatments in prison: on this matter, the legislator should rather explicitly stipulate the exceptions to the principle of equivalence for healthcare. The rule applies indeed, in principle, for preventative and curative treatments. For any other form of treatment (aesthetic, for example) there has to be a distinct substantiated decision. The question of knowing what treatments the INAMI reimburses to ordinary beneficiaries is not directly linked to this problem. Further, during negotiations on this subject, the problem of prisons has not been covered.

2. *Other members*, considering the existence and the general motives of the Belgian Prisons Act as a major ethical breakthrough in respect of the conception of the rights of prisoners, feel that the recognition of these rights, particularly that of conjugal visits, deserves no exception apart from those provided for in the said Law. Further, given that the visits have a significant positive effect on the psychosocial situation of prisoners, the risk of pregnancy would not, in their opinion, hold as an argument for restricting access to conjugal visits.

However, they do claim that a prolonged stay in prison would not be harmful to the development of a child; they feel it essential in this matter, as in others, to respect the

[81] A study devoted to the implementation of the circular, focused on conjugal visits, only emphasises this problem once, through the interview of a prison governor (S.DUTILLEUX, "Visites dans l'intimité. Etude de la mise en œuvre de la circulaire ministérielle 1715", thesis in Criminology, dir. Prof. D. Kaminski, UCL, 2006, p. 80.).

autonomy of the imprisoned parents. Independently of the fact that forcing a female prisoner to accept contraception before authorising them to have a conjugal visit is likely to discriminate them for religious reasons, they feel it essential to recognise their individual responsibility. No more than the State is entitled to force free citizens to be sterilised or to accept contraception - with a few rare exceptions and in consideration of very strict conditions[82] - society is not entitled to decide on the merits of the desire to have a child of an imprisoned person[83].

These members feel that imposing contraception on prisoners fundamentally contradicts their recognition as fully fledged citizens. They consider that invoking the "good of the child" to argue the subordination of a conjugal visit to the acceptance of contraception constitutes an abuse of power of society in respect of its prisoners - an abuse which the Belgian Prisons Act has precisely wished to abolished.

These members therefore feel that the respect of the principles stipulated by the Law is essential from an ethical standpoint. For them, it is the responsibility of society to find the financial resources necessary for the exercising of the human rights recognised in prisoners.

For the members of the Committee who recognise the right of prisoners to decide for themselves on the merits of a parental plan, even when the future mother is imprisoned, there is no doubt that it is useful to provide, inside prisons, support for the desire to have a child as well as education on contraception. Effectively, it is not enough to make contraceptives available for prisoners who benefit from a conjugal visit; these prisoners have to be informed of the difficulties inherent in birth and parenthood in the prison environment, there is a need to discuss with them the appropriateness of a pregnancy and the existence of means to avoid it, where appropriate.

Given that these members recognise in prisoners the right to decide for themselves on the merits of a parental plan, and likewise that conditions cannot be imposed on access to conjugal visits, they feel that sterile prisoners cannot be refused the right to benefit from treatments which could enable them to conceive a child on the sole grounds that they are prisoners - which in no way means this right must be granted to them in all circumstances.

4.3.4. Conclusion: rights and responsibilities of intentional parents

The members of the Belgian Advisory Committee on Bioethics can only be delighted with the existence of legislation which governs prison conditions in Belgium and which clearly recognises prisoners' capacity as fully fledged citizens. They also largely approve the legal provisions which aim to improve living conditions in prison and prepare prisoners for reintegration in free society.

However, the members of the Committee are not unanimous as to the possibilities given by this Law, particularly those concerning the imprisoned potential "intentional parents" who, in law, can now claim conjugal visits as well as medically assisted procreation. If the recent orientation taken by the legal texts tends to concur with the interests of imprisoned intentional

[82] See Opinion no. 8 of the Belgian Advisory Committee on Bioethics of 14 September 1998 on the problem of the sterilisation of mentally handicapped persons, in: Bioethica Belgica no. 4 of 4 March 1999, p.5 (www.health.fgov.be/bioeth).
[83] It must also be recalled that almost half the prison population in Belgian is in prison for preventative reasons and is therefore presumed innocent.

parents, account must in fact be taken of the fact that the exercising of some rights will end in the birth of children in a prison environment.

Faced with this possibility, the opinions diverge:

- *Some members* think that what is at stake is less so the rights than the responsibilities of the intentional parents. They feel that, given that the best interests of the child are at stake, the limitation of the principles stipulated by the Law (particularly the principle of equivalence in terms of healthcare or the right to conjugal visits) could be ethically justified. Given the prejudices which a child born in prison could suffer (and who could, further, be separated from the mother), the only responsible attitude would be to delay the time of the pregnancy.

- *Other members* think that the respect of the motives of the Law and the principles it stipulates is essential. Prisoners enjoy the rights of everyone, particularly the right to private and family life and that of founding a family or, in other words, having children. From this point of view, one cannot therefore impose conditions on their right to visits during which they may have sexual relations. As, further, it seems desirable that prisoners benefit from the same access to healthcare as persons in free society, there is therefore no reason to refuse *a priori* prisoners (on the sole grounds that they are prisoners) access to infertility treatments or to MAP.

As the sole fact of being imprisoned entails most often a feeling of mistrust in the personnel assigned to the prison, these members do not feel it opportune to entrust to the prison doctor the responsibility of deciding on medically assisted procreation. Considering furthermore that it is fitting to place prisoners on a equal footing with free persons, they propose sending the request to a specialised centre and feel that any decision related to medically assisted procreation concerning a couple, at least one of whom is a prisoner, must be the subject of the most objective and most neutral analysis possible and collaboration between the future parents and the centre's specialists[84].

All these reasons do not, however, establish any "(positive) right to procreation": this only has meaning in association with the responsibilities of the imprisoned intentional parents in respect of their future child and with those of society in respect of its prisoners and their children.

Hence, these members feel that access to this type of treatment, due to its consequences, should be conditional upon the assessment, by competent professionals, of the situation of each of the intentional parents and conditions in which the potential child would be born and grow up and this must be done in collaboration with the applicant(s). In the same spirit, it would be fitting for society, through its different representatives in the prison environment (social workers, doctors, psychologists, etc.), to take the trouble to give adequate information to the prisoners benefiting from conjugal visits on the consequences of a pregnancy in prison and on methods of contraception; where appropriate, it would be fitting, in the case of a parental plan, also to establish collaboration with the prisoner(s).

Although they diverge as to the way of arbitrating between the interests of the intentional parents and those of the child, all the members of the Committee feel it necessary to take this latter into account. The following section attempts, from the literature available, to report on the current situation.

[84] *See* Belgian Law of 6 July 2007, examined *supra*, point 2.3.5. of the opinion.

4.4. The interests of the child

Granting infertility treatments in prison is not a neutral act: just like conjugal visits, in certain cases this will lead not only to the birth and accommodation of an infant in a prison environment (stay potentially extended up to three years maximum according to the Law), but also his or her possible separation from the parent, in the event the parent remains in prison beyond the time the infant has to leave.

There are many constraints weighing on the children of imprisoned parents in general, and some of them are not however linked either to the very fact of the imprisonment of one or both parents, or to the highly unfavourable socio-economic conditions in which a very high proportion of the population that is or has been in prison finds itself in[85]. Added to these constraints are those to which the infant who stays in prison with his or her imprisoned parent is exposed. The traditional prison system, with its physical and regulatory constraints, with the various restrictions it imposes, constitutes an obstacle to the welfare of the infant, and without any doubt moreover the peaceful exercising of parenthood. The first mission of the prison is neither to accommodate nor to raise infants.

In this opinion, you will only read a limited overview of the literature and data which the Committee has been able to collect from the testimony of an expert, speaking from the front line[86]. Apart from the obstacles which prison life imposes on the welfare of the infant and the responsible exercising of parenthood, some members, taking inspiration from the international and European regulations on this matter[87], think they can deduce from numerous studies that, just as it is important to support actively the relationships between infants and imprisoned parents in general, it is highly preferably for a very young child to be kept with his or her imprisoned mother, and that it is important, above all, to reflect on the conditions and the duration of the imprisonment:

"Now, this is no longer a question of knowing whether one is for or against mother-infant imprisonment, but rather of asking in what conditions it is possible to keep an infant in prison... [...] What imprisonment conditions can facilitate the exercising of maternal skills[88]? What actions can support mothers in their role[89]? ".

Whilst *some members* of the Committee are not favourable to a prohibition of the principle of procreation (whether or not assisted) in a prison context, at the same time they can only underscore how, in our country, the current system of "flexible detention" from which women

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[85] Thus the literature emphasises that the multiple problems experienced by women after their release are not only due to the disruptions caused by imprisonment, but indeed to the fact that the imprisonment has aggravated their situation of social and economic marginalisation (L. CATAN, "Infants with mothers in prison", *in: Prisoner's children: what are the issues?*, ed. R. Shaw, 1992, p. 24-26).

[86] Mrs M-H. Delhaxhe-Sauveur, ONE paediatric consultant, author of several contributions on the subject in national and international publications.

[87] *See* the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations in its resolution 44/25 of 20 November 1989, art.9.

[88] *See* Standard Minimum Rules for the Treatment of Prisoners, adopted by the first Congress of the United Nations in 1955, art.23.

[89] M.-H. DELHAXHE-SAUVEUR, "Mères-bébés en prison", text communicated by the author and reproduced in *Children of Imprisoned parents, op.cit.*, p. 72.

with infants benefit is still insufficient to respond to their requirements and barely able to favour the exercising of maternal skills, particularly in the case of a prolonged stay of the infant.

Some members also underscore further than, according to some specialists, it is however possible to limit the harmful effects of imprisonment, at least on very young children: hence there are numerous recommendations on the organisation of imprisonment for mothers with infants, based on the observation of "positive practices" carried out in Belgium and in other European countries.

For other members, it is fitting to make a distinction between, on the one hand, children who are born inevitably in prison because their mother was pregnant at the time of her imprisonment and, on the other hand, children who are conceived and born in prison with the endorsement of society. These are two fundamentally different situations. According to them, one can authorise sexual relations in a prison environment provided that reliable contraceptives are used guaranteeing that prisoners do not become pregnant in prison and that these shall not give rise to the birth of children in prison. Indeed, it is, according to them, totally irresponsible and under no circumstance in the interests of the child to be born in prison. Society cannot hence contribute to children being born in prison.

4.4.1. Ambiguity of the status of the child in prison

The status of the child in prison - that of a free or "non-detained" person - and his or her actual situation within the prison in many respects comes into conflict: thus are the rights of the child as a free person properly restricted, for reasons of organisation and security specific to prison life? The child is therefore actually taken into a system of "supervised liberty[90]".

Thus a child should be free to receive visits from anyone, but, as it is the mother who has to make a request for this, the admissibility of this request will, nevertheless, be examined and judged in accordance with order and security related constraints by the prison governor.

4.4.2. Conflict with the rights of the child

Some constraints to which infants living within a prison are subjected are not only contrary to his or her interests, but also contrary to his or her rights, as we have just seen.

A study carried out by the ONE in 1994 upheld that the imprisonment of the newly born infant calls into question the principle of numerous articles of the United Nations Convention on the Rights of the Child (1989) approved by the French-speaking Community (1991) [91]. It underscores thus:

"the conflict between the interests of society, on the one hand, which intends to apply the necessary penalties and judgements, and the interests of the infant on the other who is thus subject to discrimination in his or her rights. His or her interests are no longer considered best (Art. 3) and are no longer placed under the responsibility of the parents (Art. 5). Family relationships are impaired as a fundamental aspect of his or her identity (Art. 8). The separation with the parents is only provoked by the circumstances (Art. 9). In this specific

[90] G. DE LABAUDÈRE, *op. cit.* note 48, p. 33.
[91] M. PETIT, *Les conditions de vie des nourrissons vivant auprès de leur mère en prison,* DIRem n. 7, Services Etudes-ONE, Brussels, 1994. http://www.one.be

case, the State is in difficulty of assuring its duty of helping parents raise their children (Art. 18) [92]".

4.4.3. Material constraints

The material constraints which usually weigh on prisoners also weigh on the infants present - variably depending on whether or not the prison has put in place specific structures and measures for the infants; they are difficult to neutralise, for reasons of principle and for reasons of means. There are various constraints: quality of the food, size of the area for moving around in, intimacy, silence and noise, poor sanitary and health conditions, possibility of going outside and enjoying contact with the natural, urban environment, etc.

As not all prisons have specific infrastructures for looking after babies and infants, one may deduce from this that in certain cases, the territory of the infant is reduced to the mother's cell and to the communal areas (corridors) which it opens out onto. The equipment designed for looking after infants and their daily activities (games, walks and siestas) are necessarily limited.
The equipment of the cells, depending mostly on the prison administration, is often very basic for looking after the infant (lack of hot water in the cell for example). If the administration supplies the milk, disposable nappies or basic pharmacy services (via the prison infirmary), the presence of a refrigerator and other amenities will depend on the resources of the mother.

Finally, some regulatory provisions specific to prison life will directly go against the welfare of the infant: the freedom to come and go in different rooms when the infant wants is limited, the infant is exposed, as is his or her mother, to repetitive night lighting, to night shifts and wake-up calls, all his or her outings depend on the authorisation of the prison management, etc.

4.4.4. Healthcare

The *intra muros* healthcare of prisoners is paid for by the FPS Justice.

Access to healthcare equivalent to what is offered in free society, difficult for adult prisoners, constitutes a particular problem for infants who are, due to their age, more subject to certain infections and therefore require adequate and regular monitoring. Whilst in Belgium, infants are now monitored by paediatricians and the multidisciplinary teams of the ONE or of *Kind en Gezin*, the infant may have difficulty in accessing a freely chosen doctor, insofar as comings and goings are subject to the discretionary power of the prison governor. We have also noted the difficulty encountered by infants in receiving healthcare at night, or in being taken to hospital, since no one can enter inside the prison between 10pm and 6am and since the authorisation for an on-call doctor to enter the prison will also depend on the prison governor.

4.4.5. Financial resources

Finally, account must also be taken of the lack of financial resources, linked to their social origin and to the imprisonment, which affects imprisoned mothers, as it does a number of prisoners in general; this may prevent them from being able to look after those needs and desires of the infant, which are not paid for by the prison, as they would wish.

[92] *Ibid.,* p. 1.

Pursuant to Article 69.1 of the coordinated laws[93], the ministerial circular 523 of 18 May 1993[94]does however stipulate that an imprisoned mother can continue to receive family benefits for her infant, provided that the latter is not raised by a natural person or legal entity which fulfils her role.

Alain Bouregba[95] shows further that some mothers fear the contrast between life in prison ("removed from any material contingency") and those which the children will leave once they have left prison, doubting their ability to be able to offer them equivalent material conditions. It thus seems that some women are so impoverished that prison to them seems the only place where it is possible to give birth and accommodate a baby in decent conditions.

4.4.6. Supervision of infants and mothers and overall policy

In Belgium, as in general in countries that practice the "flexible detention" system (see ch. 3.6.), there is no specific personnel assigned to mother-baby quarters with the exception of infancy professionals (ONE, *Kind en Gezin*, SAJ) intervening from the outside. The supervisors have no specific training.

The lack of qualified personnel (teachers, social workers and psychologists) goes hand in hand with the lack of monitoring of individual situations: no evaluation of the accommodation request in accordance with the interests of the child, no continuous assessment of the development of the child, no psychological monitoring of the mother.

There are no general directives, at federal level, defining standards (in terms of space, equipment or professionals working in the prison) or a budget for accommodating mothers and their children, and no systematic and encompassing monitoring of the accommodation by third party institutions - this is therefore left to the sole responsibility of the prison service. Specialists therefore deplore the fact that the action is done on a day to day basis, instead of obtaining a real policy drawn up by the public authorities.

4.4.7. Emotional and psychological constraints

The prison environment, where locking up, sometimes violent interpersonal relationships (based on relations of strength), submission to regulations and de-accountability of individuals prevail, is a social environment that is hardly favourable for the development of the child, but above all harmful to the exercising of parenthood. One of the experts consulted emphasised just how difficult it was for the mother to present a "normal" frame of reference which the child could imitate.

With regards the emotional and psychological dimension of the life of the child, it seems difficult to separate the interests of the child from those of the mother: the impact of imprisonment on the child is directly linked to the impact of imprisonment "on the personality of the mother, on her identity construction and on her ability to fulfil her maternal role[96]".

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[93] Royal Decree of 19 December 1939 coordinating the laws on family benefits for salaried employees (Belgian Official Gazette 22 -12-1939).
[94] On the designation of the person entitled to benefits for minors.
[95] Psychologist and psycho-analyst, Director of the Federation *Rélais Enfants-Parents*, Vice President of Eurochips.
[96] L. AYRE, K. PHILBRICK, M. REISS (eds), *op. cit.* ,note 39, p. 72.

A great many specialists seem concerned by the marks which could be left on babies and infants due to spending a long time in a prison environment[97], but the literature available in fact proposes essentially considerations on *the relationship between mother and child, and the conditions to which this is subjected*.

Research subsidised by the Houtman Fund emphasised the problems encountered by mother-child relations in prison: anxiety and distress caused by imprisonment in the mother, ambiance of the pregnancy and birth, extreme fusion of the mother and child followed by almost total separation once the age limit is reached, lack of paternal substitute, problems related to the difficulty of relations with the outside world.

Hélène Mathieu[98] emphasises the anxiety of women prisoners who fear the impact of imprisonment on the child, the difficulties of socialising of these infants due to the small number of babies in prisons, the institutional infantilisation of mothers and the difficulty in making the best of themselves in a context where they cannot always work.

We also reveal that the self-depreciation which mothers might experience, and the self-indifference which results from this, is harmful to the construction of a solid relationship with the infant; the conditions are not always put in place to respond to this lack of self-worth. According to
A. Bouregba, it is not really the conditions of the prison as such which are harmful, but first of all the way in which the mother perceives them.

A French document[99] emphasises the fact that there are many women prisoners who never received personal attention during their childhood and will hence have more difficulties than others in building a solid relationship. Life in prison, according to this study, could lead some mothers not to balance out their own needs and the needs of the infant, and we fear the propensity of some women to want a child in prison for the advantages this procures (emotional compensation, social recognition, special status).

The difficulty of contacts with the outside world, linked to the internal rules of the prison, to the lack of resources to travel for outings, to the distance from the place of origin, etc. weighs on the maintenance of links with family and close friends: the infant also here runs a risk, just like his or her mother, of increased isolation and social exclusion.

The specialists who refer to the works of Françoise Dolto regret the lack of consideration of the role of the father (who is often absent) during the time in prison, and more generally the distortion of the child's relationship with adults other than his or her mother. However, one of the experts interviewed by the Committee indicated that, in some cases, the infant is the subject of (too much) constant attention from other women present, whereas another one remarks that, due to the low proportion of prisoners with children and due to their isolation away from other prisoners, some of them can find themselves totally alone with their child.

Finally we have underscored the paradox which the mother has to face in prison: placed, more than any other, under the watch and judgment of others, she has the duty of being a good

[97] M. PETIT, *op. cit.* note 92, p. 3-6.
[98] H. MATHIEU, *Prisons de femmes,* Marabout, Paris, 1987.
[99] "La mère détenue et son enfant" (1990), Ecole Nationale de la Magistrature, Association Etudes et Recherches (document cited by the study of M. Petit, ONE).

mother "and yet is not, to this end, attributed any means of being so. The mother is herself mothered in prison[100]". We will recall, however, that in Belgium, some prisons now offer communal areas for mothers and their infants, where they can, for example, prepare their meals.

It is fitting to note the limits of the studies and research concerning the impact of living in prison on the children who live there with their mother. Whilst all these aspects constitute a series of potential obstacles to a peaceful and constructive relationship between mother and infant, no serious study can designate them as the "causes" of future deviant behaviour. As emphasised by the study of Liza Catan (1992), the long term impact of material imprisonment on the behaviour of children cannot be reduced to a cause and effect link: "it is highly unlikely that the events surrounding the imprisonment of a mother act in isolation and there may be factors for improvement which, in specific cases, counter-balance the negative experiences. […]".

4.4.8. The qualified results of the survey of L. Catan on the development of children

Although "*evidence-based literature*" on the subject is limited, the empirical study carried out by Catan (& *al.*) at the end of the 1980s (1986-1988) in England on the development of babies living in mother-baby units leads to qualified conclusions. The study is based on the parallel observation of two groups of babies of imprisoned parents: one group was comprised of infants living with their mother in prison, the others outside, essentially looked after by foster families. The development of the infants was evaluated every month using "Griffith mental development scales" (1954), a standardised test defining locomotive, social, linguistic, cognitive and fine psychomotility development standards for the first two years of life.

With regards the first months, the tests carried out on the babies did not reveal a significant difference between the two groups; contrary to popular opinion, the development of babies in prison did not present the severe and generalised latencies which the traditional studies had highlighted for children from institutions such as orphanages. The scores achieved by those living in prison did however tend to deteriorate gradually as of the fourth month with regards locomotive and cognitive development only. According to the author, the environment of the units offered, with regards locomotive development, sufficient conditions for acquiring basic skills, but insufficient conditions to enable babies to hone them and enhance them, due to an inadequate use of the facilities available, condemning the babies to staying long periods of time in chairs, lying down, etc. It was more difficult to explain the drop in cognitive performances: they would be due to several factors, such as the lack of structured educational and exploratory games. The lack of infancy professionals, such as those in nurseries, was also a reason put forward. In fact, the exclusive presence of medical nurses tended to focus the needs of the infant on the medical necessities and to adapt them to the demands of prison life, neglecting the needs which babies have in having access to activities requiring, for example, interaction and reflection, such as building, playing, etc. [101].

According to the author, the research therefore highlighted new points: "it indicated that mother-baby units have the potential to support a healthy and normal development, and this discovery advocates the installation of specific equipment for babies in prison (*child-care*

[100] M. DELHAXHE-SAUVEUR, "L'enfant et son parent détenu", dans *Vademecum des droits de l'enfant*, Kluwer, Brussels, p. 52.
[101] L. CATAN, *in: Prisoners' Children: What Are the Issues*? by Roger Shaw, Routledge, New York. 1992, p. 15-20.

facilities) and advocates the possibility for mothers to keep their babies with them during imprisonment[102]". To the contrary, the study shows the major difficulties, largely linked to the lack of stability, which some babies encountered when separated from their mother, independently of their best scores in the tests carried out[103].

4.4.9. The conception of the mother-child relationship

According to some members, the literature and the data available imply that it is generally accepted that the separation from the mother can have negative consequences on the development of the infant and that the effects of imprisonment on the infant can be underestimated: "Indeed, if the imprisonment conditions take place in a calm and open environment, it seems possible to keep the infant with his or her mother for a long time. However, imprisonment in bad conditions may be very harmful to the infant, both with regards his or her physical and psycho-emotional development and with regards his or her positive social interaction skills[104]".

In this spirit, three principles of accommodation responding to the interests of the infant have been established:

1. There is apparently international consensus on the necessity of protecting the relationship between the baby and his or her imprisoned mother. The stable caring of the baby by his or her mother (and father) is the most favourable situation to the creation of relationships of attachment.
2. A baby can only be accommodated in prison with his or her mother if this baby is or would be looked after properly and without danger and if maternity support programmes are put in place in prison;
3. An infant can only be accommodated [...] if all the (material and human) conditions necessary for his or her welfare and physical, emotional and social development are present, according to current knowledge of the development of the child.

To respond to these requirements, three types of positive accommodation criteria which should guide a concerted policy to improve the situation in Belgium[105]have been defined. The recommendations come from regulatory criteria, from material criteria and from supervisory criteria, and attempt to respond to the weaknesses previously mentioned.

Whilst conditions have improved in recent years, particularly due to the intervention of infancy services and associative networks, the "flexible detention" system specific to Belgium is still insufficient for the implementation of these recommendations: it seems in fact that only the practice of the "open" system (mother-child houses) which has been tested in some prisons in Spain, Germany and the Netherlands (see point 3.7. *supra*) can satisfy this.

Other members suggest that the data available can just as well be interpreted in another way

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[102] *Ibid.*, p. 19.

[103] *Ibid.*, p. 20-23.

[104] L. AYRE, K. PHILBRICK, M. REISS (eds), *op. cit*. note 39, p. 72. We will also note that, according to L. Catan, it is not the fact of being in prison with his or her mother, or that of being separated from an imprisoned mother which is at stake: she feels that the question must rather look at the avoidable negative effects which usually arise from one situation or the other (L. CATAN, *op.cit*. note 102, p. 15).

[105] L. AYRE, K. PHILBRICK, M. REISS (eds), *op. cit.* note 39, p. 74 -76.

and that the aforementioned principles make the mother-child relationship sacred. The principle according to which an infant is raised by his or her parents is a *prima facie* principle and making use of it is fully justified as a general rule. However, in specific situations, for example when the infant is likely to suffer greatly from major prejudices, society may intervene. The idea according to which the separation from the mother would always have negative impacts on the development of the infant is, according to them, a premise.

These members feel that the data from the study by L. Catan, for example, indicates that the later the separation occurs in the life of the infant, the greater the harm is. Furthermore, nothing proves that the separation is harmful for the infant. To the contrary, it emerges from the study that the group of infants that stayed in prison with their mother recorded not as good results[106]. Given the damage which appears after a few months and locomotive and cognitive problems posed in case of late separation, one might conclude on the basis of this study that the separation must take place as soon as possible.

The consequences on the infant depend 1) on the situation in which the mother and infant are and 2) the alternatives which are offered. Incidentally, the current regulations indicate that society shares this opinion given that numerous countries limit the time an infant can stay in prison to eighteen months maximum. This rule rightly aims to protect the infant as to his or her development possibilities.

It would therefore be fitting, according to these members, to look at other accommodation possibilities. If the infant can be placed with the second parent or with his or her grandparents, then this option should be favoured. Nevertheless, the preference given to family is also a *prima facie* element. The placement of the infant must respond to an initial condition, i.e. the presence of a social context in which stability and continuity are combined with warm relationships. If the members of the prisoner's family do not satisfy this initial condition, it is fitting to opt for a foster family. In this case, measures have to be taken to ensure regular contact between mother and infant.

4.4.10. Conclusion on the interests of the child

a) *Some members* feel that the literature available, but above all simply common sense, show that life in prison cannot under any circumstance respond to the needs either of babies or of infants; being born and staying in prison constitutes veritable harm. It is therefore contrary to the best interests of the child to authorise births in prison, particularly if these are followed by a prolonged stay with the imprisoned mother. One must therefore do everything possible to prevent the birth of children in the prison context.

b) *Other members* consider that the scientific literature available on the development of infants living in prison is insufficient and that it does not authorise any clear-cut conclusion. They emphasise the opinion of specialists according to whom, with regards babies in any case, prison is harmful in itself, further making concrete proposals to neutralise the harmful effects of life in prison on infants.

It is true that in respect of the current situation in Belgium, and more specifically the limits which life in a flexible detention system imposes on the exercising of parenthood, it is not desirable to encourage births in prison, particularly if these are likely to force the infant to a

[106] For example, in the tests relating to the functional cognitive level, determined using the Griffiths scale due to the lack of stimuli in their prison environment.

prolonged stay with his or her imprisoned mother and/or entail an abrupt separation from her.

The response to a request for infertility treatment from imprisoned intentional parents must, for these members, be subject to an assessment on a case by case basis (and not a refusal on principle) by a specialised healthcare centre. These members suggest that during this assessment, the interests of the child take precedence over those of the intentional parents.

In the analysis of the request by a healthcare centre, the assessment of the interests of the child to be born should be measured by the yardstick of:

- the accommodation and monitoring conditions offered by the prison where the infant would have to stay (given that in Belgium, these may vary from one prison to another and according to the fact that the policies on this subject may change);
- the quality and the solidity of the parental plan;
- the specific situation of the imprisoned parent(s) (age, solidity of the close or family connections outside prison, and particularly the hopes of release of the mother, since the risks to which infants separated from their mothers are exposed have been highlighted);
- the proximity over time of the benefit hoped for in relation to the treatment requested (a fallopian tube reanastomosis (for women) or a vasovasostomy (for men) can be requested without however immediately incurring a pregnancy). The commencement of medically assisted procreation does not necessarily lead to an immediate pregnancy either.

CHAPTER V. Conclusions and recommendations

5.1. Conclusions of the members of the Committee

All the members of the Committee approve in their broad lines the basic principles of the Belgian Law of 12 January 2005 and wish that those of the implementing orders designed to apply them which have not already done so be taken preferably as quickly as possible.

All the members recognise the positive nature of the measures concerning conjugal visits, but they feel that, at present in Belgium, the conditions for accommodating imprisoned parents with infant(s) are far from being satisfied. They think that, from this point of view, the rights and liberties of prisoners - particularly the right to have children - are likely to come into conflict with the interests of the child which has just been born and has to grow up in prison.

They all deplore the lack of financial resources made available to the prison authorities to improve the organisation of prisons and the material life of prisoners in general.

All the members feel that the information concerning parenthood in the prison context, as well as concerning contraception, should constitute one of the strengths of the psychosocial support programmes provided for by the Law for imprisoned men and women.

Finally, whilst all the members agree on saying that this psychosocial support of prisoners is of course important, they do however consider that the psychosocial support of children is even more so.

Apart from these points of convergence, the members of the Committee adopt different and qualified positions, which can be divided into two tendencies:

An initial tendency:
opinion in principle unfavourable to the access of prisoners to MAP

Some members, who consider that *births in prison* are as a general rule contrary to the best interests of the child, wish to add to this opinion the following considerations:
a) When the birth and stay of these infants in prison are *inevitable* (as the infant was conceived before imprisonment) it is essential that society and the bodies concerned do everything possible to reduce the negative consequences for these infants.
b) However, with regards *prisoners with long sentences*, the authorities must take all necessary measures to *avoid the procreation and/or birth* of children in prison.
These persons must not therefore have access to MAP, or to the reversal of a sterilisation procedure (fallopian tube reanastomosis or vasovasostomy) and their "conjugal visits" may only be accepted if reliable contraception is guaranteed.
The notion of "prisoners with long sentences" should be emphasised here: *(1)* the Minister uses this expressly in her letter requesting an opinion; *(2)* the cases which have been presented as an illustration were manifestly of this type; *(3)* with regards short sentences, the aspect of "urgency" and therefore the interests of the applicants are not really imposed**.**

A second tendency:
opinion in principle favourable to the access of prisoners to MAP

Other members, considering that the principles provided for by the Law, particularly in Articles 58.4 and 88, constitute a major ethical breakthrough and that the recognition of these rights deserves no exception beyond those provided for by the Law, consider:

- that it is the responsibility of the prisoners in the same way as that of free citizens to judge the merits of a parental plan and that the State cannot force sterilisation or contraception on anyone, save in specific completely exceptional situations;
- that the principle of equivalence of healthcare, combined with the fact that since 2003 infertility treatments have been paid for by the INAMI, has the effect of making, in principle, this type of treatment accessible to convicted prisoners and to untried prisoners.
- that one cannot *a priori* exclude infertility treatments on the person of sterile prisoners on the sole grounds that they are imprisoned and that by virtue of the rights recognised in them, it is fitting to let the specialised centres decide on the appropriateness of implementing this treatment, as is the case for free citizens;
- that nothing prevents an MAP treatment, which was started before imprisonment, from being able to be continued after this, save in exceptional circumstances - such as a very long-term sentence. In these cases, it is the responsibility of the centre to decide on continuing the treatment;
- that the assessment of the MAP request should be carried out on a case by case basis by professionals from the specialised centres, who shall take account of the interests of the child without neglecting those of the imprisoned intentional parent(s), based on several criteria (suggested in the Recommendations, 5.5.) ;
- that it is admittedly fitting not to encourage births in prison, but that it is also the responsibility of society to implement the financial resources necessary for the full exercising of the human rights recognised in prisoners, and in particular to respond as

best as possible to the requirements of women who are imprisoned with their infant;
— that it is of the utmost importance to apply the principles of the Law and adapt the reality of the imprisonment conditions consequently, by increasing the resources of the Directorate General of Prisons.

5.2. Arguments of members who are in principle unfavourable to the access of prisoners to MAP

5.2.1. These members base their argument first of all on a *basic ethical position.*
Indeed, given such problems, they are generally confronted with interests of different types (in this case, those of people wishing to have a child and those of the children they may potentially conceive).
In order to avoid discussions concerning definitions, they propose referring to these interests by using the term "*welfare*" (see, for example *supra* the reference to the European Prisons Rules under 2.1.1) and when this is an intense lack of welfare, using the term "*suffering*".

5.2.1.1. With regards *prisoners* in general, their "*welfare*" depends on factors of greater or lesser importance.
a) First of all a distinction has to be made between the elementary conditions of any decent human life: accommodation, clothing, heating, food and healthcare (physical and emotional); protection against any violence or sexual abuse and respect for human dignity, including respect for privacy and minimum hygiene.
b) A second type of welfare concerns periodic contact with people inside the prison and the monitoring of the family and friend relationships through the visits. Added to these are measures likely to favour the future reintegration into society, such as training, regular information on what is going on in the outside world and - why conceal it? - the possibility of having sexual activities according to the preferences of each individual.

It goes without saying that there are between these different forms of "welfare" an obvious hierarchy and that, particularly those that they mention under *(a) are part of the most elementary human rights which any civilised State has the utmost duty of guaranteeing.*

5.2.1.2. With regards the welfare of *infants conceived* in the conditions mentioned under 5.1. b), there is a real, even a considerable, risk of a reduction in their opportunities for intellectual, emotional and social development (see for example *supra* under 4.4.8.).
It should also be feared that earlier or later awareness of their affiliation with one or even two "*prisoners with long sentences*" may disrupt the formation of their identity, and sometimes - unjustly - expose them to stigmatisation. *There is a non-negligible risk that one or several of these factors has the effect of reducing their welfare and causes a real source of recurring suffering.*

Faced with the problem posed, a balance must therefore be struck between:
(1) on the one hand, the possibility of a certain increase in *welfare* of the aforementioned prisoners - this is only a 'possibility', account taken of the acknowledged fact that, in some problem families, the arrival of an infant has rather a negative effect;
(2) on the other, a non-negligible probability of harm to the welfare of the infants concerned and even real *suffering*;
(3) it should not be forgotten, further, that in the last group, these are completely *innocent* beings, whereas in the other group we find persons convicted of very serious crimes.
The ethical principle which these members recommend is the following: when there is an

absolute necessity to decide between a limited and doubtful improvement of the welfare for some and a high probability of inflicting suffering on the others, priority has to be given to reducing the suffering.

5.2.2. The second argument of these members concerns the interpretation by the Dupont Commission of the principle according to which the deprivation of liberty would alone be constitutive of the prison sentence. This was summarised by the Minister in a single phrase: *"the purpose of the prison sentence is limited to withdrawing the freedom to come and go, no more no less"* (*see supra* under 2.3.1.). This formulation may give rise to naive if not misleading interpretations.
In reality, the situation of imprisonment implies, particularly for reasons of organisation and security:
(*1*) restrictions in terms of contacts inside the prison and the termination of physical and human contacts outside the prison (save in cases of emergency);
(2) restriction concerning the use of means of communication with the outside world, by telephone, mobile phone, webcam, email and the internet in general. Without these restrictions, the organisation of escapes and the complete management of an enterprise, including a criminal organisation, would be considerably facilitated;
(3) restrictions in terms of the trading of material goods, without which rich prisoners could have their own meals and food and other comfort goods delivered, thus eliminating any form of equity with regards the application of sentences.
These few examples demonstrate almost superfluously that the prison sentence implies a lot more than the limitation "of the freedom to come and go".

These members draw the conclusion from this that a reference to *general principles of law (see supra* under 2.3.1.) may well be valid as an introduction to the consideration of certain measures, but that, in each actual case, an *ad hoc* argument is necessary, which takes account of the possible positive or negative consequences.
This remark particularly applies when it is a matter of regulating "*conjugal visits*", given that, as they have shown, the welfare of third parties is brought into question, particularly that of infants which would potentially be engendered.

5.2.3. Talking of which, they emphasise that it no longer suffices to refer to a certain Article of the Convention on Human Rights (for example the right to found a family) without taking account of the fact that other Rights may come into the picture. For example in the *United Nations Convention on the Rights of the Child* (1989) approved by Belgium, we find the following provisions.
"In all actions concerning children…, *the best interests of the child shall be a primary consideration. "*.
"States Parties shall ensure that a child *shall not be separated from his or her parents against their will*…(except) that such separation is necessary for the best interests of the child. ".
""States Parties shall use their best efforts to ensure recognition of the principle that *both parents have common responsibilities for the upbringing and development of the child*. " (*see supra* under 2.4.).

It goes without saying that a State that favours the procreation in prison of children of "prisoners with long sentences", creates for these children *inevitably* a situation *which deprives them of almost all these rights, as of their birth and for a long time*.

5.2.4. Finally, these members recall that in most cases where we are confronted with social needs, *a problem of shortage* is posed.

(1) As the Belgian State is facing serious financial problems which are not changing in a positive sense, a good many people are observing that our prison system is seriously behind in solving the problem of over-crowdedness, the shortage of personnel, the lack of hygiene and minimum conjugal visits and other rights linked to basic welfare, mentioned under 5.2.1.1., a).

To remedy these shortages, enormous sums are required and the said members find it obvious that these financial resources must first of all be invested where the most elementary rights are scorned. The right to welfare mentioned under 5.2.1.1., b) as justified as it is, comes in second place.

(2) But must we, apart from these humanely important measures for everyone, invest considerable sums to respond to needs already ethically arguable, such as the desire for children in "prisoners with long sentences"? *This option seems to them constitutive of a reversal in the commonly accepted hierarchy of values.* This is even more the case given that the hope of better treatment for imprisoned pregnant women could induce an increase in the number of children to be accommodated (huge financial cost). Finally they add that, insofar as the INAMI contributes to the costs of reimbursing MAP, the potential financial problems which this prison would experience could lend itself to a comparable argument.

5.3. Recommendations of members who are in principle unfavourable to the access of prisoners to MAP

5.3.1. Intervention of third parties

In particular circumstances, when the situation is such that an infant is likely to suffer serious damage, society has the right to intervene. This is also the case when the intentional parent(s) has (have) to call upon third parties - thus when making a request for medically assisted procreation. The intervention of these third parties (doctors, psychosocial services, community) should have the corollary of a control of births in prison, focussed on limiting them.

5.3.2. Postponement of treatment

If a woman can choose between having a child at a given time of her prison life, which will entail all sorts of difficulties for the infant, and having this child later on with much fewer negative consequences, the woman has the moral right and the responsibility to postpone her maternity.

Given the possible damage, for the infant who would be born, from his or her stay in prison, a sterile woman should await her release from prison to start a treatment; in general, it is fitting not to favour conception in prison at all. A postponement of a few months or years does not constitute a serious violation of the right of the prisoner.

5.3.3. Costs and resources

Infertility treatments are not part of the primary healthcare needs which should be satisfied especially given that it is possible to postpone them. Further, the potential birth of an infant would entail a considerable additional cost.

It would be significantly preferable to devote the financial resources available to the primary needs of prisoners - to the decoration of a higher number of cells and to the recruitment of additional personnel, for example. In the same sense, more resources should also be allocated to ensure optimum welfare of the infants conceived outside the prison and who are staying in prison with their mother.

5.3.4. Conjugal visits and contraception

Prisoners are entitled to conjugal visits. We feel in fact that this right is essential to the maintenance of normal relationships with the partner and the children. As the exercising of this right implies a risk of pregnancy for an imprisoned woman - and consequently of giving birth to a child and hence the child having to stay in prison - it would be fitting to implement the appropriate means to limit this risk to the maximum.

5.3.4.1. For some members, increased information and encouraged use of contraception are necessary.

5.3.4.2. Other members more radically feel that it is morally unacceptable that the sexual relations which an imprisoned woman would be authorised to have in prison can lead to a pregnancy. Now, although contraception is encouraged there, we note that it is not systematically used; it is hence necessary to make the authorisation of sexual relations dependent upon the voluntarily accepted and medically controllable temporary sterilisation. The integrity of the person is not harmed in this case, since this is only a temporary and reversible sterilisation and that one is acting in the best interests (of the child).

5.3.5. Requests for treatment from sterile couples of which only the father is in prison

5.3.5.1. Some members are unfavourable to sterility treatments in prison if and only if the treatment concerns an imprisoned women and if this treatment is likely to entail the birth and the staying in prison of the infant. However, they see no objection in the said treatment implying an imprisoned man and a free woman.

5.3.5.2. Other members issue reserves also on this type of situation. They adhere to the majority position taken by the European Court of Human Rights in the Judgment of 18 April 2006 (*see supra* 2.2., judgment *Dickson v. United Kingdom*), according to which the authorities must not authorise medical treatments aiming to promote pregnancy even when the woman is free. Not only the absence of the father during the education is an important element, but what is essential is that a child would be deliberately brought into the world who is forced to live later on with the idea of being the child of a serious delinquent or a criminal. In case of a minor crime, one can in fact await the release from prison.

5.3.6. Accommodation of infants

The members with an unfavourable opinion emphasise that, whilst they are unfavourable to all acts whose effect is the birth and the staying of infants in prison, the fact remains that the infant conceived and/or born before the imprisonment and who is now in prison with his or her mother poses a completely different problem: in this case the mother-child relationship is an element that cannot be ignored and the essential question is that of knowing how to ensure the best interests of the child and guarantee him or her optimum welfare.

5.3.6.1. Some members opposed to procreation and/or birth in prison feel that it is fitting to consider *separately* the case of children who have *arrived* in prison with their mother. For these situations, in which the mother-child relationship is then an *element that cannot be ignored*, they feel that investments aiming to improve their welfare are necessary. To the contrary, the high cost of infertility treatments, as well as the possible increase in the number of children which would result from this, would be likely to lead to a reduction in the quality of accommodation for these very specific situations.

5.3.6.2. Other members, also unfavourable to procreation in prison, do however feel that, when there is a birth, and regardless of its origin (from conception in prison or prior to imprisonment), it is fitting not to accommodate the children in prison but rather to provide for accommodation outside as quickly as possible. According to them, the study by L. Catan (*see supra*, 4.4.8 and 4.4.9.) indicates that the later the separation occurs in the life of the infant, the more the seriousness of the harm increases. Given the additional problems inherent in a late separation, they conclude that the mother-child relationship is not intangible and that the separation must take place as soon as possible.

According to these members, the thesis according to which separating an infant from his or her mother would always have negative repercussions on the development of the infant is incorrect and the study by L. Catan provides no proof indicating that the separation is harmful. These repercussions depend, on the one hand, on the situation in which the mother and infant find themselves and, on the other hand, on the alternatives proposed. The current regulations assume, further, that society shares this opinion, given that all countries limit the duration of the infant's stay in prison[107]. In most countries, the duration of the stay is also much shorter than in Belgium. This rule has rightly been introduced to protect the interests of the developing infant. It would therefore be fitting to look at the other possibilities of accommodating the infant, outside the prison.

If the infant can be placed with the second parent or with his or her grandparents, this option should be favoured. However, giving preference to the placement within the family is also a *prima facie* element. The first condition to be taken into consideration when placing an infant is that this latter finds himself or herself in a social context which offers him or her both stability and continuity, as well as warm relationships. If these conditions are not met with members of the prisoner's family, then a foster family has to be opted for. In this case, measures also have to be taken to ensure regular contact between mother and infant.

Other members think that if the infant is entrusted, shortly after his or her birth, with a foster mother, even if the latter regularly visits the imprisoned biological mother with the infant, when the biological mother is released from prison, the break from the foster mother is likely to traumatise the infant seriously. These members are of the opinion that, in the interests of the child, it is therefore preferable to enable him or her to establish a solid emotional bond with his or her imprisoned mother, before any separation from her. If the infant has to leave his or her mother because she has to remain in prison beyond the age limit up to which the child can stay with her in prison, it is of course essential for him or her to have regular visits to his or her mother subsequently. After the mother has been released, the infant once again finds the person with whom he or she had established his or her first emotional bond.

[107] Note however that in Germany, the Netherlands and in Finland, the infants stay in prison up to the age of 4 or even 6 in open system women's prisons.

5.4. Arguments of members who are in principle favourable to the access of prisoners to MAP

The members who share a favourable opinion to MAP base this on seven reasons:

- It seems essential to them, in this matter as in others, to respect the Belgian Prisons Act and apply Human Rights in prison.
- Even if we consider the interests of the child as a principle not only independent but superior to any other, the discussion of the appropriateness of granting this type of treatment is not closed, and should be the subject of a case by case approach.
- Due to access to conjugal visits and therefore the possibility that some prisoners now have of procreating, the prison context creates an inequality between sterile and fertile prisoners, similar to what exists in free society.
- In terms of MAP, the Law fully sanctions the autonomy of applicants and hence extends access to it[108]; it hence places the applicants under the sole responsibility of the medical team. The principle of equivalence of healthcare implies that this Law is applied equally for free persons and for prisoners.
- It is fitting, to outline ethical or moral perspectives, to have a clarified approach of the situation of the children of imprisoned parents, in particular of those who have to be born and grow up for a while within the prison (point 4.2.).
- Society has a responsibility to the individuals it imprisons and must therefore take care of the fate it reserves for them during their imprisonment, which will weigh heavily and inevitably on the path of those who will reintegrate, in the longer or shorter term, into free society (point 4.3.)
- The situation of "intentional parents" (and therefore that of the infant who will be born) may differ greatly from one case to the next; the intentional mother may, for example, be free and the intentional father imprisoned; which simplifies the problem (see below). The risks and difficulties to which a parental plan is exposed are not in fact the same, depending on whether both partners are in prison or else only one of the partners is in prison. In this last case in point, the situation is different again, depending on whether it is the woman or the man who is in prison. When the woman is in prison, the potential child is exposed to the risk of being born and having to grow up within the prison; when it is the man who is in prison, the infant finds himself or herself in a comparable situation, from an educational point of view, to a child of a single mother. Finally, the risks and difficulties to which a parental plan is exposed within which one (or both) partner(s) is (or are) prisoner(s) vary greatly depending on the duration of the sentence which one or other of the two intentional parent(s) will still have to complete once the child is born.

For all these reasons, it seems opportune to consider the different facets of the problem raised by the requests for infertility treatment: interests and responsibility of the intentional parents, interests of the child, responsibility of the other parties involved (prison administration, public authorities, MAP and infertility treatment centres). Taking account of these different facets should provide the markers for a *qualified and contextualised assessment* of the requests *on a case by case basis*, which, each time, would strike a balance between the desire to have a child and the concern for seeing this child born and grow up in good educational and social conditions. This will mean striking a balance between the best interests of the child and the interests of the intentional parents, starting with the principle that in case of a conflict between these interests, it is the welfare of the child which takes precedence.

[108] Belgian Law of 6 July 2007, *see supra*, point 2.3.6. of the opinion.

5.5. Recommendations of members who are in principle favourable to the access of prisoners to MAP

The members who share a rather favourable opinion do not adopt a unanimous position but pose more or less conditions of access for prisoners to MAP. This is why the different types of recommendations may present variations.

5.5.1. Who examines the request?

These members consider that by virtue of the equivalence of *intra* and *extra muros* healthcare, any request for infertility treatment (medically assisted procreation, reversal of a previous sterilisation procedure) is *a priori* admissible for prisoners recognised as being sterile. The prison doctor must send the request to a treatment centre authorised to give this type of treatment, chosen by the interested parties. It is this centre which will be responsible for judging that the medical conditions are in place and for defining the appropriate treatment indications; it will then be responsible for assessing the merits of this request on a psychosocial level and for examining it according to the situation of the intentional parents and the conditions in which the infant would be born and grow up. To this end, it will be particularly vigilant in preparing the applicant parents for their future responsibilities.

It is obvious that the treatment centre will be informed of the fact that the patient is a prisoner; it will therefore be the responsibility of those working in the treatment centre to obtain, from the prison and from its psychosocial service, the information they deem necessary for judging the appropriateness of giving the treatment. Some members feel that this collaboration is essential.

5.5.2. Request evaluation criteria

Some members feel that all these factors must be taken into equal consideration in assessing the best interests of the child and those of the intentional parents. Others consider that some factors, particularly that of the term of the sentence with regards women, must take precedence.

- **Respective situation of the intentional parents**
  If the request is made by a male prisoner whose companion or spouse lives in free society, it is not problematic, insofar as the child will be born and grow up outside prison. The most delicate cases are those which concern parents who are both prisoners, and those where the mother is in prison, if they are likely to entail the birth and the prolonged stay of the infant in prison and/or his or her abrupt separation from the mother, and particularly in the absence of other favourable accommodation conditions.

- **Nature of the crime and previous criminal records**
  It seems logical that the treatment centre enquires from the prison psycho-social service about relevant information concerning the nature of the crime for which the prisoner has been convicted, his or her criminal record and his or her record of time in prison (release authorisations, release on parole).

- **Prison record**

  It is fitting to enquire as to the situation of the applicant as to his or her prison record, and in the case of women, to favour the cases where one can expect a release (end of sentence, possibility of release on parole) in reasonable time frames in relation to the supposed age of the child, on the understanding that this child must, according to the current law, leave prison no later than three years of age. It is not desirable to grant this type of treatment if it is felt that the imprisonment of the intentional mother will continue for a long time after the age limit for the child to stay with her in prison and if other favourable conditions, particularly the accommodation of the child outside prison, are not met.

  Some members feel that in spite of the law and account taken of the recommendations of some infancy professionals, it would be fitting for the child not to have to stay in prison beyond the age of 18 months - with this date ideally coinciding with the release date of the mother.

  Other members feel that the period of stay in prison must be as short as possible and not exceed six months.

  Other members further feel more restrictively that, given the many releases which some treatments entail, it would be fitting for the start of the treatment to coincide with the moment the imprisoned woman or man can easily benefit either from authorised release, or from release on parole, which would release the prison of restricting and expensive approaches related to supervised releases (supervised by law enforcement officers), and would enable the prisoner to benefit from normal outpatient treatment (without handcuffs, or other restrictions liked to essential security elements).

  Such an alignment of treatment over *ad hoc* sentence periods assumes that the treatment centre obtains exhaustive information from the prison's psychosocial centre.

- **Solidity and viability of the parental plan**

  The solidity and viability of the parental plan depends on the situation of the intentional parents (one or both parents imprisoned, length of the sentence and release expectancies, etc.). But other factors may further influence this favourably or unfavourably. Time spent living together before imprisonment, previous children, maintenance of the relationship despite imprisonment, support from close family are advantages.

  If this is not the case, it would be fitting to demonstrate prudence when the parental plan involves persons who came to know each other during imprisonment, and therefore have no experience of living together, or moreover when the persons have only known each other through correspondence (as is sometimes the case of persons who benefit from conjugal visits on the basis of six months' correspondence only).

- **Family and social environment of the prisoner**

  Medically assisted procreation could be reasonably granted when one of the intentional parents lives in free society and in conditions likely to respond best to the best interests of the child. In the event the child born in prison would have to be separated for some time from his or her imprisoned mother and could not be raised by

the father, it would be fitting to assess with circumspection the conditions of his or her accommodation outside. It is not desirable for this child to be forced to be accommodated institutionally, but it seems, however, acceptable that this child is taken in by close family, if the prisoner's relationships with this family are sufficiently solid and if the means are there to assure the child's welfare.

- **Age of the intentional parents and of the mother in particular**
  In cases where it is the intentional mother that is a prisoner, it would be desirable to take account of the biological and medical limitations of her desire to have a child, particularly if she has not had children elsewhere. Some members do in fact feel that it is not desirable to impose restrictions on accessing treatment if a woman prisoner is likely to have exceeded the critical age at the time of her release. Example: a woman aged 40 and without children having been sentenced to 15 years in prison and who spent 5 years without be able to start last resort medical approaches.

  Other members feel that this criterion is not relevant and that the criterion of the prison record is more determining.

- **Type of treatment requested**
  The generic notion of "infertility treatments" covers in reality various types of medical care: the immediate consequences of a reverse sterilisation in men or women are not the same as the immediate consequences of in vitro fertilisation for example. One can in fact ask for a reverse sterilisation without however immediately leading to a pregnancy. It would not be unreasonable to consider a medical procedure of this kind for a male or female prisoner who would thus like to take advantage of his or her imprisonment, in view of commencing, *after his or her release*, the conception of a child. In other words, it would be fitting to take account of the proximity in time of the benefit hoped for with the start of the treatment.

5.5.3. Collaboration between the different players involved

It is recommended that in each particular case there is collaboration between the different players concerned so as to enable the treatment centre to make a considered decision about the request. In case of a positive response, this collaboration must lay down the practice terms of implementing the treatment.

5.5.4. Prisoner information (pregnancy, parenthood, contraception)

As exist in Flanders at present, information and discussion programmes on parenthood in the prison context (above all designed for prisoners, in view of supporting emotional and family relationships for those who have children living outside prison), it would be fitting to set up throughout Belgium information and discussion programmes not only on pregnancy and parenthood in prison, but also on contraception. The generalisation of conjugal visits multiplies the risk of unwanted pregnancies in prison and pregnancy prevention measures should be looked into.

5.5.5. Monitoring of pregnancies in prison and improvement of the accommodation of mothers with their infants

If access to infertility treatments were to be facilitated for prisoners - in consideration of the taking into account of the criteria suggested above - some members of the Committee would

consider it necessary to conduct a serious analysis of the conditions offered to women prisoners for the monitoring of their pregnancy, but also the accommodation conditions of very young infants that still await, according to the wish of infancy specialists, professional supervision.

The efforts made, particularly in Bruges prison, do not dispense the public authorities of consideration on the model which governs the accommodation of mothers with their infants in Belgium, which remains that of "flexible detention", and therefore a closed system (see 3.7). Foreign experiments (the Netherlands, Germany) show that the use of solutions as alternatives to imprisonment (open community houses) is not only viable, but a lot more profitable both for the mothers and for the infants.

5.5.6. Costs and resources

It is clear that making infertility treatments accessible to prisoners will have a financial cost and this therefore poses the question of the resources which Justice has in order to assure healthcare in prison. It could seem unreasonable to absorb part of the budget for treatments of this type, whereas one knows that healthcare requirements (but also requirements in terms of equipment, hygiene, food) in prison are far from being adequately covered.

Whilst some members feel that the lack of resources pleads against the accessibility to infertility treatments for prisoners (see also above, *unfavourable opinion*), others think that it is the time to relaunch the public debate on the essential improvement of prison conditions and on the application in reality of the rights recognised by the Belgian Prisons Act of 12 January 2005.

Belgium, like other countries and all European countries, recommends the non-separation of the infant from the nursing mother during her imprisonment. This implies that the presence of infants must in any case be anticipated in prison, especially given that some women are pregnant when they are admitted into prison. It is therefore fitting, in the interests of these infants, to adapt prisons to their needs.

The opinion was prepared by the select commission 2006/1, consisting of:

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The working documents of the select commission 2006/1 - questions, personal contributions of the members, minutes of the meetings, documents consulted - are stored as Annexes 2006/1 at the Committee's documentation centre, where they may be consulted and copied.

This opinion is available on **www.health.belgium.be/bioeth**, under the heading "Opinions".