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Van Hout, MC, Fleißner, S, Klankwarth, U-B and Stöver, H

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Title *'Best Interests of the Child'*: A global mapping of age restrictions and durations of time permitting children to stay with a primary caregiver in prison.

Summary

Women represent a growing proportion of the global prison population of 11.5 million. There are no reliable estimates of pregnant women in prison, or children born/living in prison with a primary caregiver. There are pros (e.g., mother-child bond during breastfeeding) and cons (e.g., institutionalised environment) regarding decisions permitting children to stay in prison with a primary caregiver for a duration. Documented human rights violations globally illustrate prison system failures to consider paediatric needs and ensure humane standards of child/infant detention (e.g., treatment as *de facto* prisoners, unsafe living conditions, inadequate access to safe play, healthcare and schooling, difficulties in securing identity documents when born in prison, and inadequate prison-exit supports).

There is no global consensus regarding at what age confinement of a child inhibits healthy development, warranting removal from prison. The UN Committee on the Rights of the Child observes that determining a fixed age for separation and exit from prison is not viable and could compromise child protection standards in some States.

A global synthesis mapped the variation in age restrictions and durations of time permitting children to stay with a primary caregiver in prison. Countries adopt a broad range of approaches (not permitting children in prisons, setting strict timebound limits, providing extensions based on reasonable grounds/special circumstances, and stretching official regulations beyond set time durations, e.g., in low resource/fragile states) and provisions regarding placement of children in prison.

Policymakers are advised to integrate provisions of Article 30 of the African Charter on the Rights and Welfare of the Child into domestic policies and standards. Globally it is the only set of explicit guidelines regarding individualised qualitative judicial decision-making processes, consideration of relevant safeguarding factors (e.g., child profiles, family relationships, availability of alternative care, prison environmental aspects), practical application of permissions to stay in prison regarding standards of paediatric care, and provisions of safety-net supports on prison-exit.

Training of staff and routine monitoring of pediatric standards of detention by national prison inspectorates and UN Human Rights Treaty Bodies is crucial. Future research agendas must focus on optimal child safeguarding and development during transfer and confinement, and on requisite prison-exit supports in various cultural contexts and settings.

Background

Women represent a growing proportion of the global prison population of 11.5 million.¹ This minority prison population (estimated 740,000) has increased by 33% in the past two decades.¹ Most are detained for non-violent or poverty driven crimes, or the inability to pay fines or bail.¹ They are disproportionately affected by trauma and gender-based violence, poverty, learning disabilities, psychiatric illness, and drug dependence.² Countries continue to incarcerate pregnant women and those with children, despite normative United Nations (UN) rules advocating for the prioritisation of non-custodial sanctions for pregnant women, or those with caregiving responsibilities.³ National data indicates that many incarcerated women have children (e.g., Thailand 82%; United Kingdom 66%; Russia 80%; United States (US) 80%), and many are affected by mother-child separation.^{1,4} Data remains patchy in many regions of the world, with few reliable estimates on numbers of pregnant women in prison, or children born or living in prison with a primary caregiver (generally mother). In 2018, the UN Global Study on Children deprived of Liberty estimated that 19,000 children were living with a parent in prison.⁵ The World Health Organization Regional Office for Europe reported in 2020 that 10,000 children were living in detention with their mothers.⁶

The Council of Europe recognises that children with a primary caregiver in prison experience substantial trauma, vulnerability and stigmatisation; and that whilst prisons are not appropriate environments, the forced separation of mothers and infants is highly undesirable.⁷ The UN Global Study on Children deprived of Liberty observes various pros of children living in prisons with their mother, which centre on the mother-child bond crucial in child development, the multiple physical and mental health benefits of breastfeeding, and the minimisation of separation trauma during early infant years.⁵ UNICEF advises that infants should not be separated from their mothers during custodial sentencing.⁸ Cons centre on the life situation of primary caregivers (e.g., drug/violent offences) and relative impact on care (or neglect) of their children, the restricted prison environment and related impact on cognitive, psychomotor, linguistic and emotional development of the child (e.g., restricted exposure to varied stimuli, lack of freedom to play in safe spaces, poor hygiene and sanitation, congestion).⁵

Children living in prison with a primary caregiver have the same rights and (as far as possible), freedoms and opportunities as other children.^{5,7-9} The general position by the UN Committee on the Rights of the Child is that *“every child has the right to stay and grow up with his/her parent(s)”*; *“it is in the best interest of the child to live with the mother”*; *“children should not be treated as if they are prisoners”* and in situations where the rights of the child are violated, alternatives (e.g. living with family etc) should be considered.¹⁰⁻¹¹ The issue remains controversial given the complexities in defining and establishing that *“in all actions concerning children...., the best interests of the child shall be a primary consideration.”*¹⁰ Various UN normative standards provide that *“best efforts should be made to ensure that children remaining in custody with their parent benefit from adequate care and protection, while guaranteeing their own status as free individuals and access to activities in the community”*; the prison environment *“shall be as close as possible to that of a child outside prison”*

and that in exit processes “*the removal of a child from prison shall be undertaken with sensitivity, [and] only when alternative care arrangements for the child have been identified.*”¹²⁻¹³

In 2022 we conducted a global socio-legal assessment on standards of detention for these children as reported by various UN Human Rights Treaty Bodies.¹⁴ The UN Human Rights Treaty Bodies are committees of independent experts that monitor implementation of the core international human rights treaties. Various fundamental and health rights violations were documented in 43 countries (majority in Africa), and included treatment of children as *de facto* prisoners, poor/unsafe living conditions, inadequate access to safe play, healthcare and schooling, difficulties in securing identity documents when born in prison, and inadequate support on prison exit.¹⁴

Global timespan regulations permitting children to stay with a primary caregiver for a duration in prison.

In this *Viewpoint* we present a global mapping of age restrictions and durations of time permitting children to stay with a primary caregiver in prison. We scrutinized all countries, dependencies (territories/areas) and areas of special sovereignty (autonomous territories) and other countries recognized by the UN as not being self-governing. A comprehensive online search was conducted in English on the UN Human Rights Office (OHCHR) data bases (www.ohchr.org), the US Department of State human rights webpages, various government/non-governmental organization webpages, academic databases such as Scopus, Web of Science, PubMed, Science Direct, and the Surface Web). Several MESH search terms were used (*mothers with *child*babies in *prison*detention, babies in *prison*detention, prison act *country*). No restriction on date was applied, and where two or more sources were located, the most current information was included. We supported data verification by cross checking against domestic law. Where information proved difficult to locate, requests for information were sent via the UN Office on Drugs and Crime. Domestic information could not be located in 58 countries. For illustrative purposes see Figure One which presents cartographic detail. See Supplemental Tables for the complete data set.

Insert Figure One ‘Timespan regulations permitting children to stay with a primary caregiver in prison’ **about here**

Separation of primary caregiver-child or placement of children in prison accommodation

Countries adopt a broad range of approaches; some do not permit children in prisons, some set strict time bound limits, some provide degrees of leniency for request of extensions based on reasonable grounds/special circumstances, and some stretch official regulations well beyond set time durations.¹⁵⁻

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Placement policies in prisons can range from complete separation on committal; provision of mother and baby units/prison nurseries for the duration of the breastfeeding period or for the duration of the sentence; or no specific provision at all resulting in detention of the child under the primary caregiver's conditions of detention.

Children are not permitted to live in prison compounds in China, Norway and Slovakia, and generally referred to orphanages, family or foster care. Several countries are reported to routinely separate mothers from their new-borns (Liberia, Suriname, Bahamas).¹⁹

In Norway mothers are housed outside of the prison in a "mødrehjem" [home for mothers] until her child is old enough to be separated from her, generally around nine months of age.¹⁷ In Scotland children up to the age of five years are housed outside of the prison in an independent living unit.²⁰

166 countries, dependencies or other territories permit children to stay inside prisons with a primary caregiver (generally mother). There are various degrees of separation from the mainstream prison population. In Germany children can live in high security prisons until three years old, and in low security prisons until five years of age.^{15,16,20} Several countries cater for specialized prison-based housing for children. England and Wales provide Mother and Baby Units in prisons until the child is 18 months.¹⁷ In the Netherlands, babies up to six to nine months stay in prison with their mother, and until four years of age in Mother-Child houses.²⁰ Canada operates a Mother-Child Programme in prison for children up to four years old and a part-time programme for children up to six years.¹⁷

Despite efforts to advocate for the needs of fathers to be with their children,¹⁷ few countries explicitly allow children to co-reside with incarcerated fathers, usually in special circumstances where the mother is deceased or incapacitated (Bolivia, Spain, Italy, Belgium, Germany, Denmark, Sweden and Finland).⁵ Sweden and Australia have gender neutral policies on children living in prison with their parent.¹⁷

Several Scandinavian countries provide family accommodation in prisons. Finland provides family units for children up to two years of age and open houses for children up to four years of age.²⁰ In the Danish *Horserød* prison, children can stay up to seven years in the pavilion for couples and families. Children can stay with fathers up to three years of age. In the "Engelsborg Family House" children of all ages can live with both of their parents.¹⁷

Permitted duration of time spent with a primary caregiver in prisons and age thresholds prior to mandatory exit

Most countries stipulate a specific maximum age permitting children to stay in prison with a primary caregiver. Where stipulated, permitted duration of time spent in prison and age thresholds of children living in prison ranges from three months to nine years globally. Two countries have no defined limit (Gabon, Eritrea).^{14,21}

A diverse range of non-specific or ‘vague’ maximum age time limits were identified, whereby some countries permit children to live in prison “*while breastfeeding*”/ “*during lactation*” (e.g., Tonga, Belize, Dominica), “*until weaned*” (e.g., Haiti, Kiribati, Malawi, Tuvalu, Zimbabwe) or “*under school age*”/ “*until the child starts school*” (e.g., Australia [Victoria], Tonga). Some countries state when “*weaned*” or “*during lactation*” with a specific age limit (e.g., Ghana until 24 months or when weaned, or Seychelles when breast-feeding and until 18 months). The Swedish provision refers to “*Spädbarn*” (infant) which can be interpreted to refer to the first few years of the child’s life.¹⁷

Where countries set a specific maximum age limit (and excluding countries which adopt a non-specific maximum age, e.g., ‘*during breastfeeding*’), the most common maximum age time limit is 36 months (32,0%), with the highest average maximum age found in South America (44.40 months). See Table Two.

Insert Table One ‘Global and regional set maximum age limits’ about here

Extended terms of stay based on reasonable grounds and special circumstances

Several countries observe leniency with prison regulations and provide for the possibility to extend durations of time on special or reasonable grounds (e.g., Solomon Islands, Tunisia, United Kingdom, South Sudan, Sudan, Morocco/Western Sahara, Japan, Malaysia, Singapore, Taiwan, Bangladesh, Myanmar/Burma, India, Bulgaria, Bermuda, Jamaica, Gibraltar, France, Belarus, Czech Republic, Portugal, Ukraine, Spain, Dominican Republic, Venezuela, Uruguay). Special exceptions are made in Sweden when young children older than 12 months but under three years are assessed to be so traumatized by being separated from their mothers that it is considered necessary for the welfare of the child to be reunited.¹⁷ With regard to due process around these requests, there is little information available on the exact processes and requirements for reasonable grounds, special circumstances or even time-bound scope.

Variance is also observed at prison facility, state and territorial levels. For example, in Australia a child can stay with its mother in prison until four years in the Australian Capital Territory and up to six years in New South Wales.¹⁶⁻¹⁷

Certain countries provide for explicit maximum terms beyond which no extension is granted. Guyana and Grenada have set a maximum of 12 months.²²⁻²³ Croatia stipulates a maximum of seven years with no exceptions.²⁰ Uruguay permits an extension up to eight years.²⁴

Regulations appear to be ignored in low resource and fragile states, generally due to weak State social care systems and a lack of familial capacity or State provision (usually orphanage) to assume care for the affected child. Children in these countries and regions continue to live in prison, well beyond official set time restrictions and often into adolescent years (e.g., Chad, Cambodia, Iraq, United Arab Emirates, Pakistan, India, Yemen).^{17, 25-31}

Best Interest of the Child: Guidelines for balancing separation versus risk in the prison environment

We recognise the substantial difficulties for justice and penal systems all over the world to ensure full consideration of the “*best interests of a child*” and “*right to family life*” when sentencing a primary caregiver.¹⁴⁻¹⁵ Challenges worldwide currently centre on the variability in policies, the lack of a framework for decision-making (including practice-oriented checklists), and lack of data to inform decision-making.

Development of UN normative standards for children imprisoned with a primary caregiver could build on the UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the UN Bangkok Rules for women prisoners. Creating a best practice guideline for countries with set criteria may however be unattainable due to diverse country contexts, fragile states and prison system capacity to fully consider humane and developmentally conducive conditions of detention for these babies, infants and children.

The UN Committee on the Rights of the Child observes that determining a fixed age for separation and exit from prison is not viable and could compromise child protection standards in some States.¹¹ The broad variance in approach worldwide exemplifies the lack of consensus around age limits of children living in prisons with primary caregivers; at what age confinement of a child inhibits their development, warranting removal from prison; and also illustrates inconsistency in prison system provisions and protections of this hidden and very vulnerable group of children.

We advise policymakers to integrate the normative provisions of Article 30 of the African Charter on the Rights and Welfare of the Child (ACRWC) into domestic policies and standards.^{9,33} To date, this Charter contains the only set of international guidelines which provide explicitly for prioritisation of non-custodial measures and the special treatment of mothers, and the practical application of the ‘*best interests of the child*’ principle regarding separation or permission to co-habit with a primary caregiver in prison in Article 30.^{9,33} It applies to mothers, fathers and other primary caregivers (e.g., grandparents).

Article 30 of the ACRWC recommends that court and prison system decisions around permitting children to stay in prison for a duration to be based on individualised, qualitative approaches which are nuanced and based on actual information about the child and primary caregiver.⁹ Individualised, qualitative approaches must consider relevant safeguarding factors as to whether or for what duration children should live in prison. These relate to the child in terms of age, gender, maturity,

nutritional needs (e.g., optimal duration of breastfeeding), the quality of relationship with caregiver, availability of quality alternative care in the community, and prison conditions. Article 30 further recognises that imposed age restrictions and leniency in special circumstances should depend on provisions in prison (e.g. healthcare, education, play, sanitary and hygiene) and whether viable alternative care is available.^{7,11,15-17,20,30} It provides explicit guidance on practical application of permissions to stay in prison regarding standards of paediatric care, the living environment for children during confinement and provisions of safety-net supports on prison-exit.^{9,33} It specifies that prisons ensure equivalent services are available as for children in the community; and that the prison environment provided for the child's upbringing should be as close as possible to that of a child outside of prison.

In addition to integration and operationalization of Article 30 of the ACRWC into national policy and practice, policymakers and prison system authorities are advised to implement regular training of prison security and healthcare staff on placement of children with a primary caregiver in prison. The routine monitoring of pediatric standards of detention by national prison inspectorates and UN Human Rights Treaty Bodies is crucial, and these mechanisms are advised to scrutinise the situation of these children when visiting sites of detention with an explicit focus on conditions of confinement, access to appropriate paediatric and developmental care, and provision of safety net support mechanisms on separation and prison exit.

Finally, very little is known about the developmental outcomes of children living in the “*prison nursery*” context across different durations of time.^{11,14} Future research agendas must focus on optimal child safeguarding processes and child development during confinement with a primary caregiver, the impact of confinement on children in terms of age, gender, duration and conditions, the experience of transition from confinement to freedom (and vice-versa), and on identifying requisite prison-exit supports in various cultural contexts and settings.

Conclusion

There is a clear global commitment to leave no child behind in the 2030 Agenda for Sustainable Development.³⁴ The WHO Nurturing Care Framework³² and its principles (good health, adequate nutrition, responsive caregiving, security and safety, opportunities for early learning) whilst recognising the vulnerabilities of children of prisoners, does not explicitly refer to the situation and needs of those living in prisons. Children living with a primary caregiver in prisons remain undocumented and vulnerable in many countries. They should not be left behind.

Author Contributions

MCVH contributed to conceptualisation, methodology, supervision, validation, writing-original draft.

UK contributed to conceptualisation, data curation, investigation, methodology, validation and writing-review and editing.

SF contributed to conceptualisation, data curation, visualisation, methodology, validation and writing-review and editing.

HS contributed to conceptualisation, supervision and writing- review and editing.

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Author Confirmation

This paper has not been submitted to another journal and has not been published in whole or in part elsewhere previously.

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Key Messages
Panel240623.docx



Map.png



Supplementary
document 24062023.



Table 240623.docx