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## OPINION

of 8th August 2013 (published in the *Journal officiel*, 3<sup>rd</sup> September 2013)  
of the French Contrôleur general des lieux de privation de liberté

concerning Young Children in Prison and their Imprisoned Mothers

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**1/** When parents are deprived of liberty, the need arises to choose between the inherently unsatisfactory alternatives of either separating them from their children, or including the latter in the deprivation of liberty, in order to avoid the effects of separation.

Because a positive response cannot be given to these alternatives, **in his annual report for 2010, the Contrôleur general expressed a desire for reflection to begin in order to ensure that mothers imprisoned with children should either be granted reduced sentencing, have the benefit of deferment of their sentences for maternity<sup>1</sup> or be granted release on parole.**

Since more than two years have passed without any change in the situation in this regard, the Contrôleur general is now obliged, on the one hand, to renew his proposal and, on the other hand, to once again take up the condition of mothers and their children in prison in France.

**2/** Under French law, mothers who have committed offences constituting grounds for placing them on remand or for their committal as convicted prisoners, can be imprisoned with their children. Article 38 of the Prisons Act provides that the institution which accommodates them shall enter into an agreement with the French department in order to organise the necessary social support.

The Code of Criminal Procedure (*Code de procédure pénale*) limits this simultaneous presence (since the decree [*décret*] of 6<sup>th</sup> December 1998<sup>2</sup>). Children can only stay with their mothers in prison up to the age of eighteen months; for the subsequent twelve months<sup>3</sup> “short periods” of contact with the mother (which are not otherwise defined) are possible. It should be understood that, after this time, the normal visiting room system in force within the institution becomes applicable. Exceptions may be made to the eighteen-month age limit, but only by an exceptional decision and after consultation of a commission: in practice, few extensions are granted; and only when the mother’s date of release follows shortly after the eighteen-month limit, or due to the occurrence of

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<sup>1</sup> CGLPL, *Rapport d’activité 2010*, cf. the developments devoted to “*mères incarcérées avec enfants*” (pp. 190-193), photographs nos. 5 and 7 and proposal no. 41, p. 296.

<sup>2</sup> Previously, the measures to be taken resulted from a simple circular of 6<sup>th</sup> August 1987.

<sup>3</sup> Since the decree of 23<sup>rd</sup> December 2010, prior to which a six-month period was applicable.

exceptional events. This limit of eighteen months is necessarily arbitrary. It cannot be seriously called into question: the age at which the child begins to move about easily coincides with their becoming aware of their confinement.

The Code also provides that mother and child shall be accommodated in “specially equipped premises” and that the prison service for rehabilitation and probation “in association with the appropriate departments with regard to childhood and family matters, and with the holders of parental authority” shall organise the child’s stay and outside visits, and make preparations for the time of its separation from its mother.

Any further issues are dealt with by means of the circular from the Minister of Justice of 18<sup>th</sup> August 1999 (AP 99-2296 PMJ2).

**3/** The fundamental rights of the child need to be implemented with special vigilance. Article 3 of the Convention on the Rights of the Child imposes “the best interests of the child” upon authorities and courts as a “primary consideration” in all decisions that they make and the European Court of Human Rights has taken up this requirement (for example, ECtHR, 28<sup>th</sup> June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 120), by interpreting the protection of the right to respect for family life<sup>4</sup>, in particular, in the light of the abovementioned article 3.

On the one hand, this interpretation leads to each State not only protecting family life from arbitrary interference on the part of the authorities; but also deciding upon positive measures, that is to say ensuring “the right of the parent to appropriate measures for reuniting them with their child as well as the right of the child to appropriate measures for reuniting them with their parent” (ECtHR, 7<sup>th</sup> March 2013, *Raw v. France*, no. 10131/11).

On the other hand, however, it cannot disregard the obligations that the Convention on the Rights of the Child imposes upon States: in case of imprisonment of one or both of the parents, to provide the rest of the family with information about their whereabouts (article 9); to provide the child with the opportunity to be heard in any judicial proceedings, either directly, or through a third party (article 12); to respect the right of parents to guide the child with regard to liberty of thought, conscience and religion (article 14); to refrain from any arbitrary or unlawful interference in the private life of the child (article 16); to use their best efforts to guarantee the parents’ responsibility for the upbringing of the child (article 18); and to protect the child from all forms of violence, abandonment and negligent treatment (article 19).

Finally the Convention states (article 37) that no child shall be subjected to torture or cruel, inhuman or degrading treatment: that the imprisonment of children shall only be used as a “measure of last resort” and “for the shortest appropriate period of time”. Children deprived of liberty shall be treated with humanity “and in a manner which takes into account the needs of persons of his or her age”.

**4/** The imprisonment of mothers with children is only a palliative measure aimed at reconciling the irreconcilable: the presence of a child with its mother and the intolerable nature of the presence of young children in prison. Admittedly, it is emphasised children do not accompany their mothers in prison as the result of having committed an offence; a fact to which the prisons administration in France gives expression, with good reason (cf. article D. 149 of the Code of Criminal Procedure), by not carrying out the committal formalities as far as the child is concerned. However, this consideration of a legal nature is not likely to change the facts. Indeed, from the point of view of the presence of these children in prison and of the capacity of their mothers to play their role towards

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<sup>4</sup> And, therefore, article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

them, fundamental rights make it absolutely essential to examine the reality of prison “mother and child wings”.

**5/** It emerges from the above principles that everything needs to be done, as indicated at the beginning of this assessment, in order to avoid the imprisonment of women with children. Awareness needs to be raised among judges, some of whom take a restrictive view of these principles, concerning the application of article 3 of the Convention in this respect. What view should one take of the case of one woman encountered in prison, who had long been pregnant, sentenced to a four month term of imprisonment, which was left in abeyance and then suddenly implemented by the State Prosecutor’s Office? It should no longer be possible for these kinds of situation to be ascertained: they are more numerous than might be thought.

**6/** It clearly emerges from the above principles that, when it has not been possible to avoid imprisonment, the obligations incumbent upon the authorities with regard to the mode of organisation of the life of the mother and child in prison have the objective of:

- Helping the mother to effectively take care of the child;
- Refraining from any measure which could harm the normal development of the child;
- Facilitating relations between the child and its parents, including its father, at least on the assumption that the latter has legally recognised the child, as well as with the rest of the family;
- Not to allow any of the child’s vital needs to consequentially remain unsatisfied;
- To ensure that the ordinary public services in matters of early childhood and infancy play their full role, in the health and social fields in particular.

**7/** These objectives may conflict with prison rules and, in certain respects, with each other. Their fulfilment is therefore a matter of balance, to be maintained by both the prisons administration and by members of the national legal service in charge of the execution of sentences. For all that, in case of conflict between security norms and the requirements of mothers and children, “the best interests of the child shall be a primary consideration” and the status of mother should take priority over that of prisoner.

Moreover, it needs to be acknowledged at the outset that an imprisoned mother accompanied by a child obviously presents a far smaller risk with regard to the security of persons (for example in terms of escape) than is the case for other prisoners. This necessarily needs to be taken into account in adapting the rules of institutions with regard to wings accommodating mothers and children. In other terms, the balance between the imperatives of security and of dignity of persons is not the same in “mother and child” wings as in other wings of institutions. The pursuit of this balance within each institution is a source of markedly different practices. It is a first necessity for rules and regulations specific to these wings<sup>5</sup> to be elaborated and issued to the women whom they accommodate within prisons.

**8/** The current circular also sets out a number of principles: they are aimed at assigning the tasks of preparation for the separation of the child from its mother and prevention of the development of any excessively close relationship between them, which might be encouraged by prison life, to the prison service for rehabilitation and probation. This may be well and good. Nevertheless, the essential objectives need to be unambiguous: since the mother is informed of the

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<sup>5</sup> It is to be regretted that the model rules and regulations, resulting from decree no. 2013-368 of 30<sup>th</sup> April 2013, taken for the application of the Prisons Act, is silent with regard to the questions here mentioned.

necessity of separation at a very early stage, the obligations recalled under § 6 above constitute the foremost imperative.

**9/** The Controleur general has inspected, with three exceptions, all of the penal institutions that possess a “wing” for women. The latter account for 1,794 places, of which seventy-six (4.3%) are reserved for women accompanied with children. The manner in which this number of places was estimated by the administration is not known. However, overall difficulties of accommodation have not been taken into account. In principle, as is advisable, the prisons administration never assigns excessive numbers of women with children to cells devoted to this purpose or to any other type of cell: however, judges’ decisions can lead to the occurrence of situations of this kind. In any case, the committal of a mother and child to prison at a time when the cell or cells reserved for this purpose are already occupied can lead to her being transferred to a different institution, at the risk of hindering provision of care for the child as well as the latter’s relations with its family. Indeed, with the notable exceptions of the women’s remand prison at Fleury-Mérogis, which has a wing of fifteen places (and fifteen for pregnant women) referred to as the “nursery” wing, and the women’s prison at Rennes, which has five places of the same kind, in most cases other institutions for women only comprise one or two places for mothers with children, sometimes three (Corbas, Rémire-Montjoly and Toulouse-Seysse) and exceptionally four (Roanne). Some women’s wings do not have any “mother and child” cells and a change of institution is therefore necessary in case of a birth: such is the case of the detention centre at Joux-la-Ville. These transfers need to be avoided, unless they contribute to a reduction of geographical distances required by the mother and child. When no transfer is foreseeable, it would be desirable for pregnant prisoners who should subsequently be staying in “mothers and children” wings to be able to visit the latter in advance.

**10/** With regard to practical living arrangements, mothers with children need to be separated from other prisoners in the women’s wings in which they are accommodated and have suitable spaces at their disposal. The serenity of the child and the quality of its relationship with its mother are dependent upon suitable arrangements of this kind. In many premises inspected the dedicated cells are separated from other wings by a grille, in some cases combined with Perspex. A partition with a door would in any case be preferable; less important for its strength than for providing sound insulation and protection from outside view. There are still a few institutions in which no separation exists: mothers and children are therefore housed in the ordinary prison. The placing of “mother and child wings” above the ground floor (as is the case at Dijon and Baie-Mahault) complicates the process of separation, which nevertheless needs to be firmly implemented.

Though in most cases avoided within the buildings, lack of privacy is much more difficult to avoid in the case of exercise yards. With the exception of a few particularly well laid out yards (Fleury-Mérogis), actual practice either gives rise to very poorly laid out yards dedicated to mothers and children, with small surface areas (at Toulouse-Seysse – a new institution – the mother and child exercise yard represents a surface area of 24 m<sup>2</sup>; while that of Corbas – an even more recent prison – occupies an area of 28 m<sup>2</sup>), covered in security fittings (grilles, concertina wire etc.) as in the detention centre of Roanne; or else in solitary access to yards serving the women’s prison as a whole, but at special times, which are often inconvenient and of short duration (remand prison of Nîmes). Since access to the open air remains an imperative for mothers and children, provision should be made for separate yards, at least in wings comprising two or more places; these yards need to be equipped for the needs of young children (spaces and facilities for play), while limiting the sensation of confinement and encouraging their perception of the outside world (green spaces, unobstructed view, absence of grilles etc.), as well as being visually separate from other exercise areas.

The possibility of overly intrusive surveillance also needs to be limited. Dedicated exercise yards should not be positioned at the bottom of a watchtower or in direct view of prison officers inside the latter, as is the case in the detention centre at Roanne.

**11/** Cells need to be equipped with all of the basics. In most cases, two cells have been joined together, thus providing a suitable surface area and two separate spaces, one reserved for the mother and the other devoted to the child. However, such is not always the case: the surface area is often smaller than the minimum of 15 m<sup>2</sup> fixed by the circular of 1999 (under § 4.1.1 of the latter), even in recently designed institutions such as the prison at Nancy-Maxéville (in contrast, the only specialised cell in the old remand prison of Pau has a surface area of 29.5 m<sup>2</sup>). The authorities are requested to ensure compliance with their own prescriptions and to make sure that premises comprise two separate areas, for the mother and for the child, in order to enable the former to stay up and attend to her activities (such as watching television, reading, writing etc.) while respecting the child's sleep.

In general, reasonable facilities are provided, at least for the child, for which a baby bathtub is always provided when the cell does not possess a shower (although the plumbing fixtures still need to enable the latter to be filled, which is not always the case). Apart from all of the basics required by the mother and child for feeding and care (including in terms of storage space and bathroom facilities – the latter being partitioned up to the ceiling), waterproofing of the premises against damp, adequate ventilation, the possibility of shutting out light, a night light for checks at night, a supply of hot water of adjustable temperature, suitable heating, adequate storage capacity and facilities for direct contact with the warders (for example by intercom) need to be considered indispensable in these areas. Bars and gratings on the windows, whatever the size of the mesh, and ordinary light fittings which can be lit at night are to be excluded. Cleanliness always needs to be meticulously ensured (by an “assistant helper” and not by mothers in the case of communal areas).

In addition to the facilities inside the cell, an adjoining area should also be provided offering the possibility of washing and drying linen, as well as kitchen and food storage facilities (refrigerator, freezer) when the latter are not provided in the cell. In addition, the institution should possess an activity room for children: some have very well laid out rooms of this kind (Fleury-Mérogis); such is not always the case, in spite of the modest cost of these facilities; in the prison of Marseille (in the women's wing now closed for reconstruction) the prison corridor served as a playroom for children.

**12/** Because the child is being cared for by its mother, the latter's wishes and liberty need to be respected, as long as they do not conflict with the rules of protection of the child, with regard to the principles of the upbringing that she intends to provide. Such provision of care for the child also means that the mother needs to be able to fulfil the responsibilities incumbent upon her in this capacity in an independent manner. This is made easier if relative freedom of movement prevails for her in the “mother and children” wing (with a key to the cell being placed at her disposal) enabling her, for example, to move around between the washing machine cell and the activity room. In this respect, it is to be regretted that in most institutions “nursery” cells are closed in common with other cells at 5:30 p.m., at the very moment when young children need to expend their energy and mothers become anxious about being alone in taking care of their child's needs. The mother needs to be able to speak freely with the doctor (by telephone) who is or who is going to be responsible for the healthcare of the child, as well as being able to accompany the latter to medical examinations outside and, finally, to be present at its side in case of hospitalisation, insofar as the hospital allows this. Placement in punishment cells needs to be avoided by means of alternative disciplinary sanctions, which do not lead to separation.

On the other hand, however, in order to ensure proper mental stability of the mother and, by way of consequence, of the child, it is essential that the former should sometimes be able to have a means of childcare, whether internal or external, at her disposal, enabling her to have access to activities that take her away from her role as a mother and to go to medical and legal consultations etc. on her own.

**13/** Provision of care for the child also presupposes that the mother has resources at her disposal in order to buy the items required for the child's basic needs (because infants are not prisoners, the prisons administration is not financially responsible for them). Such is not always the case. All the more so in view of the insufficient availability of work in prison, a fact emphasised by the Controleur general<sup>6</sup>, which is often in even shorter supply in women's wings than in men's wings. Yet, pregnancy and subsequently taking care of a child constitute an obstacle to work in prison for women (and moreover without there being any provision made for inspection of the rules concerning maternity leave – article L. 1225-17 of the Labour Code (*Code du travail*) – application of which is not implemented in prison: dismissal of pregnant prisoners from their employment should therefore only occur on medical grounds and not solely as a result of the wishes of the head of a workshop or of any other person).

Indeed, after the birth of a child, the presence of the mother in a workshop needs to coincide with provision of childcare by a third party, either within the prison or outside. Provision is often made for the placement of children in day-nurseries outside of the prison (but sometimes cannot be provided). However, such placements are in any case not possible before the child reaches three or four months of age; they also presuppose the mother's agreement thereto, as well as practical conditions enabling the child to leave and return to the institution. Childcare within prisons is not based upon any rules: a mother can entrust her child to a fellow prisoner, though this requires the presence of such fellow prisoners (which is not always the case when a separate "nursery" wing is only comprised of a single cell) as well as the existence of relations of trust, which is never easy in prison. It may be possible to appoint a trusted person: this possibility is however variously applied (implemented at Fleury-Mérogis but not at Rennes).

Indeed, these difficulties explain why many mothers do not have access to work. Many of them receive benefits from the social security office (*caisse d'allocations familiales*). However, in certain cases they can encounter serious difficulties in caring for their child. Admittedly, the institution takes care of the basics in case of financial distress. However, it is not strictly obliged to do so and such basics vary from one institution to another (the costs of fresh vegetables and mineral water are taken care of in some institutions and not others). It is therefore requested that the criteria applicable to persons without resources be defined in a specific and more flexible manner as far as mothers and children are concerned, and that the allowances paid in case of insufficient resources also be considerably increased. In view of the number of persons concerned the cost thereof would be negligible.

"Prison shops" (outside purchase) should offer a sufficiently wide range of items of good quality to satisfy the needs of children in terms of diet, care, hygiene and beauty, clothes and activities. It has often been noted that only pots of baby food were available for sale, at the expense of fresh products.

**14/** Provision of care for children by persons from outside is necessary in the first place with regard to health. Generally speaking, the services of the PMI child protection system (*Protection maternelle et infantile*) are active within prisons, whether or not through agreements entered into for

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<sup>6</sup> *Rapport annuel* [Annual Report] for 2011, section 4, p. 149.

this purpose. In order to make the conditions of their action stable and ensure the regularity thereof, which is sometimes inadequate, agreements should always be in place, as intended by the law, and provide in particular for cases of paediatric emergencies. Some such agreements make provision for action by doctors (when the health unit of the institution does not provide healthcare for the child), if possible paediatricians<sup>7</sup>. This set-up is much better than the, entirely theoretical, liberty left to the mother to choose a doctor for her child. It presents the advantage of allowing the doctor to ascertain the conditions of existence of the child and its mother on the spot. It also guarantees the regularity of medical examinations – not subject to removal of the child from prison. For this reason priority should be given to this solution. The same applies to possible postnatal treatment: visits to prison from a gynaecologist are preferable to removal from prison, which is often marred by uncertainties and humiliation (handcuffs and chains; presence of prison wardresses during treatment).

The mobile unit that works in the remand prison of Fleury-Mérogis, which provides care and assistance in the fields of health and child development (psychomotor development etc.) as well as with regard to administrative formalities, should be adapted to other prisons, with the assistance of the territorial authorities concerned.

In the second place, provision of care is also necessary with regard to social welfare. Early childhood workers, volunteer workers from associations specialised in parent-child relations and prison visitors (if the mother so wishes) should be able to act in “mothers and children” wings, in association of course with the officers of the prison service for rehabilitation and probation, in order to promote the proper development of the child through the organisation of activities within institutions, as well as, and above all, through the provision of support for the child outside the institution. For this reason, the signature of agreements with these external actors should constitute a priority for the prison service for rehabilitation and probation. When preparing for the separation of the mother and the child, the latter service also needs to make sure that it organises the connections necessary to ensure quality provision of care for the child after it reaches 18 months of age, in accordance with its interests and the desires of its mother and, assuming that he has parental authority, of its father. With regard to this point, it should be possible to give every assurance to the mother, who remains in prison and for whom what happens to the child who has left her will be a source of frustration and anxiety. Social security cover and, in particular, allocation of benefits available to families with children, possible accommodation needs, enrolment in a day-nursery etc. should be organised with the authorities concerned in close contact with the mother, who cannot make all of the necessary contacts on her own and who needs to be able to meet the agents concerned (social security office, social workers etc.) on the spot.

**15/** Access to its father and to other members of its family is a fundamental right of the child, the family needing to be understood in the broad sense (cf. children of homosexual couples). For this reason measures should be taken enabling application of the principle of freedom for the child to go out of the prison and access to the child for any person whose visit has been authorised by the mother, as is moreover recalled in the circular of 1999, without it being necessary to obtain a visiting permit for this sole purpose. Family life units (*Unités de vie familiale*), whose bringing into general use has been requested by the Controleur general<sup>8</sup>, constitute the preferred framework for such family meetings: access thereto is a priority for mothers with children.

Such access for the father commences on the day of the birth, at which he should be able to be present. Visiting room sessions involving young children require special provisions with regard to their frequency and duration and the premises in which they take place. At the very least, the movements of mothers and children need to be organised in such a way as to be separate from those

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<sup>7</sup> In the case of one institution possessing a “nursery” wing, the agreement entered into with the doctors was signed eight years after its opening.

<sup>8</sup> See the *Rapport d'activité* for 2010, proposal no. 29, page 295.

of other prisoners (as is the case at Nancy-Maxéville). As recommended by the circular of 1999 – seldom implemented on this point – the premises that are referred to as “lawyers” visiting rooms should provide the preferred settings for these meetings, or even other premises, provided that they enable the necessary controls. In addition, telephones should always be installed in “nursery” wings (at Rennes, a telephone booth is easily accessible) – which is not always the case at present – and the entrusting of mobile telephones to mothers should be trialled. It should be made easier for the child to go on outings with its father or grandparents – in particular its grandmother – due to the importance thereof in preparing for the separation at 18 months of age.

Access of fathers to their children has the same force when the father is also imprisoned. For this reason, both parents should be assigned to the same institution in such situations, except in case of wishes to the contrary.

**16/** According to current regulations, children are compulsorily searched before and after leaving the institution and after each visiting room session. In most cases the warders carry out this task with tact: as far as they are concerned searches consist of being present while the child’s nappy is changed (search rooms sometimes equipped with a table for changing nappies). Clumsy and excessive actions cannot however be ruled out. Such searches, of which the very principle may appear surprising, moreover raise difficulties with regard to article 57 of the Prisons Act of 24<sup>th</sup> November 2009, which stands in the way of systematic bodily examinations.

The Controleur general has made known its position on searches in a previous report<sup>9</sup>. However, as far as children are concerned, it needs to be understood that they can only be searched, as required by law, if, and only if, there are serious presumptions that a breach of the regulations may be committed. The search should be strictly limited to the child’s nappy being changed by its own mother, in front of a third party, to the exclusion of any contact between the latter and the child. Any search of the child shall be subject to a written note, recording a request made in this regard by an officer or graded officer. Finally the mother, searches of whom are subject to the same requirements of presumption, is never to be searched in the presence of her child.

**17/** Finally, as far as the management of these cells and “nursery” wings is concerned, it would be desirable for a multidisciplinary approach to be given priority in all cases and for volunteer warders to be assigned to them, selected for their composure and having received special training (for example in order to gain understanding of children’s touching, the mother breast-feeding etc. and to acquire the necessary professional habits, which can be very different from those legitimately learned<sup>10</sup>), as is often the case for other wings.

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<sup>9</sup> *Rapport annuel* for 2011, section 7, p. 231.

<sup>10</sup> In one institution, it was noted that the prison wardresses carried out the night patrols wearing slippers, in order to avoid disturbing mothers and children’s sleep.