

Received: 11 November 2022 Accepted: 15 March 2023  
DOI: <https://doi.org/10.33182/rr.v8i4.307>

## Reproductive Rights Of Women While Incarcerated In The Criminal Case - Some Proposals To The Law Of The Countries And International Law

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### Abstract

*The protection of human rights in general and the reproductive rights in publicity and self-determination of women in prisons is an essential need for women, especially in the current context of many countries with the idea that offenders (under certain circumstances) should not give birth. It has violated human rights in general and women's reproductive rights in particular, seriously showing discrimination and gender inequality. To address these issues, this article analyses and points out how nations misbehave in responding to the need to protect reproductive rights and, in publicity, proactively decide when to give birth to women in detention facilities. This article is completed using the research method, such as data collected from documentation, writing law analysis, and comparative methods. The ultimate goal of this article is to point out the confirmed cases and the provisions of the laws of some countries that are too harsh for incarcerated persons and the adverse consequences of restricting the free reproductive rights of women in detention facilities, thereby providing solutions that experts can consider to improve further the provisions of national laws in protecting the reproductive rights of women in detention facilities. These measures, when implemented, will make an essential contribution to ensuring the harmonisation of the state's responsibility in the fight against crime with the need to proactively decide on a healthy and safe pregnancy and childbirth in the favourable reproductive age of women, thereby protecting the human rights of women in detention facilities in particular and human rights in general.*

**Keywords:** *human rights, reproductive rights, women in detention facilities, presumption of innocence, publicity, initiative.*

### Introduction

It is imperative to protect the human rights of incarcerated persons and inmates sentenced to prison because even though they are suspected of having committed a crime or have committed one, they are still human beings and have the right to be treated fairly and should be treated with dignity. In matters of human rights protection, the content of human rights protection for incarcerated persons is problematic because this subject has actually committed or is falsely suspected of committing a crime. Thus, how to protect the human rights of persons in detention facilities to ensure their severe incarceration pending trial or still ensuring the punitive function of punishment but still ensuring their human rights, and protection of justice, especially for the wronged, is a complex problem. This protection is unlikely to achieve harmony while meeting the state's desire to fight crime and the need to protect the human rights of persons in detention facilities.

It becomes even more complicated when the persons in the detention facilities are women of reproductive age, and one day they demand to give birth. Is a person in incarceration pending trial or a person serving a penalty for a crime committed entitled to demand to give birth while she is in detention facilities? If so, how is it done to guarantee her human rights but to ensure that reproduction is not a means of avoiding severe punishment? If not, does denying her reproductive rights violate human rights? Do international law and the law of countries recognise the right of women in detention facilities to publicly and actively organise their pregnancy and childbirth?

A series of questions left legislative researchers puzzled. It also encountered many obstacles in applying the law on women's reproductive rights. As a result, in practice, women in detention facilities do not have reproductive rights properly and timely; even in prisons, some countries strongly apply birth control measures for women but more seriously apply forceful methods of contraception or sterilisation to women in detention facilities. Therefore, the study of women's reproductive rights in detention facilities is not new content but always has practical significance and a unique attraction for legislative researchers of countries and international law.

In order to understand the human rights and reproductive rights of women in detention facilities in this article, it is necessary first to clarify that the concept of women in detention facilities within the framework of this article refers to adult women of reproductive age, including those who are being in incarceration pending trial (pre-trial period) and those who have been sentenced to imprisonment (time-limited, life-long and even women sentenced to death but are being in incarceration pending execution in countries where the capital punishment is imposed).

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Thus, the human rights and reproductive rights of women in detention facilities in this article do not refer to the rights of girls or women not of reproductive age and women who have been permanently sterilised or are no longer/cannot bear children. Next, women's reproductive rights include many critical aspects of reproductive and sexual health, including the human right to life, freedom, and security; the right to health care and information; and the right not to be discriminated against in allocating resources to health services as well as their availability and accessibility<sup>3</sup>. Most generally, reproductive rights include three significant rights: (1) reproductive self-determination, (2) rights to reproductive and sexual health services, information, and education, and (3) equal and non-discriminatory rights<sup>4</sup>; In which, the right to reproductive self-determination can be understood as the right to decide the time of childbirth freely, the age gap between children, the mode of pregnancy, the number of children, and the right to legal abortion. Thus, in this article, the author only mentions the right to decide women's childbirth time in detention facilities without discussing other reproductive rights.

The contents presented in this article aim to clarify the inadequacies in the provisions of international law and the laws of some countries and the difficulties in practically protecting women's reproductive rights in detention facilities, thereby proposing solutions to protect their reproductive rights. To do this, in addition to Part I) Introduction and Part IV) Conclusion, this article includes two main contents presented in Part II) and Part III). Part II contains an overview of women's human rights and reproductive rights in detention facilities. Part III includes recommendations to better protect their rights to openly and actively give birth, thereby fully protecting human rights in detention facilities.

With the use of the leading research methods such as data collected from documentation, writing law analysis, and comparative method, this article introduces the core international legal regulations related to human rights and fundamental reproductive rights of women both inside and outside the detention facilities, and also access to some regulations of some countries related to the reproductive rights of these people, based on which the article criticises the cases of some countries with discrimination, violation of human rights, women's reproductive rights and gender inequality. This article aims at two primary purposes: one is to point out the inadequacies in respecting and protecting women's reproductive rights in detention facilities in countries, and the other is to make suggestions for national and international laws in perfecting regulations to protect their reproductive rights effectively. With his efforts, the author hopes this article will be a valuable document for researchers to refer to and evaluate the solutions outlined in the article and have a positive impact on the improvement of the provisions of the law on the protection of the reproductive rights of women in detention facilities in countries.

## II. Overview of women in detention facilities and their reproductive rights

### 1. Regarding the concept of “women in detention facilities” in this article

As stated in the Introduction, women in incarceration processes are held in short-term or long-term incarceration on suspicion of involvement in a crime or conviction by a Court. They consist of two groups of people; *one is* women under arrest or temporary detention in the pre-trial stage<sup>5</sup> and the *other is* women who have been convicted of a crime by the Court and are subject to punishment<sup>6</sup> in prisons.

For these two groups, several different legal characteristics greatly impact the question of “Do they have reproductive rights while in incarceration?” leading the study to propose different measures to protect women's reproductive rights in these two groups. Basically, the legal characteristics of these two groups are clarified in the following two contents:

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<sup>3</sup> “Rights to reproductive and sexual health include the right to life, liberty and the security of the person; the right to health care and information; and the right to non-discrimination in allocating resources to health services and their availability and accessibility”. (Rights to Sexual and Reproductive Health - the ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women, Carmel Shalev, 1998

<https://www.un.org/womenwatch/daw/csw/shalev.htm>

<sup>4</sup> J.N. Erdman, R.J. Cook, Reproductive Rights, International Encyclopedia of Public Health, 2008

<sup>5</sup> The pre-trial stage is the stage before the trial. Depending on the law of each country, this stage can be divided and named differently, but both are the stage of preparing the necessary conditions for the official trial at the Court to make a judgment. In Vietnam, the pre-trial stage of a criminal case includes prosecution, investigation, prosecution, and trial preparation.

<sup>6</sup> This punishment can be (time-limited or life) imprisonment or capital punishment but is being held in incarceration pending the execution of the capital punishment.

### ***1.1. The group of women who are being incarcerated during the pre-trial process (who are presumed innocent)***

It is a group of persons still considered innocent; they have not been confirmed to have committed a crime and are subject to punishment. They stem from the well-known presumption of innocence<sup>7</sup>, incarcerated persons in the pre-trial stage, even<sup>8</sup> if they have limited freedom of movement and the right to contact others. In that case, they are innocent persons, and the competent authority to settle cases must respect and protect their human and civil rights. They are not offenders yet.

It shows that, in addition to the limited freedom of movement and contact with other people, in general, persons (men and women) in temporary detention during the pre-trial stage must still be guaranteed human rights. Thus, unless the period of temporary detention or custody is very short (in days or weeks only), in the case of prolonged detention, the laws of countries generally provide for the persons in temporary detention (and the sentenced people) the regimes to ensure their education, apprenticeship, labour, healthcare, meeting relatives and defence counsel, and others. These regimes are meant to protect human rights because they help persons in detention facilities to maintain basic human needs and relationships, help them to identify themselves in connection with the outside society and create conditions for them to be released; they have favourable conditions and quickly integrate with their families and communities.

The guarantee of human rights during the pre-trial stage is an essential norm that the competent authorities settling cases must ensure compliance because, as mentioned, the person incarcerated during this period may have committed the crime. Thus, during this period of temporary detention pending trial, because it has not been proven that the incarcerated persons are offenders, the state must automatically recognise them as innocents. After that, the state and the authorities incarcerating them must respect the incarcerated persons as any innocent citizen. If, in the future, the incarcerated persons are found guilty by a court and are subject to legal punishment, the enforcement of such sanctions shall be the responsibility of other actors other than those incarcerating them. It becomes all the more critical and significant in the case where, on the day of the trial, the Court pronounces a verdict determining their innocence<sup>9</sup> The need for their release and the guarantee of their human rights during the pre-trial period has been a fair treatment of the wronged people and has contributed to minimising the damages to them caused by incarceration during the pre-trial period.

### ***1.2. Group of women who are convicted of crimes and subject to punishment in detention facilities***

The Court has found this group of persons guilty and is subject to punishment. This group can again be divided into two smaller groups, *one* being offenders and subject to imprisonment (time-limited imprisonment or life imprisonment) and the other being those who commit crimes to the point of being sentenced to death<sup>10</sup> but are being incarcerated pending the execution of the capital punishment<sup>11</sup>. These people, even though they are criminals, are still human beings. Therefore, their human rights must still be respected and protected, except for those

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<sup>7</sup>The principle of presumption of innocence states that a person “*is presumed innocent until you are proven guilty*”. (Ferguson (2016)). The Presumption of Innocence and its Role in the Criminal Process. *Criminal Law Forum*, 27(2), 131–158. <https://doi.org/10.1007/s10609-016-9281-8>

<sup>8</sup>It should be clarified that not all people in the pre-trial process are incarcerated. According to Vietnamese law, incarceration in the pre-trial process only applies to the accused or the defendant is charged with a very serious, particularly serious crime (Article 119 of the 2015 Vietnam Criminal Procedure Code, amended and supplemented in 2021). Persons in detention or custody under the laws of other countries (the United States, Russia, Germany, China, Japan, Vietnam, etc.) may still be released on bail.

<sup>9</sup>In many cases, a wronged person is released even in the pre-trial stage without a trial if the grounds for the charge are unclear, especially if the person is clearly innocent.

<sup>10</sup>Data from Amnesty International shows that by the end of 2021, 108 countries (both developed and developed) have abolished the death penalty in law for all crimes, 144 countries have abolished the death penalty in law or practice, 28 countries have effectively abolished the capital punishment for no one in the past ten years, and 55 countries still retain the capital punishment for common crimes. (Death penalty 2021: Facts and Figures, Global Figures, 2022, <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/>)

<sup>11</sup>According to Amnesty International, by 2021, there will be about 26,870 cases sentenced to death worldwide, of which 82% are pending execution. (Death penalty 2021: Facts and Figures, Global Figures, 2022, <https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/>)

deprived or restricted by the sentence (punishment). Thus, if persons are sentenced to time-limited imprisonment, they are restricted to their physical freedom and other civil rights for a specific time.

That means, in theory, we understand that at the end of that time, they will be freed, their human rights, their civil rights will be restored. Meanwhile, for those sentenced to life imprisonment, we understand that, in theory, they are permanently deprived of the right to freedom of movement outside the community. In this case, even if they are permanently deprived of freedom of movement outside the community, they are still human beings; therefore, their human rights must be respected as a natural right bestowed by life.

Moreover, for persons sentenced to life imprisonment and even those sentenced to death, the possibility that they will one day be commuted and then released or proven to have been wrongfully convicted and freed can still occur<sup>12</sup>.

The mode of study, apprenticeship, labour, medical care, meeting relatives, and the like is applied to incarcerated persons in the pre-trial stage and convicts (collectively referred to as incarcerated people in this article). These are both fundamental human rights enjoyed by incarcerated persons and a means to facilitate their reintegration into the community upon release.

### ***1.3. The restricted rights of incarcerated people***

Essentially, persons in detention facilities (including women and other genders) will generally have the following rights restricted:

- 1) Freedom of movement: Persons in detention facilities are inevitably restricted in their freedom of movement to wherever they wish. They are only allowed to move within the prison, within a certain framework and for a certain time under the organisation and management of the prison (police agency).
- 2) The right to own property in respect of property carried by persons and the right to satisfy personal material needs: Persons in detention facilities are not allowed to own personal property carried by persons and are not entitled to enjoyment according to their needs. They have to rely on the things provided by prisons.
- 3) Freedom of Speech: Persons in detention facilities have limited freedom of expression and cannot express their opinions to the community outside the detention facilities. In many cases, they were not allowed to express an opinion or objection to prison decisions.
- 4) Right to meet relatives: Persons in detention facilities are restricted from meeting their families and can only meet their families according to specific schedules and permitted by law.
- 5) The right to form groups and social interaction: Persons in detention facilities are not allowed to establish and organise groups except for groups related to study, labour, sports, and other activities within the framework of detention facilities under the law and prison regulations. They are not free to connect and interact with society according to their needs.
- 6) Right to enjoy material or spiritual benefits and other values of society such as health, culture, education, science, and technology: Because the above rights are restricted, persons in detention facilities cannot enjoy material or spiritual values according to their needs. Such as freedom in choosing educational programs, careers, enjoying health care services, freedom of choice in dress, forms of entertainment, where to go and what to do on weekends and holidays, etc., still need to be fulfilled. This restricted right includes religious rights; they are not free to practice religion according to their own religious needs but must comply with the religious regulations set out by the detention facilities.

The above-mentioned restricted rights are only general fundamental limitations. Depending on the laws and policies of each country, the specific rights restricted may vary.

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<sup>12</sup> One study showed that, in the United States, the proportion of people being wrongly incarcerated in prisons accounts for about 4-6% of those incarcerated. (Beneath the Statistics: The Structural and Systemic Causes of Our Wrongful Conviction Problem <https://www.georgiainnocenceproject.org/general/beneath-the-statistics-the-structural-and-systemic-causes-of-our-wrongful-conviction-problem/>); of the 2,991 vindicated persons over the past three decades, about 9% are women, and 71% of these vindicated women have been wrongly convicted of crimes that never occurred. (8 Facts About Incarcerated and Wrongfully Convicted Women You Should Know, Daniele Selby, 2022, <https://innocenceproject.org/news/women-wrongful-conviction-incarceration-facts-iwd2020/>). In the Netherlands, about 10% of people are convicted for crimes they did not commit (One in nine criminals may have been wrongly convicted – research, 2016, <https://www.dutchnews.nl/2016/11/one-in-nine-criminals-may-be-wrongly-convicted-dutch-research/>)

## 2. Do women have the right to become pregnant and give birth while incarcerated?

Reproductive rights are human rights<sup>13</sup>. Nevertheless, as incarcerated persons, do women have reproductive rights? In order to thoroughly address this key question, it is necessary to consider three essential aspects of the issue, including the reproductive rights of women in detention facilities, in theoretical, legal, and practical aspects.

### 2.1. Looking for answers to this question in a theoretical aspect

Humans, in general, and women, are basically biological entities in the natural world, having the instinct of self-preservation, maintaining the race to develop and evolve. As an inseparable part of the natural world, humans have a reproductive function as an animal species. It is a law that nature dictates to all living things, especially females. For humans, the reproductive function of women is also known as *the "divine function"*<sup>14</sup>. Therefore, the right to pregnancy and childbirth is a women's biological right, fixed by the natural world for women and one of the fundamental human rights of women. Protecting women's right to pregnancy and childbirth is not only the right but also the duty of women to themselves and the responsibility of countries in maintaining the race and population of the countries<sup>15</sup>. Women's right to pregnancy and childbirth is well protected as a measure of the progress and civilisation of countries.

For women in detention facilities, as presented above, who are in the pre-trial stage and who have been convicted of a crime. Do these people have the right to pregnancy and childbirth? To answer this question, it is necessary to survey both groups of incarcerated women as follows:

*Firstly, for the group of incarcerated persons in the pre-trial stage:* it should be reiterated that this is not a group of offenders. They are found not guilty; in the future, they may be convicted of a crime, released at trial (or sooner), and found innocent. Those in this pre-trial stage can be incarcerated pending trial for years. As such, this incarceration could result in losing the right to give birth at the best age for her pregnancy and childbirth<sup>16</sup>. If, by the time she was released and declared innocent, she was too old to bear healthy children, then her right to motherhood had been robbed, and nothing and no one could compensate<sup>17</sup>.

*Secondly, a group of incarcerated persons serving imprisonment or in incarceration pending execution of capital punishment (in countries with capital punishment):* are offenders and must serve the penalty. Their service in detention facilities deprives a person of many fundamental freedoms, which is enough for a person to understand the value and severity of "punishment". It means that women are sentenced to imprisonment; on the one hand, it is not necessary to apply the prohibition of childbirth as a punishment; on the other hand, in theory, it can be said that no one has the right to deprive women of the right to give birth, even if they are offenders.

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<sup>13</sup> Reproductive Rights are Human Rights, A Handbook for National Human Rights Institutions, UNFPA, 2014, <https://www.ohchr.org/sites/default/files/Documents/Publications/NHRIHandbook.pdf>

<sup>14</sup> In Vietnam, the word "divine function" used is understood to refer to the function of pregnancy and childbirth of women. This phrase means that pregnancy and reproduction are "*a biological function given by Goddess,*" associated with a *natural function*.

<sup>15</sup> In the world, the protection of the right to development and birth of fetuses is one of the reasons why many countries have banned abortion. The prohibition of abortion expresses the strictness of countries in protecting the right of the fetuses to be born naturally; it is also a measure to ensure the breed and protect the existence of the race of their country.

<sup>16</sup> See more about the best age for women to get pregnant and give birth and the harmful effects of having a baby after age 35 at: When Can You Get Pregnant and What's the Best Age to Have a Baby? Stephanie Watson, 2018, <https://www.healthline.com/health/womens-health/childbearing-age#benefits-andrisks>.

<sup>17</sup> Investigate the wrongful conviction of Cathy Woods, who was wrongly convicted and served 35 years in prison before being exonerated and released in 2014. It is assumed that during the wrongful conviction, this woman wanted to give birth, but the detention facility did not allow her to take the initiative and publicly decide to give birth. When she is released after 35 years of imprisonment, will she be able to become pregnant and give birth to healthy children at the age of 65? (Cathy Woods, woman wrongfully convicted of murder, dies 'peacefully' in her Washington home, Marcella Corona, 2021, <https://www.rgj.com/story/news/2021/08/11/cathy-woods-35-years-wrongfully-imprisoned-exonerated-dies/8101284002/>)

Thus, women's reproductive rights, even if they are free or in temporary detention, suspected of a crime or convicted of a crime, etc., are an inalienable right of women. States and their national legal systems should guarantee women their reproductive rights.

## 2.2. Looking for answers to this question in legal aspects

First of all, it must be affirmed that, in the current penal system of the countries, no country prescribes a prohibition on childbirth<sup>18</sup>. In other words, there is no penalty for "sterilization"; women are not "prohibited from having children". It is reflected in the fact that international and national legal documents recognise and protect women in detention facilities who are pregnant, specifically as follows:

*For international law: the human rights and reproductive rights of women in detention facilities are reflected in international legal documents; the most important first is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). It is an important convention in ensuring women's rights. CEDAW is committed to protecting equal rights and equality between men and women, ensuring human rights and training and education in the observance of human rights for women<sup>19</sup>.*

Article 16 (1) (e) of this Convention requires explicitly the equal right of women to decide "*freely and responsibly on the number and age gap of their children and to have access to information, education, and means to enable them to exercise these rights*"<sup>20</sup>. Under this provision, women are free and active in choosing the number and timing of childbirth as well as the right to demand the methods and means for them to exercise their reproductive rights, which is called *rights to reproductive self-determination*<sup>21</sup>. Next, other legal documents, although not clearly defining women's reproductive rights, mention many regulations related to the protection of women's rights in general, including the right to pregnancy and childbirth, such as the United Nations Universal Declaration of Basic Human Rights (UDHR)<sup>22</sup>, the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>23</sup>; the United Nations Convention

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<sup>18</sup> In early and medieval China, compulsory sterilisation measures were imposed on the king's male servants and relatives, known as "*eunuchs*". In this case, sterilisation is not a punishment for them but a measure to ensure loyalty and safety for the king and his family. The forced sterilisation of the time, such as the removal of the male testicle, was a punishment imposed on political offenders to destroy the offender's offspring, thereby minimising the possibility of future generations to revolt. (Hoeckelmann, M. (2019). *To Rot and Not to Die: Punitive Emasculation in Early and Medieval China*. *T'oung Pao*, 105(1–2), 1–42. <https://doi.org/10.1163/15685322-10512p01>). The measure is unclear on whether it applies to women, but history shows that in some cases, forced sterilisation as a punishment for women committing crimes such as hysterectomy is rare but still occurs at this stage in China. In Europe and many countries worldwide, compulsory sterilisation measures are not a punishment at all despite centuries of existence. (Niemi, J., Peroni, L., & Stoyanova, V. (2020). *International Law and Violence Against Women: Europe and the Istanbul Convention*. Routledge). Today, the "chemical castration" method is applied by many countries around the world, such as the United States, Russia, Indonesia, Ukraine, Canada, Denmark, Germany, Israel, Kazakhstan, Norway and Sweden, etc. (Chemical castration: which countries have applied it and what have been the results? 2022, <https://www.infobae.com/en/2022/04/19/chemical-castration-which-countries-have-applied-it-and-what-have-been-the-results/>). However, this measure only applies to men when they have committed certain crimes, and this measure is completely reversible (How effective punishment is 'chemical castration'? Warda Imran, 2021, <https://www.dw.com/en/combating-sexual-violence-is-chemical-castration-a-valid-method/a-56839505>

<sup>19</sup> As of early 2023, 189 countries have joined CEDAW (UN Committee on Elimination of Discrimination Against Women (CEDAW), <https://www.edf-feph.org/cedaw/>)

<sup>20</sup> Article 16 (1) (e) CEDAW: "*The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights*". (Convention on the Elimination of All Forms of Discrimination against Women,

<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>)

<sup>21</sup> In 1988, the United Nations issued the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which includes 39 principles to be followed when dealing with incarcerated persons. The code is also an important standard for protecting human rights in general and women's rights while incarcerated in detention facilities and prisons. (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment <https://www.ohchr.org/en/instruments-mechanisms/instruments/body-principles-protection-all-persons-under-any-form-detention>)

<sup>22</sup> Universal Declaration of Human Rights, [https://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf)

<sup>23</sup> The Convention addresses the right of everyone to enjoy economic, social and cultural rights, including reproductive rights and the right to access reproductive health services in Article 10 (2). (International Covenant 4769

on the Rights of the Child CCRCR,<sup>24</sup> etc. In addition, many other international legal documents do not directly address the protection of reproductive rights of women in detention facilities but do mention the protection of pregnant and childbearing women and consider it an important part of the document, such as the UNUN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) that encourage non-custodial sanctions on women, especially for pregnant and nursing women<sup>25</sup>. When countries participate in these international legal documents, they must ensure respect for the provisions of the documents, including ensuring respect for women's reproductive rights and ensuring the health and healthcare rights for pregnant and childbearing women implemented in their countries<sup>26</sup>.

*For national laws:* All countries' laws protect women's rights during pregnancy and childbirth, including prenatal services, safe childbirth and child-rearing. They also include access to legal abortion as the doctor prescribes or as the mother desires. However, it can be said that these legal documents are only aimed at protecting women's proactive reproductive rights outside of detention facilities without saying anything about creating conditions of reproductive self-determination for women while in detention facilities<sup>27</sup>.

It is easy to see that, despite the robust protection of women's reproductive rights in general and the right of women to give birth in detention facilities, those mentioned above international legal documents do not recommend that countries should give women the right to actively and publicly decide on the time of pregnancy and childbirth during incarceration. Meanwhile, countries' laws are unwilling to allow women the freedom to become pregnant and give birth at will while they are in temporary detention. Some countries' laws even provide measures to prevent women from becoming pregnant while incarcerated<sup>28</sup>.

### 2.3. Looking for answers to this question in practical aspects

The state does not allow women to become pregnant and give birth according to their will during incarceration. There are many reasons for this fact, but basically, two main reasons can be considered:

+ Firstly, the idea that *criminals do not need to/should not<sup>29</sup> have children* has existed for hundreds of years, and this idea has influenced countries' views. As mentioned above, prohibiting childbirth as a punishment for prisoners has been established since the Middle Ages, and this consciousness persisted for centuries until the modern era. Moreover, at the beginning of the twentieth century, with the development and expansion of eugenics<sup>30</sup>, many countries believed that those who should not give birth included people with biological and psychological defects (such as people with disabilities, people with cognitive limitations, people with complex diseases, etc.), people of colour, and offenders. It leads to the fact that in the justice field, states hold that to ensure that future generations of a

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on Economic, Social and Cultural Rights, [https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch\\_iv\\_03.pdf](https://treaties.un.org/doc/treaties/1976/01/19760103%2009-57%20pm/ch_iv_03.pdf)

<sup>24</sup> The CCRCR provides that for the protection of children, mothers “*shall be guaranteed adequate health care before and after birth*” in Article 24 (2) (d) (International Covenant on Civil and Political Rights, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>)

<sup>25</sup> The Bangkok Rules, [https://www.unodc.org/documents/justice-and-prison-reform/Bangkok\\_Rules\\_ENG\\_22032015.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf)

<sup>26</sup> There are currently 192 signatory countries to the UDHR (What are Human Rights, <https://www.youthforhumanrights.org/what-are-human-rights/universal-declaration-of-human-rights/introduction.html>)

<sup>27</sup> It can be seen that most countries agree and comply with the provisions on the protection of the rights of pregnant and childbearing women, expressed in civil and labour relations and applicable to persons outside the process of handling criminal cases. These rights can be consulted at Maternity Protection Convention, 2000 (No. 183) [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NODE:REV,en,C183,/Document](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C183,/Document)

<sup>28</sup> Preview this content in footnote number 37.

<sup>29</sup> Eugenics in the United States in the 1990s suggested that if “*the degenerates*” did not produce children, social problems would disappear (Forced sterilisation, <http://faculty.webster.edu/woolfm/forcedsterilization.html>)

<sup>30</sup> Eugenics was formed in the late nineteenth century in England and quickly spread to Europe, the Americas, Australia and Asia, typically in England, Germany, the United States, China and Japan (Eugenics – Genetics, Philip K. Wilson, 2023, <https://www.britannica.com/science/eugenics-genetics>)

state are perfect, an offender should not give birth<sup>31</sup>. Although countries no longer recognise forced sterilisation for offenders<sup>32</sup>, this ideology still exists in practice<sup>33</sup>, which is one of the main reasons why women do not have the right to decide to give birth during their incarceration freely.

Socially, the prohibition of childbirth (sterilisation) is still practised by countries today as a legal measure regulated by law. However, these measures are adopted by countries to control births<sup>34</sup> and not as a punishment for offenders. In any case, compulsory sterilisation is not a punishment for a crime. In some cases, on account of a person having committed a crime against a child, he/she may be temporarily or permanently deprived of custody of his/her child<sup>35</sup>. However, this measure to deprive child-rearing is only a civil measure to protect the child. Furthermore, even in this case, the law does not prohibit these parents from having the right to have more children in the future.

+ Secondly, *to ensure the serious execution of the penalty* pronounced by the Court against the offenders, the state is unwilling to create conditions for pregnant women. Because for humanitarian reasons, the women themselves who are being prosecuted for penal liability, and in order to ensure good psychological and physical health for pregnant women, as well as to ensure the welfare of the children during pregnancy and the first years of life when the children are born, many countries' laws stipulate that if a woman is pregnant or nursing a child, she is entitled to more lenient punishments than women who commit crimes in a similar state but are not pregnant. Accordingly, if pregnant women are in detention facilities, they may be considered for release or a reduction of the time to serve

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<sup>31</sup> In the first half of the twentieth century, many countries, such as the United States, Sweden, Denmark, Norway and Finland, and especially Germany under Adolf Hitler in the mid-twentieth century, passed sterilisation laws. These laws deprive the reproductive rights of many groups, including offenders. (Lombardo, P. A. (2011). *A Century of Eugenics in America: From the Indiana Experiment to the Human Genome Era*. Indiana University Press; Farrall, L. A. (2019). *The Origins and Growth of the English Eugenics Movement, 1865-1925*. Sts Occasional Papers).

<sup>32</sup> Currently, some countries still apply coerced sterilisation but are sterilisation for persons with disabilities without punishment for crimes, mainly in Europe with 13 countries including Bulgaria, Croatia, Czechia, Cyprus, Denmark, Estonia, Finland, Hungary, Latvia, Lithuania, Malta, Portugal, Slovakia (Why is forced sterilisation still legal in the EUEU?, 2022, <https://www.edf-feph.org/why-is-forced-sterilisation-still-legal-in-the-eu/>), 31 USUS states and others like Canada, India, China, Puerto Rico, Singapore, etc.

<sup>33</sup> A 2013 study and reports suggest that many prisons in the United States impose coerced sterilisation on female inmates when the state government deems them more likely to return to prison and/or because they already have too many children. (Female inmates sterilised in California prisons without approval, Corey G. Johnson, 2013, <https://revealnews.org/article/female-inmates-sterilized-in-california-prisons-without-approval/>).

<sup>34</sup> These sterilisation measures are applied voluntarily by citizens for themselves or are enforced by the government for large-scale applications whose main goal is to control the population growth of the country; or doctors decide in the medical field for specific cases to screen to prevent genetic diseases of the fetuses or to protect maternal life; or to prevent HIVHIV, etc. Previously, in some countries, the government had to apply this measure to transgender people. As of 2013, 24 European countries require sterilisation if a person wants to be transgender (24 Countries in Europe Require Sterilization of Trans People, 2013, <https://tgeu.org/24-countries-in-europe-still-require-sterilization-from-trans-people/>) but now these policies have been abolished as in Denmark, Ireland abolished in 2014, France abolished in 2016, etc. (French Law Scraps Sterilization for Transgender People, Thomson Reuters Foundation, 2016, <https://www.nbcnews.com/feature/nbc-out/french-law-scraps-sterilization-transgender-people-n666051>); Finland abolished in 2019 (Repo, J. (2019). Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilization in Finland. *Politics & Gender*, 15(1), 83–106. <https://doi.org/10.1017/s1743923x1800034x>)

<sup>35</sup> Countries with basic developed legal systems have regulations on child-rearing and cases where parents are deprived of child-rearing in marriage and family laws of countries.



a prison sentence<sup>36</sup>, and exemption from capital punishment<sup>37</sup> (for countries with capital punishment). These regulations show leniency in the countries' laws. However, they make many women in detention facilities seek to become pregnant to avoid incarceration or severe penalties imposed by the Court<sup>38</sup>. Therefore, to ensure the strict enforcement of the penalties imposed by the Court on criminals, the state is unwilling to create conditions for pregnant women.

Thus, it can be seen that, although the law does not prohibit, in fact, and legally, almost no national law allows or facilitates women in detention facilities to openly and actively decide to give birth. The fact that women are pregnant (and giving birth) in detention facilities is, in fact, against the will of the prison administrators or, to be precise, against the will of the state.

For that reason, to ensure the strictness of the law and that punishment is applied in practice, the government and the prison system are trying to take measures to prevent women from getting pregnant and giving birth during incarceration. In some countries, measures to control pregnancy and childbirth in detention facilities are taken as a seemingly democratic measure through the Judge's call to encourage "voluntary" incarcerated persons to adopt birth control measures (including contraception and sterilisation) or harsh coercive sterilisation measures<sup>39</sup>, even as preventing women from becoming pregnant while incarcerated is regulated by law<sup>40</sup>.

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<sup>36</sup> In Brazil, for example, pre-trial incarceration is replaced by house arrest for all pregnant women, and in Ukraine, pregnant women are not incarcerated until the child is born at the age of 14. Pregnant women in Georgia can receive a suspended sentence until their child is one year old; at this point, the Court may consider waiving or commuting their sentence. In Armenia, incarceration does not apply to pregnant women or those with children under the age of 8 in their care (Pregnancy and childbirth in prison, 2022, <https://www.penalreform.org/global-prison-trends-2022/pregnancy-and-childbirth/>). In July 2021, Minnesota, USA, became the first state to allow the release of pregnant and postpartum people from prisons to participate in community-based programs (Pregnancy and childbirth in prison, 2022, <https://www.penalreform.org/global-prison-trends-2022/pregnancy-and-childbirth/>).

<sup>37</sup> In Vietnam, the 2015 Vietnam Penal Code (amended and supplemented in 2021) stipulates that the death penalty shall not be applied and enforced for pregnant women and women raising children under 36 months of age in clauses 2 and 3 of Article 40 (<https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Van-ban-hop-nhat-01-VBHN-VPQH-2017-Bo-luat-Hinh-su-363655.aspx>). In Laos, the 2017 Lao Penal Code does not apply the capital punishment to pregnant and women nursing children under three years of age in Article 51 ([https://laoofficialgazette.gov.la/kcfinder/upload/files/1Oct2020\\_Lao%20Penal%20Code\\_English%20version.pdf](https://laoofficialgazette.gov.la/kcfinder/upload/files/1Oct2020_Lao%20Penal%20Code_English%20version.pdf)). It is also clearly stipulated in Part III, Article 6 (5) of the ICCPR and member countries must comply (International Covenant on Civil and Political Rights, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>)

<sup>38</sup> Here's one way to escape death row in Vietnam: Get pregnant, Allison Jackson, 2016, <https://theworld.org/stories/2016-02-18/heres-one-way-escape-death-row-vietnam-get-pregnant>; Londoner 'got pregnant to avoid capital punishment', 2009, <https://www.standard.co.uk/hp/front/londoner-got-pregnant-to-avoid-death-penalty-6712143.html>

<sup>39</sup> Our Long, Troubling History of Sterilising the Incarcerated, David M. Perry, 2017 <https://www.themarshallproject.org/2017/07/26/our-long-troubling-history-of-sterilizing-the-incarcerated>; Eugenics/Eugenic Sterilizations in Indiana, <https://www.uvm.edu/%7Elkaelber/eugenics/IN/IN.html>; N.Koreans Talk of Baby Killings, James Brooke, 2002, <https://www.nytimes.com/2002/06/10/world/n-koreans-talk-of-baby-killings.html>

<sup>40</sup> In Vietnam, according to Clause 2, Article 6 of Circular No. 182/2019/TT-BQP of the Ministry of National Defense dated December 4, 2019, stipulates that inmates meet their relatives; receive and send letters; receive gifts and contact relatives by phone (hereinafter referred to as Circular No. 182/2019/TT-BQP) and Circular No. 14/2020/TT-BCA of the Ministry of Public Security dated February 10, 2020, detailing the regime of meeting, receiving gifts and contacting inmates (hereinafter referred to as Circular No. 14/2020/TT-BCA) stipulating that when meeting with their husbands during incarceration, "*female inmates must use contraception and have a written commitment not to become pregnant to ensure the time of serving a prison sentence*".

### 3. Shortcomings in cases where women are not entitled to publicity and reproductive self-determination while in detention facilities

It should be reiterated that all countries have legal provisions to protect women's reproductive rights in detention facilities. These rights are regulated by national law differently from country to country. They are consistent with international law enough to ensure, to a certain extent, the human rights of women and children at birth. However, these rights only *recognise* women's pregnancy and childbirth in detention facilities due to the prison's weak and poor management without actively providing women with the right to decide when publicly giving birth in detention facilities. In other words, pregnant women in detention facilities are more likely to have sought to clandestinely pregnant to avoid harsh sentences, to have an unintended pregnancy due to sexual abuse, or to have become pregnant due to the exchange of certain benefits between women in detention facilities and men (who may be prison administrators or others). In other words, in practice, women in detention facilities do not have the right to publicly decide and plan when they should become pregnant and give birth. It has enormous consequences for herself and her family, leaving lasting social and legal consequences.

#### 3.1. Regarding personal and family

As mentioned above, when women are not enabled to become pregnant and give birth while in detention facilities, they can miss out on the best reproductive age of their life entirely, which is irreversible. It is a significant loss for women because, as already said, the reproductive function of women is a privilege that nature has given them, an irreplaceable or nontransferable right. Nowadays, with the development of science, women can apply the technology of freezing their eggs to wait for the right time to give birth. However, this method is only suitable for women or their husbands when one or both have to undergo medical treatment. The cost of this measure is enormous. Moreover, unlike the preservation of male sperm, in any case, the preservation of women's eggs to wait for the right time to give birth is also limited because women's bodies are only ready for raising fetuses in the womb within a certain age. Assuming that the women in the detention facilities are allowed to freeze their eggs to wait for release from prison, they will become pregnant, whose age is no longer suitable for pregnancy, then even though they can apply the method of surrogacy, asking other women to become pregnant and give birth with their eggs have also deprived mothers' privilege of conceiving and raising children and feeling the development of the children in their bodies. This is a violation of women's human rights. The two big questions that go hand in hand with the method of freezing women's eggs when they are incarcerated are whether they will pay for this cost. Moreover, who will be responsible when egg freezing is at risk?<sup>41</sup> It becomes even more inadequate if the incarcerated persons are wronged persons<sup>42</sup>. The assumption of freezing women's eggs in incarceration is inconvenient for both the state and the incarcerated women. At the same time, current practice shows that the need for women to freeze their eggs before going to prison is not an accepted precedent by the Court<sup>43</sup>. Thus, the failure to create favourable conditions for women in detention facilities to publicly and actively choose the time of childbirth is a significant disadvantage for themselves and their families and parentages, seriously violating women's human rights, reiterating that this becomes worse when, for women, childbirth must be within a certain age and irreversible.

In the case of intentionally surreptitiously pregnant women in detention facilities, women with anxiety and concealment will affect both the fetuses and the mothers' mental, psychological, and health. It becomes serious when the fetuses and the mothers will not have timely access to medical solutions, and quickly lead to significant health and life consequences for the mothers and the fetuses because of surreptitious pregnancy.

In the case of intentionally surreptitiously pregnant women in detention facilities, women with anxiety and concealment will affect both the fetuses and the mothers' mental, psychological, and health. It becomes serious when the fetuses and the mothers will not have timely access to medical solutions and easily lead to great health and life consequences for the mothers and the fetuses because of surreptitious pregnancy<sup>44</sup>.

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<sup>41</sup> What to Expect from the Egg Freezing Process, 2022, <https://www.healthline.com/health/egg-freezing-process>

<sup>42</sup> As stated in the Cathy Woods case in footnote number 15.

<sup>43</sup> Woman Loses Legal Battle to Freeze Her Eggs Before Serving Prison Time, 2015, <https://www.foxnews.com/story/woman-loses-legal-battle-to-freeze-her-eggs-before-serving-prison-time>

<sup>44</sup> Pregnant women in English jails are seven times more likely to suffer stillbirth, 2023, <https://www.theguardian.com/society/2023/mar/25/pregnant-women-in-english-jails-are-seven-times-more-likely-to-suffer-stillbirth>; Incarceration Harms Moms & Babies, 2021,

### 3.2. Regarding sociality

The unwillingness of countries to create favourable conditions for women to actively give birth while in detention facilities can cause unwanted social impacts. As mentioned above, although not creating conditions for women to self-determine to give birth while in detention facilities, once women are pregnant, protecting the fetuses and caring for the mothers in detention facilities is activated under international or national standards. It means that the state, in particular the detention facilities, shall be responsible for the care of the mothers during the period of pregnancy and after birth, the medical care and upbringing of the newborn and other material and spiritual solutions that must be applied. Accordingly, detention facilities must have separate incarceration places for pregnant and nursing women to raise and care for newly born children. They must have a separate health system and counselling for them. It naturally creates a burden on the state budget, in other words, on the taxpayers. Moreover, for countries with ageing populations (such as Japan, Italy, Portugal, Germany, and others) adopting drastic policies to rejuvenate the population, the failure to create conditions for women to give birth in detention facilities is a subtraction for these countries. Meanwhile, it should be noted that not all women in detention facilities are criminals, and women who commit crimes do not necessarily deserve to be deprived of their reproductive functions. Above all, the unwillingness to set out conditions for women in detention facilities to actively decide to have children makes countries cruel to women in particular and to people in general, even if, in some respects, this behaviour bears the appearance of genocide<sup>45</sup>.

### 3.3. Regarding legal

The fact that women in detention facilities are not allowed to decide on the time of childbirth actively causes excellent discrimination and complete injustice. The following three critical cases can be examined:

+ Firstly, *women's right to give birth to a child with their husbands*: it is entirely understandable that when women in detention facilities are not free to give birth, this implies that their husbands cannot have children with them. Thus, this causes a great injustice to the spouses because preventing women from giving birth not only causes damage to themselves but also automatically takes away the right to have children and men's rightful fatherhood to their right women. One person is generally suspected or accused, but two people suffer damage. It is unjust and unacceptable nonsense.

+ Secondly, *the reproductive rights of women accused or being incarcerated and the reproductive rights of women accused of another offence but not being incarcerated in the pre-trial stage*: in this case, incarcerated women are not allowed to self-determine reproductively, but the others are not incarcerated, so no one can prevent them from freely becoming pregnant and giving birth. Thus, if both women were eventually found innocent, the women not incarcerated during the pre-trial stage could give birth independently. In contrast, the incarcerated women had absolutely no chance. Even if both were found guilty and sentenced to imprisonment or death, the women who were not incarcerated during the pre-trial stage promptly gave birth to children with their husbands or boyfriends and experienced motherhood, then received the punishment, and the incarcerated women did not have this opportunity. It is a colossal injustice between the two accused women. It becomes even more unfair if two people commit the same crime, but one can pay bail and be free to get pregnant and give birth outside detention facilities, while the other cannot.

+ Thirdly, *the reproductive rights of women and men in the context of incarceration are the same*: It can be seen that women in detention facilities when meeting relatives as their husbands or boyfriends, may have to be subject to contraceptive measures required by the detention facilities<sup>46</sup>. That means meeting and having sex with their husbands or boyfriends is allowed, but they are not allowed to get pregnant and have children. As stated in the previous part, countries set out this regulation to prevent women from taking advantage of pregnancy and childbirth to evade a severe punishment she must or may have to bear. However, if the incarcerated persons are male, birth control measures are not applied when their partners see them. Because when a man is not subject to contraception, his wife or girlfriend may become pregnant, and this, according to the laws of some countries, cannot help him avoid punishment<sup>47</sup>. Precisely for that reason, in fact, when males are incarcerated, the law often does not force them to

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<https://nationalpartnership.org/report/incarceration-harms-moms-and-babies/>

<sup>45</sup> Point g, Clause 1, Article 7 Rome Statute of the International Criminal Court 1998 see "enforced *sterilisation*" to be one of the acts of genocide (Rome Statute of the International Criminal Court, [https://legal.un.org/icc/statute/english/rome\\_statute\(e\).pdf](https://legal.un.org/icc/statute/english/rome_statute(e).pdf))

<sup>46</sup> Preview this content in footnote number 35

<sup>47</sup> Article 40 (3) (a) of the 2015 Vietnam Penal Code, amended and supplemented in 2017, stipulates that the death penalty shall not be applied to pregnant and nursing children under 36 years old and shall only be applied to

use contraceptives. Thus, they can actively give birth to their partners. Comparing the right of women and men to take the initiative in childbirth in detention facilities can be considered severe and very unfair discrimination<sup>48</sup>.

As such, the state's refusal to allow women in detention facilities to publicly and proactively decide on childbirth has simultaneously infringed on most significant contents of the said reproductive rights, including (1) the right to reproductive self-determination, (2) the right to sexual and reproductive health services, information, and education, and (3) the right to equality and non-discrimination. After all, the unwillingness of countries to recognise and enable women to give birth in detention facilities openly is a severe limitation of their legislative consciousness. It leaves many inadequacies, the most important of which is that women in detention facilities are mistreated, severely discriminated against by men and seriously violate the human rights of the detained women.

### ***III. Some recommendations for national and international laws on protecting women's right to reproductive self-determination in detention facilities***

To address these shortcomings, it is essential to amend national and international laws to ensure women's reproductive rights in detention facilities. This change will thoroughly address the above inadequacies. Thus, when developing legal content on human rights, countries need specific solutions to protect the reproductive rights of women in detention facilities as follows:

#### **1. Affirming and recognising their right to publicly and actively self-determine reproduction**

International and national laws should boldly recognise women's reproductive rights in detention facilities openly and proactively in their domestic law. It ensures that women are appropriately arranged for childbirth according to age, health and psychological preparedness, pregnancy knowledge, motherhood and financial readiness to raise children. Even if a woman is in temporary detention, she can still weigh and measure these abilities independently and do it when everything is ready for pregnancy and childbirth.

When this right is recognised as a whole right of self-determination of women in detention facilities, women will not need to apply surreptitious measures of childbirth to their husbands or boyfriends. That will create an excellent psychological foundation for women to wait and nurture fetuses in their wombs, thereby protecting the safe development of the fetuses. When a woman is allowed to publicly decide when to give birth even though she is in detention facilities, it is implicitly her initiative to request access to medical information and means of support before and during pregnancy. It will limit the risks in pregnancy or other risks that surreptitious pregnant women suffer, thereby protecting the health of the mother and the baby at birth.

Therefore, countries that impose coercive sterilisation measures or prohibit childbirth for incarcerated women must resolutely eliminate these regulations<sup>49</sup>. Moreover, national laws should boldly recognise the right of women

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women. It means that if the person who is actually raising a child under 36 months of age is a male who commits a crime punishable by death, he is not considered to be a person who does not carry out the death penalty.

<sup>48</sup> It gives rise to another aspect that needs to be discussed: to give birth to a child with her husband or boyfriend, women in detention facilities have to perform certain acts of stealth, while men do not. The question is whether it is shameful for a woman to carry out surreptitious acts to get pregnant because of her legitimate desire to have children. Is it a fair start for the child to be formed from the fetus and grow up in the fearful surreptitious mentality of the mother?

<sup>49</sup>For example, in Vietnam, the law of Vietnam needs to consider adding a right of female inmates to Clause 1, Article 27 of the Law on Criminal Judgment Execution as follows: "*Female inmates are entitled to access health services, birth counselling, and the right to freely decide on childbirth under the advice and support of health experts on reproduction*" and boldly abolish the mandatory regulation on women in prisons to take contraceptives and commit not to get pregnant before meeting their husbands as currently prescribed in clause 2, Article 6 of Circular No. 182/2019/TT-BQP and clause 4, Article 5 of Circular No. 14/2020/TT-BCA stated. Alternatively, the law of England and Wales should be more open and have reasonable regulations allowing inmates to meet their lovers during temporary detention. Or the laws of other states of the United States, Vietnam, and other countries should refer to the very humane regulations of the states of New York and Washington, the United States, or of Australia, Brazil, Canada, Denmark, Germany, Israel, Russia, Spain, and Saudi Arabia, Mexico, etc. in allowing inmates to meet with their adult partners during incarceration, etc. (One Conjugal Visit, Nancy Mullane, 2014, <https://www.lifeofthelaw.org/2014/12/one-conjugal-visit/>)

in detention facilities to actively decide the time of childbirth in national laws, especially since this right must always be respected for women considered innocent in the pre-trial stage. Along with that, international legal documents related to human rights, the rights of women and children, the rights of incarcerated persons<sup>50</sup> etc., also need to boldly stipulate and guide the right to self-determination and publicity of decisions on women's childbirth in detention facilities. It should be noted, however, that not only is the right of self-determination of childbirth recognised, but every woman has the right to decide to give birth and to force the medical professional to accept it, which is still limited by the contents mentioned in paragraphs (2) and (3) below.

## **2. Determine the conditions of childbirth and the cases of not being entitled to reproductive rights**

In addition to providing for the publicity and freedom of women in detention facilities to decide on childbearing, national laws should simultaneously stipulate the circumstances in which women will not or should not give birth and the conditions that women in detention facilities who want to give birth must ensure. Especially as follows:

*Firstly, the law must consider cases where women are prohibited from giving birth.* For many reasons, the first is medical, not every woman who wants to give birth can have a baby, and the second is about their condition and ability to commit crimes that make it possible for certain people to have a baby. It is possible to refer to the following cases that restrict the right to pregnancy and childbirth of women in detention facilities:

- + When a woman has a physical or mental health problem that a health professional believes that pregnancy and childbirth will interfere with the everyday life of the mother and/or child;
- + For women convicted of crimes against children, such as crimes related to sexual abuse or sexual harassment of children, crimes related to the abuse and mistreatment of children, especially children of their birth or upbringing;
- + For women whose criminal acts are hereditary<sup>51</sup>.

In practice and history, countries have banned childbirth for those who fall into the status mentioned above, and the childbirth prohibitions applied include irreversible, permanent sterilisation or temporary and reversible sterilisation measures. Therefore, when countries develop cases of women in detention facilities who do not have the right to self-determination to give birth, they can refer to the practical lessons learned by these countries in developing laws following their countries' practical and legal context.

*Secondly, in terms of childbirth conditions:* women in detention facilities who want to exercise their reproductive rights, in addition to having their reproductive health checked and not falling into the above-mentioned reproductive restrictions, need to commit to competent agencies that they and their relatives meet the following conditions:

- + Commit to being financially able (by themselves or by the person agreeing to sponsor) for parenting and other expenses to ensure the child's right to live, study, and live in a typical environment until the child reaches 18 years of age;
- + Commit to having a guardian for the child if the mother has to return to the detention facilities after a reasonable time to give birth and raise the child. The guardian must be present and confirm to the competent authority his or her guardianship responsibilities for the child to be born in the future until the expiration of the age of guardianship under the laws of each country;
- + Commit to returning to the detention facilities on time to continue serving a sentence under the law. This period may be according to the time limit remaining in the sentence to be served or to the regulations of the competent authority or negotiations between the mother and the competent authority;
- + The commitment of the father of the child to know and agree that the woman wants to have a child with him and to take on paternity responsibilities under the law when the child is born unless the childbearing is due to artificial insemination where the donor has agreed not to provide his identity.

The above commitments, when stipulated by law, will create stable conditions for the birth and safe living of the child, avoid putting financial pressures on others or the state budget and create conditions for the mother to give birth safely under the permission and protection of the law.

<sup>50</sup>The international legal documents are referred to in section 2.2. this article, in particular, and other relevant international legal documents.

<sup>51</sup>It is a controversial scientific issue, so the reference to this regulation to consider in national law will depend on the specific country. (Raine, A. (1993). *The psychopathology of crime: Criminal behaviour as a clinical disorder*. Academic Press.  
<https://www.semanticscholar.org/paper/Genetics-and-Crime-Baker-Tuvblad/e2b4763057047eb8ed358ee441f28a397b41c70a>)

### ***3. Consider allowing women who are incarcerated to be released on bail during pregnancy and child-rearing***

In order to ensure the rights of the child during pregnancy and when she is born to have a safe and adequate life with basic physical and mental conditions and to ensure that women benefit from social values, the law should boldly allow women being incarcerated to be released on bail during pregnancy and child-rearing because science has proven that if pregnant women are well cared for by physical and medical conditions and by the father of the child, the health and mental condition of the mother and the child at birth will be very good<sup>52</sup>.

There are now many countries that are willing to let incarcerated mothers be released when they are pregnant such as Brazil<sup>53</sup>, Ukraine<sup>54</sup>, Armenia<sup>55</sup>, and other countries even released on bail during pregnancy and for a very long time after birth until the child is 14 years old such as in Ukraine, Russia<sup>56</sup>. It brings great benefits to the woman herself and to the community in that, *firstly*, the mother and child have the material and mental conditions to develop much better than in detention, and *secondly*, when they are released on bail and enjoy the benefits from the outside, she and her relatives have to pay the relevant costs according to their own needs. It will reduce the enormous pressure on detention facilities and the national budget.

Allowing an incarcerated woman to be released on bail during pregnancy and child-rearing, in addition to the benefits to society, is of great value to the woman in making her a helpful person. The care and raising of children and enjoying the humanity and openness of the law have great psychological value for offenders, helping to awaken their personality and help to reform them far more effectively than necessarily keeping them in prisons.

### **4. Develop mechanisms to ensure judgment enforcement for women giving birth but convicted of crimes**

One thing that should be given priority when the law considers the right of women in detention facilities to openly and proactively give birth is how to ensure the severity of the sentence and ensure that women do not take advantage of their pregnancy or child-rearing to avoid enforcing a severe punishment. Therefore, to ensure justice and that offenders are subject to punishment for their offences, the countries' laws shall also consider mechanisms to enforce the sentence imposed on them by the Court. It is countable to measures such as:

- + *Firstly, supervision measures* so that this person on bail will not commit a new crime, run away, or cause difficulties in the proceedings. Then the mechanisms applicable to them to ensure this purpose can be borrowed from the *house arrest* or *forbidden to leave the place of residence* mechanism available in the domestic laws of the countries;
- + *Secondly, the mother must update the development status of the pregnancy and the child after birth* to ensure that the pregnancy and childbirth are natural and still exist, thereby avoiding fraud to be released on bail.

However, an important suggestion that the law should consider is whether good parenting should be considered a reward to reduce the sentence. Not necessarily in every case; after pregnancy and raising a child, the woman must return to the detention facilities and fulfil her remaining obligations concerning punishment. For humanitarian purposes for mother and child, if the mother actively complies with her obligations on bail, does not violate the law and has a good parenting process, then for certain types of crimes, depending on the specific situation of each country, the law should consider giving her a notable sentence reduction or release. In this case, she has proven to

<sup>52</sup>Why is parent involvement important in a child's development? 2020,

<https://www.whitelodge.education/blog/parent-involvement-in-a-childs-development>

<sup>53</sup>Brazil: Motherhood behind bars, 2021, <https://www.prison-insider.com/en/articles/brazil-motherhood-behind-bars>

<sup>54</sup> Article 61 (3) of the Criminal Code of Ukraine provides, "*Restraint of liberty shall not be imposed on minors, pregnant women and women having children under 14 years of age...*"

([https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en\\_html/Ukraine\\_Criminal\\_Code\\_as\\_of\\_2010\\_EN.pdf](https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf))

<sup>55</sup> Article 57 (2) of the Armenian Penal Code states: "*Detention shall not be imposed on persons who, at the moment of delivering the criminal judgement, are below the age of sixteen or on pregnant women or on persons having a child below the age of eight under the custody thereof.*"

([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2021\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2021)022-e))

<sup>56</sup> Article 53 (5) of the Penal Code of the Russian Federation states, "*Restricted liberty shall not be imposed on persons deemed to be invalids of the first and second groups, pregnant women, women with children of less than fourteen years of age,...*"

([https://www.imolin.org/doc/amlid/Russian\\_Federation\\_Criminal\\_Code.pdf](https://www.imolin.org/doc/amlid/Russian_Federation_Criminal_Code.pdf))

society that she is a good woman, creating a good life seed. Because successfully reforming a criminal into a person is beneficial to society; after all, that is the goal that punishment aims. Nevertheless, it is nonetheless to be determined that this measure should be applied only to certain crimes and that each country, depending on its particular situation, may consider that a mother who has committed any crime may not consider commuting her sentence or releasing her child after she has given birth and raised her child.

## 5. Determine the responsibility of the government in verifying the conditions in the commitment and measures to protect the rights of the mother and baby

To ensure all these proposals are feasible, national laws must develop to protect women's reproductive rights in detention facilities and develop regulations on the government's responsibility when considering women in detention facilities to exercise their right to bear children. When the state's responsibility system for ensuring women's reproductive rights in detention facilities is completed, all the above recommendations can be implemented. The primary contents of the government's responsibility in exercising this right can be summarised as follows:

- + *Firstly*, the state must assess the conditions of women in detention facilities that need to be achieved if they want to have children, including the assessment of their health status, not in the case of being recommended not to have children;
- + *Secondly*, the state must verify her commitments as mentioned in paragraph (III) (2) above to ensure that they exist in practice and ensure their enforceability;
- + *Thirdly*, when the two contents mentioned above are satisfied, the state must be responsible for receiving women's pregnancy and childbirth needs in detention facilities, conducting medical and legal advice, and facilitating these persons' access to necessary services and measures to prepare for pregnancy and childbirth. These contents include freezing eggs, calculating the time of conception, facilitating them to meet their partners, approaching organisations capable of conducting artificial insemination, and others.
- + *Fourthly*, in case she is already pregnant, the state should apply bail and supervision measures. In pregnancy and raising a child, the competent authority continues to be responsible for supervising to ensure that the pregnancy and child-rearing situation remains in practice.

In addition to the core mentioned above, depending on each country's specific situation, the countries' laws should also consider the state's responsibility in researching solutions to ensure bail supervision, such as *electronic monitoring*. The mother can freely travel and leave her house rather than applying *house arrest* measures so that the mother can be convenient in actively accessing reproductive health services in case of necessity.

## IV. Conclusion

Human rights must be respected and enforced in the prison system countries is always a hot issue, especially when it is the human rights of women in detention facilities related to their reproductive rights. Despite women being in detention facilities during pregnancy and childbirth, the legal system of countries prioritises the protection of mothers and children shown by the priority regulations on eating, wearing, accommodation, and accessing health and education services. However, these priority mechanisms only deal with pregnant women who need to give birth without ever having a regulation of countries that recognises that women must have the right to publicity and decide their own time of childbirth while in detention facilities. It is a severe violation of human rights, specifically the motherhood right of women in detention facilities, demonstrating gender discrimination and injustice in some countries and international law.

In order to address this issue thoroughly, the article raised a big question about "Do women have reproductive rights while in incarceration?" and found the answer in three primary areas as follows:

- First, theoretically*, women's reproductive rights are rights that nature endowed so that every woman has the right to become pregnant, give birth and become a mother;
- Secondly, in terms of law*, the reproductive rights of women in detention facilities are now respected and protected by international law and laws of other countries, but countries are not ready to recognise and provide for women in detention facilities to openly and proactively decide on the childbirth;
- Thirdly, in practical terms*, some countries are willing to create the most favourable conditions for pregnant women to have a better living and development environment for the mother and child, including allowing them to be utterly free outside the prison during pregnancy and child-rearing. However, some countries strictly control their

meetings with their husbands or partners and force them to apply contraceptive methods, even not allowing these meetings when women are incarcerated.

The above contents are different, but the final consequence is that in all cases, women in detention are not allowed to publicly and freely decide on their childbirth. It seriously violates women's human rights in incarceration, even for offenders sentenced to imprisonment, and becomes even more severe for incarcerated persons, who are considered not guilty in the pre-trial stage. It leaves specific inadequacies for society, especially for incarcerated women themselves.

To address these inadequacies and to protect the human rights and reproductive rights of women in detention facilities, the article makes recommendations to national and international laws as follows:

*Firstly*, national and international law should recognise the right of women to give birth in detention facilities as a fundamental right. Women in detention facilities have the right to publicly and proactively plan for their childbirth under the support and advice of medical professionals;

*Secondly*, when women in detention are pregnant, the law should allow them to be released on bail to enjoy the material and spiritual values of society, which is an essential foundation for the health of the mother during pregnancy and create good development for the child in the womb and at birth. In order for a woman to become pregnant, give birth, and be released on bail, the article also sets out the issues that need to be addressed, including (1) the conditions that need to be ensured if a woman in detention facility wants to give birth; (2) the responsibilities of her family, relatives and the government in ensuring that a woman's pregnancy and childbirth are favourable and (3) the responsibility of the government in ensuring that women return to detention facilities after pregnancy and childbirth to continue serving their sentences;

*Thirdly*, the law needs to boldly consider that pregnant women who give birth, take good care of, and raise their children, actively comply with their obligations on bail and do not commit new crimes should consider commuting or releasing them. However, the article also recommends that this should not apply to all crimes but only to certain types of crimes. The choice of which crime can be commuted or released in this case depends on each country's political and social context.

In general, human rights and the reproductive rights of women in detention facilities are not new issues, but the study and development of radical solutions still need to be fully considered by professionals in all aspects to protect these rights better. Through this article, the author hopes to give his personal views and opinions based on the study of international law and the law of countries and the practice of protecting the right to childbirth of women in detention facilities in some countries around the world. With its proposals, the author wishes to be consulted by experts to consider the adjustment and practical application of national law and international law so that it can protect in a uniform and justified manner the rights of the incarcerated mother and the rights of children globally.

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