

Ireland's Approach to Maternal Imprisonment: A Violation of the Right to Family Life?

Leah Keogh^{*}

1. Introduction

With more than 740,000 women and girls detained globally, this group make up 6.9% of the world's prison population, representing an almost 60% increase in female detention worldwide since the year 2000 (Institute for Crime & Justice Policy Research, 2022). Whilst there is an international shortage of research pertaining to the number of mothers in prison and children by proxy who are affected by maternal imprisonment, it is generally accepted that women are more often primary caregivers than men and many women in prison have dependent children. Alas, it appears that there is a corresponding shortage of effort made to unpack the implications of this reality for families around the world. However, it is estimated that 19,000 children live in prison with their parent, most often their mother and several that number are separated (Penal Reform International, 2023). Given the 1.3 parenting rate in Europe, it is estimated that approximately 37,000 children in this region are affected by the imprisonment of a mother each year (Children of Prisoners Europe, 2023).

Ireland overutilizes imprisonment as punishment in a systematic way and its criminal justice system has been regarded as one of the most punitive in Europe. Although the average prison population is relatively low by international standards, most of those who are sent to prison are serving short-term sentences, usually less than 6 months and this has resulted in notorious overcrowding (Irish Penal Reform Trust, 2023). The number of women committed to prisons has increased significantly over the past two decades. In 2021 there were 487 female committals to prison, compared to 155 committals in 1999. Today, women account for 3.8% (144 people) of the sentenced Irish prison population (Irish Prison Service, 2023). This rate has risen more rapidly than that of male committals since 2011. The majority of women in Irish prison(s) serve short sentences for non-violent crimes. While detaining a woman in prison has significant economic costs for the State, averaging 80,335 euro per detainee per year in Ireland, it also has an arguably more significant cost for society. Maternal imprisonment has notable implications on both the mother and her family, and considerably affects family life. These implications on the child have been found to be significantly more disruptive than those of paternal imprisonment. Given that the number of women in prison in Ireland has more than

^{*}Academic qualifications: Bachelor in Social Studies (Social Work), Trinity College Dublin (BSS) & Master of Science in Human Rights and Diplomacy, University of Stirling (MSc).

doubled over the past two decades, it is likely that the corresponding number of children affected has also at least doubled (Irish Penal Reform Trust, 2023).

The severity of this impact on family life is why this paper will argue that maternal imprisonment in Ireland today is violating the human right to family life for detained mothers and their dependent children. In doing so, the following section will detail the negative impacts of maternal imprisonment. Section three will examine the right to family life and various protections afforded to women in prison and their children in international, regional, and domestic contexts. The fourth section will cross-reference these protections with current Irish practices using case-law examples. Finally, section five will outline recommendations of actions that the State should take to uphold the obligations created by the human right to family life.

2. The Impacts of Maternal Imprisonment

In most cases, maternal imprisonment has detrimental effects on a mother and her dependent children. A qualitative study conducted in Irish female prisons in 2019 found that imprisoned mothers constantly worried about their families outside of prison. The study noted that many used maladaptive coping strategies to manage this worry (Quinn *et al.*, 2019). Many women in prison have experienced socio-economic disadvantage, severe trauma, substance dependence and complex mental health issues. Imprisonment has been shown to exacerbate these existing issues with 60% of sentenced women in prison presenting with mental health issues and a self-harm rate eight times higher than their male counterparts. Further, mothers in prison who have been separated from their children are more likely to reoffend. These issues have compounding effects on their children, inhibiting the potential for positive family life both during their imprisonment and upon their release (Irish Penal Reform Trust, 2023).

Women from ethnic minority groups are over-represented in prison internationally. Following its most recent examination of Ireland, the Committee on the Elimination of All Forms of Discrimination against Women found that Traveller women are over-represented in Irish prisons (Committee on the Elimination of All Forms of Discrimination against Women, 2017, para 52). While Traveller women account for less than 1% of Ireland's population, this group make up approximately 12.9% of the prison population and are 22 times more likely to be detained than non-Traveller women. Qualitative research attributes this over-representation to factors including social exclusion and extreme deprivation (Kennedy and Pierce, 2023).

Traveller women in prison have specific vulnerabilities which are often overlooked (Brandon and Dingwall, 2022). Systemic discrimination which has contributed to poor educational attainment, poor health outcomes, stigma and isolation, all of which can affect a Traveller woman's experience of prison. Additionally, high marriage and fertility rates among the Community show that Traveller women have larger families on average, increasing the number of children affected by maternal imprisonment. Because there are only two female prisons in Ireland, family access can be difficult and visiting hours often vary in remand and custody environments (ECHR, 2010, Article 8). Larger families can complicate alternative care arrangements for Traveller children, an additional strain on Traveller families. This highlights the need for social workers to facilitate the involvement of Traveller mothers in prison in court proceedings related to their children (Kennedy and Pierce, 2023).

In addition, one in five women are lone parents before entering prison (Prison Reform Trust, 2018). For children from lone-parent families where the sole caregiver is the mother, many imprisoned mothers, serving long sentences lose contact with their children, sometimes indefinitely, as their children are more likely to be placed in State care. Maternal imprisonment has also been proven to push families from socio-economic backgrounds into further poverty. Whilst in prison, mothers cannot access child-benefit until their release, exacerbating financial pressures (Irish Penal Reform Trust, 2023).

It should be noted that most women in Ireland are serving short sentences of less than two years. Nonetheless, it has been found that short sentences have significant negative effects on family life which can be just as damaging for women serving longer sentences. Women serving short sentences often lose accommodation and employment. They do not have adequate opportunities for rehabilitation because of their short sentence and their ability to parent and family life is hindered. Although in most cases in Ireland, there are provisions which facilitate family contact such as permitted phone calls and prison visits, these permissions are subject to strict rules including security checks and no-contact visits in some instances. As a result, many children report visiting a family member in prison as confusing, upsetting and frightening in some instances (Irish Penal Reform Trust, 2023). Because the Irish Prison Rules do not require specific conditions for child-friendly visits, there is an inconsistency of practice among the two Irish female prisons which have faced criticism for lacking a 'child-centred' approach (Irish Penal Reform Trust, 2021).

As mentioned previously, parental imprisonment can have significant consequences for children (Kennedy and Pierce, 2023). The psychological impact of parental imprisonment on children has been found to be more acute in cases of maternal imprisonment (Irish Penal

Reform Trust, 2023). The imprisonment of a family member has been cited as one of the ten adverse childhood experiences (ACEs) which negatively affects a child's health, school completion and general life outcomes (Prison Reform Trust, 2018). Whilst it should be noted that in cases where neglect or abuse exists within the family home, the imprisonment of a mother might benefit their children, in most cases the impact of maternal imprisonment will have lasting negative effects on a child in some cases causing trauma, stigmatisation, grief, self-blame, shame and isolation and these effects are often carried through to adulthood (Irish Penal Reform Trust, 2023).

3. Protections on the Right to Family Life, Women in Prison, and Their Children

The Universal Declaration of Human Rights (1948) introduced the right to private and family life on an international level. In addition, there are a series of other international, regional, and domestic protections on the right to family life that Ireland is subject to. There are also several specific protections for imprisoned mothers and their children, some of which will be set out in this section.

3.1 The European Convention of Human Rights: Article 8

The European Convention of Human Rights (ECHR) is a regional instrument which protects the human rights of the 47 Member States of the Council of Europe. Ireland ratified the Convention in 1953. Article 8 of the ECHR affords the people of the ratifying countries the 'right to respect for private and family life'. (ECHR, 2010, Article 8). For the purpose of this paper, the focus will be on the family life element of this right.

According to the European Court of Human Rights (ECtHR), the key ingredient of family life is the ability to develop 'normally' by living together (ECtHR, 2022, para 295). The principle of mutual enjoyment of each other's company by both the parent and child constitutes a foundational part of family life (ECtHR, 2022, para 324). The idea of family primarily concerns marriage-based relationships but also provides for same-sex couples who live together. While the Court does not recognise a biological kinship between a child and their biological parent as a family without evidence of a 'close personal relationship', the Court does afford family status to a single woman and her child, whether she is married or not, stating that this form of family is to be considered no less than any other and they should not face discrimination by the State (ECtHR, 2022, para 330).

Relating to children, Article 8 asserts that the State must ‘strike a fair balance’ between the interests of the parent and the child. However, it is noted that the best interests of the child must be treated with special importance and may override the interest of the parents circumstantially (ECtHR, 2022, para 323). The ECtHR details that ‘in all decisions concerning children their best interests are of paramount importance.’ (ECtHR, 2022, para 322).

3.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is a human rights treaty which endeavours to protect civil and political rights internationally. Ireland ratified the ICCPR in 1989. There are two Articles within the treaty which pertain specifically to the right to family life; Article 17.1 of the ICCPR asserts that; ‘no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence’ (ICCPR, 1966, Article 17.1). Article 23.1, further emphasises the importance of facilitating the togetherness of the family unit, affirming that the family is ‘entitled to protection by society and the State’ (ICCPR, 1966, Article 23.1).

3.3 The Irish Constitution

The Irish Constitution (Bunreacht na hÉireann) was written in 1937 and predates all of the instruments mentioned in this section, including Universal Declaration of Human Rights (1948). This document bestows certain fundamental rights to people living in Ireland. Article 41 and 42 of the Irish Constitution outlines the rights afforded to the family by the State. Specifically, ‘The right to consort together, to enjoy each other's company and to procreate.’ (Constitution of Ireland, 1937, Article 41 & 42). Article 42(a) which outlines the rights of children is a relatively new addition to the Constitution, signed into law in 2015. This section affirms children’s ‘natural’ rights and Ireland’s duty to uphold them. These rights require that their best interests be respected and considered by the State and the right to have their voice heard in all court proceedings which affect them (Constitution of Ireland, 1937, Article 42).

3.4 Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been described as an international bill of rights for women, setting out the parameters of discrimination against women and proposing ways to tackle this. Ireland ratified CEDAW in 1985. In the context of family life, CEDAW recognises ‘the great contribution of women to the welfare of the family and to the development of society.’ (CEDAW, 1979). Further, Article

16.1 states that; ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations’ (CEDAW, 1979, Article 16.1). In the context of women in prison, Article 2(g) of the Convention asserts that States should ‘repeal all national penal provisions which constitute discrimination against women.’ (CEDAW, 1979, Article 2(g)). In its most recent evaluation of Ireland, the Committee on the Elimination of All Forms of Discrimination against Women noted that Irish women in prison are subject to overcrowding in prison (Committee on the Elimination of All Forms of Discrimination against Women, 2017, para 52).

3.5 The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)

The Bangkok Rules were the first international instrument to provide gender-specific guidelines on the treatment of prisoners. They recognise that women have needs distinct from men and recommend specific care accordingly. Whilst these guidelines are non-binding, they make considered recommendations of international best practice for States to implement. In 2020, to mark the 10th anniversary of the Bangkok Rules, there were calls made by 83 civil society organisations for governments internationally to fully implement these Rules (Irish Penal Reform Trust, 2023). Rule 58 on the Bangkok Rules provides for the reduction of the imprisonment of women, taking into consideration their family ties. It also notes that alternatives to prison should be implemented where possible (Bangkok Rules, 2010, Rule 58). Similarly, Rule 68 details that ‘non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate’, in cases where this is not possible, the best interests of the child should be considered (Bangkok Rules, 2010, Rule 68).

3.6 The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) is the most widely ratified human rights instrument globally. It is a treaty established to acknowledge and protect the rights of children around the world. Ireland ratified the CRC in 1992. Article 3.1 of the CRC contends that in courts of law, where a child is concerned, their best interests should be a primary reflection (CRC, 1989, Article 3.1). Further, Article 9 declares that children should not be separated from their parent(s) unless it is in their best interest (CRC, 1989, Article 9). Articles 12.1 and 12.2 allow for a child’s voice to be heard in matters that affect them, and that children should be afforded this right in judicial proceedings (CRC, 1989, Article 12.1 & 12.2). Finally, Article

9.3 of the Convention details a child's right to regular contact with a parent in detention and this right was recently safeguarded by a ruling from the European Court of Human Rights (CRC, 1989, Article 9.3) (*Deltuva v. Lithuania*, 2023).

4. An Irish Analysis

4.1 The Principle of Proportionality

The European Court of Human Rights has stated that the rights enjoyed under the ECHR do not immediately cease at the prison gate (ECtHR, 2022, para 4). While the Court insists that prisoners shall enjoy all fundamental freedoms protected under the Convention, with the exception of the right to liberty, this is not always the case.

The ECtHR assert that well-established case law suggests that imprisonment inherently limits the right to family life (ECtHR, 2022, para 74). However, if a right is to be limited, it must be done within parameters set by the Convention. The ECHR details that the State should not interfere with the right to family life unless it is 'necessary in a democratic society' (ECHR, 2010, Article 8). The reasons given as to what qualifies as necessary in a democratic society (relevant to this paper) include; if the limitation is in the interest of 'public safety or...for the prevention of disorder or crime.' (ECHR, 2010, Article 8).

According to the European Court of Human Rights (ECtHR) for limitation to be 'necessary' it must be in accordance with the law, correspond with 'a pressing social need' and be 'proportionate to the legitimate aim pursued' and it is the duty of the State to prove this (ECtHR, 2022, para 30). On these grounds, one might assume that imprisonment qualifies as a legitimate reason to limit the right to family life, but the ECtHR states that this limitation is only acceptable when imprisonment is proportionate (ECtHR, 2022, para 30).

The Irish Constitution also states that the right to family life may be restricted by the State when a family member is in prison (Constitution of Ireland, 1937, Article 41 & 42). However, like the ECHR, this restriction is subject to the principle of proportionality. To override a Constitutional right in Ireland, the Court must first consider the proportionality test, which asserts that the restriction; must not be arbitrary, it must have as little impairment on the right as possible and it must be proportional to the objective (Children's Rights Alliance, 2007).

4.2 *Heaney v Ireland* [1994]

The principle of proportionality was first applied by an Irish court in the case of 'Heaney v Ireland' (1994) when the claimant challenged the constitutionality of Section 52 of the Offences against the State Act (1939) which required people detained in custody to offer up

accurate information of a specified period during questioning by the Gardaí as being contrary to Article 38.1 of the Constitution which establishes a right to silence at trial. Using the principle of proportionality, the Court ruled that the constitutional right to silence does not extend to not answering police questions when the answers given would not be self-incriminating.

4.3 Practices in Conflict with Article 8 and Protection for Women in Prison

The Bangkok Rules outline that imprisonment should be used as a last resort. In recognition of this, the Criminal Justice Act 2011 introduced a requirement for the Court to consider replacing imprisonment with a community service order (CSO) for crimes which warrant sentences of less than 12 months. However, statistics published by the Irish Probation Service and Prison Service illustrate that this legislation has not yet been effective in reducing the use of imprisonment for offences considered ‘less serious’, where the woman does not present a dangerous threat to society’s safety. As previously established, the number of women committed to Irish prisons is rising and these women are being detained on short sentences for non-violent offences in overcrowded prison environments. This indicates a clear need for alternatives to custody for this cohort to avoid unnecessary disruption to family life (Irish Penal Reform Trust, 2023).

Regarding bail and pre-trial detention, women are disproportionately placed in custody for minor offences. 26.6% of women were remanded in custody for theft as their most serious offence, this figure compares to 13% among their male counterparts. Considering the significant negative impact of maternal imprisonment, it appears a gender-specific approach is required to limit its impact on family life (Irish Penal Reform Trust, 2023). The commentary of the Bangkok Rules notes that ‘by keeping women out of prison, where imprisonment is not necessary or justified, their children may be saved from the enduring adverse effects of their mothers’ imprisonment.’ (Bangkok Rules, 2010, Rule 58).

As has been established, according to the ECHR and the Irish Constitution concerning the right to family life, what is ‘necessary’ is proportionate. Proportionality in this context means, proportionate to the crime committed and the personal circumstances of the offender. It is argued that non-violent offences do not qualify as warranting a ‘pressing social need’ and that CSOs can address the ‘legitimate aim pursued’ by the criminal justice system whilst fulfilling a family’s right to develop ‘normally’ by living together (ECtHR, 2022, para 4). This would suggest that maternal imprisonment for non-violent offences in Ireland today is

unnecessarily violating the right to family life for mothers in prison and their dependent children.

4.4 Practices in Conflict with Article 8 and Protections for the Children of Women in Prison

As illustrated by the impacts of maternal imprisonment, the imprisonment of a mother does not serve the best interests of the child affected, which the ECtHR asserts ‘are of paramount importance’. (ECtHR, 2022, para 332). It continues that the State must ‘strike a fair balance’ between the interests of the parent and the child but that the best interests of the child must be treated with ‘particular importance’ (ECtHR, 2022, para 323). Article 12 of the CRC establishes a link between a child’s right to be heard and their best interests (CRC, 1989, Article 12). As detailed previously, both the Irish Constitution and the CRC include special provisions which require the State to ensure that the child’s voice is heard by the Court regarding matters that concern them. Further, Rule 58 of the Bangkok Rules notes that women should not be separated from their children for the purpose of imprisonment without due consideration of their family ties (Bangkok Rules, 2010, Rule 58).

The Irish Penal Reform Trust states that a child’s right to have their voice heard can take many forms, including seeking their views on issues including prison visits, alternative care, policies that affect them and their experience of maternal imprisonment. There is currently no forum in Ireland which affords the child an opportunity to share the aforementioned details (Irish Penal Reform Trust, 2023). The Children’s Rights Connect has said that failure to consult children affected by maternal imprisonment at every stage of the justice process could cause their best interests to be overlooked and potentially damaged (Child Rights Connect, 2023).

As the first country in Europe to develop a strategy for children’s participation in decision-making in 2015, Ireland has made some positive strides to serve the best interests of children. Alas, it has been found that ‘at no point in the Irish criminal justice system do children of persons on trial have a mechanism or an advocate to have their views heard in matters directly affecting them.’ (Irish Penal Reform Trust, 2023, p. 25). There remains no mechanism to hear the child’s voice when a parent is on trial. This evidence suggests that the best interests of the child are not currently being respected by the Irish State and this lack of inclusion of the voice of the child is infringing upon their right to family life.

4.5 *S v M* [2007]

Whilst children's best interests appear to not be routinely considered in Ireland, South Africa provides an example of best practice where the Court values the best interests of the child and considers them when sentencing their parents. In the case of '*S v M*' (2007), the Court ruled for a single mother of three children to be supervised within the community in recognition that her imprisonment would provoke damaging impacts which would not serve the best interests of her children.

5. Recommendations

5.1 Data Collection

The Irish Penal Reform Trust reports an absence of data on the numbers of women with children in prison and the effects of maternal imprisonment (Irish Penal Reform Trust, 2023). If the Irish State is to adequately address the causes and effects of maternal imprisonment and fulfil the requirements of Rule 3 of the Bangkok Rules, which encourages non-custodial sentences for women offenders, where possible, there must be sufficient data and a full picture in order to strategize for improvement (Bangkok Rules, 2010, Rule 3). To achieve this, the Irish Prison Service should implement structures, in line with data protection legislation, which record details of children of people in custody across all Irish prisons. To do so, parents should be informed of the reason for data collection and questions should be framed in a manner that will establish trust to ensure accuracy. Additionally, the Government should reinstate and resource the Irish Sentencing Information System (ISIS) to track sentencing patterns and work towards achieving consistency.

5.2 Protecting the Child's Best Interests and Sentencing Rates

To ensure the inclusion of the voices of children affected by maternal imprisonment, a concerted effort should be made by the Department of Children, Equality, Disability, Integration and Youth (Department of CEDYI) to implement the National Strategy on Children and Young People's Participation in Decision-Making in conjunction with the Child and Family Agency (TUSLA) (Department of CEDYI, 2015). Similarly, as an effort to address the issue of disproportionality in a systemic way, and to combat overuse of imprisonment and overcrowding, training bodies such as the Bar Council, the Law Society and the Judicial Council should incorporate training on the impacts of maternal imprisonments and sentencing

guidelines in Ireland should provide for the consideration of the impact on the child and their best interests before sentencing.

5.3 Alternatives to Prison

It has been argued that the most effective way to reduce the use of imprisonment in Ireland is to develop alternatives to traditional custody. To ensure that Ireland meets its obligations under CEDAW, policymakers should expand the diversity of sentencing options, creating gender-specific alternatives to prisons upon review. It is noted that these alternatives should include the incorporation of suspended sentencing, community service orders and open prisons, of which there are currently none for women in Ireland (Irish Penal Reform Trust, 2023). In doing so, Ireland should implement section 3(1)(a) of the Criminal Justice (Community Service) (Amendment) Act (2011). These alternatives should be considered at every stage of the criminal justice process. International examples include Brazil which provides a gender-specific example of non-custodial measures, they substitute pre-trial custody with house arrest for pregnant women and in Georgia, imprisonment is suspended for mothers with children under one (Irish Penal Reform Trust, 2023).

5.4 Prevention and Response

Inclusive measures, strategies, policies and legislation are required to ensure the best outcomes for women in prison and their families. The Irish Prison Service Strategy (2023-2027) makes no reference to any ethnic minority group. Additionally, The Irish Prison Rules (2007) which set out the conditions of prisons in Ireland including the admission and registration process, accommodation, visiting rights, health and education facilities does not mention any ethnic minority group. Because of the over-representation of Traveller women in Irish prisons, as a starting point, a dedicated strategy for Travellers in the criminal justice system should be developed in conjunction with Traveller organisations. This strategy should take a holistic approach and not only focus on Traveller's experiences in prison but also their engagement with the criminal justice system, both before and after prison. It should endeavour to address racial profiling, disproportionate arrest and conviction rates. It should also address unfair treatment within the prison system and provide for culturally appropriate opportunities for literacy and educational development. It should pay attention to post-prison supports including access to adequate accommodation, rehabilitation, therapy and employment (Irish Penal Reform Trust, 2023).

Additionally, the Department of CEDiy should fund the Child and Family Agency (TUSLA) to develop and deliver child-centred supports to children with parents in prison. It is well established that a high correlation exists between women who offend and poor socio-economic status. To combat this violation of the right to family life by maternal imprisonment, the State should introduce a series of anti-poverty initiatives as a preventive measure to address a root cause of offending behaviour. Studies have shown that those with secure attachment, stable accommodation and purpose are ultimately less likely to offend (Irish Penal Reform Trust, 2023).

6. Conclusion

This paper has demonstrated that maternal imprisonment in Ireland is violating the right to family life for imprisoned women and their dependent children. It has been argued that inflated sentencing for minor offences has led to a disproportionate rate of the imprisonment of women, causing practical issues such as overcrowding and financial strain on the State and also persisting social, emotional and physical issues for women in custody and their children. All of which is inhibiting their rights to enjoy the togetherness of family life which is essential for better outcomes for those impacted and for society. The paper has analysed existing legislation and literature in this area and cross-referenced it with current Irish practices. The recommendations proposed are in line with international human rights standards and provide a roadmap that if implemented, would serve to respect, protect, and fulfil the human right to family life. While Ireland has made positive advancements by way of legislation in recent years, their measure of success shall be determined by those most affected.

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