

SIAK-Journal – Journal for Police Science and Practice



Gölly, Sebastian/Kaiser, Nina (2021):

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SIAK-Journal – Journal for Police Science and Practice (International Edition Vol. 11), 54-63.

doi: 10.7396/IE_2021_F

Please cite this article as follows:

Gölly, Sebastian/Kaiser, Nina (2021). Children in Prison? The legal framework for placing children under the care of their mothers who are serving a prison sentence, SIAK-Journal – Journal for Police Science and Practice (International Edition Vol. 11), 54-63, Online: http://dx.doi.org/10.7396/IE_2021_F.

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Note: A hard copy of the article is available through the printed version of the SIAK-Journal published by NWV (<http://nwv.at>).

published online: 09/2021

Children in Prison?

The legal framework for placing children under the care of their mothers who are serving a prison sentence.



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The following article deals with the provisions of the Austrian Execution of Sentences Act that regulate the treatment of mothers serving a prison sentence and their children, and in particular the placement of children under the care of their mothers in prison. It will show the various possible case scenarios, discuss the respective legal framework and present any problem areas. After an overview of points of criticism of the current legal situation, consideration is given to the areas where changes could be useful.

1. INTRODUCTION

Imprisonment or any other measure involving deprivation of liberty undoubtedly entails radical changes for the person concerned in many areas of daily life. On closer examination, however, it becomes clear that this also has in part serious effects on other persons not directly involved in the crime. In particular, close relatives (such as spouses or registered partners, life partners, children and grandchildren, parents, etc.) of the imprisoned person should be considered.¹ Since, on the one hand, the legal, but also the actual framework conditions (duration, predictability of duration, visit and contact opportunities, etc.) of different forms of official prison sentence (criminal detention, pre-trial detention, placement under measures involving deprivation of liberty as defined by Sections 21 ff of the Austrian Penal Code (Strafgesetzbuch, StGB)², etc.) diverge, the following comments will concentrate on the possible effects of imprisonment on close relatives of prisoners³ as defined by Section 1(3) of the Execution of Sentences Act (Strafvollzugsgesetz, StVG)⁴.

The types and extent of the effects of detention on close relatives of the imprisoned person are numerous and varied. These include, for example, the financial consequences that are usually connected with the result of imprisonment, such as the loss of the imprisoned person's earnings or social security benefits (pensions, guaranteed minimum income, etc.) to which the imprisoned person is entitled. These financial consequences do not only affect the recipient, but regularly also his or her close (dependent) relatives, who from now on have to manage without this (additional) income and who, as a result, have less money at their disposal.⁵ Particular difficulties are also to be expected if the imprisoned person was self-employed and/or the entitlement to run a business depends on him or her (and his or her integrity) – especially in the case of so-called “family businesses”.

Similarly harsh effects on close relatives of the imprisoned person can also be caused by the loss of a person who, for example, had taken over a considerable part of the work involved in childcare or household duties.



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It is also important not to forget the social component of the (sudden) loss of a perhaps very important caregiver who is no longer available. Sociological and criminological effects on close relatives (and their development) should also be considered in this context.⁶

All the effects of imprisonment on the close relatives of the imprisoned person mentioned as an example have the potential to considerably complicate or worsen the living situation of close relatives.

However, the most intrusive of the conceivable effects of a prison sentence on close relatives is probably that close relatives themselves are directly affected by the deprivation of liberty of another person by losing their own liberty. This case, which is more reminiscent of a kind of “kin liability”, seems to be unlikely, almost impossible, but there is a very practice-related case of application with the provision of Section 74 of the Execution of Sentences Act: the right of female prisoners to keep their child or children with them (for a certain period of time) under certain conditions.

2. THE EXECUTION OF SENTENCES ACT AS LEGAL BASIS

The conditions for the possibility of leaving young children with detained or imprisoned mothers and the provisions on dealing with pregnant women as well as mothers and their babies or young children in the context of the prison system are set out in the Execution of Sentences Act. The key provision for this issue is Section 74 of Execution of Sentences Act entitled “pregnancy”. Section 2 of this provision secures the mother’s right to keep her child with her in prison under certain conditions until it reaches the age of two, and places the decision to leave the child with the mother until the age of three at the latest at the discretion of the prison director.⁷ Section 3

leg cit standardises the child’s subjective right to maintenance vis-à-vis the Federal Government for the period during which the child is placed in prison with its mother.⁸

Relevant provisions in this context can also be found in Sections 5(2) and 133(1) of the Execution of Sentences Act: Section 5(2) of the Execution of Sentences Act regulates the suspension of prison sentence in the case of pregnancy, whereas Section 133(1) of the Execution of Sentences Act regulates the subsequent suspension in the case of pregnancies which only become known after the execution of the sentence.

In order to better illustrate the respective areas of application of these standards, their contents and their interaction, the following section will refrain from a purely theoretical and individual standards-related presentation and instead attempt to present the aforementioned provisions separately according to case groups. Classification into the individual case groups is – as is also the case with the areas of application of the standards – primarily linked to the time of pregnancy (implantation of the fertilised egg)⁹ or child-birth. First of all, cases where the pregnancy was already apparent before the prison sentence or where birth preceded the prison sentence (first case group) will be considered. The second case group includes cases where the pregnancy started before, but only became known after the beginning of the prison sentence. The third and last group involves cases where the pregnancy did not begin until the start of the detention (i.e. the pregnancy started during the prison sentence).

First of all, it should also be noted that the following statements do not only apply to biological mothers or to their children, but as defined by Section 74(2) of the Execution of Sentences Act also to adoptive mothers. The provisions of Section 74 of the Execution of Sentences Act apply in principle (with the exception of the provi-

sions on pregnancy per se) mutatis mutandis in these cases as well.¹⁰

2.1 Section 74(1) of the Execution of Sentences Act as the main legal basis

First, Section 74(1) Execution of Sentences Act stipulates that the provisions on the care of sick or injured detainees are to be applied accordingly to pregnant prisoners and those who have recently given birth, although pregnancy is not by definition an illness. As a result, this means among other things that the Federal Government bears the costs of medically indicated and recommended examinations and treatment, childbirth and the inpatient stay itself, as well as the costs of prophylactic, diagnostic and therapeutic measures during pregnancy and the period specified in Section 74 of the (2) Execution of Sentences Act.¹¹

Starting with the first case group, the legal framework for the imprisonment of mothers with young children will now be presented in detail. This is followed by a summary analysis of further possible case scenarios.

2.2 First case group: Disclosure of pregnancy or childbirth before the detention start

The first case group relates to scenarios where pregnancy is already known before the start of the detention or where the child was born before the prison sentence was passed. In the latter case, the time of birth is decisive (in particular, whether the date is more or less than one year before the detention begins).

2.2.1 Disclosure of pregnancy before the detention begins or childbirth at the latest one year before the detention begins

Women whose pregnancy becomes known before the detention begins and mothers who have given birth no more than one

year before the detention begins are generally not permitted to serve the sentence. In such cases, pursuant to Section 5(2) of the Execution of Sentences Act, the sentence is to be suspended until the end of the sixth week following childbirth and, in addition, until one year after birth at the latest if the child is in the care of the convicted person. At the end of the sixth week after childbirth, however, the prison sentence is to be served if the convicted person so requests and if the health of the convicted person or the child is not endangered as a result of the sentence being served (prematurely) and if, in addition, the feasibility of serving the sentence as defined by Section 20 of the Execution of Sentences Act is ensured. By explicitly referring to pregnancy or childbirth and the need to take health aspects into account, the wording of Section 5(2) of the Execution of Sentences Act suggests that – unlike Section 74(2) of the Execution of Sentences Act – it will probably not be applicable to adoptive mothers. However, pursuant to Section 5(3) of the Execution of Sentences Act, in certain cases a substitute custody can be arranged in the event of incapability for serving a prison sentence.¹²

In order to be allowed to keep the child detained after the expiry of the suspension pursuant to Section 5(2) of the Execution of Sentences Act, the requirements of Section 74(2) of the Execution of Sentences Act must be met. In addition to time limits and the existence of the necessary infrastructure, it is particularly important that the mother has the right to care and education and that there is no risk of the child being disadvantaged by being placed with the mother in detention.

The existence of the necessary infrastructure

The basic prerequisite for a mother-child imprisonment is the existence of the necessary facilities in the respective prison. This

means that the competent prison must be able to guarantee such a form of imprisonment with regard to its premises. In addition to the Schwarzau prison, there are nine court prisons with mother-child facilities in Austria, namely Graz-Jakomini, Innsbruck, Klagenfurt, Korneuburg, Krems, Leoben, Salzburg, Wels and Wien-Josefstadt.¹³

Time limit

The period for which the child may remain with the mother in prison is limited by law: Section 74(2) of the Execution of Sentences Act stipulates that this is permissible under certain conditions until the child reaches the age of two. It is the mother's subjective right to keep her child with her if the conditions are met.

If the remaining sentence at the time of the completion of the child's second year of age is expected to be not more than one year, the prison director may, if there is sufficient capacity and the prerequisites continue to apply, allow the child to remain with the mother in the prison until the child reaches the age of three. However, this is no longer the mother's subjective right; the decision is at the discretion of the prison director.¹⁴

The decisive factor with regard to the aforementioned time-related conditions will therefore be a kind of prognostic decision on the likelihood of "timely" (even if only conditional) release.¹⁵ If this prognosis turns out to be unfavourable, either a negative decision will have to be made from the outset or it will be ensured that the "separation shock" for the child can otherwise be kept as minimal as possible, for example by placing the child in a suitable care facility as soon as possible.¹⁶

Right to provide care and education

In addition, the mother must have the right to care for and educate her child in

order to be able to keep the child in detention. As a preliminary question, the prison director has to decide this initially on the basis of the mother's statements, whereby, at least in cases of doubt, verification of the information provided by the guardianship court or child and youth welfare services will have to be obtained. If a foreign legal system is applicable to the guardianship situation (i.e. in particular if the woman concerned is not Austrian), the prison director must examine whether or not the mother is entitled to a comparable right according to the law of her home country.¹⁷

No disadvantage for the child's welfare

Placing the child with the mother in prison must not cause any fear of disadvantage for the child. Ensuring the child's welfare as the most important consideration for decisions is highly legitimate and presumably also required by constitutional law¹⁸, but the relatively vague concept of civil law poses difficulties in practice.

How can the child's welfare be defined? When is there a "disadvantage"? Unfortunately, these questions cannot be generally answered, at least not in this abstract form, as the child's welfare must always be assessed on a case-by-case basis. Moreover, the concept of a child's welfare is not fully clarified in the Austrian legal system. The relevant provision of civil law, Section 138 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB)¹⁹, includes "only" a demonstrative list of some criteria which must be taken into account in civil law decisions affecting the child's welfare (such as in parental custody matters). Nevertheless, the criteria mentioned in Section 138 of the Civil Code will also have to be applied in the presented decision.²⁰

The impossibility of making a general assessment of the existence of a disadvan-

tage for the child's welfare thus presents the prison director with the challenge of always reviewing and assessing all specifically relevant circumstances for each individual case (also) on the basis of these criteria.

It must be emphasised that the mother's interests need to be secondary in the decision pursuant to Section 74(2) of the Execution of Sentences Act; the prison director must place the child's interests at the centre of any considerations.²¹ The need to weigh child psychological and socio-educational aspects on a case-by-case basis as objectively as possible requires a general overview, whereby the risk factors for the child in the event of separation from the mother are compared with the risk factors in the event of placing the child in prison with its mother. In principle, it is understandably assumed that placing a child "in prison" is disadvantageous due to the environment.²²

When making a decision, the prison director will probably also have to duly consider the fact that the mother-child relationship should normally be maintained, since this bond is a protective factor for the child in the first years of its life and disruptions to it should be avoided as far as possible.²³ However, alternative placement options (e.g. with the father, grandparents or other relatives) should also be included in the decision, while ensuring continuity among the carers and avoiding the child being "passed around".²⁴

The decision is also likely to have a significant impact on the mother's ability to care for and educate her child in prison. The relevant factors here include their general physical and mental state of health and any drug or alcohol dependency. Furthermore, the offence on which the conviction or imprisonment is based can also be of significance in assessing a potential future threat to the child's welfare. In the case of

a conviction under Section 92 of the Penal Code (torturing or neglecting underage, younger or defenceless persons) as well as for bodily injury or sexual offences (in particular towards the child concerned or towards any siblings), for example, special consideration would have to be given to whether leaving the child with the mother in prison is in the child's best interests.

The decision on placement in a less stringent form of detention can also be meaningful with regard to the decision pursuant to Section 74(2) of the Execution of Sentences Act, since mother-child facilities constitute such a form of detention as defined by Section 126 of the Execution of Sentences Act due to the predominantly unlocked detention and recreation areas of the individual residential groups, which can only be approved if the prisoner is unlikely to abuse the measures due to the circumstances (personality, past life, offence, prison behaviour).²⁵ If the mother has already been refused this form of detention in the light of these criteria, it will hardly be possible to make a positive decision regarding the placement of the child with the mother in prison.

In the area of the forensic commitment, which can only be touched upon here, it should be noted that the accommodation within the forensic commitment can also provide important information. In principle, the provision of Section 74(2) of the Execution of Sentences Act is applicable to female inmates of all forms of prison, but the placement of the child with an accommodated mother is unlikely to be in the child's welfare if psychological instability or the mother's particular vulnerability are taken into account.²⁶ In addition, it is usually completely uncertain how long the mother will have to remain accommodated, which can cause immense problems in terms of taking age limits into account. The existence of a need for withdrawal in

the case of accommodation under Section 22 of the Penal Code will also be a regular argument against leaving the child in prison with the mother, at least if the addiction could not be brought sufficiently under control. In such cases, it will probably not be possible to ensure that the mother will take appropriate care of the child.

Interim result

If a release (even if only conditional) is expected within the specified periods of time, the necessary infrastructure exists in the prison²⁷, and if the mother has the right to care for and to raise her child and if a positive result is reached after an overall consideration of all the circumstances to be taken into account for the child's welfare, the mother has the subjective right (if necessary after a suspension of the prison sentence in accordance with Section 5(2) of the Execution of Sentences Act) to keep her child with her in prison until the child reaches the age of two. In this case, the prison director has the discretion to extend this right until the child reaches the age of three if the conditions continue to exist.

2.2.2 Childbirth more than one year before the detention begins

If the mother has given birth more than one year before the detention begins, it is no longer possible to apply for a suspension pursuant to Section 5(2) of the Execution of Sentences Act. Thus, the prison sentence cannot be suspended due to pregnancy, but must be commenced – provided there are no other grounds for suspension as defined by Section 5(1) of the Execution of Sentences Act. If the mother is entitled to custody, she is entitled to the subjective right to keep her child (or children) with her in prison until the child(ren) reach(es) the age of two, under the conditions set out above in Section 74(2) of the Execution of Sentences Act. In this case too, the prison

director has the option of extending this until the age of three at the latest.

2.2.3 Childbirth before the detention begins and child(ren) aged above two years

If the children under the convicted person's custody have already reached the age of two when the detention began, there is no possibility to apply for a suspension on the grounds of maternity, nor is it possible to keep the child with the convicted person pursuant to Section 74(2) of the Execution of Sentences Act.

2.3 Second case group: Disclosure of the pregnancy already existing at the time of the detention only after commencement of the detention

If the pregnancy already exists at the time of starting the detention and is discovered later, and if childbirth therefore occurs after the prison sentence began, the prisoner must be taken to a public hospital to give birth pursuant to Section 74(1) of the Execution of Sentences Act. Furthermore, in such cases, the (remaining) prison sentence must be suspended retrospectively pursuant to Section 133(1) in conjunction with Section 5 of the Execution of Sentences Act.²⁸ The aforementioned conditions of Section 5 of the Execution of Sentences Act and, if applicable, also of Section 74(2) of the Execution of Sentences Act must then be ascertained.

2.4 Third case group: Pregnancy after the begin of the detention

If a woman becomes pregnant (e.g. during leaves, breaks or long-term visits), the circumstance (pregnancy) which led to the incapability for detention did not exist when the prison sentence began. Therefore, the application of Section 133(2) of the Execution of Sentences Act is excluded; it is not possible to subsequently suspend the prison sentence.²⁹ However, Section 74 of

the Execution of Sentences Act is also applicable in this case – both with regard to transfer to a public hospital for giving birth and the mother’s right to keep the child with her in prison if the conditions are met.

2.5 Decision-making capacity

Pursuant to Section 7(1) of the Execution of Sentences Act, the presiding judge or single judge of the sentencing court is responsible for deciding on a possible suspension under Section 5(2) of the Execution of Sentences Act.³⁰

In the case of incapability for detention due to pregnancy, which is only revealed after the prison sentence began, i.e. in proceedings concerning a subsequent suspension pursuant to Section 133(1) of the Execution of Sentences Act, the court of execution is competent pursuant to Section 16(2) subparagraph 9 of the Execution of Sentences Act, which has to intervene *ex officio*. The single judge responsible according to the allocation of duties at the regional court in whose district the competent prison has its seat shall act as the court of execution.³¹

Pursuant to Section 11(1) of the Execution of Sentences Act, the respective prison director is responsible for deciding on whether to leave the child with the mother pursuant to Section 74 of the Execution of Sentences Act as the law enforcement authority of first instance.³² In practice, the prison director will try to assess the conditions in detail, taking into account, for example, observations from the judicial guard and psychological and social services.³³ However, they do not have to consult the “Youth Welfare Office”³⁴, as stipulated, for example, in German law.³⁵ Of course, the decision on parental custody remains unaffected by this; it is the responsibility of the guardianship court, which does not have to be involved in the decision pursuant to Section 74(2) of the Execution of Sentences Act.³⁶

2.6 Proceedings and legal protection

Since decisions to leave the child with the mother in prison until the child reaches the age of two are decisions on the mother’s subjective right, a description of the main features of the possibilities of legal protection is provided hereafter.

Fundamentally speaking, it must be noted that such decisions made by the prison director in the matter under Section 22(3) of the Execution of Sentences Act are made without formal “preliminary proceedings” and without a decree being rendered. They can therefore be revoked informally and do not become legally binding as defined by Section 68(1) of the General Administrative Procedure Act (*Allgemeines Verwaltungsverfahrensgesetz, AVG*).³⁷

The right guaranteed by Section 74(2) of the Execution of Sentences Act can be enforced verbally or in writing pursuant to para. 2 *leg cit* with the prison director by submitting an appeal pursuant to Section 120 of the Execution of Sentences Act within a period of 14 days from the communication or delivery of the decision. It should be noted, however, that the appeal is somewhat limited by the discretion of the prison director to decide on compatibility with the child’s welfare and the availability of the facilities. Pursuant to para. 3 *leg cit*, the appeal does not, in principle, have a suspensory effect, but it may be granted such an effect if there are no public interests to the contrary. Since the appeal in the case in question is always directed against the prison director, the court of execution is willing to decide on Section 16(3) of the Execution of Sentences Act by order as defined by Section 121b(1) of the Execution of Sentences Act, if the prison director does not follow the appeal in whole or in part. Pursuant to Section 121(5) of the Execution of Sentences Act, the prisoner or the Ministry of Justice can appeal against the decision of the court

of execution to the Higher Regional Court of Vienna on the grounds of unlawfulness within a period of six weeks.³⁸

If the prison director breaches the obligation to make a decision, there is the possibility of filing a complaint about the delay with the court of execution pursuant to Section 16(3) of the Execution of Sentences Act in accordance with Section 121c of the Execution of Sentences Act. If the defaulting prison director is predominantly at fault, the court has three months to rectify the decision and, if this deadline is not met, to decide on the substance of the case itself.³⁹

2.7 Selected problem areas, open questions and potential need of amendment

2.7.1 Heading of Section 74 of the Execution of Sentences Act and system

Section 74 of the Execution of Sentences Act is entitled “Pregnancy”. In view of the further contents of this norm, which have just been presented, this appears to be in need of discussion, as special provisions for dealing with pregnant prisoners make up only a fraction of the aforementioned provision. The fact that Section 74(2) of the Execution of Sentences Act also applies to adoptive mothers⁴⁰ would also argue against retaining the current heading. Dividing the content into a provision on pregnancy in the penal system (currently Section 74(1) of the Execution of Sentences Act) and into a separate norm concerning the (temporary) placement of children with their imprisoned parents would also make it possible to formulate the relevant provision in a gender-neutral manner – if such a provision is deemed necessary.⁴¹

2.7.2 Age limits under Section 74 of the Execution of Sentences Act

Section 74(2) of the Execution of Sentences Act in its current version – as

shown above – has rigid age limits, although the basic age limit of two years of age already allows for a somewhat more flexible handling of this provision due to the discretionary decision of the prison director to leave a child with the imprisoned mother until the age of three. The absolute age limit is reached *de jure* when the child reaches the age of three. However, cases appear conceivable where – particularly with regard to the child’s welfare – the advantages of placing the child with the mother for a longer period of time could outweigh the disadvantages of the fact that this placement is in a prison. Particular consideration may be given to cases where, apart from the imprisoned mother, the child has no social caregivers whatsoever and therefore only external placement would be possible; at the same time, maintaining contact with the imprisoned mother will also present some challenges in these cases. Even in cases where only a short prison sentence for the mother is to be expected beyond the child’s third year of age, the legal obligation to separate the (imprisoned) mother and her child for a few weeks or months appears unsatisfactory, particularly since the placement with the mother in prison must have been in the child’s welfare by then in any case, and the only factor which may have changed is the age of the child.

The practical relevance of such difficulties in the everyday life of the prison system is demonstrated not least by the fact that there are known cases in which children were (clearly) placed with the imprisoned mother even after the age of three.⁴²

Since it is obvious that such “hardship cases” can occur at any absolute age limit and therefore a possible increase in the age limits alone would not solve this problem, but only postpone it, another approach could be more effective: if the law were to

create the possibility for the prison director (possibly in consultation with the competent guardianship court) to allow the child to be placed with the imprisoned mother in justified exceptional cases even after the (possibly adjustable) legal age limit has been reached, the prison director would be given a suitable set of instruments to find individual and appropriate solutions serving the child's welfare – and in any case to remain within the legal limits.⁴³

2.7.3 Discrimination of fathers under Section 74 of the Execution of Sentences Act?

In several passages of the literature there are concerns about equal treatment in terms of Section 74 of the Execution of Sentences Act, as it only grants mothers the possibility of (temporarily) “taking” their own child into prison, but not fathers.⁴⁴ This gives rise to a risk of discrimination contrary to equality. To ensure that the provision of Section 74 of the Execution of Sentences Act complies with the constitutionally guaranteed right to equality before the law (see Section 7 of the Federal Constitutional Law [Bundes-Verfassungsgesetz, B-VG]), there must be sufficient reasons to justify unequal treatment of mothers and fathers in this situation. Unequal treatment is only permissible if it is based on unequal situations. A more detailed analysis of this subject can be found in Fehringer⁴⁵ and espe-

cially in Oberlauer⁴⁶. Due to lack of space, references are made to these statements.

3. CONCLUSION

It became clear that placing children with their mother in prison is probably the most direct intervention of the prison system on close relatives of the convicted person, and that this decision – which falls within the responsibility of the prison director – is a very complex one: Eventually, the prison director must not only weigh and assess the psychological and socio-pedagogical aspects of the child's situation on a case-by-case basis in order to evaluate potential harm to the child's welfare, but must also consider all other factors to be taken into account, such as age limits, length of the prison sentence, prison capacities, the mother's right to provide care and education, as well as the likelihood of abuse. In addition, it should be noted that the current legal situation leaves a certain amount of room for discussion and that amendments to the legal regulations appear to make sense. Consideration could be given in particular to whether the heading and system of Section 74 of the Execution of Sentences Act should be revised, whether the age limits must necessarily be so “rigid” and whether a form of the provision that minimises the problem of any discrimination against fathers should also be considered.

¹ See only Fehringer (2009) 1, including further references.

² Austrian Penal Code (StGB), Federal Law Gazette (BGBl) 1974/60 as amended by the Federal Law Gazette I 2020/148.

³ The following remarks are limited to the situation during the execution of the prison sentence. There are departures

for pre-trial detention, for example, with regard to the possibility of suspending the prison sentence on the grounds of pregnancy or childbirth, which is not possible with pre-trial detention: Oberlauer (2012) 4, including further references; Drexler/Weger (2018) Section 5 para. 1 and 6; Section 133(1).

⁴ Austrian Execution of Sentences Act (StVG), Federal Law Gazette 1969/144 as amended by the Federal Law Gazette I 2018/100.

⁵ On the broad field of the effects on the social security conditions of the relatives of imprisoned persons, see the extensive treatment of the topic in Fehringer (2009) 22 ff.

- ⁶ On criminological aspects such as the increased probability of later delinquency in children of detained parents, see also the findings of Fehringer (2009) 120 ff.
- ⁷ Drexler/Weger (2018), Section 74 para. 2; Fehringer (2009) 98 ff.
- ⁸ Drexler/Weger (2018), Section 74 para. 7; Fehringer (2009) 104 f.
- ⁹ Drexler/Weger (2018), Section 5 para. 6.
- ¹⁰ Drexler/Weger (2018), Section 74 para. 3; Fehringer (2009) 100.
- ¹¹ See Drexler/Weger (2018), Section 74 para. 7; Zagler (2012) 173.
- ¹² Drexler/Weger (2018), Section 5 para. 7 f; Fehringer (2009) 98 f; Zagler (2012) 45 f.
- ¹³ Cf. Fehringer (2009) 102; Tropper (2017) 6 f, including information on the (potential) prison population.
- ¹⁴ Drexler/Weger (2018), Section 74 para. 2; Fehringer (2009) 100 f.
- ¹⁵ Fehringer (2009) 102.
- ¹⁶ Drexler/Weger (2018), Section 74 para. 4.
- ¹⁷ Drexler/Weger (2018), Section 74 para. 3; Zagler (2012) 174.
- ¹⁸ Cf. Section 1 Federal Constitutional Law (B-VG) on the rights of children Federal Law Gazette I 2011/4.
- ¹⁹ Civil Code (Allgemeines Bürgerliches Gesetzbuch) (ABGB) JGS 1811/946 as amended by the Federal Law Gazette I 2020/148.
- ²⁰ Deixler-Hübner/Mayrhofer (2018), Section 138 para. 3 ff; Gitschthaler (2018), Section 138 para. 4 ff; Weitzenböck (2020), Section 138 para. 1 ff.
- ²¹ Drexler/Weger (2018), Section 74 para. 2.
- ²² Cf. *ibid* Section 74 para. 4; Dettenborn (2016) 198 ff; Laubenthal (2019) 685; Deixler-Hübner/Fucik/Huber (2013) 39; Zitelmann (2001) 142.
- ²³ Dettenborn (2016) 57.
- ²⁴ *Ibid* 208 ff.
- ²⁵ Drexler/Weger (2018), Section 126, para. 2 f; Zagler (2012) 116 f; VwGH 2010/06/0010 JusGuide 2011/50/2611; OLG Wien (Higher Regional Court of Vienna) 1 Vk 136/05 JSt-StVG 2007/4.
- ²⁶ Drexler/Weger (2018), Section 74 para. 4; Fehringer (2009) 101 f.
- ²⁷ Drexler/Weger (2018), Section 74 para. 4; see Fehringer (2009) 102.
- ²⁸ Drexler/Weger (2018), Section 133 para. 2; Fehringer (2009) 99 f; Zagler (2012) 52.
- ²⁹ Fehringer (2009) 100; Drexler/Weger (2018), Section 133 para. 2.
- ³⁰ Drexler/Weger (2018), Section 7 para. 2.
- ³¹ *Ibid* Section 16 para. 3, 6 and Section 133 para. 4; OGH 100s 99/70 EvBl 1970/373 SSt 41/29; 17 November 1994, 12 Os 151/94.
- ³² Drexler/Weger (2018), Section 11 para. 1 and Section 74 para. 2 and 4.
- ³³ With reference to several interviews conducted with officials from various Austrian prisons, Tropper (2017) 19.
- ³⁴ In Austria: „Child and youth welfare service”.
- ³⁵ Cf. Section 80 para. 1 of the (German) Execution of Sentences Act (dStVollzG) (German Federal Law Gazette I 1976/28 as amended and published in the Federal Law Gazette I 2019/47).
- ³⁶ Zagler (2012) 174.
- ³⁷ Drexler/Weger (2018), Section 22 para. 4; Zagler (2012) 59; VwGH (Supreme Administrative Court) 97/20/0395 VwSlg14.739A = ÖJZ 1998/89A = ZfVB 1998/1661.
- ³⁸ Drexler/Weger (2018), Section 120 para. 1, Section 121 para. 1, Section 121a para. 2, Section 121b para. 1; Zagler (2012) 174 and see also *ibid* 61 ff.
- ³⁹ See Section 121c of the Execution of Sentences Act; for further details also Drexler/Weger (2018) Section 121c para. 1 f.
- ⁴⁰ See above in endnote 10.
- ⁴¹ See chapter 2.7.3.
- ⁴² Fehringer (2009) 103, who describes such an approach as a benefit as defined by Article 24(3) of the Execution of Sentences Act.
- ⁴³ If interpreted strictly, the placement of a child over the age of three in a prison with its mother would probably constitute an unlawful or illegal (custodial) arrest, which could at worst also result in civil or even criminal proceedings for the persons concerned. This seems unfair in cases where such an approach would best serve the child's welfare.
- ⁴⁴ Drexler/Weger (2018), Section 74 para. 5; Fehringer (2009) 107 f; Oberlauer (2012) 1.
- ⁴⁵ Fehringer (2009) 107 f.
- ⁴⁶ Oberlauer (2012) 1 ff (especially 6 ff).

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