

CONSIDERING THE BEST INTERESTS OF EVERY CHILD WITH A PARENT IN PRISON: AN IMPOSSIBLE TASK?

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ABSTRACT

Children with a parent in conflict with the law may face a series of social and emotional difficulties as a result of their parent's arrest, sentence and imprisonment. With appropriate and timely support and promotion of their best interests, most children will go on to lead safe, included, happy, achieving lives. Questions remain as to how to sensitively define the best interests of a child, without discriminating against or stigmatising the child any further. With case-by-case analysis and tailor-made solutions the ideal, organisations must be conscious of how they are advocating on behalf of children with imprisoned parents and should develop sensitive, flexible guiding principles that promote involving children in the decisions that affect them.

Keywords: children with imprisoned parents; best interests; holistic support; agency; advocacy; child participation

Children who are separated from a parent in prison—an estimated 800,000¹ in the European Union—are that before anything else: children. Children like all other children yet these are children who face unusual, and sometimes very difficult, circumstances. Not only do these children have to deal with the often sudden absence of their parent in their day-to-day life, but they may also be exposed to a string of social, emotional and psychological difficulties including bullying, social exclusion, stigmatisation, trauma and violence. The recent EU-funded study “Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health”, informally known as the Coping Project, found that these children have a significantly greater risk of mental health difficulties than children in the general population (Jones, 2013). The questions surrounding the issue of parental imprisonment are complex and require careful, holistic consideration: policies and support schemes that are not tailored to individual needs are insufficient (COPE, 2016).

Indeed, having a parent in prison does not automatically dictate long-term or permanent psychological, social or behavioural issues (COPE, then Eurochips, 2011), nor that a child will be unable to cope, but their best interests can be overlooked and, on occasion, jeopardised. Discrimination towards children based on the actions or status of their parents who are in conflict with the law is quite common, even if the right to protection from such discrimination is provided for in the United Nations Convention on the Rights of the Child (UNCRC, Article 2). What's more, the very nature of issues linked to law enforcement, justice and prison means that the best interests of children affected by the arrest, sentencing and imprisonment of a parent—if they are not overlooked entirely—are often decided by various competent authorities (judges, prison services, etc.) without consulting the children concerned. Even for those who do consult children and aim to protect the child's best interests, how do they determine what these best interests are? Bearing in mind the subjective nature of a concept as complex as “interests”, this chapter will explore the issue from the child's perspective at four key stages: during the arrest, sentencing, imprisonment and release of a parent from prison. It will then consider the need for case-by-case analysis in promoting the best interests of the child, and ways in which the Children of Prisoners Europe (COPE) network² aspires to do so.

THE BEST INTERESTS OF THE CHILD

At the time of arrest

When a suspect is arrested in their own home, this usually occurs without prior warning, and, depending on the nature and seriousness of the suspected offence, with armed police officers who may force entry into the building. Children who witness their parent's arrest are in a particularly vulnerable position. The Coping Project highlighted scenarios which it found to be especially distressing for children, including "police wielding guns, doors being broken down, drawers being spilled, teddy bears being cut open to look for drugs" (Jones, 2013: 94). Some case reports have even described teenage children unconnected to the case being handcuffed as a precautionary measure (See: *Stoyanov and Others v. Bulgaria*, 2016). The actions and behaviour of police officers searching the family home and arresting a parent can have a serious impact on the child, yet few European countries have developed systematised protocols that take into consideration children when arresting parents: examples of positive behaviour tend to be at the arresting officers' discretion (Christmann, 2013).

Not only can witnessing a parent's arrest frighten a child, but it can also be humiliating for the child's parent (something which can cause issues in the child-parent relationship both during imprisonment and release, as will be explored in due course) and can have a significant impact on how children view law enforcement professionals and agencies later in life. According to Oliver Robertson (2013: 5), "sensitive arrests can [...] improve the longer-term relationship between police and the children of suspects".

Taking into account the best interests of a child during the arrest of their parent may not be the obvious priority for arresting officers but is crucial for the well-being of the child. Children need information, reassurance, to be listened to, to not see their parent humiliated and not to fear the security forces whose role it is to protect them. Again, this is not relevant indiscriminately across the board in a "one size fits all" approach, but at the very least an awareness is required of the potential for serious impact on the child. Simple solutions that take into account the best interests of the child include having a specially designated and trained officer present at all arrests where the suspect's children might be present; bringing a trained social worker to the arrest—someone who will reassure and inform the other family members of procedures and as to what will happen next; and, when feasible, keeping violence and force to a minimum. Above all, the child's perspective must be introduced to all police procedures and protocols when arresting a parent (Jones, 2013, Recommendation 1). As Police Lieutenant Ray Hassett of New Haven Department of Police Service in the United States explains, as cited by Nell Bernstein (2005: 28): "Encouraging kids to see cops as the enemy [...] does not enhance public safety—nor, for that matter, police safety [...]. Having a rapport with the family helps get the job done in a safe manner." An approach that takes into account the needs and priorities of one (the law), without neglecting the needs and best interests of the other (the children, the parent, other family members) and providing opportunities for collaboration that recognise the unique roles of all parties is the ideal³.

At sentencing

The United Nations Convention on the Rights of the Child (UNCRC) grants all children—regardless of the status or activity of their parents—all of the rights outlined in the Convention. These indivisible and universal rights include:

Article 3:

- 1 In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**
- 2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (UNCRC, Article 3)

Several Concluding Observations by the United Nations Committee on the Rights of the Child state that the best interests of the child “must be taken into consideration in sentencing and remand decisions concerning their primary or sole carer” (Townhead, 2006: 16). If this is one of the fundamental principles of the UNCRC,—that a child’s best interests not only be taken into account but be a primary consideration in any decision that affects them, as surely the arrest, sentencing and imprisonment of a parent does (Townhead, 2015: 3)—why then is the number of cases concerning the sentencing of a parent or primary caregiver where the possible impact on their child or children is accounted for so low? It was hoped that the South African Constitutional Court case *S v M* in 2007, in which the court issued a non-custodial sentence (a sentence that does not involve imprisonment) given the appellant’s status as primary caregiver of her children, would pave the way for more such decisions. This has been the case to an extent in South Africa (Skelton and Mansfield-Barry, 2015), but is yet to impact many cases in Europe.⁴ A recent case in the UK saw Justice Peter Jackson deliver a shortened judgment in simple language so that a sentenced father’s children would understand what was happening and why the judge had taken the decisions he did (*Lancashire County Council v M and Others*, 2016). This, and other examples of the judiciary taking the initiative to consider children in different ways during the sentencing of parents, is encouraging.

The judiciary is in a unique position to take into consideration the best interests of any child whose parent is being sentenced. Non-governmental organisations (and others) have been advocating for years for a child-friendly justice system which does just that. In the UK, the organisation Pact provided Magistrates’ courts with posters detailing the impact of sentencing parents to custodial sentences. Organisations such as Families Outside in Scotland have been promoting the introduction of child impact assessments prior to the sentencing of a parent (Loureiro & Loucks, 2015). Conclusions from a recent Ghent University study entitled “The experience of electronic monitoring compared with imprisonment: The view of co-residents” showed that while this type of non-custodial sentence can bring its own challenges for the family, electronic monitoring is generally preferable for family members to a custodial sentence. If the latter is the only recourse, there are other ways to take into account the child’s best interests, including ensuring that there is

a responsible adult to care for the child; allowing contact and visits from the first day of the sentence onwards; sentencing the parent to a prison close to the child's home. Where possible, age-appropriate and sensitive child impact assessments (or equivalent) should grant the child the right to express their opinion with regard to their parent's sentence, in accordance with article 12 of the UNCRC. Children should not be obliged to be present in court, although some children may cope well with this. Relevant authorities should also be minded that one impact assessment carried out by a trusted adult should be sufficient; as repeating his or her position for several different assessments is potentially distressing for the child.⁵

During imprisonment

A parent's arrest and subsequent imprisonment undoubtedly affects the child-parent bond, often causing upheaval and stress. Children may experience emotions similar to those felt during bereavement: shock, sadness and loss. "Ambiguous loss" is a concept which refers to two types of uncertain grief, including the uncertain grief experienced when a loved one is physically absent but still psychologically present (they may be absent due to any one of a variety of reasons but have not necessarily passed away), as opposed to bereavement where one is encouraged to mourn and grieve as part of a secure attachment process (Jones, 2013). In the case of parental imprisonment, the child's parent is (abruptly) no longer physically present but is still a key part of the child's life and has not passed away. Ambiguous loss prevents the usual grieving process, which can understandably be psychologically and emotionally damaging to the child, "turning what is already a difficult situation into something that they feel must not be talked about" (Doka, 1989).

Certain factors can improve the child's resilience and well-being during parental imprisonment: reassurance, support and information; healthy, open relationships with the caregiving parent; and support from NGOs and from peers. Above all, good quality direct contact from the very early stages of the sentence and open, honest communication with both parents also, on the whole, boost children's well-being and resilience (Jones, 2013). In comparison, "disrupted contact, confusion [...] and uncertainty" can have a negative impact (Philbrick, Ayre & Lynn, 2014: 44).

It is important to also be aware of the importance of a quality child-parent bond prior to incarceration. If this is not the case, the pair may need more support during imprisonment and "fostering" family ties may be more apt than "maintaining". Neither is an easy task and all parties merit support, including training for professionals who must be acutely conscious of the needs and best interests of the child, placing them at the centre and being aware that needs can evolve over time.

Prison services have a unique role to play to ensure quality contact, which can be enhanced with the help of other key stakeholders such as professionals and NGOs. Allowing visits seven days a week and visits that do not coincide with school hours helps children continue as normal a life as possible and does not disrupt their schooling. Providing child-friendly facilities such as toys, games, books, changing mats and bottle-warmers, both in visits rooms and in waiting rooms, allows families to relax and enjoy their time together

and helps children feel at ease. Having age-specific arrangements such as shorter, more frequent visits for younger children and longer visits for older children can make a considerable difference. As Philbrick, Ayre and Lynn (2014: 108) state, “what takes place before, after and during visits allows the child to develop and grow, and ultimately to individuate through a healthy separation. Respecting the needs of children, and allowing the parent to act as parent to his or her child, to spend time doing activities that are part of daily life [...] is one clear aim”.

For the vast majority, children separated from a parent in prison carry on with their day-to-day life outside the family home as before: going to school, socialising, doing after-school activities. The importance of schools, described as potential “game-changers” by European Commission Coordinator for the Rights of the Child Margaret Tuite (2016), is increasingly recognised. Often, teachers and other school staff are the first port of call for children outside the family. They therefore have a key role to play, and must be appropriately supported in this.

In preparation for release

It would be naive to suggest that the problems encountered during a parent’s imprisonment are simply solved upon release. While some families cope well, for others the transition between imprisonment and reintegration is not so smooth. If imprisoned parents are not well prepared throughout their sentence and not just prior to release, there can indeed be upset in the family dynamics with the parent finding it difficult to find their place in the family again (Bouregba, 2016a).

Preparation for release can take place in many ways. Parents should be given opportunities to take responsibility for themselves and for their children. Imprisonment strips a person of all responsibility for their actions and decisions: everything is decided for you, from the time you wake up, to what you eat, to who you speak to, to what activities you carry out. This “lack of freedom—this lack of responsibility—completely hinders a person’s ability to be a parent” (Bouregba, 2016b: 3). In some cases, children end up feeling responsible for their imprisoned parents, in a role reversal which can be damaging and can have consequences for the child, and the parent, and for both parties’ ability to cope upon the parent’s release from prison. Feelings of responsibility for their child should be encouraged in the imprisoned parent before release, for example by allowing the parent to make decisions for their child, to be involved in their school work, to be in contact with their teachers, or to create objects and gifts for their child.

A further way to ensure consideration of the best interests of the child, and those of the prisoner-parent, is to work towards reducing instances of humiliation for the parent. Being imprisoned spurs feelings of being devalued and discredited in the eyes of others, in particular of one’s children, exacerbating feelings of shame (Bouregba, 2016a). Feeling humiliated and ashamed can greatly reduce a person’s ability to build and maintain healthy relationships with those around them. Yet again, prison services have a key role to play in supporting parents during imprisonment to prepare them for a successful transition back into the family upon release.

THE NEED FOR TAILOR-MADE SOLUTIONS

Children affected by the imprisonment of a parent may feel anger, sadness, confusion, guilt and shame. They can see their parent's separation from them as abandonment; they can feel as though they deserve what has happened. Those same children may at other moments feel relief or gladness. Two siblings may have polar-opposite reactions to the same parent's imprisonment. The range of individual circumstances and reactions necessitate tailor-made solutions based on the specific needs and interests of each child, rather than a "one size fits all" approach (COPE, 2016). Yet other questions arise. Who is capable of carrying out the definition of a child's best interests? What gives us the right to decide and determine what a child's best interests are? Even if one is legally authorised to speak on behalf of a child, how does one go about assessing a concept as delicate and often as subjective as "best interests"? As Alain Bouregba has stated, "children are not possessions, neither of their parents nor of the state. The best interests of the child need to be defined for each individual child" (COPE, 2016: 7). Most importantly, where appropriate, children must be actively involved in any assessment of their best interests.

Judge Renate Winter (2016), member of the United Nations Committee on the Rights of the Child, has stated in relation to the sentencing of parents that large-scale solutions, although important in many respects, may not always be appropriate for the children they are attempting to support. Given the impossibility of creating a document that sets forth the universal best interests of the child, Winter calls for case-by-case consideration and respect for the child's right to give their opinion and have that opinion taken into account. Organisations advocating for change on behalf of children with imprisoned parents need to develop a clear set of flexible guiding principles that will inform awareness-raising and support strategies for any and every child affected by the imprisonment of a parent. Examples of guidelines that organisations can draw on include the Coping Project recommendations (Jones, 2013: 549-597), the 2011 UN Day of General Discussions on Children with Incarcerated Parents recommendations (United Nations, 2011) and the COPE network's values and child protection policy⁶. Many regional or national organisations such as Families Outside in Scotland lay out a set of core values and principles in their strategic plan (Families Outside, 2017: 3).

One way of being sensitive to the various ethical questions associated with supporting children with imprisoned parents is to become more aware of how we assess their needs and talk about them in advocating on their behalf, as well as being aware of how advocacy impacts on decision-making and policy for children in the long term. Children of Prisoners Europe (COPE) Director Liz Ayre (2012) has developed expertise in the area of frame-reflective analysis for use in advocacy on behalf of children with imprisoned parents: how organisations can frame advocacy surrounding the issue so as to resonate most effectively with a target audience. The COPE network has defined three main frames that are used in its member organisations' communications with respect to children: a "victim" frame, an "instrumental" frame and a "holistic" frame. The uses (as well as the benefits and drawbacks) of these three frames vary, and COPE has been exploring the impact of each, placing particular emphasis on identifying the frames which are most empowering.

Examples of victim frames tend to portray children as collateral victims of their parent's crime, victims requiring help or even rescue. Victim frames can be helpful in drawing attention to the issue, particularly among the general public, media and donors, which can lead to increased support and policy development. Nevertheless, these children are presented as passive victims, unable to create change for themselves; their own strength, resilience and ability to cope go unrecognised. Risks include adding to a child's sense of stigmatisation: singling a child out as "different" or "other" can compound discrimination and social exclusion (Stubbs & Kekez-Koštro, 2016; see also comparative examples of policy briefings in Lynn, 2017).

In comparison, holistic frames treat children as subjects with agency, as opposed to passive objects in need of support. Holistically framed policy goals intend to protect children's rights and promote their needs, fostering their healthy development. Children are given a voice and are recognised as having the potential to positively impact their surrounding environments. They have rights *in their own right* as children, and not as collateral victims of another person's actions, status or behaviour. Children with agency are able to "make choices and decisions, to influence events and to have an impact on [their] world" (Early Years Learning Framework, 2009). Fostering agency in children from a young age is key to children's well-being and healthy development, helping children feel their opinions count and allowing them to become competent partners for organisations campaigning on their behalf.

Thus, finding the most appropriate frame and language to employ when advocating on behalf of children with imprisoned parents is crucial. The Francophone network Fédération des Relais Enfants Parents, for example, uses the term "accompanying" to describe their work in supporting children and the child-parent bond during imprisonment. From a semantic point of view, this is key: the child is seen as an active participant and is supported, with their best interests taken into account, yet without any normalised truths or formulas of how support should be provided or how the child should experience the imprisonment of their parent. The child is simply "accompanied" on that journey. In relation to children's visits to their parents in prison, COPE's Swiss French partner Relais Enfants Parents Romands states "we should not aim to find out what a 'good' visit consists of, but [...] we should allow the child to express [him or herself] with their parent in whichever way *they feel is right*, be that through joy or through tears or by sulking or not wanting to speak" (Bornand & Schekter, 2013).

A successful support scheme for children with a parent in conflict with the law thus requires more than just "taking into account" their best interests each step of the way; rather, what is needed is careful and sensitive deliberation on what those best interests may be, and paying attention to whether these change at different stages of the process. And, as with so many questions and issues relating to children and young people, the best approach is a participative one, where children's agency is promoted and their opinions are actively sought and listened to.

Above all, children must be seen as children with unique histories, stories, personalities and capacities for resilience, and not as passive appendages of

their parents. As Justice Albie Sachs stated during the landmark *S v M* case in South Africa: “If a child is to be [...] imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them” (2007). The most holistic solutions are empowering, inclusive and tailor-made. And who better to inform these solutions than the children themselves?

RECOMMENDATIONS

- 1 All decisions relating to children with a parent in prison should be made in the light of the child's best interests.
- 2 Solutions for support should be tailor-made, based on the individual best interests and needs of each child.
- 3 Contact (both direct and indirect) between children and their imprisoned parents should be encouraged and facilitated, when in the child's best interests.
- 4 School staff should be supported in order to understand the specific needs of a child with an imprisoned parent and to recognise if and how they require support.
- 5 Children should be taken into account before, during and after the arrest of their parents.
- 6 Sentencers should consider alternatives to imprisonment for primary caregivers of underage children; at the very least, they should take the children's best interests into account when sentencing a parent.
- 7 Prisons should help strengthen and sustain the child-parent relationship by providing opportunities for quality contact and through parent support; and/or maintain ties between imprisoned parents and their children in a child-friendly way: NGOs can support prisons in this.
- 8 During their sentence, parents should be given opportunities to engage in meaningful activities that foster a sense of responsibility and competency in parenting.
- 9 Organisations working with or for children with imprisoned parents should be mindful of the impact of language when advocating on their behalf, favouring language which empowers children rather than victimising them.
- 10 Organisations advocating for change should develop flexible guiding principles to inform awareness-raising and support strategies for children affected by the imprisonment of a parent.

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BIOGRAPHY

Hannah Lynn is Assistant Director of Children of Prisoners Europe (COPE, formerly Eurochips), a non-profit organisation founded in 2000 under French Association Law 1901. COPE is the only pan-European network of professionals, practitioners and organisations working solely on behalf of children affected by parental imprisonment. COPE carries out targeted advocacy work on national, European and international levels to protect and advance the rights of these children. Working to promote examples of innovative good practice, the network seeks to effect positive change on

behalf of children with a parent in prison both in terms of policy and practice. Hannah is editor of COPE's European Journal of Parental Imprisonment, available online at: <http://childrenofprisoners.eu/2015/03/27/european-journal-of-parental-imprisonment/>. As a member of the Human Rights Education Commission of Amnesty International France, she brings expertise in non-formal education and training, youth work and activism. Contact: contact@networkcope.eu

ENDNOTES

- 1 Source: Children of Prisoners Europe extrapolation, using World Prison Brief data on prison populations in Europe and a 1999 study by INSEE (*Institut national de la statistique et des études économiques*—French National Institute for Statistics) which determined the parenting rate for male prisoners in France at 1.3 offspring per prisoner. Across Council of Europe Member States approximately 2.1 million children are estimated to be affected by parental incarceration on a given day. These figures remain extrapolations given the paucity of data available on this group of children across Europe: data is rarely collected and even when information is gathered it is not systematised nor made available for public use.
- 2 Children of Prisoners Europe (COPE) is a pan-European network of organisations, professionals, practitioners and researchers working to protect and promote the rights of children with a parent in prison. Promoting holistic, cross-sectoral support schemes and working toward systemic change, COPE carries out targeted advocacy, information-gathering, capacity-building and cross-fertilisation of good practices and expertise, giving children of prisoners a voice, raising their visibility and getting them onto policy agendas to ensure their rights are protected and their needs are met.
- 3 In line with the “participation” principle of the Learning for Well-being Foundation’s integrative framework: “Support the engaged participation of those concerned; involving everyone in decisions that impact them”. See: <http://l4wb.org/-/en/we-promote/page/7-Principles>
- 4 Some examples of similar outcomes are discussed in Donson, F. (2015). Whose rights? What impact? The potential for the development of child impact statements in the Irish criminal justice system. *European Journal of Parental Imprisonment*, 2, 10-13.
- 5 For an overview of some ethical considerations surrounding sentencing parents, see Philbrick, K. (2015). Assessing the impact on a child when their parent is imprisoned: Some ethical questions. *European Journal of Parental Imprisonment*, 2, 3-4.
- 6 See: <http://childrenofprisoners.eu/values/>