European Journal of Parental Imprisonment
An evolving child rights agenda
As emphasised by several contributors in this special issue journal, it is incumbent upon civil society to continue working from a child rights perspective to raise further awareness, underscoring the specific needs of this group of children and helping develop concrete national- and European-level entitlements and policies that protect their rights and meet their needs. Challenges lie ahead. National criminal justice policies and legislation in EU Member States generally do not incorporate a child rights perspective when a parent is imprisoned; most government policies for children do not address the rights and needs of children affected by parental incarceration. The result is a considerable policy gap. Yet the emergence of new mechanisms and advocacy opportunities provide hope for those seeking to advance child rights and translate abstract principles into effective, concrete measures. As they examine how the rights of children of prisoners have evolved since the Treaty of Lisbon, our contributors spotlight pathways to change, ways in which civil society can work together: through the development of child rights protection systems, the use of procedural safeguards, new complaints mechanisms and a strengthened jurisprudence, new avenues for child rights advocacy—highlighting how the rights of the child need to be considered when determining eligibility of a prisoner-parent’s transfer to another Member State for purposes of social rehabilitation, for example. COPE realises the complexity of these spheres of action, and the need to move forward using well-discerned action. The rights of children of prisoners are part of an ensemble in which States' rights and the rights of adults interplay. Child rights need to be upheld alongside these other rights. But what is really crucial is working to develop systems whereby the implementation of these rights genuinely meets the needs of each individual child.

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Introduction

Children of imprisoned parents now feature on the EU’s list of priorities. In 2012, the November European Forum on the Rights of the Child added children of imprisoned parents to its list of children’s rights and Union citizenship in the Directorate-General for Legal Affairs and the Internal Market. That said, the rights and welfare of children of prisoners have been largely overlooked at EU level, until recently.

More recently, the European Union has been showing an overarching sustained commitment to mainstream child rights into all areas of EU law and policy-making. This became quite clear in the European Parliament’s 2014 resolution to mark the 25th anniversary of the UN Convention on the Rights of the Child. This resolution makes specific reference to the children of prisoners in Article 13, which is a big step forward not only in terms of awareness and visibility, but hopefully also in terms of realising a rights-based approach to ensure that concrete measures are taken that impact their lives, both at EU and national levels.

In addition, UN level improvements are also being made with regard to the visibility and rights-based approach of the treatment of children of imprisoned parents. Since the Day of General Discussion focussing on children of imprisoned parents in 2011, the reviewing UN Committee on the Rights of the Child has included multiple questions on this issue and several recommendations have followed. In due course, children of imprisoned parents might even be able to use the individual complaints procedure (Third Optional Protocol, or OP3) introduced in 2014. Lasting support from NGOs like Children of Prisoners Europe, the Child Rights Action Group and the Quaker United Nations Office will however be essential for them to fulfil their rights at local, European and international levels.

As the scope of EU child rights activity expands and the added value of supra-national intervention becomes more apparent, questions are raised as to the role that the EU could and should play in addressing the distinct and complex challenges facing children with imprisoned parents.

The role (actual and potential) of the EU in enhancing the rights of children of prisoners: legal and policy perspectives

The European Union has, for some time now, been active in developing child rights laws and policies, investing in child rights-related research and knowledge exchange, and gathering comparative data on the situation of children in various contexts across the Member States. That said, the rights and welfare of children of prisoners have been largely overlooked at EU level, until recently. However, as the scope of EU child rights activity expands (particularly in the areas of criminal justice), and the added value of supra-national intervention becomes more apparent, questions are raised as to the role that the EU could and should play in addressing the distinct and complex challenges facing children with imprisoned parents.

It is worth noting from the outset that the EU has no general competence when it comes to determining the nature and scope of domestic criminal law or sentencing. It only has competence when such issues straddle national boundaries, as part of the EU’s core internal market objectives of ensuring mutual recognition of decisions across Member State borders (including judicial decisions in criminal matters). As such, the EU has adopted a particular piece of legislation—Framework Decision 2008/909—relating to prisoners who may be subject to a transfer to another Member State to complete their sentence (hereafter the Framework Decision on the transfer of prisoners). Such transfers may be aimed at facilitating their social integration, insofar as they are returned to their home country. It may also be aimed at alleviating the pressure on the prison system of certain Member States if, for example, there are problems with overcrowding. Whatever the reason, the Framework Decision ensures that the fundamental rights of prisoners are upheld in the course of issuing an order for transfer.

In considering the actual and potential impact of this legislation on children of imprisoned parents, it is necessary, first of all, to appreciate the status and force of Framework Decisions as legal instruments. It is also important to clarify the nature and scope of child rights under the legislation, not only by reference to the actual content of the legislation, but perhaps more importantly, by reference to the more general developments in relation to child rights that have taken place at EU level since the legislation was enacted.

The role of the EU in enhancing the rights of children of prisoners: legal and policy perspectives

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The changing legal status of the Framework Decision on the transfer of prisoners

Framework Decisions used to be the standard form of EU legislation embodying intergovernmental agreements relating to the mutual recognition of decisions between Member States’ authorities. These were adopted under what was referred to as “pillar three” of the EU, which governed all intergovernmental agreements in the field of “police and judicial cooperation in criminal matters”. The difference between Framework Decisions adopted under pillar three and all other legislation (directives and regulations) adopted under the main EU law-making pillar (pillar one) was that the former did not have the same binding force on the Member States.
open to infringement proceedings by the European Commission which could lead to a financial penalty.

The Framework Decision on the transfer of prisoners and the evolving EU child rights agenda

So, what does all of this mean for children whose parents are subject to the Framework Decision on the transfer of prisoners? The impact of the legislation (positive or negative) on children is not at all apparent nor is there any evidence that child rights were taken into account by the EU institutions when drafting this legislation. In fact, there is no explicit reference to the rights and welfare of children of prisoners at all, meaning that there is no explicit obligation to consider the impact that a particular order for transfer might have on the children of prisoners subject to such orders. The only aspect of the Framework Decision that could be construed in favour of children is the reference to prisoners’ social rehabilitation which requires that Member States take into account the prisoner’s family links to the executing State (para. 9 preamble). Specifically, it states:

Enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation of the sentenced person. In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should account for such elements as, for example, the person’s attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State.

This presumably could be interpreted to take into account whether the prisoner has children in the Member State to which he or she is going to be transferred. Interestingly, there is no explicit reference to the links that the prisoners’ children do have in the Member State from which she or he is going to be transferred. So, if an order is being proposed to transfer a prisoner from Member State A, where the prisoner’s children live, to Member State B, the prisoner’s country of origin where she or he has significant cultural, social and linguistic links, it is unclear whether the “attachments” to Member State B will override any concerns to protect the prisoner’s relationship with his or her children by enabling him or her to remain in Member State A. The absence of any explicit obligation in the Framework Decision to protect prisoners’ relationships with their children does not necessarily mean that the legislation cannot be interpreted in a manner that is consistent with child rights. As it happens, EU-level protection for child rights has developed considerably since the Framework Decision was enacted. This has been largely in response to two important constitutional developments.

The first was the introduction of the Charter of Fundamental Rights of the European Union in 2000. The Charter contains the first detailed reference to child rights at EU constitutional level, including, most significantly, a dedicated provision on child rights (Art. 24). This articulates three key child rights principles: the right to express their views freely in accordance with their age and maturity (Art. 24(1)); the right to have their best interests taken as a primary consideration in all actions relating to them (Art 24(2)); and the right to maintain on a regular basis a personal relationship and direct contact with both parents (Article 24(3)). Article 24(5) is bolstered by Article 7 of the Charter which mirrors Article 8 of the 1950 European Convention on Human Rights in providing that: “Everyone has the right to respect for his or her private and family life, home and communications”.

Taken together, these provisions support children’s rights to maintain contact with their parents even if the child is placed with the executing state and could be used to prevent any cross-border transfers which would obstruct the practical enjoyment of that relationship. Conversely, they could be used to support a proposed transfer if it would have the effect of bringing a prisoner into closer proximity with his or her children. The Charter now enjoys the same legal status as the EU treaties, and obliges the EU and the Member States to protect the rights it enshrines, including those pertaining to children, when implementing EU law. Moreover, the Courts of the EU have demonstrated a willingness to refer to Articles 24 and 7 of the Charter as a guide when interpreting legislation.

The second important development in relation to child rights in the EU which supports a more child-rights-based interpretation of the Framework Decision is the adoption of the Treaty of Lisbon which, as already stated, came into force in December 2009. In addition to the changes made with regard to pillar three, referred to above, the Treaty of Lisbon included the “protection of the rights of the child” as a general stated objective of the European Union (now enshrined in Article 3(3) TEU). Again, this provides an important constitutional foundation for the more general obligation to ensure that child rights are not undermined by any EU measures.

More strategic planning at EU policy level over the last five years in particular has sought to harness these newfound legal powers to address areas of children’s rights that are most in need of EU-level intervention. Notably, in 2011, the Commission adopted the EU Agenda for the Rights of the Child, setting out key priorities for the development of child rights law and policy across the EU Member States. Additionally, in 2013, the Commission adopted a new plan of action to support Member States in addressing poverty and social exclusion through a range of early interventions (for children of pre-school and primary school age).

Most recently, the EU has progressed beyond action in prioritised areas and is now showing signs of developing a more overarching, sustained commitment to mainstreaming child rights into all areas of EU law and policy-making. This is evidenced in the European Parliament’s 2014 resolution to mark the 25th anniversary of the UN Convention on the Rights of the Child. Here, the Parliament declared that “children’s rights are at the heart of EU policies” and urged both the EU institutions and the Member States to “take additional measures to ensure respect for the rights of every child everywhere, especially the most vulnerable”.

Importantly, the resolution makes explicit reference to the children of prisoners. Article 13 of the resolution: 4

calls on the Commission to assess the impact of detention policies and criminal justice systems on children; points out that across the EU children of prisoners living in detention facilities with their parents; underlines the fact that an estimated 800,000 children in the EU are separated from...
an imprisoned parent each year, which impacts on the rights of children in multiple ways.

In the same vein, the Council of the European Union adopted its Conclusions on the promotion and protection of the rights of the child on 5th December 2014. The Council of the European Union is the main context within which national ministers from each EU Member State meet to adopt laws and coordinate policies. It also coordinates cooperation between the courts and police forces of the Member States. As such, the Council has an important strategic and practical function in the development and actual enforcement of EU measures affecting children at both the EU and national level. In its Conclusions, the Council invites both the Member States and the Commission to be more effective in their implementation of child rights at the national level and makes explicit reference to the need:

...to continue efforts to strengthen the rights of accused and suspected persons in criminal proceedings; to reinforce the protection of victims; and to examine the reinforcement of the right of persons, notably children, in proceedings to facilitate enforcement of judgments in family law and in civil and commercial matters with cross-border implications.

Interpreting the Framework Decision in the light of child rights: the way forward?

There is every indication that the EU’s commitment to mainstreaming child rights into all aspects of law and policy-making will result in a formal mainstreaming strategy at some point in the future. This should, in principle, subject all EU measures to scrutiny to assess their compatibility with child rights, including the Framework Decision on the transfer of prisoners. Until that time comes, the enforcement of child rights depends to a large extent on the willingness and skills of those representing children—particularly civil society organisations to make full use of existing EU justice mechanisms at their disposal, some of which are now readily available as a result of the changes made by the Treaty of Lisbon: the Commission’s infringement proceedings process; parliamentary petitions; the Citizens’ Initiative and just old fashioned lobbying at both domestic and EU level. These all provide important channels for drawing attention to the impact of EU laws on the children of prisoners, for highlighting any gaps in legislation (including in the Framework Decision) and for holding Member States to account for failing to implement those laws in a manner that is consistent with the rights and welfare of children.


For a more detailed and critical review of how these mechanisms can be used to promote child rights see Stamford, H. Journeys to European Justice: (How) Can the EU Enable Children to Enforce their Rights? in Iussum, I. and Stamford, H. (eds) The EU as a Global Children’s Rights Actor: Law, Policy and Structural Dimensions, Berlin: Barbara Budrich Publishers.

How the EU can promote child protection

There has been an increasing recognition of the EU’s potential to prevent and address violence and to contribute to child protection systems. Indeed, since the adoption of the Treaty of Lisbon, the role of the EU in this field has steadily been on the increase, including additional powers for common EU action in fields of crime control, for example in the field of child sexual abuse and trafficking. Many recent EU activities should have a real impact on protecting children from violence, abuse, neglect and exploitation, within and outside Europe.

Within Europe, although the EU has no general competence with regard to child protection systems (as this lies with Member States), EU measures contribute to the architecture and individual elements of more comprehensive national child protection systems. In fact, there is a wealth of EU actions that address child protection. This includes both legal instruments and transnational mechanisms for inter-State cooperation on children that are of common concern to them have been developed at EU level (such as the EUROPOL Victim Identification Task Force hosted in 2014, aimed at identifying victims of child sexual abuse and at developing measures in relation to international parental child abductions).

The EU also supports data collection and targeted research, such as mapping of Member States’ policies to address violence against children and studies of children’s experiences in national administrative and judicial proceedings. Each year, the EU funds regional projects on a wide range of issues concerning violence against children, including, for example, on bullying, domestic violence, corporal punishment and sexual abuse through the DAPHNE Programme. In summary, in many different ways and by combining common resources, the EU can help reinforce national measures which prevent and respond to violence against children. The EU’s commitment to protecting children from violence has recently been confirmed by the Council Conclusions and the 2014 European Parliament resolution on the 25th anniversary of the UNCRC, which explicitly mentions children with imprisoned parents (Art. 1).
The growing momentum of a child rights agenda in the European Union

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The movement to promote child rights in Europe has entered a dynamic and promising phase. The election of a new European Parliament (EP) in May 2014 and the appointment of a new European Commission in November 2014 present rich opportunities for child-focused NGOs like Children of Prisoners Europe and World Vision to advance a stronger child rights agenda across Europe, and globally.

Both organisations actively engage in advocacy at a European level, recognising that to ensure that all and not just a few EU Member States adopt the highest standards when dealing with child rights, the impetus must come from Brussels. Although legal competence for family and child policy still rests primarily with EU Member States, EU institutions have a strong mandate to legislate and to act in the field of human rights, migration, labour and other areas relevant to child welfare. Child rights form an increasingly important part of EU human rights activities, both internally and externally.

The growing priority given to child rights by the EU is reflected in the reference to children as the objectives of the Treaty of Lisbon (Art. 3 TUE) and in the Charter of Fundamental Rights (Art. 24). It is also reflected in various EU policy frameworks developed over the past decade, including “Towards an EU Strategy on the Rights of the Child” (2006), the “EU Guidelines for the Promotion and Protection of the Rights of the Child” (2007), “A Special Place for Children in EU External Action” (2008) and “An EU Agenda for the Rights of the Child” (2011). The Court of Justice of the European Union has also invoked the provisions of the UN Convention on the Rights of the Child in its judgments, such as Case C 540/03, Parliament v Council, on the right to family reunification.

Child-focused NGOs have played an important role in Brussels over the years, advocating for many of these recent policy frameworks and pushing child rights up the EU’s policy agenda. The Child Rights Action Group (CRAG) is a major network of child-focused NGOs represented in Brussels. CRAG’s main focus over recent years has been to strive to achieve the mainstreaming of child rights across the work of major EU institutions, including the European Parliament, the Commission and the Council, as well as the European External Action Service.

CRAG deliberately targeted the European Parliament over the past two-year period, as the EP elections approached. Its members came together to draft a “Child Rights Manifesto” in which its vision of the European Union as a global child rights champion was outlined. The manifesto called for a “permanent mechanism” to be created in the European Parliament with responsibility for protecting and promoting child rights across all policy sectors in EU internal and external affairs. It called for new and more ambitious EU legislation and policy on child rights and for the potential impact on children of all of the Parliament’s legislation—direct or indirect—to be monitored and assessed.

The manifesto also encouraged Members of the European Parliament (MEPs) to sign to show their support and become “champions” of child rights. The results of the 2014 EP elections saw ninety-three Child Rights Champions elected. They subsequently formed an Intergroup on Children’s Rights consisting of MEPS from across different political groupings. Its members will become focal points for child rights in the parliamentary committees on which they sit. These MEPs will monitor and assess EU legislation and policy on child rights and for the potential impact on children of all of the Parliament’s legislation—direct or indirect—to be monitored and assessed.

The Intergroup will host expert meetings on different topics relating to child rights agenda. It has declared its intention to work closely with child-focused NGOs and other groups to ensure that their voice is heard and their priorities are taken into account. CRAG is in the process of upgrading its Child Rights Manifesto website at present. This will provide a platform for Child Rights Champions
to inform the public about the activities they are undertaking in the EP to promote child rights, particularly those of vulnerable children. World Vision believes that if the new Intergroup proves effective in advancing the mainstreaming of child rights across the work of the European Parliament, it may be possible in the future to establish a stand-alone EP Committee on Children following the ratification of a new EU Treaty.

The European Commission has also been active on child rights in recent years. The Agenda for the Rights of the Child (2011) set out EU priorities in this area. This agenda includes eleven concrete actions through which the EU can contribute in an effective way to children’s well-being and safety. Child-focused NGOs are hopeful that its successor framework will be a robust and comprehensive strategy on the rights of the child, encompassing both EU internal policies and EU external action. The Commission has a Coordinator for the Rights of the Child in DG Justice and promotes inter-agency cooperation with the institutions of the EU to ensure that their interests of those children with whom they work.

The Intergroup has declared its intention to work closely with child-focused NGOs and to be responsive to their needs and priorities.

Rights of children of incarcerated parents: towards more procedural safeguards

In November 2014, the United Nations Convention on the Rights of the Child (UNCRC) celebrated its 25th anniversary. The UNCRC, ratified by 195 States, leaving only South Sudan and the United States behind, is a holiest of human rights and fundamental freedoms. One of the core principles is that all children are entitled to the rights laid down in this human rights instrument, without discrimination of any kind (Art. 2 UNCRC). Unlike the African Charter on the Rights and Welfare of the Child, the UNCRC does not contain a specific provision on children of incarcerated parents (see Art. 30 ACRWC, which focuses on children of incarcerated mothers). However, based on the non-discrimination principle, the prohibition of separating between children on the basis of the status of their parents (Art. 2(3) UNCRC), children of incarcerated parents are equally entitled to all rights under the UNCRC.

The potential of the new EP Intergroup to highlight and address the situation of marginalised and vulnerable children in particular is significant. Child rights organisations must remain active in working alongside MEPS to promote the rights and interests of those children with whom they work. NGOs must continue to engage constructively with the institutions of the EU to ensure that their considerable influence is used to improve the prospects and well-being of children everywhere.

The principle of the best interests of the child plays a role if a parent is incarcerated, which infringes upon the right of the child to parental care. In the case S v M (2008)2, the South African Constitutional Court held that the best interests of the child have to be taken into account when the imprisonment of a primary caregiver is considered. Although the best interests of the child do not necessarily outweigh the interests of parents or the interests of society, they might imply that in a specific case a non-custodial sentence or measure will be favoured over a custodial intervention. This groundbreaking judgment has been followed by a number of other judgments regarding bail and sentencing decisions in which the court took a similar position.3 In a recent General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child observed that “a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interests of the child into consideration”. The Committee adds that “[a]s children’s best interests into account does not necessarily mean that parents and children must be separated”. Instead, “States […] must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/parent”.4

A child who is separated from his parents has the right to maintain personal relations and direct, regular contact with them (Art. 9(3) UNCRC). Where separation results from, for example, detention or imprisonment of one or both parents, the State, in principle, has to provide the primary caregiver is considered. Although the best interests of the child do not necessarily outweigh the interests of parents or the interests of society, they might imply that in a specific case a non-custodial sentence or measure will be favoured over a custodial intervention. This groundbreaking judgment has been followed by a number of other judgments regarding bail and sentencing decisions in which the court took a similar position.3 In a recent General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, the African Committee of Experts on the Rights and Welfare of the Child observed that “a non-custodial sentence should be considered first, before imposing a custodial one, and should a custodial sentence be considered, then it should be appropriate taking the best interests of the child into consideration”. The Committee adds that “[a]s children’s best interests into account does not necessarily mean that parents and children must be separated”. Instead, “States […] must ensure that judicial officers are equipped to be able to weigh the best interests of the child versus the gravity of the offence and public security when considering the incarceration of a mother/parent”.4


2. S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 252 (CC).


The right to be cared for by one’s parents and the right to regular contact with them call for special arrangements in the detention centre or prison.5 These include special visiting arrangements and adequate, child-friendly information on visiting hours and other ways to contact their parents. In addition, the best interests of very young children may require that they live with their parents in prison, for example, if the mother is still breastfeeding. This implies that the State has a special responsibility for these children in terms of basic services, including, for example, nursery care if the parent has to participate in prison activities (rule 36.2 European Prison Rules), special accommodation (rule 36.3 European Prison Rules) and regular assessments of the needs and interests of the children.6 The European Prison Rules provide that “[i]nfronts may stay in prison with a parent only when it is in the best interest of the infants concerned (and that) [they shall not be treated as prisoners” (rule 36.1).

Procedural safeguards for children of incarcerated parents: the right to be heard and access to justice

Right to be heard

Article 12 of the UNCRC stipulates that a child has the right to be heard in all matters affecting him or her. Since the incarceration of a parent has a direct impact on the child, the right to be heard should be upheld in the decision-making process affecting the incarceration.7 This raises the question as to how the participation will take place, including information on its scope, purpose and potential impact. Children should receive help and support to prepare themselves for the hearing. Finally, one should protect children from (unnecessary) exposure to situations that are likely to be traumatic or harmful. One possibility is to conduct the court and other hearings of a child behind closed doors.8

The principle of the best interests of the child plays a role if a parent is incarcerated, which infringes upon the right of the child to parental care.

Access to justice for children of prisoners

The right to be heard lies at the heart of children’s legal status under the UNCRC.9 Access to justice is another element of this legal status, which has gained significant attention at the international level. Children of incarcerated parents should also have access to justice in case of (alleged) violations of their rights. Like any other child, they should have “the ability to obtain a just and meaningful remedy for violations of their rights as put forth in national and international norms and standards”.10 In the context of parental incarceration, we are reminded of the right to lodge a formal complaint, similar to the complaints mechanisms for detainees and prisoners (see, for example, rule 70ff of the European Prison Rules). If necessary, children should have the opportunity to seek remedies against decisions of the institution administration affecting them, for example, if they are denied contact with their parent. The remedies should have a basis in law and enable children to approach an independent body with the competence to issue legally binding decisions. However, one could also think of mediation proceedings, complaints mechanisms at national human rights institutions, such as a Children’s Ombudsperson, or formal proceedings before a court of law. Since the entry into force of the Third Optional Protocol on a communications procedure in April 2014, an individual communication lodged to the UN Committee on the Rights of the Child might also provide a remedy, although both formal proceedings before a court of law as well as international proceedings are often time consuming and therefore not necessarily effective. (For more information regarding the Third Optional Protocol, see pages 16-18.)

Access to justice for children of incarcerated parents should be embedded in domestic statutory law. Many European countries have some kind of complaints mechanism in place for prisoners, either at the local level (i.e., close to one specific institution) or at the regional or national level. However, these mechanisms are not meant for children of prisoners, let alone are they child-friendly.

More importantly, access to justice for children requires “legal empowerment” (High Commissioner for Human Rights 2013, para. 5), which means that

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6 Ibid.
8 Committee on the Rights of the Child, General Comment No. 12 The right of the child to be heard, CRC/G/C/12/12. (2009)
10 Ibid., para. 134.
11 CRC/G/GC/12., 2009, op. cit.
12 Ibid., para. 1.
14 With thanks to Ms. Denise Verkroost for her assistance
Putting access to the United Nations Committee on the Rights of the Child into the hands of children of prisoners

Although United Nations’ (UN) child rights protection systems can seem complex and confusing, and can feel far away for anyone, especially to children, they are there to serve, support and protect children, including children of incarcerated parents. Perhaps even especially children of prisoners given the responsibility they have for those least able to speak for themselves. The coming into force of a new instrument in April 2014, the Third Optional Protocol to the Convention on the Rights of the Child, has made these child rights protection systems stronger and more accessible.

Child rights are the concern of all parts of the UN’s human rights machinery. Annual resolutions on child rights at the Human Rights Council, the inter-governmental human rights body, reaffirm the importance of child rights and highlight specific concerns. The 2014 resolution on the Rights of the Child contains a specific call to States to ensure the rights of children of prisoners. There is no country-specific mandate holders raise concerns about child rights.

The central pillar of the UN’s child rights protection systems is the UN Convention on the Rights of the Child (UNCRC), which more countries have signed up to than any other human rights treaty. Of particular relevance for children of prisoners, the UNCRC protects:

- their right not to be discriminated against based on the status or activities of their parents (Art. 2(4));
- their right to be heard in any judicial and administrative proceedings affecting them (Art. 12(2));
- their right to have their best interests be a primary consideration in all actions concerning them (Art. 3(1));
- their right to maintain direct contact with both parents, unless in the child’s best interests (Art. 9(3)).

The CRC recommends that the State take all necessary measures to establish mechanisms to divert sentences issued to expecting mothers to alternative forms of punishment and take measures to enable children to visit their incarcerated parents.

By ratifying this treaty, States commit to upholding the rights of the child in their country, as well as to having their progress reviewed by the Committee on the Rights of the Child (CRC), a body of eighteen independent experts from all regions of the world. Their role is to examine whether States are fulfilling their commitments to child rights and to make recommendations where they are not. The CRC examines regular reports from countries and holds a dialogue with them to raise concerns and ask questions. At the end of this process, the CRC makes recommendations. CRC members regularly ask questions about the rights of children of imprisoned parents, and there has been a steady stream of recommendations—such as one made to Hungary in September 2014, for example:

The Committee recommends that the State party take all necessary measures to establish mechanisms to divert the sentences issued to expecting mothers to alternative forms of punishment and take measures to enable children to visit their incarcerated parents.

More recent recommendations, from the CRC’s session in January 2015, concerned children of imprisoned parents in both Switzerland and Sweden, highlighting the need for facilitation of contact, upholding the principle of closeness, data collection and for protecting the best interests of the child. See feature on pages 18-19 for further details. In addition, each year, the CRC holds a Day of General Discussion to explore an issue in more detail and hear from children and advocates worldwide. In 2011, the CRC focused on children of incarcerated parents.

No consideration of the best interests of the child in sentencing decisions

As noted above, the CRC has recommended on several occasions that the best interests of the child be taken into account when sentencing their parent. It is possible that a case could be brought by or on behalf of children who are separated from their parent without any consideration being given to their best interests. Any case would be strengthened if it were possible to show the harm this had caused, for example, the impact on health, well-being or education.

Blanket bans on visiting

If there are no possibilities to visit the detained parent or if they are extremely limited (and this is not based on an individual assessment of the best interests of the child), then a complaint using Article 9(3) on the right to maintain contact with a separated parent could be explored.

Problems with access to education or healthcare or recreation for children living in prison with a parent

Children residing in prison with a parent maintain all the same rights as those in the general community. If they do not have access to all the rights enshrined in the UN Convention on the Rights of the Child, including education and the highest attainable standard of healthcare, then the State may be in breach of its obligations under the UNCRC. If it can be demonstrated that access or

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quality is worse for the children residing in prison than for those in the general community, then the State may additionally be in violation of the right not to be discriminated against due to the status or activity of their parents (Art. 2(2)).

OP3 allows for inquiries by the CRC into situations of grave or systematic violations of child rights. In other treaty bodies which have inquiry procedures the threshold for prompting such inquiries has been high. However, there are situations in which there are grave or systematic violations of the rights of children of prisoners which could meet this threshold—for example, the dire situation of children who live with their parents in Bolivian prisons in which violence is rife.7 The first step in increasing the usefulness of this mechanism lies in encouraging further ratifications. Once a State has ratified, the next step is in making public information available to ensure that children and their advocates, families and other child rights defenders are aware of the procedure and how to use it. Then it is a matter of remaining alert to possible cases (bearing in mind the limitations that the rights violations have to have taken place after OP3 came into force or after the State ratified it and that domestic remedies must have been exhausted).

OP3 has the potential to make the CRC more open to children, including children of prisoners. However, it will need the support of educators, activists and advocates to make it truly accessible.

1. Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Switzerland, CRC/C/SWE/CO/2-4, para. 32 + 33

Children of imprisoned parents: Concluding observations of the Committee on the Rights of the Child (Sweden and Switzerland)

At its January 2015 session, the UN Committee on the Rights of the Child (CRC) included recommendations of actions to improve treatment of children of prisoners in its Concluding Observations on 6 of the 11 countries reviewed, including Sweden and Switzerland. Children of Prisoners Europe members Bryggen Riksorganisation (Sweden) and the Relais Enfants Parents Romands (Switzerland) submitted information to the CRC, which the Committee members used to inform the questions they asked of the governments in advance of and at the review. This led to specific recommendations being made.

In regard to Sweden, the CRC concluded:

The Committee appreciates the various measures taken by the State party to facilitate contact between children and their incarcerated parents, including visiting apartments in several prisons. The Committee is however concerned that the “principle of closeness” only constitutes one factor among others to be taken into consideration, instead of being mandatory, which can lead children to travel long journeys to visit their parents, with some families not being able to undertake these journeys because of economic constraints. The Committee is also concerned that having to travel a long journey does not automatically constitute a justification to extend the duration of the visit in some prisons. The Committee recommends that the State party take all necessary measures to ensure that children can maintain personal relations and direct contact with parents in prisons and reintroduce the systematic application of the principle of closeness. The Committee also encourages the State party to continue increasing child-friendly visiting possibilities in prisons.


Mothers in prison: the sentencing of mothers and the rights of the child

Article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) states that everyone has the right to respect for private and family life. As imprisonment of a father or mother entails the forcible separation of a child from its parents and therefore impacts on the child’s Article 8 rights, sentencing courts are required to obtain information on dependent children and then conduct a “balancing exercise” weighing the Article 8 rights of potentially affected children against the seriousness of the parent’s offence. The author has previously conducted research to explore to what extent, if at all, the required balancing exercise is being carried out in the English sentencing courts and whether the courts are complying with the Human Rights Act in this respect.1 The research covered seventy-five cases of the imposition of custody (suspended and immediate) on mothers who care for a dependent child.2

2 This research was funded partly by Coventry University and partly by The Oakdale Trust. The author is grateful for this support which provided payment for the transcription of sentencing remarks. She would also like to thank Women in Prison for their help in making this research possible.

The study found no evidence that the criminal courts who have considered the Article 8 rights of children potentially affected by their mother’s imprisonment during the sentencing process. An analysis of the sentencing remarks of Crown Court judges, together with the reports of the Court of Appeal and the files of magistrates indicated that practice regarding the required balancing exercise is inconsistent. “A balancing exercise” is a vague phrase with no clearly defined set of procedures. Given the vagueness of the concept, the fact that sentencers have considerable discretion in terms of sentencing generally, and the absence of any guidelines, one can expect a large degree of inconsistency in judicial attitudes and practice in this area.

In a few rare cases where the imprisonment of a mother had caused great suffering to young children, a sentence of imprisonment was appealed, and reduced in length or suspended by the Court of Appeal. For the vast majority of mothers in prison, there will be no sentencing appeal. Those on short sentences will have no opportunity to appeal.
The effects on the children

In this study, the mothers in prison reported "devastating" effects on their children. One mother wrote that her children were "distracted". Another reported: "The lives of my children are in disarray. My eldest of 17 years is doing A levels [...] and my youngest daughter, who is in remission from cancer, is in year 6."

A mother of a 3-year-old boy wrote:

It’s my family who is receiving the biggest punishment as this is a massive burden. The first words that come out of my son's mouth when I see him or speak to him are “When are you coming to pick me up?” or “I want you to take me home mummy” and it is breaking my heart.

A mother of young children wrote:

I was the sole carer of my children and they were already unfortunate enough to have a father in prison. I had always cared for my children and they had never even spent a night away from me. [In prison], I missed birthdays and first days at school and I felt that my sons' emotional well-being was not even taken into consideration. It was my family who received the bigger punishment, as the burden was put on them. I think it has particularly affected my oldest son, as he still constantly talks about police, prisons and mummy being taken away. He is now being seen by our local children’s mental health service.

Perhaps the most serious effects studied were on the child of a mother sentenced to only 90 days in prison: Amanda Aldous’s 15-year-old autistic son. While she was in prison, Mrs. Aldous’s daughter looked after the boy. She was eight months pregnant at the time and she said: "It’s my family who is receiving the biggest burden, as the burden was put on them. I think it has particularly affected my oldest son, as he still constantly talks about police, prisons and mummy being taken away."


This decision in the Court of Appeal brought the complex issues of the Article 8 rights of the child in criminal sentencing sharply into focus.

Rosie Petherick pleaded guilty to causing death by dangerous driving and driving with excess alcohol. She was sentenced to four years and nine months imprisonment. She is the sole parent of a two-year-old boy who has had little contact with his father. She appealed against her sentence. The Court of Appeal reduced the length of imprisonment to three years and ten months, and explained in detail the Court’s view of the consideration that must be given by a sentencing court to the Article 8 rights of children potentially affected by parental imprisonment.

The Court of Appeal judgment expressed the Court’s view of the proper consideration of the child’s Article 8 rights when a parent is to be sentenced. A criminal court ought to be informed about the domestic circumstances of the defendant and where the family life of others, especially children, will be affected, it will take that into consideration. In the case of R v Rosie Lee Petherick, the Court said:

[Defence counsel has drawn attention] to the fact that the Article 8 rights to family life of the defendant’s infant son were clearly engaged by the sentencing process. (para. 15)

[T]he Supreme Court has considered the correct approach to the Article 8 rights of dependent children, not in sentencing directly, but in cases where the extradition of one or more parents is sought. (HII v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25.) (para. 16)

First, the sentencing of a defendant inevitably engages not only their own Article 8 right to family life but also that of their family and that includes (but is not limited to) any dependent child or children. The same will apply in some cases to an adult for whom a male or female defendant is a carer and whether there is a marital or parental link or not. Almost by definition, imprisonment often severely interferes with the family life not only of the defendant but of those with whom the defendant normally lives and often with others as well. Even without the potentially upsetting effects on children or other dependents, a family is likely to be deprived of its breadwinner, the family home not infrequently has to go, schools may have to be changed. Lives may be heavily disrupted by crime.

Second, the right approach in all Article 8 cases is to ask these questions: A. Is there an interference with family life? B. Is it in accordance with law and in pursuit of a legitimate aim within Article 8(2)? C. Is the interference proportionate given the balance between the various factors? This approach is as true of sentencing as of any other kind of case in which family life is in question. Of course in sentencing, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question which may call for careful judgment.

Third, long before any question of Article 8 or of the Human Rights Act 1998 was thought of, sentencing practice in England and Wales recognised that where there are dependent children that is a relevant factor to sentencing.

Fourth, it follows that a criminal court ought to enquire as to how the family life of dependent children will be affected. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.

It will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case, the interference with the family life of one or more entirely innocent children can sometimes tip the scales and mean that a custodial sentence otherwise proportionate may become disproportionate. (I) is the balancing which is required by Article 8 in the form that we have endeavoured to set it out which is the effective test for sentencing.

It is a legal requirement that in every case where a mother with a dependent child is at risk of a custodial sentence, the sentence must acquire information about the dependent child, and must then weigh the Article 8 rights of the children against the seriousness of the offence. Procedures must be developed as to how the balancing exercise should be carried out. Should it be a requirement that this be articulated in the remarks made by judges and magistrates when they pronounce sentence? If there is no clear reference to the balancing exercise how can we be confident that it has taken place?

In the most serious cases, the balance will come down on the side of custody. But in some instances, the court will suspend imprisonment or impose a community order rather than a custodial punishment. The vast majority of women are imprisoned for less serious types of offences and receive short sentences: the balancing exercise should now take cent stage.

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A greatly expanded version of this article, entitled “Children of prisoners: Their situation and role in long-term crime prevention”, will be available in Helmut Kury and Slawomir Redo (eds.) “Women and Children as Victims and Offenders: Background – Prevention – Reintegration: Suggestions for succeeding generations” (forthcoming).

Studies suggest that maintaining family ties can help reduce the likelihood of reoffending, and that while parental imprisonment can increase a child’s likelihood to offend, positive responses to the situation can aid the child’s well-being, attitude and attainment. As research has moved on from small-scale or anecdotal accounts to more robust studies, it has been possible to list with more confidence the ways in which children can be affected. It is also easier to highlight interventions that may not only increase access to rights and therefore assist them in coping with parental imprisonment, but also reduce crime rates and thereby improve and protect the rights of all citizens in a society.

Research suggests that (at least in some countries) having a parent imprisoned can increase the likelihood of boys going on to exhibit antisocial behaviour later in life. While no research known to the author has yet been completed identifying whether children who cope better with parental imprisonment have a reduced risk of future antisocial behaviour compared to those who do not, many of the behaviours (including anger and truancy) and factors (lack of social ties, as well as having a parent with the ways in which children can be affected. Therefore, children of prisoners may be more likely to benefit from inter vention through the life-course. Journal of Child Psychology and Psychiatry 46(2): 1269–78.


The SDQ scores refer to Goodman’s (1997) Strength and Difficulties Questionnaire, which is a behavioural screening instrument eliciting children and young people’s perceptions of their contact, concentration, emotions and social relationships. The SDQ incorporates five different subscales (hyperactivity; emotional symptoms; conduct problems; peer problems; and prosocial scale) which, when summed, provide a total difficulties score (TDS). It is generally agreed that the SDQ instrument provides one means to measure a child’s mental health.

One response that was found to be positive across countries was to have open, honest, age-appropriate communication with the child concerning the situation and what was expected to happen. This helped the children cope. Furthermore, children who chose to talk to friends about their imprisoned parent seemed to do well; open discussion helped children handle their situation; and parents who talked openly with schools received sympathetic responses. Having a trusting and caring relationship between children and school staff when discussing parental imprisonment appeared to function as a protective factor against conduct problems. Indeed, one of the key findings from the Coping research highlights the idea of “community resilience,” the importance of social support systems, especially of school, teachers and peer support for children.

The general picture from the Coping research is that parental imprisonment can have adverse effects for children in a number of areas, but that these effects can be mitigated by formal or informal support and interventions. It brings validation that for many children with imprisoned parents there are measurable health impacts and reinforces the understanding that for children the best chance of being resilient to the experience of parental incarceration arises when they have: strong, emotionally capable parents; support from schools; the possibility of good contact with their imprisoned parent; inclusion in society at large; and their needs considered at all stages of the process. Secondary or collateral victims of imprisonment, children of prisoners who have committed no crime and should not suffer because of the crimes of others. From the standpoint of fairness, they should be assisted when they face ill-effects caused by another’s actions. From the standpoint of experience, one should be supported in whatever way will most reduce the likelihood of future offending, by the child or their imprisoned parent. But whatever the reason, considering and assisting children of prisoners will most likely benefit the children, those around them and society at large.
Children of Prisoners Europe is a non-profit organisation registered in France under French Association law 1901.
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