

Sentencing parents – sentencing their children?

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ABSTRACT

There is an emerging international recognition that the rights and needs of children are systematically ignored at the point of imprisoning their parents. This article identifies why it is important that greater attention is given to this vulnerable group of children and identifies some of the issues that need to be taken into account in so doing. Whilst the adverse effect on children's needs and welfare of imprisoning a parent has been relatively well documented in recent years, the consideration of a child's rights to continuing family life has received much less attention. As incarceration rates have increased dramatically in many countries over the last decade, more and more children are systematically having their rights ignored.

INTRODUCTION

In a landmark judgement in a South African case *S v M* [2007] ZACC 18, Justice Albie Sachs ruled that the rights of children should always be taken into account when sentencing their parents and, at least in borderline cases, a primary caregiver of children should not be sent to jail. In this instance he decided not to imprison a woman guilty of credit card fraud because it would have infringed the human rights of her three children.

In this article I will consider why this judgement is so important and why it should be taken seriously in all countries. I will identify some of the dilemmas that need to be taken into account in so doing, in order to prompt reflection and dialogue amongst practitioners. Children have the same rights as adults to respect for their private and family life under article eight of the European Convention on Human Rights (ECHR). The imprisonment of a parent is clearly an infringement of that right. It may be justified if it is in accordance with the law but needs to be proportionate to the legitimate aim sought.

Taking a more child-centred approach to sentencing adults clearly demands a significant shift from arguments which usually start with the adult and the more usual consideration of the positive effect their family might have on an adult's offending. Currently the impact on the child, in sentencing a parent, is more likely to be used by the defence in arguments about the impact upon the offender's rehabilitation – for example if the link with the child is severed, there might be additional strain on the defendant from being separated from the child and worry about the care of the child.

It is estimated that 162,000 children in the UK are affected by parental/carer imprisonment every year, although there is no official record of these numbers (Niven and Stewart, 2005). In the European Union, an estimated 700,000 children are separated from an imprisoned parent every year (QUNO, 2008) but no State systematically records their existence. These invisible children have both rights and needs, which are being regularly overlooked throughout Europe and on a global level.

IMPACT ON CHILDREN OF IMPRISONING A PARENT

Unlike research on the effects of divorce on children, there are few large-scale studies of prisoners' children, reflecting the pervasive social exclusion of this vulnerable population. For some families, this relative invisibility is what they would no doubt seek. In an Irish study, 62% of prisoners stated that their children did not know that they were in prison (King, 2002). Parents explain that this is because either the child is too young to understand, or that they do not want the child to think that prison is an acceptable outcome, or that they are concerned that they might be bullied (Robertson, 2007). Similarly, families often want to keep their situation hidden from the local community, particularly from neighbours, the school or social services (Glover, 2009). Small-scale studies (SCIE 2008) suggest that parental imprisonment might cause a range of adverse outcomes for children, including aggressive behaviour, depression, anxiety, sleeping problems, eating problems, running away, truancy, poor school grades and delinquency.

A significant study about the impact of imprisonment on children comes from a prospective longitudinal study of boys in the Cambridge Study in Delinquent Development. This followed through a cohort of 411 boys, born in 1953 and who were living in a working class area in South London at age eight or nine (Farrington, 2003). The study compared the outcomes for 23 boys who between birth and the age of ten were separated from a parent because of imprisonment with four control groups. These were:

- Boys with no history of parental imprisonment or parent-child separation (up to age ten)
- Boys separated by hospitalisation or death
- Boys separated for other reasons
- Boys whose parents were imprisoned only before the boy's birth

The study found that parental imprisonment during childhood was a strong predictor of antisocial or delinquent behaviour and that parental imprisonment during childhood was a strong risk factor for mental health problems among adult men.

Other large-scale studies (e.g. Huebner, 2007, Bor, 2004) have also shown that children of prisoners have approximately three times the risk of anti-social delinquent outcomes of their peers.

For some children the imprisonment of a parent will not be a totally negative experience. For children living in situations of domestic violence or experiencing other child abuse, imprisonment can offer a period of relief from their torment. Similarly, where a family income is used to support a drug or alcohol habit, finances may be relatively improved. Some children may not have had a close relationship with the parent for a variety of reasons and will therefore be relatively unaffected by their imprisonment.

In England the unifying social policy agenda for children is 'Every Child Matters' which takes five different outcomes for children and promotes action to achieve these. In a governmental review for the Department of Children, Schools and Families (2009) the following conclusions were drawn from research findings. In every category the outcomes for prisoners' children are poor. For 'Be Healthy' the children of prisoners have about three times the

risk of mental health problems compared to their peers. For 'Stay Safe' research has demonstrated that parental imprisonment can lead to children experiencing stigma, bullying and teasing. Furthermore children's caregivers often experience considerable distress during parental imprisonment and children are often subject to unstable care arrangements. For 'Enjoy and Achieve' children of prisoners have been found to experience higher levels of social disadvantage than their peers. For 'Make a Positive Contribution' children of prisoners have three times the risk of anti-social/delinquent behaviour compared to their peers. Finally, for 'Achieve Economic Well-Being' imprisonment frequently has a negative financial impact on families, leaving them vulnerable to financial instability, poverty, debt and potential housing disruption. At the time of the research (2002) 72% of prisoners were in receipt of benefits before coming into prison.

DOES PARENTAL IMPRISONMENT ITSELF LEAD TO CHILDREN OFFENDING?

Prisoners are more likely than the general population to be unemployed, to be of low social class, to have multiple mental health problems, many criminal convictions, marital difficulties, and their own experiences of abuse and neglect (SCIE 2008). Their children might, therefore, be at risk of offending because of pre-existing disadvantage rather than because of parental imprisonment.

Attempts to tease out this important consideration have not proved conclusive. In the Cambridge study, referred to above, Murray and Farrington (2005) demonstrated that exposure to parental imprisonment caused adverse outcomes for children. Two other American studies were similarly consistent with this conclusion (Huebner, 2007 and Stanton, 1980). However, in a Swedish study (Murray, J, Janson, C-G. and Farrington, D.P., 2007) parental imprisonment was not found to predict offspring criminal behaviour. In Australia, Bor (2004) also found that, after controlling for background risks (e.g. family income, marital conflict, teenage motherhood) parental imprisonment did not significantly predict adolescent anti-social behaviour.

The conclusion that can be drawn at this stage is that whilst there is a strong correlation, poorer outcomes are not proven to be caused by parental imprisonment. (DCSF, 2009). Further research is needed in this area. As Ansbro (2008) cautions "human development is too complex to isolate particular factors as causative" but in all of the pieces of research in her study of using attachment theory with offenders, the quality of early parenting emerges as one factor that is important in determining later development.

Available knowledge in child development, from the field of neuroscience and from psychological attachment theory, highlights significant stages in a child's life with important outcomes for the child's long-term development if particular stages are negatively affected. The Journal of Attachment and Human Development Vol. 12, no.4, July 2010 is devoted to the issue of incarcerated parents and their children. Murray and Murray (2010), for example, explore how prior insecure attachment and social adversity might interact with parental incarceration and contribute to the psychopathology of a child.

PROTECTIVE FACTORS

It is important to consider why the Swedish study mentioned above, in contrast to the English study, did not find the same strong prediction, and possible causal influence, of parental imprisonment on child offending. It is possible that:

"Swedish children may have been protected from the adverse effects of parental imprisonment by more family-friendly prison policies, a welfare-orientated juvenile system, an extended social welfare, a less diverse population, and more sympathetic public attitudes toward crime and punishment"

(SCIE, 2008)

Further research into cross-national comparisons is needed to investigate the effective protective factors of differing social policies.

In recent years there has been increasing research into ‘resiliency’ and the factors that can protect children from adversity in their environment. At an individual level, having a high IQ, an easy temperament and being a good-looking child have been found to be protective factors. In addition good parental attachment and bonding are significant as well as having positive peer relationships. (Rutter, 1990). For a child of an imprisoned parent, it is a reasonable hypothesis to suggest that being cared for by one of the remaining parents and continuing to live in the same home is likely to be more protective than moving to relatives or into the state care system.

The number of children separated from their fathers, by imprisonment, is significantly greater than those separated from their mothers. Although in England and Wales the number of women imprisoned increased dramatically during the period between 1993 and 2000 by 115% as against 42% for men, the number of men imprisoned exceeds women, being over 90% of the total prison population (ICRC, 2009).

Maternal imprisonment is likely to be more harmful than paternal imprisonment for children because children are more likely to live with their mother before imprisonment; children are less likely to be placed with their other parent when mothers are imprisoned and are more likely to be placed in foster care. In addition, because mothers are likely to be held further away from home than fathers, children may be less likely to be able to visit them and, thereby, maintain significant contact.

In the UK, HM Prisons Inspectorate (1997) found that:

- 25% of female prisoners had their children’s father or partner caring for their children
- 25% were cared for by their grandmothers
- 29% were cared for by other family members or friends
- 12% were in care, with foster parents, or had been adopted

This study was completed before the very significant rise in the prison population during the end of the twentieth century and the first years of the twenty-first. Whilst the percentages are possibly the same, the number of children affected is considerably greater.

Rosenberg (2009) argues for research that distinguishes the unique stressors and outcomes related to having a mother or father in prison as well as the developmental implications of the timing of their imprisonment. Her exploration found very little rigorous research aimed at fully understanding the particular needs of imprisoned fathers and their families.

Whilst in the UK there is no provision for children to be imprisoned with their fathers, other countries within Europe have adapted to this need in special circumstances e.g. Denmark, Spain, Norway (Rosenberg *ibid* p.4). It is, however, not the focus of this paper to examine further the differing provision for parents and children following sentence and the research into outcomes for children but to focus on the point of sentencing.

CHILDREN’S RIGHTS

Whilst researchers have explored the impact on a child’s welfare of imprisoning a parent the language of children’s rights in the decision-making process is a relatively new one.

The idea that every individual person has the same rights is about 200 years old (Burr et al, 2003) but it was not until after the Second World War those international rights became codified under the 1950 *Convention for the Protection of Human Rights and Fundamental Freedoms*.

It affirmed that there were some rights that people possessed by virtue of their humanity – some rights that the state may not take away in any circumstances and others that may only be denied or compromised in specifically defined circumstances
(Canton, 2008)

It was several years before the broader vulnerability of children was acknowledged and given particular recognition. The Declaration of the Rights of the Child (United Nations, 1959) gave children rights to welfare including development, protection and free education.

Under the UN Convention on the Rights of the Child (1989) (UNCRC) ‘participation’ as a third ‘p’ was introduced in addition to provision and protection. The UNCRC aims to protect and promote children’s rights and welfare through a set of principles made up of 54 legally binding articles. It has been signed and ratified by every country except United States and Somalia.

Wyness (2006) suggests that children are now seen as being “more competent” and visible but that this generates ambiguous responses from the adult population and competing discourses. Jenks (1996) identifies that children are on the one hand seen to be cherished and on the other, are demonised and this ambiguity extends into children’s rights with a tension arising between children’s right to welfare and children’s right to self-determination. If we consider the position of prisoners’ children then it could be argued that their relative neglect is because they and their families are seen to be relatively ‘unworthy’ with further demonisation on this account.

Children’s rights are a contested area with some rights being more argued over than others, in particular participation rights which are often seen as being the most radical (Van Beuren in Burr et al, *ibid* p 153). Two differing approaches can be identified in this debate: those philosophies that view children as needing adult protection and help, where adults make decisions on behalf of a child (protectionist, welfarist and care-taker) and those that view children as needing empowering so that they are able to make decisions on their own behalf (participatory, rights-based, liberationist).

Much of the debate around these differing strands centres on the issue of children’s competences. In England the concept of ‘a child’ is an uncertain one. Whilst the UN Convention, which was ratified under UK law under the 1998 Human Rights Act, identifies a child as a person aged under 18, the law is very inconsistent in the way it treats children and young

people. Thus, the minimum age of criminal responsibility, by which a child can be held to be responsible for her/his actions is ten whereas the age of consent for sexual relations is 16 and the age at which a ‘child’ has citizen’s rights to vote is 18.

Under the 1989 Children Act, children are stated to have the right to be heard about matters affecting their welfare. This meant that, for the first time in UK legislation, the wishes and feelings of children should be sought when they were involved in judicial matters, such as where they should want to live at the time of a parental divorce or when there were actions to possibly take them into care under child protection proceedings. When the Act was introduced some commentators were concerned about what they saw as the potential for the Act to undermine parental responsibility and adult power over children (Lansdown, 1994). In practice, there has been a struggle to ensure that the wishes and feelings of children are heard in these situations and it is the focus of this article to consider what would be the outcome if this expectation was extrapolated to the situation of ascertaining children’s views at the point of sentencing their parents(s).

Canton (2009, *ibid* p9) has pointed out:

Some infringements of rights are deliberate and intrinsic to the lawfully determined punishments. Nigel Walker (1991) uses the expression obiter punishment for those effects that fall upon other people... He also discusses incidental punishment - those consequences which are not intrinsic to the punishment but are side effects.

The children of an imprisoned parent are very likely to experience both obiter and incidental punishment and Canton goes on to argue that:

In principle it should be possible to determine the loss of rights which are a proper consequence of lawfully determined punishment, whilst any further loss, either obiter or incidental, should be minimised or maybe even compensated.

Marshall (2008) identifies the particular Articles of the UNCRC that, in her view, apply to the children of prisoners. Writing as Scotland's Commissioner for Children and Young People she states that children have the same rights as adults to the protection of the Human Rights Act 1998 and the Scotland Act 1998 (ibid, p5). These safeguard rights under Article 8 of the European Convention on Human Rights (ECHR) to respect for private and family life.

It may be legitimate in some cases to deprive a child of a parent's care through imprisonment of the parent. However, because this involves a breach of the fundamental right of the child, the proportionality of the interference should be considered in each case and the impact on the child assessed and put into the balance.

Public safety and the prevention of disorder or crime are identified by the Convention as legitimate ends which might justify the deprivation of family life and it could be, Marshall argues, that alternatives to prison that promote the public order agenda at least as well, while interfering less with children's rights, should be favoured over imprisonment (ibid p8).

In addition Marshall highlights the rights, under the UNCRC to family life (article 16); to benefit from the guidance of a parent (articles 5 and 14); to know and be cared for by parents (articles 7 and 8) and to be separated from parents only where that is in the interests of the child (article 9). She stresses the importance of article 3.1 which says:

"In all actions concerning children, whether it is undertaken by public or private social institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

With regard to article 12 of the Convention, Marshall argues that, where decisions that are being made affect children, they have the right to express their views and must have them taken into account. There are clearly challenges in seeking children's views at the point of sentencing their parents to which I will return later.

Are the challenges to respect the rights of the child at odds with current sentencing policy? The answer is invariably "yes".

SENTENCING POLICY

The primary role of the Court is to punish the offender and to take account of public safety and public order. Criminal justice processes focus on determining individual guilt or innocence and punishing lawbreakers. The focus on the offender and on principles of justice and individual responsibility principally ignores those around them.

At the end of the twentieth century sentencing policy in England and Wales adopted a 'just deserts' approach in the Criminal Justice Act (CJA), 1991 (Easton and Piper, 2008). A series of 'hurdles' were effectively set up with the imposition of custody in cases where the 'offence is so serious that only' such a sentence could be justified. The retributivist principles on which this Act were based could have provided an opportunity to address the rights and needs of children when taking account of personal mitigating factors for the offender. The majority of offences for which females are imprisoned are invariably those falling below this threshold. In 2007 more women were sent to prison, in England and Wales, for shoplifting offences than for any other offence (Epstein, 2010).

Within this framework, two important Court of Appeal decisions, in 2001 and 2002, have both stressed the importance of giving due regard to children's rights and needs when considering imprisoning a mother (Epstein, ibid).

In 2001, Lord Phillips, in giving judgment, described "the balancing exercise" which has to be carried out when a woman who is the carer of dependent children is convicted of an imprisonable offence. This is the balance that weighs the ECHR Article 8 rights of the parent and child against the seriousness of the offence.

"It goes without saying that since 2nd October 2000 sentencing courts have been public authorities within the meaning of section 6 of the Human Rights Act. If the passing of

a custodial sentence involves the separation of a mother from her very young child (or, indeed, from any of her children) the sentencing court is bound by section 6(1) to carry out the balancing exercise identified by Hale L.J. in In re W and B (Children) at para 54, especially at sub-para (iii) ... before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligations under section 6(1), ask for more. It will no longer be permissible, if it ever was, for a court to choose a custodial sentence merely because the mother's want of means and her commitments to her children appear to make a fine or community sentence inappropriate, if the seriousness of the offence does not itself warrant a custodial sentence. In such circumstances it must ensure that the relevant statutory authorities and/or voluntary organisations provide a viable properly packaged solution designed to ensure that the mother can be punished adequately for her offence without the necessity of taking her into custody away from her children.

(R (on the application of P and Q)
v Secretary of State for the Home
Department [2001] EWCA Civ
1151)

The following year Lord Chief Justice Woolf, heard the appeal of a lone parent of two children age 11 and 14. She won her appeal against an eight-month prison sentence. Lord Woolf said: “with a mother who is the sole support of two young children, as is the case here, the judge has to bear in mind the consequences to those children if the sole carer is sent to prison”.

Piper (2007) argues that retributivist principles should be applied to impact factors in a more structured way, as a matter of principle, not mercy or compassion. A rights perspective for children would be consistent with this approach.

PRACTICE ISSUES FOR COURTS AND REPORT WRITERS.

Although there is increasing concern to ensure that the voice of the child is heard in many aspects of their lives and in wider social policy, little consideration has been given to accessing the voice of offenders' children at the point of decision-making which could have a considerable impact on their lives i.e. whether or not to imprison their parent.

In her review into vulnerable female offenders in England and Wales, Corston (2007) recommended that a separate report into the likely impact of imprisonment on a child was prepared when consideration was being given to the imprisonment of a mother. This was one of only three, out of a total of 43, recommendations in the report which was rejected. The Labour Government argued that there was sufficient information about this already in the probation officers' pre-sentence report. This is likely to be a view with which many probation officers in England would disagree: but (since instead of but?) there are no guidelines to dictate that information about children should be included except where they might be at risk from an offender.

In a small-scale survey of SER (social enquiry report) practice in Scotland, where criminal justice social workers prepare reports, Marshall (ibid) found that there was significant variation in the extent to which SERs took account of the interests, views and rights of children who would be affected by imprisonment. One third of her sample of 25 said that these were reflected routinely in their reports but almost half of the respondents thought they were reflected in few or none. The majority of respondents thought there was value in extending the use of SERs specifically to cover affected children and almost all thought there would be value in introducing a separate child impact statement.

A small-scale pilot study to explore the experiences of children with a parent in prison in Scotland highlighted some of the difficulties in carrying out research in this area. (Loureiro, 2010 p21). Many parents declined their children's participation for a variety of reasons, including their view that the child would not feel comfortable talking about such issues. Of the small sample, the majority would have wished to make representation to the Judge at Court, mostly at the level of expressing their potential distress if the parent were to be imprisoned. However, in debating the Criminal Justice and Licensing (Scotland) Bill, the Scottish Parliament (2010) rejected an amendment proposing that the Court should consider "responsibilities the offender has for the care of children or dependent adults". Whilst acknowledging surprise at the fact that information about children was absent from social inquiry reports in a "significant number of instances", arguments were accepted which centred on the need for consistency of treatment and fairness to victims.

Whilst the decision not to include this amendment in the recent Scottish Act (2010) was a disappointment for children's rights campaigners it highlights some of the dilemmas that need to be considered:

- All children have rights under UNCRC but clearly in many cases other factors will take precedence in deciding the punishment for an offender. Many prisoners are parents and being a parent cannot bring a "get-out-of-jail-free card". Under what circumstances should the children's rights 'tip the balance' in favour of a non-custodial option?
- Should the child's voice be heard and, if so, how could that be done "authentically" i.e. not under threat or in a way that made them feel guilty that they had not been able to affect the court sentence positively? What about a child who would be relieved to see their parent imprisoned for a period?
- At what age would a child be considered "competent" to give a view? What about learning disabled children or those with relevant mental health problems?
- Who would provide information to the Court about the impact on a child and at what point in the sentencing process? In a briefing paper QUNO (2010) have identified questions that

could be considered at every stage, including the bail decision. What are the resource implications of implementing these proposals?

- Are probation officers the right professionals to prepare a report or should the Court informant be a child-care specialist? How would an appropriate assessment be conducted in time scales appropriate to the other demands on the Court?
- How would 'justice' be addressed in dealing with different adults – lone mothers/ fathers; non-parents who are co-defendants?

Whilst the Council of Europe's European Prison Rules, updated in 2006, mention young children living with imprisoned mothers, there is very little guidance with regard to them. There is no overall policy direction for working from a child's perspective across all policy areas in the field of prisoners' children. The UN Committee on the Rights of the Child has agreed to hold a Day of General Discussion on the children of prisoners in September 2011, the first time that any UN body has looked in detail at this topic. This could mark the beginning of a greater recognition of the child's rights and needs, with possible guidelines for States to follow. In the meantime, attempts to address the issues, such as those in Scotland, deserve attention in the complex areas of balancing the rights and needs of children against the other determinants in the sentencing process.

CONCLUSION

In this article I have sought to show why a child's rights perspective is an important one to be taken into account in the sentencing process and have highlighted some of the practice issues and dilemmas that need to be addressed in so doing. Children are indirect victims in the process and should be thought of as such, in the same way that greater attention is now given to those identified as the direct victims of a crime.

Children need to be viewed in court as individuals with their own rights and not just as extensions of their parent. The sentencing court needs to be in a position to balance all the varied interests involved, including those of the children and consideration of the paramountcy principle of the 'best interests of

the child' should play a more prominent role in the balancing. It is difficult to see how a child's rights under article 8 of the ECHR can be taken into account unless a separate reliable assessment of the likely impact on them is available to the Court through a consistent, systematic process.

I would argue that there are complex and competing perspectives to be considered but that the debate should not be ignored if children's rights are to be respected. Research needs to be carried out to identify the extent to which different states, if any, have adopted the South African approach and the ways in which the problems identified in the previous section have been, or could be, addressed by all players in the sentencing process.

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