
INCARCERATED BIRTHS: SAFEGUARDING THE RIGHTS OF THE CHILDREN BORN IN PRISONS

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INTRODUCTION

Article 1¹ defines the holder of rights under the CRC as ‘every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.’ The Convention clearly specifies the upper age limit for childhood as 18 years, but recognises that majority may be obtained at an earlier age under laws applicable to the child. The legal rights of children under international law have been developing since 1919, with both regional and global treaties safeguarding their interests. Yet many of these rights, enshrined in the Convention on the Rights of the Child and other texts, are put at risk when a parent is imprisoned. This paper will explore the effects of parental imprisonment on the rights of the child. It will assess, through the relevant case law and legal instruments, how best to reconcile the rights of the child with the need for society to hold offenders to account. Consideration will be given to prisons where the family is separated and contact between the parent and child is regulated by visiting hours, as well as to prisons where the children live together with their parent in the prison, with a view to identifying the optimum way in which to ensure that the rights of children whose parents are imprisoned may be respected, protected and fulfilled. An underlying theme reflected throughout this paper is that the effects of parental incarceration on children is not a local concern but a global one, affecting children both in the developed and the developing world.

Development of the Child

At the core of decisions relating to children, including children affected by the actual or potential imprisonment of a parent is a determination of their best interests². This principle, which requires that the best interests of the child is a primary consideration, has been interpreted widely by States.

The negative effects of parental imprisonment have led to measures to try to address the issue, notably in the African Charter on the Rights and Welfare of the Child, which states that “a non-

¹ Convention on the rights of the child was the first legally binding international instrument to incorporate the full range of human rights—civil, cultural, economic, political and social rights.

² The principle of ‘the best interests of the child’ is set out in the United Nations *Convention on the Rights of the Child* (CRC).

custodial sentence will always be first considered when sentencing ... mothers".³ Rules on allowing children to live in prison with an imprisoned parent vary widely between and even within States. The inappropriate environment that prisons provide for babies and small children has been noted by the Council of Europe, but in prisons that manage to maintain more child-friendly facilities and practices, the advantages of maintaining links between small children and their imprisoned mothers become more significant. However, the legal right of the child to have her or his best interests served is dependent on factors including the facilities available for the child's stimulation and development, the attitudes of prison staff and the likely outcomes of living with alternative carers outside the prison. Children need to be protected from harm, empowered through education and other means, and to have the company of their families. In economically poorer countries, children living in prison may be more deprived materially than those in wealthier States, with problems relating to food, healthcare, accommodation, education and recreation being reported. However, such States can also require minimum standards be met for children's rights and welfare, as happened in India in 2006⁴.

Constitutional Provisions

Article 14 of the Constitution guarantees equality and Article 15 of the Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. However, it allows special provisions for women and children. Article 21A provides for free and compulsory education to all children from the ages of six to 14 years⁵. Article 24⁶ prohibits employment of children below 14 years in mines, factories or any other hazardous employment. The courts have also taken note of Article 21 providing that a person cannot be deprived of life

³ The UN draft Guidelines for the Alternative Care of Children highlight the importance of stability in care and maintaining safe and continuous attachment to primary carers.

⁴ Refer to guidelines laid down in *R D Upadhyaya v. State of AP*, 2006 (4) SCALE 336

⁵ Art 21A was inserted by the 86th Amendment in December, 2002 and passed by the Parliament in July, 2009. Free and compulsory elementary education was made a fundamental right under Article 21 of the Constitution in December 2002, by the 86th Amendment. Translating this into action, the 'Right of Children to Free and Compulsory Education Bill', was drafted in 2005. It was later revised and became an Act in August 2009, but was not notified for roughly 7 months. The provisions of the Act came into force from 1st April, 2010. This Act serves as a building block to ensure that every child has his or her right (as an entitlement) to get a quality elementary education, and that the State, with the help of families and communities, fulfils this obligation.

⁶ Constitution of India

and liberty except according to procedure established by the law⁷. Similarly, Article 23 prohibits human trafficking and forced labour.

Moving away from fundamental rights to the directive principles, Article 39(f) directs the State to ensure that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity, and that childhood and youth are protected against exploitation and moral and material abandonment. Article 42 directs the State to make provisions for just and humane conditions of work, and maternity beliefs. Article 45 stipulates that the State shall provide early childhood care and education for all children until the age of six. Article 47 lays down the raising of level of nutrition and standard of living of people, and improvement of public health as a primary duty of the State.

HISTORY AND BACKGROUND

The National Institute of Criminology and Forensic Sciences conducted a study some years ago on children languishing in jails. The salient features of this study are:

- Most children were living in difficult conditions and suffered deprivation relating to food, healthcare, accommodation, education and recreation.
- There were no programmes for the proper bio-psycho-social development of children in prisons. Their welfare was mostly left to the mothers. There was no trained staff to take care of the children.
- In many jails, women inmates with children were not given any special or extra food. In some jails, extra food was given in the form of a glass of milk; in others, separate food was being provided only to children over the age of five. The quality of food supplied was the same as that given to adult prisoners.
- No special consideration was given to child-bearing women. The same food and facilities were given to all women, irrespective of whether their children were living with them or not.
- No separate or specialised medical facilities for children were available in jails.

⁷ The Supreme Court, in its judgment in *Maneka Gandhi vs. Union of India* (AIR1978 SC 248), giving wide meaning to the right of life guaranteed under Art. 21 of the Constitution, held that, "The expression 'life' in Art.21 does not connote mere physical or animal existence. Right to life includes life to live with human dignity." It would include right to minimum subsistence allowance during suspension & all those aspects which go to make a man's life meaningful, complete & worthwhile. Besides these the Supreme Court has also read several rights (27 in number) to make life more meaningful & worth living (which I am not discussing here due to lack of space).

- Most mother prisoners felt that the stay in jail would have a negative impact on the physical and mental development of their children.
- A crowded environment, lack of appropriate food and shelter, deprivation of affection by other members of the family, particularly the father, were perceived as stumbling blocks in the development of these children in their formative years.
- Mother prisoners identified food, medical facilities, accommodation, education, recreation and the separation of children from habitual offenders as six areas that require urgent improvement.
- There were no prison staff specially trained to look after children in jails. Also, no separate office with the exclusive duty of looking after the children or their mothers.

SOCIOLOGICAL AND PSYCHOLOGICAL ASPECTS

A report by the Tata Institute of Social Sciences, which put forward five grounds as the basis for suggestions on the provision of facilities for minors accompanying their mothers in prison, was placed before the court. The report says:

- Prison environments are not conducive to the normal growth and development of children.
- Many children born in prison have never experienced normal family life up to the age of four-five years.
- The socialisation pattern of children gets severely affected due to their stay in prison. Their only image of a male authority figure is that of the police and prison officials. They are unaware of the concept of a 'home'. Boys sometimes talk in the female gender, having grown up only among women in the female ward. Sights like animals on roads frighten these children because of lack of exposure to the outside world.
- Children get transferred with their mothers from one prison to another. This unsettles them.
- Such children sometimes display violent and aggressive, or withdrawn behaviour in prison.

LEGAL ANGLE: WHAT THE SUPREME COURT SAYS

In *Writ Petition (C) No 559 of 1994 R.D. Upadhyay Vs. State of A.P. and Ors*⁸ the Supreme Court expressed concern over the plight of the children who are in jail with their mothers and who are in jail either as under trial prisoners or convicts. The applicant pointed out that there is no specific provision or regulation in the Jail Manual for facilitating the mother prisoners to meet the children.

The Court expressing its serious concern in this matter has issued certain directions. (1) A child shall not be treated as an under trial or convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right. (2) For pregnant women all basic facilities of pre natal care and post natal care shall be arranged for both mother and the child. (3) Female prisoners are allowed to keep their children with them for six years and after the period they are to be taken to the suitable institution run by the Social Welfare Department. (4) The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèche under the charge of a matron/female warden. (5) Women prisoners with children should not be kept in such sub-jails, unless proper facilities can be ensured which would make for a conducive environment there, for proper biological, psychological and social growth. (6) Jail Manual and/or other relevant Rules, Regulations, instructions etc. shall be suitably amended within three months so as to comply with the above directions. (7) Schemes and laws relating to welfare and development of such children shall be implemented.

Taking various reports, studies and information supplied by the central and state governments into account, the apex court, in its judgment dated April 13, 2006⁹, issued directions and guidelines to ensure that certain minimum standards are observed with respect to the children of women prisoners.

Firstly, the judgment makes it clear that a child shall not be treated as an under trial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right. The court directed that before sending a pregnant woman to jail, the authorities must ensure that the jail has the basic

⁸ AIR 2006 SC 1946, 2006(1)ALD(Cri)777, 2006(3)ALD42(SC)

⁹ reported as *R D Upadhyaya v. State of AP*, 2006 (4) SCALE 336

minimum facilities for delivery as well as prenatal and post-natal care for both mother and child. If a woman prisoner is found to be pregnant at the time of her admission, or afterwards, arrangements must be made to get her examined at the district government hospital. The state of her health, pregnancy and probable date of delivery should be ascertained and proper prenatal and post-natal care provided in accordance with medical advice.

The judgment directs that as far as possible, arrangements for temporary release/parole or suspended sentence, in the case of minor offences, should be made to enable a pregnant prisoner deliver her baby outside prison. Only exceptional cases that constitute a high security risk should be denied this benefit of temporary release. Births that take place inside the prison must be registered with the local birth registration office. However, the fact that the child was born in prison should not be recorded; only the locality must be mentioned in the birth certificate. As far as circumstances allow, facilities for the naming rites of children born in prison should be extended.

The age up to which female prisoners are allowed to keep their children varies from between two and six years, according to various state laws. In Bihar, children are allowed to live with their mothers up to the age of two and, in special cases, up to the age of six. In the Andaman and Nicobar Islands, a child can stay with the mother up to the age of five; in Himachal Pradesh, the age is four years. In Tamil Nadu, Delhi and Karnataka, a child is allowed to live with his/her mother up to the age of six.

The Supreme Court has laid down a uniform guideline applicable to all prisons in the country: female prisoners will be allowed to keep their children with them in jail until they attain the age of six years. After the age of six, the child will be handed over to a surrogate, in accordance with the mother's wishes, or put in an institution run by the social welfare department. Children above the age of six must be put in an institution in the same city as the prison and must be allowed to meet the mother at least once a week. In case a female prisoner dies leaving behind a child, the district magistrate must arrange for the child to be properly looked after, either by a concerned relative or a responsible person, or put into a social welfare department home.

The judgment lays down that children in jails should be provided with adequate clothing suitable to the local climate. States and union territories were directed to lay down dietary scales for children, keeping in mind the calorific requirements of growing children in accordance with medical norms. Prisons have been directed to make arrangements to provide

separate food, fulfilling the nutritional needs of children, separate utensils, clean drinking water and adequate and clean sleeping facilities. Regular medical examinations to monitor physical growth, timely vaccinations, and alternative arrangements for looking after a child should the mother fall ill form part of the guidelines laid down. Children of prisoners were also accorded visitation rights.

The judgment observes that proper educational and recreational opportunities must be provided to children of female prisoners. It directs that a crèche and nursery be attached to prisons. Children below three years of age should be put into a crèche, and from three to six years in a nursery. Crèches and nurseries should, preferably, be located outside the prison premises. These facilities must also be extended to children of wardens and other female prison staff.

Women with small children must not be put into jails where proper facilities for the biological, psychological and social growth of the child cannot be provided. Staying in crowded barracks, amidst convicts, under trials and offenders who have committed violent crimes, was held to be harmful to a child's development. The judgment also incorporated a dietary scale prepared by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children up to the age of six.

The court directed the amendment of jail manuals and rules within three months, to implement the guidelines. Courts dealing with cases relating to women prisoners whose children are in prison with their mothers were directed to give these cases priority and decide on them expeditiously. The problem of implementation of judgments or laws is an acute one. Although there have been earlier judgments regarding prison conditions and prisoners' rights, in practice little has changed, though at times the court does attempt to evolve mechanisms to try and ensure implementation. In the present case, the state legal services authorities were directed to periodically inspect and see that the directions regarding mothers and children in jail were being followed. The court also directed that the central government, state governments and union territories file affidavits with respect to the judgment's implementation, within four months. Courts, however, do not have an independent machinery to crosscheck implementation. Only time will tell whether this judgment has had any true impact on the condition of the children of women prisoners who are in jail with their mother.

THE INTERNATIONAL LEGAL FRAMEWORK

Although the CRC is the primary source for children's rights in international human rights law, it is not the only one. The Committee on the Rights of the Child noted that the Convention "reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights".¹⁰ The wealth of international treaties, agreements and conventions all apply to children. The Human Rights Committee's General Comment No. 17 on Article 24 of the International Covenant on Civil and Political Rights (ICCPR) notes that children benefit from all of the civil rights recognised in the Covenant by virtue of their being individuals.

The Committee on the Rights of the Child highlights four general principles that can be distilled from the CRC. These are: firstly, *the right to life, survival and development*; secondly, *the best interests of the child*; thirdly, *participation*; and fourthly, *non-discrimination*.¹¹

The delegates further noted that survival and development had come to acquire a special meaning of ensuring the child's survival in order to realise the full development of his or her personality, both from a material and spiritual point of view.¹² Moreover, it was recognised that the concept of prolonging the life of the child includes an obligation to take positive steps to protect the child from violence and abuse. Article 19 of the CRC obliges States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Furthermore, Article 20 calls on States to ensure that any child deprived of her or his family environment is protected and provided for by the State. Articles 32 to 38 also include safeguards, such as Article 33, which protects the child from the illicit use and trafficking of narcotic drugs. Given the interdependence and interrelatedness of human rights instruments, and of articles within each of the instruments, protecting the rights of the child becomes increasingly difficult when the child is separated from the family. It has been noted that the right to respect the views of the child as provided for by Article 12, discussed in detail below, is important in the realisation of rights: "The Committee reaffirms the obligation of States Parties to implement Article 12, which is one of the four general

¹⁰ Committee on the Rights of the Child, Day of Discussion on Implementing Child Rights in Early Childhood. 17 September 2004, para.1

¹¹ Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, pp.3-5

¹² Detrick, Sharon (1992) *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (Dordrecht:Nijhoff), p.122

principles of the Convention on the Rights of the Child and should therefore be an integral part of the implementation of the other provisions in the Convention”.¹³

The right to development

The Committee on the Rights of the Child has noted that the right to development under the CRC was to be defined in a similar way as human development is defined in Article 1 of the UN Declaration on the Right to Development 1986.¹⁴ This right to development entails a comprehensive process of realising children’s rights to allow them to “grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacities.”¹⁵ The Committee also found that the term “development” should be “interpreted in a broad sense, adding a qualitative dimension: not only physical health is intended, but also mental, emotional, cognitive, social and cultural development”.¹⁶

In this regard, the draft Guidelines for the Alternative Care of Children, forwarded to the UN General Assembly by the Human Rights Council during its 11th Session, note that “every child and young person should live in a supportive, protective and caring environment that promotes his/her full potential”.¹⁷

In examining the right to life, survival and development, the right to education is of particular importance. This right is key to a child’s development into an informed and educated citizen, capable of defending his or her rights. Notwithstanding its significance, little attention has been devoted to the education of detainees and their families. This is due to a lack of political will, reflected in the limited resources made available – often on account of a lack of public interest and deep-rooted bias against offenders. It must be emphasised that the punishment element of a custodial sentence lies solely in the deprivation of liberty, which itself causes severe hardship, and that protecting other rights, including to life, food, education and freedom from torture, must remain paramount. In light of the severe hardship prisoners and their families face, their inherent vulnerability and their neglect, the Special Rapporteur on the right to education, Vernor Muñoz, dedicated his 2009 report to the Human Rights Council to the provision of

¹³ Committee on the Rights of the Child, Day of General Discussion on the Right to be Heard, September 2006, p.2

¹⁴ Nowak, Manfred (2005) *Article 6 – The right to life, survival and development* (Leiden: Nijhoff), p.2

¹⁵ *ibid*

¹⁶ Office of the High Commissioner for Human Rights, Fact sheet No. 10, available at <http://www.unhcr.ch/html/menu6/2/fs10.htm> (accessed 7 Nov 2023)

¹⁷ Human Rights Council, 11th Session, Resolution 11/7: Guidelines for the Alternative Care of Children, para.4

education for detainees. The report emphasises the inherent link between education and its positive impact on recidivism while pointing out that it is also an imperative in its own right, and highlights some domestic provisions for the education of children living in prisons. In particular the report notes that apart from a few innovative measures, many countries do not implement legal requirements to provide education for children living in prisons.

In the case of children whose parents are imprisoned, the possible risks to the right to education provided for by Article 26 of the Universal Declaration of Human Rights (UDHR), Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 28 and 29 of the CRC merit consideration. Given the inherent interdependence of rights, any violation of the right to education also infringes upon other rights, including the right to development. Manfred Nowak has remarked, in a commentary on Article 6 of the CRC, that parents play an integral role in a child's development. This view is consistent with Article 18(1), which provides that parents have primary responsibility for the upbringing and development of their children. Therefore, the CRC calls upon States Parties to respect the parents' role as primary carers of the child, provided that the environment is such that it is suitable for the child to realise her or his full potential. Furthermore, as will be considered later, the relationship of the child with her or his parent is essential to develop the child's sense of security and place in society. Therefore, forcibly separating the child from her or his parents may negatively impact upon the child's social development.

Non-discrimination

Article 2 of the CRC provides that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment. Article 2(2) obliges States to ensure that no child is discriminated against on the basis of the actions of his or her parents. As Justice Sachs noted, a child "cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them ... the sins and traumas of fathers and mothers should not be visited on their children".¹⁸ The principle of non-discrimination is fundamentally rooted in human rights instruments and is set out in Article 2 of the ICCPR and ICESCR. The Human Rights Committee noted that the concept of discrimination encompasses any distinction, exclusion, restriction or preference.¹⁹ The principle of equality requires that

¹⁸ S v M (CCT 53/06) [2007] ZACC 18 (26 September 2007), at para.18

¹⁹ Human Rights Committee, General Comment 3 (thirteenth session, 1981), available at <http://www.unhcr.ch/tbs/doc.nsf/0/c95ed1e8ef114cbe12563ed00467eb5?OpenDocument> (accessed 10 Nov 2010)

States Parties must take affirmative action in order to diminish or eliminate conditions that perpetuate discrimination. Article 2 of the CRC confers both positive and negative duties on the State. In recognition of the risk of discrimination that may occur against children born in prisons, Rule 23 of the SMRs requires that there should be no mention of the prison as place of birth on a child's birth records. In a 2006 Indian Supreme Court judgment, Chief Justice Sabharwal set out the following guidelines in this respect: "As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned."²⁰

The Best Interests Principle

1.1 Introduction

In international law, one of the clearest statements regarding the "best interests of the child" standard can be found in the United Nations Convention on the Rights of the Child (CRC).²¹ The CRC, however, did not originate the concept in international law; thirty years prior to the CRC, the United Nations Declaration on the Rights of the Child introduced the idea that "the best interests of the child shall be the paramount consideration."²² The ideals of the Declaration on the Rights of the Child were formalized into obligations when the CRC was adopted in November 1989.²³ One of the fundamental principles of the CRC is the "best interests of the child" standard. This standard is set forth in Article 3, which states, "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

²⁰ *R D Upadhyaya v. State of AP*, 2006 (4) SCALE 336

²¹ *CRC*, *Supra Note 7*; Bridgette A. Carr, "Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure", 12 *Yale H.R. & Dev. L.J.* 120, 2009, *Yale Human Rights & Development Law Journal*, at pg.128.

²² Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 21, U.N. Doc. A/4354 (1959)[Hereinafter referred as *DRC*].

²³ *United Nations: Convention on the Rights of the Child (CRC)*, Nov. 20, 1989, 1577 U.N.T.S. 3.; 28 I.L.M. 1448, 1457 (1989); G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), art. 20 [Hereinafter referred as *CRC*].

consideration."²⁴ The "best interests of the child" standard in the international context has been called an "umbrella provision" and is invoked often as a guiding principle of interpretation for other articles and rights in the CRC.²⁵ The CRC "is the most universally adopted of all human rights charters, ratified by all but two countries in the world within the first ten years of its existence."²⁶ In fact, coinciding with the principles of the CRC, "virtually all nations are guided by the precept that the primary consideration underlying any child custody decision must be the best interests of the child."²⁷

The best interests principle features in many international conventions and declarations. Philip Alston refers to the principle as the lens through which all other rights are viewed.²⁸ Yet it is in the CRC where the principle is both a right in itself and one through which the other rights are viewed and interpreted. In order to assess how to best address the needs and rights of a child when imprisoning her or his parent, this paper will examine the salient rights of the child, previously identified as being the most relevant in these circumstances, through the lens of the best interest principle. Problematic to both the interpretation and the application of the best interest principle is that it lacks definition and clarity. It is left to individual States Parties to define the content and the scope of the principle, which leads to varying outcomes depending greatly on the social and cultural context, as well as on judicial discretion. Mr. Justice Brennan of the Supreme Court of Australia noted that "the best interest approach depends on the value systems of the decision-maker. Absent any rule or guideline, that approach simply creates an un-examinable discretion in the repository of the power."²⁹

1.2 Defining the best interests of the child

The fact that Article 3 of the CRC fails to define exactly what is considered to be the best interests of the child may at first sight seem to be a considerable failure, given that the best interests of the child is a primary consideration through which the rights of the child are assessed. During the negotiations on the Convention, the representative of Venezuela suggested

²⁴ CRC, *id.*, at art. 3(1) (emphasis added).

²⁵ Jonathan Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law", 30 Colum. Hum. Rts. L. Rev. 159, 171 (1998).

²⁶ Barbara Bennett Woodhouse, "Keynote Address at the Symposium on Legal Reform and Children's Human Rights", 14 St. John's J. Legal Comment. 331, 333 (2000).

²⁷ D. Marriane Blair & Merle Hope Weiner, *Resolving Parental Custody Disputes - A Comparative Exploration*, 39 Family L.Q. 247, 247 (2005).

²⁸ Alston, Philip (1994) 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights,' in *International Journal of Law, Policy and the Family*, Vol. 8, No. 1, p.5

²⁹ Brennan J., Department of Health and Community Services v JWB and SMB FLC (1992), at 92-3

that the best interests of the child was a subjective concept encompassing “all round – in other words, physical, mental, spiritual, moral and social – development ... leaving the interpretation of the ‘best interests of the child’ to the judgment of the person, institution, organisation applying the rule”.³⁰ Thus the best interests principle seems to safeguard the child’s development while recognising the cultural differences that may exist. John Eekelaar describes the best interests principle as related to realising one’s life chances.³¹ He argues that there are three principal types of interests that concern children: *basic interests*; *developmental interests*; and *autonomy interests*.

According to Eekelaar, a child’s basic interests relate to her or his “general physical, emotional and intellectual care within the social capabilities of his or her immediate caregivers”.³² The *developmental interests* take into account the development of a child’s capacities to her or his best advantage.³³ Finally, the third group of interests, referred to by Eekelaar as *autonomy interests*, provide for entering into social relations and making lifestyle choices on one’s own accord.³⁴ Eekelaar finds these autonomy interests to be the most problematic, as they may conflict with the other two interests and may even risk the fulfilment of the ultimate aims of the child to realise her or his life chances in adulthood, by allowing her or him to make decisions before s/he is capable of assessing and evaluating the nature and the consequences of those choices. Autonomy interests may also be in conflict with the general tenor of the CRC, which has often been described as being paternalistic and protectionist.

1.3 The best interests principle in human rights instruments

Notwithstanding the inextricable link between the best interests principle and the CRC, it remains an important standard in other international legal instruments. Article 5(b) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provides that in the “upbringing and development of their children ... the interest of the child is the primordial consideration in all cases”. Article 16(d) of CEDAW specifies that in all matters relating to marriage and family relations, it is the interests of the child that are paramount. Furthermore, Alston notes that although the phrase does not appear in the ICCPR, the Human Rights Committee refers to the paramount interests of the child in two General

³⁰ Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1989/48

³¹ Eekelaar, John (1994) ‘The Interest of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ in *International Journal of Law, Policy and the Family*, Vol. 8, No. 1, p.17

³² Eekelaar, John (1994) ‘The Interest of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ in *International Journal of Law, Policy and the Family*, Vol. 8, No. 1, p.16

³³ *ibid*

³⁴ Eekelaar, John (1994) ‘The Interest of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ in *International Journal of Law, Policy and the Family*, Vol. 8, No. 1, p.17

Comments.³⁵ The application of the principle internationally is indicative of its wide acceptance.³⁶

1.4 The best interests principle in the Convention on the Rights of the Child

Although the primary source for the best interests principle is Article 3(1) of the CRC, the principle is referred to in numerous other provisions within the Convention. Article 9 provides, for example, that where the child is separated from the parent, it must be in the best interests of the child. Pursuant to Article 20, where it has been found to be in the best interests of the child to remove the child from the home environment, the child is entitled to special protection by the state. Article 18 sets out that both parents are responsible for the upbringing and development of the child, and that their basic concern must be the best interests of the child.

Conclusion

The family is the fundamental unit of society and the starting point for the protection and education of children. This view is reflected in a number of international, regional and national treaties and conventions requiring States to safeguard the family. Promoting rehabilitation rather than retribution would be a real step towards humanising the criminal justice system³⁷ and tackling recidivism. Rehabilitation should not be mere courtroom rhetoric; it should genuinely inform sentencing policy. Without rehabilitation prisons do not serve any of the beneficial interests of society that are so often cited by their proponents.

While clearly children should not be used as pawns, or as a “get out of jail free card”, their opinions should be heard and their interests considered. As Justice Sachs noted: “The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as reasonably possible in the circumstances from avoidable harm.”³⁸

The importance of the family in providing a sense of belonging, imparting life skills and values, and creating limits on behaviour is essential for the healthy development of members of that family and for society more generally. The purpose and use of prisons needs to be considered

³⁵ Alston, Philip (1994) ‘The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights,’ in *International Journal of Law, Policy and the Family*, Vol. 8, No. 1, p.4

³⁶ For example *K and T v Finland* [2000] ECHR 174

³⁷ Langa J, in *S v Williams and Others* 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC), at para.67-8, referred to the alternative forms of punishment such as correctional supervision being legislated for as a “milestone in the process of ‘humanising’ the criminal justice system”.

³⁸ *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007), at para.35

in a wider context, with rehabilitation moving from courtroom rhetoric to the core of prison policy. The interests of the child should be considered at sentencing, with more imaginative, community based and restorative justice approaches utilised and contact maintained with parents who are imprisoned (provided that this is in the child's best interests). Applying the best interests principle in these cases could help reduce the risk of crime perpetuating from generation to generation, as well as ensure the administration of justice is served by preventing the punishment of those other than the offender.³⁹

Failure to uphold the child's best interests could result in the concept of justice becoming confused and the children made orphans of justice.

More fundamentally, if judicial sentencing extends beyond its intended recipients to the children of offenders, the administration of justice is compromised. As Shaw notes, "the justice system is believed to operate on principles of right and wrong, the acquittal of the innocent and the punishment of the guilty. When children are caught up in the punishment meted out to their father this concept of 'justice' becomes confused ... Many of [the children] have been made *orphans of justice*."⁴⁰

³⁹ Murray, Joseph (2005) 'The Effects of Imprisonment on Families and Children of Prisoners' in A. Liebling & S. Maruna (eds.) *The Effects of Imprisonment* (Cullompton, Devon, England: Willan), p.441

⁴⁰ Shaw, Roger (1992) 'Fathers and the orphans of justice' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.4

