

August 2009



Quaker United Nations Office

*Human Rights
& Refugees
Publications*



Orphans of Justice

In search of the best interests of the child
when a parent is imprisoned:

A Legal Analysis

Jean Tomkin

Foreword by Rachel Brett

English Français Español

August 2009

Quaker United Nations Office



Human Rights & Refugees Publications

Orphans of Justice

In search of the best interests of the child
when a parent is imprisoned:

A Legal Analysis

Jean Tomkin

Foreword by Rachel Brett

The Quaker United Nations Office

The Quaker United Nations Offices (QUNO) located in Geneva and New York represent Friends World Committee for Consultation (Quakers), an international non-governmental organisation with General Consultative Status at the United Nations. The Quaker United Nations Offices work to promote the peace and justice concerns of Friends (Quakers) from around the world at the United Nations and other global institutions. They are supported by the American Friends Service Committee, Britain Yearly Meeting, the worldwide community of Friends, and other groups and individuals.

QUNO's work on women in prison and children in prison is funded by Irish Aid

Other publications in this series

Jennifer Rosenberg (2009)	<i>Children Need Dads Too: Children with Fathers in Prison</i>
Megan Bastick and Laurel Townhead (2008)	<i>Women in Prison: A Commentary on the UN Standard Minimum Rules for the Treatment of Prisoners</i>
Oliver Robertson (2008)	<i>Children Imprisoned by Circumstance</i>
Oliver Robertson (2007)	<i>The Impact of Parental Imprisonment on Children</i>
Laurel Townhead (2007)	<i>Pre-trial Detention of Women and its impact on their children</i>
Laurel Townhead (2006)	<i>Women in Prison and Children of Imprisoned Mothers: Recent Developments in the United Nations Human Rights Systems</i>
Marlene Alejos (2005)	<i>Babies and Small Children Residing in Prisons</i>
Rachel Taylor (2004)	<i>Women in Prison and Children of Imprisoned Mothers: Preliminary Research Paper</i>

All QUNO work is published under a Creative Commons licence. It can be copied, distributed and altered for non-commercial purposes, provided that the original author is given credit and any altered work is published under a licence identical to this one. More information and full details of the licence are available at <http://creativecommons.org>.

Photo Credit: Jonathan Tomkin

Copies of all QUNO publications can be downloaded free from our website: www.quno.org.
Hard copies are available on request.



Quaker United Nations Office

Avenue du Mervelet, 13

1209 Geneva

Switzerland

Tel: +41 22 748 48 00

Fax: +41 22 748 48 19

Email: quno@quno.ch

Contents

<i>Foreword</i>	<i>1</i>
<i>Acknowledgements</i>	<i>3</i>
<i>Executive Summary</i>	<i>5</i>
<i>Methodology</i>	<i>7</i>
<i>Introduction</i>	<i>9</i>
<i>1 The Legal Rights of Children</i>	<i>11</i>
1.1 Development of children's rights	11
1.2 The international legal framework	12
1.3 The right to life, survival and development	13
1.3.1 The right to development	14
1.4 The right to the company of parents, family and society	15
1.4.1 The right of the family to privacy and to be free from interference by the State	16
1.4.2 The right to the care and company of the parent	16
1.5 Non-discrimination	17
1.6 The views of the child	18
<i>2 The Best Interests Principle</i>	<i>19</i>
2.1 Introduction	19
2.2 The best interests principle in human rights instruments	19
2.3 The best interests principle in the Convention on the Rights of the Child	19
2.3.1 Article 3 of the Convention on the Rights of the Child	20
2.4 Defining the best interests of the child	22
2.4.1 The child at the centre of her or his rights: balancing autonomy interests and self-determination rights with basic and developmental interests	23
2.5 The role of the judiciary in assessing the best interests principle	24
2.6 The application of scientific evidence in assessing the best interests principle	25
2.7 The rights of the child and the interests of society in the balance	26
2.8 Conclusion	28

3	<i>Secondary Prisonisation</i>	29
3.1	Introduction	29
3.2	The effects of imprisonment on the child's right to development	29
3.2.1	The direct effects of separation of the parent and child due to imprisonment	30
3.2.2	Mediating effects – indirect effect of parental imprisonment on the rights of the child	30
3.3	The effects of imprisonment on the right of a child to be with his or her family	31
3.4	Conclusion on secondary prisonisation - the best interests of the child	31
3.5	How to mitigate the negative effects on the child	32
4	<i>Primary Prisonisation</i>	35
4.1	Introduction	35
4.2	European perspectives – a brief overview	35
4.3	The advantages of primary prisonisation	37
4.4	The right to life, survival and development	37
4.5	The right to the company of the family	38
4.6	Empowerment	40
4.7	Protection	40
4.8	The situation of children of imprisoned parents in developing countries	41
4.8.1	How less developed countries tackle the effects of imprisonment on the rights of the child: a case study of prisons in Bolivia	42
4.9	General recommendations for developing countries	48
4.10	Conclusion	48
5	<i>Concluding thoughts</i>	49

Foreword

Since 2005 the Quaker United Nations Office, Geneva, has published a number of papers that look at different aspects of the impact of parental imprisonment on children. The overwhelming evidence is that the impact is multifaceted but almost always negative.

With this in mind, the Quaker United Nations Office felt it would be useful to identify situations where courts had taken account of the impact on the children when sentencing a parent with caring responsibilities for them.

We were, therefore, pleased to discover that Jean Tomkin, an Irish trainee solicitor, had written her Masters dissertation about this precise issue. We would like to thank her for her willingness to rework and update her dissertation for publication. By bringing together legal issues about the right of the child in these circumstances, and considering case law from a range of countries, including the landmark South African Constitutional Court case of *S v M*, we hope *Orphans of Justice* will encourage and enable lawyers, judges, policy-makers and activists to understand why and how the best interests of the child can and should be taken into account when a parent with caring responsibilities for children comes within the criminal justice system.

Rachel Brett
Representative (Human Rights & Refugees)
Quaker United Nations Office, Geneva

Acknowledgements

Much of this paper is the result of research undertaken during the preparation of a Masters thesis with the European Inter-University Centre for Human Rights and Democratisation. I would like to extend my sincere appreciation to the following:

Professor Paul Lemmens for his patience and wisdom during the early stages of this paper. Rachel Brett of the Quaker United Nations Office for the opportunity to revisit this topic and for her guidance and enthusiasm. Dr Hugh Gash for taking time to review the paper from a child psychologist's perspective and all at the ombudsperson's office in Bolivia for opening their doors, as well as the gates of San Pedro and Obrajes. T.P. Kennedy and Eva Massa of the Law Society of Ireland and Dara Robinson of Garrett Sheehan and Partners for their continued kindness and support throughout my education and training.

Finally, to Fergal and my family, most of all to my mother and brother Jonathan, for all their suggestions, assistance, patience and support that has been a constant throughout the life of this paper, as well as that of its author.

Executive Summary

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. The child's rights to survival and development can be hampered both by their incarceration with an imprisoned parent and by being deprived of contact with a parent, as the forcible family separation that often accompanies imprisonment impacts on the child's right to the care and company of their parents.

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 interests. This principle, which requires that the best interests of the child is a primary consideration, has been interpreted widely by States. This paper sets out to analyse the approach of courts in a variety of jurisdictions. For example, the Canadian Supreme Court has ruled that the best interests principle is not so fundamental to the dispensation of justice that it should trump all other considerations, while the South African Constitutional Court has required that the impact on children should be taken into account when sentencing offenders who care for the children. In Australia, the courts were presented with a case where both parents of three children faced a prison term. The court expressly considered the possible negative effects on the children, as well as the State's international obligations, and ordered a conditional release for the mother. In Italy, expectant mothers and those with children under three are placed under house arrest rather than imprisoned.

Courts may have to balance children's different rights and interests, including their *basic interests* (general physical, intellectual and emotional care), *developmental interests* (development of the child's capacities to his or her best advantage) and *autonomy interests* (making social relations and personal choices), and to weigh these against the interests of society at large. The lack of legislative guidance has in many cases led to courts themselves establishing and developing substantive criteria for determination of a child's best interests.

Millions of children worldwide are affected by having a parent in prison. This can impact on a child's development, due to factors including the loss of contact and nurture from the imprisoned parent, the loss of income and stability, as well as the individual child's personal response to the situation. 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-custodial sentence will always be first considered when sentencing ... mothers". 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.

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 2006.

Fieldwork in Bolivia revealed that despite legal provisions requiring that children living in prison should have access to a *guarderia* (crèche-type facility) and adequate nutrition, prisons are in reality places posing severe risks to children's rights and welfare. Three quarters of the Bolivian prison population is awaiting trial. Prisoners are allocated cells on the basis of their ability to pay, meaning that some prisoners, and any family members living with them, have to sleep outdoors or on the floors of already overcrowded cells. Cases of child malnutrition have occurred and some children living in prison have developed the anti-social behaviour of their parents and other inmates. When children attend the *guarderia*, they are often left unstimulated, while children attending school outside the prison have been subject to stigma, bullying and isolation. Changes to the criminal justice system have been recommended, with greater support for the Prisons Ombudsperson and an increase in the quantity and quality of defence lawyers.

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

Methodology

This paper has been written primarily from a legal perspective and much of its content is based on an analysis of judicial decisions, jurisprudence, national legislation and international human rights instruments. However, in recognition of the complexity of children's rights in general, and the detrimental effects of imprisoning a parent on *inter alia* the developmental rights of the child, a more holistic approach was adopted. This entailed a consideration of relevant philosophical, psychological, social and political perspectives.

The paper relies principally on legislative sources, articles and reported empirical research. However, in an attempt to balance theory and practice, and to assist in the formulation of modest but practical proposals for reform, such sources were supplemented with field research, as well as through telephone interviews and questionnaires. Visits were made to two prisons in La Paz, Bolivia, facilitated by the Office of the Ombudsperson. Numerous interviews were conducted with the Ombudsperson and caseworkers in his office, the head of the men's and women's prisons, social workers, schoolteachers and paediatricians, as well as workers at the crèche and in the kitchen of the prison. In Ireland visits were made to both the men's and women's prisons in Dublin. Questionnaires were sent out to over 30 countries in Europe regarding the availability of mother-baby units in prisons, other facilities provided for children and any measures taken to ensure that family contact is maintained during parental incarceration.

Introduction

It is estimated that 9.25 million people are imprisoned throughout the world.¹ Such imprisonment affects both the lives of those within the prison walls and those beyond. There is, in particular, a dearth of legislation and empirical research on the effects of incarceration on the children of prisoners, referred to by Roger Shaw as *the orphans of justice*.²

The following dilemma presents itself: what should be done with the millions of children facing a situation in which one or both parents are imprisoned? This dilemma was articulated in a report published by the Parliamentary Assembly of the Council of Europe, which found that “prisons do not provide an appropriate environment for babies and young children, often causing long term developmental difficulties. Yet if babies and children are forcibly separated from their mothers, they suffer permanent emotional and social damage.”³

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.

1 World Prison Population List. The list was first published in 1999 by the Research, Development and Statistics Directorate of the Home Office of the UK as Research Findings No. 88 by Roy Walmsley. The seventh edition was published in 2006. The World Prison Brief, a comprehensive database of information on the prison systems of the world, developed out of this list and is available at www.prisonstudies.org. It is produced by the International Centre for Prison Studies, King's College, University of London.

2 Shaw, Roger (1992) 'fathers and the orphans of justice' in Shaw, Roger (ed.) *Prisoners' children, what are the issues?* (London: Routledge), pp.41- 48

3 Parliamentary Assembly of the Council of Europe (2000) Doc. 8762: Mothers and babies in prison, available at <http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8762.htm>, (accessed 10 May 2007)

I The Legal Rights of Children

I.1 Development of children's rights

Children's rights have been a part of the human rights discourse since 1919, when the International Labour Organisation produced a number of conventions relating to labour standards for working children. However, generally applicable rights for children only began to gain widespread recognition following the Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924. Notwithstanding the ideological differences between those rights and the rights recognised and championed worldwide today, the 1924 Declaration served as an important foundation for children's rights. These were further developed in 1959 through the United Nations Declaration of the Rights of the Child.

These early provisions were protectionist and welfare orientated in character. The tone of the rights was that the child was "not in a position to exercise his own rights; adults exercised them in place of the child and in doing so were subject to certain obligations. Thus it could be said that a child had special legal status resulting from his inability to exercise his rights."⁴ Illustrative of such an approach to children's rights was a judgment delivered in the 1979 Irish case of the *State (M) v The Attorney General*. Here, the Irish Supreme Court recalled that "the courts have consistently construed the right of liberty of [a child], as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child".⁵

Subsequently, however, the rights of the child gradually evolved towards empowering the child. In particular, the 1989 Convention on the Rights of the Child (CRC) signals a clear move towards recognising that the child is an active holder of rights and not merely a passive object of the rights bestowed upon her or him.

The CRC contains a mixture of general rights, such as the right to life development, as well as welfare orientated rights. It also provides for both civil and political rights and economic, social and cultural rights. The wide-ranging set of provisions contained in the CRC reflects a broad spectrum of global perspectives on children's rights. Furthermore, the fact that the CRC is the most widely ratified of all international human rights instruments is testimony to the high value placed on safeguarding the rights of children.

In his analysis of the CRC, Michael Freeman notes that perhaps the lynch-pin of the rights articulated in the Convention is contained in Article 12.⁶ It requires States Parties to ensure, where a child is capable of forming her or his own views, that the child may express those views freely in all matters that may affect her or him and that those views are given due weight in accordance with the age and maturity of the child. Article 12 is illustrative of the fundamental shift in the ideology of the rights of the child over the seventy-five years of its development. However, there is still significant debate as to the extent to which *due consideration* should be given to the views and opinions of the child in accordance with the best interests principle articulated in Article 3 of the CRC.

4 French delegate to the Commission on Human Rights in 1959, as quoted in Veerman, Philip (1992) *The rights of the child and the changing image of childhood*, (Dordrecht: Nijhoff), p.164

5 *State (M) v The Attorney General* [1979] IR 73

6 The importance of Article 12 was recently restated by States Parties during the 27th Special Session of the General Assembly entitled 'A World Fit for Children' in 2002

The Committee on the Rights of the Child noted, in General Comment 5, that active participation is one of the four general principles of the Convention.⁷ Furthermore it stated that the implementation of Article 12 is an integral part of the implementation of the other articles, as well as a free-standing right of the child.⁸ The Committee found that the basis of the rights of the child turned on the rights of children to speak, to participate and to have their views taken into account. Central to this right was what the Committee referred to as *a new social contract*, where children are fully recognised as rights holders entitled to receive protection, but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders.⁹ This paper will consider the extent to which children's participation in the exercise of their Convention rights in accordance with Article 12 is in their best interests in circumstances where a parent is facing imprisonment.

1.2 The international legal framework

As previously noted, there is a dearth of legal provisions specifically addressing the needs of children whose parents have been imprisoned. An exception to this legislative deficit is the African Charter on the Rights and Welfare of the Child, Article 30(1) of which expressly provides for children of imprisoned mothers. The provision requires that non-custodial sentences always be considered first and that alternatives be established and promoted. In particular, Article 30(1)(f) states: "the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation". Other regional instruments remain silent on this issue. The results of this silence is that courts have been required to adapt and apply legal provisions of a more general nature when examining the rights of children in any given case.

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.

In addition, there are numerous instruments recognising and securing the rights of individuals deprived of liberty. Such instruments exist on an international, regional and national level, in the form of declarations, agreements and conventions. The preamble of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty (Inter-American Principles) notes the precarious situation of those detained in prisons and the critical conditions endured. Principle X provides that "Where children of parents deprived of their liberty are allowed to remain in the place of deprivation of liberty, the necessary provisions shall be made for a nursery staffed by qualified persons, and with the appropriate educational, paediatric, and nutritional services, in order to protect the best interest of the child". A recent Indian Supreme Court judgment¹¹ outlined similar recommendations regarding educational facilities and nutritional provisions for children living in prisons with their parents. Principle XVIII of the Inter-American Principles also provides for maintaining regular contact with the families and children of parents who are separated as a result of a custodial sentence. Notwithstanding these limited legislative provisions and judicial deliberations, there has been little by way of practical application and implementation of measures to protect the

7 Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, p.4

8 Committee on the Rights of the Child, Final Recommendations after the Day of General Discussion on the Right to be Heard, September 2006

9 Committee on the Rights of the Child, the Preamble of the Final Recommendations after the Day of General Discussion on the Right to be Heard, September 2006, also emphasised in Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12, para.2

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

11 *R D Upadhyaya v State of AP* [2006] INSC 204 available at <http://www.commonlii.org/in/cases/INSC/2006/204.html> (accessed 11 August 2009)

rights of children in prison with their parents, or those that maintain contact through visits and correspondence.

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*.¹² It is by reference to these principles that this paper will assess how to guarantee the legal rights of the child and ensure the best interests of the child are served in circumstances where a parent is imprisoned.

1.3 The right to life, survival and development

The protection of the right to life as enshrined in several international conventions, notably Article 6(1) of the ICCPR, is also provided for by Article 6 of the CRC, which recognises children's right to life, survival and development. Article 6(1) of the CRC provides that the child has the inherent right to life and that States Parties shall ensure, to the maximum extent possible, the survival and development of the child. The use of the word "inherent" denotes that it is not a right bestowed upon the individual by society but rather an existing right that society is under an obligation to protect.¹³ Articles 6(1) and 6(2) are rights that are interrelated, interdependent, and connected to and defined by the other rights articulated by the CRC.¹⁴ The right to life is evidently a fundamental human right, without which all the other rights in the CRC become meaningless.¹⁵ This inherent right to life, as recognised in the ICCPR, is further elaborated upon by the CRC. The State has a positive obligation not only to protect the life of the child but also to provide adequate resources to ensure the child's survival and development.

Most international and regional human rights instruments afford specific protection to pregnant women imprisoned or in danger of being executed. This applies both in International Human Rights Law and in International Humanitarian Law. Article 76(3) of Additional Protocol I to the Geneva Conventions of 1949 prohibits the execution of pregnant women and mothers with infants and young children. Article 6(5) of the ICCPR provides that pregnant women must not be sentenced to death. In Europe, Article 1 of the Thirteenth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and Article 2 of the Charter of Fundamental Rights of the European Union formally abolish the death penalty, thereby making redundant any special recognition of pregnant women or women with dependents in this respect. Article 7(2) of the Arab Charter on Human Rights similarly provides that a pregnant woman or nursing mother shall not be executed. Finally, Article 4(5) of the American Convention on Human Rights prohibits the capital punishment of pregnant women. These rights, designed to protect expectant mothers or mothers of infants, recognise the inherent right to life of the child that is expressed in Article 6(1) of the CRC. It is, however, interesting to note that during the negotiations government delegates expressly requested that debate be avoided concerning the moment at which life begins.¹⁶

During the negotiations leading to the adoption of the CRC, there was much debate over the use of the word "survival" in Article 6. From the *travaux préparatoires* it becomes clear that the rationale behind the use of the word "survival" is to place a positive obligation on States to ensure that appropriate measures are taken to prolong the life of the child.¹⁷ An observer from the World Health Organisation explained that the term "survival" in this context includes growth monitoring, oral rehydration and disease control, breastfeeding, immunisation, child spacing, food and female literacy.¹⁸

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

13 Detrick, Sharon Lynn (1999) *A Commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International), p.126

14 Nowak, Manfred (2005) *Article 6 – The right to life, survival and development* (Leiden: Nijhoff), pp.13-14

15 Nowak, Manfred (2005) *Article 6 – The right to life, survival and development* (Leiden: Nijhoff), p.1

16 Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1988/28, para.18

17 Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1988/28, para.21

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

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.¹⁹

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 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".²⁰

1.3.1 *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 1986.²¹ 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."²² 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".²³ 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".²⁴

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 education for detainees. The report emphasises the

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

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

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

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

23 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 July 2007)

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

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.²⁵

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.²⁶ 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.

1.4 The right to the company of parents, family and society

The utility of the family as the basic unit of society has for centuries been the subject of debate. Although the paramount importance of the family, especially in educating and assisting the child's development, remains prevalent, there is still no clear universal definition of the family, a concept which in any case is always changing and differs from country to country. The primacy of the family is reflected in domestic legislation and deliberations of courts, as well as in international human rights instruments. In the draft Guidelines for the Alternative Care of Children, it is noted that "the family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members. The State should ensure that families have access to forms of support in the care-giving role."²⁷

David Archard, in an analysis on the rights of parents, finds that the legal position of parents derives from a presumption that they are the most suitable carers and in the best position to secure the rights of the child.²⁸ The role of parents in raising their children has been described as twofold. The first consists of a functional role, which provides that the child is nourished, protected and stimulated. It has been noted that at this early stage of the child's life the parent "plays a crucial role in shaping the child's later development".²⁹ The second role of the parent in the child's early development has been referred to as a *cultural symbolic role*. The importance of this is to secure a sense of belonging to the child. "The role of the child-parent bond in the construction of identity revolves around two processes: the affiliation process by which the child identifies with and integrates kinship and community structures; and early attachment experiences. The latter determines whether a child feels sufficiently loved and bolsters unconscious feelings of the right to exist."³⁰

25 Muñoz, Vernor (2009) *The right to education of persons in detention: report of the Special Rapporteur on the Right to Education*, A/HRC/11/8, para.45

26 Nowak, Manfred (2005) *Article 6 – The right to life, survival and development* (Leiden: Nijhoff), pp.37-38

27 Annex to Human Rights Council, 11th Session, Resolution 11/7: Guidelines for the Alternative Care of Children, para.3

28 Archard, David (1993) *Children Rights and Childhood* (London: Routledge), pp.102-106

29 Ayre, Liz, Philbrick, Kate, Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.27

30 Ayre, Liz, Philbrick, Kate, Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.28

Legal recognition of the essential role of parents in the development of the child is reflected in the array of legal instruments protecting the autonomy and the privacy of the family unit, and in particular the position of parents. Article 23 of the ICCPR provides that the family is the natural and fundamental group unit for society and is entitled to protection by society and the State. In circumstances where a parent is imprisoned, two aspects of the right to the protection of the family become particularly relevant: the right of the family to privacy and freedom from undue interference from the State; and the right of the child to the company of her or his parents.

1.4.1 The right of the family to privacy and to be free from interference by the State

The right of the family to privacy free from interference by the State, as provided for *inter alia* under Articles 17, 23 and 24 of the ICCPR, recognises the importance of the family as an institution. It is problematic that by the use of custodial sentences the State impinges on the very institution that it is obliged to protect and limits some of the most fundamental and basic rights that would otherwise be accorded to families. Archard, advocating the autonomy and privacy of the family, argues that “family” and “State” have most commonly been represented as mutually excluding spheres of action, the family’s autonomy rights curtailing the power of the State.³¹ Article 8 of the ECHR is often relied on in this regard, as it obliges States to refrain from unlawful interference that may infringe upon the right to private and family life.

The right to respect for private and family life, as provided for by Article 8(1) of the ECHR, is not an absolute right and is subject to limitations set out in Article 8(2). In the case of *Murray and Murray v Ireland*,³² a husband and wife both serving life sentences sought to assert their rights to procreate. Although the Irish Supreme Court recognised the right to have children as a Constitutionally protected right, it held that certain rights may be suspended or placed in abeyance as a direct consequence of imprisonment.

1.4.2 The right to the care and company of the parent

The importance of the right of the child to the care and company of her or his family is reflected in its universal recognition. The right is contained in international conventions, specifically in Article 9 of the CRC, as well as in regional instruments, namely Article 19 of the American Convention on Human Rights (ACHR), which implies the right of the child to be part of a family, Article 16 of the Additional Protocol to that Convention and Article 19 of the African Charter on the Rights and Welfare of the Child.³³

Article 9 of the CRC devotes four paragraphs to the expression of the child’s right to the care and company of the parent. The first paragraph obliges the State to ensure that the child is not separated from her or his family against her or his will except where competent authorities, subject to judicial review, find that separation is in the child’s best interests. Article 9(2) provides that where there is a risk of separation, “all interested parties shall be given an opportunity to participate in the proceedings and make their views known”. Article 9(3) of the Convention obliges the State to ensure that where the child is separated from the parents, regular contact is maintained, subject to the best interests of the child. Finally, Article 9(4) requires that where the State is responsible for separating a child from her or his parent, the child must be furnished with all relevant information concerning the whereabouts of the parent. Article 16 of the Convention provides that no child shall be subjected to arbitrary or unlawful interference with her or his privacy, family, home or correspondence, and that a child has the right to seek protection of the law against such interference. Article 20 of the Convention emphasises the State’s obligation to ensure continuity of care, and provide special protection and assistance where the child is removed from his/her family environment.

31 Archard, David (1993) *Children Rights and Childhood* (London: Routledge), p.52

32 *Murray and Murray v Ireland* (1991) ILRM 465

33 African Charter on the Rights and Welfare of the Child (1990), Article 19

In a commentary on Article 9, Jaap Doek recognises that imprisonment often results in the separation of the parent and child.³⁴ Doek refers to the inherent dilemma that imprisonment poses to the rights of the child, the choice being to separate the child from the parent or to have the child live in the prison “knowing that a prison does not provide an appropriate environment for babies and young children”.³⁵

In Europe, ECHR Article 8, discussed above in the context of the right to private and family life, is often relied on to protect the child’s right to the care and company of her or his parents. In the case of *Johansen*³⁶ the Court, while assessing whether the removal of a child into care was a violation of Article 8, found that “having regard to the improvements in the applicant’s situation and the irreversible effects which the deprivation of the applicant’s parental rights and access had on her enjoyment of family life with her daughter, the measures could not be said to be justified”.³⁷ The Court took into consideration the best interests of the child when balancing the interests of the child remaining in public care with the rights of the parent to be reunited with her children, and found that removing the child from parental care should only be a temporary measure. Furthermore, any risk to the child’s health and development must be central to any decision when limiting rights guaranteed under Article 8.³⁸

The fundamental right of the child to the care and the company of her or his family was examined in the Irish Supreme Court case of *Re J.H., an infant*. Here, the Chief Justice, referring to the Irish Constitution, noted that it was a right to “belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law”.³⁹

The African Charter on the Rights and Welfare of the Child mirrors, to a certain extent, the rights contained in the CRC under Article 9 and provides that “the child *shall be* entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determined in accordance with the appropriate law, that such separation is in the best interest of the child.”

The UN Standard Minimum Rules for the Treatment of Prisoners (SMRs) note that where nursing infants are allowed to remain in the prison with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers. However, as with much of the SMRs, the provisions are limited both in precision and in protection.

1.5 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”.⁴⁰ 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,

34 Doek, Jaap (2006) *Article 8: The right to preservation of identity, Article 9: the right not to be separated from his or her parents* (Leiden, Nijhoff), p.23

35 Doek, Jaap (2006) *Article 8: The right to preservation of identity, Article 9: the right not to be separated from his or her parents* (Leiden, Nijhoff), p.23

36 *Johansen v Norway* [1996] ECHR 31

37 *Johansen v Norway* [1996] ECHR 31, at para.72

38 *Johansen v Norway* [1996] ECHR 31, at para.78

39 *Re J.H., an infant* [1985] IR 375, at para.390

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

exclusion, restriction or preference.⁴¹ The principle of equality requires that 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."⁴²

1.6 The views of the child

The question of participation and, in particular, the child's right to have her or his opinion heard as a form of empowerment is of particular significance in the context where a parent is facing imprisonment.

Freedom of expression is enshrined in a number of human rights instruments, including Article 19 of the ICCPR, Article 13 of the ACHR and Article 10 of the ECHR. When considering a child's right to express an opinion on matters that affect her or him, and for that opinion to be given due consideration, one must look to Article 12 of the CRC, which is the source from which participatory rights of the child derive. Article 12 provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child ... for this purpose, the child shall in particular be provided the opportunity to be heard". Article 9(2) of the CRC provides that all interested parties should be given an opportunity to participate in the proceedings that concern the separation of parent and child. In a general report by the Committee on the Rights of the Child, it was noted that *all interested parties* should include the child concerned, who must be afforded an opportunity to have her or his views known during the proceedings.⁴³ In order to fulfil these legal obligations, the Committee on the Rights of the Child identified a number of key strategies that should be implemented, including providing training to all branches of the judicial system such as prison officers, lawyers, and judges, and that when there is a question of providing alternative care that the views of the child concerned are, through appropriate legislation, guaranteed to be heard and considered.⁴⁴ The draft Guidelines for the Alternative Care of Children have also referred to the importance of the views of the child concerned being considered throughout the application of the guidelines, and in particular when determining the best course of action to be taken.⁴⁵

This right to participate has been compared to the right contained in Article 14(1) of the ICCPR, Article 8(1) of the ACHR, and Article 6(1) of the ECHR guaranteeing fair and public hearings. Article 5 of the Council of Europe Convention on the Exercise of Children's Rights takes this a step further by placing an obligation on the State to equip children with all the relevant information so that they may be consulted and their views and opinions considered.

41 Human Rights Committee, General Comment 3 (thirteenth session, 1981), available at <http://www.unhcr.ch/tbs/doc.nsf/0/c95ed1e8ef114cbe12563ed00467eb5?OpenDocument> (accessed 10 July 2007)

42 *R D Upadhyaya v State of AP*, [2006] INSC 204, at para. 11

43 Committee on the Rights of the Child, General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1 (b), of the Convention, CRC/C/58, para. 69

44 Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12, para. 49

45 Human Rights Council, 11th Session, Resolution 11/7: Guidelines for the Alternative Care of Children, para. 6 bis

2 The Best Interests Principle

2.1 Introduction

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.⁴⁶ 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 interests principle.

Problematic to both the interpretation and the application of the best interests 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.”⁴⁷

2.2 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 Comments.⁴⁸ The application of the principle internationally is indicative of its wide acceptance.⁴⁹

2.3 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.

46 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

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

48 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

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

2.3.1 Article 3 of the Convention on the Rights of the Child

Article 3, comprising three sections, is the key provision regarding the best interests principle. It has been referred to as an “umbrella” provision, one used to “support, justify, or clarify a particular approach to issues arising under the Convention”.⁵⁰ It often acts as a mediating principle that can assist in resolving conflicts between various Articles and can assist in the interpretation and application of laws and practices not provided for by the Convention.⁵¹

Article 3(1)

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

Article 3(1), by referring to *all actions*, implies a positive act by the State. Michael Freeman, however, argues that although omissions or a failure on the part of the State to act was not considered by the drafters, a purposeful interpretation of the CRC provides for an implicit duty on the State to ensure that the best interests of the child are served.⁵² There is an obligation on the State to provide for a child who is separated from his or her parents as a result of the parent’s imprisonment.⁵³ Article 9(2), as previously considered, supports this obligation to provide adequate alternative care.

One must assess, however, whether the imprisonment of one or both parents does indeed *concern* the child for the purposes of Article 3(1). The wording once again becomes relevant. How broadly or narrowly should the term “concerning” be construed? It has been argued that Article 3 should be broadly interpreted so that “concerning” includes any act affecting or impacting upon children. Alston submits that Article 3 applies broadly, encompassing all judicial and administrative decisions, legal provisions, and programmes or services that may have an impact on children.⁵⁴ In addition, Freeman and Alston note that the significance of the use of the word “children” in plural, rather than its singular, child, in the first sentence of Article 3(1) indicates the determination to give as broad and flexible as possible a meaning to the Article.⁵⁵ Jonathan Todres, referring to the part of the phrase “all actions concerning children”, emphasises the flexibility of the Article and argues that it is “intended to be interpreted broadly so as to encompass any action that directly or indirectly affects children”.⁵⁶ In the South African Constitutional Court, the judgment of Justice Sachs is illustrative of the challenges courts are confronted with when interpreting broad principles: “Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus the concept of ‘the best interests’ has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it.”⁵⁷

Initially, it was envisaged that the requirement to act in a child’s best interests should be “*the primary consideration*”. However, greater flexibility was sought by the drafters of the CRC and in the final text of Article 3 the child’s best interests became “*a primary consideration*”. In an analysis of Article 3, Freeman notes that the use of the indefinite article recognises that “competing interests *inter alia* of justice and of society at large, should be of at least equal if not greater importance than

50 Detrick, Sharon (1992) *The United Nations Convention on the Rights of the Child: A guide to the ‘travaux préparatoires’* (Kluwer International Press), p.92

51 Detrick, Sharon (1992) *The United Nations Convention on the Rights of the Child: A guide to the ‘travaux préparatoires’* (Kluwer International Press), p.92

52 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), p.45

53 Convention on the Rights of the Child (1989), Article 20

54 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), p.44

55 Freeman, Michael (2000) ‘Taking Children’s Rights More Seriously’ in *International Journal of Law and the Family*, p.46

56 Todres, Jonathan (1998) ‘Emerging Limitations of the Rights of the Child: The UN Convention on the Rights of the Child and its Early Case Law’ in *Columbia Human Rights Law Review*, p.17

57 *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007), at para.23

the interests of the child”.⁵⁸ The *travaux préparatoires* reveal, moreover, that following debate among the delegates and observers, the term “paramount consideration” was replaced by the term “primary consideration”. It has been argued that the rationale behind this amendment was that “paramount consideration” signified that the child’s best interests determine the course of action to be taken.⁵⁹ However, it was considered more suitable to refer to the best interests as a “primary consideration”, as the best interests of the child would be the first consideration among others.

Article 3 seeks to advance and emphasise the importance of children’s rights while recognising the intricate balancing act required by judges. Children’s rights, like all human rights, remain subject to the rights, interests and duties of others. While the *travaux préparatoires* gives the example of medical emergencies during childbirth as a situation where other rights may supersede those of the child, it is submitted that when a parent is imprisoned, the interests of justice, and of society at large to hold offenders to account, cannot be necessarily overridden by the rights of the child to *inter alia* the care and company of her or his parents. In Canada, the Supreme Court noted that while the best interests of the child was an established legal principle in both international and domestic law, it was not so fundamental to the dispensation of justice that it should trump all other considerations.⁶⁰

Article 3(2)

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 3(2) of the CRC provides some degree of substantive content and guidance as to the meaning and scope of the best interests principle. It places an obligation on the State to ensure that the child receives necessary protection and care, due regard being given to the rights and duties of those legally responsible for a child’s well-being. Freeman refers to Article 3(2) as a safety net or “backstop provision” whereby the States remain obliged to comply with the principles articulated in the Convention, even though an obligation may not be specifically prescribed.⁶¹ The provision caters for children in particularly difficult circumstances. Freeman cites the plight of street children as an example of a vulnerable category of children to whom the State has a duty of protection.⁶² It is submitted that children whose parents are in prison are a further example of such a category.

Article 3(2) also aims to strike a balance between the rights and the duties of the parents and the obligation of the State to intervene directly on behalf of the child. Freeman notes the potential conflicts that may arise and cites the cases of *Re A-conjoined twins* and *Wisconsin v Yoder*. In both these cases the State intervened to protect the interests of the child where, in the former, the parents exercised their rights to refuse a medical operation to be performed on their children and, in the latter, where they refused to send their children to school.⁶³

Article 3(3)

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 3(3) of the CRC obliges States to ensure that all facilities and institutions responsible for the care of children are of an adequate standard. This provision, though lacking in detail, is of

58 Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1989/48, para.121

59 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), p.60

60 *Canadian Foundation for Children, Youth & the Law v Attorney General & Ors*, Canadian Supreme Court (30 January 2004)

61 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), p.66

62 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), pp.66-67

63 Freeman, Michael (2007) *Article 3: The Best Interest of the Child* (Dordrecht: Nijhoff), p.69

particular importance with respect to children whose parents are in prison. Courts and other relevant bodies should have regard to the provisions of Article 3(3) when deliberating on whether a child should remain with the parent in prison or be separated from the parent and provided with alternative care. Those charged with the care of children, whether they be staff in prisons in the former case, or guardians/alternative carers and childcare workers in the latter, must be suitably trained and competent to provide the necessary care to safeguard the well-being of the child.

It remains to be considered whether for the purposes of Article 3(3) an adult prison can and ought to be considered to be a facility “responsible for the care or protection of children”. In particular, the circumstances in which the prison environment could satisfy the best interests requirement and whether available alternatives may be more suitable will be examined in more detail in second part of this study.

2.4 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 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”.⁶⁴ 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.⁶⁵ 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”.⁶⁶ The *developmental interests* take into account the development of a child’s capacities to her or his best advantage.⁶⁷ 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.⁶⁸ 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. From the *travaux préparatoires*, it is clear that some drafters were inclined to bring Article 12 (right of participation) directly after Article 3, because it was believed that the views of the child would better indicate the best interests of the child. However, the prevailing position was to separate the two rights and interests.

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

65 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

66 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

67 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

68 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

2.4.1 *The child at the centre of her or his rights: balancing autonomy interests and self-determination rights with basic and developmental interests*

Having considered the meaning of the term ‘best interests’, it is important to consider *who* is the child at the centre of the principle and the child’s part in the decision-making process.

Article 1 of the CRC provides that the child is any person below the age of 18. Case law and jurisprudence has highlighted the arbitrariness of such a practice. In the Irish case of *Sinnott v Minister of Education*,⁶⁹ the Chief Justice expressed regret that free primary education could not be given to the applicant’s adult son, who suffered from autism, because the right to free education was limited to children. This case highlights the arbitrary nature of distinguishing by age, rather than capacity.

In the landmark UK case of *Gillick*,⁷⁰ Lord Scarman noted that autonomy interests can be reconciled with basic and developmental interests described above through “the empirical application of the concept of the acquisition of full capacity”.⁷¹ The House of Lords held that safeguarding the autonomy interests of the child gave children “that most dangerous but precious of rights: the right to make their own mistakes”.⁷² The degree of autonomy given to a child should turn on the individual capacity of the child and, specifically, the child’s understanding of the implications of the choices made. When assessing the degree of autonomy attributed to the child’s decision-making process, it may be beneficial to consider the nature of the interests. In this regard, Ria Wolleswinkel suggests that one should distinguish between children’s interests as persons (which they have in common with all persons), as children (which they have as immature and dependent persons), as juveniles (which they develop as they approach maturity) and as future adults (which relate to their future interests as adults).⁷³ Eva Brems, however, refers to “the rights reflecting children’s current interests as children”.⁷⁴

Most liberationists take the position that children’s rights are stunted as a direct result of adults’ attitudes towards children. By considering children as weak, vulnerable and helpless members of society, they help create a self-fulfilling prophecy. While safeguarding children’s autonomy interests is important in advancing children’s rights, it should be remembered that empowerment of children is only one ingredient and must be added with caution. It is submitted that even the most developed child prodigy should not be expected to match the years of experience of an adult. As Archard points out, “it is one thing to underestimate the capacities of children, another to reckon them equal to those of adults”.⁷⁵ However, notwithstanding this caveat, elements of the liberationist perspective deserve consideration in assessing children’s rights and best interests.

Those opposing the liberation of children’s rights argue that children are not in a position to make autonomous decisions and that it is in their best interests that those responsible for them safeguard their rights on their behalf. Archard refers to this as the “caretaker principle”.⁷⁶ The caretaker principle rests on the premise that for a child to be able to exercise her or his rights as an adult, s/he needs to develop cognitive skills and an understanding of the world and the child’s place in the world.⁷⁷ The temporary suspension of certain rights during childhood may be necessary in order to ensure the fulfilment of rights as an adult. In this way the carer, although at first sight seeming to

69 *Sinnott v Minister for Education* [2001] 2 IR 505, at para.41

70 *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 WLR 830

71 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.181

72 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.182

73 Wolleswinkel, Ria (2002) ‘Children of Imprisoned Parents’ in Willems, Jan (ed.) *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities* (Intersentia), p.195

74 Brems as quoted in Wolleswinkel, Ria (2002) ‘Children of Imprisoned Parents’ in Willems, Jan (ed.) *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities* (Intersentia), p.195

75 Archard, David (1993) *Children, Rights and Childhood* (London: Routledge), p.50

76 Archard, David (1993) *Children, Rights and Childhood* (London: Routledge), pp.51-55

77 Archard, David (1993) *Children, Rights and Childhood* (London: Routledge), p.55

go against fulfilling the rights of the child by denying self-determination, actually protects the best interests of the child both as a child and as a future adult. What is required of the parent and the court is to take an imaginative leap, or as Parfit refers to it, an “ideal deliberation”.⁷⁸ This requires that a consideration be made as to what the child would want if s/he were an adult. Dworkin refers to this as “future-oriented consent”.⁷⁹

In practice, both the caretaker principle and the more liberationist perspective of children’s rights are relevant. Which approach is more appropriate in any given situation will depend on the facts of each case. It demands that policy, practice and law carefully balance protecting children and their rights with nurturing autonomy and self-determination, and ultimately advocating the *via media* of “liberal paternalism”.⁸⁰

2.5 The role of the judiciary in assessing the best interests principle

The Concluding Observations of the Committee on the Rights of the Child recommended that “the principle of the best interests of the child (Article 3) is carefully and independently considered by competent professionals and taken into account in all decisions related to detention, including pre-trial detention and sentencing, and decisions concerning the placement of the child”.⁸¹ This was reiterated by the draft Guidelines for the Alternative Care of Children. Paragraph 47 of the draft Guidelines notes that “when the child’s sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, non-custodial remand measures and sentences should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration. States should take into account the best interests of the child when deciding whether to remove children born in prison and children living in prison with a parent. The removal of such children should be treated in the same way as other instances where separation is considered.”⁸²

The best interests principle is most frequently applied by the courts when ruling in custody disputes. However, the reasoning adopted in such rulings may to some extent be usefully applied to cases where the court must make provision for children whose parents are facing imprisonment.

In the absence of concrete legislation defining and delimiting the best interests principle, judges rely on limited principles that have been established through case law and any guidelines that exist in national instruments. The complex and often contentious cases based on the welfare of children provide scope for the judiciary to interpret ill-defined concepts and apply them to the particular case at issue. As Lord Nicholls of Birkenhead noted in the UK case of *Re B (A Minor)*, when considering the best interests of a child the judge is “essentially exercising his ‘discretion.’ In this context this expression is illustrative of the judicial evaluation and balancing of a number of factors from which an overall conclusion is reached on a concept whose application in any given case is inherently imprecise.”⁸³

The courts in the UK have found that the judge must act not *qua* judge but rather as the prudent parent acting with regard to her or his own child.⁸⁴ The best interests principle has been referred to as the “golden thread running through the court’s jurisdiction”.⁸⁵

78 Dworkin, as quoted in Freeman, Michael (ed.) (2004) *Children’s Rights* (Aldershot: Ashgate), p.68

79 Dworkin, as quoted in Freeman, Michael (ed.) (2004) *Children’s Rights* (Aldershot: Ashgate), p.68

80 Freeman, Michael (2004) *Children’s Rights* (Aldershot: Ashgate), p.69

81 Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Thailand, CRC/C/THA/CO/2, para.48

82 Annexed to Human Rights Council, 11th Session, Resolution 11/7: Guidelines for the Alternative Care of Children

83 Nicholls, J, *In Re B (a minor)* [2001] UKHL 70

84 *R v. Gyngall* [1893] 2 QB 232 3; *Re O’Hara* [1900] 2 IR 232

85 Volger, Richard (1992) ‘The child, the imprisoned parent and the law’ in Shaw, Roger (ed.) *Prisoners’ Children: What are the Issues?* (London: Routledge), p.101

Mr. Justice Dunn in *Re D* remarked that the principle is one that is considered “first, last and all the time”.⁸⁶ Case law interpreting the principle indicates that it must be read broadly. Lord Justice Holmes found that the “welfare of a child means welfare in the widest sense”.⁸⁷ This broad approach requires that all relevant factors be considered. In the landmark UK case of *J v C*, which involved a custody battle between legal parents and biological parents, the House of Lords held that it was necessary to consider all material aspects of the case and then to decide, exercising judicial discretion, what is in the child’s interests.⁸⁸

Through an analysis of case law in common law jurisdictions it becomes evident that the best interests principle is composed of a number of constituent elements, such as the child’s physical, moral and emotional welfare.⁸⁹ In *McGrath*, Mr. Justice Lindlay held that “moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”⁹⁰ In the case of *D v W*, a non-exhaustive list of criteria was developed in order to assess the best interests of the child in the case of custody proceedings. This list includes: the strength of existing and future bonding; parenting attitudes and abilities; availability for and commitment to quality time with the child; security and stability of home environment; availability and suitability of role models; positive or negative effects of wider family; provision for physical care and help; material welfare; stimulation and new experiences; educational opportunity; and the wishes of the child.⁹¹

When all relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is in the interests of the child’s welfare.⁹²

2.6 The application of scientific evidence in assessing the best interests principle

Judges must consider a number of different types of evidence when deciding which particular course of action best serves the physical, moral and emotional development and welfare of the child. The courts must examine psychological and other scientifically based evidence available. The task of weighing up the various elements that constitute the best interests principle is rife with potential problems. Often moral, psychological and legal conceptions of the best interests principle clash. Judicial discretion comprises assessing the legal and substantive facts of the case and weighing up the different types of scientific, legal and moral components of the best interests principle in order to consider what is overall in the best interests of the child.

The US Supreme Court case of *Palmore v Sidoti*⁹³ illustrates the potential clash between the scientific conception of the best interests principle and the legal one. In this case the US Supreme Court reversed a decision of a lower court, which had removed a divorced mother’s custody of her children because she had subsequently entered into a mixed-race marriage. The lower court had held that such a marriage left the child open to peer pressure and stigmatisation. On appeal, the Supreme Court found that “the reality of private biases and possible injury they might inflict were impermissible considerations under the equal protection clause for divesting the natural mother of custody of their infant child because of her remarriage to person of different race”.⁹⁴ Therefore, although leaving the children open to the potentially harmful effects of others’ prejudices would not be in the child’s best interests, it would have been morally and legally repugnant to remove a child from her or his mother on those grounds.

86 *Re D* [1977] 3 All ER 481, at para.486, per Dunne J

87 *Re Gyngall* [1893] 2 QB 232

88 *J v C* [1970] AC 688; *Re McGrath* [1983] 1 Ch. 143

89 *G v G* [1983] FLR 894

90 *Re McGrath* [1893] 1 Ch. 143, at para.148

91 *D v W* (13 FRNZ 336, 1995)

92 Lord McDermott in *J v C* [1970] AC 668

93 *Palmore v Sidoti* [1984] USSC 87

94 *Palmore v Sidoti* [1984] USSC 87

Psychological evidence admitted in proceedings must be tested, or at the very least testable.⁹⁵ Where the best interests of the child are at issue, factors considered in the social science field, including theories such as bonding and attachment, become relevant.⁹⁶ Therefore, a significant part of the evidence produced supporting a position on what is the best course of action for the child's welfare is based on a degree of speculation and conjecture. Once again, the best interests of the child are grounded in what is an imaginative leap, attempting to look into the future to see what course of action best helps the child realise her or his life chance. The difficulty of the task of the judge was noted in the UK case of *Re B (a minor)*, where the House of Lords noted that "there is no objectively certain answer on which of two or more possible courses is in the best interest of a child in all save the most straightforward cases; there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have."⁹⁷

2.7 The rights of the child and the interests of society in the balance

Judges, regardless of jurisdiction, are often guided by similar principles when deliberating over appropriate sentences. These include retribution, deterrence, prevention and rehabilitation. In South Africa, these considerations are guided by what has been referred to as the "Zinn Triad": the crime in question; the personal circumstances of the offender; and the interests of the community at large.⁹⁸ A judge's discretion to hand down an alternative to a custodial sentence depends on the seriousness and the nature of the crime, and also on whether the relevant legislation dictates a particular punishment for a crime. For example, in Ireland a murder conviction carries a mandatory life sentence. Where there is flexibility in sentencing, the range of alternatives that are applied vary from country to country, but generally include suspended sentences, community service, electronic tagging and house arrest. It was indicated in an interview with Belgian prison authorities that these alternatives do not automatically apply where the offender has a child, but that the fact that there is a dependent is a relevant secondary consideration.⁹⁹ Richard Volger comments, that "at best, the impact of a sentence on a child of the defendant is a peripheral consideration".¹⁰⁰

In 2008, UN General Assembly Resolution 63/241 specifically addressed this issue under the heading "Children of persons alleged to have infringed or recognized as having infringed penal law". Operative paragraph 47(a) provides that States should give priority consideration to non-custodial measures when sentencing or deciding on pre-trial measures for a child's sole or primary carer, subject to the need to protect the public and the child and bearing in mind the gravity of the offence.¹⁰¹ This paragraph takes into account the child's interests and the benefit of applying non-custodial sentences to primary carers, while considering the interests and competing rights of relevant stakeholders. It specifically notes that where the protection of the public is not at issue, and subject to the seriousness of the offence, an alternative to imprisonment should be applied.

In the US case of *Southerland v Thigpen*,¹⁰² the Circuit Court noted that the right to be breast-fed by a mother who faced a prison sentence was secondary to the interests of the State to address the

95 Pursuant to the test founded in *Daubert*, whereby the judges must evaluate the relevance and reliability of scientific evidence. See *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993)

96 Artis, Julie (2004) 'Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine' in *Law and Society Review*, Vol. 38, No. 4, p. 115

97 *Re B (A Minor)* [2001] UKHL 70

98 *S v Zinn* 1969 (2) SA 537 (A), also approved in the Supreme Court in *S v Malagas* 2001 (2) SA 1222 (SCA). See also the Irish Supreme Court judgment, *The People (DPP) v M.* [1994] 3 IR 306; [1994] 2 I.L.R.M. 541, where it was held that the sentence must be proportionate to the gravity of the offence and the personal circumstances of the offender.

99 Questionnaire by email from Sven Todts, Belgian Prison Health Service, Belgium, 5 June 2007

100 Volger, Richard (1992) 'The child, the imprisoned parent and the law' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p. 102

101 UN General Assembly, Resolution: Rights of the Child, A/RES/63/241

102 *Southerland v Thigpen*, 784 F.2d 713, 715-17, 5th Cir. 1986 (USA)

criminal behaviour. This was upheld in the case of *Pendergrass v Toombs*.¹⁰³ Volger comments that “it is apparent that issues of deterrence and retribution outweigh all other considerations. Since the children [are] not party to the proceedings, may well not appear at court and feature only in the small print of social enquiry reports, their future and welfare assume an insignificant role in sentencing policy.”¹⁰⁴ With the growth of reports, recommendations and judicial deliberations highlighting the importance of considering the best interests of the children when a parent is imprisoned, and emphasising the interests of society to tackle recidivism *inter alia* through maintaining contact with the family, a trend is emerging, bringing to the fore of sentencing policy the child’s welfare and future.

Courts have considered the effects of a prison sentence on a child in so far as any additional suffering may result from the imprisonment of the parent. The mere fact that a parent is being imprisoned is not a mitigating factor. As Lord Justice Widgery held in *Ingham*, part of the punishment for committing a crime involves hardship on the family and it should not be one of the factors affecting what would otherwise be the correct sentence.¹⁰⁵ The US case of *Vaughan*,¹⁰⁶ where the dependents all suffered from disabilities and the husband of the offender facing imprisonment was already in prison, is illustrative of additional hardships that have swayed courts to look at an alternative to a custodial sentence.

Courts take a strict approach when allowing vulnerable dependents of prisoners to be a mitigating factor during sentencing. This was considered in the UK case of *Batte* where the appellate court reduced a two-year sentence to a suspended sentence on the grounds of the particularly severe hardship that the custodial sentence caused to the dependents. In doing so, the court held that it was an unusual case and stressed that this was to be an exception rather than the rule: “We consider that this is a wholly exceptional case ... we wish to emphasise strongly that this is the type of offence where circumstances that may otherwise count in mitigation ... do not normally play a role”.¹⁰⁷ In *Ingram*,¹⁰⁸ the court reduced marginally a sentence from six years to five years based on the effects the incarceration would have on the children. However, this case ought to be distinguished from *Babington*,¹⁰⁹ where the court refused to reduce the sentence on the grounds that the offender was a mother because her children were older and all but one of them were already in care.¹¹⁰

Typically, the imprisonment of a mother is more detrimental to a child, as the mother is more often the child’s sole carer.¹¹¹ Furthermore, because there are usually fewer women’s prisons, there is a higher risk that the mother will be sent further away from the child. It has been noted that “family remains a gendered institution, with women shouldering much of the responsibility for the care of children, a gender-blind law that does not take this contribution into account decreases women’s bargaining power inside and outside of court”.¹¹² This was noted in the UK case of *Re G (children)*, where the judge did not imprison a parent for violating a court order. The judge held that “sending her to prison will deprive them of their primary carer and give them a reason to resent the parent who invited this”.¹¹³ In these circumstances either the child has to live with grandparents or other relatives or is moved to foster or institutional care. This change can involve moving to a different school and/or house and leaving behind friends and relatives.

There is no fixed rule as to whether, and in what circumstances, it is in a child’s interests to be separated from a parent facing imprisonment. In Italy, for example, there are provisions to delay detention of mothers of young children and to place an expectant mother or a mother with a child

103 *Pendergrass v Toombs*, 24 Ore.App. 719;546 P.2d. 1103; 1976 Ore.App

104 Volger, Richard (1992) ‘The child, the imprisoned parent and the law’ in Shaw, Roger (ed.) *Prisoners’ Children: What are the Issues?* (London: Routledge), p.105

105 Per Widgery CJ, *Ingham* (1980) 2 Cr App R (S) 184

106 *US v Vaughan*, No. 92 CR 575, 04 (RWS)

107 *Batte* (1999) 2 CR.App.R.S9223, at para.225

108 *Ingram* [2004] EWCA Crim 187

109 *Babington* [2005] EWCA Crim 866

110 Piper, Christine (2007) ‘Should Impact Constitute Mitigation?: Structured Discretion versus Mercy’ in *Criminal Law Review*, p.148

111 Baunach, Phyllis Jo (1985) *Mothers in Prison* (New Brunswick: Transaction Books), pp.29-30

112 Artis, Julie (2004) ‘Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine’ in *Law and Society Review*, Vol. 38, No. 4, p.775

113 *Re G (children)* (FC) [2006] UKHL 43 (UK)

under the age of three under house arrest until the child reaches the age of ten, as an alternative to imprisonment.¹¹⁴

The Constitutional Court of South Africa in 2007 addressed the best interests of the child when handing down a potential custodial sentence to a primary carer. This was of particular relevance in light of section 28(2) of the Constitution, which provides that “a child’s best interests are of paramount importance in every matter concerning the child”, as well as Section 28(1)(b) which states that “every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment”. On the particular facts of the case, and the reports submitted during the appeal, the Court held that the children’s interests would only be secured if they remained in the care of their mother. In turn it was noted that this outcome would also serve the best interests of society on the whole: “despite the bad example M has set, she is in a better position than anyone else to see to it that the children continue with their schooling and resist the pressures and temptations that would be intensified by the deprivation of her care in a socially fragile environment. It is not just a question of whether they would be out on the street. And it is not just M and the children who have an interest in the continuity of her guidance. It is to the benefit of the community, as well as of her children and herself that their links with her not be severed if at all possible.”¹¹⁵

Case law in Australia has moved towards firm recognition of the detrimental effects of imprisonment on the rights of the child. This is evidenced by the Australian case of *Walsh v Department of Social Security*, in which both parents (whose three children were all suffering from chronic asthma) faced prison sentences for social security fraud. Mr. Justice Perry, upholding the application of a conditional release order, found that “the case has one unusual feature not present in any of the various cases to which counsel made reference during their submissions. That is, that the sentences, both of which were to be served forthwith, would result in three children, the youngest only just two years of age, being separated from both their parents during the period of their imprisonment.”¹¹⁶

In the case of *Yuen Yei Ha v The State*,¹¹⁷ the Fijian Court, in a bail application hearing, expressly considered the best interests of the child when sentencing the female accused. Similarly in *Sanjana Devi v The State*, the Fijian Court held that “the care of dependents is a relevant consideration in the grant or refusal of bail”.¹¹⁸ Here the Court, referring to Articles 3 and 9 of the CRC, noted that “the best interest of the applicant’s four year old, who is now left without a care-giver, is a primary consideration in the grant or refusal of bail in this case”.¹¹⁹

2.8 Conclusion

The paucity of legislative guidelines surrounding the best interests principle has led to its sculpting by the courts. In order to apply the principle, courts have established and developed substantive criteria that serve as objective points of reference against which each individual case can be assessed, resulting in a “process whereby all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account”.¹²⁰ This has led to a case-by-case approach, with outcomes depending on the factors deemed to be the most relevant by the particular judge when determining what is in the best interests of the child. While such an approach allows for the flexibility that is often needed in family law cases typically involving a great number of variables, it also removes the uniformity, certainty and predictability that is so essential in the application of law.

114 Finocchiaro Act, Act No. 40/01, entitled ‘Alternative Measures to detention with the aim of protecting the relationship between mother detainees and their children’. Article 146 of the penal code provides that “the execution of the detention penalty can be postponed *inter alia* in relation to mothers of children under the age of one”. Article 4 of Act No. 165/98 extended the house detention measure to mother detainees of children under the age of ten.

115 *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007), at para.70

116 *Walsh v Department of Social Security* [1996] SASC 5795, at para.17

117 *Yuen Yei Ha v The State*, [2004] FJHC 228

118 *Devi v The State* [2003] FJHC 47, as per Judge Nazhal Shameem

119 *Devi v The State* [2003] FJHC 47, as per Judge Nazhal Shameem

120 *J v C* [1970] AC 668, at p.710

3 Secondary Prisonisation

3.1 Introduction

Although there is little by way of official statistics, it has been reported that in Europe approximately 700,000 children have a parent living in prison.¹²¹ Despite the large numbers of children that are affected by parental imprisonment, and the severity of the impact on children's rights, there has been little monitoring or research carried out in this field. "The effects of imprisonment on families and children of prisoners are almost entirely neglected in academic research, prison statistics, public policy and media coverage."¹²² Instead, studies of children separated from their parents are most frequently confined to the impact of parental death and divorce. Nevertheless, the separation that typically arises as a result of imprisonment and the consequent infringement of the child's right to the company and care of his or her parent as provided for by Article 9 of the CRC may result in far graver long term developmental impediments. As Phyllis Jo Baunach notes: "Separation for any reason may be traumatic. A child's first day at school, hospitalisation for life-saving surgery, military service, especially during war-time, or the ultimate separation, death, all entail tremendous emotional loss. But in each of these instances there may be a higher good, a sense of inevitability, or lack of control that may be used as comforting explanation or excuse for the separation. However, incarceration carries with it the stigma that one's own behaviour, where conscious or not, has created the reason for separation. In this respect, a sense of guilt and bitterness overshadows the pains of imprisonment for inmate mothers."¹²³

Secondary prisonisation has been described as the "institutionalisation" of the prisoner's family outside the prison.¹²⁴ The effect of *secondary prisonisation* on the rights of the child will be examined in light of the general principles of the CRC. The effect of imprisoning a parent is of particular importance with regard to the child's right to development and the child's right to the care and company of his or her family. Accordingly, these aspects will receive special attention. This chapter will conclude with an assessment of the impact of *secondary prisonisation* according to the best interests principle.

3.2 The effects of imprisonment on the child's right to development

The right to development requires that a child is nurtured and cared for in order to assist the maximum development of the child within his or her capacities. In his study on the effects of imprisonment on families, and in particular on children, Joseph Murray examines four categories of effects that may hinder a child's development. These categories are: *selection effects*; *mediating effects*; *moderating effects*; and *direct effects*.¹²⁵

The *selection effects*, according to Murray, occur where some extraneous factor, such as a parent's anti-social behaviour, causes the imprisonment of the parent, which in turn is the cause of the child's developmental problems. Therefore the root cause underlying the developmental problems is the parent's behaviour, rather than the imprisonment *per se*. Murray argues that "parental criminal convictions, regardless of the sentences that follow, are a strong independent predictor of children's

121 Ayre, Liz, Philbrick, Kate, Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.7

122 Murray, Joseph (2005) 'The Effects of Imprisonment on Families and Children of Prisoners' in Liebling, A. & Maruna, S. (eds.) *The Effects of Imprisonment* (Cullompton, Devon, England: Willan), p.442

123 Baunach, Phyllis Jo (1985) *Mothers in Prison* (New Brunswick: Transaction Books), p.2

124 Comfort, Megan L. (2002) 'Papa's House: The Prison as Domestic and Social Satellite' in *Ethnography*, Vol. 3, p.471

125 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.448

own criminal and antisocial behaviour in later life”.¹²⁶ The second variable cited by Murray, the *mediating effects*, refers to indirect consequences of the imprisonment of the parent that impact negatively on the child’s development. The examples cited in this case include loss of income that the family may incur due to the practical implications of a custodial sentence, as well as children’s exposure to multiple carers.¹²⁷ The *moderating effect* is the third variable and refers to the specific intrinsic characteristics of the individual child, such as gender, age or personality, that affect how parental imprisonment will influence the development of the child. Finally, Murray refers to the actual or *direct effects* that imprisonment has on the child. These include the actual separation of the child from the parent, the possibility that the child will imitate the anti-social behaviour, and that the child will experience fear as a result of not knowing what is happening to the parent.¹²⁸

While both the *selection effects* and *moderating effects* may negatively impinge on the rights of the child, this paper will assess the direct and constant category of effects with a view to identifying tangible reforms. Accordingly, consideration will be given to the *mediate effects* and *direct effects* on a child’s development; in the first case, for example, where the child’s financial or living conditions are disrupted, and in the second case where maladjustment is a direct result of the separation from the parent.

3.2.1 *The direct effects of separation of the parent and child due to imprisonment*

Bowlby’s attachment theory has been described as establishing “internal working models that incorporate an appraisal of the self and the self in relationships which shape a general outlook on social experiences”.¹²⁹ The close parent-child relationship is important to foster a sense of security in the child, which enhances her or his relationships with others. As one writer described, “attachments provide a foundation upon which subsequent social encounters build”.¹³⁰ Therefore, recalling the categories of rights articulated by Donnelly, attachment theory is of particular relevance to the individual’s exercise of membership rights.

Separation impacts on the long and short term development of the child. In the long term, it may negatively impact on the child’s future security and social interaction. In the short term, parental imprisonment has been found to increase the likelihood of a child engaging in antisocial behaviour and increased anxiety as a result of not knowing what is happening to the parent.¹³¹

3.2.2 *Mediating effects – indirect effect of parental imprisonment on the rights of the child*

Mediating effects include any mediate event or indirect effect that imprisonment of a parent has on the development of the child. Mediating effects include anxiety and frustration from inadequate explanations as to where the parent is, stigma and ostracism associated with imprisonment, and movement between multiple carers.¹³² The extent to which the mediating effects impact on the child’s development depends on factors including: whether it is the mother or the father who is imprisoned; how far the prison is situated from the child; and whether suitable alternative care is available for the child. In the case of alternative care, the move from one carer to the next removes a sense of stability that is so integral to the development of a child. According to Goldstein, Freud and Solnit, “continuity of relationships, surroundings, and environmental influence are essential for a

126 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.449

127 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.451

128 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.450

129 Goldberg, Susan (2003) *Attachment and Development* (London:Arnold), p.172

130 Goldberg, Susan (2003) *Attachment and Development* (London:Arnold), p.171

131 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.450

132 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.451

child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world."¹³³ Stability is jeopardised when a parent is imprisoned, and the harm caused is often greater when it is the mother in prison. "Children who are looked after by their mothers prior to imprisonment are frequently subjected to many major disruptions throughout the mothers' imprisonment, including at least one change of care giver, and often involving a change of home environment."¹³⁴ Realising these developmental needs in order to better satisfy the child's best interests requires ensuring stability in the life of the child. "Physical, emotional, intellectual, social and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones."¹³⁵ Unfortunately in the case of children separated from their parents, since they are faced often with multiple care changes, "it is likely that many children will face a decrease in stable, quality parenting following their parent's imprisonment".¹³⁶

3.3 The effects of imprisonment on the right of a child to be with his or her family

Empirical research on the effects of incarceration of the parent on the family, conducted by the London School of Economics, has shown how the spouse, in an attempt to maintain family links and limit the effects of institutionalisation on the imprisoned spouse, becomes part of the carceral institution, suffering much of the hardship associated with imprisonment. "Through their efforts to create strong inclusive bonds with the incarcerated partner, they partake in the paradoxical 'institutionalisation' of their own family life."¹³⁷ In her research, Comfort refers to this as *secondary prisonisation*. It was found that by relocating family moments and events to the prison visiting room, the result is "a curious inversion of the premise that frequent visitation facilitates societal reintegration ... as family celebrations, and romance are imported into the carceral environment, the penitentiary becomes a domestic satellite".¹³⁸ The home becomes a symbolic prison for the family on account of the sense of isolation and social exclusion commonly felt by prisoners' families.

3.4 Conclusion on secondary prisonisation - the best interests of the child

As previously discussed, courts, under Article 3 of the CRC, must have regard to the interests of the child potentially affected by an order. Of course, the decision to incarcerate a parent will be made on the basis of the applicable criminal law and the child's best interests will typically, at best, be a secondary consideration. One example of this is the UK Court of Appeal, which, in the case of *R v Mills*, held that a mother with dependent children convicted of a nonviolent crime should not be imprisoned where an alternative was available.¹³⁹ However, once a custodial sentence is imposed, a court may take into account any special circumstances relating to the offender, including any dependent children who would be affected by the custodial sentence. For example, where possible, special provisions could be made available for a mother to be placed under house detention for the duration of her pregnancy and perhaps for a limited time immediately after.

133 Goldstein, Joseph, Freud, Anna and Solnit, Albert (1973) *Beyond the Best Interests of the Child* (London: Collier Macmillan Publishers), pp.31-32

134 Woodrow, Jane (1992) *Mothers in Prison: The Problem of Dependent Children* (Cambridge University), p.32

135 Woodrow, Jane (1992) *Mothers in Prison: The Problem of Dependent Children* (Cambridge University), p.32

136 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.451

137 Comfort, Megan L. (2002) 'Papa's House: The Prison as Domestic and Social Satellite' in *Ethnography*, Vol. 3, p.471

138 Comfort, Megan L. (2002) 'Papa's House: The Prison as Domestic and Social Satellite' in *Ethnography*, Vol. 3, p.470

139 *R v. Mills* [2002] CR APP R 52

In the majority of cases parental incarceration negatively impacts on the child physically, emotionally and psychologically. Although beyond the scope of this paper, it must be recognised that in certain situations, such as those involving abuse, the family may benefit from the removal of a parent. However, notwithstanding the problems associated with establishing the precise causal link between imprisonment and the maladjustment of the child, separating the parent from the child in order to incarcerate the parent generally impacts negatively on the rights of the child. These rights include the general principles of the right to development, the right to non-discrimination and, ultimately, the best interests of the child.

3.5 How to mitigate the negative effects on the child

Insofar as possible, the imprisonment of a parent should be a last resort. This has already been legislated for in the African Charter on the Rights and Welfare of the Child, which provides that in the case of expectant mothers and mothers of infants and young children, “a non-custodial sentence will always be first considered when sentencing”.¹⁴⁰ Certainly in cases where the accused is found guilty of a nonviolent offence, courts should consider ordering an alternative to imprisonment. In particular, courts should assess the impact on the child with particular attention to the alternatives available for the child, as it is often the lack of adequate alternative care that affects the child most severely. As Murray noted, “[inadequate] personal and familial coping resources actually can have a greater impact on children’s adjustment following parental imprisonment than the separation itself”.¹⁴¹

Although the CRC “has not yet become a living charter for children of imprisoned parents”,¹⁴² it is submitted that the general rights provided for in it apply to such children. Where a parent is imprisoned, it is usually in the best interests of the child to maintain regular contact with the parent.¹⁴³ The State is obliged, pursuant to Article 9 of the CRC, to facilitate regular contact. Research shows that contact between parent and child is not only in a child’s best interests but has also been shown to reduce recidivism and to aid reintegration of the offender into society after release.¹⁴⁴ Moreover, a child’s concern over the welfare and well-being of the parent is considered to impact negatively on a child’s development. Regular contact with the parent helps reduce this anxiety.

Fostering contact between parent and child could include facilitating access through the provision of low cost phone calls, affordable transport to and from the prison, and providing adequate means to send and receive letters and other forms of communication such as tape recordings of messages or stories read by parents in prison. In the United States it has often been remarked that private phone companies charge extortionate prices to the prisoners, above the national level, and that this acts as a further impediment to an already marginalised group.¹⁴⁵ In the UK, the limited number of phones available in a large prison has been problematic with respect to maintaining family ties beyond the prison.¹⁴⁶ Research undertaken in this field has indicated that parent-child visits in person are often the most positive way to ensure stability in the child’s life. The study concluded that “children who regularly visit parents from whom they are separated show better emotional adjustment, higher I.Q.

140 African Charter on the Rights and Welfare of the Child (1990), Article 30(a)

141 Murray, Joseph & Farrington, D.P. (2006) ‘Evidence-based programs for children of prisoners’ in *Criminology and Public Policy*, Vol. 5, No. 4, p.451

142 Wolleswinkel, Ria (2002) ‘Children of Imprisoned Parents’ in Willems, Jan (ed.) *Developmental and Autonomy Rights of Children; Empowering Children, Caregivers and Communities* (Intersentia), p.7

143 Ayre, Liz, Philbrick, Kate, Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), pp.47-53

144 Baunach, Phyllis Jo (1985) *Mothers in Prison* (New Brunswick: Transaction Books), p.2

145 In the USA there has been a history of one phone company being exclusively used in prisons, with phonecalls from prison having a higher surcharge than other collect call connection fees. For further discussion see Human Rights Watch (2002) *Collateral Casualties: Children of Incarcerated Drug Offenders in New York*, Section III, available on <http://hrw.org/reports/2002/usany/USA0602-03.htm> (accessed 17 August 2009)

146 McDermott, Kathleen and King, Roy D. (1992) ‘Prison rule 102: “stand by your man”: the impact of penal policy on the families of prisoners’ in Shaw, Roger (ed.) *Prisoners’ Children: What are the Issues?* (London: Routledge), p.65

scores and more improvement in behaviour than those who do not”.¹⁴⁷ However, these visits must be well planned, catering for the child’s needs and concerns.

As important as maintaining contact between the parent and child is ensuring stability and continuity of care and environment. “Developing positive relationships with consistently available and responsive alternative adults can help ameliorate the effects of parental loss or problems, whereas instability in the caregiving situation does not.”¹⁴⁸ Thus, where possible the child should be placed in a stable and attentive environment in order to cause the least amount of disruption to the child’s life. As Poehlmann notes: “Children develop representations of relationships that are less optimal when attachment figures are not available and responsive, such as when discontinuity in care, prolonged separation or maltreatment occurs”.¹⁴⁹

The Committee on the Rights of the Child has recommended in a recent Concluding Observation that “alternative care for those children who are separated from their mothers in prison be regularly reviewed ensuring that the physical and mental needs of children are appropriately met”. Furthermore, it recommends that the State Parties “continue to ensure that alternative care allows the child to maintain personal relations and direct contact with the mother who remains in prison”.¹⁵⁰ Paragraph 11 of the draft Guidelines for the Alternative Care of Children also emphasises the need to maintain stability and not to interfere with the early development of attachment between a child and her or his primary carer: “decisions regarding children in alternative care, including those in informal care, should have due regard for the importance of ensuring children a stable home and of meeting their basic need for safe and continuous attachment to their caregivers, with permanency generally being a key goal”.¹⁵¹

147 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.69

148 Poehlmann, Julie (2005) ‘Representations of attachment relationships in children of incarcerated mothers’ in *Child Development*, Vol. 76, No. 3, p.682

149 Poehlmann, Julie (2005) ‘Representations of attachment relationships in children of incarcerated mothers’ in *Child Development*, Vol. 76, No. 3, p.680

150 Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Thailand, CRC/C/THA/CO/2, para.48; and Philippines CRC/C/15/add.259, para.53-54

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

4 Primary Prisonisation

4.1 Introduction

In the previous chapter, Megan Comfort's term *secondary prisonisation*¹⁵² was used to describe the effects of separating a child from her or his imprisoned parent. Adapting this idea, the term *primary prisonisation* will be applied in circumstances where a child remains in prison with her or his parent. Developments in policy and practice where children remain in prison with their parents will be considered in order to examine how the best interests requirement of the child may be met. This will be assessed by analysing the situation of children of imprisoned parents in Europe, where policy, in recognition of the negative impact of separating children from their parents, has developed to allow children to live in the prison. In recognition of the universality of the issue, an analysis will be made of the particular obstacles faced by developing countries where the practice of permitting children to remain in the prison poses additional risks to fundamental legal obligations. Notwithstanding the universality of custodial sentencing, it must be noted that the different provisions and arrangements depend on a variety of factors, including the diversity of attitudes to and value placed on family life and the role of parents, and the availability of resources both for those within the prison and in relation to alternative care for those outside.

4.2 European perspectives – a brief overview

In Europe, babies and small children are permitted to live in the prison with their parents in limited circumstances. The Council of Europe's Committee of Ministers Recommendation,¹⁵³ in particular Article 36.1, provides that infants may stay in a prison with their parent only when it is in the best interests of the infant concerned. Articles 36.2 and 36.3 of the Recommendation provide that in such cases provisions should be made to ensure that the security and welfare of the child is considered by providing appropriately furnished accommodation and staff who are appropriately qualified. The Recommendation emphasises that the infants of prisoners are not themselves prisoners. This policy is seen as a way of mitigating the negative impact of separation. Notwithstanding this reasoning, there is recognition of the fact that the prison environment is not an ideal one in which to raise a child.

While countries in Europe are moving towards establishing child-centred facilities within prisons to maintain contact between children and their parents, the European Court of Human Rights, in the case of *Kleuver v Norway*,¹⁵⁴ held that States were not under any obligation to provide facilities for a child to reside in the prison with their parent. European policy-makers are reluctant to encourage the placement of children within prisons. This position is evidenced by a report of the Council of Europe, which stated: "The need to maintain contact must not expose the child to the ill-effects of the prison experience".¹⁵⁵ The Council noted that "prisons do not provide an appropriate environment for babies and young children, often causing long-term developmental retardation. Yet, if babies and children are forcibly separated from their mothers, they suffer permanent emotional and social damage. Most European prison systems provide some places for babies, but many hundreds of babies are nevertheless separated from their imprisoned mothers."¹⁵⁶

152 Comfort, Megan L. (2002) 'Papa's House: The Prison as Domestic and Social Satellite' in *Ethnography*, Vol. 3, p.471

153 Council of Europe Committee of Ministers (2006) Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules

154 *Kleuver v Norway* (30 April 2002), available at http://www.rechtsveven.info/Content/Menneskerett/CaseLaw/Judgments/99_045837.html (accessed 17 August 2009)

155 Parliamentary Assembly of the Council of Europe (1997) Doc. 7816: Social and Family Effects of Detention

156 Parliamentary Assembly of the Council of Europe (2000) Doc. 8762: Mothers and babies in prison, available at <http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8762.htm>, (accessed 10 May 2007)

A number of important observations may be drawn from these statements of the Council of Europe. In particular, the recognition of the dilemma of living in a pro-carceral society and, in this context, how best to care for the children left behind once the sentence is handed down.

It is often noted that the exact number of children with a parent in prison is unknown. A report into the Social and Family Effects of Detention estimates that approximately 700,000 children in Europe are affected by a parent's imprisonment.¹⁵⁷ The report, however, only considers mothers who are separated from their babies and does not take into account young children who are negatively affected by a father's incarceration. Neither does the report mention the rights of imprisoned fathers, a group which makes up the greatest numbers of prisoners worldwide.

In Europe, unlike for example in some South American countries, prisons do not generally permit children to live with their fathers. In Denmark, there is one prison which has a family unit for mothers and fathers living together with their child¹⁵⁸ and the country allows children below three years of age to stay with their fathers.¹⁵⁹ Spain also provides 'family cells' in the prison in Aranjuez, south of Madrid. However, with regard to *primary prisonisation*, general practice dictates that only mothers can keep their babies with them in prison. A policy fuelled by a lack of recognition of the role of the father in the development of the child results in a potential violation of not only equality and anti-discrimination measures, but specifically in this instance, Article 18 of the CRC which provides that the development of the child is the responsibility of both parents, and Article 9, which provides that the child has the right not to be separated from her or his parents.

The age at which a child can remain in prison also varies from country to country and even, in some cases, within a single country, with limits depending on the prison. In the UK a baby may live in prison until nine or eighteen months of age, depending on the prison.¹⁶⁰ In Germany, there are special 'open houses' that may accommodate children up to six years of age. Notwithstanding this diverse spectrum of ages at which babies and small children may live in the prison, the average maximum age for children to live in a prison is three years old.¹⁶¹ The reasoning behind this age limit seems to be that the child can form attachments without yet being aware of the prison surroundings.

Research undertaken for the purposes of this paper has shown that while nearly all countries interviewed provided at least one mother child facility, Malta was one of the few countries that did not provide any facilities to allow for children to live in the prison.¹⁶²

There are two main types of prisons which house the children of prisoners: mother-baby units and open houses. Mother-baby units are intended to allow newborn babies to be fed by their mothers. Taking the case of Ireland as an example, Article 20 of the 1947 Prison Regulations provides that "the child of a detainee can be accepted in the prison with his or her mother, if he/she is still breast-fed". In practice, it is rare for a child to remain in the prison beyond this early stage.

Open houses are available in Germany, and are generally for mothers who have committed less serious crimes. The prisoner-mothers are entitled to live together with their children under the age of six. They plan and prepare the meals for themselves and for their children. While the mothers are at work in the mornings, the children are cared for by trained specialist pre-school teachers and paediatric nurses.¹⁶³ Reports are given on the development of the children every six months.

157 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.7

158 Questionnaire from Dagmar Rasmussen, Senior Probation Officer, Denmark, 15 June 2007

159 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.74

160 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.75

161 This includes countries such as Belgium, Italy, Spain, Denmark and Poland.

162 Questionnaire from Dr. Mario Spiteri, Director of Health Promotion Department, Malta, 9 June 2007

163 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.77

4.3 The advantages of primary prisonisation

The prison must be developed into a suitable environment for small children, within the constraints of prison regulations and requirements. The Council of Europe's Committee for the Prevention of Torture noted that in situations where children remain in prisons with their parents "the goal should be to produce a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys".¹⁶⁴ Through the provision of adequate facilities, the advantages of maintaining contact between the mother and child become more significant. This contact facilitates the child's development while contributing to the rehabilitation of the prisoner through securing family links, rather than aggravating and intensifying feelings of loss and failure associated with the imprisonment of a parent.

However, whether or not keeping the child in the prison with the parent is truly in the best interests of the child remains to be considered. The question that must be addressed is whether the legal rights of the child can adequately be safeguarded in such circumstances and whether, ultimately, the best interests of the child are served.

4.4 The right to life, survival and development

In a recent report, the UN Committee on the Rights of the Child noted that integral to the right to life, survival and development enshrined in the CRC was, among other things, breastfeeding a baby.¹⁶⁵ This was also noted in the *travaux préparatoires* of the Convention.¹⁶⁶ Therefore, it can be argued that maintaining contact between a mother and baby while in prison is required in order to fulfil the child's right to life, survival and development.

In the context of small children living in prison with a parent, the right to development requires particular attention. The right to development, as set out in the 1986 UN Declaration on the Right to Development, includes *inter alia* the provision of a suitable environment conducive to the mental and physical development of the child, reflecting the child's capabilities.¹⁶⁷ The European Network for Children of Imprisoned Parents has stated that "arrangements should also be made to foster the normal development of motor and cognitive skills of infants in prison. In particular, they should have adequate play and exercise facilities within the prison and, wherever possible, the opportunity to leave the establishment and experience ordinary life outside its walls."¹⁶⁸ The risk to the development of the child due to a lack of stimulation may be one of the gravest concerns for children living in prisons in Europe.

In research carried out to measure the extent to which the prison environment impacts upon a child's development, children living in mother-baby units in prison were compared to children taken into care outside the prison, which included care by relatives, foster care and family friends.¹⁶⁹ These two groups were then compared with babies who attended a crèche. It was found that, contrary to previous tests on children in institutional care, no severe developmental impairments occurred.¹⁷⁰ It was noted that the locomotive and cognitive development of the babies who spent over four months in the mother-baby units slowed down. On release, however, they quickly caught up with the infants

164 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.20

165 Committee on the Rights of the Child, Day of Discussion on Implementing Child Rights in Early Childhood, 17 September 2004, para.8, available at <http://www2.ohchr.org/english/bodies/crc/docs/discussion/earlychildhood.pdf> (accessed 11 August 2009)

166 Detrick, Sharon (1992) *The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires'* (Kluwer International Press)

167 Nowak, Manfred (2005) *Article 6 – The Right to Life, Survival and Development* (Leiden: Nijhoff), p.3

168 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), pp.20-21

169 In accordance with the Griffiths Mental Development Scales, this research focused on developmental norms for locomotive, social, linguistic, fine motor coordination and cognitive development, as per Catan, Liza (1992) 'Infants with mothers in prison' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.15

170 Catan, Liza (1992) 'Infants with mothers in prison' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), pp.16-17

outside prison.¹⁷¹ Despite this initial setback on development, the research indicated that the babies living in the units enjoyed greater stability than those in care. This question of stability has been noted as having a greater long term impact on the child.¹⁷² Furthermore, an important element that must not be overlooked is that although the child is living in an institution, the child is cared for by her or his mother for at least part of the time.

The results of this research indicate that mother-baby units are potentially a suitable environment for the development of a baby's basic skills, but beyond that may not provide an adequate forum to develop by hampering the locomotive development of the child.¹⁷³ In relation to cognitive development, it has been argued that while children receive care and general social interaction, they may be lacking "educational, guided and exploratory play"¹⁷⁴ by virtue of the limitations and restrictions indicative of prison life. In order to compensate for the paucity of stimulants that are typical of a prison environment, special attention is required when making such an environment child-centred. It is interesting to note that Liza Catan, in her research on child development, found that one of the factors that contributes to the lack of educational stimulants, aside from the prison environment itself, are the carers of the children, who are made up of prison staff and nurses rather than qualified childcare workers. Indeed, from an assessment of the responses to questionnaires distributed to prison health care officials in Europe, it appears that very few of the prisons actually have childcare professionals working in the units or even have prison staff trained in childcare. The priorities of the staff working in the children's units differ significantly from crèche or pre-school staff. For example, nurses working in prisons are motivated to work from a healthcare perspective rather than interacting with the child with a view to stimulate or aid development through interactive play.¹⁷⁵ There have been developments in this, and in Poland, for example, the prison staff who work with the children are trained to work with children and attend special courses.¹⁷⁶

The research carried out by Catan concludes that while mother-baby units and other child friendly facilities may be a suitable environment for a child's development, and even in certain cases preferable to the separation of the child from her or his parent, the impediments cited need to be addressed in order to better satisfy both the locomotive and cognitive development of a child in such a way as it would be for a child living in more normal circumstances. More needs to be done to systematise at regional and international levels the resources and standards of care available to babies and small children living in prisons.

While it is important to encourage interaction between the mother and child, one must be aware of the dangers that such confinement, axiomatic of prison life, may entail. In the context of imprisonment, developmental impediments may include an environment in which this symbiotic relationship between the mother and child becomes unhealthy and stifling. Measures must be taken to ensure that this relationship remains healthy for both the mother and the child and to facilitate interaction with the mothers *inter se* and with the outside world.

4.5 The right to the company of the family

The family, as discussed in chapter one of this paper, is described by Donnelly as the "seat of socialisation".¹⁷⁷ The family nourishes the child's self worth, dignity and belonging.¹⁷⁸ Furthermore,

171 Lloyd, Eva (1992) 'Prisoners' children: the role of prison visitors' centres' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.25

172 Lloyd, Eva (1992) 'Prisoners' children: the role of prison visitors' centres' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.25

173 Catan, Liza (1992) 'Infants with mothers in prison' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.17

174 Catan, Liza (1992) 'Infants with mothers in prison' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.18

175 Catan, Liza (1992) 'Infants with mothers in prison' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.19

176 Questionnaire from Marzena Ksel, Director of Prison Health Services, Poland, 9 June 2007

177 Donnelly, Jack and Howard, Rhoda (1988) 'Assessing National Human Rights Performance: A Theoretical Framework' in *Human Rights Quarterly*, Vol. 10, No. 2, p.226

178 Donnelly, Jack and Howard, Rhoda (1988) 'Assessing National Human Rights Performance: A Theoretical Framework' in *Human Rights Quarterly*, Vol. 10, No. 2, p.226

as Bowlby argues, the family gives the child a sense of a place in the world.¹⁷⁹ Mother-baby units and other means of accommodating young children in prisons is recognition of the importance of family life to the right of the child, and in particular to the right of the child to the care and company of the parent under Article 9 of the CRC as previously discussed.

It is difficult to analyse conclusively the impact of parental imprisonment, as there may be a number of variables. In a situation where the child is in an abusive family, it is clearly preferable for the parent to be separated from the child and, therefore, removal of the parent does not violate Article 9 of the CRC. Rather, in such circumstances, the State is fulfilling its obligation to protect the child in accordance with the terms of the CRC. Other variables that must be taken into consideration, and often are, by the judiciary include whether or not the primary carer is being imprisoned, the length of the sentence, the seriousness of the offence and the alternative care available to the child, whether it be with a relative, friend or neighbour, in a foster home, adoption or living in an institution.

In Europe, the trend is that when the mother is imprisoned, there is an option to keep the child with the mother, but this same option is not available when the father is in prison. Often the reasoning behind it is simply the logistical difference between imprisoning men and women and the degree of security required. A clear case of this can be viewed by visiting Mountjoy prison in Dublin. In the same complex there is a women's prison and a men's prison, with a yard separating the two. The men's prison is a highly secured unit, with cells where the inmates remain locked up in for most of the day, often including meal times, and are forced to 'slop out' (urinate and defecate in containers in their cells then later take the containers elsewhere to empty them). In contrast, the women's prison, known as the Dochas Centre (Irish for 'Hope'), has brightly coloured walls and cells are referred to as rooms, to which some of the women even have keys. Near the women's section there is a playground and a kitchen facility where the women can cook for themselves and their visiting children.

Another reason for keeping children together with their mothers is that it is often the women who are the primary carers. When the father goes to prison the women are usually left to care for the children. However, it has become apparent that this is not the same when mothers are in prison, and there are few alternatives for the child's care.

Notwithstanding this trend, the importance of the role of both parents in the development of the child should not be neglected. As discussed in chapter 1, Article 9 of the CRC provides for the child not to be removed from her or his parents, while Article 18 notes that the upbringing of a child is the duty of both parents. Article 24 of the Charter of Fundamental Rights of the European Union considers that "every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests". The European Network for Children of Imprisoned Parents noted in a recent report that during the early stages of childhood, the parent's role is crucial in the child's development and that "therefore acute attention needs to be paid to the mother-father-triad during these early months".¹⁸⁰

Non-discrimination is also categorised as a membership right. Jack Donnelly and Rhoda Howard note that "the prerequisite for social participation is recognition of one's membership in society as an individual, regardless of, as well as respectful of, one's family allegiances. Thus, the right to family must be supplemented by the right to non-discrimination."¹⁸¹ In this situation, safeguarding the right not to be discriminated against means ensuring that living in the prison does not result in discrimination by those with whom the children are subsequently in contact, for example teachers.

179 Goldberg, Susan (2003) *Attachment and Development* (London:Arnold), pp.16-17

180 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), p.27

181 Donnelly, Jack and Howard, Rhoda (1988) 'Assessing National Human Rights Performance: A Theoretical Framework' in *Human Rights Quarterly*, Vol. 10, No. 2, p.228

4.6 Empowerment

The UN Human Rights Council, during its 11th Session, adopted a resolution on the right to education. This resolution, adopted without a vote, specifically considers the education of detainees and their children. Operative paragraph 10(l) refers to the obligation on all States to ensure that primary education is compulsory, accessible and available free to all including to all children in detention *or living in prisons* (emphasis added).¹⁸² As noted by Stephen Moore, one of the original researchers in this field, “all children have a right to access to education, to physical, intellectual, and social development and to the acquisition of the skills on which their life-chance depends”.¹⁸³ With regard to the realisation of the child’s right to education, this is affected by the child’s stay in prison in two ways. The first is in the mother-baby units, discussed above, where a lack of educational stimulus may negatively impact upon the child’s early educational development. The second is in the case of access to education for young children. In this case, it must be assessed whether the minimum basic rights to education of children living in prisons are being met and, further, whether such education can go beyond the basic needs and respond to the special needs of this vulnerable group of children.

Beyond realising the minimum right to education, schools can provide greater support and influence to children living in prisons. For many of the children, this is the only time they leave the prison grounds. Of particular importance is the physical location of the kindergarten, daycare centre or school outside the prison, such as in the case of the mother-child houses in Sevenum in the Netherlands or the open prisons in Vechta and Frondenberg in Germany.¹⁸⁴ Moore emphasises the role that teachers, by virtue of their position as perhaps the only stable adult figure in the volatile lives of children, can play in ameliorating the situation of children of imprisoned parents. Moore suggests: “Teachers should let their pupils know that they could be approached, if needs be, if the child chooses. This offer should be made to all children. Teachers should not single out the ones they feel may need it. A place and time should be stated away from the attentions of other pupils, when the offer could be taken up. Practical assistance, such as help in obtaining free dinners, uniforms or maintenance grants, lessens the burden of pressure on the family and therefore the child.”¹⁸⁵

4.7 Protection

The Committee on the Rights of the Child noted in a 2004 report that at present children living with mothers in prisons are among the most vulnerable groups of children.¹⁸⁶ Protection from physical or mental harm is a core human right and is especially at risk in the case of babies and small children living in prisons. It extends to both the acts and omissions of the prison staff, as well as of the mothers and indeed anyone in contact with the children. In the UK case of *JH (A minor)*¹⁸⁷ the court held that it was appropriate for the mother and child to be separated on the recommendations of the prison governor where it was found that the mother’s conduct was detrimental to the well-being of the child. This case illustrates the importance of continued monitoring of the development of the child with regard to the relationship with the mother in the prison environment.

The European Network for Children of Imprisoned Parents (EUROCHIPS) recommends that the relationship between the mother and child should be nurtured and protected in a healthy way.

182 Ertürk, Yakin (2009) *Political economy of women’s rights: report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, UN Doc A/HRC/11/6

183 Moore, Stephen (1992) ‘A link with normality: the role a school could play to help a prisoner’s child in crisis’ in Shaw, Roger (ed.) *Prisoners’ Children: What are the Issues?* (London: Routledge), p.176

184 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), pp.74-79

185 Moore, Stephen (1992) ‘A link with normality: the role a school could play to help a prisoner’s child in crisis’ in Shaw, Roger (ed.) *Prisoners’ Children: What are the Issues?* (London: Routledge), p.177

186 Committee on the Rights of the Child, Day of Discussion on Implementing Child Rights in Early Childhood. 17 September 2004, available at <http://ohchr.org/english/bodies/crc/docs/discussion/earlychildhood.pdf> (accessed 20 April 2007)

187 *R v Secretary of State for the Home Department ex parte Hickling and JH (A minor)* [1986]

Therefore, the child should never be locked in with the mother or kept in isolation and, where possible, positive contact should be maintained and facilitated with other parents and children both inside and outside the prison.¹⁸⁸

4.8 The situation of children of imprisoned parents in developing countries

Many less developed countries also have a policy of housing children with their imprisoned mothers and fathers.¹⁸⁹ In relation to Cambodia, the Committee on the Rights of the Child noted in its Concluding Observations that “at present there are still some children living in prison with their mothers because the mother does not want to be separated from them. The Ministry of Social Welfare is considering what measures should be taken to protect the children’s best interests.”¹⁹⁰ In developing countries there is a similar awareness of the effects of separation on the development of the child. However, the economic climate of the country affects the conditions in the prisons, and implementation of legal safeguards do little to placate even the most liberal-minded reader that such conditions are in the best interests of the child. The conditions of the prisons in South America and the effects of such conditions on the rights of children were noted in a report of the Inter-American Commission on Human Rights. The Commission said that it was “concerned over the physical, psychological, and emotional well-being of children and adolescents who live with their fathers and mothers in the prisons visited, given the precarious state of infrastructure, sanitation, and security at those prisons”.¹⁹¹

A study in India by the National Institute of Criminology and Forensic Sciences of children of women prisoners living in Indian jails indicated that the children suffered from diverse deprivations relating to food, healthcare, accommodation, education and recreation. There was also a lack of trained staff available to care for these children. The Supreme Court directed that further studies be prepared on prisons around the country that house children, specifically documenting the number of children living in prisons and the extent to which provisions were made available to meet their specific needs. The results varied greatly from prison to prison: some cited milk or a change of clothes as being provided, while others offered literacy programmes or nursery schools. A report by the Tata Institute of Social Sciences listed the following five grounds that require the attention of the Court when issuing guidelines for these children:

- *Prison environments are not conducive to the normal growth and the development of children.*
- *Many children born in prison have never experienced normal family life up to the age of four to 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 prisons.*¹⁹²

188 Ayre, Liz, Philbrick, Kate and Reiss, Marielle (eds.) (2006) *Children of Imprisoned Parents: European Perspectives on Good Practice* (Paris: EUROCHIPS), pp.74

189 Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Nepal, CRC/C/15/Add.261, para.52; Concluding Observations: Thailand, CRC/C/THA/CO/2, para.48; Concluding Observations: Iran, CRC/C/15/Add.254, para.51; Concluding Observations: Mexico, CRC/C/MEX/CO/3, para.39; Concluding Observations: Cambodia, CRC/C/11/Add.16, para.101

190 Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Cambodia, CRC/C/11/Add.16, para.101

191 Inter-American Commission on Human Rights (2006) *Press Release No. 48/06: IACHR checks situation of persons deprived of liberty in some jails in the Republic of Bolivia*, available at <http://www.cidh.oas.org/Comunicados/English/2006/48.06eng.htm> (accessed 8 August 2009)

192 *R D Upadhyaya v State of AP* [2006] INSC 204, at p.10, available at <http://www.commonlii.org/in/cases/INSC/2006/204.html> (accessed 11 August 2009)

This report, and other similar studies and statements made by legal counsel, spurred the Supreme Court to issue guidelines on the care of children of women prisoners. From the outset the guidelines set out that only children below the age of six should be permitted to stay with their mothers and those that do so should not be treated as prisoners. Food that satisfies the nutritional and dietary needs of children should be made available and pregnant women, where possible, should give birth outside the prison.¹⁹³ The judgment of Chief Justice Y.K. Sabharwal also set out provisions for educational and recreational facilities, in particular the establishment of crèche facilities for both children of prisoners and prison staff outside the prison grounds. This is a particularly innovative step and a positive move to ensure that children of prisoners are not segregated and isolated. Of course, measures may need to be taken to prevent cases of bullying or discrimination. The judgment ordered a compliance report by the relevant stakeholders within four months. In April 2009, the Indian National Human Rights Commission recommended that the Uttar Pradesh government pay compensation to a mother whose baby was delivered in a prison toilet and subsequently died due to inadequate medical facilities. The Commission referred to the guidelines issued by the Supreme Court judgment in support of its decision and noted that the guidelines had not yet been implemented throughout the country.¹⁹⁴

Taking into consideration this landmark judgment in India, the lessons learned and the challenges it cites to the protection and fulfilment of the rights of children living in prisons with their parents, this paper will consider, in particular, two prisons in Bolivia. In the prisons visited, it is the norm and not the exception for children to live in the prison. The situation of children will be examined in order to assess the extent to which the best interests of the child are considered by the prison authorities, and how reform may better serve the rights and needs of children living in prison. As the Committee on the Rights of the Child recommended in its Concluding Observations, the State Party should review the “current practice of children living with their parents in prison, with a view to limiting the stay to instances in which it is in his/her best interest, and to ensuring that the living conditions are suitable for his/her needs for the harmonious development of his/her personality”.¹⁹⁵

4.8.1 *How less developed countries tackle the effects of imprisonment on the rights of the child: a case study of prisons in Bolivia*

In developing countries, as in developed countries, the effects on the child of parental imprisonment are at a minimum a serious impediment to the child’s development. However, and specific to the case of developing countries, it may also be detrimental to the child’s survival.

a. *The legislative framework*

Bolivia, like many developing countries, has signed and ratified the core international human rights instruments including the UDHR, the ICCPR, and the ICESCR. Bolivia is also a party to the Convention Against Torture. On a regional level, Bolivia is also subject to the rights and obligations of the ACHR.

National law reinforces these commitments to recognise and protect human rights within the country. There are numerous provisions that safeguard the rights of children of imprisoned parents. Article 7 of the *Constitution Política de Estado* recognises the right to life, health and security, while Article 199 obliges the State to protect the mental and moral health of the child and commits to protect the child’s right to home and family life. Article 7 of the *Código del Niño, Niña y Adolescente* (Minor’s Code), similar to Article 3 of the CRC, recognises the right of the child to the company of

193 *R D Upadhyaya v State of AP* [2006] INSC 204, available at <http://www.commonlii.org/in/cases/INSC/2006/204.html> (accessed 11 August 2009)

194 National Human Rights Commission (2009) *Jail authorities held responsible for the death of a women prisoner’s child; NHRC recommends one lakh rupees monetary relief* (New Delhi, India), available at <http://nhrc.nic.in/dispArchive.asp?fno=1736> (accessed 11 August 2009)

195 Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Nepal, CRC/C/15/Add.261, para.52, available at <http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.261.pdf> (accessed 20 May 2007)

the family and that the best interests of the child are the absolute priority. Furthermore, Article 27 of the Minor's Code contains the right of the child not to be separated from his or her family. Where a father is deprived of his liberty and the child has no extended family, the State, under Article 30, must provide alternative foster care (*familia sistituta*) in the locality of the prison where the father is held. Pursuant to Article 26 of the Minor's Code, children of inmates under six years of age have the possibility of staying in the establishments with their parents. Children under six remaining in the prison should have access to a *guarderia*, or crèche type facility. Article 27 of the Minor's Code prescribes that children living in the prison receive the necessary nutritional requirements for healthy development.

Ley 2298, ley de Ejecucion Penal y Supervision (Law 2298 on Criminal Enforcement and Supervision, hereafter Law 2298), constitutes the legislative cornerstone for the protection of prisoners. It sets out the aims of prisons, namely that they are to rehabilitate the prisoner to become a law-abiding citizen respectful of society. Law 2298 also prohibits the use of preventative detention: Article 9 indicates that all inmates must benefit from all the rights and obligations guaranteed by the constitution and other human rights instruments. There is a serious gap between these ambitious provisions and the reality of prisons, the effects they have on prisoners and the continuing presence of preventative detention.

b. *The gap between legislation and practice*

Notwithstanding the wealth of legislative safeguards that exist on national, regional and global levels, the reality of the situation for prisoners and their families in developing countries is that there is a gulf between the legislation and the practice. "Prison conditions not only constitute some of the worst human rights violations in contemporary Latin American democracies, but also reveal fundamental weaknesses in those democracies."¹⁹⁶

The problems in the prisons of South America include, "systemic killing, overcrowding, disease, torture, rape, corruption, and due process abuses all under the state's twenty-four hour watch".¹⁹⁷ In the case of Bolivia, these problems are rooted in the economic climate of a country steeped in poverty and corruption, often exacerbated by a foreign policy motivated by a dependence on aid from developed countries.

Bolivia has witnessed a century of political turmoil and over two decades of military rule, which has impeded stable development. Pressure exerted by US governments to institute zero tolerance measures against narcotics has impacted negatively on human rights protection. For example, the US government played an important role in the promulgation of *Law 1008*, the cornerstone of Bolivian counter-narcotics legislation. Human Rights Watch noted that "US counter-narcotics assistance has supported programs and policies flawed by human rights abuses".¹⁹⁸ Under this law, those charged with any drug offence, minor or serious, are imprisoned without the possibility of pre-trial release. Where the accused is acquitted they must stay in prison until such time that their case has been reviewed by the Supreme Court. In a country where the legal system suffers from limited resources, especially lacking in defence lawyers and inadequate government-assisted legal aid, the practice of such a law results in the violations of *inter alia* the rights to liberty and due process. Furthermore, this law has led to Bolivia violating national and international law prohibiting the use of preventative justice. The reality of the situation is that 75% of the 7,682 prisoners in Bolivia have not been convicted but await trial.¹⁹⁹ At the time of writing the average period of pre-trial detention is between five and eight years.²⁰⁰

196 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.909

197 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.909

198 Human Rights Watch (1995) *Bolivia: Human Rights Violations and the War on Drugs*, available at <http://www.hrw.org/legacy/summaries/s.bolivia957.html> (accessed 12 August 2009)

199 Inter-American Commission on Human Rights (2006) *Press Release No. 48/06: IACHR checks situation of persons deprived of liberty in some jails in the Republic of Bolivia*, available at <http://www.cidh.oas.org/Comunicados/English/2006/48.06eng.htm> (accessed 8 August 2009)

200 Interview with Carlos Barrientos Jimenez, Jefe de Gabinete (the Ombudsperson) at the Office of the Ombudsperson, La Paz, 30 May 2007

The impact of Law 1008 has been severe prison overcrowding. San Pedro prison, in the centre of La Paz, was built in 1885 for a capacity of 200-300. Today it holds 1,500 inmates, not including the women or the 380 children that are estimated to be also living in San Pedro. The judicial body of the State is unable to process this large number of claims. These issues are indicative of greater underlying problems that exist below the surface with the justice system. Given the length of time that approximately 75% of the prison population has on average been awaiting trial, it becomes clear that for many of the children of the inmates of San Pedro, prison life is all they know. This is especially relevant in Obrajes women's prison in Bolivia, where a majority of the inmates are held under Law 1008.²⁰¹

This swelling of the prison populations has negatively impacted on the rights of the child. The Inter-American Commission, upon visiting the prisons, highlighted the fact that “the precarious state for prison infrastructure, sanitation, and security has heightened the overcrowding problem”.²⁰²

c. *The legal implications on the right of the child*

Having outlined some of the main problems that exist in relation to the prison conditions in Bolivia, and the causes behind these problems, an assessment will be made on how the conditions of the prisons affect specifically the rights of the child and the best interests of the child.

d. *The right to life, survival and development*

As noted previously, in Europe young children are only permitted to live in prisons with their mother. This is despite the fact that under Article 18 of the CRC the upbringing of children is the duty of both parents. In Bolivia, the children may reside in prison with either their fathers or mothers. The only restriction is that men cannot remain in the women's prisons and are limited to visiting two days a week. However women are permitted to live in the men's prison of San Pedro with the children and inmates.

The conditions affect the security of the prison. Most notably, there is a lack of separation in the prison between those serving a sentence, those awaiting trial, offenders guilty of serious violent crimes and those convicted of less serious or nonviolent crimes. The fact that there is no security present within the prison of San Pedro increases the security risk to the children. It is estimated that 70% of the inmates are in prison for nonviolent crimes and 30% for more serious crimes.²⁰³ The prison is divided up according to what the prisoners can afford to pay for their cells. The lack of security enforced by the guards, who remain outside the prison, results in a prison that is self-regulated by the prisoners, causing what has been referred to as “cyclical violence”.²⁰⁴ Furthermore, prisoners who cannot afford to buy a cell for themselves and their families live on the streets of the prisons or sleep on the floor in overcrowded cells:

*Inhumane conditions characterize prisons of all sizes and security level. Basics such as mattresses can only be bought – often at unaffordable prices. In Bolivia's San Pedro prison, one of the country's largest, some inmates can “buy” their own cells but most are crammed into tiny airless spaces or sleep on stairs and in hallways. The children of inmates living in the prison ferry weapons and drugs in and out, and many of those in the facility's clinic lie on the floor.*²⁰⁵

It is evident that daily life in a prison such as San Pedro, with 1,500 inmates and no guards or secured areas for children, poses a threat to life and survival. In 1996 a child in the prison was raped and killed, and although there have been no recorded incidents since that date, staff at the prison have noted that instances of violence do still occur within the prison. In an attempt to secure the child's

201 Interview with Gardy Costas at the Office of the Ombudsperson, La Paz, Bolivia, 30 May 2007

202 Inter-American Commission on Human Rights (2006) Press Release No. 48/06: IACHR checks situation of persons deprived of liberty in some jails in the Republic of Bolivia, available at <http://www.cidh.oas.org/Comunicados/English/2006/48.06eng.htm> (accessed 8 August 2009)

203 Interview with Carlos Barrientos Jimenez, Jefe de Gabinete (the Ombudsperson) at the Office of the Ombudsperson, La Paz, 30 May 2007

204 Interview with Carlos Barrientos Jimenez, Jefe de Gabinete (the Ombudsperson) at the Office of the Ombudsperson, La Paz, 30 May 2007

205 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.915

welfare a rule was brought in to ensure that the fathers collect their children from the prison gates after school. However this has not been enforced and there is no control once the child is inside the prison.

The women's prison of Obrajes seems to pose less of a risk to the life and survival of the children. It does not suffer the severe overcrowding of San Pedro. Moreover, male and female security staff work inside the prison. The fact that there are fewer drugs inside the women's prison and that traditionally women commit less serious offences than men (usually nonviolent, usually relating to drugs or the falsification of papers) also contribute to a more secure environment for children. Obrajes is better controlled and the rule that children beyond the age of six may not live in the prison is largely enforced. In San Pedro they are currently phasing out the presence of older children in the prison. At the time of writing there are only two children above 6 years of age reported to be living in Obrajes, both for medical reasons.

Over the past two years, access to medical care for the children has been provided largely by a voluntary paediatrician who visits the children in each of the prisons on a weekly basis. Medical supplies are limited and the doctors often rely on NGOs and other donations. In relation to nutritional and dietary requirements there is limited food provided for children. Meals are prepared by inmates, but the paediatrician found that she often had to treat the children for malnutrition. A variety of factors including neglect by the mother and inadequate nutrition in the meals contributed to the malnutrition.²⁰⁶

Both Obrajes and San Pedro do not adequately provide for, or assist with, the development of the child. It was noted by social workers at the prison that in relation to emotional and behavioural development the children, impressionable by nature, picked up the anti-social behaviour of their parents and inmates.²⁰⁷ Pursuant to Article 84 of the Minor's Code, the prisons must contain at the very minimum a *guarderia* (crèche facility). Located at the centre of San Pedro, the *guarderia* consists of a medium size room (approximately 9 x 8 metres) with three staff members. Approximately 80 children attend this facility twice daily. New facilities were under construction during the visit in 2007. In Obrajes the facilities for children are better and, with fewer children present in the prison, they receive greater attention. In San Pedro the ratio of adults to children is 7:1, while in Obrajes it is 3:1. The paediatrician working in the prison commented that the children sleep with their mothers in dormitories, which means that the children may be cared for by other mothers if they suffer from neglect by their own.²⁰⁸ However, it was observed during the visit that for the most part, the children were left unstimulated, playing on their own. Notwithstanding sporadic educational programmes provided by NGOs and church organisations for both mothers and children, there seemed to be little in the way of educational interaction with the children.

e. *Right to family care, company and membership*

In recognition of the importance of maintaining family ties, children under six are permitted to reside in the prison with their parents. The Ombudsperson considered that in principle it is good practice for the child not to be separated where the conditions are suitable for the child to live in the prison.²⁰⁹

f. *Non-discrimination*

For the children living in San Pedro and Obrajes prisons, the fundamental right not to be discriminated against on the basis of the actions of their parents is violated. Only three of the

206 Interview with paediatrician, Obrajes prison, La Paz, Bolivia 1 June 2007

207 Interview with social worker, San Pedro prison, La Paz, Bolivia, 1 June 2007

208 Interview with paediatrician, Obrajes Prison, La Paz, Bolivia, 1 June 2007

209 Interview with Carlos Barrientos Jimenez, Jefe de Gabinete (the Ombudsperson) at the Office of the Ombudsperson, La Paz, Bolivia, 30 May 2007

schools in La Paz will accept the children living in these prisons. Both the Ombudsperson and the prison-school liaison officer noted that the children often do not mention where they live out of fear. Both conceded that they may be discriminated against by teachers as well as by the other students and parents.²¹⁰ It was also noted that the children who live in the prison do not mix with the other children in the school and that their behaviour is different.

g. *Protection*

As previously discussed, the right to protection has been described as the need to protect children from various forms of abuse and mistreatment. It requires that children be protected against all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. Many of the provisions introduced to ensure that children are protected remain unimplemented. During a visit to the prisons, it became apparent that the level of security deteriorated significantly during the night and that the children were subjected to severe cases of abuse, including reports of parents “renting” their children to neighbours. In addition to the sexual exploitation of the children, and in violation of Article 33 of the CRC,²¹¹ the children act as “drug mules”, ferrying drugs in and out of the prison past the guards, often in their lunch boxes or hidden on their bodies. The corruption prevalent among prison guards has partially been cited as an explanation for this, but equally the potential negative impact on children placed under intrusive searches every time they leave and enter the prison would be damaging.

h. *Empowerment*

The right to be heard and the right to education have been referred to as the most important empowerment rights in relation to children living in prison with their parents. Attending school and participating in educational programmes may often be at risk owing to the children’s fear of discrimination, stigmatisation, bullying and isolation. It was further noted by social workers at the prison that the influence of their surroundings, namely the parents and others in the prison, was detrimental to their development, as they did not actively support the education of children.

In relation to Article 12 of the CRC, concerning the right to be heard and to express an opinion in cases which involve children, it seems that there is only a very superficial implementation of this right. For the children not to live in the prison they must themselves actively initiate a request for foster care or for an alternative. There is no consultation of the children following their parent’s imprisonment to inform them of their rights and options and to explain to them the available alternatives.

i. *Reform: The strengthening of the organs of the State*

The Inter-American Commission on Human Rights has stated that in its view “the situation of Bolivian jails calls for a governmental response determined through dialogue and coordination among the branches of government, with participation by the community through its various organisations and institutions. [The Commission] urges the executive, judicial and legislative branches of government in the Republic of Bolivia to promote dialogue and inter-agency discussion aimed at correcting the human rights situation.”²¹²

210 Interview with school liaison officer, San Pedro Prison, La Paz, Bolivia, 1 June 2007

211 Article 33 prohibits the use of children for trafficking drugs.

212 Inter-American Commission on Human Rights (2006) *Press Release No. 48/06: IACHR checks situation of persons deprived of liberty in some jails in the Republic of Bolivia*, available at <http://www.cidh.org/Comunicados/English/2006/48.06eng.htm> (accessed 8 August 2009)

An underlying weakness of the courts system is central to the problems faced by the Bolivian prison system. Strengthening and supporting the judiciary is key to instituting reform. Re-education of members of the judiciary on the benefits of alternatives to prison sentences, including suspended sentences and conditional release in cases of petty crimes and first time offenders, would be an important step in improving the system. In the case of Chile, suspended charges for first time offences was introduced to reduce overcrowding on the premise that should the offender reoffend, they would be charged for two counts on the next occasion.²¹³

As highlighted by the Ombudsperson in Bolivia, central to the problems of overcrowding and the lack of cases being tried is the very critical lack of defence lawyers. The position of legal defence should be improved, the quantity of public defenders increased and the quality of the service provided enhanced through training. Several officials at the Ombudsperson's office and the Ombudsperson himself have claimed that it is the lack of defence lawyers that explains the delay in commencing prosecution proceedings. In his research on the subject, Mark Ungar argues that "paucity of defenders is a principal reason that conditional release is not granted to many eligible prisoners".²¹⁴

The reform of the criminal code, in the case of Bolivia a reform of the controversial Law 1008, is necessary to reduce the use of preventative detention and other infringements of due process, and in the long term reduce overcrowding of prisons. Reform of penal process codes has been cited as another positive measure that can improve the chronic delay in processing cases.²¹⁵

j. *Reforming other institutions*

The role of the Office of the Ombudsperson is a positive measure in highlighting the human rights deficit. The Office should receive support for both its monitoring and reporting of human rights abuses, as well as its advocacy of human rights and dissemination of information at all levels of society. Through interviews it became apparent that the Office of the Ombudsperson lacked capacity to take individual cases even as *amicus curiae* briefs or test cases, and this appears to be a significant barrier to successfully fulfilling its mandate.

In relation to children living in the prison with their parents, the Ombudsperson could use its role to assess the best interests of the child on a case-by-case basis and to initiate contact with the children. Furthermore, the office could raise awareness of the important role schools play in the lives of the children and the need to combat discrimination. This is especially important because for many of the children living in Bolivian prisons the school day is often their only life beyond prison walls. The importance of the Ombudsperson maintaining independence from the State organs in order to meaningfully fulfil its mandate of investigating human rights abuses cannot be over-emphasised.

The role played by external actors must also be considered. In this case, the pressure to introduce counter-narcotic measures that have impacted negatively on the prisons by adding to the severe overcrowding is a particular issue.

k. *Supporting NGOs and civil society*

Finally, the role of civil society and NGOs must receive continued support. In many of the cases, it is individual volunteers, NGOs and church members that organise programmes and provide essential services within the prisons for adults and children. Their work raises awareness of the plight of the children, mitigates the negative effects and contributes to reform.

213 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.917

214 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.918

215 Ungar, Mark (2003) 'Prisons and Politics in Contemporary Latin America' in *Human Rights Quarterly*, Vol. 25, No. 4, p.920

4.9 General recommendations for developing countries

The endemic failings of policy and procedure, fuelled by political instability, the economic climate and widespread poverty, aggravate the problems within the prison walls. These problems, though examined only in relation to Bolivia, are recurrent themes in developing countries. In the case of Paraguay, the UN Special Rapporteur on Torture noted that many of the problems he observed in the prisons are caused by a lack of funds and encouraged international donors to support the government in its serious attempt to improve prison conditions.²¹⁶ In the case of children living in the prisons in Thailand, the Committee on the Rights of the Child urged the State to seek assistance from, among others, UNICEF and other UN bodies in order to ensure that living conditions in the prisons were adequate for the development of the child.²¹⁷

States should strive to implement reforms within the organs of the State and other relevant actors. They should endeavour to remove children from those prisons which adversely affect the child's development and to institute reform in the prisons where children remain. The Obrajes prison, for example, may be adequate for a child in the short term if certain reforms are implemented. In other situations the State should provide alternative care while ensuring that contact is maintained between the child and the parent through regular visits. The Committee on the Rights of the Child noted in its concluding remarks to Cambodia that "the social workers must facilitate regular visits to the mother or take the children to visit the mother themselves in accordance with the prison rules, while shielding the children from any sordid sight".²¹⁸

4.10 Conclusion

When reflecting on a universal solution to a universal problem such as the imprisonment of a parent, it is clear that the challenges and obstacles countries are faced with differ significantly. Each country has different priorities when working towards realising the various categories of human rights: *life, survival, development, membership, empowerment and protection*. In the case of children living in prisons in Bolivia, it was evident that the rights to protection, life and survival required special attention.

Both Bolivia and countries across Europe, as parties to the CRC, cite Article 9 of the Convention, which provides for the child's right not to be separated from the family, and present arguments of attachment theories in order to justify keeping children in the prison with their parents. Indeed, it is submitted that, based on research carried out by Catan and others, it seems that with adequate facilities the prison environment may not cause as much long term damage as separating the parent from the child where separation leads to multiple carers and lacks stability. Arrested development that may result from lack of stimulation in the prison may be quickly overcome upon release, depending, of course, on the length of time spent in the prison facility and the care available once the child has left the prison.

In developing countries, there needs to be greater focus on reforming the judicial institutions, as well as reducing overcrowding and improving facilities and conditions in the prisons, in particular security, hygiene, nutrition and infrastructure. In Europe, there is a need to better consider alternatives to imprisonment, and where a custodial sentence is unavoidable, to ensure that the best interests of the child, in a holistic sense, are indeed a primary consideration.

216 United Nations (2006) *Press release: Special Rapporteur on Torture ends mission to Paraguay*, available at <http://www.unhchr.ch/hurricane/hurricane.nsf/0/509BA4239456B976C12572350077E647?opendocument> (accessed 11 August 2009)

217 Committee on the Rights of the Child, *Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: Concluding Observations: Thailand, CRC/C/THA/CO/2*, para.48, available at http://www.ohchr.org/english/bodies/crc/docs/co/CRC_C_THA_CO_2.pdf (accessed 20 May 2007)

218 Committee on the Rights of the Child, *Consideration of the reports submitted by States Parties under Article 44 of the Convention: Convention on the Rights of the Child: initial reports of States Parties due in 1994: Cambodia, CRC/C/11/Add.16*, para.101

5 Concluding thoughts

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. As noted in the White Paper for Social Welfare, prepared by the Ministry for Welfare and Population Development in South Africa, “the well-being of children depends on the ability of families to function effectively, because children are vulnerable they need to grow up in a nurturing and secure family that can ensure their survival, development, protection and participation in family and social life. Not only do families give their members a sense of belonging, they are also responsible for imparting values and life skills. Families create security; they set limits on behaviour; and together with the spiritual foundation they provide, instil notions of discipline. All these factors are essential for the healthy development of the family and of any society.”²¹⁹ The role of the family is stifled when the judicial organs of the State, citing the interests of society at large, imprison one or both parents.

Unfortunately, to date there has been a lack of research carried out on the effects of imprisonment on the rights of the child. From the outset, criminal justice systems globally must better consider the use and purpose of prisons. Promoting rehabilitation rather than retribution would be a real step towards humanising the criminal justice system²²⁰ 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.”²²¹

During sentencing the child’s best interests must be considered and more imaginative, community based, restorative justice approaches should be utilised in place of prison terms. Where these alternatives are not an option, if the child’s best interests dictate regular contact with the parent, then all must be done to facilitate such contact in accordance with Article 9 of the CRC. This contact must be assured in a child-centred way, always cognisant of the effects and risks to all the child’s rights including, in particular, the child’s right to development.

Developing countries are confronted with the same problems as developed countries, only with greater obstacles to overcome. The root causes must be confronted, the overburdened judicial system perpetuating human rights violations must be addressed, and the basic rights of prisoners and their families must be guaranteed.

In applying the best interests principle, the courts engage in a balancing act, weighing up the competing rights and interests of children of offenders with those of society at large. However, it is submitted that by considering the best interests of the child and promoting, protecting and fulfilling the rights of the child, the best interests of society are also served. As we have seen, applying the best interests principle may reduce the risk of crime perpetuating from generation to generation.²²² 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

219 Ministry for Welfare and Population Development (1997) *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa*

220 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”.

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

222 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

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*."²²³

223 Shaw, Roger (1992) 'Fathers and the orphans of justice' in Shaw, Roger (ed.) *Prisoners' Children: What are the Issues?* (London: Routledge), p.48

QUNO offices:

In Geneva:

13 Avenue du Mervelet
1209 Geneva
Switzerland

Tel: +41 22 748 4800
Fax: +41 22 748 4819
quno@quno.ch

In New York:

777 UN Plaza
New York, NY 10017
USA

Tel: +1 212 682 2745
Fax: +1 212 983 0034
qunony@afsc.org

Orphans of Justice

A Legal Analysis

There is an increasing body of research examining the impact of parental imprisonment on children. But how is this affecting court decisions and how are judges utilising developing understandings of a child's best interests to interpret the international standards guaranteeing their rights? This paper takes a global perspective on the issue, analysing case law and practice around the world.



A young girl being searched as she returns from school to her home in San Pedro Prison, La Paz, Bolivia

