



**UNIVERSITY OF  
KWAZULU-NATAL**

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**INYUVESI  
YAKWAZULU-NATALI**

**Does South African Law and Policy Consider the Best interests of the Child when  
Sentencing Parents?**

**By**

**Nqobile Mbatha**

**209507852**


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**Supervisor: Ms RB Bernard**

## DECLARATION

I declare that this dissertation is my own work. Citations, references and borrowed ideas have been duly acknowledged. It is being submitted for the degree of Masters in Law, Child Care and Child Protection, University of KwaZulu Natal, Durban, South Africa. None of the present work has been submitted previously for any degree or examination in university.

  
**Signed:** .....

**Date:** 08/06/2022

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

|        |   |
|--------|---|
| ACERWC | African Committee of Experts on the Rights and Welfare of the Child |
| ACRWC  | African Charter on the Rights and Welfare of the Child              |
| ACT    | Australian Capital Territory  |
| CRC    | Convention on the Rights of the Child                               |
| DRC    | Declaration of the Rights of the Child                              |
| SA     | South Africa  |
| UDHR   | Universal Declaration of Human Rights                               |
| US     | United States   |
| WADCS  | Western Australia Department of Corrective Services                 |

## **ABSTRACT**

South Africa has a high number of children with incarcerated parents. A number of factors have been found to have contributed to this phenomenon, including retributive justice policies. These policies have without doubt impacted on family structure, and even though there are laws and legislation that make provision for the child's best interests to be of paramount importance in all aspects concerning children, there is still a lot that needs to be done to address the issue of children with incarcerated parents.

It is important that further research is conducted on the conceptions of incarcerated parents and the impact that has on children. This study focuses on determining whether South African law and policy adequately considers the best interests of children when sentencing their parents. Research into the law and policies in different countries was undertaken. Most findings indicate that different countries have adopted varying policies with regard to children's best interests.

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# CHAPTER ONE

## INTRODUCTION

### 1.1 Background of the study, and the problem statement

Various international and national laws exist to promote children's rights and protection, mainly to ensure that the integrity of the children is preserved. South Africa (SA) is a party to the United Nations Convention on the Rights of the Child (UNCRC)<sup>1</sup>, and has implemented legislation<sup>2</sup> and policies which ensure that children's rights are protected. One of the core principles of the UNCRC is that children must be protected and treated as human beings with equal rights. The principles of the UNCRC emphasise that the child's best interests must be of major consideration in all actions taking place in courts of law, social welfare institutions or legislative bodies. Hence, this study examined South African laws and policies to determine whether these consider children's best interests when sentencing their parents.

Parents' incarceration in children's separation from their parents. This results in denied guidance, care and protection.<sup>3</sup> The separation may cause emotional and psychological trauma, detrimental to the child's growth and development.<sup>4</sup> Children with incarcerated parents are also reported to be more likely to suffer from depression, misconduct, drug use, financial hardships and attention problems.<sup>5</sup> This in turn can directly impact on their future as they are also more likely to drop out of school, or even end up in jail themselves. Hence, courts need to consider children's best interests when sentencing their parents, because the ramifications for their children are far-reaching

The traumatic and detrimental consequences for children of incarcerated parents are demonstrated in a growing body of empirical research. The ever-increasing evidence emphasises the importance of ensuring the best interests of the child is taken into account when a parent is to be prosecuted and sentenced. By ensuring that the child's best interests is

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<sup>1</sup>United Nations (1989), Convention on the Rights of the Child (hereafter referred to as UNCRC).

<sup>2</sup> Children's Act No 38 of 2005.

<sup>3</sup> J Murray & DP Farrington 'The effect of parental imprisonment on children' in M Tony (ed) *Crime and Justice: A Review of Research* (2008) vol 37 133.

<sup>4</sup> Ibid.

<sup>5</sup> Eric Martin 'Hidden consequences: the impact of incarceration on dependent children' March 1 2017 [nij.ojp.gov](http://nij.ojp.gov):

considered, children of incarcerated parents can grow in an environment that allows them to reach their full potential.

## **1.2 Outline of relevant South African law and policy on children with incarcerated parents**

### **1.2.1 The Constitution of South Africa, 1996**

The Constitution of South Africa, 1996 provides for the promotion of human rights. Section 28 of the Constitution provides for the rights of children.<sup>6</sup> It also stipulates that the best interests of the child should be dominant in all situations children where their parents are incarcerated. Hence the Correctional Services Act 111 of 1998 stipulates in section 20 that newborns and young children must remain with their incarcerated mothers until they are five years old.

Children cannot therefore be alienated from their parents, unless the prevailing conditions dictate that this will be in their best interests.<sup>7</sup> According to Currie and De Waal, the State must ensure that the child is placed in an environment that is going to contribute to his or her growth and wellbeing.<sup>8</sup> However, the question is, who will be responsible for this parental care where parents are incarcerated, since they are then not in a position to exercise their rights and corresponding responsibilities? Every parent is responsible for raising their children. Incarcerated parents may be willing to remain in contact with their children; however, the Correctional Centres' systems and policies prevent this, which means that parents do not have the protection of the Constitution to exercise their parental rights and responsibilities towards their children. One can make the argument that when passing judgment on primary caregivers, the courts are obliged to balance the interests of society in ensuring that the wrong actions of the offender are appropriately punished, but also protecting the best interests of the child.<sup>9</sup>

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<sup>6</sup> Section 28 of the Constitution of Republic of South Africa, 1996 (hereinafter the Constitution).

<sup>7</sup> Ibid (1)(b).

<sup>8</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (2017) 421.

<sup>9</sup> Admark Moyo 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa' (2013) *South African Journal on Human Rights* 314.

Moreover, constitutionally, the child's best interests must be a priority in all matters affecting the child.<sup>10</sup> Hence, when imposing a sentence on the parent, the court must consider the influence that the parent's incarceration will have on the child.<sup>11</sup>

### **1.2.2 Children's Act 38 of 2005**

The Children's Act 38 of 2005 lists factors that the court should consider in determining the best interests of the child.<sup>12</sup> Section 18 of the Act sets out principles linked to the care and protection of children. It also describes parental responsibilities and rights of both married and unmarried parents.<sup>13</sup>

The Children's Act regulates the contact, care and protection of children. Functional families are considered the most appropriate place for children to develop to their full capabilities, unless one parent poses a danger to the child or is negligent towards the child. The Children's Act regulates the care and protection of the child, and links this care with the Constitution and international law. The principles set out in the Children's Act mandate that every child has a right to be cared for, whether by family, parents or through appropriate alternative care. Furthermore, the Children's Act stipulates that all children must be protected and safeguarded from any form of abuse or maltreatment that may negatively impact upon their growth and progress.<sup>14</sup> These rights consider suggest programme for preserving a child's family structure, such as promoting appropriate communication skills in families; promoting the development of proper parental skills; providing psychological therapeutic interventions for children; and ensuring the prevention of neglect, exploitation and abuse of children.<sup>15</sup>

### **1.3 Aims of the study**

Although the position of incarcerated parents has developed over time in South Africa,<sup>16</sup> the impact this has on children has not been given consideration by the criminal courts. This study is therefore aimed at determining whether an SA court is legally obliged to consider the best interests of the child when determining the sentence of a primary caregiver. Furthermore, this study analyses SA in comparison with other countries to determine best practices. Lastly,

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<sup>10</sup> Section 28 of the Constitution (2).

<sup>11</sup> *S v M* (2008) 3 SA CC 1989 (Hereinafter *S v M*).

<sup>12</sup> Section 7 of the Children's Act 38 of 2008 (hereinafter the Children's Act).

<sup>13</sup> Ibid Section 18.

<sup>14</sup> Section 28 of the Constitution of Republic of South Africa, 1996

<sup>15</sup> Children's Act s7

<sup>16</sup> E Coetzee 'Can the application of the human rights of the child in a criminal case result in therapeutic outcome?' (2010) vol 13 (3).

it attempts to determine whether the incarceration of parents impacts on the lives of children, and whether there are additional factors that a court should consider when determining the sentence of a parent.

#### **1.4 Objectives of the study**

The purpose of this research is to explore whether the South African legal framework considers the child's best interests when imposing a sentence on a parent, and to explore the impact and practical implications of the application of the child's best interests. The study achieves this by analysing primary and secondary sources.

The study has the following objectives:

- 1.4.1 Determine whether a court has a legal duty to consider the best interests of a child when deciding upon the sentence of a parent.
- 1.4.2 Explore the factors that the court should consider in deciding upon the sentence of a parent.
- 1.4.3 Evaluate the impact of parents' incarceration on the lives of children.
- 1.4.4 Determine how foreign countries have dealt with the child's best interests when determining a parent's sentence.

#### **1.5 Research questions**

The study explores the following research questions:

- 1.5.1 Does a court have a legal duty to consider the child's best interests when determining the sentence of a parent?
- 1.5.2 What factors should a court consider in determining the sentence of a parent?
- 1.5.3 Does the incarceration of a parent have an impact on the lives of children?
- 1.5.4 How have other countries dealt with the best interests of the child when determining the sentence of a parent?

#### **1.6 Research methodology**

The method used in the study was desktop research. The research was based on primary sources such as international and regional instruments, national legislation, policy and case law. It also looked at secondary sources such as books, internet sources and articles by South African and foreign academics. Following the completion of the desktop research, the documents obtained from all the sources were analysed.

## 1.7 Theoretical framework

The research was informed by four different theories: attachment, identity, psychoanalytic and ethological theory.<sup>17</sup> These theories provide a foundational assessment and intervention framework to understand the repercussions of incarceration for families and children.

### 1.7.1 Attachment theory

The literature regarding children of imprisoned parents proclaims that these children are expected to experience more psychological, emotional and behavioural development problems than children whose parents are not in prison.<sup>18</sup> Criminal involvement, aggressive behaviour, depression, withdrawal, and concentration difficulties have been mentioned as behaviours experienced by children with incarcerated parents in the community.<sup>19</sup>

Possible contributing factors to the problems mentioned above are the lack of attachment between the children and their incarnated parents as well as lack of care and protection.<sup>20</sup> These children tend to have poor emotional skills due to the separation from their parents, which then impacts on their development and wellbeing.

The attachment theory is in line with the concept of ‘the child’s best interests’ because it underpins the importance of meeting the child’s emotional needs, which is a responsibility of parents, caregivers and family members.<sup>21</sup> The theory posits that imprisonment of the parent or alternative guardian or caregiver of a child can affect the stability of the child’s life, leading to behavioural problems.<sup>22</sup> Childcare in an institution does not meet the normal standard of care a child would receive in their home environment. The absence of bodily

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<sup>17</sup> D Papalia & S Wendos-Olds *A Child’s World: Infancy Through Adolescence* (1996) McGraw-Hill NY (7ed) 272.

<sup>18</sup> B Western M Pattillo & D Weiman ‘Introduction’ in *Imprisoning America* (2004) Russell Sage Found. 7ed: 13.

<sup>19</sup> Ibid.

<sup>20</sup> E Coetzee ‘Can the Application of the Human Rights of the Child in a Criminal Case Result in Therapeutic Outcome?’ (2010) vol 13 (3) 272.

<sup>21</sup> Goshin ‘An international human rights perspective on maternal criminal justice involvement in the United States’ *Psych Pup Pol Law* (2017) vol 23(1) 59.

<sup>22</sup> Ibid.

contact between child the parent means that the parental figure cannot exercise physical authority over the child. It also means that children do not have direct guidance and direction from their parents. Furthermore, the caregiver cannot modify their teaching and guidance to accommodate the child's changing needs, evolving abilities, and best interests.<sup>23</sup>

### **1.7.2 Identity theory**

The identity theory is the social-psychological theory found in sociology that tries to understand the interaction between identities, their relations, foundations, and the community or society.<sup>24</sup>

The identity theory is based on the idea that there is an interplay between the circumstances, and the environment in which an individual exists, and how this influences their purpose and place in society.<sup>25</sup> It examines how different societal structures influence an individual's identity and behaviour, and also highlights the influences that impact behaviour, and how face-to-face interaction is maintained.

When establishing if the child's best interests is being considered in the sentencing of parents, the identity theory measures the varying degrees of involvement of the parent after a child's life changes, and its influences on family relationships.

Family is the foundation upon which a child is argued to develop his or her identity, and therefore a solid family structure and harmony are important in the development of positive self-esteem in children.<sup>26</sup> This is regarded as an emotional bond that family members have towards one and other, and the behaviour of children is often characterized by their family structure.

### **1.7.3 Psychoanalytic and ethological theory**

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<sup>23</sup> Ibid.

<sup>24</sup> S Stryker 'Identity theory: developments and extensions' in K Yardley & Simmons CW PhD (2000) *Children of incarcerated parents* (Electronic version) T Honess (Eds ) Self Identity John Wiley *Psychosocial Perspective* John Wiley 94.

<sup>25</sup> S Stryker 'Identity Theory: Developments and Extensions' in K Yardley & Simmons ,C,W PhD (2000) *Children of incarcerated parents* {Electronic version } T.Honess( Eds )self identity :Pshosocial perspective (pg 95 ) New York .John Wiley .

<sup>26</sup>E Coetzee 'Can the application of the human rights of the child in a criminal case result in therapeutic outcome?' PER (2010) Vol 13 (3) 272.

The psychoanalytic and ethological theory is based on the concept that a mother's affection is crucial in developing the social and cognitive skills of a child.<sup>27</sup> As mentioned in the attachment theory, the attachment between mother and child is crucial for the child's development. It is therefore plausible to suggest that the majority of problems that individuals have in later life stem from their childhoods.

Without proper nurturing and care, children are at great risk of developing what is known as 'disorganised attachments'.<sup>28</sup> Children who develop disorganised attachments are at risk of long-term troublesome outcomes, which include internalising and externalising disorders, and dissociation from society.

## **1.8 Overview of subsequent chapters**

This dissertation consists of 6 chapters.

**Chapter 1:** Provides a brief background and the problem statement of the study. It also provides the aims and objectives of the study, the research methodology and the theoretical framework.

**Chapter 2:** Provides a critical analysis of literature relating to the best interests of the child. The chapter also provides a critical review of the impact of incarceration on a child.

**Chapter 3 :** Provides the legal framework for the study. International and regional conventions such as the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, concerning children with incarcerated parents, are analysed. Further, national legislation and case law relating to the topic is discussed in this chapter.

**Chapter 4 :** Deals with the consequences and impact of incarceration on the child.

**Chapter 5:** An analysis of foreign legislation is undertaken to draw lessons to be considered and implemented in South Africa.

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid, 413

**Chapter 6:** Summary and Conclusion. In this chapter, the dissertation is summarised with emphasis on the results obtained, recommendations and conclusion.

## **CHAPTER TWO**

### **SHOULD THE BEST INTERESTS OF A CHILD BE CONSIDERED IN DETERMINING AN APPROPRIATE SANCTION FOR AN INCARCERATED CAREGIVER?**

#### **2.1 Introduction**

This chapter intends to discuss and evaluate the existing literature on whether the South African courts consider the child's best interests when sentencing parents. This chapter intends to explain the discoveries of previous studies on the research topic and to emerge with an understanding of the nature of the approaches used, in order to bring together and analyse the information for this study. Furthermore, a brief review and context will be set out in relation to children's best interests in situations where their parents are placed in prison.

#### **2.2 Historical development of the rights of the child**

An overview of the child's rights is necessary in view of the many human rights instruments that have been introduced to ensure the protection of the rights of children. Since the beginning of the twentieth century there have been developments in international law to ensure that the rights of children are protected, and a multitude of legislation has been developed and amended by member states in order to support the protection of children.<sup>29</sup>

##### **2.2.1. The Declaration of the Rights of the Child, 1924**

The Geneva Declaration of child's rights was first initiated in 1924; this was an international declaration that served to address the rights of the child. The declaration specified that mankind should give the child the best possible quality of life. The Declaration was the main document that guided international focus towards children's rights.<sup>30</sup> It was developed after the horrors of World War 1 which prompted the international community to realise that

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<sup>29</sup> E Osifunke 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underlines and repeat the Convention on the Rights of the Child (CRC)'s provisions?*Examining the Similarities and the Differences between the ACRWC and the CRC* July (2015) 145.

<sup>30</sup> Cohen C (1989)'Introductory note :United Nations Convention on the rights of the child 28 ILM1448.

children need to be protected. The paramount importance of protecting children was further emphasised in the 1948 Universal Declaration of Human Rights.

### **2.2.2. The Universal Declaration of Human Rights (UDHR), 1948**

The Universal Declaration of Human Rights of 1948 (hereinafter UDHR) is a detailed exposition of human rights applicable inclusively to all persons, and most importantly those pertaining to children. The Universal Declaration of Human Rights in 1948 was an advancement of rights after the 1924 Declaration revealed shortcomings in the protection of human rights, which had to be expanded. There was no global benchmarking for human rights until the end of World War II.<sup>31</sup> The 1948 Declaration, pointed out that the 1924 Declaration highlighted children's rights and special care.

MacDonald<sup>32</sup> notes the distinction that, as opposed to the UN Charter, the UDHR mentions children within the context of a family as a natural and fundamental unit of society, and that it is thus justifiable for them to receive protection from both society and the state.

### **2.2.3. Declaration on the Rights of the Child, 1959**

The UDHR is critical as it is child-specific. The Declaration states that the child ought to be entitled to every right set out in the Declaration, with no exemption and separation.<sup>33</sup> Osifunke stated that the Declaration used the term 'entitled' which is arguably analogous to the term 'right'.<sup>34</sup> Also significant is the phrase 'the child must be given' used in the 1924 Declaration of Geneva. In contrast, the 1959 Declaration of the Rights of the Child states that 'the child shall enjoy all the rights set forth in this declaration'.<sup>35</sup> This variation in the wording illustrates a shift from influence implemented in the Declaration of Geneva to *entitlement* or *right* in the 1959 Declaration.

Fitzgibbon<sup>36</sup>, therefore, argues that this marks a change in how children were treated. They were no longer considered as tools of international law but were viewed as subjects of the

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<sup>31</sup> Lee Swepston, 'The international labour organization and international human rights system,' in Scott Sheeran and Sir Nigel Rodley (eds) *Routledge Handbook of International Human Rights Law* 2013 340

<sup>32</sup> MacDonald *The Rights of the Child: Law and Practice* (2011) 18.

<sup>33</sup> Geraldine Van Bueran *The International Law on the Rights of the Child*, 1998. Chapter 14, pg 388

<sup>34</sup> Osifunke Ekundayo. *International Journal of Humanities and Social Science* Vol.5No.7(1) July 2015

<sup>35</sup> Geraldine Van Bueran. *The International law on the rights of the child* (1998), Chapter 2 33.

<sup>36</sup> T Fitzgibbon 'The United Nations Convention on the Rights of the Child: are children really protected? a case study of China's implementation' *Loy L.A. Int'l & Comp L.J* vol 20 . 332.

international law.<sup>37</sup> The 1959 Declaration has been described as groundbreaking by Tallying, Alston and Tobin, and provided the foundation for the drafting of a convention on children's rights.<sup>38</sup> Even though the 1959 Geneva Declaration served as a foundation for children's rights treaties, the difference between the 1959 Declaration and the CRC is that the former is not binding whereas the CRC is a legally binding human rights treaty.<sup>39</sup>

#### **2.2.4 .Convention on the Rights of the Child (CRC) 1989**

The UN General Assembly implemented the Convention on the Rights of the Child on 20 November, 1989.<sup>40</sup> The CRC is the most broadly endorsed human rights treaty in the world. The CRC does not put children's rights inside a positioned structure. The CRC is unique in that it seeks to protect the fundamental human rights at a broader scope which includes social, cultural, economic, political and civil rights all in one treaty.<sup>41</sup> The best interests of the child in the CRC serves as a guide on how to apply and preserve the principles of family law, importantly, when making decisions regarding children. It is in a child's best interests that he or she is protected from physical or psychological harm, abuse, neglect and family violence, and that both parents have meaningful contribution in the child's life. In this study, the importance of preserving the child's best interests when incarcerating his or her parents, is established.

#### **2.2.5.African Charter on the Rights and Welfare of the Child, 1990**

The African Charter on the Rights and Welfare of the child (ACRWC) was adopted by the Organisation of African Unity in 1990. The OAU legally became the African Union (AU) in 2001<sup>42</sup>. The ACRWC focuses on children's rights in Africa, and also serves as a binding legal treaty developed to protect the best interests of the child principle. The ACRWC serves as a monitoring tool for African countries to adopt the best interests principle and enforce it in their legal frameworks.

### **2.3.The best interests of a child**

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<sup>37</sup> Ibid

<sup>38</sup> Tallying Alston & Tobin J 'Laying the foundation for children's rights New York UNICEF 5 accessed on 22 October 2019.

<sup>39</sup>Principle 1 1959 Declaration of the Child.

<sup>40</sup> Cohen C*Introductory Note;United Nations Convention on the Rights of the Child* .(LLM 1989)1448.

<sup>41</sup> Ibid.

<sup>42</sup> African Charter on the Rights and Welfare of the Child, 1990

Best interests of the child is a child rights principle which is found in Article 3 of the UNCRC. This states that ‘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’. Evaluating the best interests of a child means to evaluate and balance “all the elements necessary to make a decision in a specific situation for a specific individual child or group of children”.<sup>43</sup>

The best interests of the child is a universal standard which originally applied in family law. This standard is now a guiding principle in all matters concerning children.<sup>44</sup> The principle was developed to ensure that the needs of children are met, and to ensure the enforcement of law and policy to implement this, and balance the interests of children with those of society. However, like any other rights, the notion of ‘best interests of the child’ has its limitations in a democratic society.<sup>45</sup>

The CRC refers to the best interests of the child as being ‘a primary consideration’.<sup>46</sup> The CRC provides the best provisions intended in relation to the term ‘best interests of the child’.<sup>47</sup> Thus, every decision which affects a child must be made with due deliberation on its effects on the child’s rights and interests. The best interests of the child principle is seen as a right, and one through which a child’s other rights are observed and understood.<sup>48</sup>

The ACRWC Article 4(1) refers to the best interests of the child as being ‘the primary consideration’ in all actions concerning children. The distinction adds up to just a single little word i.e. ‘the’, as opposed to ‘a’ as set out in the CRC; however, it creates a critical contrast in terms of giving weight to the principle.

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<sup>43</sup> Convention on the Rights of the Child general comment on the rights of the child to have his/her best interest taken as a primary consideration art 3.page 3.No.14 (2013)

<sup>44</sup> A Skelton ‘Constitutional Protection of Children’s Rights’ in T Boezaart (ed) *Child Law in South Africa* (2009) 278.

<sup>45</sup> Ibid.

<sup>46</sup> Article 3 of the UNCRC.

<sup>47</sup> J Tomkin ‘Orphans of justice’ *In Search of the Best Interests of the Child when a Parent is Imprisoned: A Legal Analysis* (2009) Geneva: *QUNO* 19. Article 3(1) of the CRC states that “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”.

<sup>48</sup> Ibid.

South Africa's Constitution<sup>49</sup> refers to a child's best interests as being 'of paramount importance' in every matter concerning the child. The South African Constitutional Court, despite giving careful and deliberate consideration to children's best interests, has made it clear that the paramount principle is not an absolute trump over other rights.<sup>50</sup> It is therefore possible to limit the rights of a child (as long as such limitation is practical and justified) against the rights of others.<sup>51</sup>

The Constitution provides that "the child's best interests is of paramount importance in all matters concerning care, protection and wellbeing of the child".<sup>52</sup> These are factors that must be considered where relevant, specifically the "nature of the personal relationship, or any parent and the child and the parents or any caregiver or person" appropriate in those circumstances.<sup>53</sup>

Children's rights can be placed into four categories.<sup>54</sup> The first category is welfare rights, which embraces rights and recipients; these rights include claims to receive positive benefits such as adequate education, housing, health care and economic support.<sup>55</sup> The second category is termed rights of protection. These rights emphasise the need for public intervention in order to protect children from being exposed to various forms of harm, including abuse or neglect by their parents, economic exploitation and various hazardous activities.<sup>56</sup> The third category is the right to be treated like adults; this demands that adults' rights be extended to children on the basis that there is no rational basis for distinguishing between adults and children. The last category is described as rights of autonomy, which calls for greater recognition of the claims of young people to self-determination, their capacity for independent decision-making, and freedom from parental control.<sup>57</sup>

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<sup>49</sup>Section 28 of the Constitution.

<sup>50</sup> *S v M* (CCT 53/06) [2007] ZACC 18.

<sup>51</sup> Principle 1 Declaration of the Child, 1959.

<sup>52</sup> Section 28(2) of the Constitution.

<sup>53</sup> *Ibid.*

<sup>54</sup> D Erasmus 'There is something you are missing; what about the children?' Separating the rights of children from those of their care givers' *SAPL* (2010) vol 25 124.

<sup>55</sup> *Ibid* 125.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* 124.

*Ibid* 133.

The best interests principle is, nevertheless, difficult to both understand and put into practice. Settling on what is in the child's best interests is about foreseeing outcomes and consequences that are challenging to guess.<sup>58</sup> Freeman<sup>59</sup> expresses that the idea is an "indeterminate and that there are different notions of what is in a child's best interests". Skivenes affirms that in "its present status, this principle offers little direction to leaders who need to settle on choices affecting on the existence of children and adults."<sup>60</sup> Moreover, by referring to 'all activities' this provision highlights a helpful act that is required of the State.

The comments of Justice Sachs in *S v M*<sup>61</sup> disclose the challenges of interpreting the best interests principle, as found in the Constitution. On the other hand, one can say that the best interests of the child principle is so broad such that it can be viewed as a principle that covers every best interest to the child but in reality, it does not.<sup>62</sup>

The translation and application of the best interests principle has been a challenge. Judges have therefore had to settle on decisions based on case law and guidelines that occur in public instruments.<sup>63</sup> The outcome is that decision-makers may get an impression that they have little authority and obligation and responsibility when making decisions in the child's best interests.<sup>64</sup> These difficulties are additionally aggravated by the element that the moral, psychological, and legal notions of what is in the child's best interests can battle with one another<sup>65</sup>.

Alston<sup>66</sup> further contends that the decision as to which right carries more weight is based on a burden of proof which illustrates that other practical and acceptable alternatives do not exist.

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<sup>58</sup> D Archard & M Skivenes 'Balancing a child's best interests and a child's views' *Int J Child Rights* (2009) Vol 17 9.

<sup>59</sup> M Freeman 'The best Interests of the child' in A Vande Lanotte *et al.* (eds) *A Commentary on the UNCRC* (2007) *MarNij Pub* 27.

<sup>60</sup> M Skivenes 'Judging the child's best interests: rational reasoning or subjective presumptions' *Acta Soc* (2010) vol 53 339.

<sup>61</sup> *S v M* (Centre for Child Law as *Amicus Curiae*) (2008) (3) SA 232 (CC) 261 (hereinafter *S v M (a)*).

<sup>62</sup> *S v M (a)*.

<sup>63</sup> J Tomkin 'Orphans of justice. In search of the best interests of the child when a parent is imprisoned: a legal analysis' (2009) 24.

<sup>64</sup> *Ibid.*

<sup>65</sup> *S v M* (Centre for Child Law as *Amicus Curiae*) 2008 (3) SA 232 (CC) 261.

<sup>66</sup> P Alston 'The best interest's principle: towards a reconciliation of culture and human rights' *Int J Law & Fam* (1994) vol 8 13.

Tomkin<sup>67</sup> suggests that the phrase ‘the primary consideration’ implies the best interests of the child should come first before other rights, thereby suggesting that child’s rights are superior to others. Therefore, Tomkin give in to that “when a parent is imprisoned, the interests of justice, and 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 his or her parents”.<sup>68</sup>

Despite the fact recognizing the inherent complications in its interpretation and submission, Tomkin<sup>69</sup> illustrates that the principle of the best interests of the child is one that is accepted worldwide. According to Freeman<sup>70</sup> this is because children are vulnerable, hence, the concept of giving their best interests a primary consideration is understandable because if not, the children would otherwise be in danger from adults.

Freeman (2007) states that some authors hold the view that the best interests principle goes hand in hand with the welfare principle. However, a question that may arise is whether the promotion of the welfare of children should be treated as equal to the protection of their rights. A distinction must be made between protecting children rights and their welfare. For instance, in the case of the *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) the Constitutional Court assumed that the caregivers were able to provide for the welfare of the children concerned, without taking into consideration that the children themselves had an independent right to shelter.<sup>71</sup>

The principal of the child's best interests and a detailed list of children’s rights leads to the creation of two tensions. The first emerges between case-by-case use of the child’s wellbeing standard and the general guideline of applying human rights and protected standards.<sup>72</sup> Currently, a particular child's best interests relies upon the encompassing conditions and that each case is settled on its merits. The second tension arises with balancing the “rights and

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<sup>67</sup> Tomkin ,J (2009) “Orphans of justice .In search of the best interest of the child when a parent is imprisoned:a legal analysis”

<sup>68</sup> Ibid.

<sup>69</sup> Ibid, 19.

<sup>70</sup> Freeman, M (2007).”Article 3,the best interest of the child.in Alen ,A VandeLanotte pg .27

<sup>71</sup> ZACC 19,2001 (1) SA 46 (CC),2000(11)BCLR 1169 (CC) 4 October 2000

<sup>72</sup> Deon Erasmus –“There is something you are missing ;what about the children ?Separating the rights of children from those of their caregivers (2010)25 SAPL ,pg.127

interests of children with the rights and interests of other family members and needs of society.”<sup>73</sup>

According to Du Preez,<sup>74</sup> the addition of children’s rights and the best interests standard has facilitated a move from that of a caregiver or family centred arrangements of common law to that of child centred legal rules. This implies that courts have a duty to consider and balance the rights of children and the rights of members of society.

This raises a question as to whether there is a legal duty for courts to consider the best interests of a child when determining the sentence of the primary caregivers. The next section presents deliberations on legal duties.

#### **2.4 Consideration of the best interests factor in determining sanctions**

International and national law have provided various rights to children, including the child’s right to maintain a relationship with his or her incarcerated parents. Article 39 of the CRC states that “Parties shall take all appropriate measures to promote the physical and psychological recovery and social reintegration of a child from any form of neglect, exploitation or abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment, or armed conflicts”.<sup>75</sup> Importantly, the recovery and reintegration ought to take place in a setting which ensures the respect and dignity of the child.

Article 41 and Article 42 of the CRC highlight more clearly the child’s right to information about their parent’s whereabouts. It is submitted that a parent’s conviction should in no way negatively impact the exercising of the rights of the child. Sachs J’s interpretation of children’s rights in terms of the Constitution in the case of *S v M*<sup>76</sup> should be viewed as a positive response to South Africa’s international obligation as a state party to the CRC. The Constitutional Court was required to consider the children’s best interests when imposing a sentence on parents in the cases of *S v M*<sup>77</sup> and *MS v S*.<sup>78</sup>

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<sup>73</sup> Deon Erasmus –“There is something you are missing ;what about the children ?Separating the rights of children from those of their caregivers (2010)25 SAPL.pg 127

<sup>74</sup> N Du Preez ‘Child Abuse Research in South Africa’ (2006) Vol 7(2). Pg33.

<sup>75</sup> Convention on the right of the child

<sup>76</sup> *S v M* (CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (26 September 2007), (hereinafter *S v M (b)*).

<sup>77</sup> *S v M* (Centre for child law as amicus curiae)2008 (3) SA 232 (CC)

<sup>78</sup> *MS v S* (Centre for child law as amicus curiae) 2011 (2) SACR (CC) (hereinafter *MS v S*).

In the case of *S v M*,<sup>79</sup> Miss M was the sole parental figure of three children; she had not been married to any of her three children's fathers, and lived independently from them. The court welcomed an *amicus curiae* (friend of the court) to address the obligations of a sentencing court to consider the wellbeing of the children while considering detention of an essential guardian. The Constitutional Court carefully thought about the children's best interests and how to weigh the contending rights.

Miss M was sanctioned with restorative supervision instead of imprisonment. Her sentence included community services and taking care of exploited people. The court suggested this kind of sentence as progressively therapeutic, and it balanced the benefits and privileges of the wrongdoer in conjunction with those of her children, the affected parties, and the community. The court balanced these rights considering the children's best interests and the family's integrity, and still managed to punish the criminal conduct. The *S v M* judgement sets a precedent requiring the courts to consider the impact of the separation on the child. Therefore, if the expected incarceration is to significantly impact on the child, then an alternative sentence to imprisonment may be considered depending on the seriousness of the offence.

In *MS v S*,<sup>80</sup> MS was the children's primary caregiver; her incarceration would cause serious financial difficulties for the family, and placing the children in alternative care would not be suitable for them, and thus imprisonment would impact negatively on the children. Avoidance of imprisonment for primary caregivers should be encouraged, especially when children are involved, due to its possible impact on the children. The best interests of the child should be a central consideration.

There are many cases that deal with the best interests of the child such as *Sonderup v Tondelli*,<sup>81</sup>. This appeal concerned a child that was brought to South Africa from Canada by her mother. This was against the wishes of the child's biological father who wished for her to be returned to him. The court held that a child's best interests is paramount in every matter concerning the child, and posited that the mother's actions were not harmful to the child concerned. The SA court made efforts to assure that the Canadian court and authorities

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<sup>79</sup> *S v M* (Centre for child law as amicus curiae) 2008 (3) SA 232 (CC)

<sup>80</sup> *MS v S* (Centre for child law as amicus curiae) 2011 (2) SACR (CC) (hereinafter *MS v S*).

<sup>81</sup> *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

would not arrest the mother for her actions. This case was decided to be in the best interests of the child as the mother of the child did not neglect her child; she only took the child away without taking into account the concerns' of the biological father.

The sentencing framework used in South Africa is constructed in the dictum of Rumpff JA in the decision of *S v Zinn* 1969 2 SA 537 (A) 540G, which establishes the triad for determining an appropriate sentence. These include the misconduct, the offender and the interests of society; further the judge ought to consider all mitigating and aggravating influences surrounding the offence.<sup>82</sup> These factors are therefore important to consider when determining the appropriate sanction of a parent; the critical question is whether the best interests of the child will be severely hampered by the sanction.

In *S v Kibido*,<sup>83</sup> the trial court was careful in choosing which elements to consider in deciding the proportion of discipline. These include the circumstances under which the offence was committed, whether this was a first offence, and the severity of the crime committed. The court had to determine an appropriate sentence; in doing so the court's duty is to determine whether the accused has children, and whether the incarceration will be damaging to the children.

In *S v M* the Constitutional Court developed guidelines for sentencing regarding (potential) primary caregivers:

- A sentencing court should determine whether a convicted person is a primary caregiver whenever there are indications that this might be so.<sup>84</sup>
- A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its

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<sup>82</sup> *S v Zinn* 1969(2) SA 537 (A)

<sup>83</sup> *S v Kibido* 1998 (2) SACR 213 (SCA). A(1077/96) 245/97. Date of hearing 27 May 1998

<sup>84</sup> A Friedman 'Children's Rights' in S Woolman T Roux & M Bishop (eds) Constitutional Law of SA (2008) 2ed Juta, WC ZA. Pg.47

normal adversarial position should be relaxed when the interests of children are involved. The court should also ascertain the effect of sentence on the children.<sup>85</sup>

If on the Zinn triad the appropriate sentence is clearly custodial, and the convicted person is a primary caregiver, “the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated.<sup>86</sup> If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.<sup>87</sup> Finally, if there is a range of appropriate sentences, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose”.<sup>88</sup>

*The cases of McCall v McCall,<sup>89</sup> Soller v G<sup>90</sup>, V v V<sup>91</sup> and Madiehe v Madiehe<sup>92</sup>* set out the essential factors the court should reflect on in defining the best interests of the child.

In *S v Shangase*,<sup>93</sup> the court considered whether the accused was employed, whether the accused had the means to financially support themselves and the family, and if there were any dependents. Economic circumstances will be considered if measured in conjunction with other issues, and these aspects may only impact on the ruling if a sentence of non-imprisonment is anticipated.

In *S v Benetti*<sup>94</sup>, the offender had a family who were reliant on her. The retributive aspect of the sentence was expanded as the guilty party had a family who was in need, the dependants would have been left deprived of care and support if a sentence of incarceration was imposed. In *Benetti*, the complainant had been found guilty of seven counts of theft, with three years’ detainment. The court considered that she had two prior sentences of theft, had two unde-rage children, earned R328 per month, and her partner earned R500. Hiemstra J decided that it

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<sup>85</sup> Heleen Lauwereys (2020) Sentencing primary caregivers in South Africa: the role of the child’s best interests, South African Journal on Human Rights, 36:2-3, pg 154

<sup>86</sup> A Friedman ‘Children’s Rights’ in S Woolman T Roux & M Bishop (eds) Constitutional Law of SA (2008) 2ed Juta, WC ZA. Pg.47

<sup>87</sup> *ibid*

<sup>88</sup> Heleen Lauwereys (2020) Sentencing primary caregivers in South Africa: the role of the child’s best interests, South African Journal on Human Rights, 36:2-3, pg 154

<sup>89</sup> *McCall v McCall*, 1994(3) SA 201 ( C )

<sup>90</sup> *Soller No v G and Another*, 2003 (S) SA 430(W)

<sup>91</sup> *Van der linder v Van der linder* 1996 (3) SA 509 (0)

<sup>92</sup> *Madiehe v Madiehe* 1997 SA 153 (B)

<sup>93</sup> *S v Shangase* 1972 2 SA 410 (N) 423D.

<sup>94</sup> *S v Benetti* 1975 3 SA 603 (T).

would be more beneficial to the community to keep the family of the suspect unharmed and preserve her economic productivity. As a result, she was ordered to repay the stolen amount, and received a suspended three year sentence. In his judgement, Hiemstra J stated: “we wish to adopt a more enlightened approach in which the probable effect of incarceration upon the life of the accused person and those near to her is carefully weighed”.<sup>95</sup>

The interests of children were considered as a justifying factor for the wrongdoer during the sentencing and not as a free factor separated from the *Zinn* triad. The impact of separation throughout sentencing becomes important due to the various children’s rights in the Constitution.

## **2.5 The right to family care under the Constitution, 1996**

The Constitution affords numerous rights to children. For this chapter, the relevant section, Section 28(1)(b), and is discussed. The first part of Section 28(1)(b) states that “every child has the right to family care or parental care.”<sup>96</sup> This section distinguishes between ‘family care’ and ‘parental care’. Parental care is described as the care which is made available by the biological parents, adoptive parents, foster parents and step-parents.<sup>97</sup> In contrast, family care can be defined as the care provided to a child by its extended family.<sup>98</sup>

It is important for courts to consider the right to family care under the Constitution, and also to understand the purpose of family preservation. In *Bannatyne v Bannatyne*,<sup>99</sup> the court stated that it is primarily the obligation of a parent to care for their children, but necessary legal duties must also be observed.

Sections 28(1)(b) and 28(2) of the Constitution should be considered by the sentencing courts while sentencing the primary caregivers of minors, as the state is obliged to ensure the protection and enforcement of the rights of children. It would be unlawful for a court to force

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<sup>95</sup> Ibid.

<sup>96</sup> Constitution of the Republic of South Africa Act 108 of 1998

<sup>97</sup> Ibid

<sup>98</sup> Ibid.

<sup>99</sup> *Bannatyne v Bannatyne* 2003(2) SA 363 (CC) para 6

a sentence of detainment upon the primary caregiver without having respect for the rights and privileges of the offender's children.<sup>100</sup>

The effect of children's rights on the sentencing procedure was brought up in *S v Kika*.<sup>101</sup> The court considered the child's rights and how these would be affected if their parents were incarcerated. In *Kika*, the Constitutional Court was divided in its decision; the majority found that it would not be in the best interests of the child for their caregiver to be incarcerated.<sup>102</sup> The accused was the custodian of a minor child, and in terms of section 7 of the Children's Act proper provisions for the welfare of the child were going to be a challenge since the accused was the sole guardian and breadwinner in the family. The child would be left in the care and protection of an older person who also needed supervision because of his age. Admitting the child to a child and youth care centre was going to damage the relationship between the mother and the child, which was going to affect the child's attachment and psychological well-being even after the mother was released from prison.

Madala J, writing for the minority in *S v M*,<sup>103</sup> stated that he agreed with the principles laid down in the majority judgment. The minority judgment contrasted because, in evaluating the children's competing rights to parental care against the right of society to expect offenders to be disciplined, the judges concluded that the sentence of the court a quo should not be hindered. Sach J's judgment in *S v M* illustrates the subtle balancing exercise in such cases. In this case Sach J stated that:

M is a single parent who is almost totally responsible for the care and upbringing of her children. All three boys rely on M as their primary source of emotional security, and that imprisonment of M would be emotionally, developmentally, physically, materially, educationally and socially disadvantageous to them. If the judgement against M is incarceration, the children would suffer: loss of their source of maternal and emotional support; loss of their home and familiar neighbourhood; disruption in

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<sup>100</sup> Convention on the Rights of the Child ,adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 ,entry into force 2 September 1990 in accordance with article 49 pg 1. Accessed on 14/04/2021 (<http://ohchrc.org/en/professionals/interest.pg> . 45.

<sup>101</sup> *S v Kika* 1998 2 SACR 428 (W) (hereinafter *S v Kika*).pg 3

<sup>102</sup> *S v Kika*

<sup>103</sup> *S v M* (Centre for Child Law as amicus curiae )2008 (3) SA 232 (CC) – pg 12

school routines; possible problems in transporting to and from school; impact on their healthy developmental process; and separation of the siblings.<sup>104</sup>

In *S v Howell*<sup>105</sup> the accused was charged with fraud and sentenced to 2 years' imprisonment. She appealed against the sentence on the basis that she had to care for her children. Her sentence was reduced by a year, as the children would be cared for by their grandparents who lived in a different place; this meant that the children would need to relocate and adapt to a new environment. This would lead to frustration as they needed to learn to communicate in a different language, and therefore imprisoning their mother was not going to be in the children's best interests. The court confirmed that the children would be taken care of for the duration of their primary caregiver's imprisonment through the provision of alternative care. Even though the court had to implement the best interests principle, the offence committed outweighed it, and the judgement was to be implemented accordingly.

Defending the child's best interests includes ensuring that the integrity of the family is preserved. When imposing a sentence on a caregiver or parent, the court must always take into consideration the range of sentences that are available to ensure that the wrongdoer pays for their crime, but in a way that does not compromise the integrity of the family and the child's stability.<sup>106</sup> Should a primary caregiver be sentenced to a term of incarceration, the sentencing court must ensure that the child or children are cared for and protected.

## **2.6 Summary**

This chapter has dealt with the argument raised concerning the legal duty that the court has to consider when incarcerating primary caregivers. There are different views on protecting the child's best interests and the interests of the community. It is clear from the sources reviewed in this chapter that the imprisonment of caregivers has a huge impact on the children, and that the courts do have a duty to consider the child's best interests when imposing sentence. This chapter's has established additional relevant considerations inconsidering the offender's sentence.

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<sup>104</sup> *ibid*

<sup>105</sup> *S v Howell* 1999 1 SACR 675 (C) – pg 3

<sup>106</sup> Children's Act 38 of 2005 section 7.

## CHAPTER THREE

### LEGAL FRAMEWORK

#### 3.1 Introduction

This chapter explains the preventive measures, law reforms and legal framework relating to child protection. International and regional conventions such as the United Nations Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of Children will be discussed, but with particular reference to children with incarcerated parents. In addition, South African legislation and the best interests principle in relation to the topic will be discussed.

#### 3.2 United Nations Convention on the Rights of the Child

The UNCRC is a legally binding international convention setting out the civil, political, economic, social and cultural rights of every child.<sup>107</sup> A few concerns regarding the welfare of the child at an international level have been noted.

All state parties that have ratified the UNCRC, including South Africa, are required to implement legislation and policies to ensure compliance with the Convention. Articles 2, 3 and 9 are relevant because they place an emphasis on promoting, protecting and applying the best interests principle.

Article 2(1) of the UNCRC is important as it promotes the principle that children should not be treated less favourably due to their parents' sentencing, which means that children born in correctional centres should be entitled to the full enjoyment of their rights just like children born outside of correctional centres.<sup>108</sup> Article 2(2) provides that "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment based on the status, activities, expressed opinions, or beliefs of their parents, legal guardians, or family members." Should a court decide to sentence the parent, alternative

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<sup>107</sup> Note 52 above.

<sup>108</sup> Article 2(1) of the UNCRC provides that: "State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status".

placement or custody must be provided for the child.<sup>109</sup> This includes foster care placement which needs to be in place before the sentencing of the parent for the child's benefit. Importantly, both parent and child need to undergo a reunification process once the parent is released from custody. Thus, incarceration of the parent should not impact the child negatively - the child should not be discriminated against or punished because of the imprisonment.

Moreover, Article 3(1) of the UNCRC states that "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". This article requires that the best interests of the child be considered in all matters concerning children. Children should therefore not be penalised for crimes committed by their parents. The best interests of the child should therefore be considered in determining an appropriate sentence. Article 3(2) of the UNCRC stipulates that state parties must prioritise the wellbeing of children by ensuring that the necessary administrative and legislative steps are taken to protect and care for them.

According to Article 3(2) of the CRC the state is obliged to ensure that the child is protected and cared for; this therefore extends to circumstances when a child's parents are sentenced. The court is also responsible for ensuring that appropriate measures are taken when choosing the child's legal guardian. Hence, during the sentencing process, the state is obliged to appoint an appropriate guardian for the child.<sup>110</sup>

Article 3(2) offers a measure of direction on the child's best interests as described in Article 3(1), which refers to a commitment to offer protection and care for children, while simultaneously respecting the rights and duties of those legally accountable for children. Freeman<sup>111</sup> refers to Article 3(2) as a 'backstop provision', and clarifies that there are classes of children neglected by the CRC; to be specific, newborns and minor children who are incarcerated with their mothers and are not referred to in the CRC. If there are gaps or omissions in the CRC provisions, Article 3(2) is expected to seal those openings.

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<sup>109</sup> *ibid*

<sup>110</sup> 1989 United Nations Convention on the Rights of the Child

<sup>111</sup> Freeman, M (2007). Article 3 the best Interest of the Child, in Alen, A. Vandelanotte pg .3

Freeman expresses that if a specific type of security or care is being prevented, the state party remains under an obligation to take the appropriate legislative and administrative measure.<sup>112</sup> The 'especially defenceless' children such as newborn and young children who are detained with their mothers, require exceptional protection and care. Such extraordinary protection should seek to ensure the fulfillment of the essential rights of 'especially defenceless' children. Freeman further expressed that remarkable protection could imply care and protection for children residing in correctional facilities, in order to protect their important rights.<sup>113</sup>

Article 3(3) of the UNCRC states that "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, number and suitability of their staff, as well as competent supervision." The establishment should meet the required standard to accommodate children. For example, the facilities should be child friendly, accommodate a certain number of children with enough supervision, and the establishment should be able to meet the child's basic needs such as schools, health, etc.

Lastly, Article 9(1) of the UNCRC states that children should not be separated from their parents against their own will, except in situations where the relevant authorities see it as the best resolution, and that the separation will be in the best interests of the child. Such decisions shall be necessary for cases involving abuse, neglect or any other form of abuse from the child's parents or one where the parents are living separately, and a decision must be made as to the child's place of residence.<sup>114</sup> In circumstances where a child's parent is not capable of providing care and protection for the child, the child should not be placed under the supervision of that parent as that can pose a danger to the development and the wellbeing of the child.

Also, Article 9(2) of the UNCRC states that in instances where there is separation of the caregiver from the child due to any action initiated by a state party, the state party is obliged to provide the whereabouts of the caregiver/parent upon request by the child or suitable

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<sup>112</sup> Freeman, M (2007). Article 3 the best Interest of the Child, in Alen, A. Vandelanotte pg .3

<sup>113</sup> Ibid

<sup>114</sup> Article 9(1) of the UNCRC

family member. The state party may only provide that information to the child or family member on condition that it will not have any negative consequences for the wellbeing of the child. Therefore, Article 9(2) requires that a child must have frequent contact with families from whom he or she was separated. It is normally in the best interests of children to be cared for by their parents because that represents the basic unit of society, and is the situation in which most children are raised, offering stability in growth for the child.

A separation of parent and child may result in a violation of the child's rights.<sup>115</sup> Bastick and Townhead<sup>116</sup> state that an infant child may only be kept apart from his parents provided experienced and skilled experts have determined that it is in the best interests of the child. The problem that incarceration poses to the child's rights is that the choice is made to isolate the child from the parent or have the child live in a correctional centre which does not provide a suitable environment for children.<sup>117</sup> Despite the fact it is not in the child's best interests to be detached from his or her parents, the child's interests will not always take precedence over those of a community. This implies that now and again convicted parents will be incarcerated regardless of this not being in the child's best interests.

With regard to sentencing of primary carers and the best interests principle, some clarity is given in the UN General Assembly Resolution 63/241 (2008), paragraph 47(a) "which 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."<sup>118</sup> This goal attempts to create a balance between the interests of the child and the advantage of noncustodial sentences for the child's sole or primary carer, with the interests and sometimes opposing rights of the other affected parties. Actually, when a mother is imprisoned she is regarded less as the child's sole caregiver,<sup>119</sup> and the impact of the incarceration will frequently have a disturbing effect on her child. This is provoked by the fact that there are fewer female correctional centres worldwide because there are statistically fewer female

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<sup>115</sup> Marelize Schoeman 'Babies behind bars-hidden victims of policy and practise.2011 pg 88

<sup>116</sup> M Bastick & L Townhead 'Women in Prison: A Commentary on the UN Standard. Minimum Rules for the Treatment of Prisoners' (2008).Pg 54

<sup>117</sup> J Doek 'Article 8 & 9' in Alen A *et al* (eds) *Commentary on the UNCRC*, (2006) Vol 8 *MarNij Pub*.Pg .12

<sup>118</sup> (UN General Assembly (2008).

<sup>119</sup> Tomkin, J. (2009). "Orphans of justice. In search of the best interests of the child when a Parent is imprisoned: a legal analysis." Pg 27

convicts.<sup>120</sup> Therefore, it is common that the mother may be imprisoned at a significant distance from the child.<sup>121</sup>

A South African female inmate can live with her young child in prison until the child is two years of age or until such time that the child can be appropriately placed, taking into consideration the child's best interests.<sup>122</sup> When a mother is incarcerated, the Department of Correctional Services (the Department) is required to take the necessary steps to find a proper placement for the child with the assistance of the Department of Social Development.<sup>123</sup> Whenever possible, the Department is obliged to ensure that mother-and-child facilities are available for inmates with children.<sup>124</sup> In addition, while the child is in its custody, the Department is responsible for all the essential needs of the child such as child's food, clothing, health care, and all other facilities necessary for the child's sound development. In 2013, the Department stated that there were 3,505 female inmates in the Department's care, 282 of whom were incarcerated with their babies.<sup>125</sup>

The Committee on the Rights of the Child, which observes and reports on the implementation of the CRC, identified two separate 'best interests' obligations: the first requires an assessment and evaluation in relation to existing and new laws, policies and practices in respect of the impact on children, and second, there need to be budget allocations at all levels of government.<sup>126</sup> The state's obligation is to consider the child's best interests, without undermining other rights. The individual child's best interests should concentrate on specific circumstances, and demonstrate whether there is a need to separate a child from their family.<sup>127</sup> Although the UNCRC does not allude to the best interests of a child in cases of incarceration, the Committee on the CRC has begun to focus on avoiding the isolation of children from their caregivers in cases of incarceration.<sup>128</sup>

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<sup>120</sup> United Nations Office on Drugs and Crime, 2008 (hereinafter UNODC), 15.

<sup>121</sup> Briefing on the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), 2011: 2.

<sup>122</sup> Ibid

<sup>123</sup> Press Release .S.A.Dept of Correctional Services,female inmates ,2013.S.A.Department of correctional services.

<sup>124</sup> Ibid

<sup>125</sup> Ibid

<sup>126</sup> Alston,P and Tobin J.(2005) Laying the Foundation for Childrens'Right ,New York:UNICEF pg .5.

<sup>127</sup> P Basu 'Laws Relating to Protecting of Human Rights Under the Indian Constitution and Allied Laws (2012) *Mod Law Pub* (2ed). Pg.12

<sup>128</sup> Note 95 above.

The Committee has realised that gaps and challenges may arise from alternative placement. It assumes that some children are better off accompanying their caregivers, especially mothers, to the correctional centres.<sup>129</sup> This depends on the question of an appropriate age for a child to remain with their parent in prison; however, the circumstances that the children should not be permitted to reside in correctional centres with their parents, are not prescribed.<sup>130</sup>

It is unclear as to how care will be provided by the mother of the child while in prison, the support and facilities that will be provided for the children by the correctional service institution, and also how contact with the parent will be maintained if the child is not placed with the parent.<sup>131</sup> The Committee has suggested that member states introduce and implement guidelines on children's placement with their mothers in correctional centres.<sup>132</sup> These guidelines should include important information such as the age up to which a child may be kept with a parent, the time period for which a child may be kept with a parent, interaction with the outside world, and movements outside the centre.<sup>133</sup> These guidelines should guarantee that the child is provided with adequate living conditions, and appropriate health care, according to their development. Alternative care must be provided for children removed from the centres. The guidelines must also ensure that personal relations and direct contact are maintained with the person in the centre.<sup>134</sup> The CRC provides adequately for the best interests of the child, but it fails to specifically mention the separation of children from their parents in cases of parent incarceration. Notwithstanding this, Article 3(2) is broad enough to extend care and protection to these children.

### **3.3 African Charter on the Rights and Welfare of Children**

The African Charter on the Rights and Welfare of Children (ACRWC) is the most developed regional instrument on the African continent with specific provisions about expectant mothers and mothers of newborn children.<sup>135</sup> Article 30(1) says “state parties to provide

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<sup>129</sup> P Basu ‘Laws Relating to Protecting of Human Rights Under the Indian Constitution and Allied Laws (2012) Mod Law Pub (2ed). Pg.12

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> P Basu ‘Laws Relating to Protecting of Human Rights Under the Indian Constitution and Allied Laws (2012) Mod Law Pub (2ed). Pg.14

<sup>133</sup> Ibid

<sup>134</sup> Ibid.

<sup>135</sup> The African Charter on the Rights and Welfare of the Child (ACRWC ) OAU DOC.CAB/LEG24.9/1990 entered into force Nov 29.1999

special treatment for expectant mothers and mothers of infants and young children who have been accused or found guilty of infringing the law shall, in particular:

- (a) “Ensure that a non-custodial sentence will always be first considered when sentencing such mothers,
- (b) Establish and promote alternative institutions for holding such mothers,
- (c) Establish special alternative institutions for holding such mothers,
- (d) Ensure that a mother shall not be imprisoned with her child,
- (e) Ensure that a death sentence shall not be imposed on such mothers,
- (f) The essential aim of the penitentiary systems will be the reformation and the integration of the mother to the family and social rehabilitation”.<sup>136</sup>

Rehabilitation is a fundamental goal of the correctional system. This goal rests on the assumption that individuals can be rehabilitated and returned to society.<sup>137</sup> It is a process whereby the focus is on the restoration of former rights, authority, or abilities. The rehabilitation process prepares a person for a productive life when released from the correctional centre.<sup>138</sup> The focus on correctional rehabilitation is not just on the offenders, it also aims at protecting society. Rehabilitation of the parent is important as it prepares the family and the parent to resume their responsibilities and role in the family.<sup>139</sup>

Article 30 should not be interpreted as permitting offenders to avoid culpability for their offences.<sup>140</sup> Furthermore, considering the child’s best interests principle does not imply that parents and caregivers cannot be kept or detained (such a methodology would render frameworks of criminal law impractical) to the general public's disadvantage in the interests of children.<sup>141</sup> However, the best interests principle requires that judicial officers have the capacity to always weigh in the best interests of the child, and the offence committed by the caregiver, when considering the sentence.<sup>142</sup>

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<sup>136</sup> Ibid

<sup>137</sup> Beth M,Huebner and Natasha A Frost .Handbook on consequences of sentencing and punishment decisions. 7 August 2018 Pg.135

<sup>138</sup> Beth M,Huebner and Natasha A Frost .Handbook on consequences of sentencing and punishment decisions. 7 August 2018 Pg.135

<sup>139</sup> ibid

<sup>140</sup> ACERWC, 2013.”General comment on article 30 of the African Charter on the Rights and welfare of the child.”pg 9.(hereafter ACERWC,2013)

<sup>141</sup> ACERWC, (2013).

<sup>142</sup> Ibid.

### 3.4 An analysis of South African legislation

The Constitutional Court provided a landmark decision in *S v M* by stating that “[a] child’s best interests are of paramount significance in every matter in relation to the child.”<sup>143</sup> The Court set out rules to advance the consistency of the standard, the consistency of treatment, and the individualisation of results. The rules that the court ought to consider have been examined below:

1. To decide whether a sentence is custodial, and the indicated individual is an essential guardian, the court of law must determine whether it is important to find a way to guarantee that the children will be provided with adequate care while the parental figures are in prison.<sup>144</sup>
2. In the event that an appropriate sentence does not warrant detention, the court must choose an appropriate sentence, taking into account the interests of the child.<sup>145</sup>
3. Finally, on the off chance that there is scope for a fitting sentence, the court must utilise the vital rule relating to the child's interests as a significant guide in choosing which sentence to impose.<sup>146</sup>

It is argued that isolating infants and children from their mothers who are in jail is not in the children’s best interests. In this regard, states have a duty to consider all options available. In a case where the infant or the child is to be kept in prison, the child’s interests need to be considered. The question remains whether there should be a cut-off age which determines whether the child will continue to remain in the prison facility with the parent, or whether this should be determined openly considering the various circumstances of the child; for example, the question of when the detained parent will complete their term of imprisonment.<sup>147</sup>

States should avoid detaining or imprisoning pregnant mothers unless it is a measure of last resort after considering all alternative measures. Also, states should give preference to non-imprisonment measures, as well as restorative justice processes, family group conferencing and circle sentencing, and also community orders, probation and suspended sentences.<sup>148</sup>

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<sup>143</sup> *S v M* (2008)(3) SA 232 (CC) 261.)

<sup>144</sup> ACERWC, 2013).

<sup>145</sup> *S v M* (2008) (3) SA 232 (CC) 261).

<sup>146</sup> ACERWC,2013

<sup>147</sup> ACERWC,2013

<sup>148</sup> ACERWC,2013

This, however, must be balanced against the nature of the crime committed, and the interests of society.

### 3.4.1 The Constitution of South Africa, 1996

The Constitution is based on a foundation of human rights and acknowledges that children are susceptible to the abuse of their rights. Section 28 provides a safeguard of the specific and unique interests of children. The Constitution enforces all structures of state and, according to Section 8(1), applies to all law, including Section 20 of the Correctional Services Act. This section is relevant in this study because it provides guidelines for the system, functions and controls between offenders and civilians.<sup>149</sup> The values of human dignity, equality and the advancement of human rights and freedoms, as preserved in the Constitution, ought to be considered when mothers are sentenced.<sup>150</sup>

Section 28(1)(b) briefly states that a child's right to family or parental care is guaranteed in the Constitution, which requires a child's family or parents, or the State, to be responsible for care of the child. This right requires children to be provided with adequate care.<sup>151</sup>

Robinson<sup>152</sup> clarifies that according to Section 28(1)(b) "the family is to be regarded as the primary institution within which the child must grow up." In *S v M* the court found that Section 28(1)(b), read together with Section 28(2) and Section 28(1)(c) of the Constitution provide that "children have a right to basic nutrition, shelter, basic health care services and social services."<sup>153</sup>

When the child accompanies his or her mother into the correctional centre, it would be the State's responsibility to ensure the family ties are not broken by all means possible, and that parental care is maintained.<sup>154</sup> South Africa accepted the obligation of the CRC and ACWRC by putting them into force, and also amending the current laws to reflect these international laws in terms of promoting and protecting children's rights.

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<sup>149</sup> Section 20 of the Correctional service Act No 111 of 1998.

<sup>150</sup> Section 20 of the Correctional Services Act (Act 111 of 1998).

<sup>151</sup> A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2009). Pg 285

<sup>152</sup> Robinson J "Childrens Right In The South African Constitution (2009) J PEL /PER Vol 6(1) Pg .14

<sup>153</sup> A Skelton 'Constitutional Protection of Children's Rights' in T Boezaart (ed) *Child Law in South Africa* (2009). Pg 285

<sup>154</sup> Ibid.

### 3.4.2 Children's Act 38 of 2005

Ensuring the avoidance of family breakdowns is stipulated in the Children's Act. This Act governs the law regarding care, contact and protection when parents are incarcerated.<sup>155</sup> The Act also describes parental responsibilities and rights.<sup>156</sup> It also makes provision for the foundation of Children's Courts as well as Child and Youth Care Centres where children needing care and protection can be placed. In all cases the guiding principle for the placement of these children is the best interests of the child.<sup>157</sup>

Chapter 3 of the Children's Act deals with parental responsibilities and rights (sections 18-29) that every parent has in respect of their child, which is important in this matter as it outlines all the interests and responsibilities of a parent. This is one important aspect that the court should look at when sentencing a parent and appointing a caregiver or bodies to assume the responsibilities of a parent. The relationship between the child and the person who is to assume parental responsibilities and rights while the parent is in prison is very important, as is the degree of commitment that the person has shown towards the child.<sup>158</sup> Any other factors that the court deems important must also be taken into consideration.<sup>159</sup>

The Children's Act is guided by rulings in favour of the best interests of the child. It provides that special attention be given to children, especially under special circumstances.<sup>160</sup> The children in this study can be categorised as children in special circumstances, based on the parents being convicted of a crime, and their children therefore requiring special care. The best interests principle is of dominant importance in all matters concerning the care, protection and wellbeing of the child.<sup>161</sup>

The best interests principle is expressed in section 7 of the Children's Act. Here, 14 factors are outlined to determine the best interests of the child.<sup>162</sup> This section further emphasises the

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<sup>155</sup> Children's Act 38 of 2005ss 18

<sup>156</sup> Children's Act 38 of 2005ss 18

<sup>157</sup> Children's Act Chapter 3 ss 18

<sup>158</sup> Children's Act Chapter 3 ss 18

<sup>159</sup> Note 12 above.

<sup>160</sup> Ibid, Section 2(g).

<sup>161</sup> Ibid, Section 19.

<sup>162</sup> Mezmur .2008 SA Public law.Vol23 issue 1 pg. 16

importance of the child's participation, because sometimes the child's best interests might not be in the best interests of an adult.<sup>163</sup>

There are also cases where the court has determined that it will be in the best interests of the child to have their parents imprisoned, due to the danger that they impose on their children. In the case of *Tsili v S*,<sup>164</sup> the court decided that due to the nature of the offence of which the appellant was convicted, the caregiver posed a threat to the safety of the children, and the children would therefore be better off in the care of someone else, rather than being exposed to drug abuse and other detrimental influences.<sup>165</sup> The caregiver of the children in this case was incarcerated. In *S v Kutumane and Belle*,<sup>166</sup> the court decided that it would be in the best interests of the children to have their parents incarcerated as they were faced with charges of murder; this was aimed at creating a society where those who commit murder receive an appropriate punishment in order to set a good life lesson for the community.<sup>167</sup>

### 3.4.3 Sentencing Amendment Act of 38 of 2007

For any judicial officer, the hardest task in a criminal trial is sentencing, since there are many different factors to be considered in determining an appropriate sentence. These factors include the offender's personal circumstances, the nature of the crime, and the community's interests.<sup>168</sup> There are various thoughts on the minimal consideration of the best interests of the children of incarcerated parents.<sup>169</sup> According to Coetzee,<sup>170</sup> consideration is not given to minor children during the process of sentencing a parent in South Africa. The court only considers the child's best interests as a mitigating factor during the process of sentencing.

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<sup>163</sup> Section 7 of the Children's Act 38 of 2005 states that the courts need to take into account the nature of the relationship between the parents; the attitude of the parents toward the child and to the exercise of parental responsibilities and rights in respect of that child; the likely effect on the child of changed circumstances such as separation from either or both parents; the need for the child to remain in the care of his or her parent, family or extended family and to maintain a connection with his or her culture or tradition; the child's age, maturity, stage of development, background, physical and emotional security and intellectual, emotional, social and cultural development; and the need of the child to be brought up within a stable environment; Heaton and Kruger South African Family Law 172; Rosa and Dutschke 2006 SAJHR 244; Okon 2012 AHRLJ 386; Himonga and Cooke 2007 International Journal of Children's Rights 326.

<sup>164</sup> *Tsili v S* (unreported case number) CA R455/2012{2013}jol 31045 (ECG ) 6 May 2013

<sup>165</sup> *Tsili v S* (unreported case number) CA R455/2012{2013}jol 31045 (ECG ) 6 May 2013

<sup>166</sup> *S v Kutumane and Belle* (unreported case number)CC 17/10{2011} AWCHC 178.24 March

<sup>167</sup> *S v Kutumane and Belle* (unreported case number)CC 17/10{2011} AWCHC 178.24 March 2010

<sup>168</sup> Tereblanche,2007

<sup>169</sup> M Carnelley & C Epstein 'Do not visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long-term best interest of the child' (2012) *SACR* 106.

<sup>170</sup> Coetzee 2010

The primary motive in sentencing an accused is to secure and defend the community's safety, and the safety of the victim or any other person affected by the criminal offence.<sup>171</sup>

In South Africa, sentencing is viewed as the essential responsibility of courts, and they exercise a wide discretion to decide the appropriateness of a sentence.<sup>172</sup> The sentencing factors are set out in section 11 of the Criminal Law Sentencing Amendment Act, 2017.<sup>173</sup> These factors are guidelines that can be used in imposing a sentence. These factors include the nature of the crime, the age and personality of the offender, the harm to the individual or the community, whether the offender is a professional offender, and the chances of the accused re-offending. Mitigating factors will reduce the severity of the crime or the offender's crime.<sup>174</sup> Proportionality, parity and totality ought to be factored into account when determining the appropriateness of a sentence.<sup>175</sup> When a sentence is imposed on an offender who has a minor child, the needs of that child are often ignored. The justice system tends to neglect the child's participation and involvement in policymaking.<sup>176</sup> Previous studies indicate that there is an increased number of minor children with parents in correctional centres.<sup>177</sup> The child's best interests seems to be neglected due to it's not being considered when their parents are sentenced.<sup>178</sup>

### 3.5. Summary

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<sup>171</sup> Criminal law Sentencing Amendment Act 2017.

<sup>172</sup> H Goitom 'Sentencing Guidelines: South Africa' (2014). Pg.6

<sup>173</sup>Section 11 of the Criminal Law Sentencing Amendment provided:

- a. "The nature, circumstance, and seriousness of the offence [s 11(1) (a)]."
- b. The personal circumstances and vulnerability of any victim of the offence, whether because of the victim's age, occupation, relationship to the defendant, disability or otherwise [s 11(1) (b)].
- c. The extent of any injury, emotional harm, loss or damage resulting from the offence or any significant risk or danger created by the offence, including any risk to national security [s 11(1) (c)].
- d. The accused's character, general background and offending history [s 11(1) (d)].
- e. The likelihood of the accused re-offending [s 11(1) (e)].
- f. The accused's age, physical and mental condition (including any cognitive impairment [s 11(1) (f)].
- g. The extent of the accused's remorse for the offence, having regard as to whether the accused has provided evidence that they have accepted responsibility for their actions [s 11(1) (g) (i)] and has acknowledged any injury, loss or damage caused by their actions or voluntarily made reparation for any such injury, loss or damage, or both [s11 (1) (g) (ii)].
- h. The accused's prospects of rehabilitation [s 11 (1) (h)]".

<sup>174</sup> Section 11 of the Criminal Law Sentencing Amendment Act of 2007

<sup>175</sup> Sentencing Act of 2007

<sup>176</sup>Section 11 of the Criminal Law Sentencing Amendment Act of 2007

<sup>177</sup> N Bernstein 'All Alone in the World: Children of the Incarcerated; Detailing the Plight of Children with Incarcerated Parents' in K Gabel & D Johnston (eds) *Children of the Incarcerated* (2005). *The New Press*.Pg.5

<sup>178</sup> Pruet Marsha Kline, Jeniffer McIntosh and Joan B.Kelly.Parental separation and overnight care of young children Vol 52.No.2 April 2014. Pg .242

This chapter has discussed the legal framework in relation to children's rights by referring to the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of Children, as well as South African legislation. It is concluded that the best interests of a child principle is one that is addressed at an international, regional and national level. It is a relevant factor that is considered by the courts in determining the sanction of a caregiver.

## CHAPTER FOUR

### CONSEQUENCES OF INCARCERATION FOR THE CHILD

#### 4.1 Introduction

In this chapter the impact and consequences of parental incarceration for children is addressed. This chapter also highlights how children accompanying their mothers to correctional centres are affected. This chapter also discusses the theoretical framework of the study.

Children of detained parents are regularly neglected and affected by their parents' incarceration. This creates numerous challenges.<sup>179</sup> Having an imprisoned parent has become a common occurrence for some children. The number of children who have imprisoned parents is increasing, resulting in numerous children growing up without a parent or guardian.<sup>180</sup> Separation from a parent due to incarceration is undesirable due to its impact on a child; however, incarceration impacts on children differently<sup>181</sup> depending on different factors such as whether the child is aware of the circumstances, and also the bond between mother and the child. Children frequently continue living with their mothers when their fathers are imprisoned, but children of imprisoned mothers often experience a complex set of living arrangements. For instance, these children may be placed in alternative care, and sometimes they are placed in the prison facility along with their mother.<sup>182</sup>

South African literature on the issues of primary caregivers in correctional centres is limited, and there is very little that interrogates the impact on children. Studies that have been conducted previously do show that there are major impacts on children whose primary caregivers have been incarcerated. Munting conducted a study on rehabilitation and reintegration of offenders to identify gaps and also policies that were implemented to ensure that offenders are rehabilitated.<sup>183</sup> Incarceration of a primary caregiver has diverse

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<sup>179</sup> K Turney & R Goodsell 'Parental Incarceration and Children's Wellbeing' (2018) *Future Child* Vol 28. Pg.150

<sup>180</sup> R Manning 'Prisoner – Re-entry in Cape Town – An Exploratory Study' (2008) *CSPRI No. 14*. Pg.26

<sup>181</sup> Ibid

<sup>182</sup> K Turney & R Goodsell 'Parental Incarceration and Children's Wellbeing' (2018) *Future Child* Vol 28. Pg.152

<sup>183</sup> Munting .L 2005,Offenders rehabilitationand reintergration;taking the white paper on corrections.Pg No,52 and White Paper on Correction.2005.Department of Correctional Services .Pretoria:Government of South Africa

consequences, and unavoidably disrupts the family structure and interferes with the bond between the primary caregiver and the child.<sup>184</sup> Although a child has the right to visit his or her parent there are many challenges which create difficulties; for example, the child will need an adult to accompany him or her. Hence, in the event of there being no adult available to assist the child, the child will be unable to visit his or her parent. Limited availability of finance for transport for these visits is a further challenge.<sup>185</sup>

The situation is intensified by the fact that there are only a few female correctional centres, and these are geographically far from the family, which makes contact between the parent and child difficult. This clearly does not serve the child's best interests. Not only is the child deprived of care from his or her parent, but also a stable and loving environment.

Incarceration of the essential parental figure creates serious issues for children. The detention independently affects the advancement of the child. These children experience the ill effects of post-trauma pressure, wretchedness, outrage and animosity, dietary issues, uneasiness, pity, self-blame, low confidence, wantonness, substance misuse and school-related issues.<sup>186</sup> The following section looks at the impact of incarceration on the child.

#### **4.2 The impact of incarceration on children whose parents are in correctional centres**

Children whose parents have been incarcerated face various challenges. The undesirable impact of incarceration on the family is generally visible, even though very little research has been done on the impact it has on family relationships. Munting<sup>187</sup> states that the problems occurring within families impact and affect communities as well. He further states that a family is a powerful environment in which an individual grows and develops.

Some of the problems children experience are depression, withdrawal from others and low self-esteem.<sup>188</sup> It is further reported that these children experience difficulties in achieving academic excellence as they tend to have problems with concentration.<sup>189</sup> They tend to

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<sup>184</sup> Nicole Du Preez "Child Abuse Research in South Africa" (2006) Vol 7 (2) – pg 27

<sup>185</sup> Nicole Du Preez "Child Abuse Research in South Africa" (2006) Vol 7 (2) Pg 29

<sup>186</sup> Ibid.

<sup>187</sup> L Munting 'After Prison: The Case for Offender Reintegration' (2001) *ISS Africa* Mono. No. 52. Page no

<sup>188</sup> Reed, D., & Reed, E. (1997). Children of Incarcerated Parents. *Social Justice*. Vol. 24. No 3. Pg. 152

<sup>189</sup> D Reed & E Reed 'Children of Incarcerated Parents' (1997) *Soc Justice* Vol 24(3).pg 156

experience destructive behaviour problems associated with a lack of school performance, absenteeism, punitive programmes, alcohol abuse and drug use, and escaping from home.<sup>190</sup>

Various factors that may affect the way in which a child is influenced by his or her parent's imprisonment include the age of the child when he or she is placed apart from his or her parents, the duration of the separation, the uncertainty on the child's part about why they are being separated from their caregivers,<sup>191</sup> the number of occasions the parent and child have been separated from one another, and the results of past detachment encounters.<sup>192</sup> Some other significant factors that may affect the child include the stability of their home environment, poverty, the absence of consideration in the household, and the kind of neighbourhood that the family resides in.<sup>193</sup>

According to Reed and Reed, the impact of maternal or paternal imprisonment on children may affect the parent and child relationship during the early stages of the child's development.<sup>194</sup> Children may have problems becoming independent when they observe their parents' capture and departure due to imprisonment when they are aged between two and six years.<sup>195</sup> Children between the ages of seven and 10 might experience difficulty in school and in developing relationships with others, and may exhibit aggressive behaviour in response to their experience of trauma.<sup>196</sup> Adolescents between 11 and 14 years of age who experience poverty, stigma, and multiple placements in foster care, tend to exhibit behavioural problems.<sup>197</sup> The most severe effects of parental incarceration appear among children aged 15 to 18 years. These children's associations leave them with a negative attitude towards law implementation and the criminal equity framework.<sup>198</sup> It is likewise recognized that most of these children will eventually become involved in criminal activities themselves.<sup>199</sup>

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<sup>190</sup> J Travis & M Waul 'Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families, and Communities' (2003) *Urban Institute Press. Page no.27*

<sup>191</sup> Ibid

<sup>192</sup> Note 183 above

<sup>193</sup> Ibid.

<sup>194</sup> Reed D and Reed E, 'Children of Incarcerated Parents (1997) 24(3) Social Justice pg.159

<sup>195</sup> Ibid

<sup>196</sup> Ibid.

<sup>197</sup> Ibid

<sup>198</sup> Travis, J, & Waul, M. (2003). *Prisoners Once Removed: The Impact of Incarceration and Re-entry on Children, Families, and Communities*. Washington, D.C.: The Urban Institute Press. Pg 45. accessed on 18 November 2018

<sup>199</sup> Ibid.

Johnston examined the effect of parental wrongdoing, capture and imprisonment on children's formative attributes. Specifically, she identified formative assignments, factors affecting their development, and the consequences for children whose guardians are detained.<sup>200</sup> Kampfner also noted that when children are isolated from their parents, they encounter various problems depending on their age at the time of the parent's imprisonment, and the length of the separation from their parent.<sup>201</sup> These problems impact on their advancement. The separation from their parents is seen to cause these children uneasiness, and emotional and psychological injury.<sup>202</sup> The children develop adverse social issues very quickly and have a propensity towards turning out to be criminals themselves.<sup>203</sup> Johnston established that should a child be separated from their parent during the earlier stages of their development it influences the closeness of the parent-child bond. If they are separated from their parent between the ages of two and six they develop a severe increase in tension and pressure, suffer formative relapse, and often feel survivor blame.<sup>204</sup> Concerning the ages from seven to 14 years, removing a parent is associated with behavioural issues such as dismissal of opinions of confinement as a consequence of criminal conduct, and injury responsive practices.<sup>205</sup> Between the ages of 15 and 18 years, the imprisonment of a parent is connected to an increased chance of criminal behaviour by the children themselves, and their subsequent imprisonment.<sup>206</sup>

Wright and Seymour<sup>207</sup> established that some children experience undesirable emotional and social impacts which are not limited to: identification with incarcerated parents; consciousness of social stigma; a change in their future direction; curiosity about their parents; worry about the results of the case; uncertainty and stress over how to live without their mother or father; worried about the future memories of horrible incidents identified with the capture of their parent; shame and outrage; dread; nervousness; self-pity and pity for their parent; forlornness; blame; low self-confidence; misery; emotional withdrawal from loved

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<sup>200</sup>Johnston D "A Developmental Approach to work with Children of prisoners:Mother-Child Reunification"(2010)8(2)Children of Incarcerated Parents.Pg.37

<sup>201</sup> Ibid

<sup>202</sup> C Simmons 'Children of Incarcerated Parents' in T Honess (ed) *Self and Identity: Psychological Perspectives* (2000) *Wile, NY*. Pg 89

<sup>203</sup> Ibid pg 90

<sup>204</sup> Ibid.

<sup>205</sup> C Simmons 'Children of Incarcerated Parents' in T Honess (ed) *Self and Identity: Psychological Perspectives* (2000) *Wile, NY*. 89-103.pg 101

<sup>206</sup> Ibid.

<sup>207</sup> L Wright & C Seymour 'Working with Children and Families Separated by Incarceration: A Handbook for Child Welfare Agencies' (2002) *CWLA Press*. Pg .19.

ones; division; tension; physical withdrawal; blame; discouragement; running away from home; dejection; trouble-making; hatred of self and others; eating and sleeping issues; hostility; uneasiness and hyper-excitement; lack of consideration for others; formative relapse; aggressive behaviour; the inability to move forward; poor academic performance and behaviour in the school environment (in and out of the class); truancy; carrying on improperly; other standoffish practices; troublesome conduct at home; aggressive behaviour and fighting; prompting an early turn towards wrongdoing;<sup>208</sup>

One of the most significant indicators for children confronting the existing issues is the nature of their relationship with their parent prior to the parent's incarceration. In principle, stable, quality parent-child connections will help protect these children from losing the bond that they have with their parents, and becoming criminals themselves.<sup>209</sup> Be that as it may, many parents who do wind up detained have poor child-rearing aptitudes or capacities, and are therefore not fit parents and role models for their children.<sup>210</sup> Another indicator that demonstrates how children will change as a result of their parents' imprisonment is the nature of their association with other family members and other informal organisations.<sup>211</sup>

There are numerous problems that children of imprisoned parents experience; nevertheless, not all of these issues are caused by the imprisonment. Some of these children's problems can also be caused by factors present before their parents are imprisoned.<sup>212</sup> If a child has a close relationship with their parent before the parent is detained, the child will have a better chance of not experiencing the entirety of these issues, and a chance of not encountering at least some of the issues that a child who does not have a functional relationship with their parent will face.<sup>213</sup> What is more, if the child has a supportive relationship with their other family members or good support from other informal organisations, they will have a better chance of avoiding these negative consequences. A child's upbringing plays an important role in determining the relationship between family members. Children should not be separated from

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<sup>208</sup> Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children. [Electronic version]. U.S. Department of Health and Human Services, Pg. 1

<sup>209</sup> Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children. [Electronic version]. U.S. Department of Health and Human Services, Pg. 3

<sup>210</sup> Ibid

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Ibid.

their parents against their will, except in situations where the relevant authorities see it as the 'best' solution in terms of the 'best interests of the child' consideration.

### 4.3 Effects of incarceration on mothers

According to Mortaon and Williams,<sup>214</sup> the incarceration of a mother has significant impact on their child. Young children who are separated from their mothers show, amongst other symptoms, immediate distress, followed by depression. As stated, a more substantial problem is the child's developmental retardation, and the longer the separation, the greater the negative impact on the child.<sup>215</sup>

The mother-child relationship provides the foundation for all other relationships a child will develop.<sup>216</sup> A child learns about ethics and social norms from his or her parent, particularly his or her mother. The incarceration of mothers poses a significant challenge to the child learning these. Therefore, the importance of the attachment between a mother and child ought to be recognised by correctional administrators.

The main concern expressed by mothers is that the care and development of their children is compromised while they are detained.<sup>217</sup> Mothers often encourage their children's development and growth milestones, such as walking and talking.<sup>218</sup> In the USA, correctional administrators have established programmes for mothers which allow them to provide care, as well as sustain and reinforce their relationships with their children.<sup>219</sup> Mortaon and Williams put forward numerous motives for the need for such programmes to assist mothers to preserve and strengthen their ties with their children:

- 74% of women in prison have children, compared to 64% of men.
- Incarceration of a mother disrupts the family considerably more than incarceration of a father.
- 25% of incarcerated women's children live with their fathers, compared to 90% of incarcerated men whose children live with their mothers.
- 65% of incarcerated women's children live with grandparents, and 10% are in foster care.

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<sup>214</sup> J Mortaon & D Williams 'Mother/Child Bonding' (1998) *Correct. Today* Vol 60(7).Page no 9

<sup>215</sup> Mortaon, J, B. & Williams, D, M. (1998). Mother/Child Bonding, [Electronic version]. *Corrections Today*. Vol 60. Issue 7..pg 9

<sup>216</sup> Ibid.

<sup>217</sup> (Mortaon and Williams, 1998).

<sup>218</sup> Ibid.

<sup>219</sup> Ibid

- 90% of incarcerated women have contact with their children while in prison, compared to 80% of incarcerated men.
- More than 50% of incarcerated women with children under 18 years of age are not visited by their children.<sup>220</sup>

South African statistics show that a large number of women who are incarcerated are either expecting a child or have recently given birth to one, and the majority of these women assume that they will automatically have responsibilities and rights in respect of their children after being released from prison.<sup>221</sup> A child's best interests should also be considered during the family reunification process: it is important that the incarcerated parent, upon release, undergoes an assessment process which will capacitate them in terms of resuming parental responsibilities.

Houck and Booker Loer analysed stress among detained women and identified them as with self-perceived levels of tension, anxiety, depression, stigmatization, and bad behaviour in prison.<sup>222</sup> They found that mothers are confronted with numerous stressors while imprisoned. Some of the anxieties expressed by these mothers include how to monitor their children's care while in correctional centres, how to remain close to their children, and how to respond to the different problems with their children.<sup>223</sup> Incarcerated mothers expressed concerns regarding infrequent visits and restricted contact with their children, custody issues, loss of identity as a mother, loss of control of the parenting process, worrying about the care their children were receiving, concerns regarding being honest with their children about themselves and their criminal behaviour, and longing for reunion with their children.<sup>224</sup> Being faced with these factors has a great impact on an imprisoned mother's emotional state, her sense of self-esteem, self-definition, and identity as a woman.<sup>225</sup>

There is a negative impact on the mother-child relationship if the child's mother is traumatised, because she does not keep contact with the child, and may even avoid her

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<sup>220</sup> Ibid

<sup>221</sup> Mortaon, J, B. & Williams, D, M. (1998). Mother/Child Bonding, [Electronic version].Corrections Today. Vol 60. Issue 7..pg 11

<sup>222</sup> Houck & S Booker-Loer 'A Relationship of Parenting Stress to Adjustment among Mothers in Prison (2002) *AM J Orthopsychiat* Vol 72(4), Pg no 552

<sup>223</sup> K Houck & S Booker-Loer 'A Relationship of Parenting Stress to Adjustment among Mothers in Prison (2002) *AM J Orthopsychiat* Vol 72(4), Pg no 553

<sup>224</sup> Ibid.

<sup>225</sup> Ibid.

child.<sup>226</sup> A mother may also find herself in a situation where she has to be dishonest with her child and makes empty promises, and this creates expectations for the child.<sup>227</sup> This can negatively affect their relationship as their bond may be solely founded on lies and unrealistic expectations. Failure to meet them can damage the relationship between the mother and the child.

Research done by the U.S Department of Health and Human Services has tracked down that 70% of young children whose mothers have been incarcerated who experience the ill effects of emotional or psychological problems, including anxiety, withdrawal, hyper vigilance, depression, shame and guilt.<sup>228</sup> These children may likewise have internal issues such as dietary problems.<sup>229</sup> Some external behaviours that young children typically show are anger, aggression, and hostility toward caregivers and siblings.<sup>230</sup>

#### **4.4 Effects of incarceration on fathers**

Arditti, Smock and Parkman conducted research on the experiences of imprisoned fathers, their impressions of parenthood, and their participation in raising their children. A study named the ‘Fragile Families, and Child Wellbeing Study’ indicated that imprisoned fathers differ from the all-inclusive community of fathers, and are expected to have been poorly educated, addicted to alcohol and substance abuse and have poor relationship abilities.<sup>231</sup> Previous data gathered illustrates that imprisoned fathers originate from underprivileged and poor homes and have some history of past wrongdoings.<sup>232</sup> These limitations contribute to making it hard for fathers to have interaction with their children because they are in prison.

Children whose fathers are detained are emotionally fragile and experience numerous challenges associated with their parents’ detention.<sup>233</sup> These troubles include emotional/social isolation and negative childhood outcomes, for example, “poor academic performance,

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<sup>226</sup> K Houck & S Booker-Loer ‘A Relationship of Parenting Stress to Adjustment among Mothers in Prison (2002) AM J Orthopsychiat Vol 72(4), Page.no .553

<sup>227</sup> Ibid.

<sup>228</sup> U.S. Department of health and Human Services,2002

<sup>229</sup> Ibid

<sup>230</sup> U.S. Department of health and Human Services,2002

<sup>231</sup> J Arditti S Smock & T Parkman ‘It’s Been Hard to be a Father: A Qualitative Exploration of Incarcerated Fatherhood.2005.pg .43

<sup>232</sup> Ibid.

<sup>233</sup> Ibid

emotional suffering, alcohol and drug abuse and association with wrongdoing themselves.”<sup>234</sup> Arditti, Frock, and Parkman investigated a number of detained fathers' experiences before their reunion with their families and communities. They were interested in determining how imprisonment had affected the fathers' parenting roles, how they recognised being fathers, and their inclusion as fathers while in correctional centres. These fathers assumed they would go back to their children and families after being released, and would resume their roles as “decent fathers”.<sup>235</sup> These fathers indicated the importance of having their children as part of their lives, and needing to make changes to ensure the betterment of their children's lives.<sup>236</sup>

## **4.5 Theoretical framework**

### **4.5.1 Attachment theory**

Bowlby's attachment theory is the most generally acknowledged perspective on the child's bond with their parent/guardian.<sup>237</sup> Bowlby proposes that by the time a child is one year old he or she will have built up some connection with familiar individuals who have looked after them and reacted to their requirements for existence (essential physical and emotional needs).<sup>238</sup> After some time, a genuine emotional bond is created between the young child and his/her parent(s). According to Bowlby's attachment theory (cited in Papalia and Wendkos-Olds<sup>239</sup>), there are four stages of attachment:<sup>240</sup>

- a. The pre-attachment stage (birth to about a month-and-a-half). Important development such as smiling, crying, and eye contact help bring infants into close contact with different people.<sup>241</sup> When a grown-up interacts with them, the infant urges her or him to stay close by, since they want to be held, stroked, and conversed in a caring and gentle manner. In this phase, infants can identify their mothers individuality through smell and voice recognition.

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<sup>234</sup> J Arditti S Smock & T Parkman 'It's Been Hard to be a Father: A Qualitative Exploration of Incarcerated Fatherhood.2005 pg 43

<sup>235</sup> Ibid.

<sup>236</sup> Arditti, J, A., Smock, S, A., Parkman, T, S. (2005). "It's Been Hard to Be a Father": A Qualitative Exploration of Incarcerated Fatherhood. [Electronic version].pg 45

<sup>237</sup> Pattiol, Weiman and Western B ,Imprisonment America :The Social Effects of Mass Incarceration New York :Russell Sage Foundation ,2004 please sort out your footnotes, they are very problematic.

<sup>238</sup> Papilla, D &Wendkos-olds. s (1996). A Child's World: Infancy through Adolescence. (7th Ed.) {Electronic Version}. New York: McGraw-Hill.pg 54

<sup>239</sup> ibid

<sup>240</sup> ibid

<sup>241</sup> Papalia&Wendkos-Olds, 1996)

- b. The ‘attachment in the making’ stage ranges from a month-and-a-half to six-to-eight months. During this stage, babies begin to react more diversely to a well-known parental figure than to outsiders.<sup>242</sup>
- c. The period of ‘obvious’ attachment’ is six to eight months to one-and-a-half to two years. At this stage, the attachment to the parental figures is apparent. In this age category, toddlers show withdrawal tension when the adult whom they have full-grown to depend on lives becomes absent.<sup>243</sup>
- d. Formation of a ‘corresponding relationship’ is between one-and-a-half to two years and above. Before the second year is over, fast development in recognition of their surroundings, routines and language grants toddlers the ability to anticipate their parents’ movements in terms of daily routine, and they are able to anticipate their parents’ arrival home.<sup>244</sup>

Parents are the primary individuals whom newborns know and establish their first bonds with. Parents generally provide security, love, and sustenance. Society is continually evolving, and parents have many commitments, so there is a cumulative likelihood that children will grow up without sufficient grown-up supervision, and in a temperamental and aggressive home.<sup>245</sup> Moreover, children are bound to be separated from other relatives and have limited communication with their grandparents or other distant family members. Children learn how to develop and maintain relations by observing interaction amongst people. In addition, children safely attached to their families are seen as being all the more socially skilled with their companions and guardians, and ready to control their needs and emotions.<sup>246</sup>

The attachment theory describes the importance of a family structure and the important role it has on the progress of the child’s emotions and cognitive skills.<sup>247</sup> Furthermore, it emphasises the role of the family in developing a child’s identity and self-esteem. If this stage is disrupted, the child ends up with behavioural problems.<sup>248</sup>

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<sup>242</sup>Papalia&Wendkos-Olds, 1996)

<sup>243</sup> Papalia&Wendkos-Olds, 1996)

<sup>244</sup> Papalia&Wendkos-Olds, 1996)

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

<sup>247</sup> Papalia, D., &Wendkos-Olds, S. (1996

<sup>248</sup> Ibid.

Papalia and Wendkos stated that the attachment theory indicates that a newborn's emotions of fondness and security through sound connections/relationships strengthen their mental development.<sup>249</sup> These authors further state that this new attachment is significant for psychological and social improvement for both the mother and the infant.<sup>250</sup>

Since attachment is significant in a child's life, there is no bigger threat to a parent-child relationship than separation. Children experience internal upset when a parent is detained, and they have to go into foster care. These interruptions in the parent-child bond may cause various changes in their conduct.<sup>251</sup>

Bonding with new caregivers can be problematic. Young children who are a year old or more can adapt to new parental figures faster, and search out these new guardians when they are troubled.<sup>252</sup> This process can take more time with young children and babies who go into foster care.<sup>253</sup> Indeed, even after two months, little children still reject and distance themselves from their new parental figures, and are difficult to reassure when bothered.<sup>254</sup> Their placement into foster care can have a long-term impact on children in the social and happy phase.

Guardians tend to distance themselves from children who react badly or who reject them. In addition, guardians who are forced to take care of children with incarcerated parents sometimes experience challenges in caring for these children as it is not natural for them to do so.<sup>255</sup> Children who develop unsatisfactory attachments are at risk of long-term troublesome outcomes, which incorporate masking their feelings and acting out, and separation from society.<sup>256</sup>

The little collection of literature gathered on children of detained parents states that these children will undoubtedly experience emotional and psychological distress. Their emotional

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<sup>249</sup> Papalia, D., & Wendkos-Olds, S. (1996). *A Child's World: Infancy through Adolescence*. (7th Ed.). [Electronic version]. New York: McGraw-Hill. pg.5

<sup>250</sup> Ibid.

<sup>251</sup> Dozier M and Bick J .Changing Caregivers : Coping with Early Adversity '2007'37 (6)Psychiatric Annals. Page no.10

<sup>252</sup>Dozier and Beck 2007

<sup>253</sup> Ibid

<sup>254</sup> Ibid.

<sup>255</sup> Dozier, M., & Bick, J. (2007). *Changing caregivers: Coping with early adversity*. [Electronic version]. *Psychiatric Annals*, 37, Pg .6

<sup>256</sup> Ibid.

and psychological development will be impeded in comparison with children whose parents have not been detained.<sup>257</sup> Issues such as aggressive behavior, criminal activity, withdrawal, depression and lack of focus have been noted among children of incarcerated parents.<sup>258</sup>

#### 4.5.2 Identity theory

Identity theory is especially helpful for its capacity to conceptualise how much, and why, guardians perform or neglect to perform their parental responsibilities.<sup>259</sup> It must be observed that the identity theory emerged following investigation of the increasing population (e.g. undergrads and middle-class families). Still, it neglects to consider a large number of elements related to imprisonment such as confusion and fear.<sup>260</sup> While relating theory to 'particular populations' like the detained, the theory must be analysed cautiously for its applicability to those people's unique nature.<sup>261</sup>

Burke's model of the personality affirmation procedure<sup>262</sup> is used to conceptualise incarcerated parents' associations with their children since it depicts the procedures of identity upkeep and change, and what happens when these procedures are interfered with.<sup>263</sup>

Breaks in the identity affirmation forms are conceptualised as an exceptionally powerful component influencing parental inclusion. The types of interference brought about by imprisonment influence the levels of contribution, and drive changes in the detained parent's impression of themselves as guardians<sup>264</sup>.

The enormous power imbalance (according to choices as to what parent-child connections will happen) between parents and the individuals taking care of their children is a grave concern. To exercise their roles as parents, parents have to depend to a great extent on others

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<sup>257</sup> Papalia, D., & Wendkos-Olds, S. (1996). *A Child's World: Infancy through Adolescence*. (7th Ed.). [Electronic version]. New York: McGraw-Hill.pg 57

<sup>258</sup> Ibid

<sup>259</sup> Hairston .C.F ( 1991) Family ties during imprisonment :Important to whom and for what *Journal of sociology and Social Welfare* ,19,Pg .94

<sup>260</sup> ibid

<sup>261</sup> Western, B, Patillo, M, & Weiman, D. (2004). Introduction. In M. Patillo, D. Weiman, & B. Western (Eds.), *Imprisoning America* (pg16). New York: Russell Sage Foundation.219

<sup>262</sup> Burke, P.J. (1991). Identity processes and social stress. *American Sociological Review*, 56, Pg.837

<sup>263</sup> ibid

<sup>264</sup> Burke, P.J. (1991). Identity processes and social stress. *American Sociological Review*, 56, Pg.838

while in prison.<sup>265</sup> Children have to be taken to the centres by an adult, letters have to be read to children who are unable to read, calls from parents in prison have to be received, and so on. However, those upon whom the parent depends to encourage this collaboration with their child may be uncooperative. In such instances, the parent will have little capacity to do anything about it. For example, the person responsible for taking care of the child may prevent a detained father from having access and interaction with his child by not bringing the child to visit or by preventing the child from reading letters from the parent.<sup>266</sup>

The limitation of a father's association with his children by an outsider is often referred to in written works on parenthood, concentrating essentially on the mother as the person who restricts the association and contribution.<sup>267</sup> This limitation of a father's association and contribution by the mother is referred to as 'maternal gatekeeping'.<sup>268</sup> Fagan and Barnett characterise maternal gatekeeping as a 'mother's inclinations and endeavours to limit and reject fathers from child care and inclusion with children'.<sup>269</sup> While correctional centres' guidelines limit father-child contact, the mothers or guardians may restrict it even further.<sup>270</sup>

When considering incarcerated parents, paternal role assumption in the identity theory is regularly conceptualised as having two sections: extensiveness and intensiveness.<sup>271</sup> If parents fulfill these roles, the breadth of parental commitment to nurturing roles is a factor in the number of relationships that will be adversely affected.<sup>272</sup> The intensiveness of the commitment to identity is the depth of the relations entered into by virtue of an identity.<sup>273</sup> The intensiveness of a parent's commitment to their parenthood identity is measured by the depth or values the mother places on the relationship that the father has with the child, and

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<sup>265</sup> K Kazura 'Family Programming for Incarcerated Parents: A Needs Assessment Among Inmates' (2001) *J. Offender Rehabil.* Vol 32,pg.72

<sup>266</sup> Ibid.

<sup>267</sup> Ibid

<sup>268</sup> S Allen & A Hawkins 'Maternal Gatekeeping: Mothers' Beliefs and Behaviours that Inhibit Greater father Involvement in Family Work' (1999) *J Marriage Fam Vol 61, 199-212. Page no199*

<sup>269</sup> Allen, S.M., & Hawkins, A.J. (1999). Maternal gatekeeping: Mothers' beliefs and behaviour's that inhibit greater father involvement in family work. *Journal of Marriage and the Family*, 61, pg.200

<sup>270</sup> C Hairston 'Family Ties During Imprisonment: Important to Whom and for What?' (1991) *J Sociol Soc Welf.* Vol 19, . Page no.90

<sup>271</sup> K Pasley T Futis & M Skinner 'Effects of Commitment and Psychological Centrality on Fathering' (2002) *J. Marriage Fam.* Vol 64, Page no133

<sup>272</sup> J Fagan & M Barnett 'The Relationship Between Maternal Gatekeeping, Paternal Competence, Mothers' Attitudes About the Father Role, and Father Involvement' (2003) *J Fam. Issues* Vol 24, PG.1026

<sup>273</sup> Pasley, K, Futris, T.G, & Skinner, M.L. (2002). Effects of commitment and psychological centrality on fathering. *Journal of Marriage and Family*, 64, pg136

the mother has with other people such as grandparents connected to the child.<sup>274</sup> In instances where the child has little to no relationship with his or her parents, it is said that the parents have a less intensive commitment to their parenthood identity than that of other relatives who have strong ties with extended systems of individuals and the child.<sup>275</sup>

While incarceration is meant to punish the wrongful action of the wrongdoer, it also interferes with the continuation of numerous exercises that are helpful to society. In reality, parents are incapable of carrying out their supportive roles due to their incarceration. This impacts on the child and the parents, since the parents are unable to affirm their identity as parents.<sup>276</sup>

Many incarcerated parents have encountered trauma, neglect and abandonment during their childhood, resulting in mental blocks that have disturbed their healthy personal relationships and psychological functioning.<sup>277</sup> Many of these incarcerated parents have no relatives to return to and are not welcomed by their communities. Moreover, many of these parents have a long history of substance abuse (which is frequently aggravated by being in prison), and many are unable to find work.<sup>278</sup> Without help, numerous parents revert to well-known yet unfortunate methods of relating and activities, by joining groups, abusing substances or breaking the law.<sup>279</sup> These elements neutralise their fruitful reintegration into society. Incarceration's infringement upon familial ties is particularly problematic (especially for children) since such ties are demonstrated to be protective factors against recidivism, and other negative outcomes post-release.<sup>280</sup>

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<sup>274</sup> S Stryker 'Identity Theory: Developments and Extensions' in K Yardley & Simmons ,C,W PhD (2000)Children of incarcerated parents {Electronic version }T.Honess( Eds )self identity :Pshosocial perspective pg.89

<sup>275</sup> Ibid.

<sup>276</sup> Muntingh, L. (2008). Prisoner – re-entry in Cape Town – an exploratory study. Civil Society Prison Reform Initiative (CSPRI) research paper No 14. University of Cape Town: South Africa. Retrieved from <https://www.google.co.za/#q=Prisoner+%E2%80%93+reentry+in+Cape+Town+%E2%80%93+an+exploratory+study>

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Muntingh, L. (2008). Prisoner – re-entry in Cape Town – an exploratory study. Civil Society Prison Reform Initiative (CSPRI) research paper No 14. University of Cape Town: South Africa. Retrieved from <https://www.google.co.za/#q=Prisoner+%E2%80%93+reentry+in+Cape+Town+%E2%80%93+an+exploratory+study>

<sup>280</sup> Ibid.

#### **4.6 Summary**

Incarceration impacts on the relationship between the child and the parent. It also influences the developmental stages of the child. The family system is also affected as it cannot function properly, even after the parent has been released from the correctional centre. The process of reunification can be a challenging experience for both parent and child, and thus the family preservation approach cannot work in all cases.

## **CHAPTER FIVE**

### **AN ANALYSIS OF FOREIGN JURISDICTION**

#### **5.1 Introduction**

The present chapter analyses how other countries have dealt with the child's best interests in determining a primary caregiver's sentence.

Many countries have implemented legal provisions on managing parental imprisonment and its effect on children. A few countries are opposed to children residing with parents in detention facilities. In contrast, others are of the sentiment that the constructive outcomes for the child remaining with his/her detained parent greatly exceed the downside.<sup>281</sup> The laws vary in different countries due to the various social and financial conditions.

The South African Law Commission proposed that a sentencing council be set up in the year 2000 to address the issue of sentencing reform to help ensure the protection of children's best interests.<sup>282</sup> The setting of sentence guidelines was to be one of the essential functions of this committee. As sentencing rules are unfamiliar to most South Africans, there is little

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<sup>281</sup> Huebner, B. M., & Gustafson, R. (2007). The effect of maternal incarceration on adult offspring involvement in the criminal justice system. *Journal of Criminal Justice*, 35 (3), pg 296  
doi:10.1016/j.jcrimjus.2007.03.005.CrossRefGoogle Scholar

<sup>282</sup> Ibid

understanding of what is implied by ‘condemning rules’. South Africa does not appear to have a sentencing organisation set up. Following the Van der Heeven Committee's work, the Minister of Justice established a commission in 1998, led by Professor Dirk van Zyl Smith.<sup>283</sup> This advisory group, otherwise called the Smith Committee, was directed to continue with the Van der Heeven Board Committee's research regarding sentencing reform.<sup>284</sup>

The sentencing council that was created in 2000 is still functional, but no new developments have been presented, despite the fact that the Smith Committee has made additional proposals concerning the council, accompanied by legislative language and guidelines on how the Board would be supported, its procedures, and its reporting mechanisms.<sup>285</sup>

Sentencing guidelines are ultimately aimed at consistency. The absence of consistency in sentencing is a significant issue in South Africa. The effect of parental incarceration on children is just one of the multitudes of subjects for consideration. These are significant issues, and all states have been urged to research and establish best practices that benefit a greater number of children in all nations than is presently achieved.<sup>286</sup>

Scotland's Commissioner for Children and Young People stated that the “decision to incarcerate a parent only rarely takes account of the potential impact on children,” and that law, policy and practice in connection with criminal justice and incarceration ought to be corrected to assess the privileges of children influenced by the incarceration of their parents or guardians.<sup>287</sup> The countries to be discussed will be Australia and Canada as first world developed countries in order to assess and compare the progress made with best interests of the child policy, and also Malawi and Zimbabwe as African countries in order to assess legislation and the development of such policy, and to draw lessons from these countries, as they allow young children to live in prison facilities with their mothers.

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<sup>283</sup> Ibid

<sup>284</sup> *A new sentencing framework in December 2000.* Hanibal Goitom 2014

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Scotland Commissioner report 18/19.accessed 28 December 2018 Pg.11

## 5.2 Lessons on the child's best interests in respect of incarceration

### 5.2.1 Australia

Australia has implemented a specific legislative framework in connection with correctional facilities. *The Standard Guidelines for Corrections in Australia* express that if arrangements are to be created for children and newborn children to live with their guardian in confinement, well-organised approaches and projects should be created where the interests of the children are foremost.<sup>288</sup>

Children and babies are permitted to live with their primary caregiver in confinement after the Administering Department has determined that it is advantageous for the children to do so.<sup>289</sup> There are no alternatives for the essential caregiver to serve her or his sentence in the community (by in-house confinement).<sup>290</sup> Primary caregivers and their children ought to be allowed to serve their sentences under house arrest rather than in the custody of a correctional facility. More details and information on the age restriction for children living in prison, and the numbers of places accessible for children to stay with their mothers in correctional centres in each state is promoted. This serves as a way of regulating the population in correctional centres.<sup>291</sup> This programme which allows children to stay in prison with their mothers has likewise been presented in South Africa, where certain correctional facilities accommodate female prisoners who are pregnant, and who have just given birth, to reside within the correctional facilities.<sup>292</sup> Even with this, one can note that there are still gaps with this programme that need to be addressed.

In New South Wales, the Mothers and Children's Programme comprises a full-time residency programme, an infrequent residency programme, and the release of the mother to complete her sentence outside the correctional centre in an approved location.<sup>293</sup>

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<sup>288</sup> D Sandor ,'how high –how far?The Best interest Principle in Family Law ,(1998)No.19 Australian Children's Rights News. Pg 36

<sup>289</sup> Ibid.

<sup>290</sup> Bell, M. F., Bayliss, D. M., Glauert, R., & Ohan, J. L. (2018). Using linked data to investigate developmental vulnerabilities in children of convicted parents. *Developmental Psychology*, 54(7), pg 1221. <https://doi.org/10.1037/dev0000521>

<sup>291</sup> D Sandor ,'how high –how far?The Best interest Principle in Family Law ,(1998)No.19 Australian Children's Rights News.Pg 36

<sup>292</sup> White Paper on Correction.2005.Department of Correctional Services Pretoria: Government of South Africa.

<sup>293</sup> Bell, M. F., Bayliss, D. M., Glauert, R., & Ohan, J. L. (2018). Using linked data to investigate developmental vulnerabilities in children of convicted parents. *Developmental Psychology*, 54(7),Page No. 1221. <https://doi.org/10.1037/dev0000521>

Children are permitted to live with their mothers in the full-time residency programme provided that they are under six years old and not enrolled in school.

The Northern Territory Prisons Detainment Offices (Correctional Services) Act, 1980 (NT) allows a woman detainee who has a child under the age of five years to stay with her inside the prison.<sup>294</sup> In 2012, the Alice Springs Correctional Centre built a twenty-four-bed cabin to address the issues of women with children in prison.<sup>295</sup> In Queensland, authorities may endorse a child who is not yet eligible to attend school (for example, primary school) residing full-time with their mother in a restorative office.<sup>296</sup>

Three Queensland ladies' reformatories have lodging units that allow women with babies or children to live with them.<sup>297</sup> One jail has units that can house eight prisoners and their children, and another can accommodate up to six children, and sometimes even 10, together with their mothers.<sup>298</sup> The third unit has space to accommodate eight mothers and their newborn children, and eight spots for mothers and children in a double unit.<sup>299</sup>

As per the Department's 2002–03 Annual Report, “the Adelaide Women's Prison had workplaces to suit nine women with children under three years of age. The 2012–13 Yearly Report communicated that a target for the next year was to set up a mothers and children programme at the jail”.<sup>300</sup>

In Tasmania, a detainee may appeal for permission for a child to live with them in prison. The detainee has to make a formal application with motivation for the court to consider and approve the application.<sup>301</sup> The ladies' correctional centre in Tasmania has a seven-bed mother-and-child unit. In Victoria, detainees who are expecting to have children or who are

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<sup>294</sup> Ibid

<sup>295</sup> Northern Territory Prisons OF Australia Prisons.(Correctional Services )ACT in force 14 December 2005(Correctional Services Act 1980(NT)

<sup>296</sup> Ibid.

<sup>297</sup> Melhus L 'How are Pregnant Prisoners and Their Babies Treated in the American Correctional System An in-depth look at Prison Nurseries and Community-Based Residential Parenting Programmes , Parental Rights and Health Care' University of Oslo 2013. Pg.488 Para 9.1.1 of the B-Order ,Melhuis

<sup>298</sup> Ibid

<sup>299</sup> Ibid.

<sup>300</sup> D Sandor ,'how high –how far?The Best interest Principle in Family Law ,(1998)No.19 Australian Children's Rights News.

<sup>301</sup> A Larsen, Gendering criminal law:sentencing a mothering person with dependent children to a term of imprisonment',Australian Journal of Gender and Law, 1(1), 2012, pg 28

the essential carers of children may apply for the Mothers and Children Programme.<sup>302</sup> A child must be under the minimum school age to live in confinement with his or her mother. The programme is accessible in the state's two women's prisons, where mothers and their children are retained in committed housing. According to a February 2013 news report, around nine children, from the ages of two months to four years, were residing in correctional centres with their mothers in the state.<sup>303</sup>

Western Australia introduced policy directives that provide both the principles and the strategies for children staying with their mothers in detention facilities.<sup>304</sup> Further, some prisons have limited the length of time for which a child is able to live with the mother in detention to one year.<sup>305</sup> Reports indicate that between 2010 and 2011, nine children were living with their mothers, as opposed to the regulated number of only six.<sup>306</sup>

In Australia, when determining the child's best interests, courts must consider a number of factors generally encompassing the protection of the public, the seriousness of the offence, and the personal circumstances of the offender.<sup>307</sup> In *Markovic v The Queen*<sup>308</sup> the court of appeal specifically observed whether the incarceration of the parent will impose hardship on the family.<sup>309</sup>

The Australian Law Reform Commission advocated that the effects of a sentence for a primary caregiver with children should be an important consideration without the need to establish other circumstances.<sup>310</sup> According to Walsh and Doughas, the impact of a sentence, should not affect the child. They further suggested that when a parent is being sentenced the best interests of the child should always be considered.<sup>311</sup>

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<sup>302</sup> Bell, M. F., Bayliss, D. M., Glauert, R., & Ohan, J. L. (2018). Using linked data to investigate developmental vulnerabilities in children of convicted parents. *Developmental Psychology*, 54(7), pg 1221. <https://doi.org/10.1037/dev0000521>

<sup>303</sup> Ibid.

<sup>304</sup> Boudin C "Children of incarcerated parents: The child's Constitutional right to the family relationship" *The Journal of Criminal Law & Criminology* 2011 Vol 101 (1) p 93.

<sup>305</sup> Ibid

<sup>306</sup> D Sandor ,'how high –how far?The Best interest Principle in Family Law ,(1998)No.19 Australian Children's Rights News.

<sup>307</sup> A Larsen, Gendering criminal law:sentencing a mothering person with dependent children to a term of imprisonment',*Australian Journal of Gender and Law*, 1(1), 2012, pg 28

<sup>308</sup> (2010) 30 VR 589 ("markovic")

<sup>309</sup> Ibid

<sup>310</sup> K.McCauley and A. Erikson,The impact of Incarceration on Children's Care:A strategic frameworkfor good care planning ,Monash University .Criminal Justice Research Consortium,2016 .pg 46

<sup>311</sup> R. v. Hamilton, 2003 CanLII 2862 (ON SC)

In conclusion, it has been observed that Australian law reform has caused Australian federal and some state-level laws recognize the probable effect of any sentencing option, and the mitigating factor of hardship to dependents. The state laws and/or sentencing guidelines should be revised to recognize the likely impact of a sentencing option on an offender's dependents, irrespective of whether the conditions are outstanding.

### 5.2.2 Canada

In Canada, offenders who have been condemned to detention for at least two years are kept back in government correctional service offices, while those with a lesser sentence stay in provincial correction centres.<sup>312</sup> Certain actions are set up to help imprisoned parents to maintain parental relations with their children, together with accompanied impermanent non-appearance, unescorted brief absences, and official family visits without physical obstruction to personal contact for children as young as new-borns to children aged four years.<sup>313</sup>

In 1995 the Correctional Service of Canada created rules to accommodate a Mother-Child Programme (MCP). The use of this programme is decided on by the institutional head (or warden) and the availability of space.<sup>314</sup> This was created because the Canadian sentencing policy on mitigating factors did not expressly recognize the excessive hardship on a dependent's principal (Australia) or include a list of mitigating factors such as family ties.<sup>315</sup> While criminal sentencing courts may consider an offender's dependent children as a mitigating factor, there are also cases where a sentencing court has refused to take a defendant's caregiving obligations in mitigation, and as a result special provisions to accommodate children in prison had to be implemented.

The MCP arranged for a full and part-time living programme for mothers with children below four and six years of age. In *69R v Whit Ford*,<sup>316</sup> a mother who was suspected of shooting her accomplice was permitted to keep her newborn child in jail with her temporarily.

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<sup>312</sup> B Shingle 'Canada Expanding Rarely Used Program That Lets Mothers Live With Children in Minimum Security Prisons' (2014) *National Post* (May 19, 2014.)

<sup>313</sup> R. v. Hamilton, 2003 CanLII 2862 (ON SC) at para 197. For an in depth analysis of the Hamilton and Mason cases, see especially: C Murdocca, *To Right Historical Wrongs: Race, Gender and Sentencing in Canada*, Vancouver: UBC Press, 2013. Pg 83

<sup>314</sup> Ibid.

<sup>315</sup> B Shingle 'Canada Expanding Rarely Used Program That Lets Mothers Live With Children in Minimum Security Prisons' *National Post* (May 19, 2014.)Pg No.36

<sup>316</sup> *69R v Whit Ford* (2008) BC.S.C.1378 (C.N.B.C.).

The court decided on this to protect the child from being separated from their caregiver and also to maintain the family ties. The qualification criteria were changed to exclude offenders sentenced for serious crimes, and to limit the programme to a part-time programme because the sentencing guideline proposals suggest that the adjudicators should be aware of the differential impacts of sentencing and incarcerating primary caregivers, particularly in relation to caregiving responsibilities.

Fourteen children were housed in prison in 2008, and eight of them were housed on a full-time basis.<sup>317</sup> Statistics outline that in April 2003, there were three MCP members among the female prison population, four members out of a total of 460 offenders in April 2007, and no members out of 603 female inmates in April 2012.<sup>318</sup> This indicates that MCP participation has diminished despite an increase in the number of female prisoners.<sup>319</sup> An organisation called Restorative Help of Canada requested the building of additional rooms to encourage the use of the MCP. Still, it is uncertain how many women participate at this point. At a provincial level, the biggest cities, including Québec, Ontario and Alberta, do not have programmes permitting children to live together with their incarcerated guardians.<sup>320</sup> The projects that were set up are restricted to family visits; however, Alberta has introduced video conference visits to permit additional visits, as well as extended visiting hours.<sup>321</sup> British Columbia started introducing the MCP in prison facilities in 1973 to allow women who had conceived a child prior to incarceration to keep their children with them in their particular facilities while serving their sentences.<sup>322</sup>

In 2008 the MCP was cancelled in a provincial correctional centre due to problems including the lack of subsidised funding for the programme. However, the Supreme Court of British Columbia in the *Whit Ford* case turned around the decision by proclaiming that the decision to drop the MCP was an unconstitutional violation of the principles of fundamental justice

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<sup>317</sup>Hayli Anne Millar: *The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities* Springer .June 2018Criminal Law Forum 29(2):1-51DOI:10.1007/s10609-017-9340-9

<sup>318</sup> Ibid.

<sup>319</sup> Women's correction :Mother Child programme,Correctional Service of Canada,<http://www.csc-ccc.gc.ca/text/prgrm/fsw/proo2-5eng.shtml> (last visited 23 January 2021).

<sup>320</sup> Ibid

<sup>321</sup> Ibid.

<sup>322</sup> Alberta Justice and Solicitor General"Visiting inmates (25 July 2014)Available at <http://www.solgpd.alberata.ca/programmesand> services/adult centre

and the right to equality under Sections 7 and 15 of the Canadian Charter of Rights and Freedoms.<sup>323</sup>

The case of *Inglis v British Columbia*<sup>324</sup> is evidence of the implementation of the child's best interest principle in Canada. Here, the mother was sentenced to incarceration, and during her incarceration the mother-baby program that allowed inmates to keep their newborns and infant children was cancelled, and therefore the mothers could not keep their babies with them. The court established that this cancellation of the programme was in violation of the plaintiff's right and the child's best interests principle, and sentence was suspended. In two other cases such as *R v Fiedorowicz*<sup>325</sup> and *R v Fox*<sup>326</sup> the court opted for conditional sentencing, constituted by house arrests, as opposed to keeping the offenders in custody, to allow the offenders to maintain work and support their children financially.

In conclusion, Canada's remedial sentencing provisions have been judicially recognized, and they have created obligations in terms of protecting the best interests principle.

### 5.2.3 Malawi

Domestic law, international treaties, and regional human rights treaties to which Malawi is signatory, all have progressive provisions concerning the rights of children whose caregivers are in conflict with the law.<sup>327</sup> In the past, courts have held a fairly rigid view that difficulties for families are brought about as an inevitable consequence of the enjoyment of crimes, this reason is not regarded as a mitigating circumstance.<sup>328</sup> This suggests that that accused persons should consider all consequences before they engage in criminal activities. Malawi does not have a standardised approach when dealing with incarceration of caregivers. It is well established in that country that in deciding on an appropriate sentence, the court will investigate if the sentence fits the offence, the victim, the offender, and the public interest or

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<sup>323</sup> Anon. 'Visiting Inmates' (Alberta Justice and Solicitor General)[http://www.solgps.alberta.ca/programs\\_and\\_services/correctional\\_services/adult\\_centre\\_operations/nerc/Pages/VisitingInmates.aspx](http://www.solgps.alberta.ca/programs_and_services/correctional_services/adult_centre_operations/nerc/Pages/VisitingInmates.aspx) (accessed 25 July 2018).

<sup>324</sup> *Inglis v British Columbia* (Minister of Public Safety) 2013 BCSC 2309

<sup>325</sup> *R v Fiedorowicz*, 2016 ONCJ 26 (QL)

*R v Fox*, 2015 ABPC 64 (QL)

<sup>326</sup> *R v Fox*, 2015 ABPC 64 (QL)

<sup>327</sup> *ibid*

<sup>328</sup> V.M.Chirwa "Report of the special Rapporteur on Prisons and conditions of Detention in Africa :Prisons in Malawi"(17:28 June 2001)pg .36

public goals.<sup>329</sup> Malawi has generally agreed that prisons are not an appropriate environment for children as they face acute challenges on account of an absence of government subsidies - this prevents the Malawi Prison Service from providing children's essential necessities while they are living in prison with their mothers.<sup>330</sup>

Children in prison are not provided with an exceptional eating routine; instead, the mothers end up having to frequently share with their children the food given to them.<sup>331</sup> In addition, there is no adequate provision for breastfeeding mothers.<sup>332</sup> The health services in prison are inadequate to the task of coping with the needs of babies and small children.<sup>333</sup> Only one prison, named Zomba Central Prison, provides children with a chance of attending nursery school, whereas other correctional facilities do not have nursery schools.<sup>334</sup>

There are many challenges faced by Malawian prisons which have means they are not a good environment in which to raise children. The lack of funding from the government prevents the Malawi Prison Services from providing for the basic needs of children such as food, there is no special provision for children's diet, and children have to share the food with their mothers. They are also no nursery school facilities for children, and there are also no recreational facilities available.<sup>335</sup>

The number of children separated from parents due to incarceration is unknown because judicial prisons and other systems rarely keep track of this data.<sup>336</sup> Section 23 of Malawi's Constitution provides that "all children, regardless of the circumstance of their birth, are

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<sup>329</sup> Ibid

<sup>330</sup> Centre for Human Rights Education, Advice and Assistance (CHREAA) Press Release "Malawi Prison Service Needs Reform" (5 June 2014) available at <http://chreaa.org/press-release-malawi-prison> health services-needs (last accessed 28 December 2020).

<sup>331</sup> E Kamwendo, "The Invisible Prisoners: A Case of Children in Malawian Prisons" Lund University Master Thesis (2009) 32. Presentation by Agnes Patemba, Chief Resident Magistrate (East), at a workshop for magistrates on imprisoning mothers with their children held in Lilongwe on 15 December 2015. The workshop was organised by CHREAA and the Southern Africa Litigation Centre (SALC).pg 11

<sup>332</sup> Centre for Human Rights Education, Advice and Assistance (CHREAA) Press Release "Malawi Prison Service Needs Reform" (5 June 2014) available at <http://chreaa.org/press-release-malawi-prison> health services-needs (last accessed 28 December 2020).

<sup>333</sup> Ibid

<sup>334</sup> Ibid

<sup>335</sup> O. Robertson "The impact of parental Imprisonment on children" Women in Prison and Children of Imprisoned Mothers series Quaker United Nations Office. (2007) pg .7

<sup>336</sup> O. Robertson "The impact of parental Imprisonment on children" Women in Prison and Children of Imprisoned Mothers series Quaker United Nations Office. (2007) pg 8.

entitled to equal treatment before the law, and the best interests and welfare of children shall be the primary consideration in all decisions affecting them.”<sup>337</sup>

Section 60 of the Prisons Act provides that a breastfeeding child should be allowed to stay with their mother up until the child has turned three and is of the appropriate age to be placed in alternative care placement.<sup>338</sup> In Malawi those who engage in criminal activity are punished irrespective of the circumstances. In *Gadama v State*,<sup>339</sup> the mother was breastfeeding and used this as an exceptional circumstance; the court dismissed these circumstances and imposed a sentence appropriate to the crime committed.<sup>340</sup> It can be noted that there are cases where a child’s best interests have been considered, such as *Dickson and another v Republic*,<sup>341</sup> where the child was in the custody of the incarcerated parent, and as a result the applicant was granted bail on the basis that the child remain in custody of the parent.

It is well evident that Malawi does not have a standard practice for sentencing caregivers, and needs to adopt a standardised approach.

### **5.2.11. Zimbabwe**

Zimbabwe’s economic status does not allow children to remain in correctional facilities with their caregivers.<sup>342</sup> In most correctional facilities in Zimbabwe there is no accommodation for children, and special accommodation for pregnant mothers is not provided. As soon as they give birth they have to give their child to the government for alternative placement.<sup>343</sup> There is a need for the law to change to ensure that criminal justice processes are consistent with constitutional dictates.<sup>344</sup>

The child’s best interests does not contribute much in terms of serving as a mitigating factor for courts to consider alternative sentences for caregivers. In most cases, if a caregiver has

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<sup>337</sup> Prisons Act ,(ap )9:02 of the laws of Malawi.Section 60

<sup>338</sup>Prisons Act ,(ap )9:02 of the laws of Malawi.Section 60

<sup>339</sup> Gadama v Republic court (misc.criminal applications no.145 of 2001

<sup>340</sup> Gadama v Republic court (misc.criminal applications no.145 of 2001

<sup>341</sup> Miscellaneous Criminal Case No. 107 of 2007 (High Court) (Lilongwe District Registry) (unreported)

<sup>342</sup> Nsingo, E. (2010) Zimbabwe Now a Factory of Poverty, Harare: National Statistical Agency. Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children.pg 21

<sup>343</sup> Mawere, M. (2013). Coping With Poverty In Rural Communities Of Third World Africa: The CaseOf Mukonoweshuro Cooperative Gardening In Gutu, Zimbabwe, The International Journal Of Humanities & Social Studies (ISSN 2321 -9203), Vol 1 Issue 2

<sup>344</sup> Nsingo, E. (2010) Zimbabwe Now a Factory of Poverty, Harare: National Statistical Agency. Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children.pg 22

committed a crime and is convicted, he or she is automatically sentenced with imprisonment, regardless of whether the incarceration will expose the child to vulnerabilities.<sup>345</sup> Most children have no contact or interaction with their parents while they are in detention, and the prison systems have created challenges for parents to maintain contact. It is also very difficult for children to visit their parents in prison as most of the prisons are isolated, and it is expensive to visit their parents.<sup>346</sup> But it is worth noting that courts have been trying to enforce compliance in some instances, by using different interpretations of the best interests principle, and of the right not to be detained except as a measure of last resort.<sup>347</sup>

It is observed that there are differences in the way courts approach cases concerning children with incarcerated parents in Zimbabwe.<sup>348</sup> In certain instances, judges adhere to the right not to be detained unless there is no other option under the circumstances. But sometimes judges use detention as a punitive measure against the caregivers of the child, and as a measure of first resort, without considering the child's best interests, and other less restrictive alternatives.<sup>349</sup>

In cases where the child remains with the imprisoned mother, Article 31bis of Promulgating Law No. 12 of 1996, as amended by Law No. 126 of 2008, states that every prison for women must have a nursery for placement of the children of imprisoned mothers until they reached four years old; however, this is on the condition that the imprisoned mother stays with her child in the first year of life. There is not enough evidence to show if this is happening in practice.

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<sup>345</sup> Laws on Children residing with parents in prison(2004)The law of congress,Global Legal Research Centre .available at <http://www.loc.gov/law/help/children-residing-with-parents/children-resdind-with-parents-in-prisons>(accessed in 3 April 2021)

<sup>346</sup> *ibid*

<sup>347</sup> Nsingo, E. (2010) Zimbabwe Now a Factory of Poverty, Harare: National Statistical Agency. Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children.pg 22

<sup>348</sup> Law No. 12 of 1996 Promulgating the Child Law, *al-Jarīdah al-Rasmīyah*, 28 March 1996, Vol. 39, No. 13 (supp.), pp. 2–47, as amended by Law No. 126 of 2008, *al-Jarīdah al-Rasmīyah*, 15 June 2008, No. 24Bis, pp. 2–27, both available at <http://www.egypt.gov.eg/english/laws/> (in Arabic), English translation of Law No. 12 as amended available at [http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english\\_eng.pdf](http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf)).

<sup>349</sup> *ibid*

The law also states that there must be a decree issued by the Minister of Correctional Department to regulate the communication between the imprisoned mother and the child, and to ensure that no mother is denied access to her child.<sup>350</sup>

## **SOUTH AFRICA**

South Africa is one of the countries that permit minor children to live with their mothers in correctional facilities until the child is two years of age or until the child can be appropriately placed in alternative care placement.<sup>351</sup> When a mother is incarcerated, the Department of Correctional Services is obliged to establish steps to find a proper placement for the child with the assistance of the Department of Social Development.<sup>352</sup> There are frameworks in place that are guidelines on children living with their mothers in correctional facilities.<sup>353</sup>

South Africa has incorporated domestic law as well as international law to make provision for the child's best interests. There are cases demonstrating this, where international law has played a major role for the court to implement the best interests of the child, such as the Bangkok Rules. There are a few cases that considered the Bangkok rules 2(2) when applying the policy of the best interests of the child, such as the case of *S v EB*,<sup>354</sup> where it postponed the sentence and allowed the offender to make living arrangements for her minor children while she served sentence. There is also the case of *S v Thebus and Another*,<sup>355</sup> and *S v Makau*,<sup>356</sup> where the courts considered the fact that the offender had minor children, and families who were dependent on them, and imposed a lighter sentence.<sup>357</sup>

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<sup>350</sup> Law No. 12 of 1996 Promulgating the Child Law, al-Jarīdah al-Rasmīyah, 28 March 1996, Vol. 39, No. 13 (supp.), pp. 2–47, as amended by Law No. 126 of 2008, al-Jarīdah al-Rasmīyah, 15 June 2008, No. 24Bis, pp. 2–27, both available at <http://www.egypt.gov.eg/english/laws/> (in Arabic), English translation of Law No. 12 as amended available at [http://www.nccmegypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126englis\\_eng.pdf](http://www.nccmegypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126englis_eng.pdf)).

<sup>351</sup> South Africa .Department of Correctional Service Gazette 1 June 2007.Press release

<sup>352</sup> South Africa .Department of Correctional Service Gazette 1 June 2007.Press release .

<sup>353</sup> Ibid

<sup>354</sup> *S v EB* 2010 (2)SACR 524 (SCA)

<sup>355</sup> *S v Tebus and Another* 2002(2) SACR 566 (SCA)

<sup>356</sup> *S v Makau* 2006 (2) SACR 582 (SCA)

<sup>357</sup> Melhus L 'How are Pregnant Prisoners and Their Babies Treated in the American Correctional System An in-depth look at Prison Nurseries and Community-Based Residential Parenting Programmes , Parental Rights and Health Care' University of Oslo 2013. Page no.488 Para 9.1.1 of the B-Order ,Melhus ibid in Nebraska, Indiana,

There are various programmes that Correctional Services provide for women in correctional facilities with their children. These programmes enable children to reside with their mothers until they reach the age of 2 years or until such time as the child can be appropriately placed, taking into consideration the child's best interests. When a mother is imprisoned, the Department of Correctional Services (the Department) is required to take the necessary steps to find an appropriate placement for her child, in cooperation with the Department of Social Development.

In every possible instance, the Department is obliged to ensure that mother-and-child units are accessible for mothers with children. In addition, while the child is in its custody, the Department is liable for the child's food, clothing, health care, and all other facilities needed for the child's sound development.<sup>358</sup>

Whether minor children reside with their mothers in prison or stay outside prison, they are directly or indirectly affected by their mothers' incarceration.<sup>359</sup> While the Correctional Department makes provision for allowing minors to stay in prison, whether the children stay with their mothers in prison or not, they experience great impact through the incarceration of their mothers.<sup>360</sup> There are 241 correctional centres in South Africa, and of these only 8 are exclusively for women, while the rest accommodate both men and women. This is one of the gaps that is faced by the Department as there is limited space and units to accommodate pregnant women and mothers together with their children.<sup>361</sup> Children who live with their mothers in correctional centres often exhibit behavioural problems. They learn this behaviour from the environment they are in, because they are exposed to fighting, shouting, and various kind of abuse occurring in the units where they live.<sup>362</sup>

While S.A. and Australia allow minors born before their mothers go to prison to stay with their mothers in jail, certain countries only allow infants born during the incarceration to live

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<sup>358</sup> Jules -Macquet R-The State of South African Prisons Nicro 2014 .Page 5

<sup>359</sup> Section 20 of the South Africa Correctional Services Act 2002 see also "laws on Children residing with parents in prisons " [www.loc.gov/law/help/children](http://www.loc.gov/law/help/children) -residing with the parents -in prisons /foreign(Accessed 10 July 2021)

<sup>360</sup> South Africa .Department of Correctional Service Gazette 1 June 2007.Press release ..

<sup>361</sup> Ibid

there, in order to eliminate the number of children that the State has to accommodate, besides the number of years they are permitted to stay, so there are still a lot of gaps in addressing the needs of these children. An example is a lack of alternative placement for infants, unlike countries such as Australia, which provides halfway houses, community-based programmes, and occasional residence programmes. Therefore it is highly recommended that our legislature reforms the current framework to include alternatives to incarceration, and placement of infants and children of female offenders.

### **5.3 Conclusion**

This chapter has discussed how foreign countries deal with the child's best interests when determining parents' sentences. It also analyzes foreign jurisdiction, and draws lessons to be considered and implemented in South Africa. This chapter considered the best practices from Australia, Canada, Malawi and Zimbabwe regarding the best interests of children of incarcerated parents.

While different countries have diverse legal frameworks that centre around the child's best interests in parental detention issues, the resources available for deciding the best course of action differ. Countries have varying age limits applicable to children who are allowed to remain with their parents.

The difference between South Africa and Australia is the availability of different programmes. Australia has three different programmes: full-time residence, occasional residence, and approved absence. In contrast, South Africa has only one programme, which is full time residence with one option for mothers to stay in a correctional facility with their children.

In Australia, children and infants are permitted to stay with their primary caregiver in jail after the Administering Department has ascertained that it is of greater benefit for them to do so. Australia has no alternative for the parent or guardian to serve their sentence in the community rather than in prison. The Administering Department in Australia is responsible for ensuring that the correctional facility's conditions and environment are harmless to the children.

In Canada, access to the Mother-Child Programme (MCP) depends on the institutional head's (or warden's) discretion, and the available space. Here the MCP is a full-time 'living

together' programme for female offenders with children below four years. A low-cost programme for children of six years and below is also available. However, this programme's qualification criteria exclude offenders who are sentenced for serious misconduct, and limit the part-time programme as it is not considered to be to the greatest advantage of the child.

The analysis undertaken in this study led to the conclusion that with African countries there is a need for alternatives to the incarceration of caregivers. When imposing sentence a court should take into account the type of offence and the protection of society. This approach will assist the justice system to serve the best interests of the child. When the court has alternative sentencing options, the type of punishment for a primary caregiver should be least damaging to the interests of children.

When looking at funding, it was found that countries do maintain the best interests of the child principle; however, the availability of resources is problematic. Factors such as lack of funding result in some countries not being able to provide the necessary infrastructure for pregnant women. Moreover, it is concluded that while countries may have frameworks that revolve around the matters of parental incarceration and the impact on children, the availability of resources is problematic. Additionally, the age bars and provisions for implementing the privileges and rights of such children vary among the different countries. However, South Africa should gain the accepted procedure of these countries, and improve its practices in this regard.

## CHAPTER SIX

### CONCLUSION AND RECOMMENDATIONS

#### 6.1 Chapter Overview

This chapter provides the conclusion of the study, and recommendations in accordance with the objectives of this study.

#### 6.2 Conclusion

This study's main objective was to explore whether the South African legal framework considers the child's best interests when imposing a sentence on a parent, and explores the impact and practical implications of the application of the best interests principle..

The specific objectives of this study were: to determine whether there is a legal duty on a court to consider the best interests of a child when determining the sentence of a parent; to explore factors that the court should consider in determining the sentence of a parent; to evaluate the impact of incarceration on the lives of children; and to determine how foreign countries deal with the best interests of the child when determining the sentence of a parent.

In brief, the Children's Act mandates that in any matter where a child is involved, the best interests of the child must be of paramount consideration.<sup>363</sup> From the analysis, it has been illustrated that certain countries ensure the child's best interests is considered in sentencing a parent. The analysis revealed that ensuring the protection of the child's best interests requires funding and political will. Countries have different measures for what they consider the child's best interests. Some countries find it easier to abide by the best interests principle

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<sup>363</sup> Children's Act 38 of 2005.

because they are wealthier.<sup>364</sup> Other countries may be willing but can not afford such a privilege.<sup>365</sup> Zimbabwe places the responsibility of protecting the best interests of children by expecting its citizens to consider the best interests of the child before they commit the crime.<sup>366</sup> Hence, the child is not considered when sentencing the parent, because if the parent did not think about the child before committing the crime, what good is that parent to the child? Secondly, Zimbabwe does not consider prisons to be a conducive environment where a child can grow and thrive. This is attributed to an absence of funding to actually create that environment for children, such as a nursery school, proper diet, and medical care for children.<sup>367</sup> Some countries like South Africa do allow the child to stay with incarcerated parents until they are two years old.<sup>368</sup> The age stipulations and plans made to implement such children's privileges and rights vary among the different countries. As much as prison may not be a place for children to grow, this is important because the early formative years of a child are crucial for their neural development and wellbeing.

In terms of determining whether there is a legal duty on a court to consider the best interests of a child in sentencing a parent, this study concludes that the best interests of a child is protected in the directives within the national and international legal framework. Article 9 of the UNCRC stipulates that a child shall not be separated from his or her parents. Article 3 further states that a child who is separated from one or both parents shall maintain personal relations and direct contact with both parents on a regular basis.

Moreover, article 25(2) of the UDHR states that motherhood and childhood require special care and assistance. Whether born in or out of wedlock, all children shall enjoy the same social protection.

The Constitution provides for the protection and promotion of human rights generally; however, “the Constitution provides for children's rights and states that the child’s best interests is of paramount importance in every matter concerning the child.”<sup>369</sup> Also, Section

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<sup>364</sup> Jules -Macquet R-The state of South African Prisons .pg 5.Nicro 2014

<sup>365</sup> *ibid*

<sup>366</sup> Nsingo, E. (2010) Zimbabwe Now a Factory of Poverty, Harare: National Statistical Agency. Parke, R., & Clarke-Stewart, K. A. (2002). Effects of Parental Incarceration on Young Children.pg 22

<sup>367</sup> *ibid*

<sup>368</sup> B Shingle ‘Canada Expanding Rarely Used Program That Lets Mothers Live With Children in Minimum Security Prisons’ National Post (May 19, 2014.)Pg No.36

<sup>369</sup> Note 7 above, (2).

7 of the Children's Act lists certain factors that the court must consider when determining the child's best interests. The Sentencing Act requires the court to implement general standards of sentencing, being the common law concepts of proportionality, equality and totality, when the sentence is imposed against an offender who has a minor child.<sup>370</sup>

These national and international laws bind the courts, and although these laws and guidelines influence the courts' decisions, some scholars have argued that the needs of children with incarcerated parents are often ignored, and that the justice system tends to neglect consideration of the child's when implementing policies.<sup>371</sup> Coetzee<sup>372</sup> asserted that minor children are not given primary consideration during the sentencing process followed in South Africa. The courts only consider children's interests as a circumstance or mitigating factor that an offender can utilise during their sentencing process. Pruett<sup>373</sup> also argued that children's best interests seem to be neglected and not considered when sentences are imposed on parents. It should be noted that the court can consider various sentencing principles and factors when determining parents' sentencing. These have been highlighted in the dissertation.

As far as evaluating the impact of incarceration on children's lives is concerned, this study concludes that there are several negative impacts on the lives of children with incarcerated parents. This has been concluded following the review of work by various scholars who assessed this aspect. It was observed that if a child is separated from their parent during infancy, this will impact on the emotional bond between the parent and child. Between the ages of 2 and 6 years, the separation of a parent contributes to an increase in anxiety, developmental regression, acute traumatic stress, and survivor guilt.<sup>374</sup> Separation from the mother from birth to seven years is associated with behavioural problems such as rejection and trauma reactive behaviours. Between the ages of 15 and 18 years, separation from parents is linked to increased signs of inter-generational crime and incarceration on the part of the children.<sup>375</sup>

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<sup>370</sup> Section 20 of the South Africa Correctional Services Act 2002 see also "laws on Children residing with parents in prisons " [www.loc.gov/law/help/children-residing-with-the-parents-in-prisons-foreign](http://www.loc.gov/law/help/children-residing-with-the-parents-in-prisons-foreign)(Accessed 10 July 2021)

<sup>371</sup> Coetzee, E. Can the application of the human rights of the child in a criminal case result in a therapeutic outcome?. PER [online]. 2010, vol.13, n.3 [cited 2021-05-12], pp.126

<sup>372</sup> Note 15 above.

<sup>373</sup> Note 125 above.

<sup>374</sup> Note 142 above.

<sup>375</sup> Ibid

The research done by the US Department of Health and Human Services found that 70% of young children whose mothers had been incarcerated suffered from emotional or psychological problems which included anger, aggression, hostility towards caregivers and siblings, anxiety, withdrawal, hypervigilance, depression, shame and guilt.<sup>376</sup> These children also potentially developed eating disorders. Reed and Reed have also provided extensive views on the impact of incarceration on the parent and the child, supporting views that it contributes to psychological and social behaviour problems, and affects the child's wellbeing.<sup>377</sup>

The current study has reviewed various cases presented in different countries. The literature suggests that each country considers its own laws and relevance in relation to parents' incarceration and the impact it has on their children. While some countries are firmly opposed to children living with their parents in correctional centres, others are not, and the child protection laws thus differ from country to country in terms of social, cultural, and economic circumstances.<sup>378</sup> Although all countries have a framework that seeks to address the child's best interests in matters of parental incarceration, the available resources, means of determining the same, the age limits, and steps taken to implement the rights of such children, vary from country to country.

### **6.3 Recommendations**

South Africa is one of the countries that renewed its commitment to preserve children's rights and uphold sustainable development goals to ensure that children's rights are secured. The analysis in the previous chapter showed that like many other countries across the world, South African courts do protect children's rights and do look out for their children's best interests. South Africa is a signatory of the UNCRC, UDHR and the ACRWC, advocating the protection of children and acknowledging their rights. South Africa should consider focusing on improving the conditions in prisons so that the children can be protected from being harmed and exposed to harsh conditions.

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<sup>377</sup> Note 133 above

<sup>378</sup> Note 94 above

Secondly, it should develop rigorous psychosocial care services for the children, mothers and families of the imprisoned women. As mentioned earlier, children of incarcerated parents tend to have social problems, behavioural problems, poor academic performance, etc. Hence, providing psychosocial support can prevent or reduce the number of children who experience problems due to the detachment. Ensuring that mothers receive counselling whilst in prison can help prevent separation issues that may lead to depression, bipolar disorder, poor social skills and academic performance, and, importantly, the child should also receive the necessary support to cope with such situations.

Thirdly, the study recommends that South African courts should consider alternative punishment for parents who are convicted of minor crimes, such as serving time outside the correctional facility under house arrest. Imprisonment should be the last option if the child's best interests are to be acted upon. Academic literature suggests that innovative sentencing such as community supervision, restorative justice sentences, and non-residential alternatives are preferable and more effective than life imprisonment with or without the possibility of parole.<sup>379</sup> The government should consider the socio-economic challenges facing the country, as it costs more to accommodate two people in a correctional centre than one. Ultimately, whatever decision is made regarding sentencing a parent, the child's best interests should be considered, and should be made of paramount importance in every instance.

Lastly, there should be programmes to train and continuously monitor and evaluate the people looking after children while their mothers are still in prison. This will also prevent the abuse and neglect that children face at the hands of their caregivers. Children are the future leaders of this world, and by securing children's rights, no child will be left behind, and the children of South Africa can achieve optimum health, growth, and maximum brain potential, and thus achieve sustainable development goals.

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20 December 2018

Ms Nqobile Z Mbatha 209507852  
School of Law  
Howard College Campus

Dear Ms Mbatha

**Protocol reference number:** HSS/2222/018M

**Project title:** Does South African law and policy consider the best interest of the child when sentencing parents.

**Full Approval – No Risk / Exempt Application**

In response to your application received on 06 November 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

**Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number. PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.**

**The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.**

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



.....  
Dr Shamila Naidoo (Deputy Chair)

/px

cc Supervisor: Ms R Bernard and Dr A Singh  
cc Academic Leader Research: Dr F Mnyongani  
cc School Administrator: Mr P Ramsewak

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Humanities & Social Sciences Research Ethics Committee

Professor Shenuka Singh (Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: [ximbap@ukzn.ac.za](mailto:ximbap@ukzn.ac.za) / [snymnm@ukzn.ac.za](mailto:snymnm@ukzn.ac.za) / [mohunp@ukzn.ac.za](mailto:mohunp@ukzn.ac.za)

Website: [www.ukzn.ac.za](http://www.ukzn.ac.za)



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