



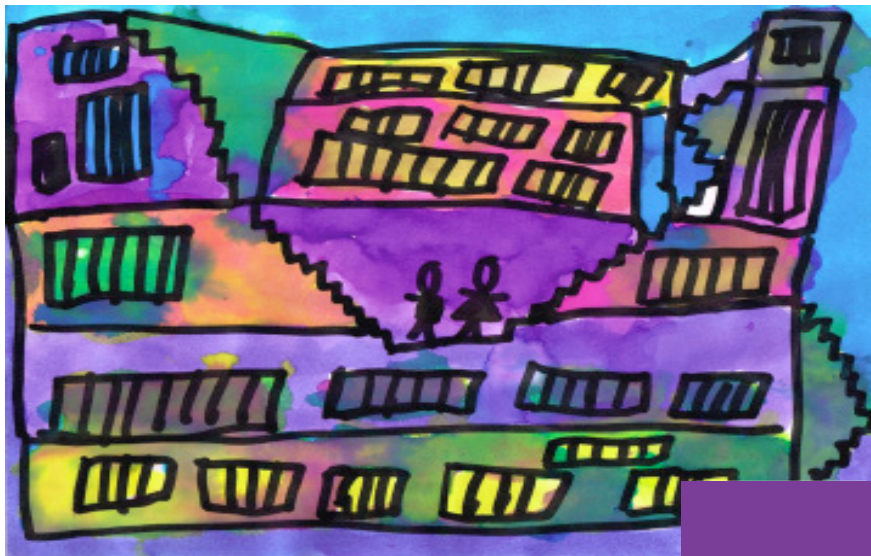
Compassionate Sentencing:
European Perspectives on Children's Rights
during a Parent's Criminal Legal Proceedings



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“Children should be part of sentence planning”
— child, age 12

1. Introduction

In 1989 the United Nations adopted the Convention on the Rights of the Child (UNCRC) and set an international framework establishing children as their own rights-bearers. Judge Albie Sachs described this legal identity of children best in the South African landmark case *S v M* in 2007: “[*The child*] cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”¹ In this case, a single mother’s prison sentence was overturned by the Supreme Court and changed to a non-custodial correctional supervision, in order for her to continue taking care of her dependent children. The children were understood as their own persons whose rights must be separated from those of their parents.

Parental imprisonment is recognised as one of ten adverse childhood experiences (ACEs)². The trauma associated with separation from an imprisoned parent and the risk of toxic stress due to involvement with the justice system can have potentially negative psychological and physiological effects, especially when children lack the presence of strong attachments and caregivers who can ensure their safety and well-being³.

However, this is rarely addressed in adult criminal justice proceedings. Children with imprisoned parents form a vulnerable group where the judiciary may often opt for more of a retributive idea of justice over one

that recognises the inherent rights of those close to the defendant. The network organisation Children of Prisoners Europe (COPE) is dedicated to the protection and advocacy of children’s rights when their parents are involved in various criminal legal proceedings, and this study aims to investigate the rights of those children throughout their parent’s sentencing process within specific European jurisdictions.

This study will explain and examine compassionate sentencing in Europe, a conception of justice which highlights the child’s best interest during the sentencing of their parent. Its primary focus is Scandinavia (Norway, Sweden, Denmark) and Portugal, although other countries are mentioned. Based mainly on desk research and outreach to COPE members and affiliates, this paper is organised into two principal parts: an examination of general awareness of compassionate sentencing and children’s rights throughout sentencing procedures, and existing practices from both within Europe and globally.

1.1 What is compassionate sentencing?

While many people intuitively have an idea about what compassionate sentencing actually is, COPE advocates for its proper inclusion in the vocabulary of academics and practitioners.

Court decisions surrounding a parent can directly affect a child and result in short- and long-term consequences⁴. Compassionate sentencing is an approach to sentencing within the criminal justice system, bridging justice and empathy by prioritising the well-being of children and their rights as a primary objective when their parents stand before a national court. It follows the goal of giving children impacted by parental

1 *S v M*, [2007] ZACC 18 para 18.

2 Felitti, V.J., Anda, R.F., Nordenberg, D., Williamson, D.F., Spitz, A.M., Edwards, V., Koss, M.P., & Marks, J.S. (1998). Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: The adverse childhood experiences (ACEs) study. *Am J Prev Med*, 14, 245-258.

3 Adalist-Estrin, Ann (2014). What are some of the unique challenges that children of incarcerated parents face? Empowering Our Young People, and Stemming the Collateral Damage of Incarceration. White House Presentation. October 8 2014. <https://nrccfi.camden.rutgers.edu/files/white-house-.pdf>

4 For more information, see “Zusammenarbeit mit der Justiz/Working with the Judiciary” https://www.treffpunkt-nbg.de/wp-content/uploads/2024/07/COPE_6-Chandra-Gracias.pdf

imprisonment a **voice**⁵ and highlighting children as individual persons with rights inherent to their own being.

Judge Daniel Mirăuță, a Court of Appeals judge in Romania and a champion of compassionate sentencing, has defined it well:

*"Remaining blind to the consequences of a sentence, justice not impartial and objective but inhumane. Striking blindfolded with a sword over the life of a guilty person, justice may also harm innocents. Compassionate sentencing is taking off the blindfold and surgically removing the evil while preserving the good parts."*⁶

Compassionate sentencing may take the form of prioritising non-custodial sentences, giving parents the opportunity to make care arrangements for their children before serving a custodial sentence, and most importantly, taking into consideration how the sentence will affect the child before a decision is taken. An example of how this can be implemented is drawn from the UK Imposition of Community and Custodial Sentences: Definitive Guideline 2017 which states that *"for offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependents which would make a custodial sentence disproportionate to achieving the aims of sentencing."*⁷

5 Children Of Prisoners Europe. (2021). A toolkit for frame reflective advocacy. https://childrenofprisoners.eu/wp-content/uploads/2022/12/COPE_Toolkit-on-Frame-Reflective-Advocacy.pdf 6, 9.

6 Mirauta, D. (2023, October 10). Compassionate sentencing – a judge’s perspective from Romania. Presentation at Children of prisoners Europe Annual Network Meeting, Limerick, Ireland. <https://childrenofprisoners.eu/compassionate-sentencing-a-judges-perspective-from-romania/>

7 Imposition of community and custodial sentences – Sentencing. (2017, February 1). Sentencing Council. <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/imposition-of-comm>

It gives the judge an option to still impose justice but without arbitrarily harming innocent dependents.

Importantly, COPE emphasises that it is not a “Get Out of Jail Free” card. Judge Albie Sachs explains that the consideration of children in their parent’s sentencing does not give an unfair advantage of leniency and formalises the central point of this idea in his ruling on S v M:

*"[I]t is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is the imposition of the sentence without paying appropriate attention to the need to have special regard for the children’s interests that threatens to do so."*⁸

1.2 Children’s rights during a parent’s court proceedings: the European situation

On any given day, an estimated 2.1 million children in Europe have a parent in prison⁹. There are various reasons that children encounter national courts, be it divorce proceedings, care orders, civil cases or criminal cases. In family law, children are more likely to be heard, but when it comes to the criminal legal proceedings of their parents, their inherent rights are often pushed aside, disregarded or seen as less important. It appears that there are shortcomings in justice systems—both civil law and common law systems— and a lack of attention devoted to the issue of parental imprisonment in legal codes, sentencing guidelines and judicial training curricula.

8 S v M, [2007] ZACC 18 para 35.

9 Figure based on calculations made by Children of Prisoners Europe, from an extrapolation of a 1999 INSEE study to prison population figures supplied by the [International Centre for Prison Studies](#). For more information see: Ayre, L., Philbrick, K., & Lynn, H., Eds. (2014). Children of Imprisoned Parents: European Perspectives on Good Practice, 2nd ed., p.15.

When preparing for the publication of the Guidelines of the Committee of Ministers on child-friendly justice, the Council of Europe instigated a broad consultation of children and youth experiences with the justice system. The report found a general mistrust among children and youth and pointed out multiple shortcomings: intimidating settings, lack of age-appropriate information and explanations, and too expeditious or too long proceedings¹⁰. COPE observes a lack of attention on child-friendly justice specifically for those children with a parent in conflict with the law, in general.

1.3 International framework for children's rights

One hundred and ninety-five countries, including all EU and Council of Europe (CoE) member States, have ratified the United Nations Convention on the Rights of the Child (UNCRC)¹¹. Accordingly, all children, including those involved in criminal legal proceedings, irrespective of their connection, have numerous rights. These include the right to have their views heard when their parents stand before a court and to have those views considered; to have their best interests prioritised by the court or administrative body; to receive information; to not be discriminated against as a consequence of the status or activities of their parents, and to maintain a relationship with a parent who receives a custodial sentence. Despite States' obligations to uphold these rights, many do not or only do so partially due to poorly implemented practices and lagging awareness.

¹⁰ Council of Europe Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)

¹¹ United Nations General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

This study places children's rights during the sentencing of their parents into three categories, derived from the UNCRC and

COPE's conception of compassionate sentencing: (1) informing the child, (2) hearing the child and (3) regular parental contact.

Hearing the child (UNCRC 12)

Article 12(1): State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12(2): The child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative...

[emphasis added]

Informing the child (UNCRC 9, 13)

In accordance with article 9, any State-initiated separation between a parent and a child, such as detention or imprisonment, must upon request be accompanied by essential information to the child and family (unless this would be detrimental to the well-being of the child). This is necessary for the child to understand what is happening, and what will happen in the future.

Furthermore, the child shall, in accordance with article 13, have the right to seek, receive and impart information and ideas of all kinds. This includes age-appropriate legal information and the right to child-friendly explanations of the proceedings.

Regular parental contact (UNCRC 9, 10)

Article 9 confers upon States the duty to ensure that children are not separated from their parents against their will, unless that is within the best interests of the child and in accordance with applicable law.

The duty to maintain personal relations and direct child-parent contact applies when the parent is detained or in prison, (except when contrary to the child's best interest.) Article 10 ensures the right for children whose parents reside in different States to maintain personal relations and direct contact, which also applies when one parent is imprisoned abroad.

Overarching best interest of the child (UNCRC 3)

Article 3 is an overarching right which should be taken into consideration in all matters where a child is involved, directly or indirectly:

Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[emphasis added]

1.4 Council of Europe Recommendation CM/Rec2018(5) Concerning Children with Imprisoned Parents

Growing more aware of this group of children and their situation, the *Council of Europe adopted Recommendation CM/Rec2018(5) concerning children with imprisoned parents* in 2018. In the Recommendation, the Council emphasised, 'without prejudice to the independence of the judiciary', the importance of the best interests of the child, including the need to consider alternatives to imprisonment for primary caregivers. The following point is listed as part of the Basic Principles:

2. Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far

as possible and appropriate, especially in the case of a parent who is a primary caregiver.

Without actually articulating the precise term "compassionate sentencing", one can deduce from what the Recommendation promotes that compassionate sentencing as a concept is inherent to the document.

2. European perspectives

While the Council of Europe and the European Commission have in recent years gained greater awareness of children who have a parent in prison, producing recommendations and guidelines on the matter, there are still no instruments as deeply incorporated in international law as the UNCRC.

An important note for this section is the lack of attention on the issue! This section is limited due to the general lack of focus on children impacted by parental incarceration as a group.

According to the European Court of Human Rights (ECtHR), the best interest of the child is not only a substantive right, but also a procedural rule requiring an assessment on the impact of the decision of the child¹². However, there are certain fallacies when this is applied in practice:

An observation from the courts is that many judges may look at children's rights as something restricted to child victims or family law cases.

Chandra Gracias has served as a judge at the Central Civil Court in Lisbon and an assessor at the Portuguese Supreme Court of Justice, and has been teaching at the Centre for Judicial Studies in family and children's law in Portugal. A common fallacy

¹² For specifics, see "Zusammenarbeit mit der Justiz/ Working with the Judiciary" https://www.treffpunkt-nbg.de/wp-content/uploads/2024/07/COPE_6-Chandra-Gracias.pdf

in the Portuguese justice system seems to be that judges outside family law courts do not consider themselves bound by the UNCRC., Judge Gracias highlighted in a personal communication. It is something framed for the family judge. Unless children are victims or witnesses, there are no requirements for judges to hear a child in a criminal court context (ex officio).

Swedish court officials are generally trained in judicial proceedings, but the focus on children's rights may vary from field to field. Alejandra Castaneda serves as the current office manager¹³ of BUFFF (Barn och Unga med Förälder/Familjemedlem i Fängelse), a Swedish organisation for children and youth with a parent in prison. In conversation, Castaneda considers varying levels of judicial training and sometimes the character of the judge as determining factors as to whether Swedish courts are child-friendly or not. Naturally, personal traits like high empathy may be influential, but a judge who has been trained in children's rights will approach a case differently than one who has not. This creates discrepancies amongst judges, and the rights of children may be inconsistently upheld.

This can also be seen in Norway, where it is not required or obligatory of judicial training bodies to offer courses/training modules on child-friendly legal proceedings. Judges can take courses on the impact of judicial proceedings on the child if they wish to do so, but it is not a requirement¹⁴.

An important step towards systematising awareness among judges would be to introduce courses and modules on the topic as mandatory for training bodies to offer, rather than obliging individual judges themselves.

13 At the time of writing

14 Larsen, B. Personal communication. (2024, February 13).

Looking at Belgium, Heleen Lauwereys's doctoral research on accounting for the child's best interests in Belgian sentencing law and practice found a lack of interest amongst judges with respect to this. Her methodology involved asking judges questions on possible case scenarios, and her results showed that five out of seventeen judges deemed the best interests of the child irrelevant in the sentencing decision of their parent¹⁵. The remaining twelve judges said that they would consider children in sentencing decisions, but Lauwerey's analysis of the interviews reveal that this consideration did not include the sentence's impact on the children.

3. Awareness in Europe

The core premise of compassionate sentencing is that children's rights should not suffer in the name of justice. Children have rights by virtue of being human, which shall never be set aside or derogated from as a consequence of parental action or legal status.

"A child of a primary caregiver is not a circumstance, but an individual whose needs need to be considered independently."¹⁶

Ensuring children these rights when a parent is being sentenced may offer them "a modicum of control and a sense of validation of their feelings, their experience, and their wishes",¹⁷ which can help mitigate the potentially adverse effects of their parent's imprisonment.

15 Children Of Prisoners Europe. (2019). Keeping children in mind: Moving from 'child-blind' to child-friendly justice during a parent's criminal sentencing. Children of Prisoners Europe. https://childrenofprisoners.eu/wp-content/uploads/2020/06/sentencing-toolkit_2019.pdf 25.

16 S v M, [2007] ZACC 18 para 30.

17 Berrick, J. D., Dickens, J., Pösö, T., & Skivenes, M. (2018). International perspectives on child-responsive courts. *The International Journal of Children's Rights*, 26(2), 251–277. <https://doi.org/10.1163/15718182-02602011 253>.

All countries in focus have ratified the UNCRC; Sweden and Portugal in 1990, and Norway and Denmark in 1991. Scandinavian countries and Portugal are in principle dualist legal systems, meaning that international treaties and agreements must be transposed into national law for them to produce national legal effect. Only Sweden and Norway have fully incorporated the UNCRC into national law, with the Norwegian *Human Rights Act* in 2003,¹⁸ and the Swedish Lag (2018:1197) entering into force in 2020.¹⁹ Nevertheless, the ratifications of Denmark and Portugal still produce obligations under public international law.

In effect, all countries are therefore bound to uphold and respect these provisions, but a closer look at the legal systems suggests that the rights of children who have a parent in prison are rarely upheld in practice.

3.1 General awareness of children's rights in European justice systems

When researching children's rights in cases of parental imprisonment, it is evident that this area lacks attention among policy- and decision-makers. Existing literature focuses on child witnesses or victims, and when courts do consider the child's opinion, experience has shown that it is primarily in care orders or child protection orders. Awareness on the situations and needs of children whose parents are on trial is low.

It appears that many countries lack official sentencing guidelines or legal codes which mention children as mitigating factors, so even when individual professionals may be aware of children's rights it is difficult to draw definitive conclusions.

Speaking with Anna Ekberg, family support counsellor with Solrosen, a Swedish

organisation providing support to children and youth with a relative in prison, it is possible to see evidence for this general lack of awareness within the justice system. In her career with the organisation, she has not met a single child or family in which the child's situation has been a matter of concern when the parent was on trial. From the perspective of Alejandra Castaneda of BUFFF on the other hand, there is a general awareness in Sweden about the importance of children's rights, even when a parent is sentenced. The court may consider the effect on the child, but it seems to be aimed more at consequences following the imprisonment (such as custody, visiting rights, etc.) than at how to mitigate the actual impact of the sentence.

There are indirect ways of protecting children's rights when their parents are on trial, such as the principle of proportionality. This is a universal concept in fair justice systems whereby the legality of an action shall be balanced between the objective and the means and methods to meet the ends; holding an individual accountable to their actions shall not cause disproportionate harm when compared to the crime. Ashling Tobin, representative of the Children and Families Initiative with the Irish Penal Reform Trust (IPRT), gives an example: in accordance with the principle of proportionality, Irish courts may take maternity into account when sentencing a mother. There is case law to support this claim, but following the generally observed trend in the countries of focus, there are no formal sentencing guidelines which explicitly mention children as mitigating factors in parental sentencing decisions. This is explored further in the sections below.

3.2 Hearing the child

When it comes to hearing children, all Scandinavian countries have the right to be heard established in law in some way. This stems not only from adoption of the UNCRC

¹⁸ Human Rights Act. (1999, May 21). <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC127929/>

¹⁹ Regeringskansliet. (2020, January 1). Lag (2018:1197) om Förenta Nationernas Konvention om barnets rättigheter. Regeringskansliets Rättsdatabaser. <http://rkrattsbaser.gov.se/sfst?bet=2018:1197>

into national law (for Sweden and Norway), but also from specific inclusion of child-rights provisions as in Norway, where the Norwegian Children Act specifically holds that children as young as seven must be able to express their opinion before decisions are taken concerning personal relations for the child²⁰. Nevertheless, this act is generally aimed at parental responsibility, custody and access despite the general term “personal matters affecting the child”. Most courts do not procedurally have any child-specific provisions and a closer look hints at a lack of application in practice.

In private communications with Bjørn Larsen, a Norwegian prosecutor working with several international projects on child-friendly justice, it is possible to observe this. On a systematic level, the right to be heard on matters concerning children is well established: if the sentencing of a parent will have significant negative effects on the parental role as caretaker, the child will be thoroughly considered. Nevertheless, the child will seldom be requested to give a statement or opinion unless they have a formal role in the case as victim or witness. In the following sections, this idea is observed throughout jurisdictions.

Portugal is a good example of children with a parent in prison having rights through the Convention but not seeing them upheld in practice. Despite ratifying the UNCRC in 1990, a 2018 NGO report described the Portuguese justice system as “not child-friendly”, stating that the rights of children with parents in prison are not explicitly included in the national Constitution.²¹

20 Norwegian Act relating to Children and Parents (the Children Act). (1981, April 8) <https://www.regjeringen.no/en/dokumenter/the-children-act/id448389/section31>.

21 Association of Women against Violence (AMCV), Portuguese Platform for Women’s Rights (PpDM), & Associação Mulheres sem Fronteiras. (2018). The Convention on the Rights of the | Portugal | NGO Shadow Report. <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewjquodJpq2EAXWd9rsIHTksAx0QFnoECBoQAQ&url=https%3A%2F%2Fwww.regjeringen.no%2Fen%2Fdokumenter%2Fthe-childre>

Speaking with Chandra Gracias, it seems that the awareness of children’s rights amongst various criminal justice professionals is severely lacking. While judges are trained in children’s rights, this is taught in family law and the idea of rights overarching the varying legal branches is widely conveyed. As such, judge trainees are told that they must hear the child in cases concerning them, but it is not always seen in practice. This is also the case with some judges in office.

As Judge Gracias explains, one of the rare times children of a defendant are mentioned is if they are a victim or witness. This situation is similar in Norway. Children are referenced and spoken about in terms such as “the child heard/saw/was present at the time...” without having their actual voices amplified, their opinions heard on how the sentencing decision would impact them, whether they wish to see their parent in prison, who will accompany them for the visit, who will take care of them in the parent’s absence etc. This removal of the personal identity of the child in effect turns them into a tool to be used at the court’s convenience.

In Danish jurisdiction, there are no specialist mechanisms to hear children in judicial proceedings; the law only requires child experts to participate in civil cases where a child will be placed outside their home. This may be detrimental in keeping the child’s best interest in focus and ensuring the right to be heard. Nevertheless, there is close cooperation between the courts and various authorities and social services.²²

Children’s houses (Barnahus) is a well-established model in Scandinavia whereby law enforcement, criminal justice, child protective services and medical and mental n-act%2Fid448389%2F&usg=AOvVaw22UTZAXw4iIMrMr-BckfMSD&opi=89978449

22 Rights of minors in judicial proceedings | Denmark. (2019). In E-Justice Europa. https://e-justice.europa.eu/35998/EN/rights_of_minors_in_court_proceedings?DENMARK&member=1

health workers come together under one roof.²³ When children encounter the legal system these children's houses serve as a singular point for the child and their family to keep in contact with during pre-trial proceedings. Such establishments provide good opportunities for the child to be heard by relevant officials, but their focus is primarily on child victims. For example, in Sweden children's houses are more focused on children who have been exposed to various crimes.

On the legal side, Norwegian Bjørn Larsen describes children's houses as highly regulated with rules that are complied with by both the judiciary and police authorities. Regardless, if children with imprisoned parents cannot access these houses, then there is no actual effect for their rights to be considered in the sentencing decision.

Speaking with Norwegian FFP (For Fangers Pårørende), an organisation for the relatives of people in prison, children have a right to express themselves when a relative is to serve a sentence at home (i.e. electronic monitoring), but their opinion has no decisive influence on that decision.²⁴ Similarly, Larsen describes criminal sentencing of parents as lacking an obligatory procedure to facilitate the hearing of a child who may be affected by the sentencing decision.

In short, it appears that while the studied countries have obligations either internationally and/or nationally to uphold the rights of Article 12 UNCRC it seems that there are few legally established opportunities or mechanisms to protect it, for children whose parent is on trial in a criminal case. The right to be heard is more commonly protected and upheld in family law, but there are rarely official procedures in criminal cases where a parent is on trial.

²³ About Barnahus - Barnahus. (2022, December 15). Barnahus. <https://www.barnahus.eu/en/about-barnahus/>

²⁴ Representative FFP, personal communication. (2024, January 19).

In cases where the child is considered, it seldom has a decisive weight and is seen as more circumstantial.

3.3 Informing the child

Children's right to information is a fundamental prerequisite to participation in matters concerning them. This may include informing a child of how a legal proceeding takes place, explaining legal jargon, what will happen to their parent during and after the trial, and what will happen to the child. The Council of Europe published guidelines on child-friendly justice in 2010, in which it is stated that justice and proceedings must be accessible and age appropriate,²⁵ but this does not seem to be the reality in the countries concerned. The Council of Europe found a high degree of general mistrust among children, with some citing shortcomings during court proceedings such as "intimidating settings, lack of age-appropriate information and explanations..."²⁶

It is noteworthy to mention that recent developments point towards an upcoming revision of the guidelines on child-friendly justice. COPE advocates for explicit inclusion of children with a parent in prison in the new guidelines. Currently, the guidelines do not mention children with parents in prison explicitly, but vaguely as "parties of proceedings" or similar. "Children in contact with criminal justice processes" can and should also refer to children who are impacted by a parent's court proceeding. Researching the extent that children are informed about proceedings, different studies have shown that children frequently misunderstand legal processes and the

²⁵ Child-friendly justice - Children's Rights - www.coe.int. (n.d.). Children's Rights. <https://www.coe.int/en/web/children/child-friendly-justice#:~:text=The%20CDCJ%20is%20an%20intergovernmental,which%20were%20adopted%20in%20201>

²⁶ Council of Europe (Committee of Ministers). (2011). Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 6

roles of professionals. In a systematic

review from the University of Algarve in 2023, Margarida Leiria and Cristina Nunes found that legal understanding is a severely limited concept for many children involved in court cases. While studying mainly Anglo-Saxon and common law countries (with exception for a Swedish study), their overall conclusion may suggest an overarching phenomenon when read in light of a Swedish Children's Ombudsman advocacy paper. Leiria and Nunes found that a child's knowledge of proceedings increases with age, yet older children still lack understanding of legal jargon and the final decision.

Children are often not adequately prepared about court proceedings and are not usually informed about the role and responsibilities of participants. This may lead to misunderstandings of their own involvement and confusing or distressing experiences.²⁷

Former Swedish Children's Ombudsperson Lena Nyberg described her experiences with the Swedish justice system and the lack of mechanisms in place to ensure that children are well-informed when in contact with the court. While focusing on children who stand trial themselves, Nyberg mentions that children, regardless of how they encounter the court, rarely understand what happens²⁸ and holds that the Swedish justice system is created by and for adults. Despite dating to 2006, this mirrors the observations of Leiria and Nunes in 2023.

According to the Swedish authority for family law and parenting support, it appears

27 Leiria, M., & Nunes, C. (n.d.). Children's Perceptions of their Involvement in Judicial Child Protection, Family and Criminal Proceedings. *The International Journal of Children's Rights*, 31(3), 624–658. <https://doi.org/10.1163/15718182-31030004646>

28 Nyberg, L. (2006). Förklara vad som händer | En pedagogisk brottmålsrättegång för unga (Barnombudsmannen informerar bi2006:03). *Barnombudsmannen*. 5.

that the primary responsibility for providing support to children with imprisoned parents lies with social services. This support includes age-appropriate information about what has happened, how the sentence will affect the child and the family situation, and referrals to additional support services available.²⁹ While this is positive, protection for children during sentencing procedures is lacking.

According to a 2024 COPE survey³⁰ aimed at asking children how to make prison spaces more child-friendly, it is clear that certain children face additional barriers to accessing information. The questionnaire surveyed forty-eight children from ten countries, and results illustrate how children experiencing neurodivergent conditions or physical health challenges may require extra attention. A case-by-case approach to each child, offering information tailored to their needs, would be the ideal.

3.4 Regular parental contact

A vital part of child development is regular parental contact. Article 9 of the UNCRC protects this right, when within the best interest of the child.

According to the Swedish prison and probation services, imprisonment should not be seen as an effective prevention measure in criminal policy. In deciding the sanction, the court must consider whether there are any particular factors which would favour a sanction other than imprisonment.³¹ This occurs at the end of a trial whereby the court goes through the practice of

29 Frihetsberövade föräldrar (mfof.se). (2023, July 4). <https://www.mfof.se/foraldraskapsstod/malgrup-per-for-foraldraskapsstod/familjer-med-sarskilda-forutsattni-ngar/frihetsberovade-foraldrar.html>

30 Akyol, P. (2024, June 10). How can we make prison spaces more child-friendly for children visiting a parent? *Children of Prisoners*. <https://childrenofprisoners.eu/how-can-we-make-prison-spaces-more-child-friendly-for-children-visiting-a-parent/>

31 Sanctions kriminalvården. (n.d.). *Kriminalvården*. <https://www.kriminalvarden.se/swedish-prison-and-probation-service/sanctions/>

Personalalia: the judge asks the defendant personal questions which may affect whether or not the authorities decide to send the person to prison, or if they could benefit from alternative measures. A child's right to parental contact should qualify as such with respect to the UNCRC. However, the Swedish Penal Code provides little guidance in this, not explicitly mentioning children as a mitigating factor in the sentencing decision.

This idea is observed almost identically throughout the Scandinavian countries where the Norwegian Criminal Act article 78 stipulates:

Section 78. Mitigating circumstances

g. the offender himself/herself has been severely affected by the offence, or the criminal sanction will impose a heavy burden due to advanced age, illness or **other circumstances**.³²

The Danish Criminal Code, Chapter 10 §82 describes mitigating circumstances and §83 holds that:

"[T]he penalty may be reduced within the prescribed statutory range when information about the offence, the offender or other circumstances conclusively supports it."³³

This suggests that the dependency of a child on a parent may be included under information about the person. Nevertheless, children are not explicitly mentioned under official mitigating circumstances in §82.

Portugal displays a similar case to Swedish Personalalia where judges receive a report of the defendant's personal circumstances from the social services or prison staff (in

32 The penal code. (2005, May 20). Lovdata. https://lovdata.no/dokument/NLE/lov/2005-05-20-28/*

33 The Criminal code (2005, December 21). https://europam.eu/data/mechanisms/PF/PF%20Laws/Denmark/Denmark_Criminal_Code_2005.pdf

cases of remand detention). This report is mandatory by law but seems to focus more on the character of the person rather than how the decision may affect their dependents.³⁴ For example, in cases where the repercussions may be a fine or imprisonment, the judge will look at the personal situation of the defendant. Chandra Gracias explains that a judge may deem that if the defendant is well integrated into the community, has no criminal record, has shown repentance, consider the age, labour integration and family dynamics, but nowhere does it say that children can be a decisive factor in these decisions. Of course, this does not prevent a judge from considering the existence of a defendant's children—especially if they are dependent on him/her—but it is not officially recognised as a mitigating factor.

During remand detention in Sweden, all authorisation for children to visit their parent is based on a decision by the prosecutor. Anna Ekberg of Solrosen explains that there is no legal right for the child to visit their parent during remand detention per se, but that it is rather a decision if the prosecutor thinks that it is in the best interest of the child. While this follows the UNCRC's objective of keeping the best interest of the child in mind, the structure of the Swedish system effectively gives this discretion to the prosecutors without any formal guidance.

Logistically, transportation to visit a parent in prison or other penal facilities can be costly and difficult for families, proving an obstacle for children to visit their parents. A recent study by Families Outside (Scotland) found that the cost of visiting a parent in prison is a factor that makes it challenging for children to see their parents.³⁵

34 Gracias, C. Personal communication. (2024, January 17)

35 Families Outside. (2023). A project on the financial impact on families of imprisonment and release.

Not only is there normally a decreased income for the household following imprisonment, but telephone calls and physical visits are becoming increasingly expensive. For younger children, these travels—especially extremely lengthy ones—can also be exhausting and difficult to carry out on a regular basis, over a longer period of time. As such, a particular component of compassionate justice includes judges' consideration of the geographical proximity to children when placing a parent in a particular correctional facility. This should be done as close to the child as possible, to minimise barriers between child-parent contact.

In Norway there is a so-called proximity principle whereby the parent shall be sentenced as close to home as possible. However, in practice this is not always followed for various reasons. FFP gives two examples, such as the incompatibility of the parent with another prisoner at the facility and the lack of women's prisons in Norway. Sweden on the other hand, has no child-specific procedures ensuring that parents are sentenced to facilities close to their children when a custodial sentence is handed down.³⁶

Similarly to Sweden, Portuguese sentencing guidelines do not explicitly reference children as mitigating factors of a parent's custodial sentence. Judge Gracias explains that criminal courts may after some time change a custodial sentence to house arrest, but this is normally done for health reasons. In practice it is rarely due to consideration of a dependent child.

³⁶ Children of Prisoners Europe. (2022). Children with parents in conflict with the Law: Levels of awareness amongst Judiciary. In Children of Prisoners Europe.

4. Highlighting good practices in Europe and elsewhere

COPE recognises the lack of attention on the topic of parental imprisonment and gaps in European justice systems where the realities of children with a parent in conflict with the law are not considered. For the purposes of knowledge sharing, the ability to build on success and providing inspiration for policies, the section below features good practices.

4.1 Nordic Children's Houses

As mentioned earlier, the Nordic countries (including Iceland and Finland) have implemented the Children's houses model (Barnehus/Barnahus).

These establishments bring together professionals from various disciplines to help a child and their family whenever a child encounters the justice system. This model is inherently based on child protection and promoting child-friendly legal proceedings, placing the best interests of the child as the focal point.³⁷ Children's houses are a good way of protecting children's rights by taking statements of their views, providing information and interpretation, all in one place to ease the burden and reduce chances of re-traumatisation from a court case whatever shape or form it takes. COPE hopes that this model can be further extended to children with imprisoned parents, in order to better involve children in the decision-making process that directly impacts their lives, in a manner that protects and respects their rights and well-being.

4.2 South African case S v M (2007)

The South African case S v M is an excellent example of compassionate sentencing from a common law jurisdiction. S v M was decided in the Constitutional Court where M, a single mother of three minor children, had been sentenced to four years in prison.

³⁷ About Barnahus - Barnahus. (2022, December 15). Barnahus. <https://www.barnahus.eu/en/about-barnahus/>

She appealed to the Court by holding that this sentence was not in the best interests of the children, as she was the sole custodian. The Court held that “the best interest of the child must be a paramount consideration in all proceedings affecting them”³⁸ and suspended the custodial sentence for a correctional supervision order instead. In doing so, the Court effectively protected the children’s rights while ensuring an appropriate means of justice which would not arbitrarily or disproportionately harm M’s dependent children.

COPE hopes that similar practices can be implemented in European civil law jurisdictions through legal policies and sentencing guidelines.

4.3 Best Interest of the Child Assessment

COPE emphasises the importance of judicial officials asking for and receiving prompt accurate information about whether there are children who could be impacted by pre-trial detention/alternative measures, or by a parent’s custodial sentence, to ensure that children’s best interests are assessed and respected at each stage of adult criminal justice processes.

This is based on recommendations and comments from the United Nations,³⁹⁴⁰ whereby any decision affecting a child must include an assessment of the possible impact on that child and on their best interests.

38 S v. M | CRIN. (n.d.). <https://archive.crin.org/en/library/legal-database/s-v-m.html>

39 Refworld - UNHCR’s Global Law and Policy Database. (2024, February 12). General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). Refworld. <https://www.refworld.org/legal/general/crc/2013/en/95780>

40 See the COPE submission to General Comment 27 on Access to Justice <https://childrenofprisoners.eu/cope-submission-to-general-comment-27-on-access-to-justice/>

The final decision must furthermore be justified to the extent that the rights of the child have been closely considered.

By implementing this practice, court systems are obliged to explicitly consider the rights of the child in any decision where a parent stands on trial, further protecting their status as rights-holders.

4.4 Children’s Hearings Scotland

Children’s Hearings Scotland is an establishment in Scottish law which combines justice and welfare for children. It is a form of tribunal where a decision is made on what’s best for the child or young person when there are concerns about their welfare or family situation. These hearings are set up in a way where the child’s rights are well respected; one of the staff explains who the present parties are, why they and the child are there, and what is going to happen throughout the meeting.⁴¹ The hearing is structured as a discussion rather than a typical court hearing, and the child has the right to speak, ask questions, bring a friend or family member for support, but most importantly to speak on their own if that is their wish.



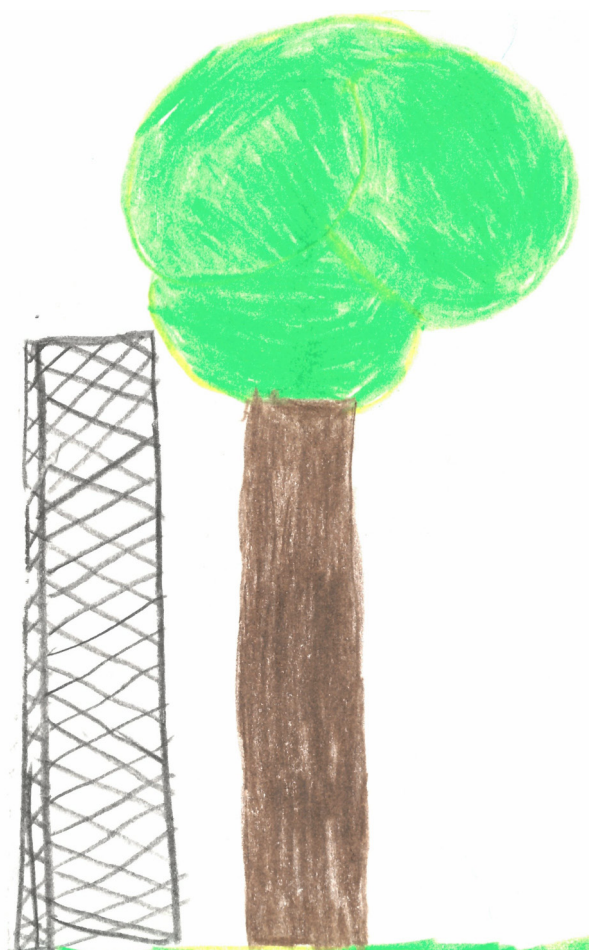
41 Children’s Hearing Scotland. (2024, January 29). Attending a children’s hearing. <https://www.chscotland.gov.uk/children-and-young-people/attending-a-hearing/>

5. Conclusion

Children should never be defined by the imprisonment of a parent. Children are entitled to a unique set of rights by virtue of being human, rights that should never be compromised irrespective of a parent's contact with the justice system. This study has observed shortcomings in multiple European jurisdictions, even in places where there is relatively good incorporation of children's rights in national jurisdictions. Going forward, COPE hopes to further bring this issue to light and advocate for meaningful, sustainable practice of compassionate sentencing that takes into consideration the rights of children with a parent on trial in a criminal court.

While all countries in focus have incorporated the United Nations Convention on the Rights of the Child into law in some shape or form, the reality is that more action is needed to ensure its proper implementation in practice. In some judicial systems, greater training is needed. For example, while the Portuguese system seems to hold high regard for children's rights in family law, the awareness about its application in criminal or civil proceedings when a parent is on trial is deficient. Nevertheless, some good practices do exist. COPE acknowledges that there are underlying practical issues hindering this topic from gaining the attention it needs. Overburdened court systems and justice professionals lacking information or holding inherent misunderstandings of the application of the UNCRC make it easy for judges and other relevant professionals to only do what is required by law. This is why the law itself must include children with imprisoned parents, and why judges must act on compassionate sentencing.

Finally, COPE underlines the idea that compassionate sentencing is not about showing leniency to people on trial simply for having children; it is not holding the parent accountable which may violate the rights of the child, rather it is the related criminal justice procedures which can do so.





Children of Prisoners Europe (COPE) is a pan-European network of non-profit organisations working with and on behalf of children separated from an imprisoned parent. The network encourages innovative perspectives and practices to ensure that children with an imprisoned parent fully enjoy their rights under the United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union, and that action is taken to enable their well-being and development.

Children of Prisoners Europe (COPE)
contact@networkcope.eu
<http://childrenofprisoners.eu/>

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