

Sentencing the parents: punishing the children?

Qualitative research regarding the role of the child's best interests in Belgian sentencing decisions

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Background of the study

Introduction

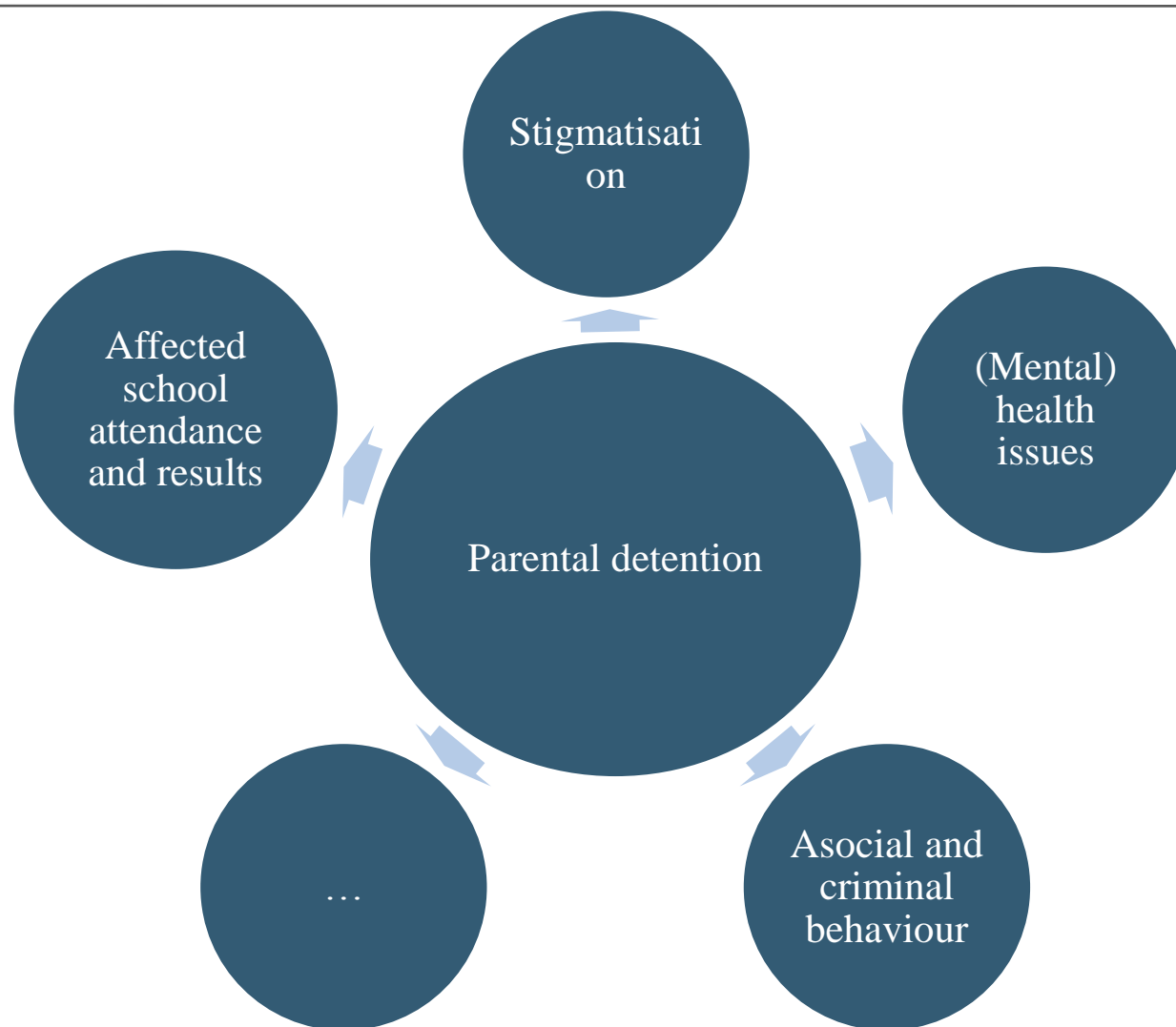
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800 000 children

affected by parental imprisonment within the European Union

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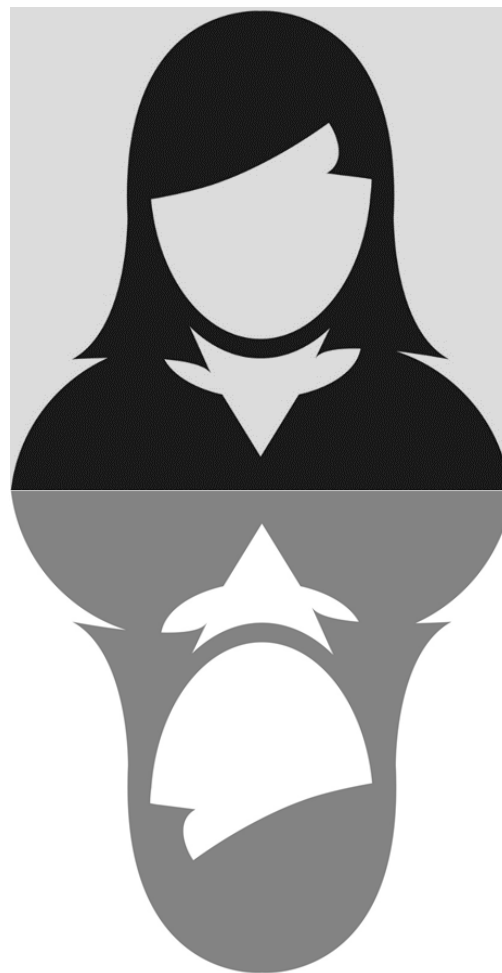
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Impact of alternative sanctions?

- Electronic monitoring (Vanhaelemeesch, 2016)
- Fines and forfeitures
- Community sentence
- Probation

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Article 3(1) UN Convention on the Rights of the Child

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

Article 3(1) UN Convention on the Rights of the Child

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*‘The Committee emphasises that in **sentencing parent(s) and primary caregivers, noncustodial sentences** should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with **full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).**’*

- Committee on the Rights of the Child, 30 September 2011, Report and Recommendations of the Day of General Discussion on “children of incarcerated parents”

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Regional developments

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*‘When a custodial sentence is being contemplated, **the rights and best interests of any affected children shall 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.**’*

- Raad van Europa, Recommendation 4 April 2018 concerning Children of Imprisoned Parents

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No best interests obligation ...

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- Article 3 (1) UNCRC + Article 22bis (4) of the Constitution: no individual rights
- No obligation in criminal code/code of criminal procedures

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But a possibility

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Broad discretionary power in sentencing decisions:

- Wide range of main sanctions
- Wide range of additional sanctions (sometimes mandatory)
- Sentences: minimum and maximum, depending on offence
- Suspension of sentences
- Mitigating circumstances

→ Optimal individualization of sentencing decision

→ A consideration of the best interests of the child is possible, but not mandatory

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Belgian sentencing studies

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*‘Having a family is **not a blank cheque** for the commission of offences’*

*‘One **should have thought about if beforehand**’*

K. Beyens (2000) 391, 408.

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Research hypothesis

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Due to the **lack of an explicit obligation** to consider the best interests of the child in Belgian sentencing law, these **interests are not considered (sufficiently and consistently)** when sentencing parent offenders.

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Qualitative in-depth interviews

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- 17 criminal law judges
- Dutch speaking Belgium
- Convenience sample + snowballing
- Interviews consisted of
 - Open ended question regarding personal mitigating circumstances more generally
 - Three sentencing scenarios
 - Open-ended questions (after revealing the specific focus of the study)

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Little explicit & spontaneous attention

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Open question re. mitigating circumstances:

- 7 respondents spontaneously mentioned the family situation and/or children of the accused person
- 1 respondent indicated this hardly has an impact in his sentencing decisions

Sentencing scenarios:

- Family and/or children are often mentioned, but the precise role is not always clear
- Not mentioned by 2, 5, and 4 respondents respectively

Open questions:

- 5 respondents would not /hardly consider the family/children of the accused
- Other respondents would consider the family situation and/or children

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Best interests of the child versus family situation

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*‘[...] the family context is, of course, important: if you have a child, **you have something to fight for**’ (R1)*

*‘if that person is really concerned with the upbringing of his children, his **family will be a stabilising factor in his life**, and might help him to stay on the right track’ (R9)*

*‘The second aspect we always look at is the family situation [...] because **someone’s network is very important when assessing the risk to re-offending**’ (R5)*

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What are the best interests of the child?

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*‘A **temporary care measure for the children**, I don’t find that **problematic actually**, because in life you have to organise yourself for your children anyway. You can’t be with your children all the time. So whether you work at the bank, or whether you are in prison...’ (R4)*

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Role of the best interests of the child

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‘But if the child is not in danger, and it is purely about the **child missing his dad, I won’t consider that easily**’ (R13)

‘The child **will of course be unhappy because he is missing his mommy or daddy**. But [...] it is **difficult to say**, the child will be too sad by punishing him for very serious offences’. (R14)

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Role of the best interests of the child

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*‘But the role of the children in the sentencing decision, is so personal, so personal, has to do with the **nature of the offence**, with the **person of the accused**, also with the extent to which the parent who is being sentenced, **has committed the offence for his children.**’ (R12)*

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Counterarguments

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*‘it is often used as an **excuse**’ (R2)*

*‘He caused it himself if he gets sentenced, he has his own responsibility. If there is a negative impact, that is his own responsibility, and **his responsibility as a parent** as well. He brought his children into this world, not me, as a judge.’ (R3)*

*‘Those who don’t have children, and those who don’t have a spouse, will never be able to invoke this argument. So I found this rather **discriminatory** regarding those accused persons who do not have this benefit’ (R8)*

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Counterarguments

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*‘Children, are indeed probably victims of the sentencing decision, but [...] they cannot be mitigating circumstances which allow you to **escape your sentence**’ (R8)*

*‘They often say “I am father to three children”, and often I reply “yes, sir, but **you knew that already at the moment you committed the offences**”.’ (R17)*

*‘Because then you might say that you **sentence an offender with children differently** from someone who doesn’t have children’ (R12)*

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Need for explicit best interests obligation

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Five arguments:

- Minority of the respondents considers children spontaneously;
- If family situation is considered, this does not necessarily imply that the best interests of the child are considered as well;
- Respondents had different views on which negative side-effects should be considered;
- Respondents had different views on the role of these side-effects in the final sentencing decision;
- Most respondents gave arguments against a consideration of the best interests of the child in sentencing decisions.

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Outstanding questions and recommendations

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What are the best interests of the child when sentencing parent offenders?

How can the principle of the best interests of the child be reconciled with the premises and aims of criminal law?

An obligation in itself is not sufficient: awareness-raising and training of magistrates is required

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