

Sentencing primary caregivers

Summary





Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)

Rule 51: “(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.

(2) The environment provided for such children’s upbringing shall be as close as possible to that of a child outside prison.”

GENERAL COMMENT NO. 1 (ARTICLE 30 OF THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD):

- “CHILDREN OF INCARCERATED AND IMPRISONED PARENTS AND PRIMARY CAREGIVERS”
- African Committee of Experts on the Rights and Welfare of the Child
- Penal Reform International





Article 30 of the African Charter on the Rights and Welfare of the Child

- States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
 - a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;
 - b) establish and promote measures alternative to institutional confinement for the treatment of 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 system will be the reformation, the integration of the mother to the family and social rehabilitation.



Principles of the African Children's Charter

1. **Non-discrimination of children** (Article 3 of the Charter);
2. **The best interest of the child** (Article 4(1) of the Charter);
3. **The right to survival, protection and development of each child** (Article 5 of the Charter); and
4. **The right to participation** (Article 4(2) of the Charter).

Courts **must** consider children when sentencing a primary caregiver

- ▶ “Every child has his or her own dignity. If a child is to be [...] imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.”
 - ▶ Justice Albie Sachs
 - ▶ S v M (CCT 53/06) [2007] ZACC 18 (September 2007) at para 18





Guidelines for sentencing

1. A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.
2. The court should also ascertain the effect on the children concerned of a custodial sentence if such a sentence is being considered.
3. If 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.
4. If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the best interests of the child.
5. Finally, if there is a range of appropriate sentences, then the court must use the principle of the best interests of the child as an important guide in deciding which sentence to impose.



What does this mean for lawyers?

- ▶ Sentencing practices in courts should be examined to ensure that they incorporate the guidelines on sentencing in General Comment 1.
- ▶ Where sentencing practices do not take into consideration the best interests of children, lawyers should seek to entrench jurisprudence and practice that is in line with General Comment 1 (e.g. CHREAA in Malawi).
- ▶ A lawyer should enquire from the client about her personal situation and should seek to know sufficient information about the situation of the client's children and what is in their best interest. Where possible the lawyer should seek to obtain reports which can be submitted to court to attest to the best interests of the children so that these can be considered during evidence on sentencing.
- ▶ If a client is incarcerated, efforts should be made to ensure that the children are taken care of.

What is in the best interests of the child?

➤ “A truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.”

➤ Justice Albie Sachs

➤ *S v M* (CCT 53/06) [2007] ZACC 18 (September 2007) at para 24

