

BOOK REVIEW*

Prisoners as Citizens: Human Rights in Australian Prisons

DAVID BROWN and MEREDITH WILKIE (eds)

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Prisoners as Citizens brings together 17 papers that were delivered at a conference conducted by the Human Rights Centre at the University of New South Wales and the federal Human Rights and Equal Opportunity Commission ('HREOC') in November 2000. In their introduction, the editors explain that one reason for this wide ranging collection of papers is that the concerns of prisoners and prison-related issues have fallen largely from public view. The riots and protests that convulsed many Australian prisons in the 1970s have become simply a matter of history. Much of the support for prison reform that arose from those convulsions was marginalised by the conservative inspired retributivism that swept over Australian State politics and prison systems in the late 1980s. In this climate, prisoners have receded from view largely because they cannot participate effectively in the political discourse of Australian society.

This volume provides a significant forum to draw issues of prisoners and prisons into clearer public view. There are several features that distinguish this volume from other edited collections. The authors are drawn from several fields. First, while many are academics, several authors are involved with prisons as researchers or members of organisations with significant roles in the support of prisoners. Further, prisoners also make a substantial contribution to the volume. One paper is authored by a current prisoner, several other papers contain substantial excerpts from interviews conducted with prisoners, and prisoners provide many short comments on their individual experience. Moreover, this volume is presented much more effectively than most collections of conference papers. The impressive range of local and international legal documents and secondary sources used by the contributors are placed in a well-organised index. As a result, this volume provides a comprehensive bibliography of sources concerning prisoners and associated human rights issues.

The volume is divided into three sections. The papers in the first section, 'Prisons and Prisoners', provide a good overview of several key issues. The first paper, by Russell Hogg, titled 'Prisoners and Penal Estate in Australia', provides a good overview of the state of imprisonment, or rather its continued growth. Hogg establishes that, whatever changes may occur in the structure of prison systems and the operation of individual prisons, one important feature remains

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unchanged. A significant number of prisoners are socially disadvantaged in one or more ways prior to imprisonment. Accordingly, imprisonment continues to have a disproportionate effect on disadvantaged persons. Hogg's analysis provides a good context for many of the subsequent papers that analyse particular groups of prisoners, notably women and Indigenous prisoners.

For example, the following paper by Loretta Kelly, on the rights of Indigenous prisoners, provides an excellent account of the history of the Royal Commission into Aboriginal Deaths in Custody ('Royal Commission'), and subsequent attempts to implement the recommendations of the Royal Commission. In what is perhaps the best paper in this volume, Kelly draws on many interviews with inmates and a well selected range of secondary material to mount a persuasive argument that the recommendations of the Royal Commission are not being observed. She also draws a clear connection between the individual recommendations of the Royal Commission and the wider role it was intended to serve in improving the observance of the citizenship rights of Indigenous prisoners. The other particularly useful paper in this section deals with prisoners with an intellectual disability. This paper draws upon the experiences of several prisoners, and illustrates the complex and varied difficulties faced by intellectually disabled prisoners.

The next section is titled 'Regulating Prisons and Prisoners' Rights'. Despite the title, the only paper that examines the regulation of prisons is by the former head of a State corrections agency. This paper mentions that, while Australia's commitment to international human rights interests appears to have wavered at the federal level, political and legal responsibility for prisons and prisoners rests largely with the States.¹ Unfortunately, this divergence of responsibilities, one of the many awkward arrangements arising from Australia's federal constitutional arrangements, is not dealt with in detail by any of the papers. Certainly, many of the papers suggest, quite convincingly, that Australia is not meeting its international obligations towards prisoners. However, the extent to which Australia's federal constitutional arrangements have enabled successive federal governments to evade any significant political responsibility for these failings could have been explored in more detail.²

The best paper in this section is one written by the eminent English prison reformer and scholar, Vivian Stern. She provides an excellent account of recent experiences in the prison systems of many Western European countries. Stern's account of the dramatic improvements in the treatment of prisoners in many European countries suggests that the attitude with which governments attempt to implement human rights obligations may be at least as important as the content of the various human rights instruments that ultimately drive prison conditions in Europe. Stern suggests, almost as an aside, that there are three essential approaches to imprisonment. One is the system that has evolved from the

1 John Dawes, 'Institutional Perspective and Constraints' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 115, 116.

2 The recent cases in which many of these deficiencies became apparent are highlighted in Craig W J Minogue, 'An Insider's View: Human Rights and Excursions from the Flat Lands' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 196.

obligations imposed by the Council of Europe upon member states of the European Union. The other two relate to a decision to either accept or reject the basic premise of art 10 of the *International Covenant on Civil and Political Rights* ('ICCPR'),³ which is that prisoners should be treated with humanity and respect for the inherent dignity of the human person. Stern suggests that many countries reject the basic premise of art 10 either because of poverty or institutional incompetence (the latter is an especially useful term to describe the inept manner in which prisons are often managed).⁴ In my view, Stern is one of the few commentators who may credibly draw such a broad conclusion. It is, therefore, a shame that she does not indicate where she might place Australia in her various categories. Many of the papers included in this volume, and virtually all of the compelling commentaries provided by serving prisoners, imply that prison administrators and governments are striving to qualify Australia on the grounds of institutional incompetence as envisaged by Stern.

The final section, 'Citizenship and Rights', contains several strong papers that deal with prisoners' rights both in law and in practice. The first paper provides an analysis of the international law applicable to prisoners that is both comprehensive and extremely readable. In the next paper, a current prisoner, Craig Minogue, draws on his own attempts to litigate human rights issues through domestic legislation. Minogue's account of the ironies and inconsistencies in Australia's current arrangements for the protection of human rights makes a compelling case for the need for improvement. He also debunks the myth, which many prison officials have expressed informally to me, that prisoners are likely to engage in litigation in order to enjoy an excursion out of prison.

The broader theme of citizenship is explored more completely in the final two papers. Two former staff members of HREOC argue convincingly that existing Australian restrictions governing prisoners' right to vote, a fundamental aspect of citizenship, conforms with neither international law nor any rational purpose related to a sentence of imprisonment.

The theme of citizenship is continued in the last paper, authored by David Brown. Brown commences with a dramatic account of the most recent American Presidential election. He suggests that the nail-biting outcome of the election was more the result of the large number of African-American men who were disenfranchised by reason of their criminal convictions than the widely reported problems with voting equipment in Florida.⁵ Brown provides an account of several well-known Australian cases in which prisoners faced similar civil disabilities, and concludes with a more general analysis of citizenship. Interestingly, Brown concedes that political and social resistance are not the only problems prisoners would face in gaining any form of full citizenship. He

3 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

4 Vivien Stern, 'Prisoners as Citizens: A View From Europe' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 154, 159.

5 The problem had been raised many years earlier. See, eg, Alice Taylor, 'Ex-Felon Disenfranchisement and its Influence in the Black Vote: The Need for a Second Look' (1994) 142 *University of Pennsylvania Law Review* 1145.

accepts, correctly in my view, that 'full' citizenship for prisoners is unlikely in view of 'the complex and condensed relations involved in imprisonment'.⁶ Brown suggests that '[t]he conditions under which prisoners can participate in a democratic citizenship lie in a discursive citizenship, an ability to participate in the public realm'.⁷ If citizenship is to be regarded as the ability of people to actually participate in society, the individual papers in this volume clearly demonstrate that Australian prisoners cannot participate in the public realm to any real extent.

Despite the broad and effective coverage of this volume, there are further issues, the coverage of which could have strengthened this book. One such matter that could have received more attention is the *Standard Guidelines for Corrections in Australia* ('*Standard Guidelines*').⁸ The *Standard Guidelines* draw heavily from the model prison rules of the United Nations and the Council of Europe. The small number of references to the *Standard Guidelines* made in this volume correctly note that they have no legal effect, and little more is made of them. By contrast, the various international instruments governing prisons and prisoners, none of which are directly enforceable in Australian law, are the subject of a considerably greater number of references. Work on a new edition of the *Standard Guidelines* is in progress. The extent to which prison officials are prepared to take account of developments in human rights law and the views of prison reform bodies might have provided useful insight into their views on human rights.

A further way in which the volume may have been strengthened is through the inclusion of the perspective of prison administrators. There is no doubt that each contributor has some form of academic, professional or personal interest in prisons and prisoners, and many contributors hold more than one such interest. However, the absence of any contribution by a prison official, or a more direct assessment of the role of prison officials, leave many claims unanswered.⁹ Many papers in this volume provide compelling evidence that prison officials, rather than society in general, are perhaps the most significant obstacle preventing prisoners from participating in society. Almost all of the papers make assertions about, or draw conclusions from, the behaviour of prison officials. For example, the authors of one chapter suggest that in Australia 'the position seems to be that prisoners are not accorded rights but privileges which can be taken away at the will of prison authorities'.¹⁰

6 David Brown, 'Prisoners as Citizens' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 308, 323.

7 Ibid.

8 The second edition of the *Standard Guidelines* was published under the auspices of the Corrective Services Ministers' Conference in 1994.

9 One of the contributors, John Dawes, served as the head of the prison agency of South Australia for several years, but the nature of his contribution suggests that, whatever views he may have held during his time as a prison manager, his thinking has moved some way from those of the typical prison manager.

10 Mark Finnane and Tony Woodyatt, "'Not the King's Enemies": Prisoners and Their Rights in Australian History' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) 81, 100.

In relation to prison administration, a leading English criminologist recently suggested that research into prisons and prisoners could benefit from attempts to understand the issues that motivate prison officials.¹¹ This volume could have been strengthened by a paper that sought to explain how and why prison officials behave in the manner that they do. While this is ironically a topic that a prison official might find very difficult to comment upon, it would have been useful if some insight had been provided into why many prison officials remain as far removed from the concerns of prisoners and prison reform groups as ever.

In one sense these relatively minor comments are inspired by the success of the book. The editors explain that one of their aims is to stimulate debate 'for a more open, informed and responsible penal politics'.¹² That goal has certainly been achieved because this collection clearly conveys the importance of further research and debate about prisons and prisoners. At the same time *Prisoners as Citizens* provides a valuable and well informed contribution to that debate.

11 Alison Liebling, 'Whose Side Are We On? Theory, Practice and Allegiances in Prisons Research' (2001) 41 *British Journal of Criminology* 472. Liebling, a leading member of the Institute of Criminology at the University of Cambridge, states that the only time her methodology was ever seriously questioned by fellow scholars was when she first made this suggestion.

12 David Brown and Meredith Wilkie, 'Introduction' in David Brown and Meredith Wilkie (eds), *Prisoners as Citizens* (2002) xix, xxi.