

BOOK REVIEWS

Parental Imprisonment and Children's Rights, by Aisling Parkes and Fiona Donson (eds), Routledge, 2021; *Mothering from the Inside*, by Kelly Lockwood, Emerald Publishing, 2020

These two books report on research undertaken both in the UK and beyond on parental imprisonment, its impact on children and other dependants, and the impact of relevant human rights law. Together they supply both a wealth of information on practice and insights into the protections that human rights conventions provide, at least in theory, to parents in conflict with the law and their children.

I must declare an interest: a chapter of the text *Parental Imprisonment* was written by your reviewer, reporting on research done at Coventry University Law School.

We begin with some history. In 2001, in a landmark judgment Lord Justice Phillips stated that in sentencing a mother of dependent children, the rights of the child must be weighed against the seriousness of the offence in a 'balancing exercise'.

It goes without saying that since October 2, 2000 sentencing courts have been public authorities within the meaning of s.6 of the Human Rights Act. If the passing of custodial sentence involves the separation of a mother from her very young child (or indeed, from any of her children) the sentencing court is bound...to carry out the balancing exercise...before deciding that the seriousness of the offence justifies the separation of mother and child. If the court does not have sufficient information about the likely consequences of the compulsory separation, it must, in compliance with its obligation under s.6 (1) ask for more.¹

This important statement of children's rights went unreported in the general press, and it appeared not to have led to changes in the judicial system. There was no discussion of how the criminal courts were to obtain the information that was now required. Who would make this enquiry and how was it to be done? What of the right to privacy if the parent or child did not want such an enquiry to be made? How would those issues be resolved? The Judicial College, whose duty it is to train judges and magistrates, undertook no training for sentencers in how they were to conduct the balancing exercise. There was no academic discipline 'Parental imprisonment and children's rights'. No one examined practice in the courts to find out what, if anything had in fact changed after the *P and Q* judgment.

Having read the judgment in *P and Q* in 2011, and believing that change in practice should have resulted, I decided to research this topic. Did the sentencing remarks made when judges and magistrates imposed custody on mothers indicate that they had conducted the balancing exercise, as required by Lord Phillips' dicta?

¹ *R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ1151, available at <https://www.bailii.org/ew/cases/EWCA/Civ/2001/1151.html>.

The study of 75 sentencing decisions found that the courts did not appear to have considered the Article 8 rights of children potentially affected by their mother's imprisonment. The report concluded:

The vast majority of women are imprisoned for less serious offences and receive short sentences: the balancing exercise should now take centre stage.²

The work of Dr Shona Minson, University of Oxford, followed. She interviewed judges, as well as children of imprisoned mothers and the family members who took care of the children left behind. She then developed training materials for the judiciary, the legal professions and defendants, which explained the requirement to consider the rights, needs and welfare of affected children.³

The academic discipline *Parental Imprisonment and Children's Rights* developed. Awareness has grown that children's rights are indeed engaged when parents are sentenced. In 2019, the Joint Parliamentary Commission on Human Rights gathered evidence on sentencing and issued its report, which stated:

When a judge is considering sending a primary carer, which is usually a mother, to prison, the child's right to respect for family life should be a central concern. Too frequently, this is not the case. As a result, tens of thousands of children each year are being harmed when their mothers are sent to prison, the vast majority for non-violent offences.

Two international meetings on parental imprisonment and children's rights were held at University College Cork, in December 2014 and in June 2015. The book edited by Aisling Parkes and Fiona Donson followed the second conference and is based on presentations given there.

Parental Imprisonment and Children's Rights, by Aisling Parkes and Fiona Donson (eds), Routledge, 2021

Lorna Brookes' powerful Foreword to this book presents the reflections of twelve children who have a parent in prison, and who were supported by *Time Matters UK*. It shows how rights could improve the lives of children.⁴ When a parent is arrested and facing a potential custodial sentence, children want their views to be listened to with care. They also want their other parent to be offered emotional support and practical help because they worry about them as well as the parent who may be going to prison. Far from feeling they had rights, the children interviewed felt ignored: 'We are unseen and unheard.'

The book has three sections: voices; policy; and law. In the first section, Ben Raikes discusses the experiences of children whose parents are sentenced to imprisonment in the context of their rights as enshrined in the United Nations Convention on the Rights of the Child (UNCRC). Dr Raikes begins by stressing the significance of Article 3, which states that all decisions that affect children must be made with the affected children's best interests as the guiding principle. As he writes: 'It is hard to think of a decision that affects a child

² <http://www.makejusticework.org.uk/wp-content/uploads/Mothers-in-Prison-by-Rona-Epstein.pdf>

³ <https://shonaminson.com/safeguarding-children-when-sentencing-mothers/>

⁴ <https://www.timemattersuk.com/>

more profoundly than the imprisonment of their parent'. Yet, very few countries (South Africa is the exception) have developed case law to encourage the judiciary to explain why they are imposing a custodial sentence despite having taken into account the effect of it upon the children of the imprisoned parent.

In their chapter 'Living with the pains of confinement' Una Convery and Linda Moore consider imprisonment in Northern Ireland and discuss the effects of imprisonment on families:

Parental incarceration and children's rights are inevitably in tension. Societal reflection is needed on the long-term consequences for children affected by parental imprisonment with consideration of more appropriate ways of responding to social harm.

In their chapter 'Making children visible: children's rights and their role in parent-child contact within the prison system' Fiona Donson and Aisling Parkes outline the relevant human rights provisions which apply when parents are incarcerated.

The Council of Europe Recommendation, 2018, states as its basic principle that:

Children with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions that may affect them. Measures that ensure child protection, including respect for the child's best interests, family life and privacy shall be integral to this, as shall be the measures that support the role of the imprisoned parent from the start of detention and after release.

Adopting this recommendation has allowed children of an imprisoned prisoner to be recognised. 'However, while they are far higher on the agenda than previously ... their "visibility" is actually hazy, and their rights are poorly understood.' They conclude that, while there have been improvements in child-parent contact in the Irish prison system in recent years, with positive change to support children and families, there remains the need to focus on specific rights of children in order to reframe how prison visits are understood and should be reformed. This is to ensure that they effectively meet the rights of children who have a parent in prison.

Marie Hutton reveals a personal interest: she spent much of her early childhood visiting a relative in prison. In her chapter 'Children first: Putting the rights of children visiting prisons at the heart of policy and practice', she reports and reflects on her research which involved interviewing prisoners in two English medium-security prisons about their contact with their families, including their children, while in prison. In these interviews, they described the deleterious effects of their imprisonment on their children. Dr Hutton argues that the children of imprisoned parents are viewed as a potential solution to the problem of re-offending and are utilised as a mechanism for exercising control over prisoners' behaviour, as prison visits are determined by prisoners' entitlements under the Incentive and Earned Privileges (IEP) scheme. This is directly opposed to a rights-based view, which would respect the rights of prisoners' children to contact with their parents and other relatives. The instrumentalisation of children of imprisoned parents as solutions to the prison's 'problems'

of reducing re-offending and maintaining order via the IEP system weakens the status of these children as rights holders under the UNCRC. This contradicts the fundamental principle that the state should act in the best interests of the child.

‘Starting Life in prison: reflections on the English and Irish contexts regarding pregnancy, birth, babies and new mothers in prison, through a children’s rights lens’ by Sinead O’Malley, Lucy Baldwin and Laura Abbott begins with this stark statement: The imprisonment of mothers may involve the separation from her infant or young child which has the ‘potential for life-long harm’.

Rule 64 of the Bangkok Rules states:

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent, or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

Despite various calls to apply non-custodial sentences to mothers and to pregnant women, such change has not taken place. How far the current practice differs from that advanced by the Bangkok Rule can be seen in the statistics showing the continuing imprisonment of women, including both mothers of young children and pregnant women for minor, non-violent offences.

The authors recommend a ‘mandatory cohesive informed response that centres the rights and well-being of the child as well as the mother.’

In a considered reform of the landscape for criminalised pregnant mothers and their babies, alternatives to prison Mother and Baby Units as we understand them must be considered. Options that promote the mother-child bond, whilst responding holistically to the mother and her needs and simultaneously meeting the needs of the unborn and newly born child, must be explored. Outcomes for mothers would be improved, enabling them to reach their full potential, significantly improving outcomes for their babies and ensuring the best possible start to live – as all children equally deserve.

‘Framing and children’s rights in Europe’ by Liz Ayre traces the history of issues of parental imprisonment in Europe, focussing on developments in Ireland, and noting the founding of the Irish Penal reform Trust in 1994 and the Department of Justice’s publication of a five-year plan in 1994. The Good Friday Agreement introduced obligations for the Republic of Ireland to introduce a level of equality and human rights protections at least equivalent to those of Northern Ireland.

In ‘Prisons, families and human rights’ Peter Scharff Smith & Emma Villman outline the history of prisoners’ rights, emphasising the importance of *Golder v UK* (1975) when the ECtHR established that prisoners have the same rights as other citizens apart from those immediately related to their sentence. However, there are also people outside prison whose rights can be violated due to the imprisonment of others:

The rights of this group [prisoners' families and dependants] are not well developed within the field of prisons and human rights, but there are interesting developments in progress, where the rights of children with imprisoned parents have gained attention. 2011 cross-national European research project on children with an incarcerated parent, led to a call for all states to incorporate the UNCRC in relation to children of imprisoned parents. UN Committee on the rights of the Child recommended that States parties ensure that the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent and by all actors involved in the process and at all its stages.

The UNCRC 1989 sets out that children are individuals with their own special rights:

1. Protection of the best interest of the child
2. Right to have regular contact with the imprisoned parent
3. Right to express his or her view and to be heard in matters affecting him or her.

The child's best interests led to the recommendation that when 'sentencing parent(s) and primary caregivers, non-custodial 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; 'non-custodial sentences should wherever possible, be issued in lieu of custodial sentences, including in the pre-trial phase'. Alternatives to imprisonment should be considered to ensure the best interests of the child.

In his chapter 'Re-imagining the Paramountcy Principle' Justice Albie Sachs gives a personal and powerful account of how he came to make the landmark judgment in *S v M* (2007) in the South African Constitutional Court:

Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children.

The South African Constitution provides that a child's best interests are of paramount importance in every matter concerning the child (Section 28 (2)). If there is a fair chance that the person concerned could be a primary caregiver and the magistrate is considering jail, or planning to send the person to jail, then they have to inquire into how the children will be affected. At this point, the role of the prosecution becomes different from the ordinary position a prosecution might adopt: it is to assist the court in protecting the best interests of the children.

Professor Helen Codd, University of Central Lancashire, provides an international perspective in her chapter 'Every child matters? Global perspectives on incarcerated mothers and their children'. Children of imprisoned parents, especially mothers, experience avoidable harms. Thus, 'if we are serious about children's rights then these harmful practices are in urgent need of challenge and reform. Rights need to not only be 'rights on paper' but also 'rights in practice', where children's rights are a key criterion for penal policies, practices and decisions from the outset. The UNCRC provides a foundation for such an approach, as do the South African cases; and common themes dominating the

experiences of the children of imprisoned mothers mean that it would be possible to identify and promote a common global framework of specific rights for the children of imprisoned mothers. This framework could then allow for local variations to respond to specific regional needs.

We should not turn away from radical abolitionist perspectives which challenge the use and existence of prison itself. Women prisoners are likely to have committed non-violent offences and be categorised as non-dangerous and low risk after release, and thus there is a very real question as to why they are imprisoned at all if they do not pose a risk and a custodial sentence would harm their children.

Mothering from the Inside, by Kelly Lockwood, Emerald Publishing, 2020

Kelly Lockwood brings attention to the experiences and perspectives of women who are 'mothering from the inside', their children, their families and those who work for and support them, exploring a range of issues associated with mothering and imprisonment in England and Wales. There are two parts: Part 1 - 'From Sentence to Resettlement' and Part 2 - 'From the Margins to the Centre'.

Part 1 focuses on a number of interrelated issues, including sentencing, maintaining maternal contact, pregnancy and childbirth and resettlement. In the first chapter Dr Shona Minson, University of Oxford, relates her research in which she interviewed judges who sentence women and the children of mothers in prison and the caregivers who have taken on the children left behind when mothers were imprisoned. She explains the training resources she has developed to help ensure that the judiciary, the legal professions and the public understand the duty imposed on sentencers to consider the rights of the child when sentencing a mother. Dr Natalie Booth, Bath Spa University, writes on contact between mothers in prison and the children outside, detailing the ways in which mothers, their children and those caring for them construct and adjust communicative practices to promote mother-child contact during imprisonment. This is illustrated with moving accounts of the willingness of mothers to make personal sacrifices in order to maintain and maximise maternal contact.

Dr Laura Abbott and Kelly Lockwood's chapter highlights the perspectives of pregnant women and new mothers in prisons. Writing of the work of the Prison Reform Trust, Sarah Beresford and others highlight how children with mothers in prison may remain invisible, and reveal the level of disruption caused to their lives and the stigma they experience. They demonstrate that, despite challenges, with the right support, children can become more resilient and develop the skills needed to thrive. Dr Lucy Baldwin, De Montfort University, focuses on resettlement with its many challenges, and the longer-term impact of maternal imprisonment. She discusses maternal identity, describing how mothering identities may become damaged due to imprisonment and consequent maternal separation with long-lasting implications for mothers' sense of self, relationships with their children and ability to engage with rehabilitative processes.

Part Two - 'From the margins to the centre' - covers perspectives and experiences relating to mothering and imprisonment. This section highlights the importance of understanding how factors such as age and mental health interreact with the experience of imprisonment. It deals with both the mothers who are in prison and the professionals working with them.

It brings attention to a rarely considered group affected by maternal imprisonment, the adult children of women in prison.

Kelly Lockwood explores the experiences of mothers in prison who have adult children, illustrating the strength of maternal identities as children transition to adulthood, and how imprisonment may disrupt those identities. Rachel Dolan then reports on her research in which she interviewed 85 pregnant women in custody across nine prisons in England, Dr Dolan makes a number of important recommendations for policy and practice. She says:

The very imprisonment of vulnerable pregnant women is a cause for real concern, particularly but not only in the case of minor offences and first-time offenders. The issues identified in this study highlight the continued risks for women imprisoned during pregnancy and for their children... Deferred sentencing of pregnant women, as in Germany, Denmark and the Netherlands, is one approach that could be implemented in England to reduce the negative impacts on mothers and children.

This is all considered in our recent research report *Why Are Pregnant Women in Prison?*⁵ It is to be hoped that this will be widely discussed. Deferred sentencing is clearly explained in a recent article by Julian Roberts.⁶

Tony Wood discusses the work of prison officers with a focus on female prison officers as mothers and their relationships with women in prison who are also mothers. The chapter explores how gendered experiences such as pregnancy, miscarriage, childbirth and child rearing (of both prison officers and women in custody) impact on their working role, home life and relationships at work.

Lorna Brookes recounts the experiences of a practitioner whose role is to support children affected by maternal imprisonment. She describes the challenges and the successes in this field, focussing on how to help children who have contact with their mothers in prison as well as those who for whom contact has been severed. Her research began with her asking women who had had repeated prison sentences

‘*What support do you need [to resettle successfully back in the community]?*’ She was surprised by how often the reply was along the lines of ‘*There’s nothing to help my little girl cope with all this*’, ‘*I’m so worried about my son, he’s angry and it’s my fault ... something should be done to help him*’.

Brookes writes: ‘I looked for formal acknowledgement of these children in the judicial services and any specialised children of prisoners support services, but on both counts found them to be scarce to non-existent’. Her account of the support to given to children whose

⁵ Epstein, R., Brown, G., Garcia De Frutos, M. (2022) Why are pregnant women in prison? Coventry University <https://www.coventry.ac.uk/research/research-directories/current-projects/2020/why-are-pregnant-women-in-prison/>
R. Epstein and G. Brown ‘We should stop sending pregnant women to prison’ (2022), Centre for Crime and Justice Studies <https://www.crimeandjustice.org.uk/resources/we-should-stop-sending-pregnant-women-prison>

⁶ Roberts, J.V. (2022) *Deferred Sentencing: A Fresh Look at an Old Concept* Crim. L. R., Issue 3.

mothers are in prison is profoundly moving. I believe it should be compulsory reading for every sentencer in our criminal courts.

In her chapter 'An International Perspective on Mothering and Imprisonment' Professor Helen Codd explains that while there is growing focus on the needs and experiences of imprisoned mothers and their children, this tends to focus on single countries. However, several common themes emerge when looking at international perspectives. Thus in the UK and the USA, much of the debate is on keeping mothers and children together, while in many other countries the focus is on how to develop practical and realistic alternatives to children growing up in prison with their mothers. This chapter contains a wealth of references to studies from around the world, which focus on mothers in prison, covering many issues concerning the nature of prison itself, which is marked by dynamics of control and submission, power and domination. Professor Codd quotes L. Haney: the key question may not be whether parenting from prison is worse than parenting in prison. Instead, it should be how we can do better to create real alternatives to the penal state.⁷

That is indeed the question – and both these volumes make a very valuable contribution to that debate.

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⁷ Haney, L. 'Motherhood as punishment: the case of parenting in prison' (2013) 39 (1) *Signs*, 105.