Book Review: International and Comparative Law on the Rights of Older Persons

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Book Review

*International and Comparative Law on the Rights of Older Persons*
Edited by Ralph Ruebner, Teresa Do, and Amy Taylor
Reviewed by Thomas E. Simmons
A terse preface and a hefty appendix of charters and protocols frame the 29 individually authored chapters collected in the recently published *International and Comparative Law on the Rights of Older Persons*. Other than the first five chapters, which deal with international treaties and conventions, the book seems to have been arranged neither alphabetically nor topically. All of the chapters derive from papers presented at the 21st Annual Belle R. and Joseph H. Braun Memorial Symposium at the John Marshall Law School in the summer of 2014. Chapter topics include civil rights of the elderly in Paraguay, age discrimination in Macedonia, and living wills in Australia. Given the rather large number of chapters, some stand out as more brilliant—and some as weaker — than others.

The collection could be viewed primarily as a comparative study of United States and Chinese elder law; there are seven chapters on Chinese law and seven on U.S. law. However, three chapters on European Union law, one on Russian law, and one on international convention law are included. A trio of chapters dealing with elderly criminal offenders provides contrasts, insights, and illuminations —

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2 *Id.* at ix.

3 Rosa Bella Cáceres Mongelós, *Toward Respecting the Human Rights of Older Persons in Paraguay* 68 (summarizing the achievements of Paraguay’s Law 1885/02); Bekim Kadriu and Ardit Memeti, *Age Discrimination in Macedonia: Employment Legislation and Practice vis à vis European Union Law* 81 (assessing Macedonia’s age discrimination in employment law); Meredith Blake, *Dementia and Planning Death: The Challenge for Advance Directives, An Australian Perspective* 265 (explicating the scope of Australian statutory frameworks for advance directives, whether limited to non-palliative care or care for the terminally ill).

4 Amy Parise Delaney and Alina A. Risser’s comparative study of social conditions shaping the demand for long-term care services in the United States and Russia is one of the more brilliant chapters. *Social Change and Its Apparent Effect on Elder Health Care Services: A Comparative Study of Russia and the United States* 133.

5 There is also a chapter examining and contrasting five countries’ laws. *See infra* n. 11 and accompanying text.

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**About the Reviewer**

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which successful comparative law studies often do. These chapters in particular demonstrate the method by which different bodies of law can be compared — an exercise that reveals hidden details and possibilities concerning our own laws. The comparative law methodology can also reveal previously unexamined cultural values inherent in different legal systems while highlighting the influence of those values on the law.

Most elder law scholarship in the field of criminal law deals with elderly persons as crime victims; elderly abuse and neglect, along with financial exploitation, are frequently emphasized. Former NAELA Journal Editor in Chief Charles P. Golbert submitted a chapter to the collection on financial abuse of the elderly. The Office of the Cook County Public Guardian in Chicago, where Mr. Golbert serves as deputy public guardian, may be the single largest program devoted to financial exploitation recoveries in this country. The office serves as guardian for approximately 800 (mostly elderly) individuals. More than a third of the individuals served by his office are elderly victims of financial exploitation, many of whom are also neglected and/or abused physically and/or emotionally. Prosecuting, correcting, and preventing such prevalent abuses of elderly citizens are common themes among students and practitioners of elder law.

Even though research on elderly criminal offenders is relatively uncommon, such research is refreshing and important. Benjamin Pomerance’s lengthy and carefully researched chapter describes the expanding elderly prison population in five countries: the United States, Great Britain, Canada, Australia, and Japan. He writes, “The figures illustrating the swelling of the elderly prison population are staggering.” In Australia, the number of inmates over age 54 increased 85 percent in 10 years (2000 to 2010). In Canada, the population of federal inmates age 50 and older increased 50 percent in the same period. In Great Britain, the number of inmates age 60 and above increased 128 percent in the same decade. In Japan, despite a decrease in the total prison population over the past 7 years, the number of prisoners age 60 and older doubled during the past decade. In the United States, we have “the dubious distinction of being the leader of the pack”: an increase of 63 percent in the number

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9 Id. at 360.

10 “Some of our wards had been swindled out of virtually every cent,” Golbert writes, “including their longtime family home, before they came to the attention of authorities and were referred to our office.” Id. at 357.

11 Ageing in the Wrong Place: Examining International Approaches and Obligations Towards an Ageing Prison Population 416.

12 Id. at 420.

13 Id.

14 Id.

15 Id.

16 Id. at 421, n. 46.
of prisoners age 65 and above in just 3 years (2007 to 2010). The trend is exacerbated by the fact that inmates over age 50 typically exhibit a functional age 11.5 years older than their chronological age on account of high-risk behaviors before incarceration and stress factors in prison.

The aging inmate phenomenon has numerous consequences. Perhaps the primary issue from a Western perspective is increased cost. Elderly inmates are expensive to incarcerate. They tend to suffer from chronic conditions, and 1 in 5 has at least one mental illness diagnosis. With slower gross motor skills — even in the absence of chronic conditions — their ability to eat, bathe, and ambulate on a rigid prison schedule is compromised. Dietary needs diverge and aids such as canes and walkers, because they are potential weapons, may be limited or denied by prison administrators and staff.

Prison systems in all five countries Pomerance surveyed are beginning to implement adjustments. Inmates with impaired mobility may be granted more time for meals and showers. Inmates with dementia may be exempted from rules and regulations they have lost the capacity to grasp. Palliative care and prison hospice are beginning to be seen as essential components of health care for prisoners nearing death. Japan has a pilot program to match older inmates with more age-appropriate jobs.

Pomerance also explores the argument that incarceration alternatives and reduced sentences should be encouraged as a matter of policy for nonviolent criminal offenders of advanced age. He explores “compassionate release” (or “medical parole”) in depth. The concept is supported by two policy arguments: first, that terminally ill inmates typically present an extremely low risk of recidivism, and second, that release shifts costs away from the corrections system (although it often shifts costs to a different government payer) and helps relieve prison overcrowding (i.e., lowers risk).

Releasing inmates unlikely to reoffend, which results in significant savings in health care costs otherwise borne by prisons, is sometimes seen as an effective strategy. Many U.S. states have codified medical parole rules, as has federal law. In Canada, the Royal Prerogative of Mercy allows discretionary conditional release of terminally ill inmates serving a life sentence. Great Britain has a similar program. Australia and Japan do not. Pomerance concludes that “at least a basic level of general acceptance is vital to the success of any early conditional release program.”

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17 Id. at 420. Since the 1980s, the elderly prisoner population in the United States has increased by 1,300 percent. Id. at n. 29.
18 Id. at 439.
19 Id. at 426.
20 Id. at 440.
21 Id. at 441.
22 Id. at 441, 443.
23 Id. at 447.
24 Id.
25 Id. at 450–451.
26 Id. at 453. The Japanese pilot program is the Onomici Prison’s “geriatric prison ward,” where the lack of air conditioning still creates special challenges for elderly prisoners. Id. at n. 294.
27 Id. at 469.
28 Id. at 471; see also id. at 479–480 (examining procedural efficiencies resulting from compassionate release initiatives).
29 Id. at 472, n. 427.
30 Id. at 473.
31 Id. at 472–473.
32 Id. at 473–474.
33 Id. at 480.
ten there is simply no safe place for frail elderly inmates to go upon release.  

Professors Zhang Lei and Liu Xianquan (both of the prestigious East China University of Political Science and Law in Shanghai) contributed two complementary chapters on China’s evolving regulation of elderly criminals, or those offenders and inmates who, in Xianquan’s words, are “full of years.” The same demographic trend of greater numbers of elderly criminal offenders in various countries as noted by Pomerance is unfolding in China. Rather than argue for shifts in policy to respond to the specific needs and limitations accompanying this demographic trend, however, Lei and Xianquan consider the issues invoked by greater numbers of elderly criminals by situating such individuals within the context of traditional Chinese values and modern criminal justice theory. As Lei acknowledges:

It is perhaps difficult for Western people to understand how extraordinary this [phenomenon] [of increasing numbers of elderly offenders] is for us in China and why we, as a society, are reluctant to punish severely such crimes. In ancient China, the elderly received special protection and were held to a different standard even if they were found guilty of criminal activity. This ancient policy still has a deep and everlasting effect on the culture and popular psychology of modern China. Hence, if the Chinese government were to punish the elderly to the same degree as other criminals and for the same crimes, the public could find such punishment to be unreasonable and doubt the appropriateness of such measures. This view is even shared by the Chinese government.

The deeply rooted respect for the elderly in Chinese culture is expressed in codified law. An amendment to China’s national criminal code in 2011 provides, “A person attaining the age of 75 may be given a lighter or mitigated penalty ….” The death penalty for elderly persons was made unavailable in most cases as part of the 2011 amendments. Probation eligibility is expressly linked to one’s age.

34 Id. at 481–482.
35 Zhang Lei, The Elderly As Perpetrators of Crimes: Reasons and Solutions to the Problem in China 397; Liu Xianquan, Current Status and Outlook for China’s Criminal Law Regulations of Crimes by Older Persons 406, 408. Professor Xianquan is also president of the law school at the East China University of Political Science and Law.
36 Xianquan, supra n. 35, at 406; see also Lei, supra n. 35, at 398 (stating that “the crime rate among the elderly in China has risen dramatically”), 405 (stating that “the elder crime rate is growing at an alarming rate”).
37 Lei, supra n. 35, at 399. Lei refers to the case of 60-year-old Sun Wanxiang who, during a period of 8 years, defrauded more than 139 victims by pretending to be struck and injured by their cars. Id.
39 “[The d]eath penalty shall not be given to a person attaining the age of 75 at the time of trial, unless he has caused the death of another person by especially cruel means.” Id. at ¶ 3.
40 The amendment provides:

Where a convict sentenced to criminal detention or imprisonment of not more than 3 years meets the following conditions, a probation may be announced, and a probation shall be announced if he is under the age of 18, is pregnant or attains the age of 75:

(1) The circumstances of the crime are
Despite the ancient origin of customs, favoring leniency for the elderly was not codified prior to 2011 out of “the belief that [elderly offenders’] rich life experiences had given them stronger capacity to identify wrongs and to control their impulses than young people.”

Xianquan calls for still more reforms to China’s commutation and parole system to fulfill the objective of leniency for elderly offenders “and realize their potential for rehabilitation.”

Committal, parole, and exemption from the death penalty, he argues, should be lowered from age 75 to age 65. Lei asserts that special care should be provided to imprisoned elderly offenders, including appropriate medical and psychological treatments, alongside modifications to “the amount and nature of labor assigned to them.”

Like Pomerance, Lei is sensitive to the high costs of health care for elderly inmates and asserts that this reality should be a relevant factor in shaping the law.

Lei suggests, perhaps unintentionally, that the unexpectedly high number of elderly criminal offenders in his country can be linked to a type of perceived immunity for these offenders on account of the elevated status of older individuals under traditional Chinese values. Sex crimes are commonly committed by older individuals in China, he says. Violent crimes committed by elderly individuals are becoming more and more common.

In traditional Chinese families, grandfathers are “considered to be rulers of their extended family.”

As such, they have the implicit authority to regulate and control family members. Mild uses of force are seen as acceptable means of punishment in this context. “When the punishment becomes excessively violent,” Lei writes, “the act [that resulted in the punishment] is then perceived as a crime.”

Lei also examines the etiology of the elderly crime wave and introduces a fascinating dichotomy, with Marxist overtones, between criminal acts committed by elderly individuals in urban areas and those committed by the elderly in rural areas. In China, the urban economy is framed by socialized production, while the rural economy is driven by “small-scale peasant production.”

The underlying causes of crime, Lei believes, can be linked to “geography, economic infrastructure, and ageing.”

According to one statistic, 98.3 percent of elderly individu-
als who commit rape are from rural communities.⁵³ Most elderly rural offenders are unmarried and poorly educated.⁵⁴ Lei links an ignorance of the law in rural areas to the occurrence of rape.⁵⁵ Crime committed by the elderly in urban areas, by contrast, is caused, Lei claims, by higher costs of living and greater instances of mental illness connected with urban environments.⁵⁶ Lei is explicit in linking economic status to crime rates.⁵⁷

Xianquan is more willing to condemn elderly criminals. He cites the Chinese saying “Fish begin to stink at the head” (i.e., when an elderly individual violates the law, his or her whole family is contaminated).⁵⁸ He believes that crimes committed by the elderly are worse than crimes committed by younger offenders.

“Elder crime is not only damaging to the good image of China’s elderly people of being a model for others; it also deepens the intergenerational gulf and transmits social wrongs,” writes Xianquan.⁵⁹

Despite his more conservative approach to crime and punishment, Xianquan believes that elderly criminals are simply unsuited for harsh punishments and that recidivism risks for elderly inmates is low.⁶⁰ He contrasts principles of leniency given to juveniles with comparable provisions of elderly criminal leniency laws and concludes that relatively speaking, laws granting greater leniency to elderly criminals “are still weak.”⁶¹ He calls for still greater liberalization of leniency principles in the Chinese criminal code, reasoning that “[t]he ability of the elderly to bear the ‘pain of penalty’ is relatively low compared to the general adult population and even juveniles.”⁶² Xianquan is willing to assert that the aging process is typically accompanied by a decrease in the ability to tell right from wrong and control one’s behavior.⁵³ He also notes, like Pomerance, that abiding by rigid prison rules is inherently more challenging for elderly inmates and “due to their physical condition and age, statutory elements that demand that they take an active part in labor, to complete production tasks or take an active part in political and cultural studies are not realistic.”⁶⁴

The views of Pomerance, Lei, and Xianquan demonstrate the kinds of insights that a collection of comparative law essays can provide. There should be a relationship between the values, climate, and manners of a country and its rules.⁶⁵

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53 This statistic is derived from the records of the Chongqing Municipal People’s Protectorate. Id. (citing Li Cunguo & Chen Yuan, Research on Rural Elderly Sex Offence: The Investigation Results of Two Prisons in Chongqing, 24 J. Hunan Police Acad. 23 (2013)).
54 Lei, supra n. 35, at 401.
55 Id. at 402.
56 Id. at 402–403. Lei also points to the loss of family supports that accompany a society with populations moving from rural to urban areas. Id. at 402.
57 Id. at 405.
58 Xianquan, supra n. 35, at 407.
59 Id.
60 Id. at 408.
61 Id. at 412. “After all,” Xianquan writes, “older persons, like juveniles, belong to ‘vulnerable groups.’” Id.
62 Id.
63 Id. at 413. See also id. at 412, n. 14, and accompanying text (outlining statistics that demonstrate that age “65 is a watershed of a person’s mental decline, and the age of 75 years has far exceeded this decline . . .”) (citing Y.N. Xie, Y.X. Gong & C.Z. Zhou, The Relationship of Intelligence, Physiology and Sociocultural Factors of Retired Old People, Chinese J. Clinical Psychol. 3 (1996)).
64 Xianquan, supra n. 35, at 415.
A country’s laws should be framed around its people; laws should be suited to their environments. Often, they are. Legislation can reveal as much about a country as its language, food, literature, and architecture, while teaching, by means of contrast, much about our country and ourselves that otherwise might go unnoticed.

Perhaps even more instructive is a comparative assessment of the voices describing a country’s laws. Pomerance speaks about the law and policy in a fundamentally different way from Lei and Xianquan. There is a different tone; a different viewpoint. For example, Lei and Xianquan are much more comfortable considering generalities of elderly populations; to argue for leniency, they are very willing to employ statistics showing cognitive decline and even moral decay among the elderly. With the more prevalent history of ageism and age discrimination in the United States, we tend to be much more cautious with generalities given their tendency to morph into stereotypes. Perhaps our sensitivity to ageism and age discrimination blinds us to policies that appropriately take into account what can be learned from the study of senescence. This is not to say that we should adopt China’s laws, nor China ours, nor that statistics should be unexamined. The best chapters in *International and Comparative Law on the Rights of Older Persons* can, however, cultivate new ways of thinking about elder law in many different contexts.

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66 Id.
68 See Montesquieu, supra n. 65, at 3 (observing “that it should be a great chance if those [laws] of one nation suit another”).