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Perrie Lectures 2014:
Life Sentences in Law and Practice

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The Perrie Lectures 2014 invite us to make sense of life sentences. We cannot easily make sense of them: the law is I believe far too complex, and the detail and complexity clouds what should be more important issues. In practice, I suspect that this complexity adds to the cost (and inhumanity?) of the system. It may be valuable to be able to stand back and to consider the reality, the law and practice, of life sentences. I shall try to give a flavour of the complexity of the law, but also of nature of the sentence as a whole. The offender has not escaped his life sentence until he (or, more rarely, she) has

- ❒ served their 'tariff' or minimum term AND
- ❒ persuaded the Parole Board to direct his release AND
- ❒ survived the license period (or periods of license, if recalled)
- ❒ AND been 'signed off' — a possibility for those on IPP (though none have yet achieved this), but not for others.

My theme is that the law is unnecessarily and unhelpfully complex. For a start, although it appears to be impossible to verify this, I believe that there are at present in prison people serving eleven different forms of life sentence (and probably many others who have been transferred back to England to serve different forms of indeterminate sentences imposed by courts abroad?):

The eleven different 'life sentences' being served today:

(i) The life sentence for murder: this sentence has been mandatory for many decades, but the way that the sentence is constructed has changed dramatically in recent years. The minimum term, or tariff, fixed by the sentencing judge is now calculated following the strict rules of s 269 and Schedule 21 Criminal Justice Act (CJA) 2003. These rigid statutory 'starting points' have been amended twice in the last ten years. The result of these changes has been a significant lengthening of minimum terms, which helps explain why the length of time that murderers are serving has grown significantly. Having identified the starting point (whole life for some offenders, 30 years, 25 years, or 15 years for other adults; 12 years for those under 18), the sentencing judge then takes into account a host of other aggravating and mitigating factors before fixing the minimum term. As we shall see, once fixed, the minimum term is what it says: a rigid term that the offender must serve before the Parole Board will consider directing the release of the offender.

(ii) The automatic life sentence (the 1997-2005 version): this was introduced by s. 2 of the Crime (Sentences) Act 1997 for anyone convicted of a second serious offence, unless there were exceptional circumstances permitting the court not to take that course. Section 2 was replaced by s. 109 of the Powers of the Criminal Courts (Sentencing) Act (PCC(S)A) 2000. After the Human Rights Act 1998 came into force, decisions of the Court of Appeal changed the way this sentence was applied significantly, introducing a little flexibility, and then, a decade later, the sentence was abolished (for those sentenced after 4 April 2005: see CJA 2003, Sch.37(7) para.1).

(iii) The discretionary life sentence: 'dangerous' offenders have long been liable to be sentenced to a discretionary life sentence if they commit a very serious offence.[1] This was (and is) at the discretion of the trial judge. There has been much guidance by the Court of Appeal, but the *Hodgson* criteria ((1967) 52 Cr App R 113) still apply:

> When the following conditions are satisfied, a sentence of life imprisonment is in our opinion justified: (1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.

1. For a freely available report on the dangers of the concept of 'dangerousness', see Padfield, N (2011) *The sentencing, management and treatment of 'dangerous' offenders: Final Report*, European Committee on Crime Problems: http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP(2010)10%20rev%205_E%20_vs%2026%2001%2011_%20%20THE%20SENTENCING%20MANAGEMENT%20AND%20TREATMENT%20OF%20DANGEROUS%20OFFENDERS.pdf;

After the introduction of IPP (see (vi) below), it appeared that the discretionary life sentence was becoming obsolete. But now IPP has been abolished, there will probably once again be a space for the discretionary life sentence (in the gaps that (vii) below does not come to fill).

(iv) The CJA 2003 discretionary life sentence: s.225 CJA 2003 created a discretionary life sentence applicable to those convicted of a very long list of 'specified' violent and sexual offences, to be found in Schedule 15 of that Act. The Court of Appeal in *Saunders* [2013] EWCA Crim 1027 seemed to think that it was no longer necessary to distinguish (iii) and (iv), but this is not correct: as the late great David Thomas QC pointed out (in a commentary to *Cardwell* [2012] EWCA Crim 3030, at [2013] Crim LR 508), (iii) may well still be available to a court dealing with a non-specified offence (e.g. a grave Class A drug dealing or importation offence). But clearly a discretionary life sentence under the 2003 Act is available only on conviction for a 'specified offence'.

(v) Detention during Her Majesty's Pleasure: the mandatory life sentence imposed on offenders who commit murder when under the age of 18 (see s. 90 PCC(S)A 2000 for the current statutory formulation).

(vi) Detention for life: this is the maximum sentence for a person aged 10 or over but under 18, who is convicted of offences for which a discretionary life sentence may be passed on a person over 21.

(vii) Custody for life: imposed on offenders under the age of 21 but over the age of 18 when they commit murder (see s. 93 PCC(S)A 2000).

(viii) Custody for life as a discretionary sentence: s 94 PCC(S)A 2000 makes it clear that custody for life may also be imposed as a discretionary sentence. Although this provision was repealed by the Criminal Justice and Court Services Act 2000 Sch.8 para.1, this repealing provision has never been brought into force! Young adult offenders sentenced to custody for life appear to be treated in the same way as other adult lifers.

(ix) Imprisonment for Public Protection (IPP): this was introduced, from 4 April 2005, by s. 225 CJA 2003, originally imposed more or less automatically whenever a person was convicted of any one of a very large number of offences designated as 'serious specified offences' (i.e. one of the long list of sexual and violent offences listed in Schedule 15 of the Act punishable by a possible sentence of more than 10 years imprisonment) and the court considered there to be a significant risk of serious harm to members of the public by the commission of a further 'specified offence'. The risk of serious harm had to be assumed in cases where the person had previously been convicted of a 'relevant offence'. Sentencing judges were given much more discretion in the application of the rules by amendments in the Criminal Justice and Immigration Act 2008, with effect from 14 July 2008. Perhaps surprisingly, given this sensible reform, IPP was subsequently abolished by the Legal Aid, Sentencing and Punishment of Offenders Act (LASPOA) 2012, for offences sentenced after 3 December 2012, and replaced with (xi) below.

(x) Detention for Public Protection (DPP): the IPP for offenders under the age of 18. This was always rather more flexible than the original 2003 provisions for adults (see (ix)).

(xi) The automatic life sentence for a second 'listed' offence: this was created by s. 122 LASPOA 2012, which adds a new s. 224A into the CJA 2003. In effect it applies only for offences committed after 3 December 2012. We now have a new 'two strikes' policy (see (ii) above for a predecessor). This is a semi-mandatory sentence for anyone convicted of a second 'listed' serious sexual or violent crime. Part of this complex provision reads:

> (2) The court must impose a sentence of imprisonment for life unless the court is of the opinion that there are particular circumstances which —
>
> (a) relate to the offence, to the previous offence referred to in subsection (4) or to the offender, and
>
> (b) would make it unjust to do so in all the circumstances.
>
> (3) The sentence condition is that, but for this section, the court would, in compliance with sections 152(2) and 153(2), impose a sentence of imprisonment for 10 years or more, disregarding any extension period imposed under section 226A.
>
> (4) The previous offence condition is that —
>
> (a) at the time the offence was committed, the offender had been convicted of an offence listed in Schedule 15B ('the previous offence'), and
>
> (b) a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence.

(5) A life sentence is relevant for the purposes of subsection (4)(b) if—

(a) the offender was not eligible for release during the first 5 years of the sentence, or

(b) the offender would not have been eligible for release during that period but for the reduction of the period of ineligibility to take account of a relevant pre-sentence period.

The Court of Appeal in *Saunders* (above) described this as a statutory life sentence where 'there is a discretionary power in the court to disapply what would otherwise be a provision requiring an obligatory sentence' (at para 7)! Clearly, it is not easy to see when and how judges will apply it. As I say, I have been unable to find a way of identifying which 'lifers' are serving which of these different variations. Are records held? Would it be possible to identify the number of prisoners in each category?

What does this mean in practice?

The number of prisoners sentenced to an indeterminate sentence of imprisonment has increased dramatically over recent years. Such prisoners now make up about 16 per cent of the prison population, compared with only 9 per cent in 1995.[2] Not only are there many more lifers, their minimum terms are much longer and the total period they remain inside, subject to the cautious decision-making of the Parole Board is, of course, even longer.[3] Let me try and explain why I think the complexity of the current system does not help us to understand the underlying justification for such a system.

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Fixing the tariff or minimum term

For whichever category of life sentence, the judge now fixes the tariff.[4] In all cases, the tariff is designed to be the 'punishment' part of the sentence — the period which the lifer must serve before being considered for release. This tariff is rigid and inflexible. And although the length is somewhat unpredictable, the average tariff does appear to be growing:

Average length of minimum term period imposed for mandatory life sentence prisoners (excluding whole life sentences), 2003-2013[5]

Year	*Average length (years)*
2003	12.5
2004	14.5
2005	15.9
2006	17.1
2007	15.6
2008	17.8
2009	17.5
2010	18.9
2011	18.8
2012	20.4
2013	21.1

One explanation for this growth is the 'starting points' introduced in the Criminal Justice Act 2003: whole life, 30 years, 25 years, 15 years….. The number of 'whole life tariffs' is also creeping up. To my mind, it is shocking that those faced with a 'whole life tariff' have no possibility of release apart from the highly exceptional compassionate release on the grounds of terminal illness. In *Vinter v UK* [2013] 34 B.H.R.C. 605, the Grand Chamber of the European Court of Human Rights held that even a 'whole life' prisoner is entitled to know what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. By a majority of 16-1, they held that this applies from the moment the sentence is imposed. Thus the majority say (at para 122):

> Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 [the prohibition on torture and 'inhuman or degrading treatment or punishment'] in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the

2. See *HMI Probation and HMI Prisons (2013)* A joint inspection of life sentence prisoners.
3. See Padfield, N (2002) Beyond the Tariff: Human rights and the release of life sentence prisoners (Willan).
4. Some sentencing remarks are available on www.judiciary.gov.uk. But generally data on life sentences is difficult to access.
5. Data obtained from Ministry of Justice by Jonathan Bild, Freedom of Information Request 89346, 7 April 2014, for his PhD on the mandatory life sentence.

meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

But our domestic Court of Appeal does not agree. In *Newell and McLoughlin* [2014] EWCA Crim 188 they upheld the legality of the whole law tariff as currently organised. One important question to consider is why the 'minimum term' has become such a rigid period of time which cannot shrink. Why cannot very long tariffs be reviewed? In *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, the House of Lords held that HMP detainees (i.e. those sentenced as children) whose tariffs have not expired, are entitled to periodic reviews of progress in custody with the possibility of reduction in tariff. It seems to me that there are strong theoretical and practical reasons for allowing a process of review for all tariffs, particularly very long tariffs.[6] We return to the right to hope, or the right to rehabilitation, later on.

'Back-door' sentencing

What happens once the lifer, of whatever category, is inside prison? Life sentence prisoners are treated somewhat differently within the prison estate to other prisoners, in part because of the length of time that they are likely to serve, but also because the Parole Board is responsible for deciding when and if they will be released from prison. They are currently known within the system as ISPs (Indeterminate Sentence Prisoners) and are 'managed' from NOMS, where Public Protection Casework Section has the following functions[7]: -

- ❒ to monitor the whole Parole Board review process for all indeterminate sentenced prisoners — lifers and IPP;
- ❒ to ensure Parole Board reviews are carried out at the appropriate time;
- ❒ to consider individual recommendations in those cases where the Parole Board panel has recommended the transfer of an ISP from closed to open conditions;
- ❒ to consider and, where appropriate, refer cases to the Parole Board for advice on the question of an ISP's continued suitability for open conditions (and any other matters affecting release);
- ❒ to monitor the progress of ISP licensees in the community including recall to custody and cancellation of supervision;
- ❒ to liaise with the Prison Service on operational ISP policy development.

The relationship between the PPCS and the Parole Board is complex. Perhaps shockingly many prisoners appear to see no distinction.[8] The Parole Board was created in 1968 as an advisory body, and it has evolved over the years to become a quasi-independent body which now makes the decision when and if a lifer should be released. The test for release, currently to be found in s. 28(6)(b) of the Crime (Sentences) Act 1997 applies to all life sentence prisoners for whom a minimum term has been fixed:

> (6) The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless —
>
> (a) the Secretary of State has referred the prisoner's case to the Board; and
>
> (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

Controversially, the Secretary of State still maintains the right to issue Directions to the Board: see s. 32(6) CJA 1991. The 2004 Directions specify that

> The test to be applied by the Parole Board in satisfying itself that it is no longer necessary for the protection of the public that the prisoner should be confined, is whether the lifer's level of risk to the life and limb of others is considered to be more than minimal.

There are many questions to be considered here. For example, should the criteria for imposing a particular sentence line up with, or match, the criteria for release? Is it fair that, although a prisoner could only be sentenced to IPP if he posed a significant risk of serious harm, he should not be released until that risk had been reduced to 'minimal'? This question was recently reconsidered in *R (Sturnham) v Secretary of State for Justice* [2013] UKSC

6. See also Van zyl Smit et al, 'Whole Life Sentences and the tide of European Human Rights Jurisprudence: What is to be done?' (2014) *Human Rights Law Review* 59-84; and my work cited at fn 7 below: French courts can and do reduce the *periode de surete* (or minimum term).
7. See PSO 4700, chapter 1.
8. Padfield, N. (2013) *Understanding recall 2011* (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201039

23 and 47. The issue had previously been raised in *R v Smith* [2011] UKSC 37, of which decision Lord Mance in *Sturnham* rather endearingly says 'I am far from satisfied that it can be regarded as the last word'. Tellingly, Lord Mance says that in *Smith*, the primary issue was whether it was *'legitimate'* (italics added) to pass a sentence of IPP for armed robbery and possession of a firearm on a career criminal who had already been recalled to prison to serve the remainder of a previous life sentence, also imposed for armed robbery. There is a growing literature on legitimacy, and I would argue that for reasons of legitimacy, it is vital that prisoners understand the system which is being imposed on them. Yet, disappointingly, in *Sturnham*, the Supreme Court held that the test to be applied by the Parole Board when considering whether to direct release on licence from IPP need not match the test applied by the sentencing judge when imposing the sentence of IPP in the first place. The two tests are substantially different, and the Court held that there was no reason why the scheme shouldn't involve a more difficult hurdle for release than it imposed for the imposition of IPP.

Whether or not this is fair is one question. Another is the burden of proof. Surely it should be for the state to prove the necessity for post-tariff detention, not for the prisoner to show that it is safe to release him? Currently it seems as though the prisoner has to prove that it is appropriate to release him — and that surely contravenes the right to liberty found in Article 5 of the European Convention on Human Rights. Then there is the question of the 'independence' of the Parole Board. In *R. (Brooke) v Parole Board* [2008] EWCA Civ 29; [2008] 1 W.L.R. 1950 the Court of Appeal was clear that the Parole Board as currently constituted did not constitute an independent court or tribunal and it appeared that the then Government had accepted this decision. A Ministry of Justice Consultation paper on *The Future of Parole* (Consultation Paper 14/09) invited comment on the way ahead: should the Parole Board be part of the court or the tribunal service? (Now an academic question, since the two have now been fused!). But sadly the issue seems to have been forgotten since the last election.[9]

The right to an oral hearing before the Parole Board has also been highly contested. It would appear that the Government's position has been driven by questions of cost. But it seems to me obvious that a prisoner who is being detained post tariff deserves an oral hearing before a court or tribunal. The courts agree. In the latest of very many cases on the subject, *Osborn and Booth v Parole Board* [2013] UKSC61, the Supreme Court unanimously allowed the appeals of three prisoners. They held that the removal of the 'right' to an oral hearing in the Parole Board (Amendment) Rules 2009 (S.I. 2009/408) was not lawful. Fascinatingly, the decision was grounded in the common law, and not on the jurisprudence of the European Court of Human Rights. The Court held that 'common law standards of procedural fairness' require the Parole Board to hold an oral hearing whenever fairness to prisoner requires such a hearing, in light of the facts of the case and the importance of what is at stake. Interestingly, the Court's concern was for the practical importance of fairness: Lord Reed pointed out that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that decision-maker receives all relevant information and that it is properly tested. He stressed the need to avoid the sense of injustice which the prisoner will otherwise feel:

> justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions (at para 68).

Unusually, the Court discusses the impact of prisoners' feelings of injustice on their motivation and respect for authority:

> The potential implications for the prospects of rehabilitation, and ultimately for public safety, are evident (at para 70).

Given the recent abolition of legal aid for many prison cases, it is worth noting that the Supreme Court was clear that a prisoner may be entitled to an oral hearing not only when the Board is deciding whether or not to recommend his release or transfer to open conditions, but also when they are considering other aspects of their treatment:

> In the context of parole, where the costs of an inaccurate risk assessment may be high (whether the consequence is the continued imprisonment of a prisoner who could safely have been released, or re-offending in the community by a prisoner who could not), procedures which involve an immediate cost but contribute to better decision- making are in reality less costly than they may appear (para 72).
>
> The Board should not give way to the temptation …. to discount the significance of matters which are disputed by the prisoner in order to avoid the trouble and expense of an oral hearing (para 91).

. . . it seems to me obvious that a prisoner who is being detained post tariff deserves an oral hearing before a court or tribunal.

9. See Padfield, N. (2011) 'Amending the Parole Board Rules: a sticking plaster response?' *Pubic Law* 691-698.

The right to rehabilitation?

I may have lost some readers with this legal detail. There are floods of individual cases which challenge the minutiae of this complex legal framework. To me, the opportunity to challenge the rules is essential. But we may miss the forest by only looking at the individual trees, branches or twigs. We lawyers are only slowly edging towards recognising the importance of the right to rehabilitation: something which lies at the heart of many European and international standards, and indeed at the heart of the Prison Rules. Perhaps eventually, the decisions of the courts will prove useful here too. In *R (Walker, Wells, Lee, James) v Secretary of State for Justice (Parole Board intervening); Wells v Parole Board* [2010] 1 AC 553 the Minister of Justice acknowledged that he was in breach of his public law duties by failing to provide appropriate courses and other rehabilitative services for lifers. However, the House of Lords held that even though the prisoners were unable to demonstrate their safety for release because the courses they were required to undertake were not available, their continued detention was not unlawful at common law. The European Court of Human Rights in *James, Lee, Wells v UK* (4th section, ECHR, 18 Sept 2012) (2013) 56 EHRR 12 went further saying that 'lack of resources, planning and realistic consideration of the impact of the sentencing scheme introduced in 2005' meant there was indeed a breach of Article 5 of the European Convention on Human Rights.

These are contested areas of law, of course. There would be great benefit in an updated Prison Act. I suggest that the Government brings upon itself some of the enormous cost of legal aid by making laws which are so complex and so difficult for anyone to understand or to apply. Much of the cost of litigation is not down to prisoners and their lawyers, but down to the Government introducing rules which may seem unfair and which they then choose to defend at vast expense before the courts. A fairer and better system, a system which was easier to challenge, would save money. Would the best way to secure improvements be to give prisoners the right to a regular review by a court or tribunal? Or a personal officer who understands (and who is rewarded for understanding) the rules and the importance of prioritizing the offender's rights? I have argued elsewhere that we should consider the French system of sentence review courts.[10] Without this independent review, can we really be confident that the system operates fairly? Should we tolerate such an enormously high number of prisoners serving indeterminate sentences? These questions need wide debate.

This is not the occasion to focus only on complex areas of law. Rule 3 of the Prison Rules 1999 is, I hope, not controversial: 'The purpose of the training and treatment of convicted prisoners shall be to encourage and assist them to lead a good and useful life'. Are lifers adequately encouraged and assisted? The period that a prisoner serves in prison is a crucial period which leads, for most, very slowly and uncertainly towards release. The help they get in prison is particularly important for lifers, whose release dates are uncertain and discretionary. I would encourage the Prison Service and its staff to ask itself many more practical (and even moral?) questions:

- ❒ Does it, the Prison Service and its staff, do its utmost to get people out on tariff completion?
- ❒ Are post-tariff lifers treated appropriately?
- ❒ Do all staff know and worry about who is post-tariff?
- ❒ What is appropriate treatment for someone who has completed the 'deserved' or punishment part of their sentence?
- ❒ Do prisoners know (understand?) that staff really want to get them out on tariff?
- ❒ Are staff proud of 'their' lifers achievements?
- ❒ Are they disappointed if they can't write a report which strongly recommends release, on tariff?
- ❒ Are probation staff really focused on getting lifers out?[11]

Please add your own! Am I right to be surprised that the prison system still appears not to acknowledge, or sometimes even not to notice, the fundamental status change which occurs when a lifer becomes post-tariff? They are then being detained simply because of the risk of re-offending: they have by then served the sentence fixed for 'punishment'. They should surely be detained in a way which recognises this important status change? There should be an anxious determination to move the prisoner onwards, and out.

The public (which is all of us) are entitled to reasonable public protection — but not absolute public protection, and that right of the public to reasonable public protection has to be carefully balanced against the offender's rights: a right to liberty, once they have served their sentence, and, I would argue, too, a right to rehabilitation. The current law is too complex and too costly. It puts too little value on human rights and human dignity. There is a growing literature on the reality of prisoners' experiences.[12] I welcome the opportunity to contribute to a much wider public debate.

10. Padfield, N. (2011) 'An Entente Cordiale in Sentencing?' 175 *Criminal Law & Justice Weekly* (available at SSRN: http://ssrn.com/abstract=2239618 or http://dx.doi.org/10.2139/ssrn.2239618)
11. Another subject very understudied: an unusual perspective is to be found in Gelsthorpe, L., Padfield, N. and Phillips, J. (2012) *Deaths on Probation: an analysis of data regarding people dying under probation supervision* Howard League for Penal Reform.
12. See for example, Appleton, C. (2010) *Life after Life Imprisonment*; Padfield, N. (2013) *Understanding recall 2011* (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201039)