

PRISON SERVICE JOURNAL

January 2015 No 217



Perrie Lectures 2014: Reforming Life Sentences

Rt. Hon. Sir Alan Beith, M.P. has been a Member of Parliament since 1973. Between 1992 and 2003, he was Deputy Leader of the Liberal Democrats and he has been Chair of the House of Commons Justice Committee since 2007.¹

It must have been an optimist who decided on the title 'Making sense of life sentences'? — I don't think we can. The life sentence involves trying to reconcile incompatible objectives:

(1)The desire to embody in law a different punishment by which society asserts that it is wrong to take the life of another. 'Thou shalt not kill';

(2)The realisation that some murders and murderers are very much worse than others;

(3)The realisation that some crimes, and some instances of repeat offending, are at least as serious and culpable as some murders, and perhaps more so;

(4)The idea that 'life should mean life';

(5)The contrasting reality that there is a wide range of actual sentences served, with an average of 14 years for mandatory life sentences and 9 years for non-mandatory;

(6)The fact that some sentences are for life because that is what the law requires, while others represent the considered view of the court that life is the appropriate sentence;

(7)And as if that wasn't enough, we had Indeterminate Sentences for Public Protection, which could turn out to be longer and closer to 'life' than many life sentences!

It is a mess, and nobody dares to clear up the mess. There is the fear that it would be breaking a commitment made when the death penalty was abolished nearly 50 years ago; and the fear that it would be presented and attacked as 'being soft on murder', or on repeat serious offences.

The Mandatory Life Sentence

Mandatory life sentences for murder were introduced by the Homicide Act 1957 as a concession to Members who were uneasy about the suspension of the death penalty.² The later Murder (Abolition of the Death Penalty) Act 1965 which abolished capital punishment, initially for five years and permanently upon renewal in 1969,³ also imposed a mandatory life sentence for murder.⁴

A mandatory sentence presents particular problems for courts sentencing offenders for murder. Murder is contrary to common law, and can be defined as the unlawful killing of a human being resulting from a) an intention to kill or b) an intention to cause grievous bodily harm.⁵ The problems presented by the combination of an offence encompassing a wide variation in culpability which incurred a mandatory sentence had been considered by the courts during the sixteenth and seventeenth centuries when the death penalty was the required sentence for murder. The solution adopted was the creation of a 'partial defence' where, if the defendant could show provocation, he or she could be convicted of manslaughter instead, an offence for which the court had discretion over sentencing. The Homicide Act 1957 sought to further mitigate the potential problems by placing provocation on a statutory footing⁶ and introducing diminished responsibility⁷ and killing 'in pursuance of a suicide pact'.⁸ The partial defences have presented problems for the courts, not least the definition of 'provocation' and its application to women who have suffered extreme and long-term domestic violence⁹ and in

1. I am indebted to Hannah Stewart, Committee Legal Specialist to the House of Commons Justice Committee, for her extensive help in the preparation of this lecture.
2. Mitchell, B. and Rivers, J. (2012) *Exploring the Mandatory Life Sentence* Oxford: Hart.
3. Murder (Abolition of the Death Penalty) Act 1965 left the capital punishment in place for high treason; piracy involving murder or GBH ('piracy with violence'); espionage or setting fire to dockyards.
4. S. 1(1) Murder (Abolition of the Death Penalty) Act 1965.
5. Modern paraphrase of 'Murder is when a [person]...unlawfully killeth...any reasonable creature in *rerum natura* under the Queen's peace with malice aforethought...' (Derived from *Coke's Institutes*, 3 Co Inst 47).
6. Section 3 Homicide Act 1957.
7. Section 2 Homicide Act 1957.
8. Section 4 Homicide Act 1957.
9. Provocation was originally held to only apply to people who 'snapped' and reacted immediately to the relevant provocation. This approach was overturned in the 1992 case of *R v Ahluwalia* [1992] in which the defendant who had suffered extreme violence from her husband over a long period burnt him to death as he slept. It should be noted that the conviction in *Ahluwalia* was not overturned on the basis of provocation, which was not found on the facts of the case despite the change in law, but on the grounds diminished responsibility which had not been raised at trial.

the consideration of 'mercy killings' for example of a very ill and suffering spouse or child. Mandatory life sentences, like the death penalty could encourage the treatment of some murders as if they were manslaughterers.

It has been argued, most recently by Professors Barry Mitchell and Julian Rivers,¹⁰ that the mandatory life sentence violates the principle of proportionality which is key in sentencing. Mitchell and Rivers argue that proportionality is dependent on community views; sentences should reflect, at least in part, the opinions of society on the gravity of a crime and the culpability of the offender. Well-informed members of the public, they contend, do not actually support the mandatory life sentence when given detailed scenarios upon which to comment, including killings in the course of other serious felonies, such as burglary and robbery; killings that resulted from various confrontations, including those between business partners, lovers, and friends; and the killing of a severely disabled child by a distraught parent. The results of their research led the authors to conclude that there was 'no evidence of overwhelming or widespread public support for automatically sending all convicted murderers to life imprisonment', although there was support for mandatory life sentences in more serious murder scenarios.¹¹

In 2006 a Law Commission report concluded that the law on homicide required significant clarification and should be placed on a statutory footing.¹² The report proposed that the offence of murder should be split into 'first' and 'second' degrees together with a new definition of manslaughter.

- ❑ First degree murder, which would continue to attract a mandatory life sentence, would be confined to unlawful killings committed with an intention to kill and unlawful killings committed with an intent to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.
- ❑ Second-degree murder would encompass unlawful killings committed with an intent to cause serious harm and unlawful killings

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intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death. It would also include cases which would constitute first degree murder but for the fact that the accused successfully pleads provocation, diminished responsibility or that he or she had killed pursuant to a suicide pact. Second degree murder would attract a discretionary life sentence.

- ❑ Manslaughter would cover unlawful killings caused by acts of gross negligence and unlawful killings caused by a criminal act that was intended to cause injury or by a criminal act foreseen as involving a serious risk of causing some injury. Manslaughter would also attract a discretionary life sentence.

These proposals received support from a number of academics, legal practitioners and human rights groups, primarily on the grounds that the single sentencing option of a mandatory life sentence is too inflexible to reflect the broad range of conduct that murder can encompass.¹³ In response the Government said it remained committed to mandatory life sentences for murder, given its status as 'a unique crime of particular moral and social significance'.

In its green paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*,¹⁴ published in December 2010, the current Government indicated that it would look at 'simplifying' the current legislation on murder sentencing, although it emphasised it had 'no intention of abolishing the mandatory life sentence'. However, no substantive simplification or reform of the murder sentencing framework has so far followed, nor has there been any indication that this will be forthcoming in the near future.

It has been suggested that the best way to reform mandatory sentences is to give greater discretion to the courts in determining tariffs (referencing for this?). However this does not necessarily resolve the issue as, even in cases where the offender's culpability may be greatly reduced and a short tariff imposed, he or she

10. Mitchell and Rivers (2012) see n.2.

11. Ibid. The research was conducted on behalf of the Nuffield Foundation.

12. The Law Commission (2006) *Murder, Manslaughter and Infanticide*, Project 6 of the Ninth Programme of Law Reform: Homicide.

13. Ibid.

14. Ministry of Justice (2011) *Breaking the Cycle: Government Response*, Cm 8070.

will remain on licence for life; able to be recalled to prison at any time. The burden of being on licence should not be underestimated. The Law Commission commented:

*If a life sentence has to be passed on an offender with no previous criminal record who was driven to kill on the spur of the moment by very grave provocation, the sentence that must be passed will have a 'topsy-turvy' character. The offender will, on current guidelines, be required to spend perhaps only two to four years in prison for the offence because of the gravity of the provocation and the fact that he or she acted spontaneously. Yet, when released from prison, he or she will then remain on licence, liable to be recalled to prison for, perhaps, another 40 years or more.*¹⁵

An offender is most likely to be recalled to prison for a breach of licence conditions or following arrest on suspicion of committing a further offence. Potentially therefore, a person who has been on licence and of good behaviour for many years may be recalled following an allegation that the police or probation later find to be wholly false.

Tariffs

The setting of the minimum terms for murderers has proved to be a challenge for successive Home Secretaries. Initially minimum terms were set by the Home Secretary but this was held to be incompatible with the requirement for all sentencing decisions to be taken by an independent and impartial tribunal under Article 6 of the European Convention on Human Rights.¹⁶ The then Home Secretary, David Blunkett MP, seems to have been reluctant to relinquish control of minimum terms, possibly as a result of the media furore over the impending release of Myra Hindley.¹⁷ Potentially intending to exert some political control over the setting of tariffs, the Home Secretary tabled an amendment to the Criminal Justice Bill being considered in parliament which required courts to give due regard to sentencing guidelines. The same Bill also

contained guidelines on minimum terms. The relevant starting points are:

- ❑ Whole life tariffs for exceptionally serious murders such as the premeditated killings of the murders of two or more people, sexual or sadistic child murders or political murders;
- ❑ 30 year minimum terms for particularly serious cases such as murders of police or prison officers (the present Government is seeking to amend this to a whole life tariff), murders involving firearms, sexual or sadistic killings or murders where the victim was targeted due to his or her race or sexual orientation;
- ❑ 15 year minimum term for murders not falling within either of the above two categories.¹⁸

These guidelines appear to have increased the length of time those sentenced to life imprisonment serve in prison custody.

In its consultation on the *Breaking the Cycle* Green Paper the current Government commented that Schedule 21 to the 2003 Act was 'based on ill-thought out and overly prescriptive policy' and was 'badly in need of reform'.¹⁹ However, in its response to the consultation the only reference to sentencing for murder was: 'Mandatory life sentences for murder are an essential part of the sentencing framework. There

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Challenges arising from the increase in the numbers of life sentenced prisoners

Life and indeterminate sentences are costly for the State, both in terms of the length of time spent in prison and the 'offending behaviour work' prisoners have to do to show the Parole Board that their risk to the public has been sufficiently reduced to allow their release on licence. The Parole Board also has to consider applications by life-sentenced prisoners for a move to open prison conditions, usually, although not invariably a few years before a suitable prisoner's minimum term expires (mandated at 48 months)?. The Board relies on reports from the Probation Service in making an assessment, Clare Bassett, Parole Board CEO, told the Committee:

15. The Law Commission (2006) see n.12 para. 2.131.

16. *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

17. Hindley died before release <http://www.theguardian.com/uk/2002/nov/15/ukcrime4> 16 November 2002.

18. Schedule 21, Criminal Justice Act 2003.

19. Ministry of Justice (2011) see n.14.

...our experience would be that where you have a very good, engaged offender manager, [Parole Board risk assessment] works really well. Where you have an offender manager who has a very high workload, is spread a bit thin and has not even met the prisoner until the morning of the hearing, for example — which is not uncommon — then it is very difficult.²⁰

Evidence to the Committee from the Parole Board itself noted the pressures they were under, significantly increased by the Supreme Court's decision in *Osborn and others v Parole Board*²¹ which held that the fair trial rights under Article 5(4) of the European Convention on Human Rights required a greater number of life-sentence and indeterminate sentence prisoners be offered oral hearings on applications for release post-tariff or for a move to an open prison. The Parole Board estimates that '[they are]...now faced with the colossal challenge of increasing [our] oral hearing capacity from 4,500 a year to closer to 14,000 a year...'²²

Discretionary life sentences and indeterminate sentences require considerable resources even before sentence is handed down because the court will require detailed pre-sentence reports in order to make a proper assessment whether the risk posed by the offender requires this type of sentence. The Committee noted in *Towards Effective Sentencing*:

The system of Imprisonment for Public Protection sentences presupposes a rigorous risk assessment prior to sentencing so as to put the sentencing judge in a position to make an informed and reliable decision on the risk to the public an offender poses. Robust pre-sentence assessment procedures need to be put in place to allow the reformed system of Imprisonment for Public Protection sentences to work in the way Parliament intends. We believe that, in order to be

*effective, Imprisonment for Public Protection sentences require the judge to be provided with a pre-sentence report including a comprehensive risk assessment. We believe that the Government needs to make adequate resource provision for these purposes.*²³

The resource requirements of monitoring life-sentence prisoners post-release are also significant. The Committee concluded in its report *Towards Effective Sentencing* that '*Resources are a fundamental issue in delivering an effective sentencing strategy.*'²⁴

Life sentences also, inevitably, mean an increase in the number of older prisoners who are likely to have greater health and mobility needs. In its inquiry into older prisoners the Committee concluded:

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*Older prisoners have needs that are distinct from the rest of prisoner population by virtue of their severity. Such severity warrants specific means of addressing those needs...*²⁵

*The growth of the older prison population and the severity of the needs of that population, warrant a national strategy in order to provide for them effectively. Some prisons hold high numbers of older people in their establishments and have the incentive to develop an effective older prisoner policy and regime. Others do not, and the older prisoners who are held in these prisons are more likely to receive inequitable treatment as a result.*²⁶

The Inspectorate Report

In September 2013 the Joint Report by the Probation and Prison Inspectors²⁷ highlighted issues about the management of life sentence prisoners. Key points included:

20. Q17 13 December 2013.

21. [2013] UKSC 61.

22. Parole Board submission to the Justice Committee December 2013.

23. Justice Committee (2008) *Towards effective sentencing* London: The Stationary Office p.27-8.

24. *Ibid* p.3.

25. Justice Committee (2013) *Older prisoners* London: The Stationary Office para. 134.

26. *Ibid* para. 136.

27. HMI Probation and HMI Prisons (2013) *A joint inspection of life sentence prisoners* London: HMI Probation.

*Despite the time it took to reach the point to transfer to open prison, life sentence prisoners were not well prepared for this significant transition... Preparation for release relied heavily on the use of release on temporary licence, rather than interventions such as courses on life skills.*²⁸

There were criticisms of pre-release assessment procedures, and an over-use of approved premises for those with lower levels of risk. In Category C prisons life sentenced prisoners generally completed offending behaviour courses; however there were some obvious gaps in opportunities offered — partly because IPP prisoners with expired tariffs got priority for scarce places. Inspectors concluded that 'Regimes in open prisons offered insufficient opportunities for prisoners to address their offending behaviour'.²⁹

There were many things that were commended, and I have quoted these criticisms in order to illustrate some of the particular practical difficulties presented by life sentence prisoners.

I would also draw attention to the key recommendation to NOMS, that they should 'use the opportunity offered by the Transforming Rehabilitation strategy to reassess how life sentence prisoners are managed in both custody and the community',³⁰ so as to ensure that the right services to promote rehabilitation were used: and that there should be more analysis of 'the underlying motivation and triggers for the original offence' so as to improve the risk assessment.

The public debate on life sentences

The public attitude to life sentences presents difficulties for any programme of reform. Though Rivers and Mitchell's research for the Nuffield Foundation cited above indicates potential support for change, public debate is almost wholly confined to media reports on notorious cases. These tend to reduce the debate to salacious headlines such as 'life should mean life' with little or no regard to the context of the case with the consequence that evidence pertinent to the

issue is ignored. The recent furore over absconders from open prison is an example. On 3 May 2014 Michael Wheatley, an armed robber serving 13 life sentences, absconded while on day release.

The disappearance of Mr Wheatley, referred to as 'Skull-cracker' in the media, triggered an avalanche of press about absconds despite the fact figures from the Ministry of Justice show absconding from open prisons has declined in recent years; from a high of 1,300 in 2003-04 to 204 in 2012-13. As noted by the *Guardian* '...in every year this century, Home Office figures show that 99.9 per cent of releases on licence ended with offenders returning as required. It must not be ignored that between six and seventeen sentenced murderers have absconded each year since 2006-07 however of these only one remains at large. This is one person too many however it should not precipitate or be used to justify a mischievous policy panic about open prisons a couple of days before the local elections.'³¹

The Committee identified public confidence as a fundamental issue in *Towards Effective Sentencing* but concluded:

*The Government has failed to provide the information and leadership required to facilitate an informed public debate, while the media climate for such debate often depends on isolated discussion of particular cases which inhibits calm consideration.*³²

Governments have to lead and cannot merely follow what may in any case be an over-simplistic picture of public opinion. Governments are responsible for keeping their citizens sage, and for spending taxpayers' money wisely and carefully. That requires rational analysis of policy, and in this field it means assessing whether we are keeping some people in prison unnecessarily, whether we could release funds from custody to crime prevention, whether we are wasting money on post custody supervision of certain offenders released on licence with a very low risk of reoffending, and whether courts are unduly restricted from imposing appropriate and effective sentences.

That is a task for Parliament after the next election.

28. Ibid p.6.

29. Ibid p.8.

30. Ibid p.9.

31. <http://www.theguardian.com/commentisfree/2014/may/19/editorial-in-praise-of-open-prisons>

32. Justice Committee (2008) see n.23 p.3.