"Life" until death: interpretations of section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965

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*Crim. L.R. 899 Summary: Section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965 substituted the penalty of imprisonment for life for the sentence of death but until the recent case of Hindley it has not been the subject of any statement as to how it might be construed. The lawfulness or otherwise of the Home Secretary's pronouncement of a "whole life" tariff in her and other cases will be finally determined in the House of Lords in the near future. The authors argue that while the section cannot be said to exclude the possibility of a mandatory life sentence prisoner spending the greater part of the remaining portion of their natural life in custody, the term "life" may be taken as meaning the state having control over the offender for the period of his or her natural life, including the liability both to be released on conditional licence and to be recalled to custody at any time should the public interest so require. The practice of executive variation of tariff beyond that set by the judiciary to accommodate the requirement of retribution and deterrence, as distinct from decisions to extend the period in custody to avoid danger to the public, is seen as affecting the balance of powers and responsibilities between the executive and the judiciary.

The penalty for murder since the abolition of capital punishment has given rise in recent years to much executive action (and resultant judicial review) over the release from custody of life sentence prisoners. But until last year, there had not been a single judicial utterance with regard to what precisely constitutes a sentence of life imprisonment. In the near future, however, the House of Lords will be asked authoritatively to pronounce on the legality of the imposition by the Home Secretary upon Myra Hindley of a "whole life tariff" (an order of detention for the rest of her natural life).

Myra Hindley has now served 33 years in custody following her conviction in 1966 for the murder of two children. Until she first challenged the decision of the Home Secretary to order her detention in prison for the rest of her natural life, no court had pronounced upon the meaning of the "sentence" of life imprisonment in section 1 of the Murder (Abolition of the Death Penalty) Act 1965. When her case came before the courts last year in the context of judicial review, initially in the Divisional Court and subsequently in the Court of Appeal, the judges were unhesitating in treating the phrase as simple and clear. What six judges were sequentially to do, with varying degrees of enthusiasm, was to uphold the power of the Home Secretary to declare, at any time during the sentence, that any prisoner serving a mandatory sentence of imprisonment for life shall literally spend the rest of his or her natural life in detention.

Two issues need initially to be identified here. First, when the abolition of the death penalty for murder was before Parliament some thirty years ago no discussion took place in Parliament or official circles as to the question of whether a life sentence was to be construed as liability to detention throughout the duration of the offender's natural lifetime or whether it implied what would in effect be a natural lifetime of detention. Although it permits for release on parole, nothing in the statute provides for a judicially pronounced sentence --as distinct from an executive fiat in the form of a declaration by the Secretary of State--that embodies life without possibility of parole such as is the case in a number of jurisdictions in the United States of America.

Secondly, the simplistic substitution of a mandatory sentence of "life" for the mandatory sentence of death without a clear definition of the term "life" permitted some confusion with the position of the life sentence hitherto served by those prisoners who, having been convicted of murder
prior to the Murder (Abolition of the Death Penalty) Act 1965 and sentenced to death, were reprieved and sentenced to life imprisonment. In the case of such prisoners, the mitigating circumstances which engendered their reprieve from the gallows correspondingly facilitated their comparatively early release on parole since they were so seldom a danger to the public. It is on this point that the question of construction becomes crucial; the question becomes, as a former Master of the Rolls put it long ago: what had Parliament in mind? Careful scrutiny of the debates at the time in both Houses reveals nothing to suggest that the imposition of a sentence of imprisonment for life was in future to be thought of as anything different from what it had been when it had been a substitute for a respited sentence of death. The purpose of the Act, so unambiguously stated in its title, was the abolition of the death penalty, not a change in the nature of life imprisonment.

*Crim. L.R. 901* The judicial interpretation of section 1(1) of the Murder (Abolition of the Death Penalty) Act 1965

There has been no recorded statement of any court on the construction of this section until the Hindley case. In the Divisional Court Lord Bingham of Cornhill C.J. said

â##One can readily accept that in requiring a sentence of imprisonment for life on those convicted of murder Parliament did not intend â##sentenceâ## to mean what it said in all, or even a majority of cases, but there is nothing to suggest that Parliament intended that it should never (even leaving risk considerations aside) mean what it said.â##

In the Court of Appeal, Judge L.J. specifically agreed, adding

â##There is no value in further elaboration. The language of the statute is clear â¡; The sentence (his italics) is life imprisonment. In my judgment the possibility remains that for the purposes of deterrence and punishment alone the criminal culpability involved in some cases of murder may lawfully permit imprisonment for life in accordance with the actual sentence pronounced by the trial judge.â##

Earlier in his judgment, Judge L.J., in alluding to the Parliamentary debates in 1965 between abolitionists and retentionists of the death penalty, considered that â##â¡; the analysis adds nothing to the language of the section which is simple and clear.â##

An alternative view

Simplicity, in the phraseology of Parliamentary language there certainly is; but of clarity of meaning and purpose there is none. By the use of the phrase â##shall be sentenced to imprisonment for lifeâ## in section 1 of the 1965 Act it can, however, be reasonably inferred that the intention of Parliament was to ensure that such subsequent liberty of which the convicted murderer might have reasonable expectation would not be absolute but contingent upon both an expiatory period of custodial punishment and his or her progress towards reformation and rehabilitation. The â##lifeâ## element would consist in the state having control over the offender throughout his or her natural life, whether in prison or on licence in the community, including the capacity to impose conditions upon and to revoke any such licence should it be in the public interest to do so. We submit that there is no evidence from the contemporary debates to suggest that Parliament intended that a mandatory sentence of life imprisonment should be synonymous with a lifetime of imprisonment. While it was contemplated that it might happen that a convicted murderer would die in prison or that he or she might do so it being the case that the offender needed to be detained for a very long period indeed given the absence of any reduction in the risk to the public were he or she to be released on licence, there is nothing in any of the speeches during the 1965 debate to suggest that life imprisonment was to be interpreted as *incarceration for life*, a sentence to be modified by executive fiat in the form of conditional licence on parole.

As a matter of statutory construction, the â##sentenceâ## of life imprisonment is distinguishable conceptually from the time spent in custody. The former is exclusively judicial in character and function: only the trial judge can pass the sentence. The latter, the determination of how long the offender actually spends in custody, is a matter for the executive in the person of the Home Secretary.

The inference that Parliament drew a distinction between the automatic life sentence and the period of actual incarceration is strengthened by reference to section 1(2) of the 1965 Act. The sub-section which was a compromise for a discretionary life sentence, provides for a judicial recommendation
with regard to the minimum period to be served in custody. If Parliament had intended that the offender sentenced to a mandatory life sentence could be made to spend the remainder of his or her natural life in prison, the minimum recommendation could have so provided. Indeed, given that Parliament spent some considerable time in debating the amendments of the then Lord Chief Justice, Lord Parker, with regard to the power of judges to indicate minimum periods to be served before such release it is surprising that no speaker in either House made any reference or suggestion with respect to a judicial pronouncement—having a statutory basis—of life imprisonment without possibility of parole. Compare, however, the provision in the mental health legislation which gives the court power in making a restricted hospital order under sections 37 and 41 of the Mental Health Act 1983 to impose the restriction â##without limit in timeâ##. The precursor to section 41 in the Mental Health Act of 1959 had provided this example of unlimited detention.

It is instructive at this point to compare and contrast the rationale behind the provision embodied in section 41 of the Mental Health Act 1983 and that imputed to section 1(1) of the Murder (Abolition of the Death Penalty) Act of 1965. Nowhere in any of the various enactments of the last hundred years dealing with those offenders deemed to be suffering from some abnormality or sickness of mind is there any suggestion that their detention has any retributive or deterrent character or component. The sole criterion for detention without limit of time has been exclusively the extent of risk to the public that their release would occasion. Until comparatively recently putative dangerousness was similarly believed to be the sole criterion for a prisoner serving a mandatory life sentence continuing to be held in custody beyond the expiry of the tariff intended to meet the purposes of retribution and deterrence in the particular circumstances of the case.

As Lord Bingham has clearly indicated, while one can readily accept that Parliament did not intend life to mean natural life in all or even a majority of cases there is nothing to suggest (even leaving considerations of risk aside) that it should never have that meaning. While Judge L.J. was even more direct in identifying the possibility that for the purposes of deterrence and punishment alone the criminal culpability demonstrated in some cases would lawfully permit such a penalty to be exacted with literal effect, it is important to note that his words â##may lawfully permit imprisonment for lifeâ## are immediately followed by â##in accordance with the actual sentence pronounced by the trial judge.â##

This provides no basis for the view that the Home Secretary may, by varying an established penal tariff to one of whole life, lawfully assume a quasi-judicial role by reviewing the offender's criminal desert as distinct from any risk presented by his or her release on parole. Moreover, any successive upward revisions of the tariff become increasingly difficult to distinguish from political responses to what is perceived as public opinion as distinct from an objective re-assessment of desert—assuming that such was possible within either the existing law or the canons of natural justice.

Nevertheless, that it is evident that Parliament has appreciated the vital distinction between the custodial term implicit in the life sentence (substantively as a form of life long control of one kind or another) and the actual period of incarceration is demonstrated by the Criminal Justice Act 1991. Section 1(2) of that Act provides that a custodial sentence shall not be imposed unless the offence is so serious that only such a sentence can be justified for it or where, if it is a sexual or violent offence, that only such a sentence would be adequate to protect the public from serious harm from the offender. Section 2(2) of the Act indicates that the length of such a sentence is to be for such a term as is commensurate with the seriousness of the offence or, in the case of a sexual or violent offence, such longer term as is necessary to protect the public from serious harm from the offender. By subsection (4) of that section, an indeterminate sentence shall be regarded for the purposes of section 2(2) as a custodial term longer than any actual term. When applying these principles to the mandatory life sentence the conclusion to be drawn is this: to mark the heinousness of the offence and to impose a retributive penalty upon the offender the trial judge indicates the minimum term that must be served in custody. Thereafter, any extension of custody must have as its object the protection of the public.

What is critical both in this context and in a wider constitutional sense is the interaction between judicial and executive power in situations involving the lawful detention of individuals against their will. In those relating to the continued detention of the mentally disordered, the attention of both the judiciary and the executive is directed to the criterion of dangerousness; the punitive dimension is wholly absent. Those who stand criminally convicted of murder and sentenced to mandatory life are in a wholly different position. Constitutionally, the separation of powers allocates to the judiciary the task of sentencing offenders, normally enabling a degree of flexibility to accommodate a range of matters from dangerousness to retribution and deterrence but not excluding powerful
mitigation. In offences other than murder, the Executive is powerless to extend any determinate sentence of imprisonment. Where murder is involved, any flexibility in sentencing vanishes—save for an indication respecting the minimum term to be served. Insofar as any mitigation is possible it can only occur through the exercise of executive power. Traditionally, during the days of capital punishment, this was by means of the prerogative of mercy and in a sense it may be still discerned within the statutory provisions of parole. What gives rise to both jurisprudential and constitutional concern is the process whereby the impression is given that the executive no longer limits its functions to ensuring the safety of the public by making judgments about dangerousness (a relatively objective matter) but has gradually extended its involvement to assessing—some would say re-assessing—the penal deserts of the offender (an essentially subjective matter) which has hitherto been regarded as the exclusive preserve of the judiciary.

Life sentences for murder prior to 1957

Prior to the partial abolition of the death penalty embodied in the Homicide Act, 1957, the experience had been that the life sentence, normally substituted for the commuted death penalty, was never carried out literally as a matter of deliberate policy. Sir Ernest Gowers, Chairman of the Royal Commission on Capital Punishment, 1949-53 observed, "A life sentence is never carried out literally. Convicts have died in prison, but there is no recorded case in which it has been decided that a prisoner shall be kept in prison until he dies." Opponents of reform of the mandatory life sentence and those who argue the case that the intrinsic heinousness of some murders—as distinct from the realistic assessment of risk to the public—is sufficient to justify life long incarceration not infrequently assert that all murders, notwithstanding that they may differ in heinousness, are as crimes per se sufficiently above a threshold of gravity that a life sentence alone can be the only sufficient penalty. It is also sometimes argued that such a view has been the case from time immemorial. The historical cadastral indicates otherwise. In the early Middle Ages culpable homicides were not infrequently the subject of restitution to the victim's kin by means of financial or other valuable consideration, while as recently as 1884 in the celebrated case of Dudley and Stevens, the death penalty was commuted, not to penal servitude for life (as might well have been the case) but to a determinate sentence of six months imprisonment. The defendants were convicted of the murder of the cabin boy of the Migonette after the yacht had foundered on the high seas and they had been adrift without sustenance in an open boat for some 19 days. The sentence was by no means unique: in the same year a commutation had been followed by a free pardon. In 1880 and again in 1883 determinate sentences of 10 years penal servitude were substituted for the death penalty while in 1879 a capital sentence had been commuted to imprisonment for one year with hard labour.

Though rare, such instances indicate the absence of an ironfast principle as the basis for the life sentence to be regarded as synonymous with incarceration for life.

Conclusion

The death penalty for all murders was statutorily declared by the Offences Against the Person Act 1861 and remained so until the Homicide Act 1957. When for non-capital murders there was substituted for the mandatory death sentence the mandatory sentence of life imprisonment, and for all murder in 1965. By definition, the sentence of death was a forfeiture of the convicted murderer's life. On abolition, the forfeiture was likewise related to the offender's liberty for the duration of his natural life, divided between incarceration and release on licence in whatever proportion was deemed appropriate to the degree of criminality and future dangerousness. In this sense, the mandatory penalty of life imprisonment is a free-standing technical legal term which has no need for any definition.

The meaning of the 1965 Act imported the system of release on licence of prisoners serving life sentences because at the time when it was passed that system had been employed in relation to commuted sentences from 1861 to 1965. But that system of licensing, both before and after 1965, was engrafted on to the penalty structure and was not the essence, nor indeed an integral part of the penalty. What is now urgently needed is a recognition of a distinction between life imprisonment and incarceration for life.

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1. Lord Denning.

2. Essentially deriving from the Royal Prerogative the exercise of which had over the centuries eventually devolved upon the Home Secretary advised by a small department within the Home Office. That situation was to be modified by the establishment of the Parole Board post 1967.


5. p.24, LL2-23

6. It matters not whether the sentence is expressed as imprisonment for life as in the case of an adult or, in the case of persons aged between 18 and 21, custody for life. Both impose incarceration, not for an indefinite period, but literally for life. In both instances the sentence is imposed automatically by the trial court as a punishment for the offence of murder, regardless of the offender’s mental state or dangerousness. See the submission by HMG to the European Commission on Human Rights in Brownfield v. UK, July 1, 1998. App. No. 32003/96, (1998) 26 E.H.R.R. CD 138-145.

7. The suggestion that there was at the time a pact whereby those favouring the retention of capital punishment agreed to its abolition on the basis of a quid pro quo that life should mean natural life is a myth which has been assiduously promoted in recent times and accepted by the Home Affairs Committee of the Home of Commons. In an article The Penalty for Murder: A Myth Exploded in this journal [1996] Crim.L.R. 707, the present authors sought to dispose of the myth. To date none of its promoters has made any rejoinder.

8. See L.J. Blom-Cooper, and T. Morris, op cit., supra.

9. Relatively early on under the 1965 Act in the case of Skingle, unreported, Reading Crown Court, the trial judge indicated to the offender that for him the words life imprisonment would have their awful terrible meaning.

10. Supra, p.2.

11. See Note 5 supra.

12. The dangers of ill-informed prejudice are self-evident while the task of establishing precisely what truly constitutes public opinion borders upon the search for the Chimera.

13. Save by its law officer appealing through the judicial process against what has to be demonstrated to be an unduly lenient sentence. In such a situation the Crown enjoys no guarantee of automatic success.


16. 24 and 25 Vict., c.100

17. s.9(1) When the court is precluded from passing sentence of death the sentence shall be one of imprisonment for life.