FOR THE TERM OF HIS NATURAL LIFE

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INTRODUCTION

In the CCSU case (CCSU v Minister for the Civil Service [1984] 3 All ER 935) the House of Lords confirmed what many public and constitutional lawyers had long believed or suspected, namely, that the prerogative powers of the Crown were generally reviewable by the courts just as if they had been created by statute so long as the subject matter of the particular prerogative power was 'justiciable' ('that is to say if it is a matter on which a court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power' (per Lord Scarman, p 948 e-f)). What were not justiciable prerogative powers, the House said, were prerogative powers such as 'the making of treaties, the defence of the realm, *the prerogative of mercy*, the grant of honours, the dissolution of Parliament and the appointment of ministers ... because their nature and subject matter [is] such as not to be amenable to the judicial process' (per Lord Roskill, p 956 d-e).

I believe that a case can be made out for saying that, in Hong Kong at least, the prerogative of mercy exercised by the Governor under the provisions of Article XV of the Letters Patent may well be amenable to judicial process notwithstanding the observations of Lord Scarman.

In saying this I know that there is Privy Council authority on the point directly against my proposition. In de Freitas v Benny [1976] AC 239 the Privy Council rejected a claim by condemned prisoner from Trinidad that he be allowed to see the materials used by a Minister when considering whether to recommend to the Governor-General that the prerogative power be exercised. There was also a committee which advised the Minister on the exercise of the prerogative. The prisoner sought also a ruling that he had a right to be heard by that committee and be legally represented before it. Both claims failed. Lord Diplock epitomized the main issue by saying:

> 'Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of a quasi-

judicial function.'

But that case concerned the exercise of the prerogative in very different circumstances to those which obtain in Hong Kong. It is because of the special circumstances of Hong Kong that I maintain that the de Freitas case and the obiter remarks in the CCSU case would not be insuperable obstacles to an action for judicial review of the prerogative of mercy. I base my contention on two grounds.

The first ground is that, unlike the United Kingdom, where the prerogative is used now only very occasionally, principally to deal with motorists who have been wrongly convicted of a minor offence, the prerogative is used in Hong Kong frequently and according to a system in order to deal with two long-standing problems.

The first problem is constitutional in nature. It arises from the fact that political opinion in the United Kingdom is such that Ministers there effectively require the Governor to commute a death sentence, almost as a matter of convention.

The second is a political problem. It is that, until only very recently, the abolition of the death penalty was considered a political impossibility because of perceived wide-spread popular opposition to abolition.

Taken together these two issues have led to a practice of automatic reprieve and subsequent commutation of the death sentence, usually to a life term, by the executive organs of government. The exercise of the prerogative in Hong Kong, in my opinion, now closely resembles the exercise of a statutory discretion by a Minister of State who devises and uses a policy in order to help him or her because the power in question affects a large group or class of people, or because there is public interest in, or a political angle to, the exercise of the power and therefore a degree of political accountability, or perhaps both.

My second ground has to do with the penal policy of the government regarding long-term prisoners. Absent a parole system, the prerogative is used pragmatically to review the continued detention of all persons who have been sentenced to indeterminate and long prison terms as a matter of prison management. The Board of Review, Long Term Prison Sentences (BOR,LTPS) exists to advise the Governor on the exercise of the prerogative in these cases which come up for automatic review by the Board at regular intervals, usually every two years. Many of the prisoners are men and women who have had death sentences converted into terms of life imprisonment. They can only be released if, one day, their sentences are converted into fixed terms by another exercise of the prerogative. The use of the prerogative

in this manner, according to a system and not on a 'one off' basis, may make it reviewable by the courts on the basis that a holding-out that the prerogative will be exercised systematically gives rise to some public law obligations.

Does the Hong Kong Bill of Rights (BOR) make a difference? Although I believe that even before the enactment of the BOR there was an argument for saying that some lifers might have been able to seek judicial review of their detention pursuant to the prerogative, the BOR would appear to provide another platform for such an argument. I say this because of the guarantee contained in Article 5(4) of the Bill which says that persons deprived of their liberty shall have the right to have the lawfulness of their detention decided by a court. Some of the judgments of the European Court of Human Rights concerning the corresponding Article in the European Convention on Human Rights (ECHR), in particular the recent decision of the Court in Thynne, Wilson and Gunnell v UK (1991) 13 EHHR 97, requires a court to have the capacity to review any indeterminate detention which cannot be justified as a proportionate punitive response to a particular crime. (In that case the United Kingdom was held to be in breach of Article 5(4) of the ECHR for failing to provide for prisoners serving discretionary life sentences any means of access to an independent tribunal which could review their continued detention in order to see whether the need for their continued detention was justified).

In order to understand better why the prerogative has come to be used in this unusual way in Hong Kong it is, I think, instructive to go back in time and see why and how the sentencing and prerogative option of the discretionary life sentence came into being in the English criminal justice system.

THE DISCRETIONARY LIFE SENTENCE: ITS ORIGINS

The discretionary life sentence for certain serious offences is a product of the great penal reforms in the English criminal justice system which took place in the late eighteenth and nineteenth centuries. These reforms had some impact on the criminal justice system in Hong Kong but, because of local circumstances, they did not lead to the establishment of any systematic executive interference in the cases of prisoners sentenced to long or indeterminate prison sentences. On the other hand, in the United Kingdom the penal policy of nearly 200 years ago based on transportation has led, albeit indirectly, to the establishment of the Parole Board and, with it, a justiciable scheme for securing the release of long-term prisoners by

administrative means.

At common law, criminal offences were classified as being either felonies or misdemeanours. The punishment for a felony was death and forfeiture of property whilst for a misdemeanour a fine and imprisonment were the usual punishments. Murder, rape, robbery and housebreaking were the major common law felonies. The rigours of the mandatory death sentence for felony were ameliorated to a certain extent by the rule that individuals subject to the ecclesiastical jurisdiction could not be punished for a felony by the secular arm if they could claim 'benefit of clergy.'

In the first part of the eighteenth century the range of offences punishable with the death penalty was extended by new laws meant to protect property interests. The benefit of clergy was expressly withheld from these new offences and was taken away from some of the common law offences. The upshot was a considerable increase in the number of persons sentenced to death each year as a consequence of conviction for felony.

Not all convicted felons hanged, however. The prerogative of mercy was used increasingly to secure the reprieve of condemned prisoners where there were some extenuating circumstances in the case. Condemned felons were granted conditional pardons upon them agreeing to transportation to one of the colonies in the Americas. These were, in a sense, discretionary sentences although the discretion was that of the executive and not of the judiciary.

Transportation was put on a statutory footing by the Piracy Act 1727 when it became a sentence which could be imposed by the judges. Over the years the range of offences for which transportation could be ordered by the courts was extended but, at about the time that this occurred, there set in a reaction to the overuse of the death penalty and the death penalty was removed from many statutory felonies. In 1827 the Administration of Justice Act provided that in all non-capital offences the judges could sentence convicted felons to either transportation beyond the sea for seven years or to imprisonment for a term not exceeding two years.

In 1837 a number of Acts of Parliament were enacted to remove the death penalty in virtually all remaining felony cases. The new penalty for felonies which had formerly carried the death penalty was, according to the statutory formula of the day, transportation 'beyond the seas for the term of the natural life of [the prisoner].' Not even the post-war £10 assisted passage scheme could match these words recited by assize judges all over England and Wales

for securing the cheapest all-expenses paid travel to the other side of the world. (This old judicial sentencing incantation provides the title of this talk. It was also used by the nineteenth-century novelist Marcus Clarke as the title for his novel describing convict life in Australia which I read, I am pleased to say, many years before I came across the 1837 Acts).

The policy of transportation in the first part of the nineteenth century provided the colonies, especially the colonies in Australia, with a ready made adult population which was ready to reproduce and which was also a cheap source of labour. The colonial authorities were quick to capitalise on this and there soon developed a system of executive intervention in the sentences of transportees that was designed to advance a policy of long-term settlement of the colonies. This was popularly known as the 'ticket-of-leave' system under which convicts were granted a restricted form of liberty during the term of their sentences. It was accepted that persons convicted of the most serious offences could obtain their liberty in due course subject only to the condition that, in cases of transportation for life, they could never return to England. If they did then they suffered serious consequences. (Readers of Charles Dickens will here recall the concerns of Magwitch, the transportee and benefactor of Pip in *Great Expectations*, about the possibility of the authorities discovering him to have returned to England from Australia).

Transportation was phased out between 1853 and 1864 in response to objections from the colonies which no longer needed, or wanted, to rely on convict labour for long-term settlement. In its place, supported by an extensive programme of prison building in Victorian cities, was introduced a new domestic regime of penal servitude which imitated the transportation system in that prisoners sentenced to penal servitude would become eligible for release within the term of their sentence. The proportion of the term which could be served on licence, the home equivalent to the ticket-of-leave, was initially set at one sixth for short sentences and one third for longer sentences, but in 1891 the figure was set at one third for female convicts and one quarter for male convicts. This system ran in parallel to a regime of simple imprisonment for fixed terms for less serious offences or where imprisonment was an alternative to penal servitude. (Offences which carried penal servitude and a term of imprisonment as options were drafted so as to ensure that there was no overlap. There was a minimum period fixed for the term of penal servitude which was always more than the maximum term of imprisonment available. But there was no remission for prisoners serving a term of imprisonment until 1898 and then it was less generous than the discount afforded

to prisoners serving terms of penal servitude).

Penal servitude was abolished in England and Wales in 1948. Its main legacy to English penal policy was that all prisoners were to be entitled to remission of one third of their sentence except for lifers who, unless there was executive interference with the sentence, could only be released on licence. It also provided the basis for the parole system which was introduced in 1967 and continued the tradition of the 'ticket-of-leave' for long-term prisoners.

The system of licensing lifers and offering parole to other long-term prisoners continues in the United Kingdom. The licence of the lifer will only terminate upon his or her death. The prisoner is liable to recall by the Secretary of State at any time. Decisions to release on licence are now made within the statutory scheme which established the Parole Board. The Board monitors the progress made by individual prisoners and makes a recommendation to the Secretary of State for the Home Department who has the final say on whether parole is granted to a long-term prisoner or whether a prisoner who is on licence is to be recalled to prison.

HONG KONG

At one time Hong Kong courts were able to sentence offenders to terms of penal servitude overseas. Norton-Kyshe records ten felons being transported beyond the seas in 1844. It appears that European prisoners went to Western Australia and 'locals' went to Penang or Singapore to work in plantations. This stopped in 1858 when the colonies made it clear that they did not want to receive any more felons. The Penal Servitude Ordinance, No 10 of 1858, provided for sentences of penal servitude to be served in prisons in Hong Kong. In 1887 however transportation, still technically 'on the books,' was abolished as was penal servitude itself by an ordinance entitled '*An Ordinance to Abolish Transportation and Penal Servitude and to Substitute other Provisions in Lieu thereof.*' The new provisions provided for a regime of imprisonment for most offences.

By way of example as to what kind of offence was punishable with a sentence of penal servitude for life there is section 38 of the Larceny Ordinance of 1865, which made it an offence to break into and enter a chapel and commit a felony therein. The sacrilegious felon was

'liable, at the discretion of the court, to be kept in penal servitude for life or for any

term not less than 3 years ... or to be imprisoned for any term not exceeding 2 years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of 16 years, with or without a whipping.'

Hong Kong has therefore not been troubled with having to run two distinct penal regimes. There has been no tradition of releasing prisoners and licensing them as there has been for a long time in the UK. Prisoners served their term or were, exceptionally, released under the prerogative. Murderers generally hanged and so there was never a very large percentage of the prison population serving indeterminate sentences. Those who were serving indeterminate sentences were, as was the case in the UK, persons convicted of manslaughter, rape, aggravated burglary, buggery, robbery and persons convicted of murder but, because of their age, sentenced to be detained until the sovereign's pleasure was known. In the words of civil service apologists who wish to maintain an established measure or institution, this system 'served Hong Kong well' until at least the time of the last hanging which took place in 1966. From that date there began to grow Hong Kong's long-term prison population which gets bigger every year.

THE ROYAL PREROGATIVE

The prerogative of mercy is an ancient prerogative of the Crown but its antiquity and legal complexity are best appreciated by reading Chitty on the subject in either Vol I, Chapter 19 of his Criminal Law (1826) or in Chapter VI of his Prerogatives of the Crown (1820) (I commend particularly the discussion whether it was within the prerogative to respite condemned felons particularly grisly and painful capital sentences in order that they might suffer the death penalty in some more agreeable way). The most important development since Chitty's day is that the practice which was maturing in his time of the Secretary of State for Home Affairs exercising the prerogative on behalf of the monarch has become a constitutional convention. When the prerogative is exercised normally with strict regard to the particular facts of a case it will not excite political comment. But occasions have arisen when a case achieves notoriety and a Minister's decision on the exercise of the prerogative has been called into question. The best-known example is the unsuccessful attempt by Sidney Silverman in 1953 to have the decision of the Home Secretary not to reprieve Derek Bentley made the subject of a motion debate in the House of Commons.

Less well-known, but perhaps of more interest and relevance to the situation in Hong

Kong, is the debate in the House of Commons that took place on 2 June 1948 in the House of Lords on a motion to include in the Criminal Justice Bill a clause suspending the death penalty for five years. Approval for the clause having been won in the Commons already, the then Home Secretary had announced that until the matter had been finally resolved by Parliament, there would be a suspension of executions as a matter of policy. This announcement prompted Lord Goddard, who was not a noted enthusiast for the abolition of the death penalty and was to be Derek Bentley's trial judge a few years later, to speak in the House of Lords on the constitutional propriety of making the prerogative an instrument of policy in order to circumvent the plain intention of the legislature:

> 'I speak merely as a lawyer, but Judges are, after all, concerned with the constitutional law of this Realm. I venture to submit to your Lordships, I hope without risk of being accused of exaggeration, that is an exercise of the dispensing power which has been repudiated by Parliament ever since the days of James II. Such a situation is enshrined, in fact, in the Bill of Rights. Action of this sort is declared to be illegal. And if this is not altering the law by administrative action, I do not know what is.'

If Lord Goddard was right then this is early support - and from an unlikely source - for the proposition that the exercise of the prerogative of mercy might be examined by the courts under one of the heads of interference countenanced by Lord Denning in Laker Airways v Department of Trade [1977] QB 643, namely the improper or mistaken exercise of a prerogative power. There are also obiter remarks that the exercise of the prerogative of mercy might be amenable to judicial review in a constitutional context in a decision of the Supreme Court of Canada in 1933 where, in the context of a judicial discussion on the nature of the prerogative of mercy in general, it was suggested that a prisoner convicted of a capital offence could waive a conditional pardon and insist on execution of the sentence of the court. The court held that the doctrine of waiver did not apply in such a case because the only way to get round a waiver in such circumstances would be by 'a colourable and unconstitutional exercise of the prerogative in granting successive reprieves' (Re Royal Prerogative of Mercy in Deportation Proceedings [1933] 2 DLR 348).

But when the exercise of the prerogative of mercy in a particular case has been an issue in an earlier case Lord Denning declined to get involved in reviewing the decision of the executive. In Hanratty v Lord Butler of Saffron Walden 'The Times' May 13, 1971, Lord Denning refused to allow an action in negligence brought by the parents of James Hanratty, the man hanged for the A6 murder, to proceed against the former Home Secretary

who had refused to reprieve him in 1962. He stayed the action permanently on the basis that the court would not inquire into the manner in which the prerogative was exercised because it was outside the competence of the courts. Then there is of course the case of de Freitas v Benny which is, as already acknowledged, right on the point.

JUDICIAL REVIEW OF THE HOME SECRETARY

Although the Hanratty case is the only English case I have been able to find where there has been an attempt to judicially review the exercise of the prerogative of mercy, the judicial review of the Home Secretary's statutory powers to order the release of lifers and other long-term prisoners has been something of a growth industry in the UK, starting in 1985 with the decision in Findlay v Secretary of State for the Home Department [1985] A C 318 that the decision of the Secretary of State not to follow a Parole Board recommendation was, in principle, amenable to judicial review. The most important case since that time has probably been that of R v Secretary of State for the Home Department, ex parte Handscomb (1988) 86 Cr App R 59 which established that some aspects of a sudden change of policy by the Home Secretary regarding fixing review dates for parole were unreasonable in the Wednesbury sense. (Other aspects of the same policy change had been challenged earlier in the House of Lords by prisoners in another case (In re Wilson [1985] 1 AC 318) but the challenge failed.) In R v Secretary of State for the Home Department, ex parte Benson [1989] Crown Office Digest 329 the Divisional Court allowed an application for judicial review against the Secretary of State for not following a Parole Board recommendation and directed him to reconsider his decision. Most recently, in R v Secretary of State for the Home Department ex p Walsh 'The Times' Dec 18, 1991, the Divisional Court told the Home Secretary that, in order to treat lifers and other long-term prisoners fairly, he is under an obligation to tell the prisoners of the earliest date on which they will be considered for parole.

EXERCISE OF THE PREROGATIVE UNDER ARTICLE XV, LETTERS PATENT

In Hong Kong, the only way in which a life sentence or, for that matter, any sentence for a criminal offence can be adjusted or remitted once all avenues for appeal have been exhausted is through the exercise of the Royal Prerogative. The Governor is entrusted with the exercise of the prerogative power on behalf of the Sovereign by Article XV of the Letters

Patent. The entrustment is not, however, a divesting of the power.

The prerogative is exercised by the Governor when either (i) a prisoner or someone acting on his or her behalf successfully petitions for a remission of sentence or (ii) when the Board of Review, Long Term Prison Sentences, a non-statutory board charged with periodic review of the cases of certain categories of prisoners, makes a recommendation to the Governor that there should be a remission and the Governor, after consulting the Executive Council, accepts the recommendation.

INDIVIDUAL PETITIONS

It is the right of every person under the care and protection of the Crown to petition the sovereign regarding any wrong done to them by any organ of State amenable to the remedial action of the prerogative. This right, established by the Bill of Rights 1688, is used frequently by prisoners and their families seeking clemency. The Secretary for Security advises the Governor on what action to take as regards such petitions. The decisions of the Governor concerning such '*ad hoc*' petitions are not, in my view, amenable to judicial review.

THE BOARD OF REVIEW, LONG TERM PRISON SENTENCES

The Board of Review, Long Term Prison Sentences was established in 1959 as an advisory body to make recommendations to the Governor-in-Council on the exercise of the prerogative of mercy. Although not established by an ordinance its function is described in Prison Rule 69A which requires the Commissioner of Correctional Services to refer to the Governor reports on certain categories of prisoner for the purpose of consideration for possible remission under Article XV of the Letters Patent. The categories of prisoner referred to the Board by the Commissioner are (i) prisoners sentenced to terms of 10 years or longer, (ii) lifers, (iii) prisoners ordered to be detained pending Her Majesty's pleasure, and (iv) any prisoner who was under the age of 21 on the date that he or she was convicted. Occasionally individual petitions are also referred to the Board by the Governor where the facts of a prisoner's case are unusual or where the case is in any event due for consideration by the Board.

The Board's legal status is therefore rather like that of the English Criminal Injuries Compensation Board in the case of R v Criminal Injuries Compensation Board, ex parte Lain

[1967] 2 QB 864: it is a non-statutory tribunal established under the prerogative to assist in the discharge of a prerogative power. In that case, the power of the Board was to make ex gratia payments to victims of crime on behalf of the Crown. There is one major difference, however. The Board in Ex parte Lain was empowered to make a final adjudication on the issue of whether compensation should be paid to the victim of a crime. The BOR, LTPS is not empowered to make a final decision on whether a person serving a prison sentence should have his/her prison sentence cut short. It can only advise the Governor who, under Clause X of the Royal Instructions which requires him to consult the Executive Council on most matters, is bound to take advice from the Council before making a decision. It is arguable therefore that its deliberations and recommendations are not reviewable by the courts because it lacks the power to make a final or, by convention, a binding decision on the use of the prerogative (R v St Lawrence's Statutory Visitors, ex parte Pritchard [1953] 1 WLR 1158; R v General Medical Council, ex parte Colman [1988] Crown Office Digest 313 (Div Ct)).

THE COMPOSITION OF THE BOARD

The Board was until 1988 chaired by the Attorney General, but in November of that year the Chair was transferred to a High Court Judge, The Honourable Mr Justice O'Connor, who retired in 1990. The current chairman is The Honourable Mr Justice Ryan. Membership of the Board consists of four 'official' members drawn from the Attorney General's Chambers, Security Branch, the Social Welfare Department and the Correctional Services Department. The other members of the Board are termed 'non-official members' and are appointed by the Governor for a term of three years. There are currently six non-official members including a psychologist, a psychiatrist, a social worker and a barrister. The Secretary to the Board is a Senior Executive Officer of the Security Branch. The Board meets quarterly to discuss the cases that have been referred to it. There are reports on every prisoner whose case is to be reviewed from the Commissioner of Police, the Correctional Services Department and the Social Welfare Department. Many of the lifers will have been convicted of murder and will have had their death sentences commuted at an earlier date. Their papers will include a copy of the trial judge's report which Clause XXXIV of the Royal Instructions requires in all capital cases. For prisoners convicted of rape or other serious sexual offences there will usually be a report from the prison psychologist. There are

psychiatric and psychological reports on prisoners who are or appear to have been under some from of mental disability. Prisoners do not appear before the Board although they may make written representations to it.

The Governor is in no way bound by the advice of the Board and its recommendations may therefore be rejected.

POLICY AND THE ROYAL PREROGATIVE

The clearest indication that the exercise of the prerogative is now policy driven because of the constitutional and political issues is the fact that the Governor has acknowledged this to be the case. On 6 November 1975 the Colonial Secretary made a statement in the Legislative Council (LEGCO) on behalf of the Governor in order to answer concerns expressed by LEGCO members about the fact that the death penalty had apparently fallen into desuetude, the last execution having been nearly ten years before. These concerns were publicly stated after it had become widely known that the Governor had only recently refused to reprieve a particularly notorious murderer. Ministers in London had then said that they were bound to advise the Queen to exercise the residual prerogative powers she retained to reprieve the prisoner. Up until the time the Colonial Secretary made his statement there was nothing to indicate that the prerogative was being exercised in accordance with any particular policy. The Colonial Secretary acknowledged the existence of a constitutional impasse and set out the position:

> 'Any prisoner sentenced to death in Hong Kong has the right to petition Her Majesty the Queen for clemency. The Queen, in reaching her decision, acts upon the advice of the appropriate United Kingdom Minister, namely the Secretary for State for Foreign and Commonwealth Affairs. In tendering his advice to the Queen the Secretary for State must take into account the likely reaction in the United Kingdom Parliament, to which he is answerable, to the advice he tendered to Her Majesty. Recent Secretaries of State have been of the opinion that they would not be supported in the House of Commons if they were to advise that death sentences should be carried out in Hong Kong.'

After explaining that he knew that this was unpopular in Hong Kong, where the majority of the population were in favour of the death penalty, he went on to say that the Governor appreciated the public feeling and he was prepared to do something to accommodate it.

> 'His Excellency has asked me to say that he accepts the fact that public opinion on this issue is so strong and so universal that a change to current practice must be made

in terms which go some way to meet the genuine feelings of the community, which clearly sees this issue as a test of the determination of the Government to tackle violent crime with determination.

In future, whenever he commutes a death penalty, the Governor will impose the alternative punishment of life imprisonment, unless, in exceptional circumstances, he feels able to accept advice from the Executive Council that a lesser sentence should be imposed.

The only exception which might be made to this principle, is where, after any long period of imprisonment, strong humanitarian considerations might have emerged such as would justify the earlier release of a particular offender.'

This policy, which sets clear parameters for the BOR,LTS at least as regards lifers who have had their death sentences commuted, continues in force. It was restated by the Chief Secretary as recently as 15 March 1989 in response to a LEGCO question asking if the death penalty was going to be abolished. After stating that it was the Government's belief that the death penalty was the appropriate sentence for murder he referred to the Colonial Secretary's 1975 statement and said that the position was 'basically unchanged.' The $64,000 question that, in my view, arises from the Colonial Secretary's statement is whether it or its contents makes the exercise of the prerogative justiciable.

I begin by assuming that judicial review of the prerogative of mercy is possible and that the prerogative is not legally inviolable, at least in Hong Kong where it is used for special purposes. I was pleased to see that Stephen Sedley's recent talk, 'The Insolence of Office,' provides some support for my view. He said that Professor Wade's assertion that the Queen in Council was not amenable to the common law was an outmoded view of the law. The thrust of his talk was that the trend of recent public law developments, including M v Home Office [1992] 2 WLR 73, meant that 'there was no reason to suppose that the whole of the state apparatus, prerogative or not was amenable to justice.' (You may recall that, in order to make his point, he mentioned the case of R v A Committee of the Lords of the Judicial Committee of the Privy Council, ex p Vijayatungga [1988] QB 322 where the Court of Appeal 'entertained without demur to its jurisdiction a challenge to the Privy Council sitting in right of the Queen as a Visitor of London University').

If the prerogative of mercy can be judicially reviewed, then clearly cases like Ex parte Handscomb and Ex parte Walsh are relevant because they deal with virtually the same subject matter, namely the application of policy regarding lifers and long-term prisoners and the exercise of a relevant discretion. One might begin any public law analysis of the Colonial Secretary's statement by asking whether it is rational. The reality of the situation is that,

since 1975 at least, when the views of Ministers on the issue were made known to the LEGCO, there has been no realistic prospect of the death penalty being carried out. There will always be a reprieve and commutation, a fact noted by the Privy Council in the case of R v Leung Kam-kwok [1986] HKLR 188 as entitling it to take the unusual step of applying the proviso in a capital case. Hong Kong is therefore *de facto* if not *de jure* abolitionist and has been so for nearly a quarter century.

That being the case is it really right to speak of a life sentence as being 'an alternative punishment' to the death penalty, as if the Governor really had any choice in the matter and might not reprieve a condemned prisoner? If he refuses to reprieve a condemned prisoner then Her Majesty will certainly do so and may, for all we know, substitute a determinate prison term. If the death penalty is therefore not an alternative when the prerogative is exercised, is it right to have a policy which appears to suppose that it is a real alternative and go on from there to have a commutation policy with a presumption against determinate prison sentences?

Another possible foothold for judicial review of the prerogative is the lack of transparency of the statement of the Colonial Secretary which may be relevant if it can be shown that there is inconsistency in the exercise of the prerogative. What are 'exceptional circumstances' and 'strong humanitarian reasons'? The Governor does not explain why he has exercised the prerogative in a particular way in any particular case and members of ExCo do not volunteer what their advice to him has been. It is possible therefore that, as Governors and members of ExCo come and go, there could develop some inconsistency in the application of these criteria. As Lord Justice Watkins put it in Handscomb, although it may be lawful for a Minister to have a policy, 'it cannot be lawful for a Minister ... to maintain it when the application of it is, in part at least, shown to give rise to injustice.'

It would clearly be very difficult to obtain the necessary data to see if inconsistency and consequential injustice can be demonstrated because of the secrecy surrounding decisions of the Governor when taking the advice of the Executive Council. One can therefore only surmise on possible instances of inconsistency but it might arise out of the facts of a particular case where, for example, prisoners A and B, who are of the same age and background and have both been convicted of the same offence on a joint enterprise basis. They are subsequently treated very differently under the prerogative when their cases are reviewed on different occasions by differently constituted Councils. One of the prisoners is

given a determinate term and the other is not. As I am sure that the prisoner who is not given the benefit of a determinate sentence will tell you, there is a very great difference between a life term and a prison term for a definite number of years. (The Criminal Court of Appeal occasionally allows appeals against sentence on the grounds of disparity. The court intervenes because of the public policy requirement for consistency in sentencing and also by way of recognition that persons convicted of an offence may have a justifiable sense of grievance if they are dealt with very differently from a co-accused. But the Court of Appeal, unlike the Executive Council, very rarely has to consider the propriety of a life sentence).

Whilst on this point, the statement of the Colonial Secretary should be compared with the very detailed statement the Home Secretary made to the House of Commons in November 1983 when he announced a major change of policy which adversely affected the prospects for parole of many long-term prisoners and lifers. His statement, which was a result of a promise at the Conservative Party Conference the previous month, was clearly politically motivated and designed to accommodate the sentiments of the 'law and order' section of the party. The statement nevertheless runs to 4 columns of Hansard (6th series, Vol 49 (1983), Written Answers, Cols 505-508) and sets out in great detail the reasons for the change in policy, how it will affect the work of the Parole Board, identifies the classes of prisoner affected and describes how all of this fits in to the statutory scheme of things set out in the relevant legislation (i.e. Criminal Justice Act 1967). An attempt by four prisoners affected by the statement of policy to judicially review the new scheme on the grounds of unlawfulness and loss of a legitimate expectation of parole failed. The statement of the Home Secretary was noted in the leading speech in the House. I believe that the failure was attributable, in part, to the careful and thorough exposition of the new policy by the Home Secretary which plugged possible public law loopholes. (See In Re Wilson [1985] 1 AC 318)

Finally, there is the argument that by ordering a periodic review of all long-term and life sentences by the BOR,LTPS the Governor has impliedly promised to look at and treat each case on its merits (otherwise, why bother?) even though the prisoners have no legal right as such to a review of their cases under the prerogative. Does this mean therefore that the review process must come up to some minimum standards of procedural fairness, such as, for example, allowing prisoners to make informed representations on the merits of their cases to the BOR,LTPS and/or to the Governor in Council by having access (which they do not have at present) to some of the reports that are filed in their cases when they come up

for review? (See O'Reilly v Mackman [1983] 2 AC 237 and AG of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 and other recent legitimate expectation cases)

I have concentrated on what might be termed 'conventional' approaches to the question of judicial review. I now propose to consider what the Bill of Rights may have to offer long-term prisoners. And to do that I will start with a consideration of a recent decision of the European Court of Human Rights in Thynne, Wilson and Gunnell v UK (1991) 13 EHHR 597) concerning discretionary life prisoners in the United Kingdom.

THE DECISION IN THYNNE, WILSON & GUNNELL

1. The Background

Mr Thynne was convicted in 1975 of rape and buggery and sentenced to a discretionary life term. Mr Wilson was convicted of buggery in 1972 and sentenced to a discretionary term of life imprisonment. Mr Gunnell was sentenced to a discretionary life term in 1965 for 4 offences of rape. They were each of them, because of personality defects and their criminal records, prime candidates for discretionary life terms because they were clearly a danger to the public and sentencing them according to the tariff for their offences as if they were 'one off' offenders would mean that they would be released within a term of years and possibly still pose a danger to society. The rationale behind the life sentence in their cases is perhaps best illustrated by the sentencing remarks of the judge at the Old Bailey who sentenced Mr Wilson in 1972 for one count of buggery, two counts of attempted buggery and seven counts of indecent assault on boys under 16.

> 'I entirely accept that, to a large extent, you cannot help yourself. To that extent, your moral guilt is the less but I have two duties to perform. One is a duty to find the correct sentence as far as you are concerned, having regard to your make-up, your physical and mental make-up. The other duty I have, and in the circumstances of the case I think it is the more important: I have a duty to the public, and in particular, to the young public, to protect them from people like you, who for one reason or another, can't control themselves.
> I hope that, in the course of time a method of treatment for your particular freakish affliction can be found. I think it will be in the best interests of society generally, and you yourself in particular, if some form of treatment for you could be found. What I am going to do may sound harsh from your point of view, but it will be explained to you, no doubt, by your counsel hereafter, that it may hold out to you more hope to you than if I merely went up to 4, 5 or 6 years, or even 7 years in a particular case.
> The sentence of the court is that as far as the count of buggery is concerned, that is the eighth count, you will go to prison for life. So far as the counts of attempted

> buggery and indecent assault are concerned, you will go to prison for a period of 7 years. All these sentences will be concurrent. Now I am sure that your counsel will have a word with you hereafter and will indicate what the situation is with regard to a life sentence, but as I say, I think that my main duty in this particular case is to protect the public and the young public, in the light of what I have heard occurred in your case. I only hope that, in due course, some form of treatment, perhaps that to which the doctor refers in the medical report which I have seen may help you.'

Mr Wilson appealed to the Court of Appeal (Criminal Division) in October 1972. His application was refused by the single judge. He later abandoned his appeal but in 1976, nearly four years after his conviction, he sought to have his appeal re-instated. This application was refused. But the words of Lord Justice Shaw are relevant:

> 'the applicant has not established a situation in which this court could properly allow him to withdraw the notice of abandonment. The Court has thought it right to go some extent into the history of the matter in order to establish that even if such a withdrawal were permitted, it could not possibly be of advantage to, the applicant, if we were to substitute for the life sentence a very long sentence that really would not be distinguishable from a life sentence. But if he wishes to take advantage of it, build himself up and strengthen his own character, he has far better prospects under an indeterminate sentence than under a long determinate sentence.'

Mr Wilson was released on licence in 1982 and recalled a year later. Although he challenged the reasons for his recall in judicial review proceedings, he did not succeed in obtaining an order for his release and so he took his case to Strasbourg.

2. The Judgment of the European Court of Human Rights

The ECHR carefully reviewed the UK's law and practice relating to discretionary lifers. It noted in particular three recent judicial review cases (R v Secretary of State for the Home Department, ex parte Handscomb (1988) 86 Cr App R 59; R v Secretary of State, ex parte Benson [1989] Crown Office Digest 329 and R v Secretary of State, ex parte Bradley [1990] 3 All ER 828) which clearly established as a matter of public law that there were two elements to a discretionary life sentence. One was punitive and was roughly equivalent to the 'tariff' for the offence in question. This 'tariff' was a judicial response to perceived needs for retribution and deterrence. Its length was ascertainable from a review of the sentencing tariffs for offenders convicted of relevant sentences but not sentenced to discretionary life terms. The other element was an indeterminate period of detention premised on the belief that the offender was a continuing danger to society. The Court noted the following remarks of Lord Justice Stuart-Smith in Ex parte Bradley in this context:

'The rationale or justification for a discretionary life sentence must surely be this: that in exceptional cases the interests of public safety cannot be sufficiently protected by imposing a determinate sentence even to the maximum extent permissible - i.e. the tariff sentence merited in the way of punishment uplifted to a limited extent allowed by established case law for the protection of the public. Rather it is necessary to cater for the presently perceived risk that, upon completion of any lawful determinate sentence, the prisoner would, if freed, remain a grave danger to society. This is achieved by passing a life sentence so as to ensure that the public will be protected and the risk re-assessed after the tariff period expires ... the sentencing Court recognizes that passing a life sentence may well cause the offender to serve longer, and sometimes substantially longer, than his just desserts. It must then not expose him to that peril unless there is compelling justification for such a course. That compelling justification is the perception of grave future risk amounting to an actual likelihood of dangerousness. But, of course, the Court's perception of that risk is inevitably imprecise. It is having to project its assessment many years forward and without the benefit of a constant process of monitoring and reporting such as will be enjoyed by the Parole Board. When at the post-tariff stage the assessment comes to be made by the Board they are thus much better placed to evaluate the true extent of the risk which will be posed by the prisoner's release.'

The Parole Board was set up by the Criminal Justice Act 1967 shortly after the death sentence for murder was finally abolished. One of its functions was to recommend the release on licence of a lifer to the Secretary of State. The Secretary of State's power to direct a release on licence could only be exercised where there had been such a recommendation and where he had consulted with the Chief Justice and, if possible, the trial judge. A recommendation of the Parole Board in no way bound the Secretary of State who was free to form his own policies on the subject of release. Indeed, after the Handscomb case led to questions in the House of Commons about releasing lifers, the Secretary of State made a policy statement saying that in future he would ensure that the Parole Board's first review of a discretionary lifer would coincide with the expiry of the punitive tariff period. He said that in any event no lifer would be detained for more than 17 years without a formal review of his/her case even where it was thought that considerations of retribution and deterrence called for detention upwards of twenty years.

The complaint of Messrs Wilson, Thynne and Gunnell was that this system did not comply with the requirement in the Convention under Article 5(4) that they should have the lawfulness of their continued detention reviewed by a court at reasonable intervals. They said that once the punitive period of the life sentence had been served their continued detention could only be justified under the Convention if it could be shown that they continued to be a menace to society. As the grounds relied upon by the sentencing judges for imposing terms

of life imprisonment were matters such as mental instability and other character traits which were susceptible to change with the passage of time and with treatment they therefore had a right to have these factors considered by a court after the tariff period had expired.

This argument was accepted by the court which applied the reasoning behind three earlier cases (Van Droogenbrock v Belgium (1982) 4 EHHR 293, X v UK (1981) 3 EHHR 302 and Weeks v UK (1988) 10 EHHR 293), which dealt with the situation of persons detained or liable to be detained by the executive for long periods of time. As the prisoners had served the 'tariff' part of their sentences they had a right to some form of judicial review of their continued detention. The UK's main submission, that it was impossible to separate the punitive and security elements of the discretionary life sentence and therefore the question of release was properly left to the executive, was rejected. Although disentangling these elements could be difficult, the fact was that English penal policy and relevant case law made it clear that discretionary life sentences were made up of two distinct elements and, that being the case, the right in question had to be recognised and protected.

The court accepted however that mandatory life sentences were quite a different matter. Parliament had expressly stated that the punishment for murder was imprisonment for life and there was therefore no possibility of splitting up the sentence into discrete components representing punishment and risk respectively.

Having failed on the main point in its case the UK Government did not try to argue that the remedies available to the prisoners under domestic law - representations to the Parole Board and judicial review proceedings - were adequate for the purpose of protecting the right in question. It was conceded that they were not. For its part the court simply re-iterated its views on what kind of judicial supervision was called for:

> 'Article 5(4) does not guarantee a right to judicial control of such scope as to empower the "court" on all aspects of the case, including questions of expediency, to substitute its own discretion for that of the decision-making authority; the review should nevertheless, be wide enough to bear on those conditions which, according to the Convention, are essential for the lawful detention of a person subject to the special type of deprivation of liberty ordered against these three applicants' (paragraph 79).

In an attempt to comply with Article 5(4) as regards the treatment of discretionary lifers the UK Government has re-constituted the Parole Board and, in effect, made it the decision-maker on the issue of release and thus making it a 'court' for the purposes of the Convention. Section 34 of the Criminal Justice Act 1991 obliges a judge to quantify and state

the punitive element in a life sentence at the outset when sentence is passed. When the prisoner has served that part of the sentence so identified the Parole Board will review the case for the prisoner's continued detention and may direct his/her release on licence. The Secretary of State is under a statutory duty to comply with an order for release. His statutory power to release life prisoners in other circumstances is preserved in section 35.

CONCLUSION

Sentencing policy in Hong Kong regarding discretionary life sentences does not seem to differ greatly from the sentencing policies of English judges in similar cases (see Wong Kin-hong, Crim App 261/78, where the Court of Appeal follows the English cases). Assuming that there is little or no difference in the legal content of Article 5(4) ECHR and Article 9(4) ICCPR (the source of Article 5(4) BOR), it would seem to follow that a person serving a discretionary life sentence who has served the 'tariff' part of his or her sentence has a right under Article 5(4) BOR to judicial review of his/her continuing detention.

How that right would be enforced is difficult to say, given the very broad terms of the BOR remedies clause, but I would expect a habeas corpus application, with or without an application for judicial review of any relevant decision, would be effective in bringing all the relevant BOR issues before the High Court which would be, in my view:

(a) Is the BOR,LTPS a 'court' for the purposes of Article 5(4) BOR?

(b) If the answer to (a) is no, is the Governor acting under Article XV of the Letters Patent a 'court' for the purposes of Article 5(4) BOR?

(c) If the answer to either (a) or (b) (or both) is yes, will the court judicially review the exercise of the prerogative of mercy and, if it does, what principles will be applied?

(d) If the BOR,LTPS and/or the Governor are not courts, will the court review the exercise of the prerogative in any event? If the court will not interfere, what remedy does the prisoner have if continued detention is a violation of Article 5(4)?

I express no views on what answers the High Court of Hong Kong might give to these questions if they were ever to be posed but whatever answers were given would be, from the constitutional point of view, very interesting indeed.

The case of a prisoner serving a mandatory life sentence using Article 5(4) as a means of having his/her sentence commuted to a fixed term poses a more difficult problem. The

ECHR made it clear that there was a very great difference between the two kinds of life sentence. The mandatory life sentence is a wholly punitive measure and, to that extent, it can be argued that the requirements for supervision by a court of the continued detention of the prisoner are met by the original court decision which reflects the views of the legislature. But the problem then is that the original court decision was not an order authorising indeterminate detention. The life sentence comes about only because of an intervening act by the executive.

It seems to me that a pragmatic court that was disposed to find that there was no question of Article 5(4) applying would seize on the fact that the prerogative has been exercised in a special way in Hong Kong for a quarter of a century and hold that the exercise of the prerogative along clearly understood policy lines was to be regarded as in effect the execution of a judicial decision. This would avoid a constitutional showdown over Article 5(4). The court, in coming to a pragmatic solution, might consider a decision of the European Commission on Human Rights where almost the same point arose.

In Christinet v Switzerland (1/3/1979) D & R 17 (1980) 35 the Commission was faced with a decision on the lawfulness of the administrative detention of a recidivist who had completed a two- year sentence for theft. The sentencing judge had made an order that, after the sentence had been served, the offender could be placed at the disposal of the State for up to ten years. The option was taken up and an administrative decision was made to detain the offender after he had served his sentence. The question was whether this period of detention required judicial supervision under Article 5(4). This is how the Commission posed the question:

> 'This therefore raises the question whether the rule stated by the Court that the supervision required by Article 5(4) is embodied in the original court decision can be applied in a case where, as is the instant case, an administrative authority takes action at a later date to interrupt and re-impose the detention. For although the decision to return the applicant to a detention centre forms a part, as has been said of the execution of a judgement, of a sentence given by a court, it is nevertheless true that the resumption of the detention follows directly and formally from an administrative decision.'

The application of M. Christinet got no further than the Commission but it illustrates very neatly the problem that a Hong Kong judge may have to face one day.

It is also appropriate to note here that uniformity in approach to the detention of life prisoners has become a topic of international concern. At the 8th UN Congress on the Prevention of Crime and Treatment of Offenders held in Havana in September 1990 a

resolution was adopted by the Congress calling on the Committee on Crime Prevention and Control to 'examine the legal position as to the rights and duties of prisoners serving life sentences and the various systems for reviewing their suitability for conditional release' and to give 'special consideration to assessment procedures and decision-making in cases of life sentences and to examine the need for life sentences.'

My own guess is that any court action taken by a lifer, whether a mandatory lifer or a discretionary lifer, will throw into sharp relief some of the legal and policy issues which I have attempted to identify. This may or may not lead to a reactive legislative response. I think that it is more likely though that the issue will be discussed when LEGCO debates a bill proposing the abolition of the death penalty. My personal hope is that legislators will at that time consider whether life sentences should be reviewed from time to time under a law of their own making rather than continue to let the executive branch of government use the prerogative to determine whether a life sentence is to be, possibly, 'for the term of a prisoner's natural life.'

Philip Dykes
March 1992

Postscript

Only after delivering this talk on 9 March 1992 at Hong Kong University did I come across Norman Miner's article entitled 'The Governor, The Secretary of State and the Prerogative of Mercy' in the Hong Kong Law Journal (1987). I regret that I was not able to make use of it for it deals with the political aspects of the exercise of the prerogative of mercy and describes in some detail the background to the statement of the Colonial Secretary in 1975. Professor Miner's examination of Hong Kong files in the Public Records Office for the period 1908-1940 also makes it clear that the Colonial Office kept a fairly close watch on how governors exercised the prerogative of mercy.

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