

# DETERMINING AN INDETERMINATE SENTENCE



Amanda Whitfort\*

*This article compares the administration of indeterminate sentences in Hong Kong with developing practices in the United Kingdom and critiques the Hong Kong decisions in the light of recent rulings of the European Court of Human Rights. The author explains that while the Hong Kong courts have ruled on some aspects of the constitutional validity of an indeterminate sentence, the ultimate question of the Chief Executive's power to detain prisoners after a recommendation of the Long Term Prison Sentences Review Board to substitute a determinate sentence for an indeterminate one has yet to be addressed. The author concludes that should the Chief Executive's right to effectively determine the release date of life-sentenced prisoners be challenged, it would likely be judged invalid for inconsistency with the Bill of Rights and the Basic Law.*

## Introduction

On 16 July 2002 the Hong Kong Court of Final Appeal considered a challenge to the constitutional validity of the current sentence for the offence of murder. The appeal in *Lau Cheong and Another v HKSAR*<sup>1</sup> challenged the validity of the mandatory penalty for murder: life imprisonment. That appeal failed. On 9 September this year the High Court, in the cases of *Yau Kwong Man v Secretary for Security* and *Lai Hung Wai v Secretary for Security*,<sup>2</sup> considered a challenge to the validity of domestic law as applied to two prisoners currently held at the Executive's discretion. That application was partially successful. Using those cases as examples, this article compares Hong Kong's administration of indeterminate (life) sentences with the development of current practices in the United Kingdom. It critiques Hong Kong's laws in the light of recent decisions of the European Court of Human Rights (ECHR) which have required the United Kingdom to amend its domestic law. The paper concludes with an assessment of whether the powers currently utilised in Hong Kong to detain prisoners serving indeterminate sentences are in

\* Assistant Professor, Faculty of Law, University of Hong Kong. The author wishes to thank the anonymous reviewer of this article who provided many helpful comments.

<sup>1</sup> [2002] 3 HKC 146 (hereinafter referred to as *Lau's case*).

<sup>2</sup> *Yau Kwong Man v Secretary for Security*, unrep., HCAL No 1595 of 2001; *Lai Hung Wai v Secretary for Security*, unrep., HCAL No 1596 of 2001 (Court of First Instance, 9 Sept 2002), per Hartmann J (hereinafter referred to as *Yau's case*).

compliance with the requirements of the Hong Kong Bill of Rights Ordinance<sup>3</sup> (HKBoR) and the Basic Law.

### The Administration of Indeterminate Sentences in Hong Kong

In Hong Kong, murder carries a mandatory sentence of life imprisonment pursuant to section 2 of the Offences Against the Person Ordinance.<sup>4</sup> A discretionary sentence of life imprisonment can also be ordered for persons convicted of serious offences such as attempted murder, rape and robbery. A discretionary life sentence is usually reserved for exceptionally repugnant examples of an offence.<sup>5</sup> To warrant a discretionary life sentence, the prisoner must usually also be considered a danger to the public. In developing the well known sentencing precedent *R v Hodgson*,<sup>6</sup> the English Court of Criminal Appeal considered a discretionary sentence of life imprisonment as justifiable where three conditions were met:

- 1 the offence or offences are in themselves grave enough to require a very long sentence;
- 2 it appears from the nature of the offence or offences from the offender's history that he is a person of unstable character likely to commit such offences in the future; and
- 3 if such offences were committed, the consequences to others might be especially injurious, as in the case of sexual offences or crimes of violence.

The *Hodgson* criteria were adopted in Hong Kong in the case of *R v Fong Lung-fai*<sup>7</sup> in 1968.

Life imprisonment, however, does not generally mean the prisoner will spend the term of his natural life in gaol. For the discretionary life-sentenced prisoner, a minimum term to be served before release is set by the trial judge at sentencing in accordance with section 67B of the Criminal Procedure Ordinance.<sup>8</sup> For the mandatory life-sentenced prisoner, no minimum term is set, but the prisoner may still be released under procedures applicable to both types of indeterminate sentence set out in the Long Term Prison Sentences Review Ordinance.<sup>9</sup>

<sup>3</sup> Cap 383.

<sup>4</sup> Cap 212.

<sup>5</sup> *R v Kelleci* [1995] 3 HKC 113, p 118.

<sup>6</sup> (1967) 52 Cr App Rep 113.

<sup>7</sup> [1968] HKLR 249.

<sup>8</sup> Cap 221.

<sup>9</sup> Cap 524.

In Hong Kong, prior to July 1997 the practice for determining the minimum term for a prisoner sentenced to discretionary life was similar to that utilised in the United Kingdom until 1991. No minimum period was set in open court. The trial judge provided the Governor with his view of the minimum sentence the prisoner could serve in the interests of retribution and deterrence. The Governor determined any remission of sentence. The Governor was advised by the Board of Review of Long Term Prison Sentences, which was charged with the review of the continued detention of life-sentenced prisoners. The board had no power to require the Governor to release prisoners, it only made recommendations on the Governor's exercise of the prerogative to commute or remit sentences.<sup>10</sup>

In 1997 the Long Term Prison Sentences Review Board was established under the Long Term Prison Sentences Review Ordinance. One of its functions is to review cases of mandatory and discretionary life-sentenced prisoners and provide recommendations to the Chief Executive where the board considers an indeterminate sentence should be replaced with a determinate one. If he accepts the board's recommendation, the Chief Executive may commute the sentence in accordance with his powers under Article 48(12) of the Basic Law. Article 48(12) provides the Chief Executive with the power to pardon persons convicted of criminal offences or commute their penalties.

In addition to making recommendations to the Chief Executive regarding the replacement of an indeterminate sentence with a determinate one, the board may order a prisoner serving a life sentence be released conditionally under supervision.<sup>11</sup> The board has reported in the First Report of the Long-Term Prison Sentences Review Board that it will exercise this power when it considers it too early to recommend to the Chief Executive the substitution of a determinate sentence for an indeterminate one.<sup>12</sup> A conditional release order would allow the prisoner release for up to two years – the legislation allows the period to be further extended,<sup>13</sup> although release will be subject to conditions including, but not limited to, places of residence and employment, limits on associations and imposition of curfews.<sup>14</sup> The completion of a conditional release without breach may result in the board recommending that the Chief Executive substitute a determinate sentence.<sup>15</sup> The board may also, where the Chief Executive has agreed to replace an indeterminate sentence with a determinate one, order the release of the prisoner if he has served two-thirds of the replacement determinate sentence.<sup>16</sup>

<sup>10</sup> See n 1 above, p 171.

<sup>11</sup> Long Term Prison Sentences Review Ordinance, s 15(1)(b).

<sup>12</sup> First Report of the Long-Term Prison Sentences Review Board (June 1997–June 2000), p 3.

<sup>13</sup> Note 11 above, s 15(4).

<sup>14</sup> *Ibid.*, s 18.

<sup>15</sup> *Ibid.*, s 21.

<sup>16</sup> *Ibid.*, ss 15(1)(c) and 29.

*The Discretionary Life-sentenced Prisoner (Hong Kong)*

Since 1997, under section 67B of the Criminal Procedure Ordinance, a trial judge who imposes a discretionary life sentence on a prisoner must specify, in open court, a minimum period to be served. The board may not allow a prisoner release on a two-year conditional release order or under supervision – in cases where the Chief Executive has approved a determinate sentence – until this minimum term of imprisonment has expired.<sup>17</sup> For a prisoner already serving a discretionary life sentence or still being held at Her Majesty's pleasure at the time of the change of sovereignty in 1997, no minimum period had been specified. Until 1993, persons under the age of 18 and convicted of murder could be held at Her Majesty's pleasure on an indeterminate sentence. Accordingly, section 67C of the Criminal Procedure Ordinance was enacted allowing that a minimum period for these prisoners would be set by the Chief Executive after receiving recommendations from the Chief Justice.

The first review by the Long Term Prison Sentences Review Board to consider whether to recommend to the Chief Executive substitution of a determinate sentence takes place after a prisoner has been in prison for five years. Even the completion of the minimum term specified by the trial judge under section 67B or section 67C of the Criminal Procedure Ordinance will not immediately qualify a prisoner for a recommendation for a determinate sentence. In the case of *HKSAR v Hui Chi Wai and Others*,<sup>18</sup> the Court of Appeal stated that a minimum period assessed under section 67B:

“is not designed to provide a sentence of imprisonment in lieu, as it were, of a life term. It is designed to draw from the court a minimum term in years which the convicted person must actually serve before release, remembering however ... that it is inherent in the phrase ‘minimum term’ that the court does not say that this is the stage at which the convicted individual is to be, or even should be, released.”

The court noted that in exercising its powers under section 67B a court would not be in a position to address all the issues which a Board of Review would, at a later stage, be required to take into account to assess whether the prisoner had rehabilitated and a recommendation for a determinate sentence should be made. That being so, the court stated that the scheme described under the Long Term Prison Sentences Review Ordinance, as well as common sense, suggested that when deciding upon a minimum term under section 67B the court was primarily addressing the punitive and deterrent element dictated by the offence and the circumstances of the offender at the date

<sup>17</sup> *Ibid.*, s 15(3).

<sup>18</sup> Unrep., CACC No 78 of 1999 (CA, 13 Nov 2001).

of sentencing.<sup>19</sup> This view is mirrored by the board, which provides in its report:

“The minimum terms (so determined) would assist the Board to consider when determinate sentences should be recommended for prisoners. However it does not necessarily follow from completion of a minimum term that consideration would have to be given to commuting the indeterminate sentence by that time. The merits of each case and other relevant factors would also have to be considered.”<sup>20</sup>

Should the board determine that the prisoner has been rehabilitated it may recommend to the Chief Executive that he substitute a determinate sentence for an indeterminate one in accordance with its powers under section 15(1)(a)(ii) of the Long Term Prison Sentences Review Ordinance. Section 15(1)(a) provides:

“When reviewing the sentence of a prisoner in accordance with this Part, the Board may do such of the following as it considers appropriate—

- (a) Make a recommendation that the Chief Executive should—
  - (i) remit all or part of a prisoner’s determinate sentence by substituting a shorter determinate sentence; or
  - (ii) substitute a determinate sentence for a prisoner’s indeterminate sentence.”

Along with the recommendation, the board also suggests the appropriate determinate sentence, taking into account the circumstances of the case. If accepted by the Chief Executive, the determinate sentence suggested will usually be followed by the prisoner’s release under supervision a short time later.<sup>21</sup> Where a life sentence has been converted to a determinate one and the prisoner has served not less than two-thirds of it the board may order his release under supervision.<sup>22</sup>

#### *The Mandatory Life-sentenced Prisoner (Hong Kong)*

For mandatory life-sentenced prisoners in Hong Kong no minimum period is set by the trial judge in open court. Rather, section 67B(2) of the Criminal Procedure Ordinance states that the judge *may*, when imposing a mandatory

<sup>19</sup> *Ibid.*

<sup>20</sup> See n 12 above, p 18.

<sup>21</sup> The Honourable Mr Justice Leong, Chief Judge of the High Court, “Long-term Prison Sentence and Parole” (2002) 7 *Hong Kong Lawyer* 39, 43.

<sup>22</sup> Long Term Prison Sentences Review Ordinance, ss 15(1) and 18.

life sentence, make a report on matters relating to the person or the offence for the purposes of reviewing the sentence in the future. Five years into his sentence of imprisonment the mandatory life-sentenced prisoner receives his first review from the board. Any report prepared by the trial judge will be amongst the materials considered by the board.

As in the case of the discretionary life-sentenced prisoner, the board seeks, in the review, to determine whether it should recommend the substitution of a determinate sentence for the mandatory life sentence. If the board considers the prisoner rehabilitated, it may recommend substitution of an appropriate determinate sentence. Similarly, if the Chief Executive accepts the recommendation, the prisoner's release will usually follow shortly thereafter.

### Recent Challenges to Indeterminate Sentences in Hong Kong

In *Lau's case*, the Court of Final Appeal was asked to consider whether the mandatory life sentence of imprisonment in Hong Kong contravened Article 5(4) of the HKBoR. That Article provides:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

The Article is extremely similar to Article 5(4) of the European Convention on Human Rights (the Convention), contraventions of which have been the basis for challenges in the English domestic courts and the European Court of Human Rights (ECHR) in Strasbourg. That Article provides:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

This Article has been interpreted by the ECHR in challenges to the United Kingdom's domestic law as requiring that both mandatory and discretionary life-sentenced prisoners have regular periodic access to a judicial tribunal after the minimum period of a life sentence has been served.<sup>23</sup> The minimum period is called the “tariff” in the United Kingdom. The purpose of the access

<sup>23</sup> *Stafford v The United Kingdom*, unrep., Application No 46295 of 1999 (European Court of Human Rights, 28 May 2002) (hereinafter referred to as *Stafford's case*) and *Thynne, Wilson and Gunnell v The United Kingdom* (1991) 13 EHRR 666 (hereinafter referred to as *Thynne's case*).

is to ensure that the lawfulness of a prisoner's continuing detention is regularly reviewed by a body with the power to release him if necessary. The rationale for requiring review after the minimum term has expired is that the detention during the minimum period is based on the requirements of retribution and deterrence, which will have been satisfied on the expiry of the minimum term. Post-expiration detention can only be justified on the grounds that the prisoner continues to present a danger to society.<sup>24</sup>

This view is supported by *Practice Direction (Crime: Life Sentences)*<sup>25</sup> which provides that a discretionary life sentence falls into two parts:

- 1 the relevant part which consists of the period of detention imposed for punishment and deterrence taking into account the seriousness of the offence; and
- 2 the remaining part of the sentence during which the prisoner's period of detention will be governed by considerations of risk to the public.

The Court of Final Appeal in *Lau's case* observed that access to a judicial tribunal under Article 5(4) is not required for mandatory life-sentenced prisoners, because access only becomes necessary at the *post tariff* stage of detention. The court found that because Hong Kong courts set no tariff for mandatory life-sentenced prisoners, the equivalent Article in the HKBoR was not engaged. No issue of possible unlawful detention can arise where no tariff is set.<sup>26</sup> In the United Kingdom, a tariff is set for mandatory life-sentenced prisoners as well as those serving discretionary life sentences.

In the cases of *Yau* and *Lai*, Mr Justice Hartmann considered whether section 12(2) of the Long Term Prison Sentences Review Ordinance contravened Article 5(4) of the HKBoR. Section 12(2) requires that the board must not conditionally release a prisoner before any minimum term set by a trial judge under section 67B of the Criminal Procedure Ordinance, or the Chief Executive under section 67C, has expired. The judge ruled that section 12(2) was not in contravention of the requirement for access to a judicial tribunal to assess the lawfulness of detention. The judge ruled that while the board's powers are limited in not allowing conditional release prior to the expiration of the minimum term, that minimum term is not the same as a tariff. It does not expire in the same way as the tariff set in the United Kingdom. In that jurisdiction, expiry of the tariff provides the prisoner with a legitimate expectation of release by the Parole Board, as the only reason for his continued detention would be continuing risk. Access to a judicial tribunal for assessment of the continuing lawfulness of detention is necessary

<sup>24</sup> *Stafford's case, ibid.*, para 80.

<sup>25</sup> [1993] 1 WLR 223.

<sup>26</sup> See n 1 above, p 189.

post-expiration of tariff in the United Kingdom because continued detention can only be justified on the basis of risk to the community. In Hong Kong, the expiry of the minimum period does not give rise to any expectation because it will still be a matter for the board to assess whether to release the prisoner on the basis of rehabilitation.

The decision in *Yau's case* recognised that there are fundamental differences between the tariff period as it is employed in the United Kingdom and the minimum term in Hong Kong. In the United Kingdom, on completion of the tariff term the prisoner is entitled to be released, subject only to considerations of risk. In Hong Kong, the minimum term's completion is only one of a broad range of matters to be considered before release. The court found the other matters canvas the assessment of the offender's rehabilitation. The judge also stated that, even if the inability to order conditional release prior to the expiry of the minimum period was in contravention of Article 5(4) of the HKBoR, prisoners still had recourse to the courts via the writ of *habeas corpus* to challenge their continuing detention.

The court was also asked to consider whether the Chief Executive's role in setting the minimum period in accordance with section 67C for those prisoners already detained at Her Majesty's pleasure or serving indeterminate sentences in 1997 was in breach of Article 80 of the Basic Law. Article 80 provides:

"The courts of the Hong Kong Special Administrative Region at all levels shall be the judiciary of the Region, exercising the judicial power of the Region."

The applicants in *Yau's case* were both convicted of murder, one in 1987 and one in 1989. They were detained at Her Majesty's pleasure because they were aged under 18 at the time of the offences. In 1997, when section 67C was enacted, the Chief Executive set each of the applicants a minimum term of imprisonment. The applicants argued that the Chief Executive's setting of their minimum terms contravened Article 80 of the Basic Law.

The court found the Basic Law, as a constitutional document, follows the Westminster model which separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary.

The court ruled that the imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. Setting a minimum term is part of the imposition of punishment and an exercise of judicial power. In so far as section 67C reserved the determination of the minimum term to the Chief Executive, it offended against the principle of separation of powers and Article 80 of the Basic Law. The judge



recognised, however, that while the assessment of the minimum term does not dictate absolutely the final length of the sentence to be served, it does, critically, primarily address and primarily determine the period which must be served to reflect the imperatives of retribution and deterrence. It would be artificial to suggest it does not to a material degree dictate the severity of sentence. The judge stated: "the fixing of a period of time that must be served by an offender to extinguish the retributive and deterrent elements of his sentence is an exercise in determining the punishment for that individual offender."<sup>27</sup> He was satisfied that "section 67C, whatever its form, in substance gives the Chief Executive the power to exercise what is inherently a judicial power."<sup>28</sup> The court declared that the Chief Executive's power under section 67C to set minimum terms was inconsistent with Article 80 of the Basic Law and was therefore invalid.<sup>29</sup>

The ruling referred to the judgment of Lord Diplock giving the well cited opinion of the Privy Council in *Hinds v the Queen*: "What parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body ... a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."<sup>30</sup>

### The Administration of Indeterminate Sentences in the United Kingdom

A conviction for murder in the United Kingdom carries a mandatory sentence of life imprisonment.<sup>31</sup> A discretionary life sentence is also available as the maximum sentence for more serious crimes such as attempted murder, robbery and rape. As in Hong Kong, life imprisonment does not generally mean that the prisoner, whether serving a mandatory or discretionary life sentence, will spend the term of his natural life in gaol. The Secretary of State has adopted a policy over the past 20 years whereby he sets a tariff period, in consultation with the judiciary, as the minimum term required before qualification for consideration for release. The practice of consultation concerning the earliest date of release for life-sentenced prisoners has a long and important history.<sup>32</sup> The 1965 Murder (Abolition of the Death Penalty) Act provided that the Home Secretary must consult with the Lord Chief Justice and, where possible, the trial judge, before releasing a prisoner sentenced for murder. The 1967 Criminal Justice Act specified not only that

<sup>27</sup> See n 2 above, para 63.

<sup>28</sup> *Ibid.*, para 67.

<sup>29</sup> *Ibid.*, para 128.

<sup>30</sup> [1977] AC 195, p 226.

<sup>31</sup> Murder (Abolition of the Death Penalty) Act 1965.

<sup>32</sup> For a detailed discussion of release procedures in the United Kingdom, see G. Richardson, *Law Process and Custody: Prisoners and Patients* (London: Weidenfeld and Nicolson, 1993), pp 194–213.

the Home Secretary must consult with the judiciary, but also that the Parole Board must make a favourable recommendation before any life-sentenced prisoner could be released. At that time, there was no set date for the first consideration of parole by the Parole Board, but in practice the case was usually first reviewed seven years into the sentence.<sup>33</sup> By 1973, the period was reduced to require review after three to four years.<sup>34</sup>

In 1983, the Home Secretary adopted a new policy to set the tariffs for both mandatory and discretionary life prisoners. He announced that three to four years after conviction for life he would consult the judiciary to determine a tariff which would reflect the minimum period necessary to be served to satisfy the aims of retribution and deterrence. The tariff set is critical, because three years before its expiry is the first date at which a prisoner can seek review of his detention and he cannot be released until the expiry of the tariff.

This new practice was criticised in *R v Secretary of State for the Home Department, ex parte Handscomb*.<sup>35</sup> In that case, the Home Secretary was criticised for waiting three to four years before consulting the judiciary about an appropriate tariff. In response to the judgment, the practice was changed and the trial judges were asked to provide their views on tariff immediately after conviction. Their views, however, were not considered binding on the Home Secretary. The Home Office determined the actual tariff, although in practice the Secretary followed the trial judges' recommendations regarding discretionary life-sentenced prisoners. He did not, however, consider he was bound to follow their views in the case of mandatory life-sentenced prisoners. In fact, in many cases he raised the tariffs of mandatory life-sentenced prisoners.<sup>36</sup>

#### *The Discretionary Life-sentenced Prisoner (United Kingdom)*

The difference in treatment formed the basis for early challenges made to the ECHR by both mandatory and discretionary life-sentenced prisoners. In response to the ECHR ruling in *Thynne's case*, section 34 of the Criminal Justice Act 1991 was enacted. In that decision the ECHR criticised the Home Secretary for setting the tariffs for discretionary life prisoners and maintained that Article 5(4) of the convention required that a prisoner compulsorily detained have regular access to a "court" to determine the continued lawfulness of his detention. The applicants in *Thynne's case* had complained there was no judicial procedure to assess the continuing lawfulness of their discretionary life sentences after their tariffs had expired. The ECHR ruled that, on

<sup>33</sup> House of Lords, Report of the Select Committee on Murder and Life Imprisonment (HL 78-1) (London: HMSO, 1989), part 8.

<sup>34</sup> *Ibid.*

<sup>35</sup> (1987) 86 Crim App Rep 59.

<sup>36</sup> See n 33 above, paras 154-156.

expiry of his tariff, a prisoner had served the period required for retribution and deterrence and must be entitled to regular re-assessment of his continued detention by a "court" with the power to order his release.<sup>37</sup> After the expiry of the punitive period (the tariff), continued detention could only be justified on the basis of the prisoner's perceived dangerousness. As the level of danger posed by a prisoner will change with time, there must be periodic assessments to ensure that the lawfulness of his continued detention, based on risk of harm to the community, remains intact.

The Criminal Justice Act 1991 accordingly removed the power of the Home Secretary not only to set the tariffs for discretionary life-sentenced prisoners, but to insist on their post-tariff detention where the Parole Board had recommended release. The duty of the Secretary to release a discretionary life prisoner on the recommendation of the Parole Board now appears as section 28 of the Crime (Sentences) Act 1997. In accordance with section 34(4) of the 1991 Act the board must be satisfied, before recommending release, that it is no longer necessary for the protection of the public that the prisoner should be detained.

If a prisoner is released he is on licence and is subject to recall on a breach of licence until his death.<sup>38</sup> A licence may involve special conditions. If he is not recommended for release, a prisoner has the right to a further review every two years, but the board may recommend another review at an earlier date. Most prisoners released by the board are already held in open prisons or pre-release hostels.<sup>39</sup>

#### *The Mandatory Life-sentenced Prisoner (United Kingdom)*

The decision in *Thynne's case* did not assist prisoners sentenced to mandatory life sentences in the United Kingdom. In 1994, the ECHR made it clear in the decision of *Wynne v The United Kingdom*<sup>40</sup> that the ruling in *Thynne's case* did not apply to mandatory life-sentenced prisoners. The ECHR found that a mandatory life sentence has an ongoing punitive purpose rather than a punitive and protective one. Accordingly, at the time of writing, the Home Secretary may still set the tariff for mandatory life-sentenced prisoners after consultation with the judiciary, although he will allow the prisoner to make written representations prior to fixing the tariff.<sup>41</sup> A whole life tariff has been considered appropriate in only the most heinous of circumstances.<sup>42</sup> The imposition of such a tariff is based on the rationale that the requirements

<sup>37</sup> *Thynne's case* (n 23 above), para 76.

<sup>38</sup> Criminal Justice Act 1991, s 37(3).

<sup>39</sup> Lord Windlesham, *Responses to Crime Vol 3: Legislating with the Tide* (Oxford: Oxford University Press, 1996), p 341.

<sup>40</sup> (1994) 19 EHRR 333.

<sup>41</sup> *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531.

<sup>42</sup> *R v Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC.

of retribution and deterrence can never be satisfied, although the prisoner's continued detention must still be subject to periodic review.

The Criminal Justice Act 1991 also allows the Secretary of State the final decision on the release of a mandatory life prisoner after consultation with the judiciary and recommendation of the Parole Board.<sup>43</sup> In contrast, legislation intended to comply with the ruling in *Thynne's case* has removed his power to veto a decision of the Parole Board to release a discretionary life-sentenced prisoner since 1991. When the Human Rights Act 1998 came into force in the United Kingdom in October 2000, challenges began to be made to the role of the Secretary of State in deciding when to release mandatory life-sentenced prisoners.

As the ECHR concluded in *Stafford's case* in 2002:

"... with the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness and openness, the continuing role of the Secretary of State in fixing the tariff and in deciding on the prisoners release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court."<sup>44</sup>

The ECHR ruled that the decision in *Wynne's case*, that a mandatory life sentence constituted punishment for life, did not reflect the real position in the domestic criminal justice system for mandatory life prisoners. The court found that the punitive element of the sentence could be satisfied in all but the most exceptional cases,<sup>45</sup> and after punishment had been exhausted, the only ground for continued detention was dangerousness and risk. Where the Parole Board assessed that detention on the basis of satisfying punishment, dangerousness and risk could no longer be maintained, Article 5(4) of the Convention required that the board should have the power to order the release of mandatory life-sentenced prisoners. As the power to make the final decision for release lay with the Secretary of State, the ECHR ruled the United Kingdom was in breach of the Convention.<sup>46</sup> Following *Stafford's case*, the House of Lords has now ruled in *Ex parte Anderson*<sup>47</sup> that the Home Secretary's power to reject the Parole Board's recommendations for release in the post-tariff period is incompatible with the prisoners' rights under the Convention.

<sup>43</sup> Criminal Justice Act 1991, s 35(2).

<sup>44</sup> Note 23 above, para 78.

<sup>45</sup> See n 42 above.

<sup>46</sup> *Stafford's case* (n 23 above), paras 87–90.

<sup>47</sup> *R v Secretary of State for the Home Department; ex parte Anderson* [2002] UKHL 46 (hereinafter referred to as *Anderson's case*).

In response to this ruling the Home Secretary has agreed to legislate to ensure all tariffs are fixed by the judges and the Parole Board has the final determination in the release of all life sentenced prisoners.

### **Applying the Lessons Learned in the United Kingdom to Hong Kong's Administration of the Indeterminate Sentence**

Several decisions of the ECHR were referred to in the Court of Final Appeal's judgment in *Lau's case*, including *Stafford's case*, although the court noted that the judgment in *Stafford* was published after the conclusion of argument in *Lau's case*. The particular importance of *Stafford's case*, and now *Anderson's case*, is that both the ECHR and the House of Lords have unanimously ruled that the English Home Secretary has no power to deny murderers' release from gaol once the Parole Board has recommended release. The rulings state that to detain a prisoner under such circumstances would violate Article 5(4) of the Convention.

The Court of Final Appeal was invited in *Lau's case* to find that the mandatory life sentence breached Article 5(4) of the HKBoR because a prisoner was not able to contest the lawfulness of his continued detention in a judicial tribunal. In its ruling, the court recognised that when the offence of murder had a mandatory life sentence attached to it the legislature intended that a statutory regime would be put in place to review individually each mandatory sentence.<sup>48</sup> The court observed that it was on the basis of the administration's assurances that the legislation necessary for such a scheme would be introduced that the mandatory sentence was passed.<sup>49</sup> The court stated that the scheme is now embodied in the Long Term Prison Sentences Review Ordinance.

The court held, however, that the position in Hong Kong under Article 5(4) of the HKBoR is different to those in the United Kingdom and under Article 5(4) of the Convention. The court noted that contravention of the Convention occurs in the absence of examination by a judicial tribunal at the expiry of the post-tariff period where fresh issues of possible unlawfulness of detention can arise. This observation, together with the ECHR's ruling in *Stafford's case* and the decision of the House of Lords in *Anderson's case*, has relevance for Hong Kong's system of administering discretionary life sentences. The power provided to the Chief Executive to continue the detention of a discretionary life-sentenced prisoner after his minimum period has been served and a recommendation of the Board for a determinate sentence and remission has been made would almost certainly be in violation of the HKBoR. To

<sup>48</sup> See n 1 above, p 176.

<sup>49</sup> *Ibid.*

make a recommendation for a determinate sentence the Board must have decided the prisoner is rehabilitated; his minimum period reflecting that retribution and deterrence has been served, and all other aspects of his rehabilitation, including any potential risk to the community, are satisfied. Where such a recommendation is made, the Chief Executive's power to veto the board's finding must be in contravention of Article 5(4) of the HKBoR and Article 80 of the Basic Law.

However, in *Lau's case*, the court was addressing the issue of whether there would be violation in relation to mandatory life-sentenced prisoners. The court ruled that there was no violation because, for mandatory life-sentenced prisoners, no minimum period is set, so no fresh issue of lawfulness of detention arises. The court did not address, however, the ultimate question of whether the Chief Executive's overriding power to effect release after a favourable recommendation from the board was consistent with the HKBoR.

Between June 1997 and June 2000 the board met on 15 occasions and conducted 1,768 reviews.<sup>50</sup> Of the 1,768 reviews, it considered 250 prisoners with mandatory life sentences and 38 with discretionary life sentences. Of these 288 cases it made 15 recommendations to the Chief Executive that determinate sentences be substituted for indeterminate ones. Of the 15 recommendations, 14 related to mandatory life-sentenced prisoners and one related to a discretionary life-sentenced prisoner. The Chief Executive adopted all 15 recommendations.<sup>51</sup>

To make recommendations for determinate sentences, the granting of which is the only route by which a life-sentenced prisoner can be released,<sup>52</sup> the board must have concluded that the rehabilitation of those 14 mandatory life prisoners' sentences had been achieved. Once the board is so satisfied, the prisoners' continued detention, at the Chief Executive's discretion, cannot be justified without a violation of Article 5(4) of the HKBoR and Article 80 of the Basic Law. The sentencing aims have been satisfied, whether the court calls the period required to satisfy the requirements of punishment, deterrence, risk of dangerousness and rehabilitation a "tariff" or not. It would be unnecessary to provide the mandatory life-sentenced prisoner with a right to review five years into his sentence (and every two years thereafter) unless the legislature intended periodic re-assessment of the continued need for detention. Where the need for detention is judged by the board to have expired, the HKBoR and the Basic Law require that the board has the power to order

<sup>50</sup> See n 12 above, p 19.

<sup>51</sup> Letter from the Secretary, Long-Term Prison Sentences Review Board to the author, 10 July 2002.

<sup>52</sup> Release on conditional release order cannot be classified as release from detention for the purposes of compliance with the HKBoR because the order is for a limited period and is used by the board as a precursor to determining whether a prisoner should receive a recommendation to the Chief Executive for the substitution of a determinate sentence.

release. It is immaterial that the Chief Executive adopted all 15 recommendations of the board; what is important is that he had the power not to do so. Section 15(1)(a) of the Long Term Prison Sentences Review Ordinance does not allow the board the final determination to grant or deny release of the life-sentenced prisoner after the purpose of his detention has been assessed as satisfied. As such, it may be invalid due to inconsistency with the HKBoR and the Basic Law.

## Conclusion

In *Stafford's case* the ECHR warned against trying to reconcile the continuing role of the Secretary of State, in deciding on a prisoner's release date after a recommendation of the Parole Board, with the notion of separation of powers. In *Anderson's case* the House of Lords confirmed that the Secretary's role was incompatible with the obligations of the United Kingdom under the Convention. In *Yau's case* the Hong Kong High Court recognised that the Chief Executive's assessment of a minimum term for indeterminate-sentenced prisoners offended against Article 80 of the Basic Law. It is artificial to suggest that because Hong Kong does not call any minimum period specified a "tariff" there can be no issue of unlawful detention after the expiration of that period, or any other period, which the board considers satisfies the aims of rehabilitation. The ECHR focused on the United Kingdom's tariff system in order to fix a point after which detention could become unlawful because the aims of punishment and risk of danger had been satisfied. Similarly, in Hong Kong, in the case of both mandatory and discretionary life-sentenced prisoners, the board determines the point at which the aims of punishment and the needs of rehabilitation are met. It is at that point that a recommendation for a determinate sentence is made to the Chief Executive. It is at that point the board's powers under the Long Term Prison Sentences Review Ordinance are lacking.

