"description of punishment", *i.e.* the mandatory death sentence, "contained in" a law which "authorised" the infliction of that punishment, which was lawful before independence. Thus the mandatory death penalty could not be held inconsistent with the Constitution. The Board's response (*Hughes* at para. [47]) illustrates the corollary of the "generous and purposive" interpretation to which the individual is entitled. The pre-independence law, it held, not only authorised the death penalty for murder but *required* it. To the extent that it required it the law was not protected by the savings clause. There is an elegant sleight of hand here: when the defendants argued that their "punishment" was inhuman, "punishment" meant the *mandatory* death penalty; when the Crown argued that that "punishment" was authorised by a pre-independence law, "punishment" became the death penalty *simpliciter*.

Two techniques of modern constitutional interpretation are particularly illustrated in these decisions. First, a certain ambiguity as to the source of the imperative to change an established practice: the key passage in *Reyes* refers to "contemporary protection of the right", "evolving standards of decency" and "the progress of a maturing society" before eliding into international material. Secondly, the very volume of such material. Only 10 of the 34 cases cited in *Reyes* were decided in the United Kingdom. Such internationalism tends to add legitimacy and authority to the decision. When, however, their Lordships feel compelled (*Hughes* at para. [35]) to cite the Court of Appeal of Botswana in support of the simple proposition that derogations from Constitutional rights should be narrowly construed, one wonders whether the technique may not perhaps have been taken a little far.

THOMAS ROE

## WHAT ARE PRISONS FOR?

LET us start with what seems like an easier question: how long should a prison sentence be? The Criminal Justice Act 1991 confirmed that the basic rule is that the length should be commensurate with the seriousness of the offence committed (section 2(2)(*a*) of the 1991 Act, now section 80(2)(*a*) of the Powers of the Criminal Courts (Sentencing) Act 2000). Exceptionally a sentence may be longer, in order to protect the public from serious harm (section 2(2)(*b*) of the 1991 Act, now section 80(2)(*b*) of the Powers of the Criminal Courts (Sentencing) Act 2000).

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Discretionary life sentences fall into this latter category: the indeterminate sentence is imposed because of the risk that the offender is perceived to present to the public (see section 80(4) of the Act of 2000; *Baker* [2001] 1 Cr.App.R.(S) 551). These longer than commensurate life sentences are seen to fall into two parts: one, the "tariff" (though the Lord Chief Justice in a Practice Statement on 31 May 2002 stated that the term "minimum term" should now be used), commensurate with the seriousness of the offence, and the second for public protection. Because the factors which cause an offender to be dangerous may vary over time, the European Court of Human Rights has long held that those detained for such reasons are entitled to a review of that part of their sentence at regular intervals by a "court". After years of reluctance the British Government agreed in the 1991 Act to create panels of the Parole Board, chaired by judges, to review whether post-tariff discretionary lifers are still dangerous. But the detention of those sentenced simply for "punishment" is justified by the original sentencing decision, even though their release date is fixed in accordance with a flexible and discretionary early release scheme.

A life sentence is imposed mandatorily on those convicted of murder, but the Government has until now resisted the suggestion that murderers should also have the chance of an oral hearing before a panel of the Parole Board. The Home Secretary has also held on to his right to fix the first or "tariff" part of the sentence in murder cases. The case of *Stafford* v. *United Kingdom* (2002) 152 N.L.J. 880, *The Times* 31 May 2002, concerned the power of the Home Secretary not to accept a recommendation of the Parole Board to release on licence an offender subject to a mandatory life sentence, whose previous licence had been revoked. The ECHR acknowledged (at para. 58) that the Convention is a dynamic tool:

> Since the Convention is first and foremost a system for the protection of human rights, the Court must ... have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved ... It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.

Noting that the Home Secretary's decision-making power in this field had been steadily eroding, the Court went on to hold (at para. 79) that:

> it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners,

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> discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment. The Court concludes that the finding in *Wynne* (1994) 19 E.H.R.R. 333 that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner.

The Court therefore accepted that all life sentences are made up of two parts: the first, the punishment element of the sentence, is a sentencing exercise, not the administrative implementation of the sentence of the court. The second part, imposed for the protection of the public because of the offender's dangerousness, should be reviewed regularly by a body with a power to release and under a procedure with the necessary judicial safeguards, including, for example, the possibility of an oral hearing. The Court held unanimously that there had been a violation of both Article 5(1) and Article 5(4) of the Convention in the case before it. The Home Secretary should not have the power to detain post-tariff lifers against the recommendation of the Parole Board.

The European Court of Human Rights has spoken and the British Government, like Shakespeare's schoolboy, creeps unwillingly towards reform. The Home Secretary appears to have reluctantly accepted that this means that he has lost the power to decide the release of adult murderers whose tariffs have expired. However, he is still determined to maintain the power to fix the tariff, having taken into account the view of the trial judge and Lord Chief Justice. Will murderers now have the right to an oral hearing?

If life, or indeterminate, sentences are made up of two parts in this way, can the same be said of determinate sentences which, for the protection of the public, are expressly longer than commensurate? Elias J. held in *R. (Giles)* v. *Parole Board and the Home Secretary* [2001] EWHC (Admin) 834 that there was no distinction between a person who is, for example, subject to a sentence of two years as punishment and ten years preventative sentence, and a discretionary life sentence prisoner. But the Court of Appeal (see [2002] EWCA Civ 951) has reversed this bold decision. Inexplicably the Court of Appeal took encouragement from the ruling of the European Court of Human Rights in *Stafford* to decide that the length of any determinate sentence is a judicial decision determined at the time of sentence. This decision is understandable on pragmatic grounds: Elias J.'s application of Article 5(4) to longer than commensurate sentences would have

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demanded not only greater clarity from judges when imposing sentence, but also a large increase in Parole Board funding. But on principle the Court of Appeal's decision makes little sense. The Court has failed to acknowledge that the length of a prison sentence of four years or more is not determined by the judge when sentencing: that decision lies in the hands of the Parole Board, who focus on questions of risk.

The underlying problem is the continuing uncertainty about what prison sentences are for; indeed what prisons are for. The White Paper, *Justice for All* (CM 5563), published in July 2002, stresses yet again the need for a "stronger focus" on public protection. But it also acknowledges that longer sentences do not necessarily reduce crime. To pursue comparison with Shakespeare's schoolboy, the Government should take its shining morning face to school and learn the lesson that those who are to be detained "simply" for public protection deserve a system which pays much greater respect to their many human rights, of which the right to liberty is but one.

NICOLA PADFIELD

## ASSISTED SUICIDE AND PERSONAL AUTONOMY

THE European Court of Human Rights recently confirmed that the exceptionless prohibition of assisted suicide under section 2(1) of the Suicide Act 1961, which had been unsuccessfully challenged by the applicant in the House of Lords because of its effects on persons physically unable to commit suicide unassisted by another (*R. (Pretty)* v. *DPP*, [2001] UKHL 61, [2001] 3 W.L.R. 1598, noted by Keown (2002) 61 C.L.J. 8), is compatible with the United Kingdom's obligations towards the applicant under the European Convention on Human Rights: *Pretty* v. *United Kingdom*, judgment of 29 April 2002. As she had before the House of Lords, Mrs. Pretty put forward arguments under Articles 2, 3, 8, 9 and 14 of the Convention. Important differences between the decisions of the European Court of Human Rights and the House of Lords emerged only in the assessment of the merits of Mrs. Pretty's case with regard to Article 8 and Article 14.

Unlike the House of Lords, the European Court of Human Rights accepted that Mrs. Pretty's right to respect for her private life under Article 8 of the Convention was affected by the prohibition of assisted suicide under UK law. The Court took the view that making choices regarding the manner and time of one's

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