

# Chapter 5

## Life Imprisonment in Hong Kong

Daniel Pascoe\*

### ABSTRACT

Despite the hardening local political context, life imprisonment laws and practices in Hong Kong remain relatively liberal by common law standards. This chapter first describes the legal position of life imprisonment in Hong Kong since the handover of sovereignty to the People's Republic of China in 1997, by assessing life-eligible crimes, types of life sentences, constraints on judicial decision-making and possibilities for eventual release. The chapter then situates Hong Kong's actual use of life imprisonment since 1997 within the worldwide practice of life imprisonment, particularly that of common law jurisdictions including England and Wales. Given the rarity of 'de facto' life sentences, the chapter's analysis focuses on mandatory and discretionary formal life terms pronounced by the Hong Kong courts, and their consideration by the Long-term Sentences Review Board – Hong Kong's answer to a parole board for life-sentenced prisoners. Finally, the chapter comments on the prospective impact on life imprisonment, if any, of the recent authoritarian turn brought to Hong Kong law and politics by the Beijing-drafted *National Security Law* (June 2020), plans for further *Basic Law* article 23 legislation, and the ongoing prosecutions of anti-government protesters after major social unrest between 2014 and 2020.

**KEYWORDS:** Hong Kong, sentencing, life imprisonment, Chief Executive, life without parole, National Security Law

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Daniel Pascoe

## 1. INTRODUCTION

Determinate sentencing in Hong Kong is strongly influenced by the practice in England and Wales, from where Hong Kong's legal system originated in the nineteenth century. Do the similarities hold for life imprisonment? The aims of this chapter are threefold. First, to describe the legal position of life imprisonment in Hong Kong since the handover of sovereignty to the People's Republic of China ('PRC') in 1997, by assessing life-eligible crimes, formal and informal life sentences, constraints on judicial decision-making and possibilities for eventual release. Second, the chapter aims to situate Hong Kong's actual use of life imprisonment since 1997 within the worldwide practice of life imprisonment, particularly that of common law jurisdictions, including England and Wales. Third, the chapter comments on the prospective impact on life imprisonment, if any, of the recent authoritarian turn brought to Hong Kong law and politics by the Beijing-drafted *National Security Law* (promulgated in June 2020), plans for further *Basic Law* article 23 legislation (scheduled for passage in late 2022), and the ongoing prosecutions of anti-government protesters after major social unrest in 2014, 2016 and 2019-2020.

## 2. LIFE IMPRISONMENT IN HONG KONG – THE LEGAL FRAMEWORK

### 2.1 Crimes and Exemptions

Life imprisonment, as defined here, designates a sentence where the state retains the power to hold an offender in prison for the rest of his or her life, following a criminal conviction (Van Zyl Smit and Appleton 2019). Numerous crimes may be punished by an actual ('formal') sentence of life imprisonment in Hong Kong. In each case, life imprisonment may be imposed on a discretionary basis as the most severe possible punishment in Hong Kong law, except for murder committed by adults and genocide resulting in death, for which life imprisonment is mandatory upon conviction.<sup>1</sup> Alongside the typical offences involving violence or life-threatening activities that attract life sentences (e.g. homicide, arson, robbery, explosives offences, possession of firearms with intent)<sup>2</sup> are sexual offences (e.g. rape, non-consensual

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<sup>1</sup> *Offences Against the Person Ordinance*, ss 2, 9A(2)(a). Murder committed by persons under 18 years old is punishable by discretionary life imprisonment (*Offences Against the Person Ordinance*, s 2).

<sup>2</sup> Among the major offences are the following: Murder by adults (*Offences Against the Person Ordinance*, s 2); Manslaughter (*Offences Against the Person Ordinance* s 7); Genocide (*Offences Against the Person Ordinance*, s 9A); Piracy (*Crimes Ordinance*, ss 19, 20(2)); Explosives offences (*Crimes Ordinance*, ss 53-54); Robbery (*Theft Ordinance*, s 10); Aggravated Burglary (*Theft Ordinance*, s 12); Causing Grievous Bodily Harm or Wounding with Intent (*Offences Against the Person Ordinance*, s 17); Detention for Ransom (*Offences Against the Person Ordinance*, s 42); Unlawful Abortion (*Offences Against the Person Ordinance*, s 46); Child Destruction (*Offences Against the Person Ordinance*, s 47B); Infanticide (*Offences Against the Person Ordinance*, s 47C); Arson or Property Damage With Intent (*Crimes Ordinance*, ss 60(2)-(3), 63(1)); Torture (*Crimes (Torture) Ordinance*, s 3(1)); Terrorism by Explosives (*United Nations (Anti-Terrorism Measures) Ordinance*, s 11B(1)-(2)); Terrorism Aboard a Ship or Fixed Platform (*United Nations (Anti-Terrorism Measures) Ordinance*, ss 11E(2)(a), 11F(2)(a)); Possession of Firearms with Intent (*Firearms and Ammunition Ordinance*, ss 16, 18); Resisting Arrest with Firearms (*Firearms and Ammunition Ordinance*, s 17); Aircraft Hijacking, Endangering Aircraft or Aerodrome Safety (*Aviation Security Ordinance*, ss 8, 9, 11, 12, 15). Inchoate versions of these offences are also punishable with life imprisonment and are sometimes spelt out separately in the relevant ordinances.

buggery, sexual intercourse with a boy or girl under 13),<sup>3</sup> offences against the state (e.g. treason, incitement to mutiny, national security offences)<sup>4</sup> and certain drug offences (trafficking, manufacturing).<sup>5</sup>

Many of these life-eligible offences find parallels in the common law world and in East Asian jurisdictions (Van Zyl Smit and Appleton 2019). However, there are also anomalies. Among the more unusual life-eligible crimes that do not fit into the preceding categories are the forgery-based crimes of making a false entry in a bank book, in a register, or in a register copy.<sup>6</sup> Unlike several other comparable jurisdictions, Hong Kong's kidnapping offence is not life-eligible.<sup>7</sup> Nor has the territory enacted separate laws criminalising military offences, crimes against humanity or war crimes, each of which commonly attracts life imprisonment as a punishment (Van Zyl Smit and Appleton 2019).

Although the severity of punishments is historically and culturally contingent (Tonry 2015), the discretionary life sentence available for several of the preceding crimes appears unusual and excessively punitive. That the forgery-based offences are punishable so severely is a legacy of colonial rule and legislative stasis, with certain kinds of forgery once regarded as treasonous in the United Kingdom (Horder 2019). Buggery (i.e. anal sexual intercourse) with a girl under the age of 21 remains punishable with life imprisonment, irrespective of factual consent by the victim and the relevant age of consent for buggery between men in Hong Kong now being 16.<sup>8</sup> Unlawful abortion, when attempted by a person other than the pregnant woman (for example, by a doctor), also carries a maximum sentence of life imprisonment. If the foetus is capable of being born alive, the charge of Child Destruction instead applies, under which even the pregnant woman may be sentenced to life imprisonment.

In these latter offences we see vestiges in Hong Kong of criminalisation and the potential for extreme punishment imposed on the basis of morality. While the morality-based offences are among those unlikely to ever result in a formal sentence of life imprisonment (Table 5.2; Cross and Chan 2022; Cross and Cheung 2018), the maximum sentence of life remains on the books for what many might consider 'consensual crimes'. Young (2021) has explained that Hong Kong criminal justice often seems to be stuck in a 'time warp' of 1970s Britain due to legislative dysfunction and resource constraints. Alongside conservative Chinese social values, postcolonial stasis has set in stone offences and punishments that have long been abolished and liberalised in other parts of the secular world.

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<sup>3</sup> Rape (*Crimes Ordinance*, s 118(1)); Non-consensual Buggery (*Crimes Ordinance*, 118A); Buggery with a Boy under 13 (*Crimes Ordinance*, s 118C; *Leung TC William Roy v. Secretary for Justice* (2006)); Buggery with a Girl under 21 (*Crimes Ordinance*, s 118D); Sexual Intercourse with a Girl under 13 (*Crimes Ordinance*, s 123); Permitting a Girl or Boy under 13 to be on Premises or Vessel for Intercourse (*Crimes Ordinance*, s 140).

<sup>4</sup> Treason, Treasonable Offences (*Crimes Ordinance*, ss 2(2), 3(1)); Incitement to Mutiny (*Crimes Ordinance*, s 6); Unlawful Oaths to Commit Murder, Treason, Piracy (*Crimes Ordinance*, s 15); Secession, Subversion, Terrorism, Collusion (*National Security Law*, art 20, 22, 24-25, 29). Treason and related offences remain on the Hong Kong statute book despite being archaic, referring to offences against the British sovereign in the pre-Handover period. Several of the National Security Law offences may also fall into the category of offences involving violence, such as terrorism.

<sup>5</sup> *Dangerous Drugs Ordinance*, ss 4(3)(a), 6(2), 38M(2)(b)-(c).

<sup>6</sup> *Crimes Ordinance*, ss 85, 88, 89.

<sup>7</sup> See *Criminal Procedure Ordinance*, s 101I(1).

<sup>8</sup> In the future, this provision may be declared unconstitutional, in line with the ruling in *Leung TC William Roy v. Secretary for Justice* (2006) on consensual sex between men aged 16-20.

## 2.2 Formal and Informal Life Sentences

On paper, Hong Kong law allows for both formal and informal life sentences. Formal life sentences are passed by the sentencing judge for the crimes described in the preceding subsection. Informal life sentences, on the other hand, are possible by the imposition of a determinate (i.e. fixed term) prison sentence so long that a person so sentenced is likely to die in prison. Van Zyl Smit and Appleton (2019, p. xi) have labelled this kind of sentence as ‘de facto life’.<sup>9</sup> Informal life sentences may also arise via the imposition of indefinite preventive detention on mental health grounds following conviction (Van Zyl Smit and Appleton 2019).

Informal life sentences, although theoretically possible in Hong Kong, are nevertheless difficult to locate in practice. Whether a long determinate sentence will amount to a ‘de facto’ life sentence depends upon the age of the defendant when convicted, his or her life expectancy in prison, and when he or she may be likely released (Van Zyl Smit et al. 2016). To date, the longest determinate sentences in Hong Kong’s recent past tend to have been passed for drug trafficking or manufacturing (up to 35 years) (*R v. Ng Muk-kam* 1995), and murder committed by juveniles (up to 30 years) (*HKSAR v. Lam Albert Hon Man* 2008; *HKSAR v. Lau Kin-hang* 2006; *HKSAR v. Lee Kar Yeung* 1999; *HKSAR v. Vo Van Hung* 1998).

In practice, an informal life sentence in Hong Kong would have to involve a late-middle-aged or elderly defendant convicted of a major drugs offence, or an inchoate offence to murder. In other jurisdictions, scholars have calculated 50 years as a typical threshold whereby a determinate prison sentence that becomes a ‘de facto’ life sentence (Nellis 2021; Van Zyl Smit et al. 2016). Based on existing practice, Hong Kong falls far short of this mark, especially considering that fixed term prisoners first become eligible for conditional release halfway through the head sentence (Security Bureau 2022a).

As another potential route towards an informal life sentence, convicted defendants detained under a ‘Hospital Order’ under Hong Kong’s *Mental Health Ordinance* may be held indefinitely, in cases where psychiatrists cannot predict the length of treatment required before the offender re-joins the community (*R v. Lung Fan Wa* 1994). One hundred and twenty persons were detained indefinitely in this manner between 1997 and 2020, an average of five per year, the majority (88%) convicted of offences against the person (Correctional Services Department 1997-2020). However, in practice, it is unclear how long persons in prison under indefinite orders tend to be held and whether this commonly amounts to a sentence running to the prisoner’s death. In at least one case, a prisoner has died of natural causes after being detained under a Hospital Order for more than 40 years (The Government of the Hong Kong Special Administrative Region 2020).<sup>10</sup>

Nonetheless, the majority of life-sentenced prisoners in Hong Kong are serving formal life sentences. When a Hong Kong judge pronounces a mandatory or discretionary life sentence, the sentence officially ‘ends with the death of the offender’ (Cross and Chan 2022, p. 482). Hong Kong has never had a traditional parole system for life-sentenced prisoners (Dykes 1992), but since 1997 all formal life sentences (whether passed before or after that date) have become subject to *review* by a statutory body upon the expiration of a set minimum term (Yiu 2014). The 8 to 11-member Long-term Prison Sentences Review Board (‘the Review Board’), may recommend to Hong Kong’s Chief Executive that a life sentence be converted to a determinate sentence, from which a prisoner may then receive conditional release, if the sentence is still running (Whitfort 2003). As such, all formal life sentences passed in Hong

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<sup>9</sup> Nellis (2017, 2021) prefers the term ‘virtual life’.

<sup>10</sup> For a second case involving an elderly person likely subject to an informal life sentence via this method, see Lau (2016).

Kong are, technically speaking, Life Without Parole ('LWOP') sentences, unless or until they are converted. With the exception of an optional 'trial period' of two years under a licence granted by the Review Board, in no case may a life-sentenced prisoner in Hong Kong be released from prison *without* first having his or her indeterminate sentence converted to a determinate one by the Chief Executive (Whitfort 2003; Dykes 1992).<sup>11</sup> Although all of Hong Kong's life sentences are formally classifiable as LWOP, in practice the conversion system performs the same function as parole in other jurisdictions, particularly as the Review Board is *automatically* tasked with reviewing all life sentences (Yiu 2014).

Reflecting the established practice in England and Wales, discretionary life sentences imposed in Hong Kong are now split into two components: an initial minimum period of imprisonment that reflects the sentencing goals of retribution and deterrence, followed by the remainder of the head sentence during which the Review Board may reward rehabilitation, or else the individual is kept in prison to protect the public (Cross and Chan 2022; Whitfort 2003). The division of the life sentence into two components technically opens the door for a 'true' LWOP sentence to be imposed, whereby the minimum term imposed by a judge is so long that the offender is likely to die in prison, before the Review Board may recommend conversion. However, previous case law suggests that this possibility is remote. As I describe below, the minimum terms for discretionary life sentences are generally in the range of 10 to 20 years, which is within the lower half of the global range identified by Van Zyl Smit and Appleton (2019).

Before the Handover in 1997, a discretionary life sentence contained no minimum term set by a court, but commutation or pardon by the British governor was possible on a case-by-case basis (Lum 2018; Whitfort 2003).<sup>12</sup> Changes to the *Criminal Procedure Ordinance* after 1997 required a minimum term to be set in the case of discretionary life sentences, but not in the case of mandatory life sentences (Lum 2018; Whitfort 2003).<sup>13</sup> The sentencing judge in the Court of First Instance now has the power to determine both the head sentence and the minimum period for a discretionary life sentence, although not the total time spent in custody (Cross and Chan 2022). The latter is within the authority of the Review Board and the Chief Executive (Yiu 2014).

Previous minimum terms that have been upheld on appeal for various types of crimes since 1997 are listed in Table 5.1. They tend to be less severe than recent 'tariffs' from England and Wales, which have averaged more than 20 years (Appleton and Van Zyl Smit 2016).

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<sup>11</sup> A further but rare exception is an ad hoc pardon from the Chief Executive. See further Part 2.4, below.

<sup>12</sup> A non-statutory precursor to the Review Board existed between 1959 and 1997: the Board of Review, Long Term Prison Sentences. Its function was to advise the British Governor on the discharge of his prerogative power to grant mercy (Dykes 1992).

<sup>13</sup> *Criminal Procedure Ordinance*, s 67B. See further *Lau Cheong v. HKSAR* (2002).

**Table 5.1: Discretionary Life Minimum Terms Upheld on Appeal, Hong Kong, 1997-2021** (Correctional Services Department 1997-2020)

Crime/Category	Minimum Term(s)	Case
Conspiracy to Murder	22 years	<i>HKSAR v Cheng Wui Yiu</i> (2007)
Murder by Under 18s	22 years	<i>HKSAR v Liu Pak Shing</i> (2010) <sup>14</sup>
Murder by Under 18s	22 years and 20 years	<i>HKSAR v Hui Chi Wai &amp; Ors</i> (No. 2) (2003)
Murder by Under 18s	20 years	<i>HKSAR v Harman Preet</i> (2005)
Rape	18 years	<i>HKSAR v Chan Li Fat</i> (2010)
Manslaughter (Unlawful and Dangerous Act)	20 years	<i>HKSAR v Chan Man Lok</i> (2003)
Manslaughter (Unlawful and Dangerous Act)	16 years	<i>HKSAR v Liu Chun Yip</i> (2008)
Manslaughter (Unlawful and Dangerous Act)	15 years	<i>HKSAR v Tsang Man Wai, Raymond</i> (2017)
Manslaughter (Murder under Diminished Responsibility)	12 years	<i>HKSAR v Tsui Chu Tin, John</i> (2007)
Manslaughter (Murder under Diminished Responsibility)	12 years	<i>HKSAR v Lee Yin-Wai</i> (2000)
Manslaughter (Murder under Diminished Responsibility)	10 years	<i>HKSAR v Hui Mak Kwan</i> (2003)
Arson	10 years	<i>HKSAR v Yim Kam Chung</i> (2006)

Six months before the expiry of the minimum period of imprisonment in a discretionary life sentence, prisoners are referred to the Review Board for consideration (Security Bureau 2022b). For mandatory life sentences, once the prisoner has served a statutory minimum term of five years, the Review Board proceeds to review the sentence every two years (Security Bureau 2022b). The anomalous result is that murder convicts may, on paper, be considered for release sooner than prisoners serving a discretionary life sentence.<sup>15</sup> As a plausible justification, while the variety of murders by culpability remains wide and all are subject to the same punishment (Fitzgerald and Starmer 2007), persons receiving a full life sentence at the top of the discretionary range for arson, robbery, rape or manslaughter demonstrate the very worst example of the offence and of future dangerousness (Cross and Cheung 2018). In some ways, the release procedures in Hong Kong therefore could operate to subvert the injustice inherent

<sup>14</sup> At para. 37, the Court of Appeal observed that ‘the minimum term imposed in this case was well in line with minimum terms specified in other murder cases where a life sentence has been imposed [upon a juvenile]’. Note that in this case, the minimum term was reduced to 20 years on account of the defendant’s guilty plea.

<sup>15</sup> However, the trial judge also submits a report in murder cases ‘on matters relating to the person or the offence for the purposes of reviewing the sentence in the future’ (Whitfort 2003, p. 40). The effect appears to be to make it more difficult to release the prisoner at the point when the minimum term of five years has elapsed.

in the mandatory life penalty, as was suggested in *Lau Cheong v. HKSAR* (2002). Whether it proceeds that way in practice is less clear.<sup>16</sup>

Whenever the prisoner's case is considered for release, whether after a minimum of five years or after the minimum term, when presented with evidence of a prisoner's rehabilitation the Review Board may either recommend to the Chief Executive to convert the life sentence into a determinate (fixed term) sentence, or else may conditionally release the prisoner under supervision for a two-year (renewable) trial period, before reassessing whether the life sentence should be made determinate at the end of the two years.<sup>17</sup> The Chief Executive does not, in practice, reject the Review Board's recommendation, although she retains the discretion to do so (Whitfort 2003; Yiu 2014).

Once a prisoner's life sentence has been converted into a determinate sentence, the Review Board may also grant release under supervision to such a prisoner, provided the prisoner has also served two-thirds of the replacement, fixed term, sentence.<sup>18</sup> Exceptionally, the Review Board may also recommend remission of any part of the remaining determinate term.<sup>19</sup> In practice, the Review Board tends to release prisoners on supervision a short time after the conversion. The Board will not recommend conversion to a determinate sentence if its members are not already convinced that the prisoner has been rehabilitated or will soon be as a result of being released into the community (Cross and Cheung 2018; Whitfort 2003).<sup>20</sup> To consider a typical example, after 21 years' confinement and eight rejected reviews over the past 16 years, a person's mandatory life sentence for murder is converted into a 30-year determinate sentence. With two-thirds of that sentence already served, the prisoner is eligible for immediate release, albeit under supervision for up to nine more years, and liable to immediate recall during the length of the supervision order.<sup>21</sup> At the end of this nine-year period, subject to remissions,<sup>22</sup> the sentence comes to an end.

A prisoner sentenced to a long determinate sentence amounting to a 'de facto' life sentence may, in theory, also benefit from remissions recommended by the Review Board.<sup>23</sup> In practice, however, the Review Board almost never recommends permanent sentence remissions for fixed term prisoners (Carvalho 2016). Supervised release for fixed term 'de facto' life prisoners is instead covered by two further statutory schemes, via a) the *Post-Release Supervision of Prisoners Ordinance* and b) the *Prisoners (Release under Supervision) Ordinance*. Under the former scheme, the Post-Release Supervision Board may recommend release under supervision after two-thirds of the head sentence<sup>24</sup> – a move that does not involve sentence commutation by the Chief Executive. The ordinance specifically excludes from this scheme formally life-sentenced prisoners whose sentences have already been converted to fixed terms.<sup>25</sup>

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<sup>16</sup> *ibid.*

<sup>17</sup> *Long-term Prison Sentences Review Ordinance*, ss 15(1)(a)(ii), 15(1)(b).

<sup>18</sup> *Long-term Prison Sentences Review Ordinance*, ss 15(1)(c), 29(1)(a).

<sup>19</sup> *Long-term Prison Sentences Review Ordinance*, s 15(1)(a)(i); Prison Rules, r 69.

<sup>20</sup> See also *Long-term Prison Sentences Review Ordinance*, s 8(a)-(b).

<sup>21</sup> *Long-term Prison Sentences Review Ordinance*, Part V. The supervision order may be shorter than the length of the remaining determinate sentence.

<sup>22</sup> *Long-term Prison Sentences Review Ordinance*, s 33.

<sup>23</sup> *Long-term Prison Sentences Review Ordinance*, s 15(1)(a)(i).

<sup>24</sup> *Post-Release Supervision of Prisoners Ordinance*, s 6.

<sup>25</sup> *Post-Release Supervision of Prisoners Ordinance*, s 3(2).

The second statutory scheme is set by section 7(1) of the *Prisoners (Release under Supervision) Ordinance*, whereby prisoners serving sentences of three or more years become eligible for recommendation for release by the Release under Supervision Board after serving only *half* of their head sentence. Likewise, this scheme does not typically benefit former life-sentenced prisoners whose indeterminate sentences have already been converted into determinate sentences. Such persons are usually released via the supervision orders found in Part V of the *Long-term Prison Sentences Review Ordinance*, mentioned previously.

### 2.3 Judicial Decision-Making

Hong Kong judges are closely constrained by the dictates of precedent in imposing discretionary life sentences. In the decision whether to impose life imprisonment or a lesser, determinate, sentence, the Hong Kong courts largely tend to follow or make minor adaptations to the English jurisprudence (Cross and Chan 2022; Cross and Cheung 2018; Dykes 1992).

Discretionary life sentences are reserved for circumstances where, after committing a very grave offence, the offender remains ‘a serious danger to the public for a period which cannot be reliably estimated at the date of sentence’ (*HKSAR v. Chan Li Fat* 2010, para. 22).<sup>26</sup> With the sentencing limits on magistrates (two years) and District Court judges (seven years), High Court judges are the only judges legally entitled to pass sentences of life imprisonment in Hong Kong. The Court of First Instance of the High Court is the only court that can try the most serious crimes punishable by life, including murder, manslaughter and rape. Except for recent changes brought to national security offences,<sup>27</sup> all trials in the Court of First Instance are held before a judge and jury, although the jury plays no role in sentencing.

A rough guide to those life-eligible offences most likely to result in a formal or an informal life sentence when prosecuted is their presence in the *Magistrates Ordinance*, Schedule 2, Part III. Indeed, Schedule 2’s predominant criteria for inclusion (although subject to various exceptions) is whether the offence is punishable by life. Although the Schedule is mainly designed to limit *prosecutorial* discretion in choice of trial venue, rather than judicial discretion, the exclusion of certain life-eligible offences from Part III (e.g. explosions, sexual intercourse with a boy or a girl under 13, arson, drug trafficking and manufacturing, robbery, aggravated burglary, wounding or grievous bodily harm with intent, firearms offences) and the inclusion of piracy and certain offences against the state serve as a legislative suggestion as to punishment severity. As the data outlined below tend to reveal, this is borne out in practice with very few property, firearms, explosives and drugs cases resulting in life imprisonment. For those offences rarely prosecuted in the first place (such as piracy or crimes against the state), their placement within Schedule 2 plays a symbolic role demonstrating to prosecutors, judges and the wider public their severity.<sup>28</sup>

After imposing a discretionary life sentence, the second decision a Court of First Instance judge will have to make is what minimum period the prisoner is to serve. In determining what is effectively the ‘non-parole’ period, Hong Kong judges are guided by a number of considerations: ‘the seriousness of the original offences, the deterrent effect, and ... correctional and psychological reports’ (Lum 2018). As Cross and Cheung (2018, p. 401) observe of the case law, ‘full weight [must be] given to the offender’s culpability, and this, in

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<sup>26</sup> See also *R v. So Ching Kwan* (1993) and *R v. Hodgson* (1968) on the prevailing criteria.

<sup>27</sup> *National Security Law*, art 46.

<sup>28</sup> Additionally, *Magistrates Ordinance* Schedule 2 Part III crimes must be tried before a jury, which is an important procedural safeguard for offences against the state, even if deserving of a punishment less than the District Court’s maximum threshold of seven years.



turn, entails a consideration of the seriousness of the offence and of the circumstances of its commission'. One way to think about the judicial decision on what minimum term to impose is as follows: accepting that human behaviour is unpredictable (and hence the head sentence of life imprisonment),<sup>29</sup> if the offender were guaranteed never again to repeat the offence, how many years should the offender serve as punishment and as a warning to others (*HKSAR v. Cheung Lai-man* 2004)? Unlike the initial decision on sentencing length, there are no guideline sentences on the minimum period previously set by the Court of Appeal. Nevertheless, prisoners can appeal against the minimum term by itself. Several have successfully done so, arguing that the minimum term imposed is manifestly excessive for the crime committed (Cross and Chan 2022; Cross and Cheung 2018).

#### 2.4 Options for Release

As discussed above, each prisoner serving a formal or 'de facto' life sentence in Hong Kong remains eligible for consideration for release into the community by one of three separate boards, subject to serving the minimum discretionary or statutory term, where applicable. Furthermore, the *Hong Kong Basic Law* ensures that all prisoners remain eligible for ad hoc executive clemency (Cross 2019; Legislative Council 2017), in the form of pardon (immediate release while maintaining a criminal conviction) or commutation (reduction of penalty) (Pascoe and Novak 2020; Cross 2019).

In practice, however, such *ex gratia* pardons and commutations are uncommon in Hong Kong, except for where medical conditions or assistance to law enforcement justify release (Legislative Council 2017). As with the United Kingdom, ad hoc grants of clemency have been gradually overtaken by bureaucratized and more transparent forms of sentence administration. Following the abolition of the death penalty in 1993 and the steady rise of the administrative state, ad hoc petition-based executive clemency has lost much of its utility for Hong Kong's leaders (Ho 2011). It is now via the boards' recommendations that long term prisoners enjoy their best chance at re-joining society, except in cases of extreme old age, disability or terminal illness (Legislative Council 2017).<sup>30</sup> For prisoners sentenced to formal life sentences in Hong Kong, the typical path to release is via conversion to a determinate sentence, followed by release under supervision or the end of the sentence shortly thereafter.

Hong Kong's formal life sentences, while technically classifiable as LWOP, do not fall into the stricter 'irreducible life without parole' category (Van Zyl Smit and Appleton 2019, pp. xi-xii). There still remains a common law right to petition the sovereign (in the guise of the Chief Executive) directly for commutation or pardon.<sup>31</sup> Conversion from life to a determinate sentence as decided by the Review Board also technically constitutes a grant of executive clemency, given that the Chief Executive makes the final, discretionary, order under article 48(12) of the *Basic Law* (Pascoe and Novak 2020; Whitfort 2003). In practice, however, the decision made by the Review Board is never rejected by the Chief Executive (Yiu 2014; Whitfort 2003), and thus functionally resembles bureaucratized 'parole'. In fact, the Review Board's closest common law equivalents are the boards of *pardons and paroles* common in the

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<sup>29</sup> See note 25 and associated text.

<sup>30</sup> Note the *Prison Rules*, r 148(2):

The Medical Officer shall make his recommendations in writing to the Commissioner [of Correctional Services] for transmission to the Chief Executive whenever he is of opinion that the life of any prisoner will be endangered by his continuance in prison, or that any sick prisoner will not survive his sentence, or is totally or permanently unfit for prison sentence.

<sup>31</sup> *Prison Rules*, r 54.

United States, plus the advisory mercy committees found throughout former British colonies (Pascoe and Novak 2020; Novak 2015).

Whereas no complete statistical breakdown on supervised release is publicly available, anecdotally it appears that the vast majority of life-sentenced prisoners are eventually released and do not die in prison (Yiu 2014; Whitfort 2003). Some of the most notorious murderers have been released into the community after many years incarcerated, upon demonstrated evidence of rehabilitation (e.g. Lum 2018; Chow 2017; Chu 2015; Agence France Presse, 28 September 2004). And in other cases, ad hoc medical pardons are a means to ensure that life-sentenced prisoners do not die while incarcerated. Whether this practice reflects an emergent moral norm requiring all long-term prisoners to be released before dying in prison is an important topic for future research.

### **3. Life Imprisonment in Hong Kong – The Practice in Context**

#### *3.1 Statistics*

Today, prisoners serve their life terms at one of four maximum-security prisons in Hong Kong: Shek Pik Prison on Lantau Island, Stanley Prison on Hong Kong Island (both housing adult male life-sentenced prisoners), Pik Uk Correctional Institution, New Territories (housing male life-sentenced prisoners under 21 years of age), or the Tai Lam Centre for Women, New Territories (housing adult female life-sentenced prisoners) (Information Services Department 2019). As Table 5.2 indicates, no women under 21 have been sentenced to life imprisonment since the Handover.

It is difficult to ascertain exactly how many prisoners are serving life in Hong Kong at any one point in time, cross-referenced against the crimes they have committed.<sup>32</sup> The literature provides some clues. In April 1996, prior to the Handover, there were 32 prisoners serving *discretionary* life sentences. 12 of these were adults sentenced to life imprisonment for life-eligible offences other than murder. The remaining 20 were minors (aged under 18 at the time of the offence) serving discretionary life imprisonment for murder. By 2004, the combined number had dropped to 25 (Lum 2018). The larger number of minors serving discretionary life sentences for murder compared with adults for other crimes is consistent with the annualised sentencing statistics presented in Table 5.2. Murder very much continues to dominate life imprisonment in Hong Kong, despite the large number of discretionary life-eligible crimes (Correctional Services Department, Personal Communication, 12 May 2022).<sup>33</sup> At the time of writing, a best estimate is a life-sentenced prisoner population of 200 to 300 prisoners, the vast majority convicted for a homicide crime.<sup>34</sup> Official figures revealed an average of 242 persons serving formal life imprisonment sentences between the years 2000 and 2020, more than 90 percent of whom were serving mandatory life sentences (Correctional Services Department, Personal Communication, 12 May 2022).

Statistics for the total number of life sentences passed each year are more widely available and are regularly published by the Correctional Services Department (Correctional Services Department 1997-2020). 243 life-sentenced prisoners were admitted to prison in the 24 years

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<sup>32</sup> I received no useful response after emailing the Department of Correctional Services about the relevant statistics.

<sup>33</sup> See notes 1-6.

<sup>34</sup> This is a conservative estimate for 2022, based on annual sentencing totals and data on automatic Review Board assessments in the post-Handover period. The estimated range equates to 3-4% of Hong Kong's 2020 prison population of 7107 (World Prison Brief 2020) and to 2.7-4.1 life-sentenced prisoners per 100,000 population in 2021. The proportion of life-sentenced prisoners in Hong Kong prisons has remained small over time (Dykes 1992).

between 1997 and 2020 inclusive, a rate of approximately 10 per year (Table 5.2). Nevertheless, life-sentenced prisoners form a tiny percentage of all receptions to the custody of the Correctional Services Department, around a tenth of a percent each year. The number of formal life-sentenced prisoners is also small compared to the number of sentences to determinate terms of 10 or more years (averaging about 125 per year) (Correctional Services Department 1997-2020), the latter of course the potential source of ‘de facto’ life sentences.

Since 1997, the vast majority of formal life sentences have been passed on males 21 years of age and over (84%) and for offences against the person (96%) (Table 5.2). As a statistical category, offences against the person (‘OAPs’) include murder, murder under diminished responsibility and unlawful and dangerous act manslaughter (Correctional Services Department 2019). There have been fewer formal life sentences passed in the period 2008 to 2020 (8.4 per year) compared with the period 1997 to 2006 (12.2 per year). This is roughly in line with the moderate fall in Hong Kong’s prison population since the Handover (World Prison Brief 2020) and also in line with the declining trend in serious crimes detected by police since 1997 (Hong Kong Police Force 2022; Broadhurst et al. 2017). Table 5.2 presents these data in full detail.

**Table 5.2: Life Sentence Receptions by Demographic, Hong Kong 1997-2020**  
(Correctional Services Department 1997-2020)

Year	<21 Male	<21 Female	21+ Male	21+ Female	Total Life	Non-OAP Crimes
2020	0	0	5	0	5	-
2019	0	0	7	0	7	-
2018	0	0	14	0	14	1 against local laws
2017	0	0	3	0	3	1 against local laws
2016	0	0	5	0	5	1 against local laws
2015	0	0	5	0	5	1 against local laws
2014	2	0	9	0	11	-
2013	0	0	7	0	7	-
2012	0	0	9	0	9	-
2011	0	0	11	1	12	-
2010	2	0	8	1	11	-
2009	1	0	10	1	12	1 against morality
2008	1	0	5	2	8	-
2007	0	0	1	11	12	-
2006	0	0	13	1	14	1 against property
2005	0	0	11	1	12	1 against morality
2004	1	0	6	1	8	1 against the penal code
2003	1	0	6	2	9	-
2002	0	0	7	1	8	1 against morality
2001	0	0	14	2	16	-
2000	0	0	12	0	12	-
1999	5	0	12	1	18	-
1998	1	0	12	0	13	-
1997	1	0	11	0	12	-
<b>Total (24 Years)</b>	<b>15</b>	<b>0</b>	<b>203</b>	<b>25</b>	<b>243</b>	<b>OAPs 234, local laws 4, morality 3, property 1, penal code 1</b>

The overall picture that emerges from the Correctional Services Department data is a reluctance on the part of trial judges to impose discretionary life sentences for the major non-homicide crimes, namely rape, aggravated burglary, robbery, drug manufacturing and drug trafficking.<sup>35</sup> Indeed, based on the available data, not a single formal life sentence has been passed for robbery, aggravated burglary or for a drugs offence since the Handover in 1997.<sup>36</sup>

The absence of a formal life sentence for a drug crime is particularly surprising, given Hong Kong's relatively harsh guideline sentences by the standards of the common law world (Linklaters LLP and Penal Reform International 2020). Defendants who are convicted of trafficking more than 4,000 grams of heroin or cocaine face a determinate sentencing *starting point* of 26 to 30 years' imprisonment before considering aggravating factors such as recidivism or organised crime (Cross and Cheung 2018). Greater amounts may result in even lengthier determinate sentences.<sup>37</sup> The explanation for this may lie in the fact that judges sentencing serious drug cases increase the length of determinate sentences in accordance with a strict, graduated, tariff system based on the type and weight of drugs, that does not specifically mention life imprisonment at the higher end (Cross and Chan 2022).<sup>38</sup> It is perhaps significant that both rape and robbery also carry guideline sentences in Hong Kong, set either by the local Court of Appeal or the English equivalent (Cross and Chan 2022; Cross and Cheung 2018).

Table 5.2 also reveals that life imprisonment is highly skewed along gender lines, with males receiving around 90% of the life sentences imposed since the Handover, although this is likely a lower proportion than the worldwide average. Van Zyl Smit and Appleton's (2019) global survey found that more than 96% of life-sentenced prisoners were male. The absence of young female life-sentenced prisoners in Hong Kong stands in stark contrast with Hong Kong's high female imprisonment rate, which has at times exceeded 20 % of the overall prison population (World Prison Brief 2020). Since the 1990s, thousands of younger women have been imprisoned for immigration, prostitution and drug offences (Lo 2008; Lee 2007), albeit for far shorter sentences than life. The gender skew in Table 5.2 reinforces the impression that life imprisonment in Hong Kong is characterised by violent, homicidal, offending by males.

Complete statistics in terms of release are difficult to come by. Between June 1997 and June 2000, the Review Board reviewed 250 prisoners with mandatory life sentences (i.e. murder by adults) and 38 prisoners with discretionary life sentences. In around 5% of these combined cases (15 in total, or an average of 1.7% per year) the Board recommended conversion to a determinate sentence (Whitfort 2003). During 2013 to 2015, 39 of 361 indeterminate sentences were recommended for conversion (10.8%, or 3.6% per year) (Carvalho 2016). During 2017 to 2021, 38 of 536 indeterminate sentences were recommended for conversion (7%, or 1.4% per year) (Security Bureau 2022a); Turton 2019. Recall that sentence conversion does not necessarily result in the immediate release of the prisoner. It does mean with certainty,

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<sup>35</sup> See also Part 2.3, above, on trial venue limitations, providing support to this argument, except in the case of rape.

Note that each of these crimes is reasonably common. During the ten years between 2012 and 2021 police recorded 744 cases of rape, 24,902 burglaries, 2,815 robberies and 16,279 serious drug offences (Hong Kong Police Force 2022).

<sup>36</sup> The one life sentence for a property crime was passed for arson. See Table 5.1 and Table 5.2.

<sup>37</sup> The current sentencing tariffs for trafficking heroin and cocaine merely state that trafficking in more than 15,000 grams results in a sentencing starting point 'at the sentencer's discretion' (Cross and Chan 2022, p. 646). This phenomenon speaks to the difficulty in comparing indeterminate sentences with long determinate sentences of imprisonment (Van Zyl Smit 2002).

<sup>38</sup> *ibid.*

however, that the prisoners concerned will eventually be released into the community, provided they live to the end of their determinate sentences and do not commit another offence within prison in the meantime.

### *3.2 Hong Kong in an International Context*

The most relevant comparative context within which to consider Hong Kong's life imprisonment practice is that of the common law world, due to its long history as a British colony. The other reason to compare Hong Kong in a systemic context rather than a regional one is practical: statistics on East Asian life imprisonment are exceedingly difficult to find, primarily due to language and state secrecy barriers. As part of their global study, Van Zyl Smit and Appleton (2019) found quantitative data on life imprisonment from only 14 Asian jurisdictions out of 32, and in East Asia from only three jurisdictions (Japan, Macau and South Korea) out of nine.<sup>39</sup> The authors faced similar problems to death penalty scholars engaged in global comparisons, whereby reliance upon limited data from unofficial sources necessarily leads to qualified conclusions (Pascoe 2016). In this section, I locate Hong Kong's life imprisonment practice within as wide an international context as the data allows for.

While a detailed assessment of the experience of life-sentenced prisoners in Hong Kong is beyond the scope of this chapter and must await further empirical research, several general observations are possible. Prison is generally oriented towards rehabilitation in Hong Kong. Prisoners enjoy more favourable conditions than in some other parts of the world where a punitive approach still prevails (Blundy and Ng 2017; Lo 2008; Stokes 2008). Prisoners in Hong Kong, including life-sentenced prisoners, spend their time undertaking paid work, education, and religious activities (HKET 2018), broadly in line with global best practice recommendations on 'implementing life well' (Van Zyl Smit and Appleton 2019, p. 205). Although release into the community remains subject to a statutory or judicially-imposed minimum term, the Review Board begins considering prisoners' progress as soon as five years of any life sentence have elapsed (Security Bureau 2022b).<sup>40</sup> Two notable absences: the lack of irreducible LWOP sentences and the lack of a death row solely devoted to holding prisoners until their execution are among the main factors contributing to a comparatively progressive focus on rehabilitation in the context of prisoners serving 'extreme' punishments.

Turning to the mechanics of release, Hong Kong is unusual but not unique in global perspective in that its formal life sentences have never incorporated within them the possibility of release (Stokes 2008; United Nations Office at Vienna 1994). Nevertheless, regular reviews by the Review Board and conversion to determinate sentences ultimately perform the same function as parole in other jurisdictions. Hong Kong's relatively low population and previous imposition of a mandatory death penalty for murder meant that, until the mid-1960s, the royal prerogative of mercy could do the job ascribed to parole elsewhere, on a case-by-case basis (Dykes 1992).<sup>41</sup> The current system is a holdover from this earlier era. At least on paper, it appears distinctly old-fashioned by the standards of other common law jurisdictions, including in England and Wales, where upon the expiration of a 'tariff' period (i.e. a minimum term), prisoners serving

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<sup>39</sup> The nine jurisdictions were: China, North Korea, Hong Kong, Japan, Macau, Mongolia, South Korea, Taiwan, and Vietnam.

<sup>40</sup> A best practice policy is to review the sentences of life-sentenced prisoners on a regular basis well before they are seriously considered for release into the community. The UN Office on Drugs and Crime has recommended that assessments begin as soon as the prisoner commences his or her sentence (United Nations Office at Vienna 1994).

<sup>41</sup> Writing in the pre-Handover period, Dykes (1992, p. 7) stated that 'there was never a very large percentage of the prison population serving indeterminate sentences'.

a mandatory or discretionary life sentence may be released on parole, subject to any remaining risk to the public (Appleton and Van Zyl Smit 2016; Whitfort 2003). Although Hong Kong's life sentences impose short-term uncertainty upon the individuals serving them, the system may be more humane in the longer term than that of England and Wales. By converting indeterminate sentences to determinate ones, Hong Kong's executive removes the *lifetime* threat of being recalled to prison upon a breach of licence conditions (Appleton and Van Zyl Smit 2016; Dykes 1992). Once a determinate sentence is served, it is served.

On their face, Hong Kong's closest comparators may be several state and federal jurisdictions of the USA whose only possible life sentence is a LWOP sentence,<sup>42</sup> thereby increasing the importance of executive clemency and compassionate release as procedural avenues for mitigation and release (Nellis 2017; Price 2009). However, the American analogy has its limits. Some American states have implemented 'fully irreducible life without parole' sentences through legislative or constitutional amendments, forbidding even executive clemency as a remedy.<sup>43</sup> All life-sentenced prisoners in Hong Kong retain the possibility of sentence mitigation via the prerogative, and are even considered for it automatically. Moreover, Hong Kong does not have an established practice of issuing 'de facto' life sentences, which represents a growing category in jurisdictions where life imprisonment is being phased out or otherwise stigmatised (Van Zyl Smit et al. 2016; Stokes 2008), including in several American jurisdictions (Van Zyl Smit and Appleton 2019; Nellis 2017).

Finally, I turn to comparative patterns based on life-sentenced prisoner populations and offences. No offender demographic is exempt from a life sentence of imprisonment in Hong Kong, apart from 10 to 13-year-olds, who can be convicted but cannot be sent to prison.<sup>44</sup> High Court judges have, in the past, passed discretionary life sentences for aggravated murders committed by males aged 16 and 17 years old (Cross and Cheung 2018; Table 5.1), and they have no choice but to do so for elderly men and for adult female offenders (Table 5.2), including pregnant women and young mothers. Nevertheless, Hong Kong's life-sentenced prisoner population, overwhelmingly dominated by adult males (18+) convicted of homicide offences, is typical of global patterns (Van Zyl Smit and Appleton 2019; United Nations Office at Vienna 1994).

Of course, the mandatory minimum life sentence for murder is not unusual throughout the common law world, both in countries that have abolished the death penalty as in countries that have not (Van Zyl Smit 2002; United Nations Office at Vienna 1994). Although more than 50 offences carry a discretionary life sentence in England and Wales, only a few such crimes tend to be prosecuted: attempted murder, manslaughter, rape, arson, robbery and wounding with intent (United Nations Office at Vienna 1994). The situation in Hong Kong is similar, particularly respecting life-eligible offences against the state, terrorism offences and aircraft safety crimes. A large majority of lifers in both jurisdictions have been sentenced to mandatory life sentences for murder, rather than to discretionary life sentences. In Hong Kong, as in England and Wales, the phenomenon of life imprisonment is primarily attributable to mandatory sentencing statutes, rather than to the relative incidence of serious crime.<sup>45</sup>

As for the overall life-sentenced prison population, based on recent global averages, Hong Kong would expect to host 481 prisoners incarcerated for life in a jurisdiction with its

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<sup>42</sup> For example: Georgia, Maine, South Dakota, US Federal Jurisdiction (Nellis 2017).

<sup>43</sup> For example: Georgia and Wyoming (except in innocence claims) (Nellis 2021).

<sup>44</sup> *Juvenile Offenders Ordinance*, ss 11(1), 14, 15(1)(l).

<sup>45</sup> Note 34.

population size (Van Zyl Smit and Appleton 2019). Although official figures are only occasionally available, the territory clearly has far fewer.<sup>46</sup> Figures from India (54%), the United Kingdom (11%), Kenya (11%) and the United States (10%) (Van Zyl Smit and Appleton 2019) also indicate that a far greater proportion of all incarcerated persons are serving life sentences elsewhere in the common law world, compared with Hong Kong's low-single-digit percentage.<sup>47</sup> Sentences of life imprisonment, despite playing an important denunciatory, signalling, role on paper for a broad range of crimes, appear to be fairly peripheral in the actual control of crime by incapacitation and specific deterrence in Hong Kong.

#### **4. Life Imprisonment and Hong Kong's Changing Legal-Political Scene**

##### *4.1 The 2014-2020 Protests*

In this part I consider the momentous recent political changes in Hong Kong and how these might affect life imprisonment in the near future. Hong Kong has experienced significant civil unrest over the past decade. Three major protest movements – the Occupy Central (or Umbrella Movement) protests of September-December 2014, the Mongkok 'Fishball Riot' of February 2016, and the anti-Extradition Bill and broader anti-government protests of 2019-2020 call into question whether the unprecedented scale of civil unrest will have an impact on life imprisonment in the territory. These events have led commentators to suggest that Hong Kong's criminal justice system will change irreparably as a result (e.g. Cohen 2022; Chui and Khiatani 2017).

Of most potential significance before the courts, more than 10,000 persons have been arrested as a result of the mid-2019 to early 2020 anti-government protests, with almost 3000 prosecuted by February 2022 (Kong 2022). Yet, following all three movements or incidents (2014, 2016, and 2019-2020), most of the assailants were arrested for relatively minor offences such as criminal damage, assaults, possession of offensive weapons, offences against police and public order crimes (Hong Kong Watch 2022; Kong 2022). At the time of writing, the backlog of prosecutions relating to events in 2019-2020 is still being cleared. The Hong Kong government is building a new court to try protest-related suspects from mid-2023 (Wong 2021).

It is important to note that data on completed protest-related trials available at the time of writing evince a bias toward minor offences, as indictable offences tried in the District Court and Court of First Instance require greater preparation from both the prosecution and defence. Nevertheless, the existing count shows that very few suspects (whether anti-government demonstrators, counter-protesters, or errant police) have been charged with life-eligible offences. By the time of writing, based on the available data, only *four* 2014 to 2020 protest cases had been brought in the Court of First Instance for life-eligible offences. These resulted in imprisonment sentences of 3 years (conviction for arson plus other charges, following a guilty plea by an anti-government protester) (*HKSAR v. Yuen Chi-kui* 2019), 12 years (explosives offence, guilty plea, anti-government protester) (*HKSAR v. Lo Yat-sun, Louis* 2021), 6 years and 4 months (wounding with intent, guilty plea, counter-protester) (*HKSAR v. Liu Guosheng* 2021), and 7 years and 9 months (wounding with intent, guilty plea, anti-government protester) (*HKSAR v. Hui Tim-lik* 2022). The preliminary but clear conclusion is that Hong Kong's 2010s protest movements while dominating lower court criminal caseloads, have not yet impacted *at all* on the life-sentenced prisoner population. The latter is still dominated by homicides committed in the course of robberies, domestic disputes and organised crime (Lee et al. 2017; Lau et al. 2012).

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<sup>46</sup> Note 33 and associated text.

<sup>47</sup> Note 33.



#### 4.2 The National Security Law and Article 23 Legislation

The *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* ('NSL'), drafted by the Standing Committee of the mainland Chinese legislature, was promulgated in Hong Kong on 30 June 2020 and has attracted a significant amount of international attention and criticism. Among other changes, it provides for the largest accumulation of new life-eligible offences since the *United Nations Anti-Terrorism Measures Ordinance* (2002) and the *Aviation Security Ordinance* (1996). Within the NSL, each of secession, subversion, terrorism, and collusion with foreign countries or elements can be punished with a maximum sentence of life imprisonment.<sup>48</sup> The stated punishments in the legislation are unusually harsh in the context of Hong Kong's pre-existing offence scheme (Cross and Chan 2022; Pascoe 2022). The NSL incorporates mandatory minimum punishments of up to 10 years for each of these offences, when committed in aggravated circumstances.<sup>49</sup>

Several academic commentators have recently argued that the promulgation of the *National Security Law* marks a new era in Hong Kong criminal justice, characterised by a punitive intolerance for political dissent and a weakening of due process safeguards for defendants (e.g. Chan 2022; Cohen 2022; Clift 2020). Nevertheless, in the short term, the new security law is unlikely to have as transformative an impact on life imprisonment in Hong Kong. The domestic and international criticism which has greeted the passing of the law suggests that judges will take proportionality in sentencing seriously, especially when many of the NSL offences may be committed through non-violent written or oral expression (Petersen 2020). Moreover, the NSL's mainland Chinese-style tiered sentencing scheme, dividing terrorism and collusion into serious and non-serious cases, operates as a limit on judicial discretion, not only at the lower bound but also at the top end.<sup>50</sup>

Any offenders whose actions warrant a sentence of life imprisonment under the NSL will probably have also committed pre-NSL offences such as murder, manslaughter, firearms or explosives offences, large-scale arson, or related inchoate offences. Although much will depend on the Secretary for Justice's prosecution strategy and the signalling effect that the Hong Kong authorities wish to create, it is difficult to envisage a scenario whereby a plot (attempted, foiled or planned) to secede, to overthrow a government, to coerce it violently, or to paralyze its functions would *not* incorporate the commission of other life-worthy offences, or their inchoate equivalents. The NSL is arguably not intended as a tool of mass incarceration, but rather to have a silencing and deterrent effect vis-à-vis political opponents of the regional and national governments (Bandow 2021). For the Hong Kong and Beijing authorities, its most useful purpose is to punish *less* serious behaviours not caught by existing laws, such as peaceful advocacy to change the political status quo.<sup>51</sup>

The very limited number of sentences handed down for NSL offences are listed below, current to March 2022. None of the offences prosecuted has so far attracted sentences as high as those

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<sup>48</sup> *National Security Law*, art 20 (secession), 22 (subversion), 24-25 (terrorism), 29 (collusion). Unlike the traditional common law position, the inchoate versions of these crimes do not attract the same maximum penalty as the completed versions.

<sup>49</sup> *ibid.*

<sup>50</sup> *National Security Law*, art 24, 29.

<sup>51</sup> A contrasting view anticipates a substitution effect, whereby the prosecutorial authorities prefer NSL to non-NSL charges in more serious cases, due to the former's procedural advantages in denying bail, excluding jury trials and facilitating searches (Kellogg 2022). Nevertheless, the baseline outcome in terms of life-sentenced prisoner numbers is unlikely to differ greatly.

typical for armed robbery, recidivist rape, or major drug trafficking (Cross and Cheung 2018). Hong Kong's judges are bound to interpret the law's provisions using common law reasoning, including the established tradition in discretionary sentencing that the maximum sentence is reserved for the worst possible examples of the offence (Cross and Chan 2022). Only three defendants have thus far been convicted and sentenced for security crimes created by the NSL (Wong et al. 2022):<sup>52</sup>

- *HKSAR v. Tong Ying-kit*: inciting or abetting secession (of a serious nature, 5-10 year sentencing range) and terrorism (ordinary case, 3-10 year sentencing range) – sentenced to 9 years' imprisonment in the Court of First Instance (30 July 2021);
- *HKSAR v. Ma Chun-man*: inciting or abetting secession (of a serious nature, 5-10 year sentencing range) – sentenced to 5 years and 9 months' imprisonment in the District Court (11 November 2021).
- *HKSAR v. Chung Hon-lam*: secession (active participant, non-serious nature, sentencing range 3-10 years) – sentenced to 3 years and 4 months' imprisonment in the District Court (23 November 2021).

Hong Kong may not have finished creating new security offences. The *National Security Law* does not include all the offences first mentioned in the *Basic Law*'s contentious article 23, which requires Hong Kong to legislate on its own to:

prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

Accordingly, new legislation criminalising treason, sedition, theft of state secrets, activities by foreign political organisations and ties between foreign and local political organisations will likely be introduced in Hong Kong's Legislative Council in the second half of 2022 (Leung 2022). As with the initial four security offences created by the NSL, the further article 23 legislation is unlikely to have a major effect on life sentence numbers. Based on existing legislative practice in Hong Kong and the law in mainland China, the largely symbolic crime of treason is likely to add to the list of life-eligible offences.<sup>53</sup> Sedition, also a colonial-era offence, albeit one that has already been resurrected since the civil unrest of 2019-2020 (Wong and Kellogg 2021; Young 2021), will likely not.<sup>54</sup> The offences involving foreign political organisations and the theft of state secrets, bearing close similarity with the life-eligible collusion offence in the NSL, are likely to attract life as a maximum sentence in aggravated cases only.<sup>55</sup>

## 5. Conclusion

Life imprisonment in Hong Kong is still largely driven by homicide committed by men, especially murder as one of only two offences on the statute book demanding a mandatory punishment of life for adults. Although the political upheavals of 2014, 2016, and 2019-2020 have precipitated an authoritarian political turn and ever-increasing mainland Chinese

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<sup>52</sup> This list does not include *Leung Kam Wai* (sentenced to three months' imprisonment for failing to provide information in contravention of the NSL's implementation rules, December 2021) (Wong et al. 2022).

<sup>53</sup> See *Crimes Ordinance*, ss 2(2), 3(1); *PRC Criminal Law*, art 102-113.

<sup>54</sup> See *Crimes Ordinance*, ss 9-10.

<sup>55</sup> See *PRC Criminal Law*, art 111, 113; *National Security Law*, art 29.

influence, ‘extreme’ punishments have largely been unaffected by these developments. Hong Kong remains a death penalty abolitionist jurisdiction, has long banned corporal punishment (Druzin and Wan 2015), and political dissidents have recently been punished with fixed rather than indeterminate prison terms.

Nevertheless, Hong Kong’s criminal justice system has the potential to become more punitive in the leadup to 2047, marking the current endpoint of the ‘One Country Two Systems’ arrangement. Whether Hong Kong’s recent ‘law and order’ turn leads to a greater population of life-sentenced prisoners will largely depend upon prosecutors’ willingness to make increasing use of new security offences, or their functional equivalents in the *Crimes Ordinance* and the *Offences Against the Person Ordinance*, and upon judicial restraint in discretionary sentencing. With a shrinking and aging population in 2022, it is unlikely that the ‘ordinary’ criminal offences leading to life imprisonment sentences in the recent past (i.e. murder, manslaughter, arson, rape) will rise much above their current levels.<sup>56</sup>

Despite the changing political context, in 2022 Hong Kong is arguably more liberal than its former colonial power the United Kingdom in its use of life imprisonment.<sup>57</sup> On a per-capita basis, the number of prisoners sentenced to life in Hong Kong is likely less than a third of the United Kingdom’s figure. Hong Kong’s rate falls more in line with prevailing continental European standards (Van Zyl Smit and Appleton 2019).<sup>58</sup> Although at face value Hong Kong’s formal life sentences all deny the possibility of parole, in practice, such sentences are periodically considered for mitigation by the Long-term Prison Sentences Review Board once a certain minimum term is reached (Yiu 2014). The five-year statutory minimum term imposed on adult murder convicts seems particularly lenient in the global context (Van Zyl Smit and Appleton 2019; United Nations Office at Vienna 1994), albeit there is no guarantee of release after five years. The minimum terms imposed for murder in England and Wales averaged 21.1 years in 2013 (Van Zyl Smit and Appleton 2019). In Hong Kong, some of the most feared killers have eventually been released after spending around 25 to 30 years incarcerated, in contrast to the growing number of prisoners serving ‘whole life’ terms in England and Wales (Van Zyl Smit and Appleton 2019).

What explains Hong Kong’s relatively moderate position on life imprisonment, seemingly at odds with its hardening political stance? For much of its early history, at least until progressive social reforms in the 1970s, Hong Kong’s penal regime was characterised by its relative brutality (Holdsworth and Munn 2020). More recently however, with a lack of effective electoral democracy, both under British colonialism and now as a Special Administrative Region of the PRC, the territory has been effectively insulated from the ‘get tough on crime’ populism that has stricken the UK and US since the 1970s (Young 2021). It is at first tempting to think that the recent authoritarian turn in Hong Kong has yet to affect life imprisonment numbers but will do so in the coming years as more cases make their way through the system. Yet, Hong Kong’s violent crime rate remains very low by developed-world standards (Johnson 2018). The recently enacted life-eligible security crimes will only target a small number of political dissidents if government press releases are to be believed (Bandow 2021). For the ‘ordinary’ crimes subject to a life penalty in Hong Kong, the due process protections afforded to defendants by the *Hong Kong Bill of Rights Ordinance*, the judiciary’s respected tradition of independent decision-making, and judges’ adherence to sentencing precedent have long

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<sup>56</sup> See Hong Kong Police Force (2022) on local crime declines over the past ten years.

<sup>57</sup> However, as with the United Kingdom (Van Zyl Smit 2002), Hong Kong has seen no debate about the merits of life imprisonment *per se*.

<sup>58</sup> See note 33.

served to temper punitiveness. In drawing life imprisonment comparisons with the UK and the US, Hong Kong's relative leniency might instead be explained by the exceptional punitiveness of the former two countries in global perspective (Appleton and Van Zyl Smit 2019), as exemplars of the neoliberal turn towards 'law and order' politics (Cavadino and Dignan 2005).

Commensurate with the increasing Sinicization of Hong Kong's political and legal systems, the future of life imprisonment in Hong Kong may instead look something like mainland China's current practice, with a predominance of parole-eligible life sentences passed, a focus on rehabilitation in prison with a view to release, a nonetheless cautious approach to freeing perpetrators of crimes against the state, and a large range of life-eligible offences featuring tiered sentencing schemes, not all of which often lead to life terms (Li 2021; China, this volume; Smith and Jiang 2019). So long as the death penalty and corporal punishment remain abolished under the new political normal, the forecast for Hong Kong's 'extreme' punishment practices does not appear that bleak.

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