Right Not to Face Cruel and Unusual Punishment

Introduction

Section 12 of the *Canadian Charter of Rights and Freedoms* protects against "any cruel and unusual treatment or punishment." Like other *Charter* rights, section 12 can only be triggered by government action. For example, a parent using corrective force in a family setting is not bound by section 12, because a parent is not the government.[1] On the other hand, imposing mandatory minimum prison sentences is considered government action, and therefore, could be the subject of a section 12 *Charter* challenge. In such a case, the length or the mandatory nature of the sentence could be considered cruel and unusual treatment or punishment.

In order to engage section 12 of the *Charter* two issues must be considered:

1. treatment or punishment
2. cruel and unusual

Treatment or Punishment

First, a court must ensure that there is actual treatment or punishment inflicted on a person. The primary purpose of the law does not have to be for punishment in order for section 12 to be engaged. For example, in *R v Wiles,* the Supreme Court of Canada confirmed that prohibiting a convicted drug offender from possessing firearms could be considered punishment under section 12.[2] In that case, the purpose of that prohibition was to take away the privilege to possess weapons, but the court held that the offender's section 12 right was still affected because not allowing the possession of the firearm could have some punitive effect on that person.[3] However, the court held that Mr. Wiles had not established that his section 12 *Charter* right was violated in this case, because prohibiting weapons relates to a "valid and important" state interest: protecting the public and the police officers involved with enforcing drug offences.[4] Here, the court confirmed that Parliament can prohibit a person from possessing firearms "upon conviction of certain criminal offences where it deems it in the public interest to do so."[5]

Cruel and Unusual

Once a court has established that there has been treatment or punishment, it must then determine whether the treatment or punishment is both cruel and unusual.[6] It is not enough to be one or the other. The treatment or punishment must be both. The terms "cruel" and "unusual" have not been concretely defined, nor has it been fully determined what makes an action both cruel and unusual. However, Canadian courts have narrowed the definitions of these terms to include the following categories:

1) treatment or punishment that is barbaric in itself

This includes any treatment or punishment that would be considered cruel and unusual as the penalty for any offence, no matter the severity of the crime.[7] Examples include lobotomizing dangerous offenders or castrating sexual offenders.[8]

2) treatment or punishment that is grossly disproportionate to the offence

According to the Supreme Court's decision in *R v Smith,* treatment or punishment is grossly disproportionate if the punishment imposed on the offender is too severe or excessive for that specific crime or where there are specific circumstances surrounding the offender or the case that create a gross disproportionality.[9] Some factors that a court would consider include the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case.[10] Like *Smith,* much of the law on gross disproportionality thus far has focused on mandatory minimum sentences, which are a form of punishment. In the 2015 case of *R v Nur*, the Supreme Court of Canada shed more light on whether a mandatory minimum prison sentence is both cruel and unusual, because it is grossly disproportionate to the offence.

To determine whether treatment or punishment – in this case, a mandatory minimum sentence - is grossly disproportionate, the court in *Nur* suggested a two-step process. First, the court must determine whether the mandatory minimum imposes a cruel and unusual punishment for the person bringing the case forward.[11] The individual circumstances of the person convicted must be considered. An example of this could be a law that imposes a minimum 10-year sentence for illegally possessing firearms where the convicted person doesn't have any prior firearm offences. The length of sentence would be disproportionate given the person's lack of prior criminal activity.

Next, the court must consider whether it is reasonably foreseeable that the mandatory minimum could impose cruel and unusual punishment on other offenders.[12] For example, Mr. Nur did not argue that the mandatory minimum was too severe for him, but that it could be too severe for others. In that case, the court decided that the mandatory three-year sentence could be cruel and unusual punishment for some people, such as for those who have no prior firearm offences.[13] Therefore, because the mandatory minimum sentence could be considered grossly disproportionate in some cases, the court decided that the mandatory minimum sentence was a violation of section 12 of the *Charter*.

Thus, section 12 protects individual offenders from receiving punishments that are grossly disproportionate to their particular circumstances, but section 1 allows this right to be "overridden to achieve some important societal objective."[14]

Conclusion

The courts have not yet provided a concrete definition of cruel and unusual punishment. Most of the law surrounding section 12 of the *Charter* to date has focused on mandatory minimum sentences. These sentences have a role in deterring and denouncing specific

crimes, but the *Charter* ensures that a court weighs whether these sentences are disproportionate to the offences to which they are attached. If the punishment is too severe for the offence given the offender's circumstances, the mandatory minimum sentence would be considered both cruel and unusual.

---

[1] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCR 1 at para 48.

[2] *R v Wiles,* 2005 SCR 84 at para 3 .

[3] Peter Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) at 53-2 .

[4] *Wiles, supra* note 2 at para 9.

[5] *Ibid.*

[6] Hogg, *supra* note 3at 53-3.

[7] *Ibid.*

[8] *R v Smith,* [1987] 1 SCR 1045 at para 56 .

[9] *Ibid* at para 55.

[10] *Ibid.*

[11] *R v Nur,* 2015 SCC 15 at para 46.

[12] *Ibid* at para 58.

[13] *Ibid* at para 83.

[14] *Smith, supra* note 8 at para 55.