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Editorial

The Future of Mandatory Sentences after the Death of Constitutional Exemptions

The Supreme Court's decision in *R. v. Ferguson*, 2008 SCC 6, that constitutional exemptions cannot be used as a remedy for mandatory sentences that impose cruel and unusual punishment, can be questioned on its merits. Even if one accepts that constitutional exemptions cannot be ordered under s. 24(1) of the Charter, s. 52(1) of the *Constitution Act, 1982*, still seems capable of producing such tailored remedies.

Section 52(1) only requires unconstitutional legislation to be treated as of no force and effect "to the extent of the inconsistency" with the Constitution. Constitutional exemptions could be seen as a tailored s. 52 remedy that invalidates a mandatory sentence only to the extent of its inconsistency with the right against cruel and unusual punishment.

It seems odd that a Court that has used severance, robust reading in and reading down remedies to save the constitutionality of legislation would shy away from the prospect of a constitutional exemption on the grounds that it alters the intent of the legislature. Any s. 52(1) remedy alters the narrow intent of the legislature or, in the Court's words in *Ferguson* at para. 50, changes the legislation "to create something different in nature from what Parliament intended". The justification for such judicial actions is that the constitution requires that the legislation be altered.

The Court's approach in *Ferguson* is based on the idea that a mandatory sentence is a more specific and stronger form of legislative intent than that found in legislation that is altered by reading in, reading down or by severance. Mandatory sentences are a special clear statement to judges and offenders about mandatory minimum punishment. One hopes that Parliament is responsible in using this special legislative device, but the recent history of expanded mandatory sentences suggests not.

The Court's conclusion in *Ferguson* that allowing courts to fashion exemptions would undermine certainty, fair notice and the rule of law also seems a bit exaggerated. The Court's conclusion is in tension with its frequent conclusions under s. 7 of the Charter that otherwise vague criminal offences and defences can be saved because of the ability to provide interpretative certainty. If courts can provide enough interpretative certainty to satisfy s. 7 demands for fair notice and the limitation of law enforcement discretion, then it is difficult to understand why courts could not develop a jurisprudence of constitutional exemptions that would be reasonably certain. In any event, fair notice and certainty about possible mitigation of punishment in the form of a constitutional exemption is a less fundamental component of the rule of law than fair notice and certainty about exposure to criminal liability.

But all this is spilt milk if not sour grapes. The unanimous decision of the Court in *Ferguson* means that constitutional exemptions are dead and not likely to be revived in the future. The pressing question now is how courts and Parliament will respond to the new limited remedial landscape.

The most likely possibility consistent with *Ferguson* is that courts forced to decide whether to strike a mandatory sentence down in its entirety or to uphold it will take the latter course. The Supreme Court has become increasingly deferential under s. 12 when reviewing mandatory sentences. In some respects, the facts of *Ferguson* were even more sympathetic than those in *R. v. Morrisey*, [2000] 2 S.C.R. 90, where the Court upheld the mandatory minimum sentence of four years' imprisonment for causing death by criminal negligence and with a firearm. Courts may be more inclined to hold that the effects of mandatory sentences on both reasonable hypothetical offenders and on real offenders before them are not so disproportionate that they violate s. 12.

The danger in this likely pessimistic scenario is that the drastic consequences of a declaration of invalidity will make jurisprudence under s. 12 of the Charter even more deferential to Parliament's use of mandatory sentences. Mandatory sentences are often not the kind of calculated and deliberate clear legislative statement that the Court contemplates: they are often a political gesture to denounce the worst offenders without anyone thinking about what their effects will be on more sympathetic offenders.

Although this is the most likely scenario, it is not the only one. Trial judges who experience first hand the effects of applying mandatory sentences in odd cases may decide to pull the trigger and strike down the entire mandatory sentence. They will likely find that there is no point in suspending a declaration of invalidity given that as a result of *Ferguson*

they will likely be unable to exempt the offender from the period of suspension.

The Crown may have a difficult time defending most mandatory sentences under s. 1 given the nature of proportionality analysis and the lack of social science data that confirm the success of mandatory sentences in deterring crimes. If the Crown loses at trial and a mandatory sentence is struck down for all offenders, it will likely appeal s. 52(1) rulings that affect all cases. The blunt remedy of a declaration of invalidity could exacerbate institutional conflict over mandatory sentences.

It could be argued that striking down mandatory sentences will result in more dialogue between courts and legislatures. The Court obliquely refers to this in *Ferguson* at para. 65 when it states that when a mandatory sentence is struck down “the ball is thrown back into Parliament’s court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects”.

But the idea of dialogue is somewhat at odds with the Court’s idea that a mandatory sentence is a special form of legislative intent, a clear statement to judges and offenders about the minimum level of punishment that society demands. If Parliament really wants such a clear statement, it is not clear what it will do once a declaration of invalidity puts the ball back in its court.

Faced with a declaration of invalidity, Parliament will have little choice but to provide some statutory form and guidance for constitutional exemptions such as are found in s. 113 of the Code, which allows the lifting of firearm prohibitions for sustenance or employment. This provision is a response to prior court cases fashioning constitutional exemptions from such mandatory penalties and is consistent with best practices in other countries. It also provides some statutory guidance to judges about how they should use their statutory power to order exemptions.

If Parliament is, however, bound and determined to limit sentencing discretion in order to send a clear signal to judges and offenders, then the only other response will be to re-enact the mandatory sentence that has been struck down by the courts notwithstanding s. 33 of the Charter.

Critics of the idea of dialogue will be quick to argue that these are not really choices, but statutory exemptions such as s. 113 can guide judicial discretion. Moreover, it remains premature to conclude that the override will never be used. Parliament is likely to make its first use of s. 33 in a case involving popular punishment and unpopular criminals.

But the idea that *Ferguson* will produce more dialogue and controversy about mandatory sentences is only an optimistic scenario that is dependent on the willingness of judges to use the blunt and broad remedy of a declaration of invalidity to cure the injustice that mandatory sentences will cause in exceptional cases.

The more likely scenario remains that *Ferguson* will encourage the trend to greater use by Parliament of mandatory sentences and greater judicial acceptance of such sentences despite the injustice that mandatory sentences will cause in exceptional cases.

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