R. V. BISSONNETTE: LEGAL PRINCIPLE OR LEAP OF FAITH?

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In *R. v. Bissonnette*, the Supreme Court of Canada found that life imprisonment with a minimum parole ineligibility period of 50 years is contrary to section 12 of the *Canadian Charter of Rights and Freedoms* and not saved under section 1.[1] The Supreme Court found this punishment is incompatible with human dignity because it negates the penological objective of rehabilitation and conflicts with the conviction that every individual is capable of repenting and re-entering society.[2]

The "basic proposition that all human beings carry within them a capacity for rehabilitation" is a leap of faith.[3] That it is presently based on a secular concept of human dignity, rather than a religious creed, does not make it any less a matter of faith. It is true criminal law must take certain fundamental concepts on faith. Caution is necessary when extending the consequences of such principles, especially in constitutional cases that permanently set the limits of what Parliament may legislate. While the Supreme Court is concerned with maintaining public confidence in the criminal justice system, public confidence is undermined if the Supreme Court's articulation of the requirements of human dignity does not accord with the practical experiences of society.

I. FACTS OF THE CASE

To say Mr. Bissonnette's personal facts are unsympathetic is an understatement. Armed with a semi-automatic rifle and a pistol, he attacked a group of worshippers, including children, in the Great Mosque of Quebec. He killed six people and seriously injured many others. His terrorist actions deeply impacted everyone present and the greater community.[4] He was originally sentenced by the trial judge to life in prison, without the possibility of parole for 40 years.[5] The sentence was reduced to the standard 25 years of parole ineligibility to be served concurrently given the Supreme Court's ruling.[6]

The Supreme Court emphasized its reasoning was based on general legal principles establishing constitutional limits on criminal punishment, rather than the specific facts of the case.[7] While taking a general approach is appropriate, such reasoning cannot be totally divorced from the potential facts of this case and others like it. Specifically, some offences are so grievous they undermine faith in the belief that rehabilitation is always possible or appropriate.

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1 *R v Bissonnette*, 2022 SCC 23 at paras 4–9 [*Bissonnette*]; *Canadian Charter of Rights and Freedoms*, ss 1, 12, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 *Bissonnette*, *ibid* at para 8.

3 *Ibid* at para 146.

4 *Ibid* at paras 10–12, 144.

5 *Ibid* at paras 12–13.

6 *Ibid* at para 138.

7 *Ibid* at paras 10, 81, 142.

II. WHY IS REHABILITATION ALWAYS POSSIBLE?

As noted by the Supreme Court, rehabilitation presupposes that offenders are capable of reforming and re-entering into society.[8] This conclusion derives from the fundamental premise that a human being is "an agent who is free and autonomous and, as a result, capable of change."[9]

These concepts of individual autonomy, free will, and capacity for change are present in many religious traditions.[10] They are not established by scientific inquiry and perhaps can never be. Instead, criminal law must presuppose them, because questioning them undermines not only rehabilitation, but also deterrence and the concept of *mens rea*.

However, the faith principle of autonomy cuts both ways. While a person is capable of change, they are also presumed to be responsible for their actions and to be aware their actions have ongoing consequences for their victims, society, and themselves (including punishment under the law).

III. WHAT IS THE PURPOSE BEHIND EXTENSIVE OR LIFETIME PAROLE INELIGIBILITY PERIODS?

The Supreme Court's primary focus on the punishment not accounting for the possibility that the person can be rehabilitated misses the retributive point of the punishment. Certain crimes, including multiple murders, are considered so heinous that society does not care whether the perpetrator can be rehabilitated within 25 years. Whether or not they can be rehabilitated in theory, as an autonomous actor they must now face the consequence of their crime, including a longer period before being eligible for parole.

The Supreme Court refers to multiple murders that shock our collective conscience. Consider the "case of terrorists who seek to destroy Canada's political order without regard to the devastation and loss of life that may result from their crimes" referenced in the decision.[11] One can sadly imagine a terrorist who succeeds in killing a hundred or a thousand people. Is such a person capable of being redeemed and reintegrated into society? Should society even care about their rehabilitation? Reintegration of offenders into society is a two-way street. Such a person would never be accepted by other members of their society, even if they were found to no longer be at risk of committing further crimes. To release them would undermine confidence in the criminal justice system and encourage vigilantism.

One of the benefits of longer periods of parole ineligibility is that the victims' families are not repeatedly involved in parole hearings to relive the crimes. The Supreme Court was cognizant of the painful impact of parole hearings.[12] Surviving victims and family members

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8 *Ibid* at paras 48, 83.

9 *Ibid* at para 83, citing Julie Desrosiers et Catherine Bernard, "L'emprisonnement à perpétuité sans possibilité de libération conditionnelle : une peine inconstitutionnelle?" (2021) 25:3 Can Crim L Rev 275 at 303 [as translated in *Bissonnette*, *ibid*].

10 Their presence in Canadian criminal law may originate from the Judeo-Christian tradition; see Rt Hon Lord Justice Denning, *The Influence of Religion on Law* (Newcastle upon Tyne: King's College, 1953).

11 *Bissonnette*, *supra* note 1 at para 145.

12 *Ibid* at para 44.

do not want an opportunity to condemn the criminal acts once again. They want to move on with their lives without the spectre of future parole hearings and without the risk of further tragedy caused by the offender.

IV. NECESSARY LIMITS ON STATE RETRIBUTION

The Supreme Court notes a sentence based on denunciation and a retributivist approach could justify a sentence of unlimited severity, but the *Charter* limits the state's power to sanction offenders.[13] This is an alternative route supporting the Supreme Court's conclusion, given the Supreme Court's concern regarding the psychological impact on prisoners of taking away any hope of applying for parole.[14] Whether one agrees with the conclusion, taking this form of punishment off the table due to an objective impact on prisoners makes more sense than the reasoning based on the possibility of rehabilitation in every case.

V. COMPARATIVE LAW COMPARISON: THE COMMON LAW COUNTRIES

The Supreme Court also looked to various approaches in other countries with regard to lifetime parole ineligibility, noting that Germany, France, and Italy have found such sentences to be unconstitutional, while they are permitted in the United States, England, Wales, Australia, and New Zealand.[15] The Supreme Court then concluded that a "parallel can be drawn between the approach taken in Canadian criminal law and the approaches taken in international law and in the law of various countries similar to Canada with respect to sentences of imprisonment for life without the possibility of parole, which are generally considered to be incompatible with human dignity."[16]

Why the Supreme Court did not draw a parallel with the reviewed common law countries, which all permit this type of punishment, is unclear. While comparative law might be more focused on comparisons between common law countries when it comes to interpreting case law, arguably it should take a similar approach for constitutional law cases that are based on the values in each country. Even if the United States is viewed as an outlier and there is a review mechanism distinguishing England and Wales, Australia and New Zealand are the countries most similar to Canada in history, development, traditions, and values. Australia and New Zealand may not have an equivalent to the *Charter*, but the point of the comparison was supposed to be based on country approaches to and societal values regarding punishment, which transcends this difference.

VI. DEATH KNELL FOR THE DEATH PENALTY

One legal takeaway from the Supreme Court's decision is that the death penalty must be unconstitutional in Canada. If it is incompatible with human dignity to take away the opportunity of applying for parole, then by definition the death penalty is also incompatible

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13 *Ibid* at paras 46, 93, 142.
14 *Ibid* at para 97.
15 *Ibid* at paras 105–107.
16 *Ibid* at para 108.

with human dignity. This conclusion is clear even without considering the impact of wrongful convictions and the Supreme Court's existing *obiter* in *United States v. Burns*.[17]

VII. CONCLUSION: THE CONSTITUTIONALIZATION OF REHABILITATION

Rehabilitation is listed as one of the sentencing objectives under section 718 of the *Criminal Code*, but it is not mandatory in every case based on the legislative wording.[18] The Supreme Court's conclusion goes beyond the legislation with a requirement that it be kept as a realistic possibility in every criminal case.[19] The impact of this decision will likely be felt far beyond the context of parole ineligibility.

17 2001 SCC 7 at para 78.

18 RSC 1985, c C-46, s 718.

19 *Bissonnette*, *supra* note 1 at paras 9, 141. While the Supreme Court subsequently stated in *R v Hills*, 2023 SCC 2, that "rehabilitation has no standalone constitutional status," this is contradicted by the repeated conclusion from *Bissonnette* that the door for rehabilitation must be kept open in every case to avoid violating section 12 of the *Charter* (*ibid* at para 141). See also *R v Hilbach*, 2023 SCC 3 at para 38 (rehabilitation must form part of the calculus of all criminal punishment).