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# When (and Where) Is a Crime a Crime? “Double Criminality” as a Principle of Fundamental Justice

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# Agenda

- Defining double criminality
- Canadian and international uses
- Is it a POFJ?
- Does this question even matter?

# Double Criminality: Extradition

- Extradition: formal transfer of individuals between states for prosecution/serving sentence
- States will only extradite if the conduct for which the alleged offender is sought by the requesting state is also criminal under the laws of the requested state
  - Rationales: sovereignty, justice, protection, reciprocity
  - Origins: 17th century Europe
  - Ubiquitous; is probably an int'l law rule (custom, general principles)

# Broader Use, A Broader Definition

- Underlying principles not confined to extradition
  - E.g.: D is a national of Pakistan, where there is a crime of “blasphemy.” D has one conviction for blasphemy on his criminal record in Pakistan.
  - D emigrates to Canada, question comes up as to whether he has a criminal record
  - Does this qualify as a criminal record in Canada? No, because we have no crime of blasphemy

# Broader Use, A Broader Definition

- Sometimes used in reverse fashion
  - E.g.: D is a national of state X, where gambling is illegal. Travels to Las Vegas, USA, where gambling is legal, and gambles.
  - X exerts extraterritorial jurisdiction on a nationality basis, can prosecute nationals for offences committed abroad
  - But, laws of X also provide that it will not prosecute if conduct was lawful in foreign state
  - Therefore, D will not be prosecuted

# Broader Use, A Broader Definition

- So this involves the same underlying analysis: is the conduct that took place in the foreign state also criminal here (or in some cases, vice versa)? Same question, different purpose
- A broader definition:
  - in order for a state to give legal cognizance or justiciability to a criminal offence committed in a foreign state, the conduct underpinning the offence must also amount to a criminal offence in the forum state.

# Is this even really a thing?

- Yes! Many situations come up in which courts have to consider whether a person committed an offence in a foreign state, because it is relevant to some issue in the proceedings
- In those cases, Parliament and the common law tend to employ double criminality (DC)

# Examples of DC in Canadian Law

- **S. 12 Canada Evidence Act:** witness (incl accused) can be cross-examined on criminal record for credibility purposes
- Just Canadian record, or foreign convictions too?
- *R. v. Stratton* (ONCA 1978): only if:
  - *DC made out*
  - *Foreign proceedings allow for the “equivalent” of a conviction under Cdn law, and no oppression or unfairness*
- Probably for s. 666 of the Code (use of record re character) too

# Examples of DC in Canadian Law

- **Special pleas of *autrefois convict/acquit***
- Canadian version of “double jeopardy”
- Can be pleaded re foreign convictions/acquittals
  - Law is clear that in order to make out plea, foreign charge and Canadian charge must have been substantially the same
  - Law is very messy on how to do this—conduct-based vs. elements-based approaches
- Could be more here: *Kienapple*, s. 11(h), *res judicata*

# Examples of DC in Canadian Law

- **Immigration and refugee protection law**
- Permanent residents, foreign nationals and refugee claimants can all be held “inadmissible” to Canada (and thus deported) for “criminality” or “serious criminality”
  - If outside Canada, conduct must be something that would “constitute an offence under an Act of Parliament” if committed here → DC
  - Both convictions and uncharged conduct
  - Very well-developed “equivalency” analysis

# Examples of DC in Canadian Law

- **Conspiracy: *Criminal Code***

- 465(3) Every one who, while in Canada, conspires with any one to [commit an offence] in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada

- **Crown must prove DC beyond a reasonable doubt**

# Examples of DC in Canadian Law

- **Civil forfeiture: gov't confiscates proceeds of crime**
- Ontario *Civil Remedies Act*, applies to “unlawful activity”:
  - “an offence under an Act of a jurisdiction outside Canada, if a similar act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario”

# Examples of DC in Canadian Law

- ***International Transfer of Offenders Act***, section 4:
- “...a transfer is not available unless the Canadian offender’s conduct would have constituted a criminal offence if it had occurred in Canada at the time the Minister receives the request for a transfer.”

# Examples of DC in Canadian Law

- **Sentencing**

- Foreign convictions can be adduced as aggravating factors, just like domestic convictions
- Goes to character, likelihood to re-offend, etc.
- Seems to be some notion of DC employed; *Stratton* sometimes cited
- No decisive consideration; one decision says presence of DC makes foreign conviction “more relevant”

# Examples of DC in Canadian Law

- More work to do
- Bail? Not unknown to have foreign criminal record adduced as evidence in bail hearing; explicit consideration of DC?
- Any other examples? Do YOU know of any?

# Principles of Fundamental Justice (POFJs)

- *Charter s. 7*: cannot be deprived of life, liberty or security of person, except in accordance with the principles of fundamental justice
- basic tenets of legal system. Requirements:
  - Legal principle
  - Consensus that “vital or fundamental to notion of justice”
  - Sufficiently precise to be applied in a way that produces predictable results

# Is DC a POFJ?

- Legal rule? Yes, not policy
- Precise, predictable results? Yes
- Consensus that vital/fundamental to justice?
  - When foreign criminal conduct comes up, almost inevitably used, by Parliament and common law → suggests consensus that there's something fundamental about it
  - Human dignity: an expression of when the consequences of criminal conduct outside Canada are justiciable in Canada; individual vs state
  - Other countries do it

# Is DC a POFJ?

- Main point: if you could be deprived of freedom or security of person for doing something outside Canada which is not criminal in Canada...the gut rebels
- Surely our legal system should not give any legal effect to foreign crimes like adultery, apostasy, engaging in homosexual acts, insulting the honour of the President, etc.
- This is what is at stake – seems fundamental

# Is DC a POFJ?

- Strong case that it is a POFJ in the extradition context
  - SCC in *USA v. Burns*: there are POFJs in extradition
  - SCC in *USA v. MM*: double criminality is a “fundamental principle of extradition law,” underpins each phase of the process
  - Case law on double criminality indicates that challenges to it will be resisted

# Does it matter otherwise?

- When would one seek a s. 7 remedy for being deprived of DC?
  - Sentencing: not clear whether it's actually applied
  - If state removed a DC protection currently existing in a statute, or legislated one out of the common law
  - Canada prosecutes someone for an extraterritorial crime that was not a crime in the locus state (could be problematic)
  - Mutual legal assistance in criminal matters: requirement of DC being relaxed. Is this appropriate/constitutional?

# Thanks

Your input welcome!

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