

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

by

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## I. INTRODUCTION

The idea that crime crosses borders is fast becoming ordinary, even old hat, particularly in an age of online crime such as ransomware attacks, cyber-extortion and the like. As we have become more geographically mobile, however, it is increasingly common for people to have engaged in criminal conduct in one state<sup>1</sup> but then seek to exercise legal rights, or face legal entanglements, in others. Legal questions can then arise about what effect should be given by one state—in this article, Canada—to an individual’s conduct that was, or is alleged to have been, a crime in a foreign state. The inquiry boils down to this: what should the law do in situations where one’s status as a criminal offender crosses borders, or some party or state agency seeks to have it do so? Put another way, in situations where it matters legally that a person has committed a crime, does it matter that the crime was committed in a foreign state? And if so, how do we determine whether that foreign crime should be given legal effect here in Canada?

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<sup>1</sup> I am using the word “state” here in its public international law meaning, i.e., sovereign state, synonymous with the word “country.”

This kind of scenario raises a legal tool, often referred to as a principle, called “double criminality,” or sometimes “dual criminality.” It is a principle that is well known in some legal contexts but much less so in others, yet is becoming increasingly important to the determination of rights, the obtaining of remedies, and the imposition of penalties. It is used frequently by courts, legislatures and governments, yet this use has been unexplored in the Canadian legal literature. The proposal here is that this lack of attention shrouds a legal principle that says some fairly important, albeit specialized, things about the nature of criminal justice in Canada—so much so that it may qualify as a “principle of fundamental justice” (POFJ) under section 7 of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup>

The remainder of this paper will proceed in five parts. Part II will introduce double criminality and survey the various ways in which it is used, beginning with extradition but moving to other sorts of uses both in Canadian law and in the laws of a selection of foreign states. Part III will draw on the various uses of double criminality to distill from it a legal principle, and explain the rationales that underpin it. Part IV will examine the criteria developed by the Supreme Court of Canada for when a legal principle can be considered a POFJ under section 7 of the *Charter* and the work that a rule with this status does in Canadian law. Part V will apply the criteria to double criminality and consider whether this principle, or some version of it, can and should be considered a POFJ. My ultimate argument is that there is a good case that double criminality qualifies as a broadly-applicable POFJ, and that there is a particularly compelling argument that it is a POFJ in the specific context of extradition. Part VI will offer brief conclusions.

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<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. For non-Canadian readers I note parenthetically that the *Charter* is a “bill of rights” that forms part of Canada’s constitutions and thus is part and parcel of the highest law of the land.

## II. HOW DOUBLE CRIMINALITY IS USED IN LAW

### a) Extradition

Double criminality is most often thought of as a mechanism in the law of extradition, the formal legal process by which individuals are surrendered by one state to another for the purpose of criminal prosecution and/or the imposition of criminal sentences.<sup>3</sup> A practically universal stance among states is that extradition will not be granted unless the crime for which the individual is sought by the requesting state is also a crime in the requested state.<sup>4</sup> Accordingly, a rule of double criminality appears in virtually every modern extradition treaty, both bilateral<sup>5</sup> and multilateral,<sup>6</sup> as well as influential instruments such as the United Nations Model Treaty on Extradition.<sup>7</sup> The requirement is relaxed in some regional arrangements between closely-allied states, such as the European Arrest Warrant system,<sup>8</sup> but only for a select range of crimes and even there it has been somewhat controversial.<sup>9</sup>

Double criminality also appears in the domestic laws that states use to provide for extradition proceedings, such as Canada's *Extradition Act*.<sup>10</sup> In Canada, there are double criminality requirements at all three stages of the process of extraditing individuals from Canada:

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<sup>3</sup> See generally Robert J Currie & Joseph Rikhof, *International & Transnational Criminal Law*, 3rd ed (Toronto: Irwin Law, 2020), ch 9, part B.

<sup>4</sup> See Neil Boister, "A History of Double Criminality in Extradition" (2023) 25 J Hist Intl L 218 at 247-49; Harmen van der Wilt, *The Law and Practice of Extradition* (New York: Routledge, 2022), ch 3.

<sup>5</sup> See e.g. *Treaty on Extradition between the Government of Canada and the Government of the United States of America*, Can TS 1976 No 3, as amended by *Protocol 1*, Can TS 1991 No 37 and *Protocol 2*, Can TS 2003 No 11.

<sup>6</sup> See e.g. *United Nations Convention against Transnational Organized Crime*, (2000) 2225 UNTS 275.

<sup>7</sup> UN Doc A/RES/45/116 (1990), as amended UN Doc A/RES/52/88 (1997).

<sup>8</sup> See generally Libor Klimek, *European Arrest Warrant* (New York: Springer, 2015).

<sup>9</sup> See Gianmarco Bondi, "Double criminality and the European Arrest Warrant: current trends and future developments in light of the *KL* case" (2024) 15:1 New J Eur Crim L 99.

<sup>10</sup> SC 1999, c 18.

the Minister’s evaluation of the extradition request in order to issue an “Authority to Proceed” (which initiates the domestic proceeding);<sup>11</sup> a decision by a judge that double criminality is met in order for the person sought to be “committed” for extradition;<sup>12</sup> and a final evaluation by the Minister of Justice as to whether “surrender” is warranted, in which the Minister may take into account “the broad principle of double criminality.”<sup>13</sup>

The ubiquity of the principle’s use is usually explained on the basis that it is a means by which states safeguard the integrity of their own sovereign concepts of what criminal conduct is and is not; they will not facilitate a foreign state’s prosecution of crime unless they share the view that the conduct in question is, in fact, criminal. This also underscores the largely reciprocal nature of inter-state relations, in that states typically only provide cooperation on the same basis on which they receive it.<sup>14</sup> So Canada, for example, will certainly extradite an alleged offender to face prosecution for murder, since murder is a crime in our own legal system. It would not, on the other hand, extradite an individual to face prosecution for the “crimes” of proselytizing and converting people to Christianity,<sup>15</sup> or criticizing government projects on social media;<sup>16</sup> while the foreign state is free to criminalize such conduct if it wishes, such “crimes” are not known to Canadian law and it would be against Canadian legal policy (informed by domestic and

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<sup>11</sup> *Ibid*, ss 3 and 15.

<sup>12</sup> *Ibid*, s 29(1)(a).

<sup>13</sup> *Ibid*, s 40. See also *M.M. v United States of America*, 2015 SCC 62 at para 26.

<sup>14</sup> See generally Arianna Whalen, *Reciprocity in Public International Law* (Cambridge: Cambridge University Press, 2023).

<sup>15</sup> See Zeinab Mohammed Salih, “Six Libyans face death penalty for converting to Christianity,” *The Guardian* (3 May 2023), online: <<https://www.theguardian.com/global-development/2023/may/03/six-libyans-face-death-penalty-for-converting-to-christianity>>.

<sup>16</sup> See Tom Porter, “A Saudi woman was given 30 years in prison for criticizing the Neom megacity project on Twitter,” *Business Insider* (3 July 2023), online: <<https://www.businessinsider.com/saudi-woman-gets-30-years-prison-criticizing-neom-megacity-twitter-2023-6>>.

international human rights norms) to assist with prosecuting this conduct. I return to the question of rationales for the use of the principle in section III, below.

#### **b) Non-Extradition Uses of Double Criminality in Canadian Law**

Double criminality is not just a creature of extradition law. This subsection will provide an overview of the many ways in which some version of the double criminality principle is used across a variety of Canadian legal regimes. The overview will be brief and largely descriptive, rather than analytical, because the goal is to illustrate the breadth and frequency of the use of the principle, rather than provide granular detail on how it is used in any particular setting. It is noteworthy, however, that some version of double criminality is used in substantive, procedural and evidentiary rules, and that while crime of some sort is always a factor of the usage, it is used in a variety of regulatory and administrative contexts quite apart from the criminal law. This data will, in turn, be used to feed the inquiry into whether double criminality is a POFJ, which will be taken up in Section IV.

#### **Immigration/Refugee Law**

Under the *Immigration and Refugee Protection Act*,<sup>17</sup> there are several grounds of inadmissibility for people who committed criminal acts in foreign states, and each imposes a double criminality requirement. Permanent residents and foreign nationals are inadmissible for “serious criminality” if they are found to have committed and/or been convicted of an offence

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<sup>17</sup> SC 2001, c 27 [IRPA].

outside Canada “that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.”<sup>18</sup> Similarly, foreign nationals are inadmissible for “criminality” if they are found to have committed and/or been convicted of offences that would be indictable offences if committed in Canada.<sup>19</sup> There is a well-developed Federal Court jurisprudence on how this double criminality requirement—referred to as “equivalency”—is to be conducted.<sup>20</sup> There are similar requirements are regards organized criminality<sup>21</sup> and with regard to refugees who have committed serious non-political crimes.<sup>22</sup>

### **Special Pleas in Criminal Prosecutions**

Under s. 607 of the *Criminal Code*,<sup>23</sup> an accused can plead *autrefois acquit/convict*, which essentially amounts to what U.S. law calls a “double jeopardy” protection—i.e., the accused cannot be prosecuted for an offence because they have already been prosecuted for the same conduct. These pleas are available in situations where the accused, charged in Canada, argues that they have been prosecuted for the same offence in a foreign state. There is an inherent double criminality requirement in such cross-border double jeopardy cases, since the offence for which the accused says they were already prosecuted abroad must also be an offence

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<sup>18</sup> *Ibid*, s 36(1).

<sup>19</sup> *Ibid*, s 36(2).

<sup>20</sup> See e.g. *Casimiro Santos v Canada (Minister of Citizenship and Immigration)*, 2013 FC 425; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 946; *Ghahraman-Ebrahimi v Canada (AG)*, 2020 FC 746; *Garcia v Canada (Citizenship and Immigration)*, 2021 FC 141.

<sup>21</sup> *IRPA*, *supra* note 17, s 37.

<sup>22</sup> *Ibid*, s 98.

<sup>23</sup> RSC 1985, c C-46 [Code].

in Canada. However, as Aylward notes in his excellent write-up of the topic, the case law is in a confused state.<sup>24</sup>

### **Extraterritorial Conspiracy**

Section 465(3) of the *Criminal Code* provides that it is an offence to conspire, while in Canada, to do anything that amounts to an offence under Canadian law “in a place outside Canada that is an offence under the laws of that place.” This is, in a sense, a reverse double criminality requirement to the more typical one being considered here; a person can only be prosecuted for conspiracy to commit, in a foreign state, an offence known to Canadian law if their conduct would also amount to a crime in that state. Interestingly, as it is an element of the offence, the Crown must prove double criminality beyond a reasonable doubt.<sup>25</sup>

### **Civil Forfeiture**

Most provinces have statutes that allow the government to apply to a court to forfeit assets that can be proven to be the proceeds of crime. The class of offences that are caught by these regimes includes those committed in foreign states, but only if double criminality is made out. For example, Ontario’s *Civil Remedies Act* defines “unlawful activity” (for which forfeiture can be granted) to include “an offence under an Act of a jurisdiction outside Canada, if a similar

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<sup>24</sup> Stephen Aylward, “Cross-Border Double Jeopardy in Canada—Part I” (2019) 39:4 *For the Defence* (Westlaw) and “Cross-Border Double Jeopardy in Canada—Part II” (2019) 39:5 *For the Defence* (Westlaw).

<sup>25</sup> See *R v Singh-Murray*, 2011 NBPC 34.

act or omission would be an offence under an Act of Canada or Ontario if it were committed in Ontario.”<sup>26</sup>

### **Jurisdiction Over Extraterritorial Offences**

Canada exerts extraterritorial prescriptive jurisdiction over a number of offences that are committed abroad. Usually this is done without attention to whether the conduct also amounts to an offence in the foreign state, but there are exceptions. For example, s. 7(4) of the *Code* provides that Canada has jurisdiction over indictable offences committed outside Canada by government employees, if the conduct is also “an offence under the laws of that place.”

### **International Transfer of Offenders**

The *International Transfer of Offenders Act*<sup>27</sup> implements treaties between Canada and other states, under which Canadian citizens who have been incarcerated for offences in foreign states can be transferred to Canada to serve their sentences here, and vice versa. Section 4(1) of the *Act* provides that “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.” This is reflective of the transfer of offenders treaties themselves,

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<sup>26</sup> *Civil Remedies Act, 2001*, SO 2001, c 28, s 1.1. See similarly *Civil Forfeiture Act*, SNS 2007, c 27, s 3(1)(m)(iii); *Civil Forfeiture Act*, SBC 2005, c 29, s 1(1), “unlawful activity” (subsection (c)); *Civil Forfeiture Act*, SA 2001, c C-15.2, s 1(2)(d); *Civil Forfeiture Act*, SNB 2010, c C-4.5, s 1, “unlawful activity” (subsection (c)); *The Criminal Property Forfeiture Act*, CCSM c C306, s 1, “unlawful activity” (subsection (b)); *The Seizure of Criminal Property Act*, 2009, SS 2009, c S-46.002, s 2(u)(ii).

<sup>27</sup> SC 2004, c 21.



which impose this requirement.<sup>28</sup> Accordingly, the crime of which the individual has been convicted in the foreign state must also amount to a crime in Canada in order for a transfer to take place. In one way this seems harsh, in that Canada will not accept a transfer if the individual has been convicted of conduct that Canada does not recognize as a crime; yet the rationale is that Canada should not participate in imprisoning an individual for conduct that it does not view as a crime. This provision in particular is somewhat analogous to how double criminality is used in extradition, insofar as it involves inter-state cooperation with reciprocal protection of sovereign values around criminal law.

### **Sex Offenders Registry**

Under s. 490.02902(1) of the *Criminal Code*, a person may be compelled to comply with the *Sex Offender Information Registration Act*,<sup>29</sup> and therefore register as a sex offender, if they were convicted of (or found not criminally responsible for) a sexual offence “outside Canada.” However, this only applies if the Attorney General or Minister of Justice determines that the foreign offence is “equivalent to” one of the prescribed set of sexual offences to which *SOIRA* applies. The person is entitled to challenge the latter decision and request a court to declare that the offence of which he was convicted is not an “equivalent” to one of the prescribed offences, and thus be exempt from registration.<sup>30</sup>

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<sup>28</sup> See e.g. Treaty Between Canada and the United States on the Execution of Penal Sentences (1977) 1978 CTS No. 12, art II(a).

<sup>29</sup> SC 2004, c 10 [*SOIRA*].

<sup>30</sup> *Code*, *supra* note 23, s 490.02905.

## **Cross-Examination of Witnesses**

Under s. 12 of the *Canada Evidence Act*,<sup>31</sup> any witness (including the accused) can be cross-examined on their criminal record, for the purpose of testing their credibility. Occasionally Crown prosecutors have sought to cross-examine accused persons on the basis of their foreign criminal convictions, and the limited case law on point indicates that in order for this to be permitted, double criminality must be made out as regards the foreign offence.<sup>32</sup>

### **c) Uses of Double Criminality in Foreign Law**

As noted, double criminality is used by virtually every state in its extradition laws and practice. The purpose of this subsection, similar to that immediately above, is to provide evidence of the broader use of the principle by foreign states. This survey will be brief and by no means exhaustive, and as with the Canadian examples this information will be used as part of the POFJ analysis in Section IV. It certainly does not establish that double criminality is in ubiquitous use by states across the entire range of laws where it might be available, but it does establish that it is used analogously to how it is used in Canada.

## **Immigration/Refugee Law**

In South Africa, a person can be declared an “undesirable” and therefore subject to removal if they have “previous criminal convictions without the option of a fine for conduct

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<sup>31</sup> RSC 1985, c C-5.

<sup>32</sup> See e.g. *R v Stratton* (1978), 21 OR (2d) 258, 90 DLR (3d) 420 (CA); *R v P.(D.K.)* (1991), 5 BCAC 302 (CA). In *Stratton*, the Court of Appeal indicated that the foreign conviction must also come from a criminal justice system that has a recognizably fair process.

which would be an offence in the *Republic*, with the exclusion of certain prescribed offences.”<sup>33</sup>

In Poland, a foreigner can be denied a residence permit on humanitarian grounds if there are substantial grounds to believe that he/she has committed a crime within the territory of the Republic of Poland or committed an act outside this territory that is a crime under the Polish law,<sup>34</sup> Mexico has a similar provision.<sup>35</sup>

### **Double Jeopardy Concerns**

States incorporate double criminality into laws dealing with double jeopardy concerns in various ways. In Australia, a conviction in another state bars a federal prosecution for the same conduct if that conduct would be an offence under certain parts of Australian criminal law.<sup>36</sup> In the United Kingdom, extradition is barred if the individual is sought for an offence for which he has already been convicted, so long as the offence has an equivalent in England and Wales.<sup>37</sup>

### **Proceeds of Crime Offences & Assistance**

In the United Kingdom, forfeiture of criminal proceeds can take place if those proceeds result from “unlawful conduct,” which includes conduct that constituted both a crime in the place where it was committed and in the UK.<sup>38</sup> Many states impose a double criminality requirement

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<sup>33</sup> See *Immigration Act (S Afr)*, No 13 of 2002, s 30(1)(g).

<sup>34</sup> See *Act of 2013 on Foreigners (Poland)*, No 1650 of 2013, online: <<https://www.refworld.org/docid/54c0b9384.html>>.

<sup>35</sup> See *Migration Law*, art. 43(1), Official Journal of the Federation on May 25, 2011. See also *Immigration Act 2009 (NZ)* 2009/51, s 161.

<sup>36</sup> See *Criminal Code Act 1995 (Aust)* 1995/12 [*Australia Criminal Code*], s 270.13.

<sup>37</sup> See *Extradition Act 2023 (UK)*, s 12.

<sup>38</sup> See *Proceeds of Crime Act 2002 (UK)*, s 241(2).

upon requests from other states to forfeit proceeds of crime located on their territories, including Hong Kong,<sup>39</sup> Germany<sup>40</sup> and South Korea.<sup>41</sup>

### **Jurisdiction Over Extraterritorial Offences**

When states exert extraterritorial prescriptive jurisdiction over offences (i.e., assume jurisdiction over crimes that take place outside the territory of the state), attention is often paid to double criminality concerns. Under the UK's *Domestic Abuse Act* there is jurisdiction over a range of offences committed outside the UK by British nationals or habitual residents, provided that the conduct "constitutes an offence under the law in force in that country."<sup>42</sup> In Australia a similar approach is taken to the entire range of criminal law, at both the federal<sup>43</sup> and state<sup>44</sup> level. Germany exerts active nationality jurisdiction (offender is German national or resident) and passive nationality jurisdiction (victim is German national) over offences outside Germany if the conduct is also an offence in the place of commission.<sup>45</sup> France exerts nationality jurisdiction over extraterritorial misdemeanours if double criminality is made out,<sup>46</sup> while Poland generally

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<sup>39</sup> See *Re Kim Dotcom and Others*, [2019] HKCU 4181.

<sup>40</sup> See Gesetz über die internationale Rechtshilfe in Strafsachen in der Fassung der Bekanntmachung vom 27. Juni 1994 (BGBl. I S. 1537), das zuletzt durch Artikel 6 des Gesetzes vom 19. Dezember 2022 (BGBl. I S. 2632) geändert worden ist.

<sup>41</sup> See Ministry of Justice of the Republic of Korea, International Criminal Affairs Division, *Step-by-Step Guide for Asset Recovery [Republic of Korea]* (Republic of Korea: Ministry of Justice, 2020), online (pdf): <<https://star.worldbank.org/sites/default/files/2020-12/2020%20G20%20Asset%20Recovery%20Guide%20South%20Korea.pdf>>.

<sup>42</sup> *Domestic Abuse Act 2021* (UK), s 72(1)(b).

<sup>43</sup> See *Australia Criminal Code*, *supra* note 36, s 14.1.

<sup>44</sup> See *Criminal Code 2002* (ACT) 2002/51, s 65, cited in *R v Himbert*, [2015] ACTSC 6.

<sup>45</sup> See *Strafgesetzbuch* (Germany) in the version published on 13 November 1998 (Federal Law Gazette I, 3322), as last amended by art 2 of the Act of 22 November 2021 (Federal Law Gazette I, 4906), ss 7(1), (2).

<sup>46</sup> *Code pénal*, arts 113-116 C pén. Note, however, that this does not apply to more serious offences.

requires double criminality with certain exceptions.<sup>47</sup> Similar approaches are taken in Israel<sup>48</sup> and Mexico.<sup>49</sup>

### **International Transfer of Offenders**

Similarly to Canada, states which engage in the transfer of convicted offenders between them for the purpose of serving prison sentences impose a double criminality requirement. The American law uses the phrase “double criminality,” which it defines as follows: “ ‘double criminality’ means that at the time of transfer of an offender the offense for which he has been sentenced is still an offense in the transferring country and is also an offense in the receiving country[.]”<sup>50</sup> The same approach is taken in the laws of Australia<sup>51</sup> and South Korea,<sup>52</sup> as well as in the EU Convention on the Transfer of Sentenced Persons.<sup>53</sup>

### **III. Double Criminality as a “Principle”**

Both Canadian and foreign state practice, then, suggest that the use of double criminality is widespread enough to look for unifying themes or state interests. All of the foregoing examples—and the lists are not exhaustive—are outside the extradition process, yet all involve the same underlying analytical question: is the conduct that took place in a foreign state and was

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<sup>47</sup> See UNODC, *Country Review of Poland* [for UNCAC Review Cycle 2010-2015] online (pdf): <[https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/FINAL\\_Country\\_Review\\_Report\\_Poland.pdf](https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/FINAL_Country_Review_Report_Poland.pdf)>.

<sup>48</sup> *Penal Law* (Israel), 5737/1977, ss 13-17, cited in *Wultz v Islamic Republic of Iran*, 755 F Supp (2d) 1 (DDC 2010).

<sup>49</sup> See *Federal Criminal Code* (Mexico), 2000, art 4.

<sup>50</sup> See 18 USCS § 4100(b). See also *Martinez v Rosalez*, 2023 WL 2904579 (WD Tex).

<sup>51</sup> See *International Transfer of Prisoners Act 1997* (Austl), 75/1997, ss 14(1)(b), 15(1)(b).

<sup>52</sup> See *Act on the International Transfer of Sentenced Inmates* (South Korea), 11690/2013.

<sup>53</sup> See *Strasbourg*, 21.III.1983.

considered to be criminal there also considered to be criminal here (or in some cases, vice versa)? In each of these cases, double criminality functions as a rule, since its application will drive a particular result; if it is made out, this will produce one outcome, while if it is not the outcome will be different.

I will not expend a great deal of energy on the distinction between a legal “rule” and a legal “principle,” but it is probably fair to say that a “rule” amounts to a specific device that operates in a discrete legal context, while a “principle” is a mix of policy and prescription that is broader in scope and is employed to accomplish particular objectives within an overall legal system, whether they are those of the government/legislator or reflect more systemic legal machinery like the common law.<sup>54</sup> Accordingly, the broader “principle” at play here is something like this: in order for a state’s legal decision-makers (including but not limited to courts) to give legal cognizance or justiciability to a criminal offence committed in a foreign state, the conduct (alleged or proven) underpinning the offence must also amount to a criminal offence in the forum state.

Why should it be so? What motivation lies behind the use of this principle in so many different contexts? Its development and use in the extradition context provide the logical starting point to examine this. In his historical overview and analysis Professor Boister traces the evolution of rationales behind the double criminality requirement in extradition that began in early foundational notions of state sovereignty. Independent states, having institutionalized local notions of justice and morality, were “skeptical of foreign law” and keen to “[retain] sovereign

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<sup>54</sup> This description probably changes as the varying nature and structure of legal and government systems are taken into account, e.g., the classic contrasts between common law and civilian systems. This is certainly a point that bears further reflection, though I will not undertake it here.

control over coercive legal processes like extradition.”<sup>55</sup> Later the idea sharpened as a means of asserting the well-known chauvinism of states around domestic notions of criminal law<sup>56</sup> and “the rights of a society to control what is considered criminal within that society.”<sup>57</sup> As notions of systemic fairness and individual human rights came about in the 20<sup>th</sup> century, “double criminality was justified by reference to the rights of the individual subject to the extradition requests not to be subject to injustice.”<sup>58</sup>

Given that extradition is an inter-state process, it is important that double criminality is nearly always negotiated as a requirement by states as they agree upon the treaty provisions that will govern how their relations proceed. The pragmatic result is that, having agreed upon the imposition of this condition beforehand, states are spared the diplomatic indelicacy of appearing to criticize each others’ notions of what is properly viewed as criminal conduct. As Professor Wise described it some decades ago, double criminality is therefore:

a device for giving vent to doubts about the justice of putting the fugitive to trial for the particular acts charged against him. The requested State mechanically invokes its own law as a yardstick simply to avoid the indelicate aspersions to which a rule more clearly pegged to considerations of justice might give rise.<sup>59</sup>

From a body of law, doctrine and state practice that has fairly intensely considered the rationales for the use of double criminality, it is fairly easy to extrapolate these rationales out to the broader kinds of uses being discussed here. For analytical clarity I would propose that we can

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<sup>55</sup> Boister, *supra* note 4 at 252.

<sup>56</sup> See Markus Dubber, “Comparative Criminal Law: Histories, Functions, Topics” (4 January 2018) at 2-3, online: SSRN <<https://ssrn.com/abstract=3096540>>.

<sup>57</sup> Boister, *supra* note 4 at 252.

<sup>58</sup> *Ibid.* See also William C Gilmore, “The Provisions Designed to Protect Fundamental Rights in Extradition and Mutual Legal Assistance Treaties” in Commonwealth Secretariat, *International Co-operation in Criminal Matters: Balancing the Protection of Human Rights with the Needs of Law Enforcement* (London: Commonwealth Secretariat, 2001).

<sup>59</sup> Edward M Wise, “Some Problems of Extradition” (1969) 15:2 Wayne L Rev 709 at 719.

identify two essential purposes: a sovereignty purpose and a due process/human rights purpose. In the sovereignty basket are the state's interests in maintaining, asserting and protecting domestic views on what does and does not constitute criminal conduct, particularly in situations where the legal apparatus of the state is being brought to bear in a way that goes against, or affects, the legal interests of its population. The populace, then, is being protected from being indirectly affected by foreign law, in line with the usual principle that states do not apply each others' criminal laws (outside of specifically-determined parameters). There is still a hint of the "skepticism about foreigners" of old, in that legal processes are only viewed as legitimate if they are applying standards that the sovereign agrees with. Someone whose foreign criminal record for apostasy or adultery is refused effect in a state, or before its courts, is being protected in some sense from what the forum state views as the legal overreach or "weird ideas" of the foreign sovereign.

The due process/human rights basket, I think, contains the very basic and intuitive notion that it is unfair for the state to impose legal consequences related to criminal conduct upon an individual if the state itself does not view the conduct as being unlawful. It is arguably linked to the "principle of legality" (*nullum crimen, nulla poena sine lege*), a principle of international law which provides that "an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached."<sup>60</sup> Of the domestic uses of double criminality, some will have "punishment" results and others may not, but the kind of mischief sought to be prevented by the

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<sup>60</sup> Claus Kreß, "Nulla poena nullum crimen sine lege" in *Max Planck Encyclopedia of International Law* (Oxford University Press, last amended February 2010) at para 1, online: <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e854?rskey=GS0y2l&result=1&prd=MPIL>>. See also Lech Gardocki, "Double Criminality in Extradition Law" (1993) 27:1-2 *Israel L Rev* 288.



principle of legality is invoked where there are legal consequences related in some way to criminality, imposed by the state for conduct that the state does not view as criminal.<sup>61</sup> The principle of legality is often viewed as a general principle of international law and manifestly acts as a procedural human rights protection in the many states where it is applied.<sup>62</sup> Double criminality, then, acts as a safeguard against both procedural and substantive unfairness.<sup>63</sup>

It seems reasonable to propose, then, that in every scenario where the cognizability of a foreign criminal offence is in play, the double criminality principle is the tool with decisive effect. In Canada, as explored above, both Parliament and the courts appear to think so. If that is so, then this suggests in turn that the principle itself has some sort of special status in law. One obvious possibility is that it amounts to a “principle of fundamental justice” (POFJ) under section 7 of the *Charter*, to which I will now turn.

#### **IV. What Are Principles of Fundamental Justice?**

##### **a) The Basics**

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<sup>61</sup> It is worth noting that there are instances where states *could* impose a double criminality requirement but do not do so. For example, when Canada decriminalized the consumption of cannabis, diplomatic representatives of Japan and South Korea both issued press releases reminding their citizens that these states both criminalize cannabis consumption and exercise extraterritorial nationality-based jurisdiction over it. See Ryan Flanagan, “Japanese, South Korean citizens banned from using legal pot in Canada,” *CTV News* (23 October 2018), online: <<https://www.ctvnews.ca/canada/japanese-south-korean-citizens-banned-from-using-legal-pot-in-canada-1.4146077>>. One might venture that this presents a problem of legality, in that conduct that is not criminal in the place and at the time where it is committed is nonetheless criminalized elsewhere. Ironically, these examples, too, demonstrate domestic chauvinism about criminal law, specifically via its application through extraterritorial prescriptive jurisdiction.

<sup>62</sup> See Kreß, *supra* note 60 at paras 15, 20.

<sup>63</sup> See “Dual Criminality and Turkey’s Red Notice Request for teacher who criticized government on Twitter,” *Red Notice Monitor* (23 November 2023), online: <<https://www.rednoticemonitor.com/post/dual-criminality-and-turkey-s-red-notice-request-for-teacher-who-criticised-government-on-twitter>>.

The body of jurisprudence and doctrine on s. 7 of the *Charter* is dense, the kind of subject about which books can be and have been written,<sup>64</sup> and only a fairly brief review of the basic points is required here. Section 7 protects individuals from the deprivation of life, liberty or security of person, “except in accordance with principles of fundamental justice.” Challenges made under s. 7 are typically to legislation, which is subject to being “read down” or even struck down as unconstitutional if the particular “deprivation of liberty/security of person” it sets out is inconsistent with one or more POFJs, and the inconsistency cannot be “demonstrably justified” as a “reasonable limit” to the right in a free and democratic society, under s. 1 of the *Charter*. Naturally s.7 occupies a unique place in criminal law and related matters, though its applicability is not confined to that setting.

The POFJs are not codified in the *Charter*, or anywhere, and they have emerged in the evolution of the Supreme Court’s interpretation and application of s. 7 over decades.<sup>65</sup> In its case law on identifying the POFJs, the Supreme Court has indicated that they are “to be found within the basic tenets of our legal system,”<sup>66</sup> and are part of “the inherent domain of the judiciary as guardian of the justice system.”<sup>67</sup> While they may be reflected in existing legal rules and norms, stemming from both legislative and judicial sources, this is not conclusive; the definition and scope of a principle of fundamental justice “will also depend on the general philosophy and purpose of the *Charter*, the purpose of the right in question, and the need to reconcile that right with others guaranteed by the *Charter*.”<sup>68</sup>

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<sup>64</sup> See e.g. Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019).

<sup>65</sup> For a good account, see Justice Canada, “Section 7: Life, liberty and security of the person” in *Charterpedia* (as amended 31 July 2022), online: <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art7.html>>.

<sup>66</sup> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 [*Motor Vehicle Reference*] at 503, 24 DLR (4th) 536.

<sup>67</sup> *Ibid.*

<sup>68</sup> *R v Hebert*, [1990] 2 SCR 151, 57 CCC (3d) 1.

For a particular norm to qualify as a POFJ it must meet three requirements. First, it must be a legal principle, in that it has normative effect rather than reflecting state interest in “the realm of general public policy.”<sup>69</sup> A simple indicator is whether the norm in question is already being used as a legal rule or test, whether in common law, statutory law, or international law.<sup>70</sup> For example, the Court has held that the lawyer’s duty of commitment to a client<sup>71</sup> and the principle of diminished moral culpability for young offenders<sup>72</sup> were each “legal principles,” where each was already employed in existing common law duties and legislation, respectively.

Second, there must be consensus that the principle is “vital or fundamental to our societal notions of justice,” in that it is among a body of legal principles that “find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens.”<sup>73</sup> The word “fundamental,” then, points us to principles that “would have general acceptance among reasonable people.”<sup>74</sup> Once again, a good barometer of being vital or fundamental is the extent to which the principle is already in use as a legal rule of some sort, and its demonstrable importance. For example, in *Federation* the Court noted that the lawyer’s duty of commitment to the client’s cause was part of the underpinning of the legal system, in that client confidence in their lawyer was necessary for the solicitor-client relationship to function; thus the duty was “essential to the integrity of the administration of justice.”<sup>75</sup>

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<sup>69</sup> *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 [*Canadian Foundation*] at para 89.

<sup>70</sup> *Ibid* at para 91.

<sup>71</sup> *Ibid*.

<sup>72</sup> See *R v B(D)*, 2008 SCC 25 at para 48.

<sup>73</sup> *Canadian Foundation*, *supra* note 69 at para 8.

<sup>74</sup> *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 107 DLR (4th) 342.

<sup>75</sup> *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 96.

Third, the principle must be sufficiently precise to be applied in a way that produces predictable results.<sup>76</sup> It must be capable of certainty and a corresponding lack of vagueness. As

Professor Stewart notes:

Where a court measures the content of legislation against a constitutionalized legal principle, and has the power to invalidate the legislation if it does not comply with that principle, it is essential that the principle be sufficiently precise that the public, the legislature, and other courts and tribunals understand exactly what is the defect in the legislation that leads to its invalidation and how that defect must be cured.<sup>77</sup>

The *Foundation* case provides a good example of a rule that was found not to meet this criterion. At issue was the “best interests of the child,” a principle whose application is widespread across a number of areas of substantive and procedural law, most notably family law. In the context of deciding the constitutionality of the so-called “spanking defence” in s. 45 of the *Criminal Code*, the Court declined to hold that “best interests of the child” amounted to a POFJ because of the inherent contingency of its application. Despite the importance of the principle, the manner in which it was applied was “inevitably highly contextual and subject to dispute,”<sup>78</sup> and thus had insufficient certainty to amount to a POFJ.

The POFJs, then, are not rights in and of themselves, but instead function as qualifiers of the right against deprivation of life, liberty or security of person; as the Court has said, they “set the parameters” of this package of rights.<sup>79</sup>

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<sup>76</sup> See e.g. *R v Marmo-Levine*; *R v Caine*, 2003 SCC 74 at para 113.

<sup>77</sup> Stewart, *supra* note 64 at 124.

<sup>78</sup> *Canadian Foundation*, *supra* note 69 at para 11.

<sup>79</sup> See e.g. *Motor Vehicle Reference*, *supra* note 66 at para 24; *R v Lyons*, [1987] 2 SCR 309 at para 23, 44 DLR (4th) 193; *Canada (AG) v Bedford*, 2013 SCC 72 at para 94.

## b) International and Comparative Law

Given the highly international and transnational nature of the double criminality principle, and in light of the brief survey of comparative practice above, it is worth noting that the Supreme Court has drawn on both international and comparative law in its determinations of whether particular principles qualify as POFJs.<sup>80</sup> As early as *Re BC Motor Vehicle Act* the Court recognized international law as a potential source of POFJs,<sup>81</sup> and in *Foundation* the Court used a treaty provision as evidence that a particular norm did not meet the “vital or fundamental” requirement to be a POFJ.<sup>82</sup> Not surprisingly the influence of international law has played out in the human rights realm.<sup>83</sup> In its 2010 *Khadr* decision the Court noted that POFJs “are informed by Canadian experience and jurisprudence, and take into account Canada’s obligations and values, as expressed in the various sources of international human rights law by which Canada is bound.”<sup>84</sup> The fact that Canada has bound itself to a treaty rule may be “taken into account” in this way; for example, in *B(D)* the Court recognized a presumption of diminished moral capacity for young persons as a POFJ, relying in part on Canada’s obligations under the *UN Convention on the Rights of the Child*.<sup>85</sup>

However, in dealing with international law the Court has consistently been careful to uphold Parliamentary supremacy and confine international law norms to the status of evidence of

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<sup>80</sup> The Court often makes use of international and comparative law more generally when interpreting *Charter* rights. Recently, see e.g. *R v Bissonnette*, 2022 SCC 23 at paras 98-108; *Quebec (AG) v 9147-0732 Quebec inc.*, 2020 SCC 32.

<sup>81</sup> *Motor Vehicle Reference*, *supra* note 66.

<sup>82</sup> *Canadian Foundation*, *supra* note 69 at para 10.

<sup>83</sup> Though, as Van Ert and Freeman note, the POFJ is very much a Canadian construct, not known to international human rights law: Gibran Van Ert & Mark Freeman, *International Human Rights Law* (Toronto: Irwin Law, 2004) ch 7.

<sup>84</sup> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 23.

<sup>85</sup> *B(D)*, *supra* note 72 at para 60.

the overall normative weight or influence of the principle, avoiding any suggestion that a treaty commitment, in particular, might automatically be considered a POFJ. Most recently, in *Kazemi Estate*, the Court stated:

International Conventions may also assist in establishing the elements of the *Malmo-Levine* test for recognition of new principles of fundamental justice (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 10). But not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.<sup>86</sup>

Similarly, the Court has long been willing to take a comparative view on just how “fundamental” a legal principle is—that is, it will look to the laws and legal principles of foreign states to assess whether or not a particular principle meets the POFJ criteria. The Court posited as far back as *Lyons* that POFJs engaged “the basic principles of penal policy that have animated legislative and judicial practice in Canada and other common law jurisdictions,”<sup>87</sup> and stated in *Seaboyer* that POFJs are found “in the legal principles which have historically been reflected in the law of this and other similar states.”<sup>88</sup> In *B(D)* it shored up its understanding of the importance of the principle of diminished moral culpability of young persons with a finding that

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<sup>86</sup> *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 150. The Court has been willing to give a more elevated status to *jus cogens* norms; after a confusing account of whether the prohibition on torture might be a *jus cogens* norm and therefore might inform a POFJ (in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1), in *Kazemi*, at para 151, Lebel J was content to state, “I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law.”

<sup>87</sup> *R v Lyons*, [1987] 2 SCR 309 at 327, 44 DLR (4th) 193.

<sup>88</sup> *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at para 18, 83 DLR (4th) 193.

consensus on the point “exists internationally” and, in particular, that “[t]he most notable aspect of the treatment of youths who offend in Western countries is that every country appears to have laws or policies reflecting the belief that youths should be treated differently from adult offenders.”<sup>89</sup> By contrast, the Court has also been willing to take into account the laws and practices of other states that weigh against a principle being a POFJ, notably in *Lyons* where its finding that indeterminate sentences for dangerous offenders were constitutionally firm was based in part on a survey of statutory and judge-made law from England, the United States, Denmark, and Sweden.<sup>90</sup>

### c) Extradition: “Contextual” POFJs?

Somewhat uniquely, in its extradition jurisprudence the Supreme Court has put forward the idea that there are POFJs that are specific to the extradition context. I say “somewhat” uniquely because the recognition of POFJs that apply with particular force in a specific context is not at all unknown; this is clear from the number of them that have to do specifically with criminal law. However, extradition is a fairly specialized legal regime and one would not normally expect a detailed account of POFJs that applied to one small and discrete area of practice in this way.

Yet this is just what the Supreme Court did in *United States v. Burns*,<sup>91</sup> better known as the case in which the Court decided that extraditing an individual to face the death penalty (i.e. without assurances being provided by the requesting state that it would be not imposed) would

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<sup>89</sup> *B(D)*, *supra* note 72 at para 67.

<sup>90</sup> *Lyons*, *supra* note 87 at paras 28-35.

<sup>91</sup> *United States v Burns*, 2001 SCC 7.

amount to a breach of s. 7—that is, a deprivation of life and liberty not in accordance with the POFJs. The overall ratio of the case is that, if the fate to be suffered by the individual in the requesting state would “shock the conscience of Canadians,” then extradition would amount to deprivation of liberty not in accordance with the POFJs. However, the Court took the opportunity to set out what it called “the applicable principles of fundamental justice in the extradition context.”<sup>92</sup> Some are pro-extradition:

- that individuals accused of a crime should be brought to trial to determine the truth of the charges..., the concern in this case being that if assurances are sought and refused, the Canadian government could face the possibility that the respondents might avoid a trial altogether;
- that justice is best served by a trial in the jurisdiction where the crime was allegedly committed and the harmful impact felt...;
- that individuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents...;
- that extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice...; subject to the principle that the fugitive must be able to receive a fair trial in the requesting state.<sup>93</sup>

However, in the circumstances of the *Burns* case itself, other countervailing principles were identified:

- The criminal conviction of the innocent is wrongful and a miscarriage of justice;<sup>94</sup>
- The death penalty is an inappropriate punishment for crimes in Canada;<sup>95</sup>
- Capital punishment is unjust and should be stopped”;<sup>96</sup>
- Youth of perpetrator is a mitigating factor for criminal punishment.<sup>97</sup>

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<sup>92</sup> *Ibid* at para 68.

<sup>93</sup> *Ibid* at para 72.

<sup>94</sup> *Ibid* at para 2.

<sup>95</sup> *Ibid* at para 77.

<sup>96</sup> *Ibid* at para 84. The Court fleshed out this principle with a survey of international practice indicating that there was “significant movement towards acceptance internationally of” this principle: paras 89, 92.

<sup>97</sup> *Ibid* at para 93.



The Court has since added more POFJs to extradition law; for example, that extradition cannot be granted where the requesting state is abusing the process of the courts,<sup>98</sup> or that committal for extradition requires a fair and impartial hearing before a judge who is empowered to exclude evidence that is “manifestly unreliable.”<sup>99</sup> In *Lake* the Court ruled that a surrender that was “unjust or oppressive” would breach POFJs, as would extradition to face discrimination on a prohibited ground.<sup>100</sup>

What is interesting about the Court’s adoption of extradition-specific POFJs is that they were set out in a highly-internationalized context in which account was taken not only of what foreign states do (i.e., international and comparative law), but where “fundamental justice” had to be understood in the context of Canada’s relations with foreign states and its corresponding safeguarding of its sovereign interests. This has obvious application to the question of whether double criminality is a POFJ and will come up a couple of times in the discussion below.

## **V. Is Double Criminality a POFJ?**

### **a) Is it a Broadly Applicable POFJ?**

I will now turn to the main question being pursued in this paper: is double criminality a POFJ for the purposes of s. 7 of the *Charter*? To ask it a more thorough way, if: an action of the state or the operation of a Canadian law will deprive a person of their life, liberty or security of person; and the deprivation depended upon conduct that was criminal according to the laws of a foreign state; and the application of the state action or law in question did not apply the principle

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<sup>98</sup> See *United States of America v Cobb*, 2001 SCC 19.

<sup>99</sup> See *United States of America v Ferras*, 2006 SCC 33.

<sup>100</sup> *Lake v Canada (Minister of Justice)*, 2008 SCC 23.

of double criminality; then would this amount to a deprivation that was not in accordance with the POFJs, and thus see the action invalidated or law struck down as unconstitutional?

Recall the definition of the principle offered above: in order for a state's legal decision-makers (including but not limited to courts) to give legal cognizance or justiciability to a criminal offence committed in a foreign state, the conduct (alleged or proven) underpinning the offence must also amount to a criminal offence in the forum state. In my view there is little doubt that double criminality meets two of the three criteria for being a POFJ. It is certainly a legal principle that has normative effect, rather than a general precept of public policy. Naturally, it reflects public policy, in the sense that it conveys an attitude of protection of both Canadian sovereignty and fundamental human rights, with implications for foreign policy and foreign relations law among other things. But it is a legal principle, the powerful evidence for which is simply that, as explored earlier, it is used as a legal rule or test—in the common law and/or statutory law in a variety of states, and in international law instruments.

It is also most certainly a principle that is capable of being identified with precision and applied in a way that yields predictable results. This, too, is proven by the existing various uses of double criminality in Canadian law reviewed earlier, where it is employed as a legal test upon which results and outcomes are based. Extradition cannot take place unless double criminality is in place—full stop. Proceeds of a foreign crime cannot be subject to civil forfeiture in Canada unless the foreign offence is also an offence in Canada.<sup>101</sup> A person cannot be excluded from Canada under *IRPA* for “criminality” that took place abroad unless the “criminality” would also have amounted to a crime in Canada.<sup>102</sup> And so on. Granted, there is some variation in the way

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<sup>101</sup> See note 26, above.

<sup>102</sup> See notes 18-19, above.

that double criminality is assessed, depending upon the specific legislative or common law context in which it is used. As pointed out earlier, the law around the *autrefois acquit/convict* pleas is not entirely settled as regards double criminality, and that law is different from the “equivalency” regime under *IRPA*. But distilled to its essence, the “test” is the same. Double criminality, when it is employed, asks a question with a yes or no answer.

The more complex question is whether the second criterion is met: is double criminality “vital or fundamental to our societal notions of justice,” in that it is among a body of legal principles that “find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens?”<sup>103</sup> Is it indeed “fundamental,” in that it “would have general acceptance among reasonable people?”<sup>104</sup> Again, the Court instructs us, much weight is given to whether and how the rule has been used, and its importance within the system.

There is certainly evidence that points to a vital or fundamental quality to the double criminality principle. Admittedly, double criminality relates to a fairly specific issue—evaluation of foreign criminal law against Canada’s, and vice versa—and it is an issue that does not come up every day. However, as *Burns* tells us, POFJs can arise in fairly specific contexts. Many POFJs are in fact quite specific: the right to silence, the right to counsel, the duty of the Crown to disclose evidence to an accused, and the principle of reduced moral culpability of young people in criminal matters only arise in criminal cases. Even something as particular as the bar against interrogation of a youth in custody who is being deprived of procedural rights and knowing the fruits of the interrogation will be shared with U.S. prosecutors has been ruled to be a POFJ.<sup>105</sup>

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<sup>103</sup> *Canadian Foundation*, *supra* note 69 at para 8.

<sup>104</sup> *Rodriguez*, *supra* note 74.

<sup>105</sup> See *Khadr*, *supra* note 84 at paras 24-25.

All of this suggests that the fact that the principle only applies to particular issues and/or in particular kinds of cases and situations is not a bar to its being fundamental.

Moreover, as discussed above, while the double criminality issue itself is a discrete one, it is used across a wide variety of Canadian legal regimes that are by no means all even in the criminal law area (e.g., immigration, civil forfeiture). The main point is that wherever and however the issue of the cognizability of foreign criminal conduct comes up, the double criminality principle is, seemingly, inevitably employed. This persistent use of the principle—by both Parliament and the common law—suggests a consensus that, at least in cases where the issue is whether a foreign criminal law has a Canadian equivalent, there is something fundamental about the principle.

Double criminality appears to be an expression of some fairly fundamental values that inform “the basic norms for how the state treats its citizens.” Traditionally it was an expression of the intense sovereign interest the state had in exerting complete control over what conduct was viewed as “criminal” in nature on its territory, applied in a sort of paternalistic way to protect citizens from the improperly extended arm of a foreign sovereign. In modern times the focus has shifted to the protective effect of the principle for the individual *qua* individual, rather than just as citizen. What is at stake is the protection of human dignity, expressed through a rule that is both procedural and substantive in nature. This fits nicely into the scope of POFJs, which as Professor Stewart notes are meant to encapsulate “values appropriate to a constitutional order that respected human dignity.”<sup>106</sup>

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<sup>106</sup> Stewart, *supra* note 64 at 120.

What is more, in most situations where the rule might be applied, there is a “gut check” quality in play. If one considers that a person could be deprived of life, liberty or security of person for doing something outside Canada that is not a crime in Canada, the gut rebels. Surely our system should give no legal effect, in any context, to foreign “crimes” like apostasy, adultery, engaging in homosexual acts, insulting a political leader, etc. This is quite literally what is at stake in situations where double criminality might be applied.

There is also a powerful argument that double criminality is analogous or related to an already-recognized POFJ, that the innocent not be punished.<sup>107</sup> The life of this intuitive legal principle seems to have begun in the Supreme Court’s decision in *Motor Vehicle Reference*, where the Court found a POFJ that imprisonment cannot be imposed for absolute liability offences, and invoked as evidence for this principle the “longstanding” principle that innocent should not be punished; it described it as “an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law.”<sup>108</sup> Later, in *Leipert*, the Court declared that it had “consistently affirmed that it is a fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted.”<sup>109</sup> It is a powerful thought that “the innocent,” whom we should not punish, would include people whose allegedly criminal conduct in a foreign state is not criminal under Canadian law. In discussing double criminality in the extradition context, the Supreme Court has recognized that the purpose of the principle is connected to protecting individuals who, based on Canadian standards of conduct, have engaged in no real wrongdoing. In *Johnson*, for instance,

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<sup>107</sup> I owe this idea, and indeed some of the text here that advances this point, to Elizabeth Matheson (see note \*, above).

<sup>108</sup> *Motor Vehicle Reference*, *supra* note 66 at para 69.

<sup>109</sup> *R v Leipert*, [1997] 1 SCR 281 at para 24, 143 DLR (4th) 38.

Wilson J cited with authority Shearer’s proposition that the result of the double criminality principle – at least in the extradition context – is that “[t]he social conscience of a State is [...] not embarrassed by an obligation to extradite a person who would not, according to its own standards, be guilty of acts deserving punishment.”<sup>110</sup>

The Court’s direction to look to relevant international and comparative law also yields evidence that there is something vital and fundamental about double criminality. Extradition provides a powerful example. It involves one of the most serious “deprivations of life,<sup>111</sup> liberty and security” in the law—the criminal prosecution of individuals—and we see virtually universal insistence by states on the application of the principle in order for extradition to occur. Aside from being a ubiquitous treaty norm, it is sometimes described as a rule of customary international law,<sup>112</sup> and given how frequently states use it to accomplish various domestic law tasks it may also qualify as a “general principle of international law.”<sup>113</sup> Quite apart from its international law status, the summary of comparative practice by a variety of states above produces a powerful inference that double criminality is the main tool in the evaluation of foreign criminal law under domestic legal regimes of various kinds.

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<sup>110</sup> *Washington (State of) v Johnson*, [1988] 1 SCR 327, 40 CCC (3d) 546 at para 25 (emphasis added).

<sup>111</sup> Life, in that some states still extradite individuals to face the death penalty in foreign states, and it is not yet unlawful under international law to do so.

<sup>112</sup> Torsten Stein, “Extradition” in Rudolf Bernhardt, ed, *Encyclopedia of Public International Law*, vol 8 (New York: Elsevier, 1985) 222 at 224. I am skeptical of this position. Customary international law rules arise from widespread and consistent state practice accompanied by the perception by states that they are legally obliged to engage in/comply with this practice. Double criminality does not fall neatly into this methodology; it is not that states appear to think that they are *required* to apply the rule, it is that they insist on inserting it into treaties. Consideration of this point will play a major part in a book project currently being undertaken by Profs. Boister, Harrington and me: Neil Boister, Robert J Currie & Joanna Harrington, *Principles of International Extradition Law* (Oxford University Press, forthcoming 2027).

<sup>113</sup> I.e., fundamental principles of law derived from the legal systems of a plurality of states, which can be applied by international courts. See Phillip M Saunders & Robert J Currie, eds, *International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond Publishing, 2019) at 45-49.

If there is such a POFJ, it is worth considering what its potential reach or range of application would be; after all, POFJs must be amenable to being applied to a predictable range of situations. First, it is important to recall one important limit: POFJs are purely creatures of s. 7 of the *Charter* and therefore a double criminality POFJ would only apply to situations where a state action or legislation threatened an individual's "life, liberty or security of person." This means that not every situation where the principle is, or could be, applied will attract the constitutional protection. For example, the forfeiture of the proceeds of crime is a civil remedy that results in the deprivation of property or assets, but does not affect the interests set out in s. 7. Similarly, it is at best debateable whether being excluded from Canada under *IRPA* due to "serious criminality" would amount to a deprivation of life, liberty or security of person (the latter might apply to people seeking or who have obtained refugee status), so removing it from that legislation might not be unconstitutional.

Second, the scope of the norm is worth considering. Recall that double criminality seeks to protect both the sovereign interests of the state and important aspects of human dignity, particularly as both are presented, applied and cognizable in Canadian law. Accordingly, there might be situations that involve interaction between or comparison of Canadian and foreign criminal law and do affect life, liberty or security of person, and to which the principle could be applied, but to which the principle would not apply as a POFJ because its application does not serve these interests, or serve them sufficiently. Suppose a Canadian citizen commits sexual offences against children on the territory of a foreign state, which does not criminalize such conduct. The person could be prosecuted in Canada because the *Criminal Code* provides for extraterritorial jurisdiction over such offences,<sup>114</sup> but would it seem "fundamentally unjust" (to

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<sup>114</sup> *Code, supra* note 23, s7(4.1).

leverage s. 7's language) to prosecute them in Canada even though the conduct was not criminal in the place where it was committed—that is, even though double criminality cannot be made out? Surely not. To use another example, under s. 462.31(1) of the *Criminal Code* it is an offence to launder the proceeds of crime. This applies to situations where the proceeds were “obtained or derived directly or indirectly” both from a predicate offence that was committed in Canada and, under s. 462.31(1)(b), from “an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.” In the latter case, an accused might argue that the “proceeds” were generated from conduct that was lawful in the foreign state, and since double criminality is not met it would be unjust to prosecute him from dealing with them as he sees fit in Canada. However, both sovereignty and human dignity concerns defeat the argument. Section 462.31(1)(b) is basically about jurisdiction, and even though he is affected by its operation, it is not a situation where the individual needs to be protected from the operation of a foreign criminal law that is somehow anathematic to Canadian values. Moreover, it is not offensive to human dignity for Canada to define what it considers to be proceeds of crime for the purposes of domestic prosecution.

In the end, the POFJs protect inherently Canadian views on what the fundamental principles of justice might be, and with double criminality the sovereignty and human dignity purposes are intertwined. Accordingly, and while I will admit to not having fully thought out the entire range of hypotheticals and permutations, double criminality could operate as a POFJ if it is limited to evaluating (as proposed here) whether effect can be given to foreign criminal laws and/or their application.

## **b) Why Does it Matter?**



The main point of this inquiry is not one of abstract interest: if double criminality is a POFJ then, in situations where the state could apply the principle and does not, an affected individual could get a constitutional remedy. That is, the courts might strike down either the offending state action or the legislation underpinning it.<sup>115</sup> Accordingly, where the state acted or legislated and did not apply double criminality, or where an existing double criminality protection was stripped out of legislation, the relevant action or law would be vulnerable to constitutional challenge.

It is beyond the scope of this paper to cover the wide variety of scenarios where this might come up, but I will offer a few thoughts. In existing situations where double criminality is already in place, a failure to apply it could invalidate the relevant state action. As a simple example, suppose an accused testifying at trial was cross-examined (under s. 12 of the *Canada Evidence Act*) on his convictions for foreign offences that did not have Canadian equivalents. This would not only breach the common law rule described earlier, but would be a breach of s. 7 and might play some role in having the case sent back for a new trial. A more novel but decisive situation might be in the sentencing context, where if a sentencing decision took into account (as an aggravating factor) conduct for which the individual had been convicted in a foreign state but which was not criminal in Canada, the sentence itself might breach the POFJs.<sup>116</sup> Similarly, foreign criminal convictions are sometimes taken into account when considering bail

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<sup>115</sup> I will not embark here on the question of whether a section 7 breach on the basis of double criminality as a POFJ might, in some situations, be “saved” by section 1 of the *Charter*. This is a rare (though not unknown) occurrence in the case law.

<sup>116</sup> In sentencing matters, where foreign convictions are concerned, the courts seem to apply an implicit double criminality rule, in that when foreign convictions are referred to, they generally have Canadian equivalents. There are occasionally vague invocations; for example, see *R v Froesse-Friessen*, 2011 ONSC 5390; *R v H.(D.)*, 1999 CanLII 12678 (SK KB). For consideration in the Australian context, see David Lanham, “Sentencing and Prior Cross-Border Convictions: Admissibility and Double Criminality” (2003) 27 Crim LJ 23.

applications;<sup>117</sup> should a person be refused bail on the basis of “criminal” activity in a foreign state that did not amount to a crime in Canada? This, too, would be a deprivation of liberty and potentially be caught by a double criminality POFJ.

One notable and internationalized area where the question could arise is in Canada’s provision of mutual legal assistance in criminal matters (MLA) to foreign states, which is typically done pursuant to treaties that are implemented into Canadian law by the *Mutual Legal Assistance in Criminal Matters Act*.<sup>118</sup> Under these arrangements Canada provides various forms of assistance to partner states in the latter’s investigation of crimes, including executing search warrants in Canada, the taking of oral evidence, provision of documents, seizing proceeds of crime, etc. As is increasingly typical internationally, many of Canada’s MLA treaties do not have a requirement of double criminality in order for cooperation to take place,<sup>119</sup> and Canada does not impose a double criminality requirement except for requests to enforce seizure and forfeiture orders.<sup>120</sup> Therefore, it is possible and in fact anticipated by both the treaties and the *MLACMA* that Canadian police could, for example, execute a search warrant and seize evidence that it would then transmit to the requesting state, for the purpose of prosecuting conduct that is not criminal in Canada.

This seems ripe for the application of a POFJ of double criminality, if one exists. As a threshold matter, it seems obvious that s. 7 of the *Charter* applies to MLA proceedings and

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<sup>117</sup> See e.g. *R v Martinez-Mayorga*, 2015 ONSC 559.

<sup>118</sup> RSC 1985, c 30 (4<sup>th</sup> Supp).

<sup>119</sup> See, e.g. Treaty Between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters (1985) CTS 1990 No. 19, in which double criminality is not a basis for refusal of a request. By contrast, art III of the Canada-Mexico treaty ((1990) CTS 1990 No. 34) provides for lack of double criminality as a basis for refusal of a request, but it is not a mandatory ground of refusal and Canada does not invoke it (see *infra*, next note).

<sup>120</sup> Justice Canada, *Requesting Mutual Legal Assistance from Canada: A Step By Step Guide* (Ottawa: Department of Justice Canada, 2013) at 3, online: <<https://www.justice.gc.ca/eng/cj-jp/emla-eej/mlaguide-guideeej.pdf>>.

specifically the sending of the evidence. In extradition cases, the Supreme Court has long been clear that a particular committal or surrender order could breach s. 7 if the accused's fate in the requesting state would "shock the conscience" via human rights abuses; this is so even though that fate would be directly caused by the foreign state itself, since it is extradition from Canada that puts the process into action.<sup>121</sup> The same logic applies to the MLA process, in which Canada is cooperating in a foreign criminal prosecution that has as its goal the deprivation of the liberty of the individual targeted by the investigation. That being so, the obvious question becomes, should Canada be cooperating with foreign states that are investigating and prosecuting for "crimes" that Canada does not consider to be criminal, i.e., where double criminality is not made out?

The argument that this general policy question should be answered "no" has been made in the *MLACMA* case law, albeit without success. In *Commissioner of Competition v. Falconbridge Ltd.*,<sup>122</sup> the Court of Appeal rejected the defence argument that double criminality was required for Canada to respond to an MLA request, simply on the basis that both the *MLACMA* and the relevant treaty appeared to anticipate exactly this.<sup>123</sup> However, the court was sympathetic to the relevant policy concern:

That is not to say that we as a nation should be unconcerned about the prospect of rendering assistance in circumstances where, for example, the foreign law is one that we do not adhere to and find socially or politically unacceptable. On the contrary, the concern is a legitimate one.<sup>124</sup>

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<sup>121</sup> See *Burns*, *supra* note 91.

<sup>122</sup> *Commissioner of Competition v Falconbridge Ltd.* (2003), 225 DLR (4th) 1, 173 CCC (3d) 466 (Ont CA). See also *United States of America v Stuckey* (2000), 194 DLR (4th) 729 (BC CA).

<sup>123</sup> *Ibid* at paras 83-84.

<sup>124</sup> *Ibid* at para 81.

If double criminality is, indeed, a POFJ, then this policy concern becomes converted into a live *Charter* issue, which would suggest a very different result.

### **c) Is Double Criminality a POFJ in the Extradition Context?**

Even if the case for double criminality being a broadly-applicable POFJ is uncertain, the proposition that it is a POFJ in the extradition context seems sound. The Supreme Court has referred to it as a “fundamental principle of extradition law,” pointing out that the principle infuses all three phases of the extradition process, albeit in slightly different ways as shaped by the legislation.<sup>125</sup> Earlier the Court had called double criminality “a fundamental principle of the extradition process,”<sup>126</sup> and pointed out that it is “internationally recognized as central to extradition law” and “a clause in all of Canada’s extradition treaties.”<sup>127</sup> Its history tracks pretty much Canada’s entire modern history of extradition,<sup>128</sup> and thus it seems fairly “fundamental” to questions of how the individual is treated by the state vis-à-vis extradition. In terms of international and comparative law practice, it suffices to recall that there is virtually universal adherence to double criminality in extradition treaties and arrangements, which means that regardless of how it appears in the particular domestic law orders of states, they have all bound themselves to it; the obligation is relaxed only in specialized regimes like the European Arrest Warrant.

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<sup>125</sup> See *M.M.*, *supra* note 13 at paras 10, 14-26.

<sup>126</sup> See *Canada (Justice) v Fischbacher*, 2009 SCC 46 at para 25.

<sup>127</sup> *Ibid* at para 26.

<sup>128</sup> See Anne W La Forest, *La Forest’s Extradition to and From Canada*, 3rd ed (Aurora, ON: Canada Law Book, 1991).

Double criminality also fits nicely into the matrix of extradition-specific POFJs that the Supreme Court has already established. In *Burns*, in particular, the Court noted that “fundamental justice” in extradition depends heavily on notions of comity and mutual respect for sovereignty between states. Double criminality, I suggest, is paradigmatically a function of interstate comity. The fact that states universally accede to having this principle serve as a built-in limitation on extradition available under treaties strongly suggests that they view it not only as desirable from a domestic point of view, but as an acceptable limitation on the otherwise important goals of mutual cooperation in crime suppression. Both the sovereignty and the protection of human dignity functions are at their highest in this setting.

Interestingly, as this paper was being finalized, an extradition decision was released in which the person sought argued precisely this point, that double criminality is a POFJ. In *United States of America v. Nygard*,<sup>129</sup> the person sought challenged extradition in part on the basis that the Minister had surrendered him to face racketeering charges in the U.S., for which he said double criminality was not made out. Part of this argument was based on the position that double criminality was a POFJ and thus the Minister had no authority to surrender anyone where it was not satisfied. The unanimous panel of the Manitoba Court of Appeal essentially declined to consider the argument, noting that it was “academic” in the circumstances of the case and that a proper record had not been established. However, the Court of Appeal did note that, at least according to one authority, “universal international consensus” on how the double criminality principle is used was lacking;<sup>130</sup> the fact that the EAW regime removed or diluted double criminality requirements showed that “views on the...principle are not universal in the modern

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<sup>129</sup> *United States of America v Nygard*, 2024 MBCA 37.

<sup>130</sup> *Ibid* at paras 152-153.

era in democratic states committed to human rights and the rule of law.”<sup>131</sup> Moreover its use in Canada reflected a policy choice on the part of the government that could be subject to change in the future, particularly given that it had never been a constitutional or common law principle but rather a creature of “treaties and/or statute.”<sup>132</sup>

With respect, the Court’s musings are not entirely convincing. So far as the role that international and comparative law might play as evidence for the existence of a POFJ, “universal international consensus” is not the standard (and is probably an impossible one, to boot). The fact that certain small groups of like-minded states have chosen to relax the applicability of double criminality to carefully-selected offences hardly at all dilutes the otherwise ubiquitous use of the principle as a hard requirement of extradition. To be sure, constructions of the contours or applicability of the principle in domestic law regimes will certainly vary, with some according it more importance than others, but for the purposes of how it informs whether a Canadian POFJ exists this is less important. Nor do the principle’s origins in statute and treaty preclude an evaluation of whether it might nonetheless be constitutionalized; the issue is the “fundamental justice” of requiring double criminality as a precondition for extradition. It is worth recalling that, for this specific purpose at least, the matter can be boiled down to a simple question: should Canada extradite people to face criminal prosecution for conduct in a foreign state that Canada, itself, does not view as being criminal? This is the point on which the “gut check” mentioned earlier points strongly to there being something quite “fundamental” about double criminality. In all fairness to the Court of Appeal, it very wisely pointed to the lack of a sufficient record to do

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<sup>131</sup> *Ibid* at para 156.

<sup>132</sup> *Ibid* at para 153.

justice to the question. If such a case arises in the future, the opposite view might very well prevail.

## **VI. Conclusion**

In this paper I have argued that, based on applying the Supreme Court of Canada's framework for identifying "principles of fundamental justice" under s. 7 of the *Charter* to the available evidence, there is a strong argument that the principle of double criminality is a POFJ of general application. Moreover, in my view there is a particularly compelling argument that double criminality is a POFJ in the discrete context of extradition law and practice. I am cognizant that the space and word count required to make these arguments sensibly has prevented me from considering counter-arguments to any meaningful extent. The discussion is by no means exhausted and there may very well be counter-arguments to consider and analyze. Moving away from Canadian law, I think international and comparative law on point provides some very fertile ground to explore for future research. States use double criminality so frequently, and across such a wide variety of contexts, that its status as a rule with some resonance under international law seems highly worthy of inquiry. All of this will have to wait for another day and another paper.