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Criminalising Migrant Smuggling in Canada
La criminalisation du trafic de migrants au Canada
La criminalización del trafico de migrantes en Canadá

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Résumé de l'article

La migration irrégulière est perçue par la communauté internationale comme un enjeu sécuritaire. La criminalisation de l'immigration devient alors un outil de contrôle migratoire et de sécurisation des frontières. Au cours des dernières années, le Canada a adopté une approche punitive et un recours plus important à la criminalisation de l'immigration irrégulière, avec des peines pouvant atteindre l'emprisonnement à vie. Paradoxalement, malgré un renforcement normatif, dont l'adoption de peines minimales obligatoires et l'augmentation des peines maximales, les tribunaux canadiens imposent aux passeurs des peines d'emprisonnement de courte durée et généralement des peines d'emprisonnement avec sursis à purger dans la collectivité. Le présent article présente les résultats des analyses législatives et jurisprudentielles relatives au trafic de migrants au Canada. Les résultats démontrent que les peines octroyées par les tribunaux ne sont pas proportionnelles aux discours politiques et médiatiques alarmistes à l'égard de la menace que représente l'organisation de l'entrée illégale.

Criminalising Migrant Smuggling in Canada

Estibaliz Jimenez

Abstract

Irregular migration is seen by the international community as a security issue and the criminalization of immigration has become a tool for migration control and border security. In recent years, Canada has taken a punitive approach toward irregular immigration and increasingly relies on criminalization to deal with it, adopting more severe penalties, including life imprisonment. Paradoxically, despite tougher legislation that includes mandatory minimum sentences and increased maximum sentences, Canadian courts tend to give migrant smugglers short-term prison sentences or conditional sentences that are served in the community. This paper presents the results of a legal analysis relating to the smuggling of migrants in Canada. The results show that sentences given by the courts are not proportional to the political discourse and alarmist messages in the media regarding the threat posed by the smuggling of migrants.

Keywords

Smuggling in migrants, border securitization, criminalization, legal analysis.

Introduction[1]

In recent years, irregular migration has led to debates in the United Nations, the European Union, and North America about organized transnational crime, migrant smuggling, and the slave trade. Governments continue to create laws, conventions, and bilateral and regional agreements to deal with migration issues (Jimenez, 2009a, 2019b, 2010a).

[1] Original article published in *Criminologie, La criminalisaiton de l'immigration*, vol. 46, no1, Spring 2013. Jimenez, E. (2013). La criminalisation du trafic de migrants au Canada. *Criminologie*, *46*(1), 131-156. https://doi.org/10.7202/1015296ar

The Canadian parliament has also expanded its legislation in the field of immigration and criminal law. The *Immigration and Refugee Protection Act* (IRPA), adopted in 2001, increased the penalties for organizing illegal border crossings but jurisprudential analysis demonstrates that, despite increased social concern and heightened maximum penalties, Canadian courts tend to deal with migrant smugglers through short term imprisonment and conditional sentences carried out in the community.

The present article is divided into two parts. The first part presents analysis of international and national legislation dealing with migrant smuggling. The second part describes the result of jurisprudential analysis related to such legislation.

Problematizing Immigration

We live in a context where securing borders has become a priority for numerous countries (Bigo, 2005, 2007). This idea is behind the process of problematizing immigration in Western countries, where identifying immigration as an existential threat is used to legitimize recourse to exceptional measures to counter the problem. Immediately after the attacks of September 11, 2001, and the increased fears of terrorism they created, Western countries adopted antiterrorist and immigration laws that privileged the paradigm of national security to the detriment of the protection of fundamental rights, particularly those of migrants. In the name of national security, they tightened control over immigration and intensified measures to maintain border control (Crépeau and Jimenez, 2002; Bigo, 2005, 2007; Crépeau and Nakache, 2006; Crépeau *et al.,* 2007, 2009; Jimenez, 2010a, 2010b; Lowry, 2002). Security within sovereign territory is now presented as necessitating the closing of national borders to protect citizens from the threat of terrorism, which is seen as originating from outside. This approach tends to reinforce the generalized, and highly mediatized, association between migrants, refugees, and terrorists (Crépeau and Jimenez, 2002; Jimenez, 2010a, 2010b). The tragic events of September 11 are thus manipulated (Jimenez, 2010a, 2010b), a manipulation in which Canada participates through a policy toward migrants that emphasizes security and defense (Macklin, 2001; Crépeau and Jimenez, 2002; Crépeau and Nakache, 2006; Crépeau *et al.,* 2007, 2009; Jimenez, 2010a, 2010b).

International and National Criminalization of Migrant Smuggling

This article presents the results of legislative and jurisprudential analysis of Canadian provisions to criminalize irregular migration. Our legislative analysis looks at both international and Canadian legislation related to migrant smuggling.

International criminalization of migrant smuggling

Although there is some debate over whether organized criminal groups are active in migrant smuggling (Finckenauer and Waring, 1998; Skeldon, 2000; Chin, 2000, 2001; Koslowski, 2001; Kyle and Liang, 2001), the prevalent view among politicians, law enforcement organizations, and legislators is that there are close ties between migrant smugglers and criminal groups. The link between migrant smuggling and organized crime is used to legitimize and justify, among other things, the struggle against irregular migration (Jimenez, 2010a) and led the international community to adopt the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*[2]. In order to accelerate prosecution procedures and eliminate refuge for smugglers, counties that are party to the *Protocol Against Smuggling* are required to punish migrant smuggling and to establish criminal offences for the "criminal smuggling of migrants[3]." The protocol mandates incrimination both for ensuring illegal entry – "smuggling" (art. 3 and art 6.1 [a]) – and for facilitating residence by illegal means (art. 6.1 [c]). It also obliges signatory countries

[2] The *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,* adopted on November 15, 2000 and effective January 28, 2004. Accessed February 4, 2013 http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_smug_french.pdf [Hereafter *Protocol Against Smuggling*].

[3] See *Protocol Against Smuggling*, art. 6.

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
(a) The smuggling of migrants;
(b) When committed for the purpose of enabling the smuggling of migrants:
(i) Producing a fraudulent travel or identity document;
(ii) Procuring, providing or possessing such a document;
(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

to criminalize the act of "producing a fraudulent travel or identity document; [and p]rocuring, providing or possessing such a document" (art. 6.1 (b)).

The signatory countries of the *Protocol Against Smuggling* undertake to enforce their national legislation and to criminalize the clandestine introduction of migrants, as well as to cooperate internationally in maintaining such measures. One of the objectives of the Protocol is to criminalize instances of smuggling and to ensure that punishments for smugglers are sufficiently severe that they act as a deterent.

Canadian criminalization of migrant smuggling

Canadian authorities estimate that during the period from April 1, 2010 to March 31, 2011, 44,000 irregular migrants were being sought for deportation, including 4,615 who had sought asylum in Québec (Meunier, 2012). In 2010, according to the Canadian Border Services Agency (CBSA), 23,167 irregular migrants entered Canada (Meunier, 2012). Of these, 810 came by boat, 623 more than in 2009. (The 2010 arrival of the *Sun Sea* in Vancouver with 500 asylum seekers contributed to this increase (Meunier, 2012)). On the other hand, the number of irregular travellers arriving by plane with false documentation decreased. Between January 1, 2005, and July 1, 2011, Canadian customs officers intercepted 14,883 illegal immigrants carrying counterfeit travel documents (De Pierrebourg, 2011).

On December 31, 2000, Canada signed the *Protocol Against Smuggling* and the *Protocol to Prevent Trafficking in Persons*, which was ratified on May 13, 2002 (Canada, 2002). Irregular migration and migrant smuggling were criminalized in the Criminal Code and the *Immigration and Refugee Protection Act* (IRPA).

The Canadian Criminal Code deals with numerous offences related to irregular migration, migrant smuggling, and the slave trade and establishes as criminal offences the production or use of a passport, citizenship certificate, naturalization certificate, or false document for fraudulent purposes (art. 57 [1], [2], [3], 58 [1], 366, 367, 368). In addition, the Criminal Code increases the punishment when the offence is committed for the benefit of or under the direction of a criminal organization (art. 718.2).

The Immigration and Refugee Protection Act (IRPA*), the instrument of choice for criminalizing migrant smuggling*

In keeping with an approach that emphasizes security and closing borders, the Canadian government has chosen to combat and punish irregular migration and migrant smuggling, notably through the IRPA. The previous *Immigration Act* included severe sentences for people convicted of clandestine activity related to migrant entry and related activities, with a maximum sentence of ten years' imprisonment in accordance with provisions 94.1 and 94.2. In 2001, only three weeks after the September 11 attacks, the IRPA, which provides for an extensive reform of federal law on immigration, was approved. The new act strengthens measures designed to inhibit the arrival in Canada of those without the required documents. A number of offences were listed and penalties were increased for some infractions that had been part of the previous system, such as organizing clandestine entry (article 117), shipping people by sea (article 119), advising someone to make a false declaration (article 126), and making a false declaration in order to immigrate to Canada (article 127).

The heavier sentences for clandestine crossing include life imprisonment and fines of up to a million dollars and permit confiscation of the property of illegal immigrants and people smugglers. It also notes two aggravating factors that the court must take into account in determining punishment (article 121): whether

- the offence was committed to benefit, on behalf of, or under the direction of a criminal organization or a terrorist group or an associated body;
- in perpetrating the offence, the accused put the life or the safety of the illegal immigrant in danger or caused the injury or the death of one or many illegal immigrants.

On June 29, 2012, the government adopted the controversial bill C-31, *Protecting Canada's Immigration System Act*, which allows Canada, among other things, to define the arrival of certain groups as irregular and facilitate the pursuit of people smugglers; to accuse owners and ship operators of participating in people smuggling; and to make

possible the mandatory detention of migrants and asylum seekers who arrive irregularly. The amendments also provide for a progressive increase in mandatory minimum imprisonment depending on the number of persons brought into the country illegally and the presence of aggravating factors (Canada, 2012).

The increases in penalties were intended to send a clear message to anyone tempted to engage in activities that facilitate illegal entry of migrants into Canada. In particular, the government made a deliberate and calculated choice to criminalize migrant smuggling through the IRPA rather than the Criminal Code. Under the Criminal Code, no one can be found guilty of a criminal act unless the court is convinced, beyond reasonable doubt, that the accused is guilty of the offence charged. The administrative courts that operate under the IRPA, such as the Immigration and Refugee Board of Canada (IRB), have no such restriction, making it easier to declare someone guilty of trafficking.

As a party to the *Protocol Against Smuggling,* Canada is responsible for meeting its commitments. However, while Canada has used international tools to combat migrant smuggling and organized crime, its actions have been even more repressive than those required by the Protocol.

Canadian legislation is more punitive than that required by the Protocol Against Smuggling

There are many important differences between international and Canadian legislation. First, the *Protocol Against Smuggling* is applicable only when "an organized criminal group" is involved (art. 4), as opposed to the IRPA, which requires only that "one knowingly organizes" (art. 117). Canada can therefore impose severe penalties on individuals operating outside a criminal organization.

Second, the criterion "financial advantage or another material advantage" (art. 3) was deliberately introduced into the definition of trafficking in the Protocol by the participating states in order to highlight their intention to punish only the lucrative activities of organized criminal groups. But in Canada, if "the offence was profit-motivated, whether it was carried out or not" (art. 121[1] [c]), the Court must consider

this as an aggravating circumstance and not as an essential and constitutive element of the crime of trafficking. The law also allows for severe punishment for individuals who are not motivated by material gain but by humanitarian concerns. Last, article 5 of the Protocol provides for immunity for migrants and those who help them voluntarily; the Protocol does not criminalize the smuggled migrants. However under the IRPA only migrants recognized as refugees are exempt from prosecution (art. 133).

Canadian law, unlike the *Protocol Against Smuggling,* punishes those who are not members of criminal organizations. Family members or supporting groups, such as religious or non-government organizations who assist migrants for humanitarian reasons, run the risk of being very severely punished. It is important to note that Canada does not grant smuggled migrants penal immunity and, as a result, they are liable for severe punishment. On January 11, 2012, the Supreme Court of British Columbia[4] ruled that article 117 of the IRPA violates the *Canadian Charter of Rights and Freedoms* because it criminalizes humanitarian acts aimed at protecting refugees.

Methodology

This article focuses on the way in which the many provisions in international and Canadian legislation relating to irregular migration and migrant smuggling are applied in Canadian courts. The jurisprudential analysis includes a review of legal jurisprudence relating to decisions made by Canadian criminal courts (see appendix 1). The decisions analyzed were collected using Quicklaw, a database related to Canadian jurisprudence. Different key phrases, such as "people smugglers" and "illegal entry", were used to locate relevant decisions[5]. Nineteen decisions concerning migrant smuggling in Canada,

[4] *R. c. Appulonappa, [2013] BCSC 31*.

[5] *R. c. King Fong Yue*, [1991] Ontario Provincial Court; *Mahmood c. Canada,* [2000] A.C.F. no 608 (C.F. 1ère inst. Ont.); *R. c. Chowdhury,* [2000] R.D.S.D. no 171, R.J.P.Q. 2000-171, J.Q. no 1004 (C.Q. Qué.); *Chowdhury c. R..,* [2002] J.Q. no 1597 (C.A.Q. Qué.); *Chowdhury c. R.,* [2002] R.D.S.D. no 92, JCPQ 2002-9 (C.A.); *R. c. Damani,* [2003] O.J. no 5493, [2004] C.C.S. no 7615 (Ontario Court of Justice); *R. c. Kadri* [2004] O.J. No. 5018; *R. c. Mendez,* [2004] O.J. no 5733 (Ontario Superior Court of Justice); *R. c. Tongo,* [2002] B.C.J. no 2458 (BC Prov. Ct. J.); *R. c. Graca,* [2003] O.J. no 2560 (Ontario Court of Justice); *R. c. Graca,* [2003] R.C.S. no 8676, O.J. no 2560; *R. c. Li,* [2001] B.C.J. no 748 (British Columbia Supreme Court); *R. c. Li, Chen and Liu,* [2002] 162 C.C.C. (3d) 360 (Ontario Court of Appeal); *R. c. Li,* [2002] O.J. no 438 (Ontario Court of Appeal); *R. c. Xu,*[2001] O.J. no 5864 (Ontario Superior Court of Justice); *R. c. Chen,* [2001] B.C.J. no 2983 (British Columbia Supreme Court); *R. c. Muhme,* [1992] N.S.J. no 125. (Nova Scotia Provincial Court); *R. c. Roo*, unreported, (Ontario Court of Justice); *R. c. Balchand,* [2002],

handed down in a variety of courts and courts of appeal in different Canadian provinces, were studied. This methodology was employed to achieve two research objectives. First, we wanted to determine what courts see as the effect of the threat of and negative impacts of migrant smuggling and irregular migration on Canada. Second, we hoped to discover how the laws regarding migrant smuggling and associated offences are applied and what sort of judicial decisions result.

Research results

The punishments are not proportional to alarmist discourse

Criminal courts have adopted an alarmist rhetoric about migrant smuggling and the Canadian parliament has expressed concern about the seriousness of the problem of migrant smuggling in Canada. Migrant smuggling is consistently presented in Canadian criminal courts as a serious criminal activity that has important negative effects that necessitate severe punishment. This legislative attitude is reflected in several court decisions: *R. c. Damani*[6], *R. c. Muhme, R. c. Xu, R. c. Li, R. c. Mendez, R. c. Kadri*.

> The I.R.P.A was a strong response by Parliament to a growing problem of illegal migration of persons into this country. Part 3 recognizes the role of organized crime and persons who would profit from such activity and establishes severe penalties which are considered to be aggravated by profit, by involvement of organized crime and by the inhuman treatment of the migrants, including humiliation, degradation, death or bodily harm. (*R. c. Tongo*[7])

> This is clearly a serious crime. Parliament has re-emphasized this point with new legislation and accompanying increased maximum penalties. The legislation referred to in Court is directed at immigration and security. In addition, as with basically all areas of criminal law, the fact that this is a conspiracy, in other words, a group of people organized to commit this offence, is of great concern. (*R. c. Kadri*[8])

unreported, (Ontario Court of Justice); *R. c. Graprasad and Samaroo,* [2003] unreported, (Ontario Court of Justice).

[6] *R. c. Damani,* [2003] O.J. no 5493, [2004] C.C.S. no 7615 (Ontario Court of Justice).

[7] *R. c. Tongo,* [2002] B.C.J. no 2458 (BC Prov. Ct. J.).

[8] *R. c. Kadri* [2004] O.J. No. 5018.

The court has noted a number of negative effects connected to migrant smuggling. First, migrant smuggling has become a very lucrative business. The increased profitability of the crime, which involves low risk and high profit for the smugglers, is seen as the reason behind the increase in migrant smuggling, particularly as rewards from migrant smuggling may be greater than those from the drug market.

> Smuggling of human beings has been described as the crime of the '90's. It has become so profitable that individuals involved in the drug trade are now switching to this type of smuggling. The profits are as high and to date, penalties imposed have not been severe. … It is the Crown's contention that a clear and unmistakable judicial message must be sent out to those who would engage in trafficking of humans for profit. (*R. c. Muhme*, Michel Paré, prosecutor, for the prosecution)

> There are larger profits to be derived from immigration smuggling than from drugs. There is minimal risk, and the prison sentence is generally lower than for drug offenses. The proof is generally difficult. There is a never-ending supply of people to serve. (*R. c. Xu*)

The scale of the problem, as well as the number of immigrants involved, is also of great concern (*R. c. Xu*). Migrant smuggling is widespread and the seriousness of the problems it presents requires an international response, including signing the *Protocol Against Smuggling:*

> There is increasing international concern about the global problem of trafficking in people, where vulnerable people are exploited and exposed to dangerous circumstances. In fact, subsequent to this offence, Canada became a signatory to the United Nations Protocol Against Migrant Smuggling. *(R. c. Li)*

Since the attacks of September 11, illegal immigration has often been associated with terrorism. This association is found both among the public and in the courts (*R. c. Xu*). The arrival of boatloads of migrants has also led to public outrage: "the defendant has made himself wealthy by taking advantage of the misery of human beings who seek better living conditions" (*R. c. Chowdhury* [our translation]).

The courts see organizing the entry of people to Canada without valid travel documents as a serious problem that requires equally serious punishment.

The contradiction between repressive discourse and the severity of punishment

Normative analysis demonstrates that the IRPA increases measures designed to recognize the severity of the problem and provides for stronger enforcement of the law for individuals attempting to circumvent it. Our jurisprudential analysis examines how this legislative severity is expressed in the courts (see appendix).

Criminal courts and the attempt to deter trafficking

Jurisprudential analysis makes it possible to identify the penological goals that form the framework for dealing with organizations organizing illegal entry.

The purposes of punishment are denunciation and deterrence of migrant smuggling

The courts are attempting to send a clear message that illegal entry into Canada is unacceptable and involves penalties both for those who attempt to migrate to Canada illegally (*general deterrence*) and those who profit from the trade in illegal immigration *(special deterrence)* (*R. c. Mendez, R. c. Kadri* and *R. c. Damani*).

> The Crown argues that general deterrence is the issue and that sentencing in this case must send a message to the international community that Canada is not receptive to persons who would engage in this activity. (*R. c. Tongo*)
>
> It is necessary to send a clear message, not just to this individual but to others who might be tempted to involve themselves in this kind of misconduct. … And to a certain extent, any severity or harshness in sentencing today is going to send a message to others. (*R. c. Graca*)

In *R. c. Muhme,* the prosecutor's sentence recommendations were intended to have a deterrent effect and included imprisonment as well as a substantial fine that would have directly undermined the financial gains that were the goal of the activity. In this case, the judge recognized that the Sikh migrants had already paid more than $122,000 and imposed a sentence of 15 months imprisonment and a $5,000 fine.

In *R. c. Li*, which was handled under the previous law, Judge Stromber-Stein sentenced the smugglers to prison, a decision that was also intended to deter migrant smuggling.

> The growing trade in people smuggling must be deterred because it adversely impacts on all aspects of Canadian society. … This Court has an interest in stemming the flow of illegal migrants from Fujian Province by discouraging other like-minded individuals who consider participating in another highly profitable people smuggling enterprise. It is imperative that the message be conveyed that the Courts will not condone such activity. A sentence of four years is appropriate in all the circumstances.

Weighting factors in migrant smuggling offences

Article 121 of the IRPA provides for increased punishment if the victim was subjected to humiliating or degrading treatment related to working or sanitary conditions, was the victim of sexual exploitation, or if the act was done to earn a profit or to benefit a criminal organization.

Judicial analysis demonstrates that the courts take many circumstances into consideration, particularly the nature of the crime, the impact and consequences of illegal immigration, the role played by the accused, the time over which the crimes were committed, the conditions and treatment suffered by the migrants, and the involvement of criminal organizations and the degree of planning behind their actions. The *R. c. Li* decision is an important reference for decisions relating to migrant smuggling (*R. c. Chen, R. c. Tongo, R. c. Mendez, R. c. Damani*). Ruling under the former law, Judge Stromber-Stein imposed a four-year prison sentence on three people accused of organizing, helping, or encouraging the entry to Canada of a group of 190 people who did not possess valid travel documents. This decision was related to those involved with the third of four boats transporting immigrants from China, which arrived on the coast of Vancouver in 1999.

> The appropriate sentence will reflect the nature and the gravity of the offence. The aggravating features loom large. This was obviously a lucrative criminal operation with financial gain as the motive. Each passenger owed $30 to $40,000 U.S. … It is an aggravating factor that the illegal migrants were brought to Canada in an

> unsafe, unseaworthy, unsanitary vessel, suffering deplorable conditions and being provided with inadequate food and water which was rationed. In addition to navigating treacherous waters in the dark, the bow of this unsafe vessel was badly damaged in a storm, probably a typhoon. There is evidence there were weapons on board the vessel - a gun and a knife - and evidence the gun was used to force compliance from at least one passenger. The illegal migrants were total strangers, with no connection to each other or to Canada.

In another case, *R. c. Damani*, decided under the IRPA, Judge André described the following aggravating circumstances:

1. The scheme was well-planned and orchestrated;
2. It was a financial operation designed exclusively for pecuniary gain;
3. It was perpetrated over a significant time period and involved the smuggling of a large number of illegal aliens;
4. It violated the immigration laws of a number of countries;
5. It jeopardized the chances of legitimate immigrants or genuine refugees seeking a safe haven in Canada or the United Stated;
6. It exposed both the United States and Canada to the risk that dangerous individuals would gain surreptitious entry into these countries;
7. It harmed Canada's reputation by fostering an impression or belief that the country may afford a safe passage or conduit for illegal aliens intent on going to the U.S.;
8. The scheme imposed a severe burden on government resources, particularly those involving surveillance, processing of false refugee claims, and prosecuting persons involved in such nefarious schemes;
9. Mr. Damani played a significant role in the conspiracy.

The treatment of migrants and travel conditions during smuggling

Unsanitary conditions, insecure means of transport, lack of food and water, and danger (*R. c. Li*) are considered aggravating circumstances. The signatory countries of the *Protocol Against Smuggling* took special note of migrant smuggling by sea (art. 6-7) owing to the increased risk involved in this means of transport for migrants. The

vulnerability and increased risk of migrant victimization in transport by boat is also reflected in Canadian decisions:

> It is an aggravating factor that the ship was unsafe, unseaworthy, unsanitary, and I agree that is the case here. When these accused decided to participate in this for some kind of a benefit and privileges to themselves, they were participating in a program in which a number of other people lived in deplorable conditions and which, as we know on the evidence, one person died be decision when she became ill there was simply no possible way to get any medical aid for her. (*R. c. Chen*)

The spatial dimensions and sanitary conditions of migrant confinement are also important factors. In *R. c. Muhme,* the defence lawyer refers to the ship *Amelie* in assessing the aggravating circumstances.

> First of all, the *Amelie* transported 174 people. Secondly, the people on board the *Amelie* lived in abject poverty; they lived in the holds of an old cargo ship. It was unclean, it was never cleaned during passage. There was limited food available. There were no toilet facilities and the passengers were not permitted to see the light of day during the voyage.
>
> The degree of accountability of the accused

The degree to which the accused were involved in the organization of illegal entry is taken into account in deciding punishment. Jurisprudential study makes it possible to distinguish the different roles: “substantial player . . . a person who is a cog in the wheel of trafficking in human beings and they’re attempting to come in by illegal means into the country” (*R. c. Muhme*), “The success of the operation depended upon their participation . . . each accused played a pivotal role (*R. c. Li, R. c. Chen*)”, “the accused was a ‘bit player,' rather than a ‘key player.' Defence argues that he is certainly not a ‘directing mind’ of the conspiracy” (*R. c. Xu*), “but it really was a non-essential role” (*R. c. Kadri*).

> I am satisfied that these two accused were far from being involved in any high level organization here. They were limited, in exchange for possibly a discount and some minimal privileges, to doing what they could to help everyone else on the ship make it across the Pacific without starving or getting into further

> difficulty. In that sense, they were pivotal, they were very important to the voyage and that activity of organizing in that sense and of aiding and abetting in this scheme is what is prescribed by the law and must be prescribed by the law. (*R. c. Chen*)

The extent of the criminal organization's involvement

The extent of planning and organization by the criminal organization is a factor in determining punishment (*R. c. Chen and R. c. Graca*), conforming to the principles for determining punishment and aggravating circumstances set out in the Criminal Code (art. 718.2).

> Relatively sophisticated planning and organization was required to undertake this people-smuggling operation. The vessel had been equipped with relatively sophisticated communication and electronic equipment, some which could be used to avoid detection, most which was obviously thrown overboard before the boat was apprehended. (*R. c. Li*)

> The aggravating factors noted by the Court are the duration during which the crimes were committed, that it was not a one-off crime but rather a way of life, that it was a well-established organization with quite sophisticated methods (*R. c. Mozid Chowdhury* [our translation]).

Refugees as smuggled migrants

The fact that the migrants being smuggled are refugees can constitute an extenuating circumstance (*R. c*. *Kadri* and *R. c. Damani*). Many Canadian judges take into account the fact that the actions of the accused may have saved people who were in danger in their home country.

> As for the mitigating factors, the Court takes into account the argument that the actions of the defendant may have allowed certain people to come to Canada when they were in danger in their home country (*R. c. Mozid Chowdhury* [our translation]).

This reflects the understanding and awareness of judges concerning the phenomenon of forced immigration and the recognition that refugees may not have an

alternative to an irregular approach as a way to achieve protection in Canada (Jimenez, 2009b).

Sentences given in the criminal courts contradict the deterrent aim

The jurisprudential analysis of 19 decisions relating to migrant smuggling shows that the punishments imposed by the courts after the introduction of the new legislation seem to be less severe than those under the previous law, the *Immigration Act*, despite the increase in punishment for illegal entry into Canada under the IRPA. Under the previous system, the judges often imposed custodial sentences of three or four years (*R. c. Chowdhury, R. c. Li, R. c. Min, R. c. Chen*)**.** Only in one case did the judge order a sentence of conditional imprisonment (*R. c. Balchand*)**.** Under the IRPA, the courts imposed shorter prison sentences, often of less than a year (*R. c. Graca, R. c. Bello, R. c. Tongo*), and these were generally conditional imprisonment sentences to be carried out in the community. This occurred despite the fact that the majority of the accused were members of criminal organizations involved in migrant smuggling that had, on many occasions, facilitated the illegal entry of a group of more than ten migrants.

Although political, parliamentary, and judicial speech denounces the nature and seriousness of migrant smuggling, in practice the sentences provided under the IRPA do not reflect the severity that had been expected under the new law. There is therefore a lack of correlation and proportionality between perceptions of the seriousness of migrant smuggling and the punishment given to those found guilty of such acts. Two cases illustrate this paradox.

Case study of *R. c. Kadri*[9] and *R. c. Damani*[10]

These two decisions relate to the same experience, organized by the migrant smuggling network of a criminal organization that had at least 19 members and had been operating for some time. The decisions established the transnational nature of the organization, which brought migrants from South Asia, India, and Pakistan to Canada before illegally

[9] *R. c. Kadri* [2004] O.J. No. 5018.
[10] *R. c. Damani* [2003] O.J. No. 5493.

transporting them to the United States. Around 300 migrants were involved. Each migrant paid up to $40,000 USD for transportation to North America, earning the organization millions of dollars. It was therefore clear that a transnational criminal organization, as defined in the *Protocol Against Smuggling* and by Canadian legislation, particularly the Criminal Code and the IRPA, was involved. This was the first time that the law on belonging to a criminal organization according to the Criminal Code had been applied to a network of people smugglers and resulted in arrests. The Royal Canadian Mounted Police (RCMP, 2001) invested resources and time in a collaboration with other police, including American police, to eliminate this network of people smugglers. The police operation was a response to the seriousness and threat that the migrant smuggling phenomenon seems to represent.

The judicial framework

The activities cited in this case were offences punishable under different Canadian provisions. Under IRPA, article 117: "Organizing clandestine entry" is punishable by a jail term with a maximum of life imprisonment as well as a maximum fine of one million dollars if there are aggravating circumstances such as described in article 121 (2): "if the act was done for the profit of the benefit of a criminal organization". It is also punishable under the Criminal Code, according to articles 461.1 (1) "criminal organization," 467.11 (1) "participation in the activities of a criminal organization," (465) (1)(c) "conspiracy," 465 (3) "conspiracy to commit an offence overseas" with aggravating circumstances noted in article 718.2 (iv) "offence committed for the profit or under the direction of a criminal organization or in association with one is considered an aggravating circumstance."

The verdicts

In *R. c. Kadri,* the accused faced various charges, including conspiracy under American immigration laws and illegal participation in the activities of a criminal organization, contrary to article 465 (1)(c) of the Criminal Code. During the sentencing, Judge Hawke of the Ontario Justice Court raised a number of important points that were not compatible

with a sentence of conditional imprisonment. First, he outlined the seriousness of the negative impacts of the offence and the deterrent aim of the law:

> I will first deal with the elements militating against a conditional sentence. The first one is the gravity of the offence. This is clearly a serious crime. Parliament has re-emphasized this point with new legislation and accompanying increased maximum penalties. The legislation referred to in Court is directed at immigration and security. In addition, as with basically all areas of criminal law, the fact that this is a conspiracy, in other words, a group of people organized to commit this offence, is of great concern. Returning to the immigration and security issues, activities such as this have a negative impact on legitimate claimants and on relationships with other countries, including our important neighbour to the South.
>
> The second element militating against a conditional sentence is general deterrence. It really is an overriding principle in matters of this nature. Qualitatively, actual jail is perceived as more severe punishment. The principle of general deterrence is reinforced by the penalties in the new Act. It is clear that Parliament and the Courts are endeavoring to send a message, both nationally and internationally, that these matters are to be taken seriously and will be met with serious consequences.

Despite this, the judge concluded that Kadri had not played a leading role in the criminal organization. In addition, from a restorative justice approach and with the goal of the individual's rehabilitation and accountability, Judge Hawke favoured conditional imprisonment. Kadri was sentenced to 160 hours of community service with curfew. The judge considered that the period of 66 days that Kadri had passed in detention equated to four and a half months of this sentence.

Damani also faced charges of conspiracy under American immigration laws, illegal participation in the activities of a criminal organization, and possessing incriminating evidence (art. 465 [1][c] and [3] of the criminal code). Damani pleaded guilty to the accusation of breaching Article 117 of the IRPA. The judge acknowledged the seriousness of the offence and indicated that he wished to send a clear message to those tempted to circumvent American and Canadian immigration laws. He also noted the many aggravating circumstances, including but not limited to the lucrative, transnational, and sophisticated nature of the offence and the number of illegal migrants involved in the transaction (300). The 14 months spent on remand were held to be the

equivalent of three years of community service and the accused was sentenced to 12 additional months of community service.

In the cases of both Kadri and Damani, the charges were serious, the documentary evidence solid, and all aspects of the cases suggested that punishment could be used to send a message of denunciation and deterrence. Instead, the defendants received a sentence of conditional imprisonment to be carried out in the community, based on article 742.1 of the Criminal Code which permits this sentence when the court is convinced that carrying out the punishment in the community will not put community members in danger.

It is paradoxical that, despite an increase in negative normative views and the goal of more severe penological punishment for migrant smuggling, a person found guilty of being a member of a transnational criminal organization and involved in the illegal passage of 300 Indian and Pakistani migrants to Canada and the United States received a sentence to be carried out in the community. Such a sentence means that the judge is convinced that the condemned does not represent a danger to society. In both these cases, the sentence does not seem commensurate with the seriousness and dangerous nature of the offence suggested by the alarmist and repressive discourse of government organizations and in jurisprudential decisions.

Conclusion

Defining migrant smuggling as a crime is, as with any crime, a social, political, and judicial construct. This same social construct is also used when migrant smuggling is defined by a country as a threat or a danger to a society: choosing to describe entering a country without the required documents as *illegal immigration* and an organization's assistance with such entry as *migrant smuggling* is a political decision. Governments are also responsible for categorizing crimes as more or less severe, a distinction that is recognized in the level of punishment provided for the offence. When migrant smuggling is punishable with a maximum penalty of life imprisonment, the state is defining it *a priori* and deliberately as a serious crime. Recognizing this, governments, who are responsible for the protection of a society from dangers and threats, increase their

immigration security measures in an attempt to decrease irregular migration, migrant smuggling, and the slave trade. Our normative analysis shows that the Canadian government has undertaken such a reforcement of its security measures.

Paradoxically, our jurisprudential analysis points to an important gap between political and legislative discourse aimed at countering organized crime and illegal immigration and the application of legislated penalties to combat it: political discourse denounces the threat and the negative consequences of migrant smuggling and organized transnational crime in Canada and Canadian legislators see more severe punishment as the way to deal with these activities, but the punishment given migrant smugglers does not reflect the seriousness of the offence. Is it useful to increase the severity of punishment, including increasing the maximum penalty, if, in practice, sentences do not reflect this increased severity?

As a way of sending a political message, criminalizing migrant smuggling and raising the maximum penalties for such activity has a largely symbolic function, giving the impression that the Canadian government is taking action and targeting the problem. However such criminlization may create a false sense of security, as the punishments imposed by Canadian courts do not reflect the increased level of normative concern.

In the end, as recognized in the idea of the *vicious circle of border tightening*, as long as there are individuals who feel that their lives are in danger, that their civil rights are violated in their home country, or that they are willing to risk anything to find a safe life elsewhere, there will be people who will find ways to respond to this demand. Dealing effectively with migrant smuggling requires responding to the different aspects of the problem with methods that go beyond repression.

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La criminalisation du trafic de migrants au Canada

Résumé

La migration irrégulière est perçue par la communauté internationale comme un enjeu sécuritaire. La criminalisation de l'immigration devient alors un outil de contrôle migratoire et de sécurisation des frontières. Au cours des dernières années, le Canada a adopté une approche punitive et un recours plus important à la criminalisation de l'immigration irrégulière, avec des peines pouvant atteindre l'emprisonnement à vie. Paradoxalement, malgré un renforcement normatif, dont l'adoption de peines minimales obligatoires et l'augmentation des peines maximales, les tribunaux canadiens imposent aux passeurs des peines d'emprisonnement de courte durée et généralement des peines d'emprisonnement avec sursis à purger dans la collectivité. Le présent article présente les résultats des analyses législatives et jurisprudentielles relatives au trafic de migrants au Canada. Les résultats démontrent que les peines octroyées par les tribunaux ne sont pas proportionnelles aux discours politiques et médiatiques alarmistes à l'égard de la menace que représente l'organisation de l'entrée illégale.

Mots clés

Trafic de migrants, sécurisation des frontières, criminalisation, analyse jurisprudentielle.

La criminalización del trafico de migrantes en Canadá

Resumen

La migración irregular es percibida por la comunidad internacional como una cuestión de seguridad. La criminalización de la inmigración se vuelve, entonces, una herramienta de control migratorio y de seguridad de las fronteras. En el transcurso de los últimos años, Canadá ha adoptado un enfoque punitivo y un mayor recurso a la criminalización de la inmigración irregular, con penas que pueden llegar, incluso, a la encarcelación de por vida. Paradójicamente, a pesar de un fortalecimiento normativo, que incluye la adopción de penas mínimas obligatorias, así como la aumentación de las penas máximas, los tribunales canadienses imponen a los inmigrantes ilegales, penas de encarcelación de corta duración y, generalmente, penas de encarcelación con posibilidad de purgar en la comunidad. El presente artículo presenta los resultados de análisis legislativos y jurisprudenciales relativos al trafico de migrantes en Canadá. Los resultados demuestran que las sanciones impuestas por los tribunales no son proporcionales a los discursos alarmistas políticos y mediáticos con respecto a la amenaza que representa la organización de la entrada ilegal.

Palabras clave

Trafico de migrantes, seguridad de las fronteras, criminalización, análisis jurisprudencial.

Appendix

Table 1. Penalties imposed for migrant smuggling offenses under the former *Immigration Act* and the current *Immigration and Refugee Protection Act*[11]

Former *Immigration Act*			
Case	Documented facts	Articles supporting the decision	Sentence
Affaire Bateau Amelie *(not reported)* (1987) (cited in *R. c. Muhme* [1992])	174 Sikh migrants landed by boat on the coast of Nova Scotia. Poor conditions and inhumane treatment of migrants.	Art. 94.1 *Immigration Act* L. R. C. (1985).	Boat captain: 1 year in prison + a fine of $5,000. Crew members: 1 month.
R. c. King Fong Yue [1991]	Accusd was member of a criminal organization charged with illegally facilitating entry of Chinese people to Canada.	Art. 94.2.	22 months in prison (+ 7 months on remand).
R. c. Muhme [1992]	Organized illegal entry by boat of 13 Sikh Indians into Halifax Harbour. Each migrant paid $9,400.	Art. 94.2, helping or organizing the entry of 10 people without valid documents into Canada.	15 months in prison + $5,000 fine.
Mahmood c. Canada [2000]	Using a passport to obtain a boarding pass on a flight to Vancouver for a friend.	Art. 10 (b) of *Canadian Passport Order,* a passport can be revoked if a person uses the passport to commit in a foreign country any offence that would constitute a criminal offence (art. 94.1) if it were committed in Canada.	Suspension of Canadian passport.
R. c. Mozid Chowdhury [2000]	Organization of illegal entry of 19 people from Bangladesh to Canada in exchange for $18,000–$45,000.	Art. 94.1 (a). Having acted as a smuggler.	3 years in prison for each of the leaders with merger of sentences.
R. c. L, [2001]	Organizing the entry of the third of 4 boats that arrived in Vancouver with 190 Chinese immigrants on board without documents, in exchange for $30,000- $40,000 per person. Poor conditions and inhumane treatment of migrants.	Art. 94.2.	4 years in prison.
R. c. Mi, [2001]	At the head of the organization behind the illegal passage of 400 Asian migrants to the United States through Canada between November 2000 and March 2001.		4 years in prison.
R. c. Chen [2001]	Assisting in the organization of a trip of 131 Chinese migrants arriving by boat. Poor conditions and inhumane treatment of migrants.	Art. 94.2.	4 years in prison.

[11] As the table was compiled based on information gathered through a jurisprudential analysis, much of the data (the article on the decision, the sentence, relevant factors, etc.) is missing.

R. c. Xu [2001]	Organizing illegal passage of migrants to the United States through Canada between July 2000 and February 2001.	Art. 94.1 + Art 465(1)(c) of the criminal code Having conspired with 17 or 18 individuals to illegally bring migrants into the United States through Canada.	
Regina c. Li, Chen and Li, [2002]	Participation in a criminal organization smuggling Chinese migrants to Canada, undertaken as a way to reduce the debt incurred when they used the organization to secure their own entry. Removal of 3 members of a family for 22 days.		Reduction of a life sentence to 14 years in prison + deportation order.
R. c. Balchand [2002]	Facilitating illegal passage of persons to the United States through Canada.		6-month conditional imprisonment.
R. c. Mendez []	Acting as a consultant in immigration, the individual advised a number of clients to make false declarations when applying for refugee status.	Art. 94.5.	9 months in prison.
R. c. Roo []	Smuggled 31 migrants in 5 different trips across the border between Canada and the United States		34 months in prison
Current *Immigration and Refugee Protection Act*			
R. c. Tongo [2002]	Assisting illegal entry into Canada of 3 Chinese migrants hidden in a compartment of a boat.	*IRPA* 117(1), 117(4), 118, 119, 127(a).	5 months in prison
R. c. Graprasad (a) and Samaroo (b) [2003]	Participating in the illegal passage of 40 people into the United States through Canada, 20 trips over an 8-month period.	The American immigration law	a) Recidivist: 3 years imprisonment b) 1st offence: 2years minus 1 day, **conditional imprisonment**
R. c. Damani [2003]	Member of a network smuggling migrants from India and Pakistan to the United States through Canada; around 300 migrants were transported. Involved in 8 crossings transporting 61 migrants, 28 successfully. Cost of the border crossing , $2,500 to $3,000 AUD.	Charges of conspiracy to violate the United States Immigration laws by causing persons to come to the United States unlawfully. *Immigration Act*: Art. 94.1, 94.1(m), 94.1(m)(a). Criminal code: 465(3) and 465(1)(c) and of being in possession of criminal goods contrary to article 354 (1)(b) IRPA: a leading accusation predicted in chapter 27 and article 117(1)	4 years prison.
R. c. Kadri [2004]	Member of a network smuggling migrants from India and Pakistan to the United States through Canada. Around 300 migrants were transported (same network as in *Damani*). Plotting in virtue of American laws on immigration.	Conspiring under American immigration laws. Criminal contribution to the activities of a criminal organization. S. 465 (1) (c) Criminal code.	160 hours of community service (+ 66 days on remand X 2 = 4 ½ months).

	Criminal contribution to the activities of a criminal organization. Responsible for facilitating 14 crossings of 65 migrants across the Canada-American border.		
R. c. Graca [2003]	Helping a family illegally cross the border between Canada and the United States	Art. 127(a) of the IRPA.	65 days in prison
R. c. Bello [2004]	Helping or organizing entry into Canada without valid documentation.	Arts. 117(1) and 131 of the IRPA	1 day (+ 5 ½ months on remand X 2).