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# Double jeopardy ruling sends “alarming” message

**By Kathleen Hamann and Timothy Malley**

On 17 June, the US Supreme Court issued its decision in *Gamble v United States*, a case challenging the long-standing precedent that allows both state and federal prosecutions for the same offence without running afoul of the double jeopardy clause of the Fifth Amendment to the US Constitution.

Outside academic and some legal circles, the case drew little attention or comment, and the outcome affirming the doctrine surprised few. A closer read of the opinion, however, is alarming in its potential implications across international,

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rather than state, boundaries, and furthers a concerning trend that can have a serious impact on companies operating across international boundaries.

Terance Gamble, the defendant, pleaded guilty in Alabama state court to being a felon in possession of a firearm. As he awaited sentencing, the federal government filed separate charges for the identical offence, which he challenged on double jeopardy grounds. In a five-two decision, the United States Supreme Court doubled down on the narrow construction of the double jeopardy clause of the Fifth Amendment, which provides protections during criminal proceedings.

The Court relied on the "separate sovereigns" doctrine – each American living in the fifty states lives under two sovereigns, the state government and the federal government. Because each of these sovereigns has an independent interest in seeing their laws vindicated, prosecutions brought by two different governments will not be construed as pursuing the same offence, even if their elements and the facts on which they are based are identical, because the two charges came from separate sovereigns.

While the context of the case is domestic, the ruling applies equally internationally. To take the reasoning of the Supreme Court to its logical end in the international context, the "separate sovereign" doctrine would mean, for example, that a Canadian national employed by a UK company who pays a bribe in US dollars to an Iranian official in Switzerland has committed not one crime, but five, and could face prosecution in all five countries. (This is not a far-fetched fact pattern – Ousama Naaman, a defendant in the Innospec foreign bribery case brought in the US, was convicted of paying a very similar bribe, albeit only in one country.) The UK company, likewise, could face investigations and prosecutions in at least four countries.

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**The international context**

The decision is notable for its hostility toward comity and reciprocity regarding foreign enforcement of criminal law, without considering that the enforcement of economic crime laws across borders has changed dramatically in the last twenty years. The Court furthers a movement toward creating, rather than resolving, conflicts of jurisdiction that began with *In re Grand Jury Subpoena (Bank of Nova Scotia)* (where the strictures of foreign law were subjugated to the supposedly superior interests of domestic law). These cases, although they purported to consider issues of international comity, nonetheless prioritised the use by US law enforcement of coercive investigative techniques in the face of contrary foreign law.

For companies operating across borders, the *Gamble* ruling further bricks up the divide between countries that believe jurisdiction over transnational offences should be allocated to one country to avoid unfairness, and those that believe no crime has been properly punished until their own domestic interest has been asserted through local prosecution. This can exacerbate the issues with parallel prosecution that can enmesh companies in decades-long, costly investigations and penalties from different governments.

Internationally, there has long been a split on the approach to double jeopardy, also referred to as *ne bis in idem*. While some countries, like the US and Australia, view convictions or acquittals by a different country as having decided a separate offence, a number of countries, such as the UK and the Netherlands, view a prosecution in any country as having preclusive effect. In 2015, a French court found four companies that had signed deferred prosecution agreements in the United States could not be prosecuted in France.

In fact, article 54 of the Schengen Agreement expressly applies double jeopardy across the contracting parties' boundaries, and article 50 of the EU Charter of

Fundamental Rights applies it across the European Union. A number of other countries have long held that ne bis in idem applies both domestically as well as internationally, while many conclude it applies domestically only. As conflicts of jurisdiction arise more frequently, several international law enforcement organisations have recognised the issues posed by multiple prosecutions arising from the same facts in different jurisdictions and tried to open a dialogue. Eurojust's Hague seminar on Conflicts of Jurisdiction and the World Bank Stolen Asset Recovery Initiative report, "Left out of the Bargain", are just two examples.

However, aside from initiatives within Europe and Latin America, little headway appears to have been made. The significant growth of the application of criminal law extraterritorially over the past few decades, led by the US and multiplying most significantly after the 2001 terrorist attacks, has increased tensions over conflicts of jurisdiction.

US authorities have aggressively applied some laws extraterritorially, notably the Foreign Corrupt Practices Act and anti-money laundering laws, including for conduct with little apparent contact with the US. Enforcement agencies have taken the position that the use of means or instrumentalities of interstate commerce establish US jurisdiction, even when it is incidental to the offence – for example, denominating a transaction in dollars can be sufficient to create US jurisdiction. While the US has been the most aggressive, it is far from alone – the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires the establishment of nationality jurisdiction for transnational bribery offences. The UK Bribery Act similarly goes beyond the usual reach of United Kingdom criminal law, and in fact well beyond the reach of most US law. Its Section 7 reaches foreign companies if they carry on "part of a business" in the UK, even when the bribery takes place wholly outside the UK and the benefit accrues to the foreign company. Under the Proceeds of Crime Act, UK

persons overseas can be prosecuted for money laundering that occurred entirely overseas.

A company that operates in the US and the UK could easily be liable in both countries for the identical acts of bribery or money laundering. Some countries have taken action in response to try to block such reach, including the recently-adopted blocking statute in China and the strictures on the transfer of information to non-European Union authorities in Article 48 of the General Data Protection Regulation.

In light of the increasing internationalisation of economic crimes, *Gamble's* dismissive approach to foreign enforcement increases the tension with the practical realities of law enforcement. The Supreme Court signalled to lower courts that no foreign conviction or acquittal is a good bar to proceedings in the US. The Court claims a "practical" reason for refusing to honour the efforts of foreign law enforcement and foreign courts:

*"We may lack confidence in the competence or honesty of the other country's legal system. Less cynically, we may think that special protection for US nationals serves key national interests related to security, trade, commerce, or scholarship. Such interests might also give us a stake in punishing crimes committed by US nationals abroad – especially crimes that might do harm to our national security or foreign relations."*

This passage – which lays sweeping grounds for "key" US interests – clearly prioritises domestic interests, as did *Bank of Nova Scotia*. However, in *Gamble*, the Court does not even tip its hat to the principles of comity and reciprocity as it did in *Bank of Nova Scotia* – not only overtly criticising foreign enforcement, but failing to acknowledge that there may be other countries, including European allies, that lack confidence in the competence and honesty of US law enforcement. In essence, the Court gave US primacy in criminal enforcement a greater reach

than any other modern case – no matter the resulting unfairness or the importance of the foreign interest in prosecuting a particular case, federal district courts are free to disregard all foreign proceedings and begin again, even following acquittal.

Even the widely accepted principle that foreign civil judgments carry preclusive effect, once thought to be well established in the United States, are called into question by the *Gamble* decision as "not uniformly accepted", particularly given that legal persons are often pursued in many countries via civil or administrative systems, rather than criminal. It defies the logic of the double jeopardy clause, in fact, to say that civil or administrative actions are precluded, but criminal actions – those that truly create jeopardy – are not. The Court is essentially instructing every federal court not to give credence to foreign judgments of any kind, or at least approach them with an unhealthy degree of scepticism.

To illustrate, the majority opinion describes a murder of an American committed abroad. While the "foreign country's interest lies in protecting the peace in that territory", the offence is a crime against the United States "as much as it is to the country where the murder occurred and to which the victim is a stranger". Regardless of outcome, the United States can prosecute the murder a second time. Without citation, the Court states that "customary international law allows this exercise of jurisdiction". While the Court may be correct in that nationality jurisdiction is recognised as customary international law, successive prosecution can hardly be considered customary international law given that the number of countries that have persistently rejected it and, over time, more countries are concluding that successive prosecution is unfair.

While things like the US Department of Justice's 2018 "anti-piling on" policy are designed to give comfort that successive prosecution will be limited, that policy, like *Gamble*, lays broad grounds for multiple penalties (albeit with offsets for fines in other jurisdictions), and is restricted to companies. Successive prosecution in

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different countries is still relatively rare, but it is occurring with increasing frequency not only against companies, but against individuals – where the risk of deprivation of liberty is more acute. To cite a recent example, Zwi Skornicki, Technip's former consultant in Brazil, in June pleaded guilty in the United States to FCPA violations, notwithstanding his prior conviction in Brazil for the same offence. Global settlements may provide for offsets of penalties (known as *ne bis poena in idem*internationally), but not all countries are included in those settlements and nothing prevents the US from pursuing a case if they are not part of an original settlement.

Moreover, given that not all countries have statutes of limitations for serious criminal offences, this could mean investigations and prosecutions that continue for decades after the relevant misconduct, without deference to what has come before. In light of sprawling investigations like those involving Petrobras, multiple countries seeking their own piece of the pie is unlikely to end any time soon. *Gamble's* broad language regarding grounds for national interest may fuel successive prosecutions to the detriment in particular of individuals and small and medium sized enterprises rather than encouraging the joint resolutions the US has championed in the past.

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