

JUSTICE

Provinces, cities creating ‘criminal law through the back door’

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POSTMEDIA NEWS

Police in Ontario search a car and discover almost \$30,000 cash and items suggestive of marijuana production. There isn't enough evidence to charge the driver under federal criminal laws, but authorities seize the cash under provincial civil forfeiture laws.

In Edmonton, a man and woman get into a fight at a nightclub. Police do not file assault charges. Instead, they slap a \$500 fine against one of them under a municipal bylaw that prohibits public fighting.

In Canada, the authority to create criminal laws is supposed to be the exclusive domain of the federal government. Yet there has been a worrisome and "growing trend" of provinces and municipalities enacting "criminal law through the back door," says a newly published article in the journal *Canadian Public Administration*.

This back-door approach raises questions about due

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process, since evidence standards are lower, writes Dennis Baker, a political science professor at the University of Guelph. Instead of proof beyond a reasonable doubt, authorities only have to prove that, on a balance of probabilities, an accused more likely than not committed the offence.

In some cases, penalties for violating these quasi-criminal provincial and municipal laws can be more severe than the penalties under federal criminal law.



Canadian provinces and municipalities are increasingly enacting laws aimed at working around the federal Criminal Code, says a newly published article in the journal *Canadian Public Administration*.

"It may introduce unintended consequences" in the form of "reduced Charter protections and removing all the norms of the criminal process," Baker said in an email.

The workaround of the federal Criminal Code by provinces and

municipalities shows no signs of slowing, Baker said. In fact, a 2012 discussion paper circulated by a steering committee of federal and provincial deputy justice ministers, judges and lawyers seemed to encourage the practice as a way to help

address backlogs in the criminal justice system.

Those caught driving impaired for the first time could be dealt with through administrative sanctions, such as vehicle seizures or loss of driving privileges, the paper

suggested. Such measures were introduced in B.C. in 2010.

Besides the Ontario civil forfeiture law and Edmonton public fighting bylaw, Baker cites other examples of the blurring lines between federal, provincial and municipal division of powers. A Manitoba law allows for a wide range of civil remedies to victims of domestic violence; a Saskatchewan law prevents anyone charged with or convicted of a crime from making money from selling their memoirs; and a Vancouver bylaw prohibits aggressive panhandling.

Baker acknowledges that those who have challenged such laws in court usually have failed, and that the federalism argument tends to lose to arguments that the laws help to maintain public order, deter crime and compensate victims.

If Ottawa decides in the future to decriminalize prostitution or marijuana, it is not inconceivable that some provinces or municipalities might move to enact laws designed to "recriminalize" or restrict those activities in some way, Baker said.

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Abstract

Under s.91 (27) of the BNA Act, 1867, the Federal Parliament has the exclusive authority to legislate "criminal law." This has not stopped the provinces from passing "quasi-criminal" laws that are difficult to distinguish from criminal law. Recent legislation regarding "public fighting" and civil remedies for criminal acts suggest there are few legal obstacles to enacting provincial criminal law. This article identifies such provincial criminal laws, explains how the modern doctrines of federalism might invite and allow for their enactment, and discusses impacts on criminal justice policy and administration. It highlights the discretion afforded the Crown and police in charging individuals under the federal Criminal Code or similar provincial laws (or municipal by-laws). While provincial or local laws may allow for more efficient law enforcement, they do so at the expense of the procedural guarantees associated with the criminal law.