CONCEPT OF DOUBLE JEOPARDY[i]

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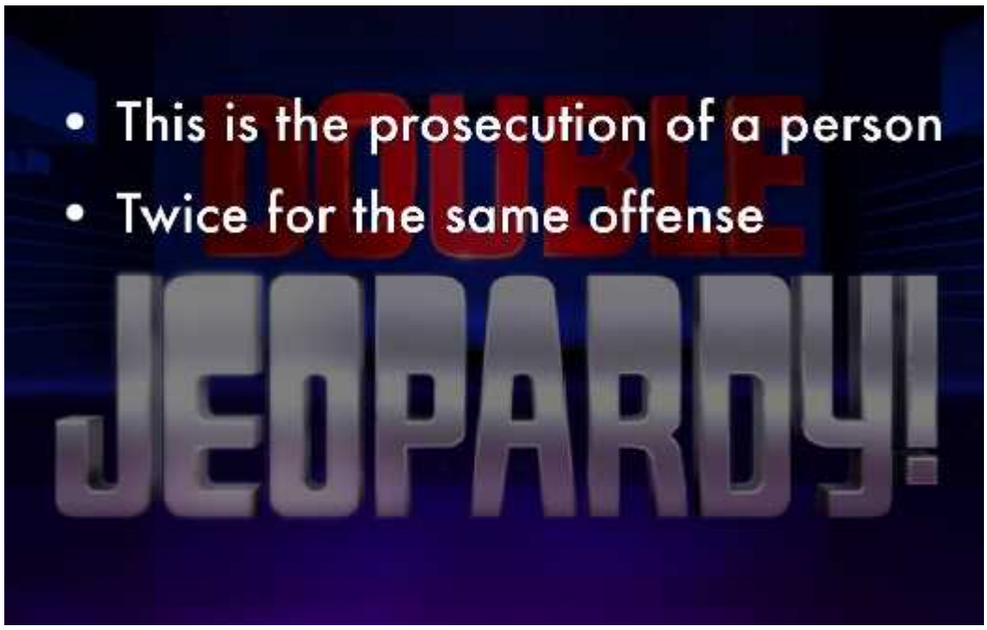

Introduction

Double jeopardy protects people from being tried for the same crime twice in a court of law. The rule against double jeopardy is a centuries old common law principle, which bars repeated criminal prosecution for the same offence. The rule plays a vital role for the protection of integrity of the criminal justice system including precious human rights of the accused persons. The existence of the rule is very essential as far a criminal justice administration is concerned irrespective of the nature of the system. The criminal justice system operates on the basis of certain values within which it admits no compromise. The double jeopardy principle is one such value protected by the system. It is a procedural safeguard, which bars a second trial then an accused person is either convicted or acquitted after a full-fledged trial by a court of competent jurisdiction. The rule against double jeopardy originally flows from the maxim *"nemo debet bis vexari pro uno et eadem causa"* which means that no person shall be vexed twice for the same cause. The term *"double jeopardy"* expresses the idea of a person being put in peril of conviction more than once for the same offence[1].The core rule includes the old pleas in bar of jurisdiction, *namely autrefois acquit and autrefois convict*[2]. These two doctrines are aimed to protect criminal defendants from the tedium and

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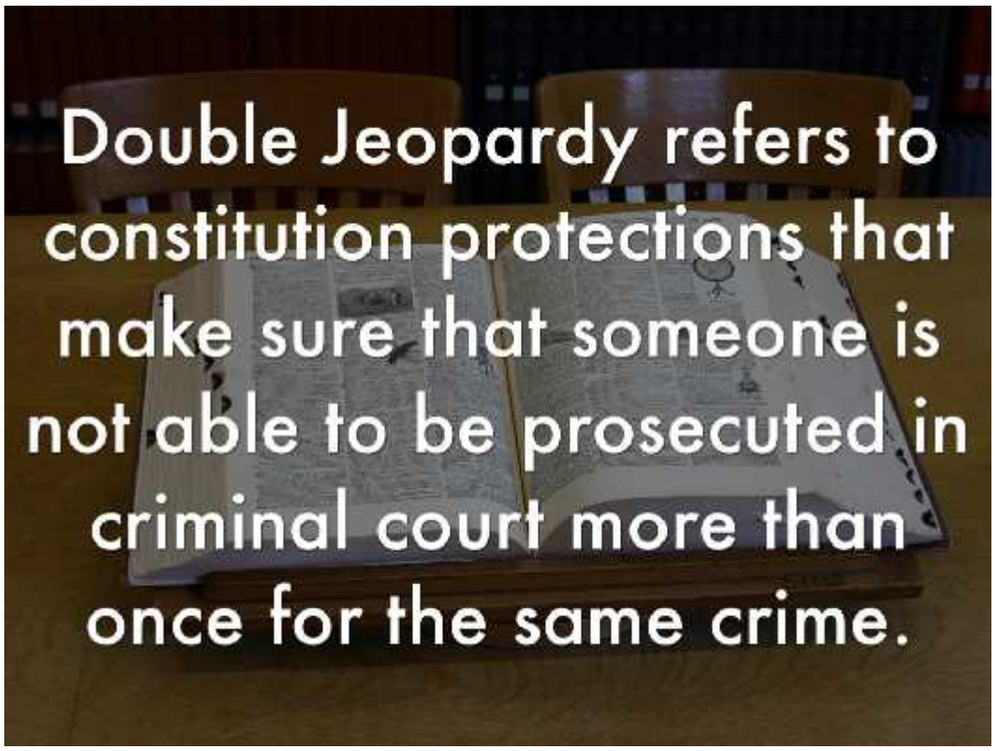
[1] Ian Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process", [2000] Crim. L.R. 993. For the applicability of the principle, the conviction must be for the same offence: "For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts, which constitute the crime, and the legal characteristics, which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law." See, Lord Devlin in *Connelly v. Public Prosecutions,* [1964] A.C 1254

[2] *Autrefois acquit* is a defense plea available to the accused in a criminal case, that he has been acquitted previously for the same offence and thus entitling a discharge. Likewise, *Autrefois* convict discharges an accused, as he has been convicted previously for the same offence.

trauma of re-litigation[3]. When a criminal charge has been adjudicated by a competent court, that is final irrespective of the matter whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a further prosecution when it is for the same offence[4]. It is regarded as one of the most important fundamental as well as the human right against the repeated state prosecution for the same offence.

Rule of double jeopardy is a legal principle accepted by almost all jurisdictions of the world, which states that a person who has once been charged and put to trial and a verdict has been announced concerning his innocence in that charge, he shall not be again charged or tried for the same offence on the same facts and same evidence.

The wisdom behind this principle of law is that human dignity is to be respected and on the plea of suspicion the earlier exercise of formal charge and trial is not to be undone. Further, if this practice is allowed there will be no end to litigation and none will be secure from the jeopardy or danger.



International Scenario

International Covenant on Civil and Political Rights

The 72 signatories and 166 parties to the International Covenant on Civil and Political Rights recognise, under Article 14 (7):

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

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[3] Daniel K. Mayers and Fletcher L.Yarbrough, "Bisvexari: New Trials and Successive Prosecutions", [1960] Harv. L. Rev.74

[4] *R V. Miles, 24 Q.B. 423, at p.431,* as cited in *Broom's Legal Maxims*, R.H.Kersley (Ed), Herbert Broom, Pakistan Law House, Karachi (10thed), 1998.

European Convention on Human Rights

All members of the Council of Europe(which includes nearly all European countries, and every member of the European Union) have signed the European Convention on Human Rights. The optional Seventh Protocol to the Convention, Article Four, protects against double jeopardy and says:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

Member states may, however, implement legislation which allows reopening of a case in the event that new evidence is found or if there was a fundamental defect in the previous proceedings:

The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

This optional protocol has been ratified by all EU states except five: Belgium, Germany, Spain, the Netherlands, and the United Kingdom[5].In those member states, national rules governing double jeopardy may or may not comply with the provision cited above.

In many European countries, the prosecution may appeal an acquittal to a higher court (similar to the provisions of Canadian law); this is not counted as double jeopardy, but as a continuation of the same trial. This is allowed by the European Convention on Human Rights (note the word *finally* in the above quotation).

Australia: In contrast to other common law nations, Australian double jeopardy law has been held to further prevent the prosecution for perjury following a previous acquittal where a finding of perjury would controvert the acquittal.

Canada: The Canadian Charter of Rights and Freedoms includes provisions such as section 11(h) prohibiting double jeopardy. However, this prohibition applies only after an accused person has been "finally" convicted or acquitted. Canadian law allows the prosecution to appeal an acquittal: if the acquittal is thrown out, the new trial is not considered to be double jeopardy, as the verdict of the first trial would have been annulled. In rare circumstances, a court of appeal might also substitute a conviction for an acquittal. This is not considered to be double jeopardy, either – in this case, the appeal and subsequent conviction are deemed to be a continuation of the original trial. For an appeal from an acquittal to be successful, the Supreme Court of Canada requires that the Crown show that an error in law was made during the trial and that the error contributed to the verdict. It has been suggested that this test is unfairly beneficial to the prosecution.

France: As per French law**, o**nce all appeals have been exhausted on a case, the judgment is final and the action of the prosecution is closed (code of penal

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[5] "Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms". Council of Europe.

procedure, art. 6), except if the final ruling was forged. Prosecution for a crime already judged is impossible even if incriminating evidence has been found. However, a person who has been convicted may request another trial on grounds of new exculpating evidence through a procedure known as *révision*.

Germany: The Basic Law (*Grundgesetz*) for the Federal Republic of Germany does provide protection against double jeopardy, if a final verdict is pronounced. A verdict is final, if nobody appeals against it. Nobody shall be punished multiple times for the same crime on the base of general criminal law- Art. 103 (3) GG[15][16]. However each trial party can appeal against a verdict in the first instance. This means the prosecution and/or the defendants can appeal against a judgement, if they don´t agree with it. In this case the trial starts again in the second instance, the court of appeal (*Berufungsgericht*), which considers the facts and reasons again and delivers the final judgment then. If one of the parties disagrees with the judgement of the second instance, he or she can appeal for it, but only on formal judicial reasons. The case will checked in the third instance (*Revisionsgericht*), whether all laws are applied correctly. The rule applies to the whole "historical event, which is usually considered a single historical course of actions the separation of which would seem unnatural". This is true even if new facts occur that indicate other and/or much serious crimes. The Penal Procedural Code (*Strafprozessordnung*) permits a retrial (*Wiederaufnahmeverfahren*), if it is in favor of the defendant or if following events had happened:

A retrial not in favour of the defendant is permissible after a final judgment,

1. *if a document that was considered authentic during the trial was actually not authentic or forged,*
2. *if a witness or authorised expert wilfully or negligently made a wrong deposition or wilfully gave a wrong simple testimony,*
3. *if a professional or lay judge, who made the decision, had committed a crime by violating his or her duties as a judge in the case*
4. *if an acquitted defendant makes a credible confession in court or out of court.*

— § 362 StPO

In the case of an order of summary punishment, which can be issued by the court without a trial for lesser misdemeanours, there is a further exception:

A retrial not in favour of the defendant is also permissible if the defendant has been convicted in a final order of summary punishment and new facts or evidence have been brought forward, which establish grounds for a conviction of a felony by themselves or in combination with earlier evidence.

— § 373a StPO

In Germany, a felony is defined as a crime which (usually) has a minimum of one year of imprisonment.

India: A partial protection against double jeopardy is a Fundamental Right guaranteed under Article 20 (2) of the Constitution of India, which states, "No person shall be prosecuted and punished for the same offence more than once". This provision enshrines the concept of *autrefois convict*, that no one convicted of an offence can be tried or punished a second time. However it does not extend to *autrefois acquit*, and so if a person is acquitted of a crime, he can be retried. In India, protection against *autrefois acquit* is a statutory right, not a fundamental one. Such protection is provided by provisions of the Code of Criminal Procedure rather than by the Constitution.

Japan: The Constitution of Japan states in Article 39 that

> *No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.*

In practice, however, if someone is acquitted in a lower District Court, then the prosecutor can appeal to the High Court, and then to the Supreme Court. Only the acquittal in the Supreme Court is the final acquittal which prevents any further retrial. This process sometimes takes decades.The above is not considered a violation of the constitution. Because of Supreme Court precedent, this process is all considered part of a single proceeding.

The Netherlands: In the Netherlands, the state prosecution can appeal a not-guilty verdict at the bench. New evidence can be brought to bear during a retrial at a district court. Thus one can be tried twice for the same alleged crime. If one is convicted at the district court, the defence can make an appeal on procedural grounds to the Supreme Court. The Supreme Court might admit this complaint, and the case will be reopened yet again, at another district court. Again, new evidence might be introduced by the prosecution.

According to Dutch legal experts Crombag, Wagenaar, van Koppen, the Dutch system contravenes the provisions of the European Human Rights convention, in the imbalance between the power of the prosecution service and the defence. On 9 April 2013 the Dutch senate voted 36 "yes" versus 35 "no" in favor of a new law that allows the prosecutor to re-try a person who was found not guilty in court. This new law is limited to crimes where someone died and new evidence must have been gathered. The new law also works retroactively.

Serbia: This principle is incorporated in to the Constitution of the Republic of Serbia and further elaborated in its Criminal Procedure Act.

South Africa: The Bill of Rights in the Constitution of South Africa forbids a retrial when there has already been an acquittal or a conviction.

> *Every accused person has a right to a fair trial, which includes the right ... not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.*
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> *— Constitution of the Republic of South Africa, 1996, s. 35(3)(m)*

South Korea: Article 13 of the South Korean constitution provides that no citizen shall be placed in double jeopardy.

United Kingdom

England and Wales*: Double jeopardy has been permitted in England and Wales in certain (exceptional) circumstances since the Criminal Justice Act 2003.*

Pre-2003

The doctrines of *autrefois acquit* and *autrefois convict* persisted as part of the common law from the time of the Norman conquest of England; they were regarded as essential elements of protection of the liberty of the subject and respect for due process of law in that there should be finality of proceedings. There were only three exceptions, all relatively recent, to the rules:

- The prosecution has a right of appeal against acquittal in summary cases if the decision appears to be wrong in law or in excess of jurisdiction.
- A retrial is permissible if the interests of justice so require, following appeal against conviction by a defendant.
- A "tainted acquittal", where there has been an offence of interference with, or intimidation of, a juror or witness, can be challenged in the High Court.

Scotland: *The double jeopardy rule no longer applies absolutely in Scotland since the 2011 came into force on 28 November 2011. The Act introduced three broad exceptions to the rule: where the acquittal had been tainted by an attempt to pervert the course of justice; where the accused admitted his guilt after acquittal; and where there was new evidence.*

Northern Ireland: *In Northern Ireland the Criminal Justice Act 2003, effective 18 April 2005, makes certain "qualifying offence" (including murder, rape, kidnapping, specified sexual acts with young children, specified drug offences, defined acts of terrorism, as well as in certain cases attempts or conspiracies to commit the foregoing, subject to retrial after acquittal (including acquittals obtained before passage of the Act) if there is a finding by the Court of Appeal that there is "new and compelling evidence."*

United States: The Fifth Amendment to the United States Constitution provides:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Double Jeopardy Clause encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishment in the same indictment. Jeopardy "attaches" when the jury is empanelled, the first witness is sworn, or a plea is accepted.

Prosecution after acquittal, the government is not permitted to appeal or retry the defendant once jeopardy attaches to a trial unless the case does not conclude. Conditions which constitute "conclusion" of a case include

- after the entry of an acquittal,
- whether a directed verdict before the case is submitted to the jury,
- a directed verdict after a deadlocked jury,
- an appellate reversal for sufficiency (except by direct appeal to a higher appellate court),
- or an "implied acquittal" via conviction of a lesser included offence.
- re-litigating against the same defense a fact necessarily found by the jury in a prior acquittal,
- even if the jury hung on other counts.
- in such a situation, the government is barred by collateral estoppel.

In these cases the trial is concluded and the prosecution is precluded from appealing or retrying the defendant over the offense to which they were acquitted.

This principle does not prevent the government from appealing a pre-trial motion to dismiss or other non-merits dismissal, or a directed verdict after a jury conviction, nor does it prevent the trial judge from entertaining a motion for reconsideration of a directed verdict, if the jurisdiction has so provided by rule or statute. Nor does it prevent the government from retrying the defendant after an appellate reversal other than for sufficiency, including *habeas corpus*, or "thirteenth juror" appellate reversals notwithstanding sufficiency on the principle that jeopardy has not "terminated." There may also be an exception for judicial bribery, but not jury bribery.

The "dual sovereignty" doctrine allows a federal prosecution of an offense to proceed regardless of a previous state prosecution for that same offense and vice versa because "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." The doctrine is solidly entrenched in the law, but there has been a traditional reluctance in the federal executive branch to gratuitously wield the power it grants. Another exception is that the perpetrator can be retried by court martial in a military court, if they have been previously acquitted by a civilian court, and are members of the military.

Legal principal of double jeopardy law was stated in the Fifth Amendment, which was ratified in 1791. The term “double jeopardy” was first used about 1905.

Criminal Cases and Double Jeopardy Law: Double jeopardy law only applies to criminal court cases and does not protect people from being brought back to trial in civil proceedings. This means that if a person is found not guilty of manslaughter, he cannot be tried in criminal court again. However, the family of the slain victim can sue the defendant in civil court for a wrongful death suit to recover damages.

Eligibility for Double Jeopardy Protection: Most criminal cases are eligible for double jeopardy protection, primarily because criminal conviction may result in loss of liberty or life. The Fifth Amendment extends double jeopardy protection to those proceedings that threaten a person’s “life or limb.” However, the Supreme Court has established that eligibility for double jeopardy protection is not limited to capital crimes, but encompasses all felonies, misdemeanors, and juvenile convictions, regardless of the punishment that may be handed down. In modern times, this protection is extended because criminal conviction may result in loss of “liberty.”

If this issue is raised, evidence will be placed before the court, which will normally rule as a preliminary matter whether the plea is substantiated; if it is, the projected trial will be prevented from proceeding. In some countries, including Canada, Mexico and the United States, the guarantee against being "twice put in jeopardy" is a constitutional right. In other countries, the protection is afforded by statute.

When Principal of Double Jeopardy Protection can be invoked in Pakistan

In Pakistan, the protection against the double jeopardy is a constitutional[6] as well as a statutory guarantee.[7] The principle has also been recognized under the

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[6] Constitution of the Islamic Republic of Pakistan, 1973

Article 13. Protection against double punishment and self-incrimination. No person-

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself.

[7] Criminal Procedure Code ,1898

OF PREVIOUS ACQUITTALS OR CONVICTIONS 403.

Person once convicted or acquitted not to be tried for same offence :

(1) A person who has once been tried by a Court of Competent Jurisdiction for an offence and convicted or acquitted of such offence shall whiles such conviction or acquittal remains in force, not liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been .made under Section 236, or for which he might have been convicted under Section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which separate charge might have been made against him on the former trial under Section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences: which together, with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequent charged with, and tried for, any other offence constituted by the same acts which fie may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897, or Section 188 of this Code. Explanation: The dismissal of a complaint, the stopping of proceedings under Section 249, or the discharge of the accused is not an acquittal for the purposes of this section.

Illustrations (a) A is tried upon a charge of theft as S servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and. acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for robbery,

provision of General Clauses Act[8]. The Constitution of Pakistan recognizes only *autrefois convict* whereas the Code of Criminal Procedure, 1898 incorporates *autrefois acquit* as well. The rule against double jeopardy has been recognized as a fundamental right in the Constitution of Pakistan. A person can claim fundamental rights against the state and the state can abridge those rights only to the extent laid down. Even though its origin can be trace back in the common law principles, the ambit and content of guarantee are much narrower than those of the common law in England. Under Pakistan law, when a person has been convicted of an offence by a court of competent jurisdiction, the conviction serves as a bar to any further criminal proceeding against him for the same offence. The most important thing to be noted is that, sub-clause (a) of Article 13 has no application unless there is no punishment for the offence in pursuance of a prosecution.

Under the provisions of the Pakistan Constitution, the conditions that have to be satisfied for raising the plea of autrefois convict are firstly; there must be a person accused of an offence; secondly; the proceeding or the prosecution should have taken place before a 'court' or 'judicial tribunal' in reference to the law which creates offences and thirdly; he accused should be convicted in the earlier proceedings. The requirement of all these conditions have been discussed and explained in the landmark decision, *Hassan & others v. State & others*. [8] -- *Autrefois acquit and autrefois* convict, principles of---Scope---Provisions of Art. 13 of the Constitution recognized the principles of autrefois acquit and autrefois convict and granted them the status of a Fundamental Right, which right could not be violated or abridged and against which no legislation could be passed. This view is also supported by other judgments[9].

To operate as a bar under Article 13(a), the second prosecution and the consequential punishment must be for the same offence, i.e., an offence whose ingredients are the same. One of the important conditions to attract the provision under clause (a) of article is that, the trial must be conducted by a court of competent jurisdiction. If the court before which the trial had been conducted

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(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the First Class with, and convicted by him of, voluntary causing hurt to S. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the Second Class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the First Class with, and. convicted by him of robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts

[8] P L D 2013 Supreme Court 793

[9] Essa Noori v. Deputy Commissioner PLD 1979. Quetta 188, Ramkrishna v. State 1956 Cri. L Jour 1073, Purnananda Das Gupta v. Emperor AIR 1939 Cal.65, Yeok Kuk v. Emperor AIR 1928 Rang.252, Saifuddin E. Contractor v. State 1979 PCr.LJ 258, Sunderial Bhagaji v. State AIR 1954 Madh B 129, Srinivasulu v. P.V. Subbamma 1959 Cr.L. Jour 1137, T. Nangarappa v. Ranganatha Rao AIR 1953 Mys.64.

does not have jurisdiction to hear the matter, the whole trial is null and void and it cannot be said that there has been prosecution and punishment for the same offence.

The constitutional right guaranteed by Article 13 (a) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

However, the Code of Criminal procedure recognize both the pleas of *autrefois acquit* as well as *autrefois convict*. The conditions which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be by be a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression "same offence" shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.

This almost universally accepted principle and as enshrined in Article 13 (a) of our Constitution in its import and as evolved through the precedent case-law, has following implications:--

(i) A person may not be tried for a crime in respect of which he has previously been acquitted or convicted.
(ii) In respect of the crime of which he could on some previous charge/indictment has been lawfully convicted
(iii) Where the offence charged is in effect the same or substantially the same as one in respect of which the person charged has previously been acquitted or convicted or in respect of which he could on some previous indictment, have been convicted.
(iv) The evidence necessary to support the second indictment or the facts which constituted the second offence would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which on the indictment the accused could have been found guilty.
(v) The offence charged in the second indictment must have been committed at the time of the first charge i.e. a conviction or acquittal for an assault will not bar a charge of murder if the assaulted person later died.
(vi) The earlier adjudication leading to guilt or innocence of a person charged must have been through a valid process and by a Court of competent jurisdiction.
(vii) The conviction or acquittal in the previous proceedings must be enforced at the time of the second trial.
(viii) The proceedings in which the plea of double jeopardy is being raised must be fresh proceedings where the person is sought to be prosecuted for the same offence for the second time.

Principal of Res Judicata under Order VII rule 11 of the Code of Civil Procedure, 1908

The principle of Double Jeopardy resembles with the principle of civil law called "*res judicata*" where also where a matter is decided by a competent court between the same parties on the same issues fresh suit becomes barred. This principle is contained in Order VII rule 11 of the Code of Civil Procedure, 1908. This rule came to light since 1847. The fact of being prosecuted or sentenced twice for substantially the same offence is called double jeopardy.

Section 11 of the Code is founded on the general rule that "a man shall not be twice vexed for the same cause" and that if an action be brought, and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are precluded and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment. In such a case, the matter in dispute having passed in *res judicatum,* the former judgment, while it stands, is conclusive between the parties, if either attempts, by commencing another action, to re-open that matter; and for this rule two reasons area always assigned, the one, public policy, for interest *rei publicoe ut sit finis litium;* the other, the hardship on the individual that he should be twice vexed for the same cause. Section 11 of the Code contemplates bar to successive suits, involving the same questions, directly and substantially in issue between the same parties or under whom they or any of them claim, one of the suits already decided and attaining finality.

Pakistani Case Law

In *ABDUL HAQ v. MUHAMMAD AMIN alias MANNA,* it was held that, Accused once-having served out substantial legal sentence for an offence could not be awarded another sentence for same offence[10].

In *Syed MUBBASHAR RAZA v. GOVERNMENT OF PUNJAB through Secretary Home Department* it was held that, Detention order under S.3(1) of the West Pakistan Maintenance of Public Order Ordinance, 1960 against a person against whom criminal proceedings were already pending, was violative of Art.13 (a) of the Constitution[11].

In *KHADIM HUSSAIN PALH v. State* it was held that, Concept of double jeopardy was (only) attracted where accused had been tried for the offence charged in a competent court and there was a judgment of conviction or acquittal, Mere lodging of F.I.Rs would not attract the rule of double jeopardy[12].

In *IMRAN AHMED v. FEDERATION OF PAKISTAN through Secretary*, Ministry of Interior, Islamabad, it was held that, Protection against double punishment and self-incrimination has been provided under Art.13 of the Constitution, which embodies the provision of the maxim *Nemo debet bis vexari pro una et eadem causa*[13].

In *Mst. NAUSHAD BIBI v. SHER KHAN and others*, it was laid down that, Art. 13 of the Constitution of Pakistan, S. 403 of the Criminal Procedure Code (V of 1898), S.26 of the General Clauses Act (X of 1897), Protection against double jeopardy had been provided against double punishment and not the trial of the offence[14].

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[10] 2004 SCMR 810

[11] PLD 2015 Lahore 20

[12] 2014 PCrLJ 2014 Karachi 1698

[13] PLD 2014 Karachi 218

[14] 2013 P Cr. L J 666

This view was reiterated in *MUHAMMAD AKBAR V. THE STATE*, wherein it was held that, Even on the first report alleged to have been submitted under Section 173, Cr.P.C, the Magistrate could, irrespective of the opinion of the Investigating Officer to the contrary, take cognizance, if upon the materials before him he found that a prima facie case was made out against the accused person. After all the police is not the final arbiter of a complaint lodged with it. It is the Court that finally determine upon the police report whether it should take cognizance or not in accordance with the provisions of Section 190(1)(b) of the Code of Criminal Procedure[15].

In *SHER MUHAMMAD UNAR and other V.STATE* it was held that, Principle of double jeopardy cannot be invoked--Application u/S. 193, Cr.P.C. to summon petitioner was allowed in earlier round of litigation--Order was reversed by High Court--Challenged before Supreme Court--Question of--Whether petitioners who had been declared innocent during investigation could be summoned by trial Court and whether such would amount to double jeopardy--Protection against double punishment and self-incrimination--Validity--Even if when an accused was discharged by trial Court, consequence would be that he was discharged from his, bond at stage when his custody was no longer required by investigating agency--But such an order was only an executive order passed at investigating stage when the case has yet to get for trial--Court can still try if same fresh material was brought before it--Petitioners were not even discharged by trial--Order of discharged based on police report cannot be equated with acquittal--Court was not bound by such finding of innocence reflected in final report submitted u/S. 173, Cr.P.C.--Trial Court having assessed their evidence came to prima facie conclusion that a case was made out against petitioners and summoned them--Concurrent prima facie assessment of evidence had not been found by Supreme Court to be either arbitrary or against record to warrant interference--Witness examined before framing of charge against petitioners will have to be examined afresh after framing of charge--It was for trial Court to assess the evidence which was finally recorded in presence of all accused, consider defence plea including the one which was being convassed before Supreme Court--Appeal was dismissed [16].

In *NAZIR AHMED v. CAPITAL CITY POLICE OFFICER, LAHORE*, it was held that, Criminal proceedings and disciplinary proceedings were not synonymous or interchangeable for having distinct features and characteristics--- Provisions of Art. 13 of the Constitution and maxim *"nemo debet bis vexari pro una et eadem causa"* (no person should be twice disturbed for the same cause) would not apply to such case[17].

In *SECRETARY LOCAL GOVERNMENT AND RURAL DEVELOPMENT, GOVERNMENT OF PUNJAB, LAHORE and another v. AHMAD YAR KHAN*, it was held that, Simultaneous action under disciplinary rules and criminal law can be initiated subject to certain legal exceptions[18].
In *HASSAN v. STATE*, *Autrefois acquit and autrefois convict*, principles of---Applicability---Convict who was sentenced to death had undergone a period of custody equal to or more than a full term of imprisonment for life during the pendency of his legal remedy against his conviction---Question was as to whether sentence of death awarded to convict could be maintained by the Supreme Court

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[15] 1972 SCMR 335

[16] PLJ 2012 SC 245

[17] 2011 SCMR 484

[18] 2010 P L C (C.S.) 495 Supreme Court of Pakistan

despite the fact that he had already served out one of the two legal sentences provided for in S.302(b), P.P.C.---Plea of accused was that in such a situation the Supreme Court must not, affirm the sentence of death and might reduce the same to imprisonment for life in view of provisions of S.403, Cr.P.C---Validity---Principles of *autrefois acquit and autrefois convict* contained in S.403(1), Cr.P.C. forbid a new trial after a conviction or acquittal on the basis of the same facts had attained finality but it was equally obvious that the said principle had no application to the present situation wherein holding of a new trial was not in issue---Principles of *autrefois acquit and autrefois convict* contained in S.403(1), Cr.P.C. had no relevance to a case wherein the question under consideration in an appeal was not as to whether a new trial of the convict should be held or not but the issue was as to which sentence would be the appropriate sentence for a convict[19].

In *SUPREME-COURT, MUHAMMAD AYUB v. CHAIRMAN ELECTRICITY BOARD W.A.P.D.A. PESHAWAR*, it was held that, Any penalty imposed on a civil servant as a consequence of departmental proceedings under Efficiency and Discipline Rules, after accused officer has been acquitted of criminal charge is not barred-Fresh trial and punishment for same offence is barred and not infliction of a penalty as a result of departmental proceedings[20].

In AZIZ *MUHAMMAD v. QAMAR IQBAL*, it was held that, since the accused had served out the substantial/legal sentence for the offence of murder, they could not be awarded another sentence for the same offence in violation of Art. 13 of the Constitution and S.403, Cr.P.C[21].

In *BAHADUR ALI v. THE STATE*, it was held that, where an accused has served out a legal sentence of imprisonment for life on the charge of Qatl-i-Amd, appeal seeking enhancement of his sentence to death cannot be legally heard as the enhanced sentence, if recorded, would be hit by the doctrine of double jeopardy as per mandate of Art. 13 of the Constitution[22].

In *CHAIRMAN AGRICULTURAL DEVELOPMENT BANK OF PAKISTAN, MUMTAZ KHAN*, it was held that, Maxim *autrefois acqui*t---Principle of *Afw*---Scope---Ultimate acquittal in a criminal case exonerates accused person completely for all future purposes vis-a-vis the criminal charge against him---Concept of autrefois acquit embodied in S. 403, Cr.P.C., protection guaranteed by Art.13(a) of the Constitution, *Afw (waiver)* or *Sulh (compounding)* in respect of an offence has the effect of purging the offender of the crime[23].

In *GHULAM ABBAS NIAZI v. FEDERATION OF PAKISTAN*, it was held that, even if one civilian instigated military officer for any insubordination etc. it could not fall under S.37(e) of Pakistan Air Force Act, 1937, because not an individual but collective act of insubordination could be dubbed as mutiny---As accused have already remained in jail for a period longer than the sentence of Air Force Officers, their fresh trial by regular Courts of country would be nothing but a double jeopardy and violative of Art.13 of the Constitution read with S.403, Cr.P.C.---Conviction and sentence awarded to civilian accused by Field General

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[19] PLD 2013 SC 793

[20] PLD 1987 SC 195

[21] 2003 SCMR 579

[22] 2002 SCMR 93

[23] PLD 2010 SC 695

Court Martial were set aside and they were acquitted of the charge under S.37(e) of Pakistan Air Force Act, 1937---Appeal was allowed[24].

In *SECRETARY LOCAL GOVERNMENT AND RURAL DEVELOPMENT, GOVERNMENT OF PUNJAB, LAHORE v. AHMED YAR KHAN*, it was held that, Double jeopardy, principle of---Scope---No person can be punished twice for the same offence[25]

In *MUHAMMAD MAQSOOD v. W.A.P.D.A*, it was held that, Employee was issued only one charge-sheet and as a result of the inquiry held in pursuance thereof he was awarded the punishment contained in the order of competent Authority--Punishment being considered inadequate by the revisional authority subsequently a show-cause notice was issued under its revisional powers i.e. under R.12 which conferred on the Authority to pass an order to enhance, in suitable cases, the penalty already imposed by a, competent Authority---Held. case was not that of punishing a person twice for the same offence but was a case of normal exercise of revisional powers by the Authority in a fit cases---No violation of Art. 13, Constitution of Pakistan, had, therefore occurred in the case, nor was R.12, WAPDA Employees (Efficiency and Discipline) Rules, 1978 in any way violative of the provision of Art.13, Constitution of Pakistan (1973)[26].

In *MUHAMMAD NADEEM ANWAR v. SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN*, it was held that, No person could be vexed twice and prosecuted or punished for the same offence, but if he was guilty of offence under another enactment, though by the same chain of facts, he could be tried, convicted and punished under that very offence committed by him. Although both sets of offences had been committed by the accused in one go, however accused acted in such a manner which constituted offences punishable under two separate and distinct laws, i.e. one under the National Accountability Ordinance, 1999 and the other under the Companies Ordinance, 1984--- Despite the fact that the two separate prosecutions of accused arose out of the same incident or that some of the facts in the two prosecutions were common, the offences committed by accused under the Companies Ordinance, 1984 were quite different from the offences committed by him under the National Accountability Ordinance, 1999--- Both were different and distinct pieces of legislation, therefore, acts and omissions committed by accused could not be said to be the same offences--- Since the acts committed by accused did not fall within the definition of same offences, therefore, principle of double jeopardy would not come into force.[27]

In *KHALID IQBAL v. MIRZA KHAN*, it was held that, Principle of autrefois acquit and autrefois convict contained in S.403(1) Cr.P.C. had no relevance to a case wherein the question under consideration in an appeal was not as to whether a new trial of the convict should be held or not, but as to the quantum of sentence for a con vict---Reduction of sentence from death to imprisonment for life of a convict, who had served out the sentence of 25 years during the pendency of the legal remedy, could not seek refuge under the doctrine of autrefois acquit and autrefois convict contained in Art. 13(a) of the Constitution[28].

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[24] PLD 2009 SC 866

[25] 2010 PLC(CS) 495 SUPREME-COURT & 2010 SCMR 861 *SECRETARY, LOCAL GOVERNMENT AND RURAL DEVELOPMENT, GOVERNMENT OF PUNJAB, LAHORE v. AHMAD YAR KHAN*

[26] PLD 1992 SC 242

[27] 2014 CLD 873 SUPREME-COURT

[28] PLD 2015 SC 50

Analysis of the Rationale of Rule against Double Jeopardy from a Human Rights Angle

i) Reducing the risk of wrongful conviction

One of the long established rationale for the double jeopardy rule is that it reduces the risk of wrongful conviction. The chance of erroneous conviction is comparatively high in a re-trail since the prosecution is forewarned and forearmed with the defence strategies. The United States Supreme Court has rightly observed:

"Repeated prosecutions increase the risk of an unjust conviction of an innocent defendant by wearing down the defendant and giving the Government opportunities to learn from its earlier mistakes and to hone its trial strategies."[29]

ii) Minimising the distress and trauma of the trial process

Manifold attempts by the state to conduct a retrial of an accused acquitted for an offence would expose him to embarrassment, expenses and ordeal, and compelling him to live in a continuous state of anxiety and insecurity. The retrial will seriously disrupt the accused's personal life during the trial. This argument is based on the state's duty of humanity to its subjects to treat them with dignity and respect[30]. Prof. Glanwille Williams has written thus:

"It is hard on the defendant if, after he has at great cost in money and anxiety secured a favorable verdict from a jury on a particular issue, he must fight the battle over again when he is charged with a technically different offence arising out of the same facts."[31]

iii) Preventing harassment

In the absence of such a rule, the government could be able to re-prosecute an acquitted until securing a conviction. The law informant officers may use it as a weapon to take vengeance against their enemies. Moreover, a prosecutor who believes that the accused was wrongly acquitted by the jury, would be able to harass him by bring about a second prosecution. Even if the police or the prosecution did not find any evidence of guilt, they may be satisfied with forcing the accused to undergo additional embarrassment, anxiety, concern and expense arising from the retrial.

The analysis of the rationales of the principle of double jeopardy made it clear that, it protects some values of the criminal justice system. It shows concern for the basic human rights of the unfortunate accused persons who are caught in the web of criminal law. Another view is that the innocent defendants may lack sufficient stamina and resources to defend the state continuously in criminal

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[29] United States v. DiFrancesco, 449 US, (1980)

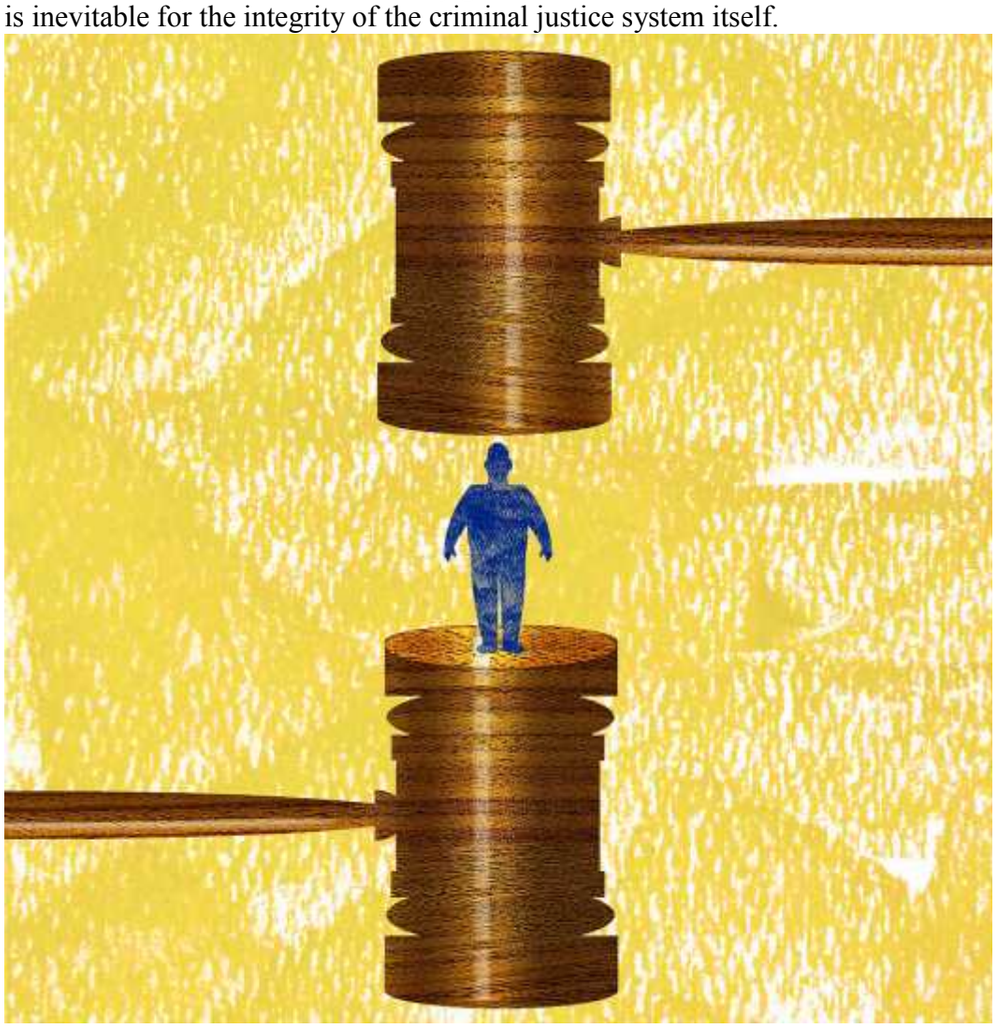
[30] Rosemary Pattenden, "Prosecution Appeals Against Judges' Rulings", [2000] Crim. L.R. 971.

[31] Glanwille Williams, *"Textbook of Criminal Law"*,(1983),(2nd ed.) p. 164

proceedings [32] The distress attaches to the criminal trial is undoubtedly high and definitely, it will increase with the repeated trial process.[33]

Conclusion

Double jeopardy is a procedural defence that forbids a defendant from being tried again on the same (or similar) charges following a legitimate acquittal or conviction. In common law countries, a defendant may enter a peremptory plea of *autrefois acquit* or *autrefois convict* (*autrefois* means "in the past" in French), meaning the defendant has been acquitted or convicted of the same offence and hence that they cannot be retried under the principle of double jeopardy The rule against double jeopardy is a universally accepted principle for the protection of certain values within the criminal justice system. It serves many purposes such as preventing the arbitrary actions of the state against its subject, ensures finality in litigations etc., which are of great importance for the protection of human rights of the accused persons. It is a centuries old principle, which survived not by chance, but for many good reasons. Thus, existence of such a rule is inevitable for the integrity of the criminal justice system itself.



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[32] R v Carroll [2002] 194 ALR 1

[33] David S. Rudstein, "Retrying the Acquitted in England. Part II: The Exception to Rule Against Double Jeopardy for Tainted Acquittals" San Diego Int'l L.J. [2008], p.246