Addis Ababa University

College of Law and Governance Studies

School of Graduate Studies

Prohibition of Double Jeopardy: A Case Study

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Abbreviations/Acronyms

BPR	**Business Process Re-engineering**
Cr.P.C	**Criminal Procedure Code**
ECHR	**European Convention on Human Rights**
FDRE	**Federal Democratic Republic of Ethiopia**
FHC	**Federal High Court**
FFIC	**Federal First Instance Court**
FSC	**Federal Supreme Court**
ICCPR	**International Covenant on Civil and Political Rights**
RAAF	**Royal Australian Air Force**

Abstract

The rule against double jeopardy is an age old protection for an accused person not to be tried and punished again for an offence once he has been finally convicted or acquitted. The straightforward application of the rule is imperative to prevent the continuous litigations and keep the accused to lead undisturbed life after his final verdict of acquittal or conviction. However, the public wants the outcome of the previous trial would be correct one. Sometimes, an accused person might be acquitted for insufficient evidences but, afterwards new evidences come into view which strongly points to the guilt of the formerly acquitted person. Then, the individual right of not to be retried and the need for accurate justice will clash. This paper therefore finds the middle way for the competing needs of accurate justice and the solid application of the rule against double jeopardy.

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Chapter One

Introduction

1.1 Background of the Study

The prohibition of double jeopardy is grounded on the notion that a person who has undergone the ordeal of a criminal trial should be left undisturbed following the final verdict, either to go on to lead a normal life if acquitted or to face the appropriate punishment if convicted. This rule is thought to have its origins in the controversy between Henry II and Archbishop Thomas à Becket whether clerics convicted in the ecclesiastical courts were exempt from further punishment in the King's courts because such further punishment would violate the maxim ***[nimobis in idipsum] [no man ought to be punished twice for the same offence].*** This maxim stemmed from St Jerome's commentary in AD 391 on the prophet Nahum: "For God judges not twice for the same offence".[1] The rule later found expression in the common pleas of French terms– *autrefois acquits de meme felonie* and *autrefois convict de meme felonie* .[2] The obvious idea here is that if a person has, on a prior occasion (autrefois) been acquitted or convicted of the exact same crime (la meme felonie) with which he is now charged, he can plead the previous judgment as a bar to the second indictment.

The essential idea of prohibition of double jeopardy is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of fretfulness and uncertainty. It reinforces the need for investigations and prosecutions to be thorough and diligent, with police and prosecutors knowing that they will not get a second chance to secure a conviction. Individuals should not be compelled to live in a state of continued uncertainty and anxiety with the possibility of a retrial for the same offence at some future unspecified date.

The basic rule against double jeopardy is recognized and protected at a domestic level by over fifty national constitutions, including the constitutions of countries as diverse as Germany,

[1] Martin Friedland, *Double Jeopardy* (1969) Clarendon Press, Oxford at 5.
[2] William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 17th ed), vol. IV, at 335-36.

Japan, Nigeria, and South Africa.[3] It is enshrined in a variety of international and regional instruments, including Article 14(7) of the International Covenant on Civil and Political Rights, Article 4 of the Seventh Additional Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(4) of the American Convention on Human Rights, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa as proclaimed by the African Commission on Human and Peoples' Rights, and Article 20 of the Rome Statute.[4]

Even if the rule of double jeopardy is a universal principle, its scope of interpretation varies. The interpretation given for a certain case at one point in time might be varied in another time for similar cases having similar transactions. The stipulation of the rule in different countries' legislations including Ethiopia did not have circumstantial briefs for easy applications. The subtle stipulation of the rule puts its murkiness on the judiciaries to interpret the rule more logically than legally.

1.2 Statement of the Problem

The whole point of a criminal justice system is to bring criminals to justice. In countries like Ethiopia where criminal investigation is not modernized and the prevalence of false testimony and corrupt practices are observed, lot of criminals will inaccurately be acquitted. Then the rule against double jeopardy will merit immunities for such persons against re-prosecution and culpable criminals would be left unpunished. Therefore, if there is no possibility of retrial at least for grave crimes as exception to the rule, justice will be endangered and the public confidences in the justice system become depreciated. On the other hand, the slight stipulation the rule is in the criminal laws of Ethiopia by itself made courts to interpret the rule inadequately.

[3] The (1949) Grundgesetz (GG) [Constitution] of Germany, Art. 103(3); the (1947) Kenpō [Constitution] of Japan, Art. 39; the (1999) constitution of Nigeria, Art. 36(9) and the (1996) constitution of South Africa, Art.35 (3) (m).

[4] International Covenant on Civil and Political Rights (ICCPR), Art.14 (7), G.A. Res. 2200A (XXI), U.N.Doc. A/6316 (Mar. 23, 1976); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms Art. 4 (Nov. 22, 1984), amended by Protocol No. 11, ETS No. 155 (Nov. 1, 1998); American Convention on Human Rights Art. 8(4), July 18, 1978, 1144 U.N.T.S. 123; Resolution on the Right to Fair Trial and Legal Aid in Africa, Nov. 15, 1999, ACHPR/Res. 41(XXVI) 99; Rome Statute of the International Criminal Court, Art.20, July 17, 1998, UN Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

1.3 Research Questions

Based on the statements framed above, the following questions would be the chief questions of the study:

1. Can a person once convicted or acquitted for bodily injury (felony assault), be recharged for murder crime if the victim later dies for the same incident?
2. Is the principle of prohibition of double jeopardy applicable to files closed for absconding of witnesses or defendants and withdrawal of charges?
3. If a defendant who actually committed the crime is acquitted for insufficient evidence and later fresh and compelling evidences are emerged pointing that the crime was committed by him, how is the competing interest of the victim or the public and the right of the defendant resolved under Ethiopian criminal law?
4. Can an accused person be retried in the future for the crime once interrupted (stopped) by an order of the ministry of justice (government) for public interest?
5. If tainted acquittal is obtained through interference, or perversion of the administration of justice (such as perjury, interference with witnesses, etc), and to a particular causative link between the commission of such offences with the previous acquittal, is there any legal means to redress the injustice in Ethiopia?
6. How is the individual right to be free from multiple punishments and the sovereign jurisdictions of states to enforce their own laws be resolved?

1.4 Objective of the Study

The objective the study is to examine the corollaries of the prohibition of double jeopardy in the criminal justice system in general and the scope and practical implication in Ethiopia in particular. The study particularly assesses whether the rule against double jeopardy applies to the present offence laid against the accused to be the same in law and fact to the offence for which the accused has been acquitted or convicted in the prior trial or accordingly extends to a different offence later occurred as a consequence of the previous act. To this end the study strives to address the following chief objectives:

- ✓ Examine the scope of applications of the rule against double jeopardy in other countries and bring lessons for Ethiopia.

- ✓ Examine how the principle of double jeopardy is articulated in the international instruments and in the Ethiopian constitution and criminal laws and the possibilities of retrial if any.
- ✓ Investigate whether or not the Ethiopian criminal justice system permits exceptions to the rule against double jeopardy in case of public interest.
- ✓ Examine the factors that lead to put an exception to the prohibition of double jeopardy rule in the criminal laws of other countries.
- ✓ Analyze some case decisions and put forward academic suggestions.

1.5 Scope of the Study

The scope of the study is particularly confined to look into the practical application of the rule against double jeopardy in Ethiopia. In due course, the scope of interpretation of rule against double jeopardy in other countries will slightly be seen. The study is emphasized to challenge the standing of wrongful acquittals in Ethiopia under the guise of double jeopardy. It also scrutinizes the rule of double jeopardy in the international human right laws.

1.6 Significance of the Study

This study will adduce to the Ethiopian criminal justice system an enduring interpretation of the rule against double jeopardy by studying into court decisions of common law countries where it has been entrenched. Particularly, the paper suggests for an exception to the rule against double jeopardy that a person should not be allowed to escape justice when new evidence, of sufficient strength, has emerged subsequent to his acquittal which points to his guilt. Besides, the findings of the study will help legislatures, judiciaries, and justice administration as inputs in their careers and justice reform activities of the country.

1.7 Methodology

This research is basically of doctrinal nature which the writer has planned to analyze and scrutinize the legal protection given for the principle of double jeopardy in the international and domestic laws. Since this research will be conducted in Ethiopia, the writer has intended to collect primary sources through interviews with judges and justice administration organs. A secondary source which encompasses literature reviews embodies; books, case decisions, articles, journals, relevant national and international laws, theses and internet links shall be referred and utilized significantly. In the mean time, the research questions shall be answered.

1.8 Limitation of the Study

Financial limitation is the main impediment of this writer. Since the writer is a self-sponsored student, he has not got any financial support either from the university or funding organs which would be a power to gather more enriching case files from different federal and state courts. Though the writer has planned and tried to have interviews with Federal Supreme Court Judges, most of them were busy of working files. So, he could not spend time with them.

1.9 Ethical Consideration

This writer has carefully discerned the ethical considerations during writing this paper. He provided an accurate account of information by analyzing and examining collected cases and relevant literatures to build coherent justifications for descriptions. Explanations taken from literatures to strengthen the writer's arguments are fully authorized in footnotes. The Blue Book system of citation is used in the paper.

1.10 Chapter Outline

This paper is organized into five chapters. The first chapter is an introductory part and deals with the general background of the study, statement of the problems, research questions, objective, scope, significance, methodology of the study and ethical considerations which the writer should obey during the study. The second chapter concerns with the general concept of the rule of double jeopardy from its origin to its contemporary application. This chapter is a critical literature review of double jeopardy jurisprudence.

The third chapter deals with the recent movements towards reforming the rule against double jeopardy in the common law countries. The arguments in favoring and protesting the reforms for the rule against double jeopardy are discussed. Exceptions and safeguard measures of the proposed reforms are described therein.

The fourth chapter envisages the practical application of rule against double jeopardy in Ethiopia by analyzing some decided cases with relevant legislations and international covenants. The last chapter summarizes the issues discussed in the paper and recommends the key findings of the writer to the concerned organs of the government.

Chapter Two

The General Concept of the Principle of Double Jeopardy

2.1 The Origin of the Principle of Double Jeopardy

Double jeopardy is one of the oldest legal concepts in Western civilization. In 355 B.C., Athenian statesman Demosthenes said, "The law forbids the same man to be tried twice on the same issue." The Romans codified this principle in the Digest of Justinian I in A.D. 533.[5] The principle also survived the Dark Ages (A.D. 400–1066), notwithstanding the deterioration of other Greco-Roman legal traditions, through Canon Law[6] and the teachings of early Christian writers.

In the Digest of Justinian, it is stated that "the governor must not allow a man to be charged with the same offence of which he has already been acquitted." In the English legal tradition other Latin sentences such as "*nemo debit bis puniri pro uno delicto*"[7] are often cited and referred to as belonging to the Roman heritage although their precise framing and their application under Roman Law is not clearly known. Also under canon law, double jeopardy finds its room. In particular, it is made descending from the Bible's reading "there shall not rise up a double affliction."[8]

Though the origins of the double jeopardy rule are in both Roman and Greek law, it had gained more widespread use under 12th century English law. At that time there were two different court systems- ecclesiastical and the king's court, and there was concern about whether someone convicted in the church-run court could subsequently be tried in the king's court. By the middle of the following century the principle of double jeopardy had emerged to mean that a defendant can only be prosecuted once, no matter what the verdict.[9]

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[5] *http://legal-dictionary.the freedictionary.com/Justinian+ I*, (Visited on June 25/2015).

[6] *http://legal-dictionary.the freedictionary.com/Canon +Law*, (Visited on June 25/2015).

[7] Other variants often cited are: "*Nemo bis punitur pro eodem delicto; Non bis in idem; Nemo debet bis vexari pro una et eadem causa*" cited in Matteo Rizzolli ,*Why Public Prosecutors cannot Appeal Acquittals, Studi e Note di Economia, Anno XV, n. 1-2010, at 83.*

[8] "*Non consurget duplex tribulatio", Latin Vulgate Bible St. Jerome 382 AD 1 Nahum 9* cited in Jay A. Sigler, '*A History of Double Jeopardy'*, The American Journal of Legal History, Vol. 7, No. 4 (1963), at 7.

[9] Hunter, J. '*The Development of the Rule against Double Jeopardy', Journal of Legal History*, (1984), at 5.

Martin Friedland has traced its origins in the common law to the dispute in the 12th century between King Henry II (King of England from 1154–1189) and Archbishop Thomas à Becket over whether clerks convicted in the ecclesiastic courts were exempt from further punishment in the King's courts. Henry is reputed to have said that it takes "two crimes to hang a priest." The first crime could lead to his being defrocked and only then could the second crime lead to capital punishment. The renowned legal scholar and Archbishop of England Thomas à Becket strenuously objected to Henry's proposal and invoked the canon-law principle of "not twice for the same fault.[10] Conflict over this and other points of church authority became so bitter between the two men led to Becket's murder by knights who thought they were carrying out the king's wishes. As penance, and to suppress dissent, Henry II bowed to the "benefit of clergy" — that is to the exclusive authority of ecclesiastical courts to try their own. Over time, the clerical privilege evolved into the universal protection that is now called "double jeopardy."[11] The principle of double jeopardy may, however, have been derived from the continent through the canon law, rather than being native to England. The assumption on this point is difficult to resolve since much of Western law derives from a common fund of shared judicial concepts. No statement of the double jeopardy clause appears in Magna Charta, nor can it be discovered by implication.[12]

2.2 The Development of the Principle of Double Jeopardy

The concept of double jeopardy goes far back in history, but its development was uneven and its meaning has varied. The English development, under the influence of Edward Coke and William Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[13]

In England, the protection against double jeopardy was part of the common law, or the body of judge-made law used in royal courts, but in the United States it became a part of the Constitution. The phrase "life or limb" contained in the Fifth Amendment[14] has a literal meaning in English laws. For instance, in Ethel red's laws it is said of the accused that upon a

[10] Martin Friedland, *supra note* 1, at 5
[11] Wendy McElroy, *Why Double Jeopardy may not Protect You* (2011), at 2.
[12] Jay A. Sigler, *'A History of Double Jeopardy', The American Journal of Legal History, Vol. 7, No. 4 (1963),* at 284.
[13] Martin. Friedland, *supra note* 1, at 7.
[14] The Fifth Amendment of the U.S. Constitution ratified in 1791.

second conviction "let him be smitten so that his neck breaks."[15] It is believed that, to the drafters of the clause, "to be in jeopardy of life or limb" meant to be in jeopardy of “capital punishments”. However, the term later used metaphorically than literally that, imprisonment may not literally deprive me of my limbs, but chains or bars do deprive me of free use of my “limbs”, loss of days, weeks or months of one’s “life”. This seems the spirit and purpose of the clause obviously applies.

In the 15th century double jeopardy concept was still not the same as that found in later English or American law. In most common law jurisdictions, the attachment of jeopardy in the legal sense arises following a lawful acquittal or conviction on the merits of the particular case. According to the American rule, jeopardy attaches to the initial stages of the criminal trial. The attachment of jeopardy at this early stage of the trial in the United States undeniably fails to protect the interests of society and overall public confidence in the criminal justice system, as it greatly enhances the possibility that guilty persons may be “acquitted” in the absence of a completed trial on the merits. However, some states have altered the federal requirement. Mississippi stipulates in her constitution that "there must be an actual acquittal or conviction on the merits to bar another prosecution."[16] The English rule requires a final verdict before jeopardy can be said to begin.[17] But English double jeopardy in 1482 attached at the time of the plea of not guilty, since, as Justice Fairfax explained: "The defendant has pleaded a plea 'not guilty' by which he has put his life in jeopardy."[18] But, on the other hand, discharge of a jury did not amount to putting in jeopardy, as exampled by a 1406 case in which the jurors previously sworn "later sworn was new as if they had never appeared before."[19] By 1676, the rule required an acquittal or conviction to constitute a prior jeopardy,[20] the modern English rule. This would certainly reduce the possibility that accused persons, who in all probability are guilty of the offence(s) charged, may be released from the jurisdiction of the courts without further prosecution.

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[15] Stephen, *A History of the Criminal Law of England* (1883), at 58.
[16] *The Constitution of Mississippi, Art. III, Sec. 22*
[17] *Reg. v. Charles worth, 1 B. and S. 460, 507* (1861) and *Winsor v Queen, L. R. 1 Q. B. 289, 303; 390* (1866) cited in Jay A. Sigler, *supra note* 12, at 294.
[18] *Trin. 22 Ed, IV, f. 19, pl. 46* (1482) cited in Jay A. Sigler *ibid*.
[19] *Hil. 7 Hen. IV, f. 39, pl. 2* (1406) cited in Jay A. Sigler *ibid.*
[20] *Turner's Case (1676), 84 Eng. Rep. 11* cited in Jay A. Sigler *ibid.*

The basis of double jeopardy was described by William Blackstone who informed generations of English lawyers. His1769 statement of the doctrine remains the standard definition:
The plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life or limb more than once for the same offence. The plea of autrefois convict, or a former conviction for the same identical crime is a good plea in bar to an indictment. And this depends upon the same principle as the former that no man ought to be twice brought in danger of his life for one and the same crime.[21]

Writing hundred years after Coke, Blackstone describes former jeopardy as applying to state prosecutions alone.[22] The contemporary conception is broader and not limited to felony cases, as Blackstone required. The necessity of a prior verdict of guilt or acquittal is accepted in England but not in America. American conceptualization of double jeopardy began with the Massachusetts colony. It took a separate tack from English developments and laid the ground work for the eventual adoption of double jeopardy as a constitutional protection. Massachusetts criminal law was well in advance of that of England with respect to double jeopardy. Whereas in 17th century England it meant that no man's life ought twice to be placed in jeopardy for the same offense, the Massachusetts rule extended to all types of criminal prosecutions and to civil trespasses as well.[23]

The Massachusetts Code of 1648 was a comprehensive and relatively complete statement of the laws, privileges, duties, and rights of inhabitants of the colony, and as such, "it was the first comprehensive code of laws in the New World."[24] Its provisions were often adopted directly into the law of other colonies, especially the Connecticut and New Haven colonies.

No matter what the reason was, the first Bill of Rights which expressly adopted a double jeopardy clause was part of the New Hampshire Constitution of 1784, stating: "No subject shall be liable to be tried, after an acquittal, for the same crime or offense."[25] It is noteworthy

[21] William Blackstone *supra note* 2, at 329.
[22] *Id*. at 336.
[23] Max Farrand, *The Laws and Liberties of Massachusetts* (1929) at 46.
[24] George L. Haskins, *"Codification of the Law in Colonial Massachusetts: A Study in Comparative Law," 30 Indiana L.J. 1 (1954)* cited in Jay A. Sigler *supra note* 12, at 299.
[25] The Constitution of New Hampshire (1784), Art. I, sec. XVI.

that this protection extends merely to former acquittals, only a portion of the protection available in contemporary England, or in the Massachusetts of the previous century. Passing from constitutional provisions to the case law of colonial America permits a more accurate understanding of the roots of double jeopardy.

History has given American law a double jeopardy concept as a part of its most fundamental principles. On June 8, 1789, the following amendment to the Constitution was proposed in the House of Representatives that: "no person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."[26] The subject of amendments to the Constitution was first broached by James Madison "to quiet that anxiety which prevails in the public mind." Madison asserted that certain amendments had occurred to him as "proper to be recommended by Congress to the State Legislatures." Madison's propositions included the substance of the double jeopardy concept. It has been noted that the double jeopardy clause was adopted by the first Congress of the United States without much debate or indication of its intended meaning. It was intended to be "declaratory of the law as it now stood" and was to conform to the "universal practice in Great Britain."[27]

The contemporary categories of double jeopardy are contained in Coke's three pleas of autrefois acquit, autrefois convict, and former pardon. At the time of the adoption of the American Constitution the double jeopardy principle was recognized by these three pleas in bar, as well as the plea of autrefois attaint. An 'autrefois attaint', a now defunct plea, was a very significant part of 17th century double jeopardy, as Coke explains that," autrefois attaint of the same felony was a good plea, as well in an indictment as in Appeal." This rule seems to have had a similar impact to that of double jeopardy, since, "if a man be attainted of manslaughter, it is a good bar to an indictment of murder of the same death, and in the reverse. The second trial would be superfluous"[28]

The recent common law trend towards extending the scope of the double jeopardy rule has also been reflected internationally. Both the *International Covenant on Civil and Political*

[26] *Annals of the Congress of the United States, First Congress,* Vol.1 (Joseph Gales, ed.1790) at 434.
[27] Jay A. Sigler *supra note* 12, at 306.
[28] Jay A. Sigler, *supra note* 12, at 296

Rights (ICCPR)[29] and the *European Convention on Human Rights (ECHR)*[30] have double jeopardy provisions, while the doctrine is constitutionally guaranteed in India,[31] South Africa,[32] the United States of America[33]and Canada,[34] as well as in 50 other states.[35]

2.3 The Nature and Application of the Principle of Double Jeopardy

The principle of double jeopardy begins when a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. If the proceedings during the former trial were *ultra vires*, the verdict of that court will be deemed void *ab initio* of legal efficacy and, accordingly, may not form the basis of the pleas in bar against a second trial for the same criminal offence.

The rule against double jeopardy does not preclude ordinary civil or administrative proceedings against a person who already has been prosecuted for the same act or omission. The criminal proceedings were instituted with the purpose of punishing and deterring others from similar behavior whereas the civil suits were intended to compensate the victim with money damages for the losses they had suffered. Many courts have ruled that punitive damage awarded in civil suits are not sufficiently criminal for double jeopardy purposes when the

[29] 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': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[30] Article 4(1) of the Seventh Protocol: '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 has already been finally acquitted or convicted in accordance with the law and penal procedure of that State': *European Convention on Human Rights* opened for signature 4 November 1950, ETS 005 (entered into force 3 September 1953).

[31] The Constitution of India (2010), Art. 20(2), *'No person shall be prosecuted for the same offence more than once'*.

[32] The Constitution of the Republic of South Africa (1996), s. 35(3)(m).

[33] United States Constitution amendment V: *'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'*. Nevertheless, the U.S. Supreme Court has established that the right against double jeopardy is not limited to *capital crimes or corporal punishment*, but it extends to all felonies, misdemeanors and juvenile delinquency adjudications regardless of the applicable punishments.

[34] The Canadian Charter of Rights and Freedoms, being part I to the Constitution Act (1982), s.11 (h), 'Any *person charged with an offence has the right … if finally acquitted of the offence, not to be tried for it again'*.

[35] Chief Cassiouni, *'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions' (1993)* 3 Duke Journals of Comparative and International Law, at 235, 288–9.

plaintiff seeking those damages is a private party, not the state.[36] This ruling can be best explained by noting that the Bill of Rights guarantees protection only against government action. It does not create a system of rights and remedies for disputes between private citizens like the law of torts or contracts. Courts have not determined whether punitive damages recovered by the government in a civil suit would bar subsequent prosecution, nor have they agreed whether a number of administrative proceedings can be uniformly characterized as punitive or remedial.

The overall design of the Double Jeopardy Clause was best expressed by the U.S Supreme Court in *Green v. United States.* Writing for the majority, Justice Black stated:
"*the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.*"[37]

The landmark English case of *Connelly v Director of Public Prosecutions (DPP)* [38] defined the powers of a court to bar a second prosecution for a charge which was included in the first indictment. The defendant was indicted for robbery with aggravation and murder, in separate indictments and was convicted of murder. The Court of Criminal Appeal vacated the conviction and entered a directed verdict of acquittal. The trial judge set aside the second indictment for robbery, waiting for the outcome at the Court of Criminal Appeal on the first indictment. However, after the appeal, the prosecution tried to move forward with the robbery count, and the defendant pleaded autrefois acquit. The trial judge concluded that the jury had

[36] In *United States v. Halper, 490 U.S. 435* (1989) case, the U.S. Supreme Court prohibited the federal government from seeking a $130,000 civil penalty against a man who previously had been sentenced to prison for the same offense of filing $585 worth of false Medicare claims. The Court concluded that the gross disparity between the fine imposed and society's economic loss reflected a punitive remedial aim.
[37] *Green v. United States, 355 U.S.*, (1957) at 184, 187–88 cited in '*Rights of Person 5th Amendment,'* (1992), at 1279.
[38] . *Connelly v Director of Public Prosecutions* [1964] AC 1254 cited in Anthony Bellanto QC, *Developments in Double Jeopardy & The Application of the Statutory Non-Parole Period,* (2011), at 9

not acquitted the defendant on the robbery count and the judge refused to exercise his discretion and express an opinion that the prosecution should not proceed.

The defendant then was convicted of robbery, which was affirmed by the Court of Criminal Appeal, after which the defendant appealed to the House of Lords. The House of Lords rejected the defendant's autrefois acquit argument by saying: one test as to whether the rule of autrefois acquit applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a 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.[39]

Although the court denied Connelly relief through double jeopardy, the case is important because the House of Lords clarified the rules against double jeopardy.[40] The House of Lords prohibited prosecuting a defendant for lesser or greater offenses that could have been included within the initial indictment.[41] Three exceptions were stated in this case: (1) re-trial of a defendant who was convicted of a lesser-included offense and retried for murder −if the death occurred after the acquittal or conviction on the lesser charge, (2) partial jury verdicts − where the jury cannot reach a unanimous decision on some of the lesser included offenses, the defendant could be retried for those offenses(*i.e.* when a jury has been given an opportunity to deliberate and unable to reach a verdict, a retrial takes place at the discretion of the prosecution. The subsequent trial does not constitute a violation of the prohibition of double jeopardy), and (3) if the defendant agreed to have separate trials for two indictments.[42]

Lord Morris gave a lengthy judgment that established **nine Connelly principles** which defined the scope of the autrefois plea[43]:

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[39] *Connelly v DPP*, [1964] A.C. at 1259 cited in Steven V. DeBraccio, '*The Double Jeopardy Clause, Newly Discovered Evidence, and an Unofficial Exception to Double Jeopardy:* A Comparative International Perspective', Albany Law Review, vol.76.3, (2013), at 1824.
[40] Nyssa Taylor, Comment, *England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes*, 19 Temp. Int'l & Comp. L.J. (2005), at 198.
[41] *Ibid*.
[42] Lisa Griffin, *Two Sides of a "Sargasso Sea": Successive Prosecution for the "Same Offence" in the United States and the United Kingdom*, *37 U. RICH. L. REV*. (2003), at 471, 498.
[43] Anthony Ballento QC, '*Developments in Double Jeopardy and the Application of the Statutory Non-Parole Period, Lexis Nexis Criminal Law Conference Parkroyal, Darling Harbour*,30 Nov.2011, at 9-11.

1. A man cannot be tried for a crime in respect of which he has been previously acquitted. In modern times the plea also affords a shield against cognate charges sufficiently connected with the original charge;
2. A man cannot be tried for a crime in respect of which he could, on some previous indictment, have been convicted – The typical example is murder and manslaughter. The plea is also an answer to charges of criminal attempts where the accused was acquitted of the crime itself because on the first indictment the jury could have convicted of an attempt;
3. For the rule to apply, the offence charged in the second indictment must have been committed at the time of the first charge(for instance, a conviction or acquittal for assault will not bar a charge of murder if the assaulted person later dies);
4. The same rule applies if the crime in respect of which the prisoner is being charged is in effect the same, or substantially the same, as the principle or a different crime in respect of which he has been acquitted, could have been convicted or has been convicted;
5. The test as to whether the plea is available is whether the evidence which is necessary to support the second indictment or the facts which constitute the offence charged within it would have supported a conviction on the first indictment or some count on which it was competent for the jury to convict;
6. On a plea of autrefois acquit the accused is not restricted to a comparison of the indictments; he may prove the identity between persons(*i.e.* victims of the former and present indictment, if any), transactions and offences required to sustain the plea – The court is not confined to the record, but the reality of the matter will be considered. The case of "autrefois convict" does not involve so many difficulties as " autrefois acquit," because if a man has been convicted and suffered the punishment adjudged by a Court, both individual justice and the interests of the state suggest that he should not be tried again whether the conviction was according to law or not. But in the case of acquittal, there is not the same consonance between the interests of the individual and the interests of the state;
7. The substantial identity of the crime charged in each of the proceedings and it is immaterial whether the facts under examination, or the witnesses to be called, in the later proceedings are the same as those in the earlier proceedings – The facts under examination and the witnesses may be identical; yet the crime charged in the second indictment may be one in which the

accused could not have been convicted on the first indictment. Unless this test is satisfied, the plea is not available[44] ;

8. Apart from circumstances under which there may be a plea of autrefois acquit, a man may be able to show that a matter has been decided by a court competent to decide it and; so that the principle of *res judicata* applies (*i.e.* when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. An acquittal or conviction is res judicata if it is final, in the sense that all ordinary procedures have been exhausted); and
9. Autrefois acquit is an alternative to the plea of not guilty which the accused may make when arraigned. If the plea is put forward, the Crown must either admit it, in which case the accused will be discharged or answer it by filing a notice that the plea is denied.

Thus, in Connelly it was argued that, even if a plea of autrefois acquit was not strictly available the court had discretion to stay the second proceedings. This claim failed because their Lordship saw nothing unfair in the appellant being charged with robbery when his acquittal for murder was due to an error in the summing up. But not, different views are expressed on this question.[45] The majority accepted the existence of "issue estoppel"(*i.e*. once a court has decided an issue of fact or law to its judgment, that decision may preclude re-litigating of the issue in a suit on a different cause of action involving a party to the first case) against the Crown in criminal cases although these views were not necessary for the decision.

It is Lord Morris's test that has been followed through the years and developed with further case law, but it should be noted that Lord Devlin gave a further judgment with Connelly where he sought to narrowly confine the issue of autrefois stating: "For the doctrine of autrefois to apply it is necessary that the accused should have been put at risk of conviction for the same offence as that with which he is then charged. Although under veil of agreement with Lord Morris, Lord Devlin thus argued that *autrefois* requires one to be charged with the "same offence," not "substantially" the same offense. The word "offence" embraces both the

[44] Handley, The Honorable Justice Mr. KR *'The Doctrine of Res Judicata'*, Butterworths, 3rd ed, 1996, at 318.
[45] *Id*. at 324.

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."[46]

Lord Devlin advocated that where a wider approach was taken and offences that were not the same in both facts and law were to be tried twice the defendant ought to rely on the principles of abuse of process, which give the court a far wider discretion, rather than the plea in bar that autrefois constitutes. Initially the court appeared to favor Lord Morris's definition and allow a wider interpretation however more recent case law has emphasized the importance of Lord Devlin's speech and the use of autrefois where an abuse of process argument ought to run.[47]

However, in 1997, the Court of Appeal further clarified Connelly in *Regina v. Beedie*.[48] On November 29, 1993, Tracy Murphy was died of carbon monoxide poisoning because her landlord, Thomas Sim Beedie, did not properly maintain the gas heater in her apartment.[49] In 1994, the landlord was prosecuted by the Health and Safety Executive under Health and Safety Work Act of 1974[50] and pled guilty to a breach of the duty to ensure that the appliance was maintained and was fined £1918. At a later inquest the defendant gave evidence, believing that he was immune from prosecution led him to manslaughter prosecution. He was subsequently charged with manslaughter by the Crown Prosecution Service (CPS). Accordingly, he pleaded autrefois convict that he had already been convicted of a lesser offense related to the same conduct and the victim did not subsequently die after the plea, but the court rejected his plea. [51]

He subsequently pled guilty to manslaughter and was sentenced to 18 months' imprisonment.[52] Beedie appealed his sentence, and the appellate court quashed the conviction,

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[46] Michelle Heeley- No 5 Chambers, '*Double jeopardy' (2013), at 3.*
[47] *Ibid.*
[48] *Regina v Beedie,* [1998] Q.B. at 356 (Eng.) 1259 appearing in Steven V. DeBraccio, 'The *Double Jeopardy Clause, Newly Discovered Evidence, and an Unofficial Exception to Double Jeopardy: A Comparative International Perspective'*, *Albany Law Review*, vol.76.3, (2013).
[49] *Id.* at 358–59.
[50] The Health and Safety Executive (HSE) is responsible for enforcing workplace safety standards in the United Kingdom. Health & Safety Executive Enforcement Policy Statement 2–3 (2009).The HSE is empowered to actually prosecute people who violate health and safety codes in the United Kingdom through Approval and Litigation Officers. *Available at* http://www.hse.gov.uk/enforce/enforce.htm#enfpro, (visited on June 22, 2015).
[51] *Beedie*, [1998] *Q.B.* at 360-61 *supra note* 48, at 1826.
[52] *Id.* at 357.

holding that the indictment ought to have been stayed as an 'abuse of process' and there were no exceptional circumstances to justify the second prosecution. It also rejected the trial court's balancing of 'public interests' against the defendant's rights.[53] Also irrelevant was the fact that different bodies led the prosecutions (the HSE led the first, and CPS led the second).[54]

The principle that a person should not be tried for a second time on substantially the same facts because it is an abuse of process is known in the United Kingdom as the 'Connelly principle', after the case of *Connelly v DPP* in the House of Lords, was lately referred to by the High Court of Australia in *R v Carroll.*[55] In Australia, the merits of double jeopardy including the issue of abuse of process – were examined in the *R v Carroll* case that involved the sexual assault and killing of an infant girl in 1973. Raymond Carroll was charged with the murder of a 17 month old girl, Deidre Kennedy, whose body was found in Ipswich, Queensland, on 14 April 1973.[56] The cause of Deidre's death was strangulation and her injuries included bruises on the left thigh that were identified by medical and dental experts as marks left by human teeth. Carroll pleaded not guilty and gave sworn evidence at his trial in 1985, claiming that he was attending a RAAF course in South Australia at the time of the murder. The Crown's case included forensic odontology evidence that the marks on the victim's thigh were made by Carroll's teeth, and evidence that suggested he had left the RAAF course before its conclusion. Carroll was convicted of murder but appealed to the Queensland Court of Criminal Appeal. On 27 November 1985 the Court allowed the appeal and entered a verdict of acquittal, finding that the evidence was insufficiently strong to sustain the conviction. In 1999 Carroll was charged with perjury. The Crown alleged that Carroll had

[53] The lower court found that concerns for the victim's family constituted public interest sufficient to allow a re-trial. *Id* at 366. While the Court of Appeal found the lower court's analysis to be incorrect, it was quick to point out that submissions made by the Crown Prosecutor might have misled the lower court into thinking that this was the correct standard.

[54] *Id* at.360, 366–67. The court argued that there could have been a joint prosecution by both offices with manslaughter being included, concluding that —we understand that liaison between the separate prosecuting authorities in the North East has now improved so that the history of the present prosecution should not be repeated in other cases. While it is not entirely clear why the parties did not engage in a joint prosecution, the prosecutorial bodies' respective jurisdiction suggests that the HSE would not prosecute a manslaughter charge.

[55] *R v Carroll* [2002] *HCA 55*; (2003)194 ALR 1 per Gleeson CJ and Hayne J at paras 38-39, and McHugh J at paras 131-132.

[56] The High Court judgment does not articulate all the details of the case. Some aspects of the facts and evidence are taken instead from the judgment of the Supreme Court of Queensland in *R v Carroll* [2000] QSC 308 (refusal to grant stay of proceedings in perjury trial) cited in Rowena Johns, *Double Jeopardy, Briefing Paper No 16/03*, at 7.

given false evidence at the murder trial by testifying that he did not kill Deidre Kennedy. The defense applied to stay the proceedings, arguing that they were an abuse of process and in contravention of the rule against double jeopardy, but the application was dismissed. The perjury trial was held in 2000 and the Crown relied on some new and stronger evidence: an alleged confession by Carroll to a fellow inmate on remand before the murder trial (although not reported to police until 1997); evidence of a woman who claimed that she had seen Carroll in Ipswich on the day of the murder; evidence from another woman who corroborated claims by Carroll's ex-wife that he had bitten the legs of his own daughter when she was a girl ('similar fact evidence'); and digital analysis of images scanned onto a computer to show that the marks on the victim's legs corresponded with a cast of Carroll's teeth. The jury found Carroll guilty of perjury. He appealed to the Court of Criminal Appeal which again quashed the conviction and entered a verdict of acquittal.

The Crown was granted leave to appeal to the High Court but the appeal was dismissed. The Court unanimously held that the proceedings for perjury should have been stayed because they were an abuse of process. Even if Carroll was not tried for the same offence twice, the prosecution for perjury sought to controvert the earlier acquittal on the charge of murder: per Gleeson CJ and Hayne J, with whom Gaudron, Gummow and McHugh JJ agreed. Gleeson CJ and Hayne J in a joint judgment stated: The inconsistency between the charge of perjury and the acquittal of murder was direct and plain. The laying of the charge of perjury, solely on the basis of the respondent's sworn denial of guilt, for the evident purpose of establishing his guilt of murder, was an abuse of process regardless of the cogency and weight of the further evidence that was said to be available.
Gaudron and Gummow JJ found: …the laying of that indictment for perjury was vexatious or oppressive in the sense necessary to constitute an abuse of process; in substance there was an attempt to re-litigate the earlier prosecution.

McHugh J concurred: It is an abuse of process for the Crown to charge a person with an offence of perjury when proof of the charge necessarily contradicts or tends to undermine an acquittal of the accused in respect of another criminal charge.

The protection against double jeopardy in America was incorporated into the federal and over forty state constitutions. Even in those states not having constitutional provisions the common law rule is applied as one of the elements of due process of law.[57] Most of the constitutions provide that no person "shall be twice put in jeopardy for the same offense" or that no person "shall be subject for the same offense to be twice put in jeopardy of life and limb."[58] The greatest perplexities in the application of these provisions have been caused by the lack of certainty as to the definition of the seemingly simple term "same offense." In attempting to define this term, the courts have devised certain technical rules and tests, fair perhaps in one case, but often inadequate criteria when applied to different fact situations.

The two double jeopardy problems which have caused the greatest conflict, and which have been most inadequately solved, have arisen where the same act violates the laws of more than one sovereign states and where more than one offense arises from the same act. In the first situation the majority of courts have held that a prosecution by one sovereignty will not bar prosecution by another, while in the second it is generally held that there may be a prosecution for more than one offense if certain requirements are met.[59]The reasoning behind the rule of successive prosecutions is that, an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of each and therefore may be punished by each; though the acts punished are identical, the offense is not the same.

The constitutional provisions against double jeopardy usually prohibit a second prosecution for the "same offense." In attempting to reach a standard definition that would be satisfactorily applicable to all fact situations the United States' courts have applied series of tests. The most important ones are; the same evidence test, the same transaction test and the same element test.

The ***same evidence test*** *is* a widely used test often harsh in its application.[60] This test is whether the evidence necessary to support the second indictment would have been sufficient

[57] Margaret Jones, *What Constitutes Double Jeopardy, 38 J. Crim. L. & Criminology 379* (1947-1948), at 379.
[58] Illinois Stat. Rev. Const.(1945) Art. 2 &10.
[59] Margaret Jones, *supra note* 57, at 380.
[60]*Dowling v. United States, 493 U.S. 342* (1990) (The record in Dowling case indicated that the Government was offering the eyewitness testimony to establish the defendant's identity. The eyewitness had testified at the first trial(burglary, attempted robbery, assault, and weapons offenses, but was acquitted of all charges) that Dowling

to procure a legal conviction upon the first.[61] A true same evidence test would prevent the government from introducing in a subsequent prosecution any evidence that was introduced in a preceding prosecution. Perhaps because of the ambiguity in the Court's statement of the test, i.e., whether the inquiry focuses upon the evidence adduced at trial, or upon the proof required to convict, the same evidence test has been applied differently by the courts.[62] This writer believes that, this test avoids the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct. The critical inquiry is what conduct the prosecution will prove, not the evidence the prosecution will use to prove that conduct. The presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding.

The ***same transaction test*** recognizes that when all consecutive violations of the law are considered part of the same transaction until the defendant takes positive steps to rectify the situation or until external factors separates the situation, they are the same.[63] There can only be one criminal prosecution for the multiple ramifications of a single criminal transaction. All crimes committed by the defendant that require proof of the same intent and occur in the same proximate time frame must be tried together.[64] Hence, it requires the prosecution to join all offences committed during a continuous interval that share a common factual basis and display a single goal and intent. The chief advantage of the *same transaction test* is that it demands a more efficient prosecution at the first trial. The careless and inefficient prosecutor may not cover his mistakes by repeatedly compelling the defendant to stand charges until a conviction is finally obtained.

The ***same element test***[65] requires courts to examine the elements of each offence as they are

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had entered her house "wearing a knitted mask with cutout eyes and carrying a small handgun" and that his mask had come off during a struggle, revealing his identity which is an essential element of an offense charged in the subsequent prosecution for other bank robbery," and that the testimony would likely "prove conduct that constitutes an offense for which the defendant has already been prosecuted).

[61] Edward Sutherland, *Double Jeopardy - The "Same Evidence Test" Applied*, Vol.33 La. L. Rev. (1973) at 476.

[62] See State v. Miller, 571 So.2d 603, 606 (La. 1990) (The 'same evidence' test depends upon the proof required to convict, not the evidence actually introduced at trial).

[63] Otto Kirchheimer, *The Act, The Offense, and Double Jeopardy*, 58 Yale Law Journal (1949) at 540.

[64] *Id.* at 541

[65] *Blockburger v. United States, 284 U. S. 299* (1932) (Where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether either provision requires proof of fact which the other does not).

delineated by statute and whether each provision requires proof of additional fact which the other does not, without regard to the evidence that will be introduced at trial. In other words, it is not to say that two criminal provisions create "distinct" offenses simply by appearing under separate statutory headings; but if each contains an element the other does not.[66] If anyone offence is fully subsumed by the other, such as a lesser included offence, the two offences are deemed the same, and only one punishment is allowed. For instance, Had the defendant been first acquitted on the indictment for murder, obviously such acquittal would constitute a bar to his subsequent prosecution for the crime of assault with intent to murder, because the latter is a lesser offense which is included in the crime of murder.

The protections afforded by the principle of double jeopardy in U.S. generally apply to proceedings entailing the following scenarios:

- In order for a defendant to be able to avail himself of jeopardy's protection, he must face a criminal sanction.

- Even if a defendant is faced with a criminal prosecution, jeopardy does not arise as a protection against future action by the state until jeopardy "attaches." In a jury trial, jeopardy attaches when the jury is impaneled and sworn,[67] *i.e.* when the entire jury has been selected and has taken the oath required for jury service.[68] In a bench trial, jeopardy attaches when the court begins to hear evidence.[69] Jeopardy also attaches when the court accepts a guilty plea, or if the defendant admits to sufficient facts, when the court swears a witness.[70] In case of Ethiopia, jeopardy attaches when the court finally decides on the merit of the case either in a verdict of acquittal or conviction. The verdict of conviction alone may not be sufficient to sustain the pleas in bar, as it also necessary that the defendant had been

[66] George C. Thomas, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, (1985) at 35.
[67] *Commonwealth v. Vaidulas, 433 Mass. 247, 252* (2001); *Commonwealth v. Super, 431 Mass. 492, 496* (2000); *Commonwealth v. Johnson, 426 Mass. 617, 624* (1998) cited in David Rossman, *'Chapter 21: Double Jeopardy'* (2011), at 4.
[68] In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the United States federal courts when the jury has been empanelled and sworn or when the court in a nonjury trial has begun to hear evidence.
[69] *Commonwealth v. Love, 452 Mass. 498* (2008) (although judicial error for judge to hear motion to suppress and conduct trial simultaneously, jeopardy attached once oral testimony was introduced in the proceeding) But in *Commonwealth v. Elizondo, 428 Mass. 322, 325* (1998) (jeopardy attaches in Jury-waived trial when first witness is sworn, but trial begins when defendant is placed at bar).
[70] *Ibid.*

punished accordingly. *i.e.*, the finality of verdict requirement has been fulfilled. Because the underlying rationale of autrefois convict is to prohibit duplication of punishments; if the plea could be supported by a finding of guilt alone, a defendant might escape punishment.

- The scope of federal and state protection against double jeopardy varies with respect to the identity of the sovereign bringing each criminal case. Under the federal constitution, jeopardy does not prevent different sovereigns from each punishing a defendant for violating their own laws, although the conduct punished in each case may be identical. Thus, a defendant can be punished for the same conduct by two different states,[71] by the federal government and a state, by the federal government and another country,[72] or by the federal government and a tribal court.[73]

- However, federal jeopardy does prevent cumulative punishment by different levels of the same sovereign — for instance, a municipality and the state in which it is located.[74] The term "sovereignty" refers to a prescriptive jurisdiction which authorizes independent state to enforce that law through a separate prosecution. The jurisdictional theories of international double jeopardy rule on the other hand argues that: (1) a state with an independent basis of national jurisdiction deriving mainly from entitlements over national territory and persons is an independent law giver, or "sovereign," for double jeopardy purposes that retains the ability to apply and enforce its own laws through prosecution in the face of prior prosecutions by other states; and (2) the state may do so whether the crime is a national offense (say homicide) or is an international offense (say genocide); but (3) where a state's jurisdiction derives solely from a shared entitlement with all other states to apply and enforce the international law against universal crimes, it should be blocked from prosecuting again if another state already has prosecuted for the crime in question.[75] The principle of *ne*

[71] *Heath v. Alabama, 474 U.S. 82* (1985), the full judgment of the case is available at https://en.wikipedia.org/wiki/Heath_v._Alabama, Accessed on June 20/2015.
[72] An exception to the dual sovereign rule bars multiple prosecutions if one sovereign dominated the other's acts. *United States v. Guzman, 85 F.3d 823* (1st Cir. 1996) (defendant's trial for related offense in Netherlands Antilles did not raise double jeopardy bar to trial in U.S. District Court).
[73] *United States v. Lara, 541 U.S. 193* (2004).
[74] *Heath v. Alabama, 474 U.S. 82* (1985); *Commonwealth v. Medina, 64 Mass. App. Ct. 708* (2005) (two counties prosecuting defendant for separate acts in continuous chain of events does not violate double jeopardy clause).
[75] Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 Wash. U. L. Rev. 769 (2009), at 775.

bis in idem which is an outcome of the complementarity principle, prevents an international court or tribunal from asserting jurisdiction when a competent national criminal justice system has already tried the defendant.[76] Thus, when a domestic court of competent criminal jurisdiction has already tried the defendant the complementarity mechanism reflected in *ne bis in idem*, points to a test as to whether the national criminal proceedings were genuine.[77]

- Double jeopardy's protection against multiple trials or punishments depends on how one determines whether the two proceedings involve the "same offense." Most obviously, a person who has already been acquitted or convicted cannot be re-prosecuted subsequently on the same charge. This is the classic and straightforward case where the pleas, autrefois acquit and autrefois convict would be applicable. The former acquittal has protective effect at common law because the acquittal has passed into judgment; it is *res judicata*.[78] The later plea is based on the rule of merger. The subsequent charge cannot be dealt with because it has merged in the earlier judgment.[79]

- The pleas of autrefois acquit and autrefois convict might also apply, in limited circumstances, to protect an individual from a second prosecution for a different charge arising from the same facts. This application of double jeopardy is potentially of very broad scope because, with the proliferation of statutory offences, a single factual scenario can give rise to several different offences. There has been considerable uncertainty about the precise ambit of such aspect of double jeopardy.[80] It has been variously described as applying to successive but different charges which are 'in substance the same',[81] where the fact prosecuted is the same in both, though the offences differ in color and degree.[82]

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[76] Gerard Coffey, '*Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting ne bis in idem in Conjunction with the Principle of Complementarity'*, New Journal of European Criminal Law, Vol. 4, Issue 1–2, 2013, at 64. Note: the principle of complementarity is the co-existence of two or more equally authoritative systems or sources of law which coordinates the functional relationship between domestic courts, international courts and tribunals.

[77] Art.20(3) of the Rome Statute of the International Criminal Court, Art.20, July 17, 1998, UN Doc. A/CONF.183/9, 2187 U.N.T.S. 90.

[78] '*Chapter 2: Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals' Discussion Paper Model Criminal Code* (2003), at 5.

[79] *Id.* at 4.

[80] *Id.* at 12.

[81] Michelle Edgily, '*Truth or justice? Double jeopardy reform for Queensland: Rights in jeopardy'*, Vol. 7 No 1 (QUTLJJ) (2007), at 117.

[82] *Ibid.*

Chapter Three

The Need for Reform and Putting an Exception to the Rule against Double Jeopardy

3.1 Justifications for the Rule against Double Jeopardy and Counter-Arguments

3.1.1 Justifications for the Rule against Double Jeopardy

The core justifications for the rule against double jeopardy often raised to refute the reform are that: (1) It avoids the repeated distress of the trial process; (2) It reduces the risk of a wrongful conviction; (3) It promotes finality in the criminal justice system; 4) It encourages the efficient investigation of crime and (5) It Protects the erosion of presumption of innocence.

3.1.1.1 Avoids the Repeated Distress of the Trial Process

What forcefully considered is that the double jeopardy rule avoids the repeated distress of the trial process, and that distress affected not only the accused, but also his family, witnesses on both sides, and the victim as well.[83] The rule protects a person from the humiliation, expense, anxiety and uncertainty that could accompany the quashing of an acquittal and the subsequent retrial.

The distress caused might be out of proportion to the seriousness of the alleged crime or the public interest in the conviction of the offenders might be an argument for confining relaxation of the rule to serious offences, or only where relaxation was in the interests of justice, but not for negating the proposed relaxation entirely.[84] It is the interest of this writer that if strong new evidence emerged of a defendant's possible guilt following an acquittal, it is quite likely that the victim and any witnesses would be willing to suffer the distress of a retrial as the necessary charge of obtaining justice. Certainly, there is little doubt that public outrage is generated when a presumptively guilty offender exploits the system and escapes

[83] English Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.7.
[84] The Law Reform Commission of Hong Kong Report, *Double Jeopardy* (2012), at 24, available at *http://www.hkreform.gov.hk.*

justice.[85] Compared to other defendants acquitted, guilty defendants fear much the ordeal of future repeated trial. The distresses of such individuals for narrow exceptions are sufferable for the collective interest in securing the conviction of guilty offenders, even in liberal democracies.[86]

3.1.1.2 Reduces the Risk of a Wrongful Conviction

One of the age old rationales for the double jeopardy rule is that, it decreases the risk of wrongly convicting the innocent. It is often argued in support of the double jeopardy rule that having only one trial allows the greatest opportunity for a defendant to properly defend a charge. The corollary being that more than one prosecution may reduce the capacity of innocent defendants to successfully defend themselves due to a depletion of stamina and the requisite resources.[87] The likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired a tactical advantage from the first trial.

Nevertheless, the English Law Commission considered that the risk of wrongful conviction was equally true of any trial and retained that if the new evidence was "very strong", the risk at a retrial would be "very small−considerably smaller than in the ordinary case, where the prosecution's evidence need only constitute a case to answer".[88]The writer would not be convinced with the argument that retrial could increase the risk of wrongful conviction because the need for retrial is a search for truth that the prosecutor indubitably prove its case upon strong evidences and that a defendant is not obliged to inculpate himself. And also, the new evidence supporting retrial comes to view reasonably after the passes of time and the defendant could replenish himself to defend the second trial. The Scottish Law Commission did not also deem the increased risk of wrongful conviction a persuasive argument against a

[85] Chris Corns, '*Retrial of acquitted persons: Time for reform of the double jeopardy rule*', (2003) 27(2) Criminal Law Journal, at 87.
[86] English Law Commission Report, *Double Jeopardy and Prosecution Appeals*, LAW COM # 267 (2001), at 37.
[87] The arguments of Gleeson CJ and Hayne J in *R v Carroll* [2002] 194 ALR 1, at 6–7.
[88] *Id.* at para 5.10.

retrial, since the presumption of innocence and the prosecution's burden of proving its case beyond reasonable doubt provide safeguards.[89]

3.1.1.3 Promotes Finality in the Criminal Justice System

Another argument for maintaining the double jeopardy rule is that it 'acts as a curb on the unfettered power and resources of the State, stopping it from being a persecutor rather than a Prosecutor'.[90]

Finality promotes closure after awful events, allowing a line to be drawn signifying that a crime and its aftermath are now closed. The prospect that it might be needed to go through the trial process again at some future date is likely to cause anxiety not only to the defendant but also to others involved.

The New Zealand Commission commented that "by preventing harassment and inconsistent results, the rule against double jeopardy promotes confidence in court proceedings and the finality of verdicts."[91] It is a primary rationale for the rule against double jeopardy was to bring about finality.[92] It is for the next reasons that: first, the common interest of society in treating final judgments of the courts as conclusive, so that parties and others can carry on with their lives. Second, preventing the possibility of conflicting judicial decisions on the same case is important for maintaining public confidence in the general efficacy of the courts.

The English Law Commission considered that it was not undesirable that such defendants should be subjected to the anxiety of knowing that their crimes might eventually be punished. They admitted that a higher value should be given to the "finality" argument, but that did not mean that no exception could be justified.[93]

3.1.1.4 Encourages the Efficient Investigation of Crime

[89] Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at paras. 2.15, 2.16 and 2.20.
[90] Richard Yallop, '*Split Verdict on Retrials'* (2003), at 9.
[91] New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para. 14.
[92] Scottish Law Commission Discussion Paper, *supra note 89*, at para. 2.30.
[93] English Law Commission Report, *supra note 86*, at para 4.22.

If the prosecution were able to prosecute a defendant once, there would be no risk that the initial investigation might be carried out as diligently as it should be. The English Law Commission observed that "the fact that, there is one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation."[94] As the pressure on police and prosecutors to investigate fully and obtain convictions for serious crimes is high, the impact of the double jeopardy doctrine on the behavior of investigators will be small, especially as retrials are to be restricted to cases where new evidence has become available that was not reasonably discoverable before the first trial.[95] A more serious threat is the possibility that a second prosecution may give police officers, who believe that an acquitted defendant is guilty or engaged in corruption tend to manufacture new evidences.

3.1.1.5 Protects the Erosion of Presumption of Innocence

There would be a real risk of the jury/judge at the second trial assuming that the new evidence must be compelling enough for permission to be granted to reopen the case, and therefore that the accused must be guilty. If the second trial is allowed, the jury/judge will make the previously acquitted defendant blameworthy prior to the evaluation of evidence. This will create a pressure on the defendant in the litigation.

3.1.2 Justifications in Favor of Reforming the Rule against Double Jeopardy

The rule against double jeopardy provides certainty and a conclusion for the individual who has been tried. From the general public's point of view however, the question arises as to whether a person should be allowed to escape justice when new and compelling evidence has emerged subsequent to his acquittal which points to his guilt. Rapid developments in recent years in forensic science and DNA testing have highlighted these concerns. Anomalies arising from strict adherence to the rule has sparked public outcry in some jurisdictions. Changes to the law have therefore been proposed or adopted in a number of countries.

Contrary to sound justifications favoring the strict rule against double jeopardy, powerful arguments have also emerged in favor of relaxing (reforming) the rule in certain circumstances. The most obvious is where new and compelling evidence is brought to light

[94] English Law Commission Consultation Paper, *supra note 83*, at para. 4.11.
[95] Charles Parkinson, *'Double Jeopardy Reform: The New Evidence Exception for Acquittals'* (2003), at 614.

after the completion of the original proceedings which points to the guilt of an acquitted defendant. This situation is increasingly likely to arise with the swift advances in recent years in the scope and quality of scientific evidence, particularly DNA testing, which offers persuasive evidence which was not previously available. There may also be circumstances where compelling evidence comes to light after the conclusion of the original trial, perhaps from a newly identified witness, documentary evidences or even confession statements.

Prof. Ian Dennis annotates that the emergence of new evidence of guilt calls into question the legitimacy of an acquittal and suggests that a mistake has been made. He states that a retrial in such circumstances will serve to "resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty."[96] In considering whether exceptions should be made to the strict rule against double jeopardy, one of the questions to be asked is whether society would be worse off if the rule remains unchanged. Comparably the acquittal of the guilty is as much a miscarriage of justice as the conviction of the innocent. Former Prime Minister of England, Tony Blair went even further in saying that, "It's perhaps the biggest miscarriage of justice in today's system when the guilty walk away unpunished."[97]

The term miscarriage of justice may be a synonym for a wrongly convicted innocent, describe a situation in which the state has obtained a conviction improperly, or include the unjustified avoidance of conviction. The quashing of the convictions of those who, by any understanding other than legal, are guilty, may damage public confidence in the system. As the government argues, 'to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity.' Those who made the mistakes should be punished, if appropriate; the public and the victim should not be penalized.[98] Politicians, police, prosecutors and victim of crime support

[96] Ian Dennis, "*Rethinking Double Jeopardy*" (2000) Crim. L R 933, at 945.
[97] Prime Minister Tony Blair's speech on *'Re-balancing of criminal justice system'* (sic), 18 June 2002, available at *http://www.pm.gov.uk/output/* .
[98] Quashing Convictions: Report of a Review by the Home Secretary, Lord Chancellor and Attorney General (London: Office for Criminal Justice Reform, Sept. 2006), at 12.

organizations in recent times advocated law reform that would allow the re-prosecution of those who had been previously acquitted.[99]

Miscarriage of justice emanating from wrongful conviction would also be redressed by revisionary trial. The Ethiopian legal system which the writer is well aware, no retrial is permissible and pardon is the merely available remedy for a convicted person, even if fresh evidence conclusively shows that the conviction was pronounced erroneously. Of course, the new draft criminal procedure code has come up with a new inclusion to allow retrial in cases of wrongful convictions.[100]

Sometimes, difficulties may arise where new or fresh evidence, which bears on the original finding of guilt or the fairness and probity of the original proceedings, becomes available after all appeal processes have been winded up. The main arguments forwarded to lay exceptions to the double jeopardy rule when new information emerges to cause guilty of an acquitted person are examined as follows.

3.1.2.1 The Interest of Justice

Convicting the guilty serves justice and fosters public confidence in the legal system. The law is brought into disrepute if offenders escape conviction. The interests of justice call for correct enforcement of criminal law against those who have committed offences. In this respect, technological advances and DNA evidence may now provide stronger evidence of a defendant's guilt. There is also an incident of public disquiet, even outrage, when someone is acquitted of the most serious crime and new evidence, such as a confession, points strongly to guilt. These cases undermine public confidence in the administration of justice – and may do so in a damaging way.[101]

3.1.2.2 The Rights of the Victims

[99] Gerard Coffey, *"Post-Acquittal Retrials for Serious Offences in the Irish Criminal Justice Process: Lessons from England and Wales"* (2013) 3(1) Irish Journal of Legal Studies, at 60-61.
[100] See Arts.501-512 of the Draft Criminal Procedure Code of Ethiopia, proc. No._/2002 [Unratified].
[101] Sir Anthony Mason, *'Double Jeopardy and the Limits of Justice'*, *The Sunday Telegraph*, 22 Dec. 2002 cited in Rowena Johns, *Double Jeopardy, NSW Parliamentary Library Research Service,* Briefing Paper No 16/03, at 15.

One of the purposes of punishment is retribution. Proper punishment freezes the angers of the victims, families of the victims and the public as well. Victims, or families of victims, have the right to expect that offenders will be punished. The trauma and lack of finality experienced by victims when the accused cannot be prosecuted again, despite the uncovering of new evidence, is as unfair as exposing the defendant to the emotional and financial strain of another trial. Victims or close relatives of the victims may also opt to take vindictive measures on the defendant, close families of the defendant or properties of the defendant unless real criminal will be punished up on the newly discovered evidence which robustly indicates at the acquitted defendant who was in fact guilty.

3.1.2.3 Technological Developments

The capacity of DNA, biometrics, and other technology to assist in solving crimes is one of the main arguments raised in favor of restricting the operation of the double jeopardy rule and abides the law to keep pace with science.[102] Such Scientific advancement in criminal investigations make possible to provide new, stronger or clearer evidence than was available at the original trial. Unique biological 'markers', such as digital finger prints, face mapping, eye scanning, and voice recognition are currently being used in areas such as workplace security.[103] They also have significant potential to contribute for the identification of suspected in criminal cases. Such technological advancement supports the criminal investigation by reducing doubts and help to give correct decisions on right criminals.

3.1.2.4 Laws Should Evolve Overtime

The law should adapt in response to the dynamic needs of society rather than remaining static. The principle of double jeopardy was originated in a less sophisticated era when defendants had fewer protections in the trial process, limited rights of appeal, and could receive the death penalty as a consequence of conviction.[104] Though, it is all humans' wish to live in peace and tranquility, it is inevitable to quarrel and commit crime in their day to day life. The development of societal mentality makes the commission of the crimes perplex to escape from criminal liability. As a result, the criminal investigation techniques should be modernized in

[102] Rowena Johns, *Double Jeopardy, New South Wales Parliamentary Library Research Service,* Briefing Paper No 16/03, at 35.
[103] *Id.* at 46.
[104] *Id*. at 14.

order to arrive at the real committers. Therefore, the law needs to be organic, evolving over time to accommodate the way society moves forward in its values and in its capabilities. The law should be the servant of society not the master.[105] For this fact, it has to be responsive and adjustable.

3.2 Exceptions to the Rule against Double Jeopardy

There are some defects which are sufficiently exceptional and constitute such an affront to the community's sense of justice that as a matter of policy the law should permit an exception to the alleged right against double jeopardy. Such exceptional circumstances are the discovery of "fresh and compelling evidence" as to guilt, and "tainted acquittals" involving a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3.2.1 Fresh and Compelling Evidences Exception

In order to get a retrial, there must be new and compelling evidence. Evidence is 'compelling' if it is reliable, substantial, and in the context of the outstanding issues it appears 'highly probative of the case against the acquitted person'.[106] The word "new" simply refers to evidence that was not used previously. Some reform proposals however prefer the term "fresh" to the term "new". The term "fresh" carries the connotation that it was not found/could not have been found previously, which is deemed more consistent in use.[107]The additional criterion that the evidence "could not have been adduced in those proceedings with the exercise of reasonable diligence"[108] addresses the argument that retaining the rule against double jeopardy encourages efficient investigation of crime. Accordingly, the term "fresh" is arguably a narrower concept than "new" because "fresh" evidence is evidence that was not adduced, or could not have been adduced, at the original trial with the exercise of reasonable diligence, whereas "new" evidence is simply evidence that was not adduced regardless of due diligence. Examples of new evidence could be DNA, fingerprint tests, or new witnesses who have come ahead.

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[105] Sally Broad Bridge, *Double Jeopardy*, Standard Note: SN/HA/1082 (2009), at 5.
[106] Rowena Johns, *supra note* 102, at 31.
[107] Law Reform of Commission of Hong Kong Double Jeopardy Sub-Committee Consultation Paper on Double Jeopardy, LC Paper No. CB (2)1093/09-10(01), at 6.
[108] See Section 102(2) of the NSW 2001 Act.

3.2.2 Tainted Acquittals Exception

A tainted acquittal is one unjustly obtained through the commission of an administration of justice offence, either by the acquitted person himself or another person. It is irritably the desire of the prosecuting authorities to pursue a defendant who interfered with the administration of justice by intimidating or influencing witnesses or the jury/judge. Such interference makes the original trial tainted/infected. In such situation, the argument in favor of a re-trial is quite tough. Justice Walsh pointed out that: *"**It would be totally abhorrent if a conviction which had been obtained by improper means, such as the corruption or coercion of a jury, should be allowed to stand; it would be equally abhorrent if an acquittal obtained by the same methods should be allowed to stand. If attempts to sway the verdicts of jurors by intimidation or other corrupt means were allowed to go unchecked, they could eventually bring about the destruction of the trial system."***[109]

Witnesses sometimes mislead or lie to the court about certain aspects of their evidence to protect the witnesses' own integrity or susceptibility to a criminal offence. A benefit for an accused may be a collateral consequence of an untruthful witness. If an accused person is acquitted in this situation, it is debatable whether the prosecution can rely on a perjury by a witness as grounds for a re-trial. However, an alleged tainted acquittal in such circumstances, a court of appeal would need to be satisfied beyond reasonable doubt that the verdict was tainted by virtue of the witness' false testimony.

The exceptions to double jeopardy have recently legislated in UK, Ireland, Scotland, New Zealand, and Australia, to relax the rule against double jeopardy.[110] In an effort to minimize the impact of the departure from the double jeopardy rule, the exception covers only very grave offences. In spite of the different meaning given to 'serious offences' especially in kind and gravity of punishment, the provisions provided for in the respective Acts, are almost similar.

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[109] Justice Walsh of the Supreme Court of Ireland argument in the case, *People (D.P.P.) v. O'Shea* [1982] IR. 384.

[110] See the UK Criminal Procedure Act 2003, Irish Criminal Procedure Act 2010; Scotland Double Jeopardy Act 2011; New Zealand Crimes Act 1961 (as amended by the Crimes Amendment (No. 2) Act (2008) and the Australian Crimes (Appeal and Review) Act 2001 (as amended by the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act (2006)

The presence of a series of safeguards *inter alia* given emphasis to ensure that the power to quash an acquittal will not be abused and that the scope of the relaxation is narrowly tailored to the legitimate purpose:[111]

- the exception must only apply to acquittals of serious offences;
- the consent of the Director of Public Prosecutions is needed before law enforcement agencies can reinvestigate the acquittal case;
- only the Court of Appeal will have the jurisdiction to quash the acquittal and order a retrial;
- new evidence which could have been found by law enforcement agencies acting with reasonable diligence will not meet the "fresh and compelling" evidence exception;
- before quashing the acquittal and ordering a retrial, the Court of Appeal must be satisfied that it is in the "interests of justice" to do so;
- prohibition on prejudicial publication from affecting the fairness of retrial; and
- only one re-trial will be granted for a retrial in respect of any particular case that originally resulted in an acquittal.

3.3 The Human Rights Implications in the Principle of Double Jeopardy

Article 14(7) of the ICCPR states that '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'. The literal reading of this article prohibits the reopening of acquittals and does not apply to appeals from convictions.[112] The UN Human Rights Committee the treaty body charged with implementing the ICCPR has not construed Article 14(7) in literal way. The Committee stated that the reopening of criminal proceedings, where 'justified by exceptional circumstances', did not infringe the principle of double jeopardy.[113]However, the meaning of 'exceptional circumstances' was not defined. The Article has not conferred absolute right on acquitted persons.[114]

[111] The Law Reform Commission of Hong Kong Report, *supra note* 84, at 36.
[112]Art 14(5) – 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law': *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 and entered into force 23 March 1976.
[113] United Nations Human Rights Committee General Comment No 13 (21) on Art 14, adopted at its 516th meeting (21st session), 12 April 1984.
[114] Article 14 of the ICCPR is not mentioned in Article 4 of the Covenant as a non-derogable right in time of public emergency.

General Comment No 32, in replacing General Comment No 13 has put beyond doubt the non-absolute character of Article 14(7): "The prohibition of article 14(7) is not at issue if a higher court quashes a conviction and orders a retrial. In addition, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal."This view has been reflected in article 4(2) of Protocol 7 to the ECHR which says: *'…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'*. [115]

In contrast with Article 4 of Protocol No. 7 to the ECHR, Article 14(7) ICCPR does not expressly provide for the re-opening of a criminal trial in the light of new evidence of the defendant's guilt or where the former criminal trial was tainted. In response to this lacuna, reservations were submitted by many states parties, which resulted in the Committee issuing a declaratory statement pertaining to the application and scope of this provision: In considering State reports differing views have often been expressed as to the scope of Art.14(7). Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* contained in paragraph 7.[116] The deficiency in the scope and application of Article 14(7) lies in the fact that it is only applicable 'in accordance with the law and penal procedure of each country' that is within the jurisdiction of the same signatory state. Hence, it is not applicable between states *inter se*.[117]

[115] Art.4 (2) of the Protocol 7 of the European Convention on Human Rights opened for signature 4 November 1950, ETS 117, and entered into force 22 Nov. 1984.
[116] Gerard Coffey, *Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting ne bis in idem in Conjunction with the Principle of Complementarity, New Journal of European Criminal Law, Vol. 4, Issue 1–2,* 2013, at 74.
[117] *Ibid.*

Chapter Four

Assessing the Application of the Rule against Double Jeopardy in Ethiopia

4.1 The Reception of the Rule against Double Jeopardy in the Ethiopian Criminal Legal system

In the 1950s and 1960s; Emperor Haile Selassie founded a university with a law faculty and initiated the drafting of a core group of modern legal codes, including criminal, civil, procedural, commercial, and maritime codes. The legal codes were based on European models. The Emperor hired a Franco-Swiss team of specialists of comparative law, which crafted a complete set of codes up to the latest standards of the late fifties.[118] While these codes were arguably of an extremely high standard, they were not matched with adequate capacity building or training at the local level. Following the progression of these codes, procedural provisions were subsequently imported wholesale from England, India and the US, with little regard to the consistency of the system as a whole.[119]

A Penal Code which was introduced in 1957 has largely drawn upon its counterpart in Switzerland.[120]The code had thus adopted the common law concept of prohibition of double jeopardy in order to forbid "double punishment" for the same act.[121] However the Code did not explicitly prohibit double trial. By implication, retrial of an acquittals and wrongful convictions could be legal loopholes which were not clearly prohibited. The reason for retrying an acquittal is because; the defendant who has been previously tried but acquitted was not punished, and couldn't bar the next punishment. And the outcomes of retrying wrongful conviction is not double punishment, rather a release upon the defendant's innocence or punishing him with other crime proved by new evidences or else, keeping the conviction intact.[122] However, the criminal procedure code of 1961 had embodied the rule as an objection to the charge by the defendant where he/she has been previously acquitted or convicted on the same charge.[123] Though cumulative readings of the two provisions seem hazy, the right to object the charge is given to the accused and the court has discretion to carry

[118] The World Bank: *The Ethiopian Legal and Judicial Sector Assessment* (2004), at 4.
[119] *Ibid*.
[120] Ameha Wondirad, *An Overview of the Ethiopian Legal System,* (2013), at 190.
[121] See Art. 2 (3) of the Penal Code of the Empire of Ethiopia, Proc. No. 158/1957.
[122] See Art.509 of the Draft Criminal Procedure Code of Ethiopia, proc. No._/2002 (Unratified).
[123] See Art.130 (2) (b) of the Criminal Procedure Code of Ethiopia, Proc. No.185/1961.

on or halt the trial. But the court is abided by the principle of legality set by the penal code that 'nobody shall be punished twice for the same act'. The new criminal code of 2004 has also ascribed the rule of double jeopardy in line with the FDRE Constitution in an extended form that, "nobody shall be tried or punished again for the same crime for which he has been already convicted or acquitted by a final decision".[124]

Awol Sultan raised that, "in Ethiopia, if someone is wrongfully acquitted and later evidence proving his apparent guilt is discovered, the prosecutor under the usual practice is not given the right to demand a revision of the first verdict acquitting such defendant. The possibility of retrial for unjust acquittal is a disregarded area of justice reform which requires a concern owing to the appearance of new evidence(s) refuting the prior acquittal".[125]The New Draft Criminal Procedure Code has come up with the possibilities of retrial in case of wrongful conviction where the crime of which a person wrongly convicted was committed by other(s) or tainted conviction was obtained by false witnesses, expert testimony or document.[126] Note that, the violation of the constitutional protection against retrial for an offence once the person is finally convicted or acquitted is an issue for debate. Accordingly the writer believes that, it is a persuasive argument if we stick on Art. 13(2) of the constitution which says "fundamental rights specified in chapter three shall be interpreted in the manner conforming to international covenants on human rights adopted by Ethiopia" because, the UN implementing committee of human rights as cited above, has construed Art.14 (7) of the ICCPR in its comment no.32 that resumption of criminal trial justified by exceptional circumstances did not infringe the principle of double jeopardy.[127] A trial that is "resumed" under the supposed exception is not less a "retrial" because the accused is being put on trial again.[128]

4.2 The Application of the Prohibition of Double Jeopardy in Ethiopia: Some Case Analysis

[124] See Art. 2(5) of the FDRE Criminal Code, Proc. No.414/2004 and Art. 23 of the FDRE constitution, Proc. No.1/1995.
[125] Interview with Ato Awol Sultan, in the Ministry of Justice, legal study, drafting and dissemination directorate prosecutor, on Oct.22/2015.
[126] See Art.502 of the Draft Criminal Procedure Code *supra note* 122.
[127] *The United Nations Human Rights Committee General Comment No.32 (56) on Art. 14(7),* 23 Aug. 2007.
[128] The Law Reform Commission of Hong Kong Report *supra note 84,* at 33.

The 2004 Ethiopian Criminal Code has newly incorporated concurrent crimes in which the multiplicity of consequences resulting from a single act entails multiple liabilities. It provides that a person commits concurrent crimes in the case of a criminal act which, though flowing from the same criminal intention or negligence and violating the same criminal provision, causes the same harm against the rights or interests of more than one person[129]. The rationale behind this provision is merely that, the one who causes the same harm to several persons should be punished more severely than if he causes harm to only one person. Graven argues that, it will not be fair to try the person who killed two persons with one bullet as one offence while punishing the other person who killed one person and injured the other with two counts.[130] For the purpose of Art. 60(c), the same criminal intent or negligence should be understood to exist where a defendant commits crimes during a single behavioral incident against multiple victims. For instance, stealing 10 cattle on the same time from a certain area which belongs to different individuals constituted one or the same intent. In this case, a person could be prosecuted for 10 counts of charges citing the same provision of the law. In this respect, the Cr.P.C. requires, all charges may be tried together but where the accused is likely to be embarrassed in his defence, the court shall order the charges to be tried separately.[131] On the contrary, some lawyers contend that, prosecuting defendants for multiple counts of the same act will amount to double jeopardy. Since it is the state who is the injured party in a criminal prosecution because its law has been breached, there is but one breach of the statute and thus only one injury when there is a single act.[132] Nevertheless, in Ethiopia, one may not invoke the double jeopardy objection since the legislature need a person who inflicts injuries to more victims should be held liable for all of them individually whereas, one who does not should be held liable to that extent.[133] The Federal Cassation Court has more clarified this in the case, Ass/Saj/ Ahmed Legesse v. Federal Prosecutor that, Art. 60(c) shall be supposed to protect the rights and benefits of each individual victim. So, any defendant with the same criminal intent or negligent commits crimes covered under the same criminal provision

[129] See Art. 60 (c) of the FDRE Criminal Code, Proc. No.414/2004.
[130] Graven Jean, "The Penal Code of the Empire of Ethiopia." J. Ethiopian L. 1 (1964), at 165.
[131] See Art.116(2) of the Criminal Procedure Code of Ethiopia, *supra note* 123.
[132] Crain, Hillary Jerrol, "Criminal Law Prosecution for Two Crimes Resulting from a Single Criminal Act." Louisiana Law Review 19.4 (1959): 10, at 869.
[133] Amharic expose de motif (Criminal Code Hateta) to the Federal Democratic Republic of Ethiopia Criminal Code Proclamation No. 414/2004, Art. 60, at 37

against many individuals shall be prosecuted for each concurrently.[134] The determination of punishments for concurrent crimes defined in Article 60(c) is determined based on Art. 184(1). Accordingly, the total penalty for each does not exceed the maximum penalty fixed in the General Part of the Criminal Code. But, it is awkward for the defendant to stand against many counts of similar charges having similar facts repeatedly where victims would appear to the prosecution at different times for various reasons.

Exceptionally however, *"When the law, in a special provision of the Special Part, has taken multiplicity of victims into consideration as a constituent element or as a factor of aggravation of a crime, the Court may not take this aggravation into account again"*[135] In this case, the special part provisions shall wholly consider multiplicity of victims as an aggravating factor. For instance, *"The punishment shall be rigorous imprisonment from five year to fifteen years and fine from ten thousand to fifteen thousand Birr where the criminal has negligently caused the death of two or more persons or where he has deliberately infringed express rules and regulations…"*[136]

4.2.1 Hagos Weldemicha'el v. Tigray Region Public Prosecutor[137]

This case had first arisen in Tigray Region, Atsebi Wereda Court. The defendant Hagos Welde micha'el has contrary to Art. 540 of the 2004 Criminal Code intentionally killed the deceased named Ato Gidey Gebreyesus by stoning on his forehead and spinal cord on Feb. 22/2002 E.C at a place named 'Arewa village' of M/Emba Wereda. Mind you, the Atsibi wereda court has got the power to adjudicate a murder crime from the regional BPR justice reforms which establishes the civil and criminal jurisdiction of courts. After the court has adjudicated on the merit of the case, pled the accused guilty and punished with 10 years rigorous imprisonments. However, having aggrieved with the decision, the defendant appealed to Zone High Court. He argued that, it was not his act that caused the death of the deceased. He had also previously charged for common willful injury against the same person violating Art. 556(2) (A) for the same act and punished with fine 500 birr. He further raised

[134] Ass/Saj/ Ahmed Legesse v. Federal Prosecutor, Federal Supreme Cassation Decisions vol.16, File No.96079/2006, at 270-275. (Amharic Version).
[135] See Art.84 (2) of the FDRE Criminal Code, Proc. No.414/2004.
[136] Id. Art.543 (3).
[137] Hagos Welde Micha'el v.Tigray Region Prosecutor, Federal Supreme Cassation Decisions vol.13, File No.72304/2004, at 308-312. (Published case translated by the writer).

that the deceased was already healed after his injury and later died for other causes. Unfortunately, the High Court affirmed the lower court decision.

The defendant again applied for the Regional Supreme Court Cassation bench for which he has been punished twice for the same act of ordinary homicide regardless of his penalty for bodily injury. The Cassation Court has discredited the defendant's grievance of opposing the second prosecution as useless since, it was not raised before the HC pursuant to Art. 130(2) the Cr.P.C. But, the bench decided on the issue that, trying and punishing the defendant twice for same act is against the right guaranteed under Art. 23 of the FDRE constitution and Art. 2(5) of the Criminal Code.

Having dissatisfied with the Supreme Court Cassation decision, the Regional Prosecutor lodged an application to the FSC Cassation bench for correction. The prosecutor argued that, prosecuting the defendant for bodily injury is an incidental error made by the lower prosecutor and did not bar the subsequent prosecution for murder which is a different crime. The medical evidence given by Minilik Hospital has also ascertained the cause of death of the deceased as an injury caused by stoning on his forehead.

The FSC cassation bench investigated the file in light of Art. 23 of the Constitution, Art. 14(7) of the ICCPR and Art. 2(5) of the Criminal Code and ruled that: the structure and substance of Art.23 is to limit the prosecutors not to bifurcate type of crimes from the same criminal act at different times or not to prosecute the defendant for the same offence once he/she has been finally convicted or acquitted. In addition, it restricts government prosecutorial discretion over successive charging. It also interpreted Art.130 (2) (b) of the Cr.P.C. as a constitutional right raised by defendant at any court proceeding and where proved by evidence, the court of rendition can accept the objection and rule over it. Finally, the court has rendered the binding decision that, Art.23 of the Constitution and Art. 2(5) bar subsequent murder prosecution though the victim later died.

In the writer's opinion, allowing the accused to successfully raise the pleas in bar in these situations would amount to an upset not only to the victim, but also to the requirements of a just and ordered society. This decision collides with the germane principle of double jeopardy

which the UK Lords had underscored in the famous case of *DPP v. Connelly*. In that case, Lord Morris has stated as his third Connelly principle that, "for the rule to apply, the offence charged in the second indictment must have been committed at the time of the first charge (*e.g.* a conviction or acquittal for assault will not bar a charge of murder if the assaulted person later dies)." The same argument has been applying in America that, if a defendant is convicted of felonious assault with the intent to murder and then the victim later dies, the defendant may be prosecuted for murder. This exists when the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred despite the exercise of due diligence.[138] Ato Ali Mohammed, who is among the deciding judges of this case, states that, "the purpose of the rule against double jeopardy is to protect the individual from continuous criminal charges and harassment that emanate from a single criminal act. For example, the prosecution will not be allowed to charge the accused for theft after judgment was rendered, by instituting another charge defining the same action as aggravated theft or robbery. The same is true for assault and murder."[139] This writer defiantly argues that, if a person had been convicted of assault after the victim died, he couldn't later be prosecuted for murder.[140] Where the prosecutor was aware or could have been aware the death of the victim after he had instituted an assault charge, it is expected that, he should withdraw the assault charge ahead of the verdict. Thus, he could not be proscribed from re-prosecuting for murder.

Moreover, writer wishes the FSC cassation bench to overrule this case in the similar scenarios happened in the future time using the power given to it to render a different legal

[138] See Diaz v. United States, 223 U.S. 442 (1912); *Commonwealth v. Vanetzian, 350 Mass., 491, 215 N.E.2d 658*(1966); *State v. Meadows, 272 N.C. 327* (1968) and the late People v. Latham, 83 N.Y.2d 233, 331 N.E.2d 83,609 N.Y.S.2d 141(1994) (Latham was first indicted for attempted murder in the second degree and attempted assault in the first degree and pled guilty to top count-attempted murder. Over nine Months after attack, the victim died for the same cause and he subsequently indicted for an intentional murder. The New York appellate Court affirmed the prosecution holding the 'same element test' that; delayed death does not bar a second prosecution for homicide following conviction of assault or other non-homicide offense because the element of death distinguishes the two offences).

[139] Interview with Ato Ali Mohammed, the Federal Supreme Court Cassation division judge, on Oct.22/2015.

[140]The Dallas County District Attorney's Office has declined to prosecute Sylvester Brown citing "double jeopardy" standard. Since he had pleaded guilty to misdemeanor assault on April 24/2013, after the death of his girlfriend Cherry Whitacre on April 17/2013, he couldn't be tried on a more serious charge for the same act but different in magnitude, available at *http://www.dallasnews.com/news/crime/headl*... Assessed on Oct.20/2015.

interpretation some other time.[141] In such anomalous situation, the defendant shall be entitled to credit for the time spent imprisonment for assault or non-murder crimes. If not, the accused would be placed twice in jeopardy of the imposition of multiple punishments for the same criminal offence, an outcome of the common law proscription against double jeopardy.[142]

4.2.2 Lemma Gizaw v. Oromia Public Prosecutor[143]

In this case, the Weliso wereda public prosecutor brought an alternative charge against Lemma Gizaw at Weliso Wereda Court contrary to Arts. 665(1) or 689 of the 2004 Criminal Code, for cutting one Juniper tree, the property of a victim named Guta Dessisa valued to 4000 birr and appropriated for himself or destroyed for not to be used. The defendant has objected the charge according to Art. 130 (2)(b) of the Cr.P.C. in raising that, he was formerly charged on file no.30316 for committing theft but the prosecution was withdrawn. Secondly he was charged on file no.30350 for violating Art. 15(4) of the Oromia Forest Protection Proc. No.72/95 that he had cut protected tree. But the court made him free for, he would not be prosecuted under this legislation. Accordingly, the court has seen the case in light to Art.23 of the FDRE constitution and Art. 2(5) of the criminal code and decided that the previous judgments were final and vexing the defendant for the third time was against these provisions. The High Court of South West Showa Zone has also seen the case on appeal and confirmed the lower court decision. However, the zone prosecution has appealed to the regional Supreme Court. The Oromia Supreme Court has further investigated the issue as; in the first charge, withdrawal by the prosecution is not amount to final resolution of the case to raise a plea in bar of subsequent prosecution because the defendant was not finally acquitted or convicted; in the second charge, an order of court for "not a crime covered under such legislation" could not be a bar for other relevant prosecution. Thus, the court reversed the lower and higher courts' decisions and ordered retrial.

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[141]Article 2(1) of the Federal Courts Re-amendment Proclamation No.454/2005, "The federal Supreme Court Cassation division considers and interprets any final court decision over any matter, whether federal or regional and regardless of the tier of the court, provided such decision contains an error of law. The cassation division may however render a different legal interpretation some other time." See also art.10 of Proclamation No.25/1996.

[142] In *State v. Meadows, 272 N.C.327* (1968), The Supreme Court of North Carolina concluded that the defendant should receive credit.

[143]. Lemma Gizaw v. Oromia Public Prosecutor, Oromia Supreme Court File No.192286/2007, (Unpublished case translated by the writer).

The writer would share the reasoning of the Supreme Court. In common law countries, the Latin term "*nolle prosequi*" ("do not prosecute") is commonly used to describe the circumstances of proceedings not finally concluded in acquittal or conviction. The entry of *nolle prosequi* is precisely described as a stay on proceedings rather than a complete bar to a second trial for the same crime, the former not amounting to a final verdict of acquittal by the trial court, which shall form the basis of the plea in bar, autrefois acquit, against a further prosecution for the same offence.[144] In such case, the second trial would effectively be the first trial of the accused which would not violate the common law principle against double jeopardy. Before the accused may be said to have been in jeopardy of conviction at the first trial, the trial court must have recorded a formal verdict of conviction or acquittal following a trial on the merits. However, in U.S., if the prosecutor enters a *nolle prosequi* by his own will after jeopardy has attached, it acts as an acquittal and bars subsequent indictment.

In case where the accused or witnesses of the prosecution and the defendant failed to appear for not good cause on court hearing, a court may not grant adjournment. [145] In effect, the court shall give an interlocutory order and close the file. Interlocutory order by its nature is not final and is not subject to immediate appeal.[146] Consequently, the criminal law does not impede the continuation of the proceeding from its stop upon the reappearance of the absconders.

In Ethiopia, pardon is a constitutionally recognized grant of exempting convicted persons from sentences[147] As well, Amnesty is another mercy grant from prosecutions and sentences to certain classes of criminals accused of commonly political crimes set out in the criminal code.[148] Amnesty is an act of oblivion of past offences granted by the government to those who have been guilty of any crime for the purpose of restoring tranquility in that state.[149] The aim of amnesty is to forget a crime which has been committed whereas the aim of pardon is to exempt a convict from the punishment prescribed by law where he has exhausted all his legal

[144] Gerard Coffey, *Raising the Pleas in Bar against a Retrial for the Same Criminal Offences (2005),* at 137.
[145] See Art.94 (2) (a & b) of the Criminal Procedure Code of Ethiopia, *supra note* 123.
[146] Ibid. Art.184 (a).
[147] See Art.71 (7) of the FDRE Constitution, Proc. No. 1/1995.
[148] See Art. 230 of the FDRE Criminal Code, Proc. No.414/2004.
[149] Epiphany Azinge, *The concept of Amnesty and Its Place in Human Rights Discourse,* A Paper Presented at the Nigerian Bar Association 53RD Annual General Conference 27th Aug. 2013, at 19-20.

rights of appeal or where he is wrongfully convicted and is afterwards pardoned upon the ground of his innocence.[150] In both cases, the grantee is immune from re-prosecution for that same offence as this will amount to double jeopardy.[151]

4.2.3 Soliyana Shimelis et.al v. Federal Public Prosecutor[152]

In this case, the federal prosecutor initially charged the defendants called the "Zone 9 bloggers" Soliyana Shimeles (in Absentia), Befekadu Hailu, Natneal Feleke, Mahlet Fantahun, Atnaf Birhane, Zelalem Kibret, Abel Wabella, Asmamaw Hailegiorgis, Edom Kassaye and Tesfalem Weldeyes for violating Arts.32(1,2), 38(1,2) of the 2004 FDRE Criminal Code and Art. 4 of the 2009 FDRE Anti-Terrorism Proclamation at Federal Lideta High Court. The facts of the charge are: from May 2012 until they got captured, conspire and agree with various other members and willfully join an undercover enterprise of persons with the intent to overthrow, modify or suspend the Ethiopian Federal State Constitution; by violence, threats, or conspiracy. In order to accomplish the objectives they set the accused individuals knowingly committed acts of crime by working with an outlawed terrorist organization which calls itself as Ginbot7(May 15).The accused willfully accept the strategies of Ginbot7 to conspire against the constitution & constitutional order and carry out the political program of OLF, another terrorist organization as one of their own political programs with the intention of furthering their unlawful purpose of the enterprise. They used digital encryption to communicate, of getting training in "making and detonating explosives," and of having connections with ESAT, an opposition satellite television station based in the Diasporas and the mouthpiece of the terrorist organization.[153] Having seen the contents of the charge, the court ordered Prosecutor to amend his charge to include details such as the specific act of terror the defendants are alleged to have committed and the roles and acts of each defendant. The defendants originally faced two charges of 'conspiracy to commit acts of terror' and 'outrage against the constitutional order'. However, judges dropped the later stating that the facts constituting the alleged crime are covered under the terror charge. As per the

[150] *Id.* at 18.
[151] *Id.* at 21, see also Art.42 (1) (c) of the Criminal Procedure code of Ethiopia *supra note* 123.
[152] Soliyana Shemelis et.al v. Federal Public Prosecutor, Federal High Court File No.155040/2014)(Unpublished case pending on the rest five defendants (Befeqadu Hailu, Natnael Feleke, Atnaf Berahane, Abel Wabella and Soliyana Shimelis (in absentia)).
[153] Chala Endalkachew (12 August 2014).*"Full Translation of Zone 9 Bloggers Charge Sheet"* Retrieved 24 August 2014.

amendment, the defendants are accused of causing "serious risk to the safety or health of the public or section of the public" and "serious damage to property"(Art. 3(2)). Upon the court finished hearing evidences and was due to deliver a guilty or not guilty verdict, the Ministry of Justice (MoJ) has sent to court a letter of withdrawal on July 8, 2015 against the charges of five bloggers; Zelalem Kiberet, Tesfalem Waldyes, Asmamaw Hailegiorgis, Mahlet Fantahun and Edom Kassaye. All charges against them were dropped and freed. The officials of the MoJ reported no explicit reason to drop but only cited Art.16 (6) of Proclamation No. 691/2010 which defines the powers and duties of the executive organs which states, "the ministry can withdraw criminal charges for good cause".

More or less, Charges that were dropped or put on hold for any reasons can be reinstated in the future—if not barred by some statute of limitations. Therefore, charges dropped by the order of the Ministry of Justice for the purpose of public interest in Ethiopia may be resumed upon the alteration or abolition of the reasons to do so[154]and may not be barred by the rule of double jeopardy.

[154] *The Criminal Policy of the Federal Democratic Republic of Ethiopia* (2011), para.3.9 (A &C), at 13.

Chapter Five: Conclusion and Recommendations

5.1 Conclusion

The protection against double jeopardy is common law principle that an accused of a crime will be protected from a second prosecution by pleas of his former acquittal or conviction. In England, the protection against double jeopardy was the body of judge-made law used in royal courts and it became a part of the United States Constitution. Protections against double jeopardy prevent a person from being convicted twice for the same crime based on the same conduct. A defendant cannot be twice convicted on two different crimes arising from the same conduct unless they are significantly different or designed to prohibit different forms of conduct. Double jeopardy will only attach to prosecutions for the same criminal act by the same sovereign, but in separate sovereigns, the federal and state governments or different state governments can bring separate prosecutions for the same crime

Rapid developments in recent years in forensic science and DNA testing have got great concerns in the need of accurate criminal justice. Irregularities arising from strict adherence to the rule against double Jeopardy has sparked public outcry in number of jurisdictions. Recently, legislatures in England and Wales, Ireland, New Zealand Scotland and Australia have enacted statutory reforms that created exceptions to the rule against double jeopardy.

The exceptions often raised to force retrial are when fresh and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant and when tainted acquittal is unjustly obtained. The main justifications raised in favor of reforming the rule against double jeopardy are; the interest of justice, the right of the victims, technological development and the law needs to go with the dynamic society.

The proponents of the rule against double jeopardy have also argued that the rule avoids the repeated distress of the trial process, which affects the accused, his family, witnesses and the victim; the likelihood of conviction, whether the defendant was guilty or not, might be greater at a second trial as the prosecution may have acquired a tactical advantage from the first trial. It also promotes finality in the criminal justice system and Encourages the efficient investigation of crime that if the prosecution were able to prosecute once again a defendant

who had been acquitted, there would be a threat that the initial investigation might not be carried out as diligently as it should have been.

Art. 14 of the ICCPR and art. 4 of Protocol 7 of the ECHR provide that no-one shall be tried a second time for an offence of which he has been finally convicted or acquitted. However, both accommodate the reopening of criminal proceedings in exceptional circumstances. Indeed, the ECHR expressly provides for the reopening of cases where there is evidence of newly discovered facts or if there was a fundamental defect in the proceedings, which could affect the outcome of the case.

The FDRE constitution and criminal code prohibits double trial and punishment for an offence once the defendant was finally convicted or acquitted. However, The Cr.P.C and Cr.C does not seem to address crimes occurred as a consequence previous act after the defendant is already convicted or acquitted for the same act.

5.2 Recommendations

From the discussions of this thesis the writer recommended the following findings to the concerned bodies to give due regards.

- The sight of guilty man walking free surely harms the society; In order to cure such societal abhorrence, reforming the rule of double jeopardy is important in exceptional circumstances to allow retrial for some horrible offences where new and compelling evidences are discovered pointing that the acquitted person is guilty. The discovery of new evidence indicating guilt not only decreases the legitimacy of the verdict or the criminal justice system in the abstract, but also fosters public disrespect and mistrust. Taking into account scourges of wrongful conviction in Ethiopia, the law allowing retrial for wrongful conviction is now on a draft process. This writer also recommends to the legislature to pass laws permitting the retrial of inaccurate acquittals of serious crimes which depreciate the trust of society in the criminal justice system with its necessary safeguards there to control the prosecution from charging the same defendant with multiple prosecutions. The constitutionality of the law shall be seen positively to preserve the accurate justice and strictly construed in exceptional cases incompliance with the interpretation given to art.14 (7) of the ICCPR by UN implementing committee of Human Rights in its comment no.32.

- Courts should be cautious while interpreting the rule of double jeopardy in crimes stemming from the same criminal conduct of the defendant. Despite the unity of guilt that fully covers the same criminal act or a combination of criminal acts flowing from a single intent or negligence, the same element test is relatively better gives effect to the language of double jeopardy Clause, which protects individuals from being twice put in jeopardy "for the same offence," not for the same conduct or actions. "Offence" was commonly understood to mean the violation or breaking of what the law prohibits.

- I also recommend the legislature to amend the rule against double jeopardy in the criminal procedure law in order to determine the brief extent of its applications. In this regard, we can learn from the well articulated Kenyan Criminal Procedure Act, Arts.138-141 which describe that a person may not be charged and tried again for an offence finally tried by competent court. However, a person may be prosecuted and tried for a separate offence arising from the same set of facts as those of the crime for which the accused was previously convicted or acquitted and for consequences which arise after a conviction or acquittal, if they were not known at the time of conviction or acquittal.

- The inherent judicial discretion to prevent 'abuse of process' enjoyed in Anglo-Australian courts has to be recognized and applied in Ethiopia. In such case, courts consider the question of fairness to the accused; in particular whether the prosecution is vexatious in the circumstance of the case or an attempt to controvert a prior verdict of such courts. Precluding unfair prosecutions under the pretext of abuse of process allows the court greater flexibility to give effect to the rule of double jeopardy in a broader range of cases and prevent the embarrassing absurdity of conflicting judicial decisions.

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