THE CONCEPTUAL ANALYSIS OF THE PRINCIPLE OF DOUBLE JEOPARDY AND THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL JUSTICE ADMINISTRATION

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Abstract

The rule against double jeopardy is a centuries old common law principle, which bars repeated criminal prosecution for the same offence. The rule plays a vital role for the protection of integrity of the criminal justice system including precious human rights of the accused persons. The existence of the rule is very essential as far a criminal justice administration is concerned irrespective of the nature of the system. The paper attempts to analyse the concept of double jeopardy under Indian law in comparison with English law and examines how it protects the human rights of the persons accused of an offence.

Keywords: Double jeopardy, retrail, new and compelling evidence, human rights, appeal, autrefois acquit, autrefois convict.

Introduction

Every civilized society maintains a system of criminal justice administration in order to punish the guilty and make the life of common man safe. The criminal justice system operates in accordance with the specific criminal statutes. A valid criminal justice system must satisfy certain legal as well as constitutional requirements. The criminal justice system operates on the basis of certain values within which it admits no compramise. The double jeopardy principle is one such value protected by the system. It is a procedural safeguard, which bars a second trial then an accused person is either convicted or acquitted after a full-fledged trial by a court of competent jurisdiction[1]. The rule against double jeopardy

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[1] Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.252

originally flows from the maxim "*nemo debet bis vexari pro uno et eadem causa*" which means that no person shall be vexed twice for the same cause. The term "double jeopardy" expresses the idea of a person being put in peril of conviction more than once for the same offence[2].The core rule includes the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*[3]. These two doctrines are aimed to protect criminal defendants from the tedium and trauma of relitigation[4]. When a criminal charge has been adjudicated by a competent court, that is final irrespective of the matter whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a further prosecution when it is for the same offence[5]. It is regarded as one of the most important fundamental as well as the human right against the repeated state prosecution for the same offence.

History of double jeopardy

There is no unanimity of opinions regarding the origin of double jeopardy principle since it obscure in the mists of time. It is a centuries old principle, and it has been rightly observed that the history of double jeopardy is the history of criminal procedure[6]. The rule is considered to have its origin in the controversy between Henry II and Archbishop Thomas Becket in 12th century[7]. At that time

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

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

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

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

[6] Martin L.Friedland, "Double Jeopardy", (1969) Oxford University Press,p.3

[7] Excerpt by Justice Roslyn Atkinson at Australian Law Student's Association (ALSA) Double Jeopardy Forum, 9 July 2003, Brisbane, available at http://archive.sclqld.org.au/judgepub/2003/atkin090703.pd, visited on 6/12/2009.

two courts of law have existed, the royal and the ecclesiastical. The king wanted the clergy subject to be punished in the royal court even after the ecclesiastical court punished him. Becket relied on St. Jerome's interpretation of Nahum and declared that the ancient text prohibitted "two judgments"[8]. He had viewed that the repeted punishments would violate the maxim *nimo bis in idipsum* that means no man ought to be punished twice for the same offence. Followed by the dispute, King's knights murdered Becket in 1170, and despite of this King Henry exempted the accused from further punishment in 1176. This concession given by King Henry is considered as responsible for the introduction of the principle in English common law. In the twelfth century, the *res judicata* doctrine had been introduced in English civil as well as criminal law due to the influence of teachings of Roman law in England. During the thirteenth and part of the fourteenth centuries, a judgment of acquittal or conviction in a suit brought by an appellant or King barred a future suit. During the fifteenth century, an acquittal or conviction on an appeal after a trial by jury was a bar to a prosecution for the same offence. The sixteenth century witnessed significant lapses in the rational development of the rule partly due to the statute of Henry VII, by totally disregarding the principle. Further, it was during that period the famous *Vaux's* case was decided to the effect that a new charge could be brought even after a meritorious acquittal on a defective indictment. The last half of the seventeenth century was the period of enlightenment regarding the significance of the rule against double jeopardy. Lord Coke's writings contributed to it partly and of course, the rest was due to the public dissatisfaction against the lawlessness in the first half of the century. It is only by seventeenth the century, the principle of double jeopardy seems to have developed into a settled principle of the common law[9].

During the eighteenth century, the extreme procedure was generally followed. It should be noted that, in eighteenth century, Blackstone stated thus:

[8] Nyssa Taylor, "England and Australia relax the double jeopardy privilege for those Convicted of Serious Crimes", [2005] 19 Temp. Int'l & Comp. L. J., p.195.

[9] Charles Parkinson, "Double Jeopardy Reform: The New Evidence Exception for the Acquittals", (2003) UNSW Law Journal,p.,605

"First, 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 for more than once for the same offence and hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence he may plead such acquittal in bar of any subsequent accusation for the same crime."[10]

Until the nineteenth century, the accused was provided with virtually no protection against a retrial when he or she was discharged due to a defect in the indictment or a variation between what was alleged and proved[11].

It must be noted that Continental law recognised the principle of double jeopardy. Article 360 of the Napoleonic *"code d'instruction criminalle"* provided that, "No person legally acquitted can be a second time arrested or accused by reason of the same act." In Spanish law also, there were references to double jeopardy in the thirtieth century. It is noteworthy that both the Continental as well as the Common law have adopted the doctrine from the common source of Canon law. The origin of the maxim that, "not even God judges twice for the same act" was present in church canons as early as 847 A.D. The protection under the rule was also available in Roman law. As per the Justinian Code, "He who has been accused of a crime cannot be complained of for the same offence by another person."[12]

The classical argument for the need of maintaining the rule is apparent in the observation of the court in *Green* v. *United States*[13]. The Court observed thus:

"The underlying idea… is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an

[10] Blackstone, Commentaries, 335, (1889), excerpt by Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.252.
[11] *Supra* 6, p.3.
[12] Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.254, See also; Peter Westen, Richard Druben, "Toward A General Theory of Double Jeopardy", Sup. Ct. Rev.(1978), p.81.
[13] (1957) 355 US 185

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."

The protection given under this rule has gained international recognition also through various international documents[14]. Today, almost all civilized nations incorporate protection against double jeopardy in their municipal laws. While some of these countries have provided the protection through their constitution and others have incorporated it into their statute law[15].

Double jeopardy protection in India: A comparison with English law

Double jeopardy protection under Indian law

In India, the protection against the double jeopardy is a constitutional[16] as well as a statutory guarentee.[17] The principle has also been recognized under the provision of General Clauses Act.[18] The Constitution of India recognize only *autrefois convict* whereas the Code of Criminal Procedure, 1973 incorporates *autrefois acquit* as well. The rule against double jeopardy has been recognized as a fundamental right in the Constitution of India. A person can claim fundamental rights against the state and the state can abridge those rights only to the extent laid down. Even though its origin can be trace back in the common law principles, the ambit and content of guarantee are much narrower than those of the common law in England. Under Indian law, when a person has been

[14] The states are bound to cope with the relevant provisions of the conventions to which they are parties. For instance, Article 14(7) of the International Covenant on Civil and Political Rights; Article 4(1) , Protocol 7 to the European Convention of Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union.

[15] For instance, in countries such as U.S.A and India, it is accepted as a constitutional right. In particular, Fifth Amendment to constitution of USA and article 20(2) of the constitution of India. Conversely, in England and Canada, it is the part of common law and statute law.

[16] Article 20(2) of the Constitution of India articulates that, "No person shall be prosecuted and punished for the same offence more than once".

[17] See, Section 300(1) , Code of Criminal procedure, 1973.

[18] General Clauses Act, 1897, Section 26 provides," Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

convicted of an offence by a court of competent jurisdiction, the conviction serves as a bar to any further criminal proceeding against him for the same offence. The most important thing to be noted is that, sub-clause (2) of Article 20 has no application unless there is no punishment for the offence in pursuance of a prosecution.

Under the provisions of the Indian Constitution, the conditions that have to be satisfied for raising the plea of *autrefois convict* are firstly; there must be a person accused of an offence; secondly; the proceeding or the prosecution should have taken place before a 'court' or 'judicial tribunal' in reference to the law which creates offences and thirdly; he accused should be convicted in the earlier proceedings. The requirement of all these conditions have been discussed and explained in the landmark decision, *Maqbool Hussain* v. *State of Bombay.*[19] In this case, the appellant, an Indian citizen, was arrested in the airport for the illegal possession of gold under the provisions of the Sea Customs Ac, 1878. Thereupon, an action was taken under section 167(8) of the Act, and the gold was confiscated. Sometimes afterwards, he was charge sheeted before the court of the Chief Presidency Magistrate under section 8 of the Foreign Exchange Regulation Act, 1947. At trial, the appellant raised the plea of *autrefois convict*, since it violates his fundamental right guaranteed under article 20(2) of the constitution. He sought the constitutional protection mainly on the ground that he had already been prosecuted and punished inasmuch as his gold has been confiscated by the customs authorities. By rejecting his plea, the court held that the proceedings of the Sea Customs Authorities cannot be considered as a judicial proceedings because it is not a court or judicial tribunal and the adjudgment of confiscation or the increased rate of duty or penalty under the provisions of the Sea Customs Act does not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. The court also held that the proceedings conducted before the sea customs authorities were, therefore, not 'prosecution' and the confiscation of gold is not punishment inflicted by a 'court' or 'judicial tribunal'. The appellant, therefore, cannot be said to have been

[19] A.I.R. 1953 S.C. 325

prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate Court.

To operate as a bar under Article 20(2), the second prosecution and the consequential punishment must be for the same offence, i.e., an offence whose ingredients are the same.[20] One of the important conditions to attract the provision under clause (2) of article is that, the trial must be conducted by a court of competent jurisdiction. If the court before which the trial had been conducted does not have jurisdiction to hear the matter, the whole trial is null and void and it cannot be said that there has been prosecution and punishment for the same offence.[21] Gajendragadkar, J. has stated the protection under Article 20(2) as follows:

"The constitutional right guaranteed by Article 20(2) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure."[22]

However, the Code of Criminal procedure recognize both the pleas of *autrefois acquit* as well as *autrefois convict*. The conditions which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be by be a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression "same offence" shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.[23]

[20] *Manipur Administration* v *Nila Chandra Singh*, AIR 1964 SC 1533
[21] *Bai Nath Prasad Tripathi* v. *Statel*, A.I.R. 1967 S.C. 494
[22] *Raja Narayanlal Bansilal* v *M.P. Mistry*, AIR 1961 SC 29
[23] *State of Rajasthan* v *Hat Singh*, (2003) 2 SCC, 152

Double jeopardy protection under English law

In England, the pleas of *autrefois acquit* and *autrefois convict* are understood as they have been understood in the common law.[24] In *Sambasivam*[25], Lord McDermott stated thus;

"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence".

As per the decision of *Sambasivam*, the effect of a final verdict of acquittal after a lawful trial by a competent court is binding and conclusive in all subsequent proceedings between the parties to the adjudication.The House of Lords affirmed the rule in *Humphry*'s case[26] and thus the rule came into force in English law. Further, in English law, the rule against double jeopardy is supplemented by the doctrine of abuse of process[27], laid down by the House of Lords in *Connelly v. DPP*[28]. In this case, the Crown had charged Connelly, and three other defendants with two indictments: one for robbery and one for murder. These indictments arose out of an office robbery in which an employee had been killed. Initially, the Crown proceeded on the murder indictment alone. The jury returned a guilty verdict and Connelly appealed to the Court of Criminal Appeal. The Court quashed Connelly's conviction and directed a verdict of acquittal. A month later, the state tried and convicted Connelly on the second indictment for robbery. Connelly appealed his robbery conviction. The House of Lords dismissed Connelly's appeal and held that the *autrefois* plea was a limited doctrine that did not prevent Connelly's retrial. In this case the House of Lords found that the traditional autrefois rule did not developed in England as had in other countries and instead of enlarging its scope, they favored supplementing the rule with the inherent power to stop abuse of process.

[24] Dr. K.N. Chandrasekharan Pillai, *Double Jeopardy Protection: A Comparative Overview*, Mittal Publications, Delhi (1st edn- 1988), p.28.
[25] *Sambasivam* v *Public Prosecutor, Federation of Malaya,* [1950] AC 458
[26] [1977] AC 1 H.L.
[27] Abuse of process means abuse of process of the court by the parties to the litigation. The court has the inherent power to stop proceedings if it is an abuse of process of the court.
[28] [1964] A.C. 1254

In another case, the House of Lords observed that the inherent power, which a court of justice must possess to prevent misuse of its procedure, would otherwise bring the administration of justice in to disrepute among right thinking people.[29] The court also held that a second trial is permissible only when special circumstances demand and what is meant by this phrace is not settled. However, it would mean to includes acquiescence by the defendant in separate trials of two indictments, cases where in a subsequent event occurred in relation to and after the first trial (say for instance, the death of an assault victim of which the defendant has already been convicted for the offence of assault).

The English rule against double jeopardy is very narrow in the sense that it is restricted to an offence identical in law to the offence of which the person was previously acquitted or convicted. In *Beedie*,[30] it was held that the protection is not available to an accused who has been acquitted previously for an offence under the Health and Safety at Work Act,1974, in respect of his failure to maintain a gas fire in a house he let out, when later he charged with manslaughter of a tenant who died of poisoness gas from the faulty fire.

One of the notable difference between the rule against double geopardy in India and England lies on the prosecution's right of appeal. Under English law, until the coming into force of Criminal Appeal Act of 1907, neither the prosecution, nor the defense was allowed to appeal. This was mainly due to the fact that an appeal provision would offend the rule against double jeopardy and resulted in difficulties and inconveniences to the defendants. The Act did not provide for the any prosecution appeals instead, the defendant could very well get his conviction vacated by the Court of Appeals on the ground of some errors in the trial. The law operated asymmetrically in the sense that the prosecution could not challenge an acquittal except under very limited situations. At the same time, the defendant has been able to challenge his conviction on appeal[31] as well

[29] *Hunter* v. *Chief Constable of the West Midlands Police* [1982] AC 529
[30] [1998] Q.B. 356
[31] The Criminal Appeal Act, 1907.

as post appeal.[32] The rationale underlying behind the rule is that it helps to serve the purposes of double jeopardy protection. However, after coming into force of the Criminal Justice Act, 2003, a new trial is permissible at the instance of finding out "new and compelling piece of evidence". A retrial is allowed in pursuance of tainted acquittals in serious offences.[33]

Under Indian law, any person convicted of an offence may prefer an appeal in accordance with the law subject to certain restrictions. The notable provision with regard to the power of appeal is that the State has given ample power to prefer an appeal against inadequacy[34] in sentencing or acquittal[35].

The need for preserving a system prevents retrial for the same offence: Rationale behind the rule against double jeopardy in a human right perspective

The rule serves two reasonably defined objectives. First, it performs a declerative function by informing citizens the boundary, beyond which they can be sure that the criminal process will no longer be levied againt them in respect of the same alleged offence. Secondly, it serves as the safegurd to the subjects' aginst the abuse of state's power by making them the illegitimate persuits of suspects leads to undue hardships and harassment[36]. In fact, the principal reasons

[32] David Hamer, "The Expectation of Incorrect Acquittals and the "New and Compelling Evidence" Exceptio n to Double Jeopardy" [2009] Crim. L. R., 64, the post appeal provision is administered in England by the Criminal Cases Review Commission which commenced operation on January 1, 1997 under the Criminal Appeal Act,1995 (UK).

[33] Part10 of the Criminal Justice Act, 2003 sets out a statutory framework, which enables retrial of a defendant who has been secured a cloudy acquittal at trial. But the process is available only for the so called "qualifying offences" as specified in the legislation, i.e., the offences listed in Part 1 of Schedule 5 to the Act. Section 75 of the Act deals with the cases that may be retried and section 76 provides for certain procedure for making the application to Court of Appeal. As per section 76, the prosecutor may apply to the court for quashing a person's acquittal for a qualifying offence and ordering him to be retried. Such an application must be pursued only with the leave of the Director of Public Prosecution, who must issue a written consent. The DPP may give consent if he satisfied that there is new and compelling evidence against an acquitted person in relation to the qualifying offence. Section78 of the Act deals with the expression, new and compelling evidence. Accordingly, evidence is new if it was not adduced in the proceedings in which the person was acquitted (nor, if those were appeal proceedings, in earlier proceedings to which the appeal related).

[34] Section 377 , Code of Criminal Procedure, 1872

[35] *Id.*,S. 378

[36] Ben Fitzpatrick, "Tinkering or Transformation? Proposals and Principles in the White Paper, Justice for All", [2002] 5 Web JCLI.

for protection of the rule are two fold. Affording protection to the citizens against the repeted state prosecution is at one hand and preserving the moral integrity of the criminal justice process on the other[37]. The English Law Commission identifies four major rationales for the double jeopardy rule.[38] They are; i) reducing the risk of wrongful conviction, ii) minimising the distress of the trial process, iii) the need for finality, and iv) the need to encourage efficient investigation. Some scholars are of the opinion that the rule serves many purposes[39]. Here, it is desirable to analyse some of the rationale of rule against double jeopardy in a human rights angle.

i) Reducing the risk of wrongful conviction

One of the long established rationale for the double jeopardy rule is that it reduces the risk of wrongful conviction[40].The chance of erroneous conviction is comparatively high in a retrail since the prosecution is forewarned and forearmed with the defence strategies. The United States Supreme Court has rightly observed:

"Repeated prosecutions increase the risk of an unjust conviction of an innocent defendant by wearing down the defendant and giving the Government opportunities to learn from its earlier mistakes and to hone its trial strategies."[41]

[37] A.L-T. Choo, "Abuse of process and Stays of Criminal Proceedings", as quoted by Gavin Dingwall in "Prosecutorial Policy, Double Jeopardy and Public Interest",[2000] MLR Vol. 63, p.268.

[38] Law Commission (UK), Double Jeopardy, Consultation Paper No 156 (1999).

[39] David S. Rudstein, "Retrying the Acquitted in England, Part I: The Exception to the Rule against Double Jeopardy for New and Compelling Evidence", (2007) 8 San Diego Int'l L.J., 387. The author identifies eight rationales for the rule. They are: a) preserving the finality of judgments, b)minimizing personal strain, c)reducing the risk of an erroneous conviction, d)protecting the power of the jury to acquit against the evidence, e)encouraging efficient investigation and prosecution, f)conserving scarce prosecutorial and judicial resources, g) preventing harassment, and h) maintaining the public's respect and confidence in the legal system.

[40] Supra n.9 at p.613, See also Ian Dennis, "Rethinking Double Jeopardy: Justice and Finality in Criminal Process", [2000] Crim. L. R. 939; Poul Roberts; "Double Jeopardy Law Reform: A Criminal Justice Commentary", MLR (2002) Vol. 65(3), p. 397.

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

ii) Minimising the distress and trauma of the trial process

Manifold attempts by the state to conduct a retrial of an accused acquitted for an offence would expose him to embarassment, expenses and ordeal, and compelling him to live in a continious state of anxiety and insecurity. The retrial will seriously disrupt the accused's personal life during the trial. This argument is based on the state's duty of humanity to its subjects to treat them with dignity and respect[42]. Prof. Glanwille Williams has written thus:

"It is hard on the defendant if, after he has at great cost in money and anxiety secured a favorable verdict from a jury on a particular issue, he must fight the battle over again when he is charged with a technically different offence arising out of the same facts."[43]

iii) Preventing harassment

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

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

[42] Rosemary Pattenden, "Prosecution Appeals Against Judges' Rulings", [2000] Crim. L.R. 971.
[43] Glanwille Williams, "*Textbook of Criminal Law"*,(1983),(2nd ed.) p. 164

proceedings.[44] The distress attaches to the criminal trial is undoubtedly high and definitely, it will increase with the repeated trial process.[45]

Conclusion

The rule against double jeopardy is a universally accepted principle for the protection of certain values within the criminal justice system. It serves many purposes such as preventing the arbitrary actions of the state against its subject, ensures finality in litigations etc., which are of great importance for the protection of human rights of the accused persons. It is a centuries old principle, which survived not by chance, but for many good reasons. It must be noted that when the English legislatures intended to introduce an exception to the rule, strong criticism was raised from the part of legal fraternities as well as human rights activists. Thus, existence of such a rule is inevitable for the integrity of the criminal justice system itself.

[44] *R* v *Carroll* [2002] 194 ALR 1
[45] David S. Rudstein, "Retrying the Acquitted in England. Part II: The Exception to Rule Against Double Jeopardy for Tainted Acquittals" San Diego Int'l L.J. [2008], p.246