PROHIBITION AGAINST SUBSEQUENT PROSECUTION: PERISCOPING THE NON BIS IN IDEM PRINCIPLE

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1. Introduction

The concept of double jeopardy is founded upon the principle of justice that a man should not twice suffer for the same wrong. It is expressed in the maxim *nemo debet bis vexari pro una et eadem causa* and is an important feature of criminal procedure law in virtually all modern legal jurisdictions. The universal application of this concept is a mark of the important role ascribed to it, particularly that of being a strong pillar of protection of the citizenry against prosecutorial oppression and abuse of the court’s process. In international law, the concept is replicated in the principle of *non bis in idem* and it plays no less of a significant role. Its central tenet is the timeworn ideal that no one should be twice judged for the same offence. Apart from its procedural importance, this principle is clothed with additional dignity by its elevation to the status of a fundamental human right in the constitutions of old and emerging democracies, international human rights instruments,1 the Statutes of *ad hoc* International tribunals and the International Criminal Court.

An attempt is made in this article to briefly unfold the law of double jeopardy, with particular emphasis on the application of the plea of *autrefois*

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1 See e.g. para. 35(3)(m) of the South African Constitution Act 108 of 1996. The principle is also enshrined in international and regional instruments; see Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR); Article 4 of Protocol 7 of the European Convention on Human Rights; Article 9 Statute of the ICTR; Article 10 Statute of the ICTY; and Article 17 Rome Statute of the ICC.
acquit and the *ne bis in idem* principles. In so doing, a comparative analysis of the plea as understood in Anglo-American jurisdictions is undertaken, focusing mainly on the origin, values, problems and current attempts being made in some jurisdictions to overhaul the application of the rule in order to make it responsive to the interests of both the accused and society. In the same breath, as it has become apparent in recent history that the application of the principle is not confined to municipal law, a searchlight is also beamed on the application of *non bis in idem* in international law.

### 2. Scope of Protection of Double Jeopardy

#### 2.1. Historical Background and Rationale of the Doctrine

In spite of many valiant attempts by jurists and text writers to trace the origin of the double jeopardy doctrine, its exact source remains shrouded in mystery. Nevertheless, the debate as to its origin continues. A writer has described double jeopardy as being of no distinct origin,\(^2\) while one court has declared that “it seems to have been always embedded in the common law of England, as well as in the Roman law and doubtless in every other system of jurisprudence, and instead of having a specific origin, it simply always existed”.\(^3\)

A plethora of legal and social justifications have been advanced for the existence of the twin pleas of *autrefois acquit* and *autrefois convict*. In Roman law, the underlying policy objective that there must be an end to litigation appears to be the justification for the introduction of the doctrine.\(^4\) In modern times the value consistently advanced as the objective of the concept is succinctly captured by the United States Supreme Court as being 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


\(^3\) *Stout v State*, 36 Okl. (1913) 744, p. 755.