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A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era

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The double jeopardy principle is a guarantee of individual liberty that has ancient origins. The development of the principle has been incremental, and its meaning has varied through the ages. The research question and attending analyses presented in this article advances an examination of the evolution of the double jeopardy principle in historical context. Through doctrinal analysis the hypothesis advances the supposition that the common law principle was firmly established by the post-medieval period. Through an examination of landmarks in the development of the principle the article examines theoretical underpinnings and considers the extent to which the criminal justice system developed a public prosecution model of criminal justice. The incremental development of this fundamental principle of criminal justice can be explained in terms of the deficiencies in medieval criminal procedure, prejudices and practices of medieval trial procedure and punishments imposed on convicted offenders. Jurisprudence on the application of the principle indicates significant developments following the Restoration.

Keywords: *Double jeopardy; Ne bis in idem; Autrefois acquit; Autrefois convict; Criminous clerks; Restoration*

Introduction

With the establishment of the public prosecution model of criminal justice from the nineteenth century, liberal democratic states are imbued with constitutional and statutory obligations to detect, investigate, prosecute, and punish convicted offenders.[2] These obligations must be legitimately discharged in accordance with substantive and procedural safeguards to prevent injustices of wrongful convictions, and wrongful acquittals. Criminal justice processes should be realistic concerning pragmatic constraints on law enforcement and evidential burdens of proof. In this regard, the criminal justice and sentencing processes are conducive to the principled asymmetry of convictions and acquittals, provided that individual rights are respected and protected.

The principle of double jeopardy in common law adversarial jurisdictions, and its continental counterpart *ne bis in idem* in civil law inquisitorial jurisdictions,

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[2]Ma (2008); Langbein (1973).

proscribe multiple trials and punishments for the same criminal offence.[3] The principle finds expression in the pleas in bar, *autrefois acquit* and *autrefois convict*. Although commonly referred to as 'the rule against double jeopardy' the proscription is more appropriately identified as a principle or maxim incorporating multiple rules of substantive and procedural law. A rule of law *simpliciter* would not incorporate fundamental procedural issues including the attachment of jeopardy to the original criminal trial, final verdict of acquittal or conviction, and the most litigated element of the principle regarding types of conduct that might constitute the same criminal offence.

Historical methodology allows legal researchers to evaluate a principle in its original context to develop a greater depth of understanding.[4] Through doctrinal analysis of legalistic sources, this article traces the historical development of the common law double jeopardy principle. The analysis reveals that the importance of the principle gained traction during the late medieval period and was firmly established in the common law by the late seventeenth century. The foundations of this incremental development were based on the status of the principle in classical antiquity, migration of Roman law scholars, church-state conflicts over clerical immunity, changes in medieval criminal procedure and harsh punishments. The hypothesis is augmented by the status of the principle having migrated to the American colonies and subsequently enshrined in the federal and state constitutions during this formative period.

Rationale of the Principle

Multiple prosecutions and punishments for the same conduct/offence is intrinsically unlawful from a deontological perspective.[5] Deontological ethics, and the nature of duty and obligation on states impacted on the prescriptive ethical theory that morality of conduct should be constructed on whether such conduct is right or wrong according to a series of rules, rather than based on the consequences of the proscribed conduct. This theoretical underpinning of criminal justice processes resonates with the development of the double jeopardy principle.

Contemporary policy considerations underlying the rationale of the double jeopardy principle were neatly encapsulated in *Green v United States*[6] where Black J. opined:

> *"The underlying idea, one that is deeply ingrained in at least the Anglo-American systems 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*."

[3] Stuckenberg (2019).
[4] Reid (1993).
[5] Hurd & Moore (2021); Binder (2002).
[6] (1957) 355 US 184 at 187-188.

Enhancing the possibility that innocent persons would be convicted and punished is pivotal as Friedland[7] writes:

> *"In many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And, knowing that a second proceeding is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge, he may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial*."

The power imbalance and disproportionate resource allocation between prosecution authorities and accused persons clearly necessitated a formal limitation on states against multiple trials and harsh punishments. The wide-ranging resources available to prosecuting authorities in contrast with the adverse standing of accused persons necessitates a procedural bar against the ordeal of repeated criminal trials for the same criminal offence following an acquittal or conviction by a court of competent criminal jurisdiction. While the prohibition is firmly established in legal systems concerned with individual liberties, the incremental development of the principle in historical perspective reflects the social, political, and economic climates delimiting the contours of the proscription.

Origins of the Principle

A double jeopardy principle of sorts was evidenced by Law 5 of the nineteenth century BCE Code of Hammurabi:

> *"If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgement*."

This edict prohibited judges from changing judgments once the issues of a case had been determined and reflects the doctrine of *res judicata* that prohibits the reopening of issues that have already been decided by courts of competent jurisdiction. *Res judicata* has broader application than the *ne bis in idem* principle and is also applicable in civil law. Nonetheless, one may speculate that Law 5 was one of the earliest recorded legal provisions recognising the injustice of repeated trials and punishments following conclusive judgments, and (presumably) influenced the recognition and development of the principle in western legal traditions.

[7]Friedland (1969) at 4.

Classical Antiquity

Formative legal cultures, traditions and customs that underpinned the development of written (as opposed to oral legal tradition) Greco-Roman laws expediated the formation of nation states advanced legal systems reflective of their own national identities. These guiding principles provided the rational character of legal systems and legalism of the western states.[8] The legal methodological approach to resolving social and economic conflicts not only by force, authority, or compromise, but also by the application of general conceptual principles and rules of law is the characteristic feature of contemporary western legal thought.

The existence of the *ne bis in idem* principle in western civilisations can be traced to the classical period of cultural history (c. 8th century BCE - 6th century AD). The development of the principle was evidently based on deontological precepts from its inception in classical antiquity as a primitive form of *res judicata*. Ancient Greco-Roman precepts can be traced to 355 BCE when Athenian statesman and orator Demosthenes proclaimed, "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort,"[9] which is one of the earliest known references. Jones writes, "The law of Athens was that, once tried, a person could not be re-prosecuted on the same charge". [10]

In last century BCE, Roman statesman, lawyer, scholar, and philosopher, Cicero proclaimed the civil law maxim *non bis in idem*. The maxim may have influenced its adoption into the common law both directly and through ecclesiastical law where it was generally known.[11] There is a close analogy between the way Roman law and the common law of England evolved.[12]

The principle found expression in the pervasive nature of Roman law expressed in the *Digest of Justinian* (533) as "the governor should not permit the same person to be again accused of crimes of which he has been acquitted."[13] This incorporated the maxim *nemo debet bis puniri pro uno delicto*, which is a probable source for the introduction of principle in the common law.[14]

These declaratory statements indicate the principle was based on the universal law of reason, justice, and conscience common to all nations. Protection was not absolute however, as Jones writes:

> *"The main concern of a man brought into court was to win a verdict by one means or another, for once tried he could not be prosecuted again on the same charge, the rule ne bis in eadem being accepted in Athens if not in Sparta, though in this matter again the pleaders were not slow to find loopholes in the law and to employ various*

[8]Duxbury (1989).
[9]Demosthenes (trans. 1962) at 589.
[10]Jones (1977) at 148.
[11]Friedland (1969) at 6.
[12]Stephen (1883, vol. 1) at 49.
[13]Scott (1932, vol. II) at 17.
[14]See text accompanying footnotes 45-47.

> *devices, including charges of false witnesses, for reopening questions which had apparently already been disposed of by the courts*."[15]

In the Roman Republic, an acquittal could not be appealed. The laws of ancient Rome did however, recognise an exception to the concept in that judgement upon an action between an accused person and his accuser did not bind against a second accuser who was not a party to the first action, or at least was not aware that the first prosecution had being brought.[16] The purpose for this exception was to facilitate a second accuser with standing to prosecute the accused on a second occasion for the same criminal offence in circumstances where the second accuser may have had more conclusive evidence of the accused's guilt. Allowing accused persons who in all probability were guilty to remain unpunished would have brought the criminal justice system into disrepute. This in turn could have resulted in actions of 'private justice' by the person against whom the offence had been committed or by his next of kin if he had been murdered. Earlier forms of legal procedure were grounded in vengeance against perpetrators, which originated with the blood feud.[17]

Canon Law

Since the fall of Rome c. 476 the development of canon law opposed placing accused persons twice in jeopardy for the same offence. The ecclesiastical *ne bis in idem* principle of natural law, reason and justice is based on the interpretation by St. Jerome c. 391 AD on a passage from the Old Testament from the prophet Nahum (Nahum 1:9) '*For God judges not twice for the same offence*' (Duoay Rheims version), *affliction shall not rise up the second time*' (King James' version), '*No adversary opposes Him twice*' (New Jewish Publication Society translation), to mean that not even God judges twice for the same conduct. The canon law declaration was introduced into the church canons in 847 AD and accepted the interpreted to mean that 'not even God judges twice for the same conduct'. Thereafter the principle migrated into continental legal systems, and subsequently influenced the development of the principle in the common law of England.

Canon law influenced the gradual transition from imposing harsh punishments including the death penalty for an increasing number of offences instead advocating for imprisonment as the less draconian punishment. This transition was to ameliorate the harshness of the common law that dealt with offenders from the perspective of retribution. The Church stringently advocated treating offenders from the perspective of intention and sin and introduced the concept of imprisonment to facilitate repentance of the offender through solitary confinement and replaced harsh, and in many cases capital, medieval punishments.[18]

[15]Jones (1977) at 148-149.
[16]Scott (1932, vol. II) at 17-18.
[17]Holmes (1991) at 2-3.
[18] Plucknett (1956) at 305.

Late Antiquity

The transition from classical antiquity to the early medieval period was marked by the reign of Anglo-Saxons kings from the fifth to eleventh centuries, a period colloquially known as the 'Dark Ages' (originated with the Tuscan scholar Petrarch as a revisionist who regarded the post-Roman centuries as 'dark' compared to the light of classical antiquity) principally because of the scarcity of written sources.[19] This lacuna between the classical antiquity and medieval developments invariably leads to supposition as to the precise origins of the principle in modern area.

During the early medieval period, the punishment imposed upon a second conviction for every offence was death or mutilation, albeit there were few capital offences in existence at this time, such as murder and treason. In Ethelred II's (978-1016) laws, it is said of the accused that when convicted "let him be smitten so that his neck break."[20] The laws of Cnut (1016-1035) did not improve the situation of accused persons. Capital punishment seems to have been common after Cnut's time, notwithstanding his cautions against the abuse of it, as William the Conqueror found it necessary to forbid it.[21] Trials for criminal offences were by the ordeal in pre-Conquest criminal laws and habitual criminals were subjected to the 'triple ordeal.' Assumptions of guild following a second ordeal resulted in removal of the hands, feet, or both, and following a third ordeal punishments included blinding, excision of the nose, ears and upper lip, or scalping.[22]

The inference from the imposition of such draconian punishments is that the Anglo-Saxons did not attach much importance to individual rights or liberties of accused persons. The concept of a double jeopardy protection would not have been extant during this period, from which it may be concluded that it was not until the reign of the Norman Kings that an embryonic principle became evident. Moreover, the Anglo-Saxon Chronicle is a collection of annals in Old English, chronicling the history of the Anglo-Saxons, which did not document cases. This lacuna suggests the double jeopardy prohibition was not recognised, or not important enough to have been recorded during this period.

An embryonic double jeopardy principle does not appear to have been extant during this period given that the laws were void of basic tenets of fairness and justice. Prior to the Norman Conquest there was no true criminal procedure operative throughout the reign of the Anglo-Saxon Kings.[23] If an embryonic double jeopardy principle had existed during this period, then the prohibition on retrials and multiple punishments would (presumably) have carried over from the Norman Conquest and the inception of the common law. However, it was not until the late medieval period that the common law courts began to apply double jeopardy principles in a recognisable form.

[19]Nelson (2007); Higham (2004); Kallendorf (1996).
[20]Stephen (1883, vol. I) at 58.
[21]Stephen (1883, vol. I) at 59.
[22]Thorpe (1840) at 393-395.
[23]Holdsworth (1926, vol. II) at 108-110.

Benefit of Clergy

The Norman Conquest was completed with encouragement from Pope Alexander II, and William I was expected to reciprocate by permitting the development of ecclesiastical courts alongside the common law courts, although this practice did not continue indefinitely.

The complete rejection of a double jeopardy principle by Henry II (1154-1189) is evident in the Constitutions of Clarendon, 1164, that made provision to retry religious clerks who had formerly been acquitted in the spiritual courts. The Constitutions restricted ecclesiastical privileges, restrained the authority of ecclesiastical courts, and curtailed the extent of papal authority in England. The church had extended its jurisdiction by taking advantage of the weakness of royal authority during the anarchy of Stephen (1135–1154), Henry II's predecessor. The purpose of the Constitutions was to restore the law as it was observed during the reign of Henry I (1100-1135).

What appears to have been the development of a corresponding principle of the common law arose from the 12th century controversy between Archbishop Thomas Becket (Archbishop of Canterbury) and King Henry II. The influence of Roman law was significant on the early development of the common law especially following the posthumous victory of Archbishop Becket following the power struggle between the Church and Henry II.[24]

The principle that religious clerics should not be punished by the King's Courts after a trial in the ecclesiastical courts was a major source of the dispute between Becket and Henry II. The full extent of the clerical claim was that not merely every criminal charge but every personal action against a clerk was an issue that lay outside the competence of the temporal courts.[25] While the controversy over clerical immunity was not the crucial issue it was nonetheless the single aspect around which the quarrel was waged most bitterly.[26] This issue brought the disagreement between Henry II and Becket reached a crisis point. Finding a resolution was not going to be an easy task.

Becket's main argument in the dispute was that any further punishment of clerks in the King's Courts would violate the maxim *nemo bis in idipsum* no man ought to be twice punished for the same offence. This would violate ecclesiastical law prohibiting double punishment based on St Jerome's comment in AD 391 to I Nahum 9. He objected firstly to the summoning of clerks before a secular justice at the initial stage of the King's procedure; secondly, that no secular punishment should follow the deposition of a guilty clerk since secular judges had no jurisdiction over clerks (who were under the jurisdiction of the ecclesiastical courts); thirdly, that deposition was itself the penalty for the crime in question, to which no secular punishment could be legitimately added, for this would involve the imposition of a double punishment.[27] This approach underscores the rationale for the inception of the concept in classical antiquity based on the universal law of

[24]Friedland (1969) at 328 and chapter 1.
[25]Pollock & Maitland (1968, vol. I) at 446.
[26]Duggan (1962) at 2.
[27]Duggan (1962) at 4.

reason, justice, and conscience. This development is the earliest intimation in the common law of the inequity of the imposition of double punishment and multiple proceedings for the same criminal offence, influenced by ecclesiastical law.

The King's officials were notified of offences proffered against accused persons, and if convicted, the offenders' property was forfeit to the King.[28] The King's direct involvement in the administration of criminal justice ensured a continued major source of revenue. Breach of the King's peace was not considered a felony and was punished by a pecuniary penalty by way of damages, which provided much of the incentive for the King's involvement in law enforcement.[29]

Becket vehemently opposed the proposals in the Constitutions based on canon law and invocation of the maxim *nec enim Deus iudicat bis in idipsum.*[30] Becket prevailed albeit posthumously in 1176.[31] The King's judges thereafter applied the principle and henceforth the principle evolved a part of the common law. The concession between state and church meant that religious clerks accused of committing felonies were exempt from both trial and punishment in the King's court. This process established the immunity from secular prosecution known as the benefit of clergy (*privilegium clericale*) with the result that ecclesiastical courts would henceforth bring justice to religious clerks.[32] The punishment for all felonies was the death penalty that was unlikely to be commuted but for religious clerics who could avail themselves of *privilegium clericale*.[33] This operated as a 'structured bargain,' somewhat analogous to the scale of tariffs extant in Anglo-Saxon laws, whereby accused clerics received the benefit of the prearranged 'bargain' of being confined to the jurisdiction of ecclesiastic courts in exchange for his plea.[34] The plea in bar applied only to the first offence and offences committed thereafter would subject the cleric to the to the jurisdiction of the curia regis without placing him twice in peril of conviction for the same offence. Benefit of clergy was formally abolished in 1827.[35]

Henry II objected to the 'benefit of clergy' on the basis that it protected clerics from the authority of the King's courts. Punishments imposed by the ecclesiastical courts, deposition, would not be as severe as punishments imposed by the *curia regis* namely fines, and forfeitures. This might have encouraged criminal behaviour against the King's peace by clerics who would then claim the 'benefit of clergy' as a procedural defence to being tried for the same offence in the temporal courts.

Becket's successor, Archbishop Richard, was not opposed to dual punishment, and wanted laypeople who murdered clerks to be handed over to the temporal courts for punishment, who could impose more severe forms of punishment on the basis that 'there is no duplication where what is begun by one is completed by

[28]Milsom (1969) at 354.
[29]Bracton (1968, vol. II) at 411.
[30]Hunter (1984) at 6.
[31]Pollock & Maitland (1968) at 448-449.
[32]Hunter (1984) at 6.
[33]De Morgan (1900).
[34]Wishingrad (1974) at 11.
[35]7 & 8 Geo. IV, c. 28.

another.' This was Henry's position concerning offences committed by clergymen.[36]

Towards the end of the reign of Henry III (1216-1272) the King's courts were conducting their own 'trial' before handing the clerk over to the spiritual courts. This 'trial' was to determine whether the offender's goods should be forfeited to the Crown. Although the Church protested echoing Becket's argument based on *non bis in idipsum*, the King's courts did not desist.[37]

Becket was murdered in Canterbury Cathedral in December 1170, which 'earned him a martyr's crown and the church succeeded in making him England's most popular saint.'[38] Following Becket's martyrdom and Henry II's capitulation the Kings judges deemed the maxim Becket was championing worthy of consideration. Friedland[39] suggests the controversy was primarily responsible for the inception of the double jeopardy principle however, analyses of the development of the common law through the *curia regis*, evidences a gradual evolution as a procedural doctrine.

Influential Writers

The courts will typically have recourse to the writings of recognised and authoritative legal commentators where there is a *lacuna* of formal legal sources. Such commentaries were accorded a status akin to that of judicial decisions. A survey of medieval commentators reveals a developing principle of the common law, which suggests that the concept was not a pre-existing principle.[40]

Glanville was Chief Justiciar during the reign of Henry II (1154-1189). The treatise written in 1187 that was the first book on medieval English common law and is attributed to Glanville.[41] Written at the behest of Henry II as the culmination of his long-term endeavours to restore peace and prosperity following years of anarchy under Stephen I. The purpose of the Treatise was to implement Henry II's objectives. The treatise is mostly devoted to explaining the proper use of royal writs in actions that fell under the jurisdiction of royal courts. Mainly concerned with forms of actions (writ) and procedure in civil matters, is a complete statement of the law since the fall of Rome. This record of the proceedings of the *curia regis* does not reference the double jeopardy pleas in bar to a further prosecution for the same offence, which suggests the principle was not carried over as an established principle of law from the Anglo-Saxon period.

Glanville's Treatise was superseded by a treatise composed by Henry de Bracton (c. 1210 - c. 1268), which owes much of its heritage to the Treatise.[42] Bracton (writing in the 1220's and 1230's) composed soon after *Magna Carta* does not make any reference to the principle. Coke claims to have discovered

[36]Friedland (1969) at 7.
[37]Friedland (1969) at 7.
[38]Baker (2002) at 128.
[39]Friedland (1969) at 32.
[40]Wilson (1960).
[41]Woodbine (1780).
[42]Bracton (1968).

tenets of the principle in Bracton's works, however it has been suggested that this is a highly personal interpretation and not indicative of an embryonic double jeopardy principle.[43] Judicial pronouncements suggest that Bracton did recognise the urgency of a bar against multiple prosecutions for the same offence.[44] This uncertainty among leading common law writers and jurists suggests the prohibition on multiple trials and punishments was not an important principle of the common law during this period.

The Roman law influence on the development of the common law principle may have been introduced by the influx of Roman law scholars in the twelfth, thirteenth and fourteenth centuries,[45] or, alternatively that it was transposed to English common law through the influence of Canon law which had been introduced following the Norman Conquest in 1066.[46] This immigration influenced the writer and jurist Bracton et al who were enthusiastic to supplement the relatively unsophisticated common law with the doctrinal refinements of Roman jurisprudence.[47]

Britton is the earliest work on the common law of England at the behest of Edward I (1272-1307) and written in the French language, which declared that a former judgement barrier was perceptible during that period[48]. The Norman-French terminology of the pleas in bar, *autrefois acquit* and *autrefois convict*, might be attributable to this work and suggest that the common law principle migrated from the continent.

It was not until around the sixteenth century that the common law courts began to accord some recognition, albeit in a rudimentary form, to the development of a protection against multiple prosecutions (with the potential imposition of draconian punishments) for the same offence. The development of the prohibition was in response to the draconian penalties imposed upon conviction for criminal offences during the medieval period in addition to the increasing number of statutory provisions for the imposition of the death penalty on defendants convicted of most offences extant during this period.

By the seventeenth century, Lord Coke, Chief Justice declared the common law double jeopardy principle.[49]

Although the word 'jeopardy' began to have some significance during the earlier periods in the development of the common law, it was not originally concerned with the principle that a man's life should not be twice placed in jeopardy of conviction with imposition of punishment, for the same offence. It appears that the contemporary term 'double jeopardy' was unknown during the earlier periods of English legal history.[50] The principle against double jeopardy as expressed by the pleas in bar against a second criminal trial for the same offence,

[43]Sigler (1963) at 291.
[44]Bracton (1968) at 391.
[45]Barton (1993); Turner (1975); Re (1961).
[46]Sigler (1963) at 283-285.
[47]Hunter (1984) at 4.
[48]Sigler (1963) at 292.
[49]Coke (Reprint, 2018).
[50]Baker (2002) chapter 2.

autrefois acquit and *autrefois convict*, which are still referred to in contemporary criminal justice systems, are attributable to Blackstone, although the concepts probably existed before his time.[51]

The common law of England has a rich Christian heritage, a tradition that has been embodied in the drafting of *Magna Carta*. Eminent jurists, including Blackstone and Coke, frequently invoked their devout Christian faith when expounding and developing legal principles.[52] It is conceivable that canon law directly influenced the common law recognition of the double jeopardy principle.

Medieval Punishments

The necessity for a prohibition against double jeopardy became especially relevant during the late medieval period when the number of capital statutes increased exponentially. In England at the end of the thirteenth century, apart from treason and three offences that were transgressing into the category of misdemeanours, there were only six felony offences.[53] Capital punishment was imposed for a very few serious offences such as treason, murder, rape and the burning of a dwelling-house.[54] In 1688, notwithstanding the exceptionally rigorous laws enacted by the Tudors (1485-1603) and Stuarts (1603-1714)[55] no more than about fifty offences carried the death penalty. Stephen[56] notes that criminal law during the earlier periods of the common law imposed the most severe punishments, a situation which was further exasperated under the reign of the Tudors and from the time of Elizabeth I until the close of the seventeenth century there was slight change. The eighteenth century witnessed a spectacular increase in the creation of capital offences and most capital statutes in force during the 1820's had been enacted during the eighteenth century.

An examination of the rate of enactment of capital statutes imposing the death penalty or other draconian punishments for certain offences, evidence that it was not until the late seventeenth and early eighteenth centuries that the number of capital statutes increased at a staggering rate. From the accession of Edward III in 1327 to the death of Henry VII in 1509 only six capital statutes had been enacted. During the century and a half from the accession of Henry VIII in 1509 to Charles II in 1660 a further thirty capital statutes were enacted. From the Restoration of Charles II in 1660 to the death of George III in 1820 the number of capital offences had increased by about one hundred and ninety.[57] With the Restoration of Charles II the old forms of law were restored.[58]

[51]Sigler (1969) at 222.
[52]Zimmermann (2014).
[53]Pollock & Maitland (1968, vol. I) at 47.
[54]Sigler (1963) at 28.
[55]In *Conlin v Patterson* [1915] 2 IR 169 at 176-177 the Court of King's Bench *per* Dodd J. opined: 'This doctrine has been a shield and protection to the people in a time of stress, and especially in the time of the Stuart Kings.'
[56]Stephen (1883, vol. I) at 466.
[57]Radzinowicz (1948, vol. I) at 4.
[58]Baker (2002) at 214.

In 1810 Sir Samuel Romilly opined: '[…] there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England.[59] By the same token, in 1821 Sir Thomas Fowell Buxton exclaimed during his great speech in the House of Commons on the law of forgery, that:

> "*Men there are living, at whose birth our code contained less than seventy capital offences; and we have seen that number more than trebled. It is a fact that there stand upon our code one hundred and fifty offences, made capital during the last century. It is a fact that six hundred men were condemned to death last year [1820] upon statutes passed within that century. And it is also a fact, that a great proportion of those who were executed, were executed on statutes thus comparatively recent*."[60]

The need for a protection against being placed in jeopardy for the same offence was especially marked during the earlier periods in the development of the common law. Following the Norman Conquest criminal procedure did not improve in the sense of recognising the individual rights of the accused answering a criminal charge, as opposed to the standing of the prosecution authorities with the power and resources available to them. Post-Conquest common law reflected pre-existing Anglo-Saxon law. Little attention was paid to individual wrongdoers or to the protection of individual rights, which suggests that the purpose of the criminal justice system at this time was in securing convictions, a process made easier by the prosecution having all the advantages in terms of procedural rules as opposed to the disadvantages of the accused. Accused persons were not afforded any of the privileges of criminal procedure such as having a detailed knowledge of the charges, not permitted to call witnesses, nor afforded a sufficient opportunity of preparing a defence. It is hardly surprising therefore that there are no references to double jeopardy rules being a key component of rudimentary medieval criminal procedure.

The law during the reign of Henry I (1100-1135) provided that the punishment upon a second conviction was death or mutilation for almost any offence.[61] The disastrous reign of Stephen (1135-1154) allowed the achievements of Henry I to disintegrate. During the reign of Henry III (1216-1272) the criminal law consisted of eleven known offences all of which were capital offences. Moreover, the definitions and doctrines of the criminal law extant during this period were crude and unsettled.[62]

By the fourteenth century all felonies were punishable by death. Misdemeanours and trespass such as petty theft (less that one shilling) were dealt with comparatively mildly, such as the loss of an ear. Treason, as a personal affront to the sovereign, merited dismembering, quartering, stoning, burning or any combination thereof.

[59]Parliamentary Debates (1810), vol. 15, col. 366.
[60]Parliamentary Debates (1821), N.S. vol. 5, col. 926.
[61]Stephen (1883, vol. I) at 58-59.
[62]Stephen (1883, vol. II) at 219.

During the earlier periods of the common law, the Norman Kings continued to impose cruel and inhumane punishments on those convicted of criminal offences. From this, one may conclude that double jeopardy rules had not emerged as an important aspect of criminal procedure, at least from the early inception of the common law.

During the period of Coke's writings, the number of capital statutes had increased to twenty-seven and in Blackstone's day (broadly coinciding with the adoption of the Constitution of the United States 1789) there were 160 such statutes.[63]

Punishments were severe and by the eighteenth century over two hundred offences carried the death penalty.[64] Arguably the death penalty was a deterrent as many offenders had their sentences commuted and were 'transported'.[65] There was no police force in existence until the 19th century.[66] Nonetheless, capital punishment clearly necessitated a formal prohibition on retrials.

Medieval Criminal Procedure

The common law involved a dual system of prosecution, the appeal of felony by the victim or the victim's next of kin, and the King's indictment. A conviction in cases which could be prosecuted either by the appeal of felony or the King's indictment, resulted in the imposition of the death penalty.

The King was permitted to 'step into the position of the party to whom the suit rightfully belonged' to ensure that those who it was alleged had committed a felony were properly tried and punished.

Should the appeal fail at the pleading stage or if the appellor withdrew his appeal prior to a trial on the merits of the case, the appellee could not raise this failure or withdrawal as a plea in bar to a second appeal for the same offence. The appellor was prevented from bringing the appeal on a second occasion but this did not prevent another individual brining an appeal against the accused for the same crime so long as he had standing.[67] This procedure of allowing a second accuser to bring an appeal prosecute the accused for the same offence on a second occasion, undoubtedly placed the accused twice in peril of conviction for the same criminal offence. The inference from this procedure is that double jeopardy was not a recognised principle of the common law during the early medieval period.

During the thirteenth century, the century following the Henry II–Becket controversy, an acquittal or conviction following a suit commenced by an appellor prevented a second suit by the appellor, and a judgement in a suit brought on indictment by the King prevented a further suit by the King. However, towards the end of the thirteenth and for part of the fourteenth century, a suit by an appellor

[63]Stephen (1883, vol. II) at 219.
[64]Stephen (1885).
[65]Kercher (2003).
[66]Taylor (1997).
[67]*Seler v Limoges* (1321) 85 Selden Society, Eyre of London 14 Ed. II 87 at 89.

would not bar a suit by the king and *vice versa*.[68] This was especially true if the appellor's suit involved trial by battle.[69] This possibility of two trials for the same offence, whether it be by the king's indictment following an appeal, or *vice versa*, undoubtedly negates the existence of the prohibition against placing an accused twice in peril for the same criminal offence during this period.

Kirk[70] and Friedland[71] suggest that the retention of the appeal of felony with the King's indictment imposed a system of dual prosecution thereby vitiating any notion of the double jeopardy prohibition extant during this period. However, the purpose of the dual procedure was to ensure that offenders were prosecuted either by the appeal of felony or King's indictment.

Criminal procedure required the King to wait a year and a day before initiating a prosecution, the interim period allowing for the appeal of felony to be commenced. The difficulty in prosecuting after a year and a day meant that many crimes went unpunished, principally due to the time lapse in prosecuting resulting in witnesses having vague recollections of the alleged criminal episode, not to mention the fact that such witnesses may have since died or could not be located.

The statute 3 Hen. VII, c. 1, 1487 permitted the King's indictment to be brought within the proscribed period (year and a day) in the case of homicide only, and an acquittal would not prevent the retrial of the accused by the process of appeal of felony. This enactment was in response the desire of the prosecution authorities to have the exclusive authority in the prosecution of crimes.

The statute of 1487 allowed the King to indict within the year and a day, and an acquittal would not prevent a second trial being initiated by the appeal of felony, clearly establishes that the principle against double jeopardy was not recognised nor indeed applied by the common law courts by the fifteenth century.

In the fifteenth century, before the Statute of Henry VII, an acquittal on an appeal after a trial by jury was a bar to a prosecution for the same offence by indictment and an acquittal on an indictment was a bar to a prosecution for the same offence by an appeal. However, after the Statute of 1487 neither a conviction nor an acquittal on an indictment could be raised as a bar to a subsequent prosecution for the same offence by an appeal, if the appeal was brought within the year and a day.[72] This procedure was followed until the late seventeenth century when in *Armstrong v Lisle*[73] the Court of King's Bench *per* Lord Holt opined: "The statute of 3 H. 7 is severe in overthrowing a fundamental point of law, in subjecting a man that is acquitted, to another tryal, which is putting his life twice in danger for the same crime; therefore the purview of 3 H. 7 ought to be taken strictly, and the exception favourably." Subjecting an individual who has been acquitted to another trial is wrong in law and an exception to this rule should be used 'favourably.' This judicial declaration indicates the Court of King's bench

[68]Friedland (1969) at 8-9; Kirk (1934) at 607.
[69]*Bartkus v Illinois* (1958) 359 US 121 at151-152 *per* Black J.
[70]Kirk (1934) at 605.
[71]Friedland (1969) at 8-9.
[72]Kirk (1934) at 607, n. 26; Sigler (1963) at 289.
[73](1697) 84 ER 1096 at 1101.

seems to be favouring the development of a principle against retrials for the same criminal offence following an acquittal. The phrase, 'putting his life twice in danger' had a literal meaning at this time when one considers the severity of the draconian punishments imposed for most offences.

In *Young v Slaughterford,*[74] Holt C.J. ordered an appeal to be brought against the accused for the same offence following an acquittal on indictment for murder. The accused was convicted and sentenced to death.[75] This provision clearly allowed a second prosecution of the accused for the same offence following an acquittal because of the dual system of prosecution operative during this period.

The statute 26 Hen. VIII, c. 6, 1534 the trial in England of felons who had committed offences in Wales, a procedure that totally disregarded the proscription against retrials.[76] This may have been in response to the less rigorous prosecutorial policies followed by the Welsh courts at this time. It is evident from this enactment that the double jeopardy principle was not an established cornerstone of English criminal procedure during this period.

Medieval criminal procedure did not provide accused persons with basic due process and fair trial guarantees and ambiguities were resolved in favour of the prosecution. Accused persons on trial for treason or felonies were denied the assistance of defence counsel and were also denied the opportunity to examine the indictment against them. The prosecution was permitted to call witnesses, but this privilege was not accorded to the accused. There was also some doubt as to the admissibility of evidence and the general conduct of the trial, but again these uncertainties were resolved in favour of the prosecution.[77] These inherent deficiencies in the medieval criminal trial are vividly illustrated in *Lisle's Case,*[78] as Stephen commented: "It was cruel, but legal, to sentence a woman to be burnt alive for harbouring two rebels for a night. The conviction was illegal on the grounds that Hicks, whom she harboured, had not been convicted before the trial."[79]

The development of the double jeopardy principle was prompted by such factors as the severity of punishments imposed on convicted offenders, the disproportionate trial advantages in favour of the prosecution and the procedural disadvantages for the accused throughout the medieval period. Accused persons indicted for felony offences were first granted the right to summon witnesses in 1702, and not until 1837 were they permitted representation by counsel, and not until 1898 onwards could they testify on their own behalf.[80] Accused persons were not afforded knowledge of the charges until the indictment was read to him immediately in open court before the trial and was never allowed to see the indictment, and were not permitted to have proper books or papers to assist their defence.[81] Apparently the reason for such procedures was that although the

[74](1709) 88 ER 999.
[75](1709) 88 ER 1007.
[76]Friedland (1969) at 10.
[77]Holdsworth (1926, vol. IX) at 224.
[78](1697) 84 ER 1095.
[79]Stephen (1883, vol. I) at 413.
[80]Plucknett (1956) at 434-437, and 424-441.
[81]Stephen (1883, vol. I) at 330-332.

prosecution had the burden of proving its case against the accused, the accused was required to do nothing. An acquittal therefore was most unlikely given the resources of the prosecution and all the advantages of criminal procedure of which it could avail, as opposed to the adverse standing of the accused. Medieval criminal procedure failed to accord individual due process and fair trial rights to the accused, which evidences the absence of the principle during the medieval period.

Moreover, statutes were passed making it more difficult for defendants to be released on bail pending trial; the practice of issuing warrants for the arrest of suspected persons was enhanced; an inquisitorial system was introduced whereby justices of the peace or judges could examine suspected persons.[82]

Common Law Evolution

The existence of the principle deeply rooted in legal history cannot be demonstrated with a sufficient degree of certainty, notwithstanding the fact that there have been numerous judicial statements[83] and academic commentaries[84] asserting that the concept is as old as the common law itself, which (presumably) stems from the beginning of legal memory in 1189 as with other customs and practices.[85]

The incremental development of the concept was in consequence the adverse standing of accused persons during the medieval period and procedural anomalies that undermined fair trials. The development of the principle was necessitated at a time when criminal procedure did not resolve disputes on the merits but according to the powers and resources available to the prosecution as opposed to the adverse position of the accused. In 1166, Henry II enacted in the Assize of Clarendon (remodelling of criminal procedure) that even though the accused was acquitted by the ordeal he must abjure the realm if he was of bad character.[86]

The concept was not incorporated in *Magna Carta* (1215) and is not inferred, which suggests the principle was not recognised as a fundamental right of accused persons during the formative period of the common law.

Because of the absence of plea rolls the extent to which the courts prevented double jeopardy from evolving before the twelfth century is difficult to ascertain. The earliest recording of court decisions began with the *Year Books* under the authority of the Norman Kings. The *Year Books* (1290-1535) written in the Anglo-Norman language were the earliest series of reported cases of the common law courts, which include eleven mentions the term 'jeopardy.' Embryonic criminal

[82]Holdsworth (1926, vol. IX) at 223.
[83]*The People (DPP) v Quilligan (No. 2)* [1989] IR 46 at 54 *Henchy J; United States v Jenkins (*1973) 490 F 2d 868 at 870 Friendly J; *Bartkus v Illinois* (1958) 359 US 121 at 151-152, Black J. (dissenting); *Green v United States* (1957) 355 US 184 at 200 Frankfurter J (dissenting); *Stout v State* (1913) 36 Okl 744 at 756 Ames J; *R (Hastings) v Justices of Galway* [1906] 2 IR 499 at 505 Palles CB.
[84]Fisher (1961) at 603.
[85]Wharam (1972).
[86]Friedland (1969) at 6.

procedure extant during the period of the *Year Books* further evidence that the double jeopardy principle was not an established principle of liberty since the inception of the common law, but that the principle gradually evolved throughout the development of the common law as a procedural defence.

The English Bill of Rights (1689) did not incorporate a double jeopardy provision. The principle does not appear to have been statute based prior to its inclusion in the Fifth Amendment to the United States Constitution 1787. This suggests a lack of political/criminal recognition of the importance of the concept as the law was more concerned with dealing with offenders.

Late-Medieval Period

From the late sixteenth century the courts began to recognise the importance of an acquittal, except where an acquittal was reached on a defective indictment. In 1591, the Court of King's Bench in *Vaux's Case*[87] held that a new trial could proceed following an acquittal because the indictment which charged the accused was defective in that it charged an offence unknown to the law. Since this acquittal was founded on an error of law the accused was prohibited from pleading *autrefois acquit* in bar to a subsequent trial for the same criminal offence.

An acquittal based on a defective indictment meant the accused was not formerly in jeopardy of conviction and punishment. However, if the former acquittal had been lawful, then the accused would have been permitted to raise this as a plea in bar against a second prosecution for the same criminal offence. It was also the year 1591 that the Court of King's Bench in *Wrote v. Wigges*[88] decided that '*auterfoits convict* of manslaughter, and clergy thereupon allowed, is a good bar in an appeal of murder.'[89] The Court further held that 'such bar is good at the common law, and not restrained by Stat. 3 H. 7, c. 1, and is also a good bar to an indictment for murder.'[90] A conviction for the lesser-included offence of manslaughter was pleaded in bar to a subsequent trial for the greater (compound) offence of murder.

In 1660, the Court of King's Bench held that the prosecution had no right to seek a new trial after an acquittal. In *R v Read*,[91] the Court of King's Bench held that '[...] new trials may be in criminal cases at the prayer of the defendant, where he is convicted (but) not at the suit of the King where he is acquitted.'[92] It was also during the 1660's the courts were faced with the task of finding a solution to the problem of re-indictment for a different offence, following an acquittal or conviction for a separate offence. In *R v James Turner and William Turner*,[93] the two accused were indicted for burglary resulting in the conviction of the first accused and the acquittal of the second. The prosecution sought to re-indict the

[87](1591) 76 ER 992 at 993.
[88](1591) 76 ER 994.
[89](1591) 76 ER 994 at 994.
[90](1591) 76 ER 994 at 994.
[91](1660) 83 ER 271.
[92](1660) 83 ER 271 at 271.
[93]*R v Turner* (1664) 84 ER 1068.

second accused for the burglary with the additional charge of stealing money from a servant of the person whose property had been burgled. The Court of King's Bench held that having once been acquitted of the burglary he could not be re-indicted for that offence, but he could be indicted for a different offence, in this case the offence of stealing.

This appears to be an application of the 'same elements' test of sameness of criminal offences for the purposes of double jeopardy jurisprudence as opposed to the 'same conduct' test, the latter affording greater protection to the accused against a second trial for a separate offence alleged to have been committed at or about the same time as the offence for which the accused had formerly been acquitted or convicted. Likewise in *R v Jones and Bever*,[94] two accused were indicted for burglary and acquitted. They were subsequently indicted for the same burglary with the additional count of stealing goods. The Court of King's Bench ruled that they could not be re-indicted for the same burglary but could be indicted on the count of stealing for which they had not previously been tried upon.

These cases are indicative that the common law courts were beginning to accord some degree of recognition to the gradual emergence of the prohibition against double jeopardy, albeit embryonically.

Prosecuting the accused for a different offence or for the same offence committed on a different occasion would not violate the double jeopardy prohibition. The purpose of the prohibition against double jeopardy is to prevent multiple trials and punishments for the same offence. However, the accused may be charged and convicted for the 'same' offence committed on a different occasion or indeed for a different offence committed on the same occasion as that for which he had formerly been acquitted without violating the double jeopardy maxim. In the latter scenarios the accused is not being placed twice in jeopardy for the 'same offence' both as a matter of law and fact. There must be both a factual and legal *nexus* before two offences will be deemed the same for the purposes of double jeopardy jurisprudence.

In 1662 the Court of King's Bench in *Sir Henry Vane's* case[95] refused to accept a bill of exceptions, which Friedland[96] suggests 'would have substantially widened the scope for the appeal by writ of error and would have had the effect of permitting further trials in cases of felony.' *Vane* had been indicted for high treason and after the indictment had been read out, he requested that it be read a second time, and this was done. He then requested that the indictment be read out a third time, but this time to be read in Latin, however, this request was denied by the trial court. He was tried and found guilty to which he entered a bill of exceptions, but the trial court refused to accept this, holding that a bill of exceptions does not lie in criminal cases, but only in actions between party and party.[97] *Vane* was executed by beheading. This is an early intimation of the

[94](1665) 84 ER 1078.
[95](1662) 83 ER 300.
[96]Friedland (1969) at 11-12.
[97]The proper mode of appeal in such circumstances would have been to enter a writ of error.

increasing consciousness by the courts of the inherent injustice in permitting more than one criminal trial for the alleged commission of a criminal offence.[98]

In 1663 the Court of King's Bench in *Sir John Jackson's Case*[99] extended the application of the emerging principle against double jeopardy to misdemeanours, deciding that a retrial should be prevented following a conviction for perjury. Likewise in *R v Lewin*[100] the Court of King's Bench refused an indictment of the accused who had already been convicted of perjury and in *R v Marchant*[101] the Court of King's Bench again refused a trial *de novo* for perjury where the accused had already been convicted of that same perjury. In *R v Hannis*[102] the Court of King's Bench denied a retrial of the accused after a conviction on the charge of perjury.

Where a verdict of guilty has been set aside by the trial judge because of procedural irregularity this would not prevent a retrial of the accused as there was no formal verdict of either acquittal or conviction recorded by the court. The pleas in bar, *autrefois acquit* and *autrefois convict*, are predicated on a former acquittal or conviction for the same criminal offence as in a subsequent indictment. In *R v Smith*[103] the defendant was found guilty on a charge of perjury by a 'obstinate jury' against the direction of the trial Judge. The Court of King's Bench set aside this verdict and a new trial was ordered. The double jeopardy principle may only be raised as a plea in bar when the first trial of the accused was concluded following a lawful adjudication of the case.

Criminal trial procedure throughout the development of the common law progressed in a manner detrimental to the accused in that all the advantages vested in the prosecution, such as the ability to know the charges in the indictment so as to prepare their case accordingly; only the prosecution could call witnesses and related procedural issues.[104] It was the blatant discharge of the jury when it appeared that an acquittal was likely permit the prosecution to bring a further charge on more compelling evidence, a practice that continued up until the end of the seventeenth century, that resulted in the courts affording greater recognition to the emerging principle against double jeopardy.

This practice evidences the criminal justice system extant during the medieval period favouring the prosecution. A second prosecution in such circumstances must surely have been regarded as an abuse of the process of court, which undoubtedly would have resulted in a 'chorus of disapproval' with the result that the criminal justice system would have been brought into disrepute and reform was therefore inevitable. In *R v Roberts*[105] the accused was indicted as a principal on a count of burglary but from the evidence he was only an accessory in that he received the principals and the goods stolen but did not take any part in the actual burglary. It was doubted by the prosecution that if the jury acquitted him, as they

[98]By refusing a bill of exceptions which would require a *trial de novo*.
[99](1663) 83 ER 1157.
[100](1668) 84 ER 248.
[101](1668) 2 Keble 403.
[102](1671) 84 ER 483.
[103](1681) 84 ER 1197.
[104]Holdsworth (1926, vol. IX) at p. 224.
[105](1662) 84 ER 1066.

were most likely to do, whether he would be subsequently indicted and convicted as an accessory. The Court of King's Bench discharged the jury and indicted him as an accessory to the burglary. This blatant discharge of the jury with the purpose of seeking a new trial can also be evidenced in the infamous treason case of *R v Whitebread and Fenwick*[106] where the jury was discharged after evidence had been given and concluded by the prosecution which was insufficient to convict the accused. To allow such a procedure to have the force of law would render the entire criminal justice process futile as the prosecution would enter a *nolle prosequi* whenever an acquittal was likely, with the purpose of retrying the accused on a subsequent occasion for the same offence.

By 1660 the Court of Kings Bench had decided in *R v Read*[107] those earlier cases, which had permitted the prosecution to seek a new trial after an acquittal were no longer to be followed. This practice was followed in subsequent cases[108] and signalled the emergence of the double jeopardy principle.

Towards the end of the seventeenth century Lord Holt in *R v Perkins*[109] expressed a strong reaction against the early discharge of the jury with the objective of seeking a new trial.

Nevertheless, this procedure appears to have prevailed throughout the eighteenth century. In *R v Kinloch*[110] the Court of Crown Cases discharged the jury to allow the accused to enter a different plea. It was held that it was no answer to the original indictment that the jury had been discharged, for such a discharge did not amounting to an acquittal. This of course accords with contemporary double jeopardy jurisprudence which requires a final verdict of either acquittal or conviction before the accused may raise the pleas in bar to a second indictment for the same criminal offence. It was not until around the middle of the nineteenth century that the contemporary procedure of discharging a hung jury or the discharge of a jury for other legitimate reasons of necessity prevailed.[111] Retrials in these circumstances would not place an accused in double jeopardy due to the absence of a former verdict of either acquittal or conviction following a criminal trial on the merits.

The most important expansion in the recognition and application of double jeopardy occurred during the 1660's when the Court of King's bench began to recognise judgements in other jurisdictions, which would prevent a trial proceeding in England for the same offence. In *R v Thomas*[112] the Court of King's Bench held that the accused's acquittal in Wales on a charge of murder could be raised as a plea in bar to a second trial in England. Likewise, in *R v Hutchinson*[113] where the accused had been acquitted on a charge of murder committed in Portugal, the Court of King's Bench held that he could not be tried again for the same murder in

[106](1679) 7 How. St. Tr. 311.
[107](1660) 83 ER 271.
[108]*R v Jackson* (1661) 83 ER 330; *R v Fenwick and Holt* (1663) 82 ER 1025.
[109](1698) 90 ER 1122.
[110](1746) 168 ER 9 (Crown Cases).
[111]Friedland (1969) at 13-14.
[112](1664) 83 ER 1180, see also, (1664) 83 ER 1147, (1664) 83 ER 1172.
[113](1677) 84 ER 1011.

England. These decisions are significant in that they evidence the embryonic common law principle against double jeopardy.

The court had effectively ruled that if the accused's claim of former jeopardy could be substantiated then he would be permitted to raise this as the plea in bar, *autrefois acquit.* The procedure whereby an acquittal by a foreign court will be admitted preventing a domestic trial for the same offence was firmly established in *R v Aughet.*[114] A verdict of either acquittal or conviction by a foreign court must be verified by the production of a certificate of acquittal or conviction before it can be raised as a plea in bar in a domestic court.

Throughout the seventeenth century, however, protection was not absolute, such as where judges habitually discharged juries to enable prosecutors to present a stronger case on a retrial. Furthermore, in murder cases a private person could appeal after the accused had been acquitted following a trial on indictment. Nevertheless, it was during the seventeenth century that defendants were gradually afforded broader rights to appeal from a conviction. The latter half of the seventeenth century was a period of increasing consciousness by the courts of the importance of emerging double jeopardy jurisprudence. This was partly due to the writings of Lord Coke and partly as a reaction against the lawlessness in the first half of that century.

By the eighteenth century the Court of Queen's Bench recognised judgements given by other criminal courts in England for in 1726 Hawkins declared:

> *"Notwithstanding the opinion of the Book of Assizes (9 Assize 15), that no acquittal in any other court can be any bar to a prosecution in the Court of King's Bench, because that is the highest court, I take it to be settled at this day, that an acquittal in any court whatsoever, which has a jurisdiction of the cause, is as good a bar of any subsequent prosecution for the same crime, as an acquittal in the highest court."* [115]

In 1765, Blackstone affirmed that "the plea of *auterfoits acquit,* or former acquittal, is grounded on this universal maxim of the common law of England that no man is to be bought into jeopardy of his life, more than once, for the same offence."[116] The principle developed into the common law pleas in bar, *autrefois acquit*, *autrefois convict*, *autrefois attaint* and former pardon. Blackstone declared 'that no man is to be brought into jeopardy of his life, more than once, for the same offence' was a 'universal maxim of the common law of England.'[117] Furthermore, by 1776, in the *Duchess of Kingston's Case*[118] defence counsel could declare with confidence that: "[...] whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops."

The nature and scope of the protection afforded by the double jeopardy principle in Blackstone's day was quite restrictive in the light of the contemporary application of the proscription.

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[114](1918) 13 Cr App R 101; see also, *R v Thomas* [1985] QB 604 (CCA).
[115]Cited by Friedland (1969) at 12.
[116]Blackstone (1772) at 335.
[117]Blackstone (1772) at 335-336.
[118](1776) 20 How St Tr 355 at 528.

Reception in the American Colonies

The origins of the double jeopardy principle in the American colonies are founded on the English common law formulation, and "the principle was brought to (America) by the earliest settlers as part of their heritage of freedom."[119] The principle was initially expressed in the Body of Liberties of Massachusetts 1641, Cl 42, *"No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse"* and Cl 64 in more elaborate terms: "*Everie Action betweene partie and partie, and proceedings against delinquents in Criminall causes shall be briefly and destinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not afterwards brought againe to the vexation of any man*." The formulation of the principle in the codes of other colonies were influenced by the Massachusetts Code.[120]

The New Hampshire Constitution 1784 was the first bill of rights expressly adopting a codification of the principle in Article 1, *'No subject shall be liable to be tried, after an acquittal, for the same crime or offence*.' A more comprehensive protection was included in the Constitution of the Commonwealth of Pennsylvania 1790, Article IX that provided: *'No person shall, for the same offence, be twice put in jeopardy of life or limb*', language almost identical to the Constitution of the United States fifth amendment provision *'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*'. It is notable that the terminology 'life or limb' had a literal meaning throughout the medieval period when harsh punishments were imposed.

Although technically negatively implied from the Statute of 1487 and Statute of 1534 the fact that the principle was not mentioned in English statute law prior to its inclusion in the Constitution of the United States suggests that the principle gradually evolved as a procedural defence throughout the development of the common law as opposed to being a 'cornerstone of the common law.'

Hypothesis

The sixteenth and seventeenth centuries witnessed an expansion of decisions applying and developing the principle through the pleas in bar autrefois acquit and autrefois convict. The incremental movement towards the elimination of multiple prosecutions, which seems to have coincided with the Restoration following the Interregnum (1649-1660), and from this start the double jeopardy principle began do develop into its modern form. The Restoration of the Stuart monarchy in the kingdoms of England, Scotland and Ireland took place in 1660 when Charles II returned from exile in Europe. This development might suggest that aspects of continental law and procedure might have impressed Charles II to the extent that these princciples were adopted in the common law of England.

[119] *Bartkus v Illinois* (1958) 359 US 121 at 152, Black J.
[120] Haskins & Ewing (1958).

Although beyond the scope of this article, it is noteworthy that the Renaissance 14th to 17th centuries culminating in the 'rebirth' following the Middle Ages, followed by the Age of Enlightenment / Age of Reason c. 17th and 18th centuries might also have impacted on judicial development of the double jeopardy principle. By the late eighteenth century double jeopardy was settled as a common law principle.

Conclusion

The injustice of repeated ordeals of trials and inhumane punishments necessitated the incremental development and implementation of the procedural defence as a bar on the authority of the state.

Interpretations of the double jeopardy principle should consider the historical context wherein the procedural defence originated. The basis of double jeopardy jurisprudence may be traced to the formative periods in the development of the common law and the policies it espouses have progressively evolved through the decisions of the common law courts in response to the adverse standing of the accused in the medieval criminal justice system. It is arguable that the rationale for the development of the common law principle against double jeopardy was influenced by the continental civil law which may have been transposed through the cannon law of the Church. It is unlikely that the principle was native to the common law of England particularly in consideration of the former Anglo-Saxon rudimentary legal system and the absence of reported decisions of the common law courts during the formative periods in the development of the common law legal system. Nevertheless, the exact basis for the gradual emergence of the common law principle against retrials cannot be demonstrated with a sufficient degree of certainty.

The precise origins of the recognition of the injustice of retrials and multiple punishments for the same offence remains speculative. Further research into the historical evolution of the principle is necessitated to shed light on the underlying driving forces that stimulated the incremental development of the principle into its modern form in criminal justice systems concerned with universal law of reason, justice, and induvial liberties.

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