



Scottish Law Commission  
*promoting law reform*

| (DISCUSSION PAPER No 141)

# Discussion Paper on Double Jeopardy

discussion  
paper





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## Discussion Paper on Double Jeopardy

January 2009

DISCUSSION PAPER No 141

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**The Commission would be grateful if comments on this Discussion Paper were submitted by 17 April 2009.**

**Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page.** Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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# List of Abbreviations

1995 Act

Criminal Procedure (Scotland) Act 1995

Chalmers and Leverick

James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006)

Hume

Baron Hume, *Commentaries on the Law of Scotland Respecting Crimes* (4<sup>th</sup> edn 1844; reprinted, 1986)

*Renton and Brown*

Christopher H W Gane and Gerald H Gordon, *Renton & Brown: Criminal Procedure* (6<sup>th</sup> edn, 1996; looseleaf updated to December 2008)

# Part 1 Introduction

## Terms of reference

1.1 On 20 November 2007 we received the following reference<sup>1</sup> from the Cabinet Secretary for Justice, Mr Kenny MacAskill MSP:

"To consider the law relating to:

judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;

the principle of double jeopardy, and whether there should be exceptions to it;

admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and

the *Moorov* doctrine;

and to make any appropriate recommendations for reform."

The present discussion paper relates to the second part of this reference, namely the principle of double jeopardy and whether there should be exceptions to it. We published a Discussion Paper<sup>2</sup> and Report<sup>3</sup> on *Crown Appeals* in 2008, which dealt with the first part of the reference ("judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such"), and aim to report on the remaining aspects of the reference in 2010 or 2011.

1.2 We wish to acknowledge the role played in the early stages of this project by Professor Gerry Maher QC, who, in the last months of his term as a Commissioner, brought together a number of academics and practitioners in a seminar to discuss the general principles surrounding the law of double jeopardy. We also wish to thank all those who participated in that seminar, which was held at the Commission's offices in April 2008,<sup>4</sup> and whose contributions have proved invaluable in shaping our ideas.

## What is "double jeopardy"?

1.3 "Double jeopardy" is not a technical term of Scots law, and before embarking on a discussion of the principle of double jeopardy, it is important to define, at least in outline, what we understand it to mean. According to the Oxford English Dictionary, "double jeopardy" means "the placing of a person in jeopardy twice for the same offence, against which there is a common-law immunity".

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<sup>1</sup> Under the Law Commissions Act 1965, s 3(1)(e).

<sup>2</sup> DP No 137.

<sup>3</sup> Scot Law Com No 212.

<sup>4</sup> Those attending from outside the Commission were: James Chalmers, University of Edinburgh; Prof Andrew L-T Choo, University of Warwick; Prof Ian Dennis, University College London; P W Ferguson QC; Dr Fiona Leverick, University of Glasgow; Prof Mike Redmayne, London School of Economics; and Prof Paul Roberts, Nottingham University.

1.4 It is possible to approach the question of when a person is twice placed in jeopardy in two ways. On one view, double jeopardy arises whenever there is a risk that an accused person will be subjected to more than one punishment for what is in substance the same offence.<sup>5</sup> This understanding of the term has some currency in Scotland, where the courts have sometimes referred to the concept of double jeopardy in considering questions of what may competently be charged as an aggravation,<sup>6</sup> and in reasoning that overlapping offences should be made the subject of concurrent rather than consecutive sentences.<sup>7</sup>

1.5 This Discussion Paper is principally concerned with the other sense of double jeopardy, that is, with the rule or principle that a person once tried and convicted or acquitted of an offence should not be subject to further prosecution in relation to that offence. It is this to which we refer when we speak of the rule against double jeopardy.<sup>8</sup>

### The background to the present reference

1.6 A number of jurisdictions have reconsidered their rules against double jeopardy in recent years. In England and Wales, the Criminal Procedure and Investigations Act 1996 introduced a limited exception to the rule against double jeopardy, permitting an accused to be retried where the acquittal at the first trial was likely to have been secured by the commission of an offence against the administration of justice, such as the bribing or intimidation of witnesses or jurors.<sup>9</sup> In the report of his inquiry into the Stephen Lawrence murder case, Sir William Macpherson of Cluny noted that if fresh evidence were to emerge against any of the three men suspected of that murder, they could not be tried again however strong the evidence might be. He suggested that the rule against double jeopardy deserved debate and reconsideration.<sup>10</sup> A reference was made by the Home Secretary to the Law Commission, which recommended the introduction of an exception to the rule, applying only in cases of murder, and allowing a fresh prosecution on the basis of new and compelling evidence.<sup>11</sup> Part 10 of the Criminal Justice Act 2003 introduced a broader exception than that suggested by the Law Commission, allowing new proceedings to be authorised on the basis of new and compelling evidence of the commission of any of a number of crimes listed in Schedule 5 to the Act.

1.7 A number of other English-speaking jurisdictions have considered the introduction of exceptions to the rule against double jeopardy. In Australia, the high-profile case of *R v Carroll*,<sup>12</sup> followed by a campaign led by the *Australian* newspaper, prompted the introduction of exceptions to the rule against double jeopardy in New South Wales. A Council of Australian Governments working group set up in July 2006 recommended, in April 2007, a model for exceptions based on new evidence or the commission of an administration of

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<sup>5</sup> A principle summed up in the maxim *nemo bis puniri pro uno delicto*: none shall be twice punished for the same wrong.

<sup>6</sup> As, for example, in *Robertson v Donaldson* [2007] HCJAC 22; 2007 SCCR 146, in which the High Court held, quite unsurprisingly, that it was not competent, in relation to a charge of breaching a bail condition, to charge as an aggravation that the accused was on bail at the time when the offence was committed.

<sup>7</sup> As in *Ogilvie v HMA* 2002 JC 75.

<sup>8</sup> The scope of the present rule in Scots law is explored in Part 3, and Appendix 2 describes the rule in a number of foreign jurisdictions.

<sup>9</sup> Criminal Procedure and Investigations Act 1996, ss 54-57.

<sup>10</sup> *The Stephen Lawrence Inquiry – Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262 (1999) at para 43.47.

<sup>11</sup> The Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 26 (2001). The reference was made in July 1999 and the Law Commission reported in March 2001.

<sup>12</sup> [2002] HCA 55; (2002) 194 ALR 1.

justice offence at the original trial. All Australian jurisdictions, with the exception of Victoria and the Australian Capital Territory, have agreed to introduce exceptions based upon this model. As at December 2008, exceptions have been introduced in New South Wales, Queensland, South Australia and Tasmania.

1.8 New Zealand is also in the process of introducing exceptions to the rule against double jeopardy. Here, as in England and Wales and in Australia, the spur was a high-profile case. In *R v Moore*,<sup>13</sup> the accused had escaped conviction for murder by conspiring to introduce false alibi evidence. Although he could be, and was, convicted for the administration of justice offence, the maximum sentence for this was considerably less than that which he would have received for murder. A reference was made to the New Zealand Law Commission, which recommended the introduction of an exception to the rule against double jeopardy when the accused is subsequently convicted of an administration of justice offence. However, the Commission did not consider there to be a case for a 'new evidence' exception to double jeopardy to be introduced in New Zealand.<sup>14</sup> The Criminal Procedure Bill, presently before the New Zealand Parliament, would go beyond the Commission's recommendations and introduce exceptions both for tainted acquittals and in light of new evidence. The introduction of exceptions for new evidence and tainted acquittals is also being considered in Ireland.<sup>15</sup>

1.9 In Scotland, the introduction of changes to the rule against double jeopardy was debated in the Scottish Parliament in February 2007,<sup>16</sup> and interest in the finality of criminal verdicts was stimulated by the collapse of the World's End murder trial in September 2007.

### **A brief note on terminology**

1.10 As we have noted, "double jeopardy" is not a technical term of Scots law. Instead, Scots law speaks of a principle that a person shall not be made to *thole an assize* more than once, and gives effect to this principle through the plea of *res judicata*. "Assize", sometimes spelled "assise", is simply an archaic term for a jury and, by extension, a trial. To "thole" is to endure, or undergo. So the rule against tholing an assize twice, sometimes referred to merely as "tholed assize", translates directly to a rule against successive trials or, in other words, double jeopardy. For ease of reading, we have chosen wherever possible to refer to "double jeopardy" rather than "tholed assize". (We also mention at this point the use, in the European context, of the term "*ne [or sometimes non] bis in idem*" – this Latin expression, which broadly translates as "not twice for the same thing" is essentially just another term for the rule against double jeopardy.)

1.11 We use the term "*res judicata*" (literally, "a thing decided") in two related senses. Generally, it describes the principle, common to both civil and criminal proceedings, that where a point has been determined by the courts it will generally not be open to the parties to the original proceedings again to litigate the same point. More narrowly, we use it to describe the plea which may be advanced by a party who claims that proceedings would violate this rule: an accused who wishes to rely upon a past acquittal as a bar to a present criminal charge does so by advancing a preliminary plea of *res judicata*.

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<sup>13</sup> [1998] 3 NZLR 385.

<sup>14</sup> New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice* NZLC R70, (2001).

<sup>15</sup> Balance in the Criminal Law Group, *Final Report* (2007), available at <http://tinyurl.com/5q8wjy> (accessed 30 December 2008).

<sup>16</sup> Official Report, 22 February 2007.

1.12 Some other technical terms should also be explained. Some of the older Scots authorities refer to the "panel" or "pannell". This is simply another term for the accused. "Desertion" refers to the abandonment of a trial, usually on the motion of the prosecution, though sometimes by order of the court. Desertion may be either *simpliciter* (simple desertion), which will preclude the prosecutor from taking further proceedings in respect of the charge which is deserted, or *pro loco et tempore* (literally, "for place and time"), which leaves the prosecutor free to seek a further trial at a later time or in another court. A "*diet*" is a hearing.

### **The structure of this Discussion Paper**

1.13 Part 2 of this Discussion Paper considers the principles and rationales underlying the rule against double jeopardy. In Part 3, we examine the present Scots law. Part 4 contains a discussion of the international agreements relevant to double jeopardy. Part 5 introduces a number of options for reform. Part 6 considers a possible statutory restatement of the rule against double jeopardy, while Part 7 considers the case for the introduction of exceptions to that rule. Part 8 contains a list of our proposals and questions. The Appendices contain detailed discussion of the European and human rights law relevant to double jeopardy and a summary of the law of double jeopardy in a number of other jurisdictions.

## Part 2 Principle and Rationales

2.1 The present Scottish rule against double jeopardy is fully analysed in Part 3 of this paper: for the purposes of this general discussion it may broadly be stated as prohibiting a repetition of criminal proceedings against anyone who has been previously tried for a particular offence, whether he was convicted or acquitted in those earlier proceedings.

2.2 There has been a resurgence of interest in the principle underlying the rule against double jeopardy in a number of jurisdictions in recent years. In most cases this has resulted from public and media reaction to cases in which the system for criminal investigation and prosecution appears to have failed. These cases have led some jurisdictions to acknowledge the rule against double jeopardy but to provide for exceptions to it. Parliaments, law reform bodies and academic and other commentators have entered the arena, setting out the arguments for and against the rule. We accordingly consider it useful to rehearse the arguments fully, both generally and in the Scottish context.

2.3 Further, we would caution against the idea that because a particular rule – or an alteration to a rule – has been thought appropriate in other jurisdictions, it is necessarily appropriate here. There is a beguiling and seductive plausibility in the assumption that arguments for or against a doctrine of a particular nature in one jurisdiction can be applied to the operation of that doctrine – or one very like it – in another jurisdiction. But in fact, and even as between closely related common law jurisdictions such as those in Scotland and England, there are substantial differences in the approach in public policy, law and procedure to the treatment of legal issues generally, and in particular to the treatment of criminal matters. Features which are apparently similar or identical may play a different part, of a greater or lesser importance, in another system of law; and it would be unwise to assume that considerations which inform a decision in one jurisdiction will necessarily inform a similar decision in another.<sup>1</sup> And, even assuming that the conditions in one jurisdiction are directly comparable to those in another, there is no reason why different parliaments should not take different views on purely policy grounds. Against that background, and in the light of the general arguments for and against the principle which have been rehearsed historically and over recent years, we turn to look at the place of the rule against double jeopardy in any modern criminal justice system, before examining how it has developed in Scotland.

2.4 It may be sensible to begin by putting the matter into a wider context. Society has found it convenient to require various disputes between its members to be resolved by a

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<sup>1</sup> "In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised; it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom." Hume, i, *xlvii*.

Cf *Brown v Stott* [2000] UKPC D3; 2001 SC (PC) 43. After a careful analysis the High Court of Justiciary concluded that the principle against self-incrimination embodied in Canadian and American jurisprudence was applicable also in the case of s 172 of the Road Traffic Act 1988. The JCPC had no difficulty in rejecting this approach. Cf Lord Bingham at page 61: "The United States Supreme Court decisions in *Hoffman v United States* (1951) 341 US 479 and *California v Byers* (1971) 402 US 424 and the decisions of the Supreme Court of Canada in *R v Jones* [1994] 2 SCR 229 and *R v White* [1999] 2 SCR 417 undoubtedly support the conclusion reached. Those courts were, however, considering different constitutional provisions."

centrally controlled judicial function. Such a system serves the public interest in a number of ways. It gives the parties an opportunity to specify precisely what it is that is in issue between them. It then, through an independent judiciary, provides the parties with a definite answer to the dispute. Last, it provides for that answer to be final. This has two results. First, the litigants themselves, as well as others more remotely affected, can rely on the finality of that answer, and can settle their affairs on that basis in the future. Second, the resources of the state will not be dissipated in repeated examinations of the same issues between the same parties. This concept of finality is reflected in the plea of *res judicata*, which is discussed below.

2.5 Over the development of society particular classes of injury done by one person to another have come to be recognised as not only a matter for dispute between the individuals most directly concerned, but as a wrong, a crime, committed against society as a whole. Thus, a violent assault is seen not simply as a matter affecting the parties involved, but as a matter affecting the general peace. Further, certain kinds of conduct have come to be recognized as offences against society generally, even if no individual could be said to be personally affected. Modern examples are smuggling, possession of drugs, and money laundering. In times past, the illicit distillation of whisky might have provided a ready example. Accordingly, as society and its rules developed, it began to be recognised that there was a public interest in the prosecution of certain kinds of conduct as offences against the public good. It also came to be accepted that there was a public interest in controlling and in some cases preventing the private prosecution of crime. In modern times, while some jurisdictions still enable private prosecution of crime to take place, others (such as our own) have reduced it to a vestigial remnant, and have essentially entrusted the whole function of the prosecution of crime to a public prosecutor.

2.6 The discussion below demonstrates how the doctrine of finality, expressed in the plea of *res judicata*, continues to apply in both criminal and civil proceedings. Since much of the judicial discussion of the doctrine has taken place in civil cases, it may be convenient to deal with them first.

#### *Res judicata in civil matters*

2.7 In dealing with civil disputes between individuals, the adversarial system operated in Scotland requires parties to identify and focus the dispute between them in written pleadings which are set out in accordance with carefully developed rules. Legal argument and an investigation of the facts is then conducted on the basis of those pleadings. The judge's function is to ensure that the litigation is conducted according to the applicable rules, and to decide the issue between the parties according to the evidence led and arguments made. He is only to a limited degree able to intervene himself. This is a well-recognised facet of adversarial procedure, as shown by the comments of Lord Justice Clerk Thomson in *Thomson v Corporation of Glasgow*:<sup>2</sup>

"Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. . . it is on the basis of two carefully selected versions that the Judge is finally called upon to adjudicate. He cannot make investigations on his own behalf; he cannot call witnesses; his

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<sup>2</sup> 1962 SC HL 36 at 52.

undoubted right to question witnesses who are put in the box has to be exercised with caution."

2.8 Subject to any appeals for which the system may provide, that adjudication is the decision which is declared to be final, and which will be treated as preventing any attempt by those parties to litigate that issue again. As Lord President Cooper observed in *Grahame v Secretary of State for Scotland*:<sup>3</sup>

"The plea [of *res judicata*] is common to most legal systems, and is based upon considerations of public policy, equity and common sense, which will not tolerate that the same issue should be litigated repeatedly between the same parties on substantially the same basis. I use the word 'substantially' advisedly; for a tendency which can be detected in earlier Scottish cases to concentrate too narrowly upon the precise terms of the conclusions of a summons or of pleas in law was corrected in the third *Boyd & Forrest* appeal, in which we were directed to look at the essence and reality of the matter rather than the technical form, and simply to inquire – what was litigated and what was decided?"

2.9 An example of how the principle operates in what might have been considered a hard case is to be found in the *Amphill Peerage Claim*,<sup>4</sup> before the Committee on Privileges, in which an attempt was made to challenge a declaration of legitimacy made some 50 years previously, partly on the basis that new technology as to blood types made it possible to reach a factually accurate determination of the question. In the course of the hearing doubts were expressed as to whether the (then) new technology of identification of blood types would in fact produce an unequivocal answer; but, even on the assumption that it would have done so, the Committee were not disposed to seek to reopen the matter.

2.10 In the course of a judgment rejecting the attempted challenge, Lord Wilberforce said:<sup>5</sup>

"[a]ny determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that conclusion, it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interests of peace, certainty, and security, it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gaps. But there are cases where the certainty of justice prevails over the possibility of truth. . . and these are cases where the law insists on finality."

The point was emphasised by Lord Simon of Glaisdale:<sup>6</sup>

"But the fundamental principle that it is in society's interest that there should be some end to litigation is seen most characteristically in the recognition by our law – by every system of law – of the finality of a judgment. If the judgment has been obtained by fraud or collusion it is considered as a nullity and the law provides machinery whereby its nullity can be so established. If the judgment has been obtained in consequence of some procedural irregularity, it may sometimes be set aside. But such exceptional cases apart, the judgment must be allowed to conclude the matter."

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<sup>3</sup> 1951 SC 368 at 387.

<sup>4</sup> *The Amphill Peerage* [1977] AC 547.

<sup>5</sup> *Ibid*, at 569.

<sup>6</sup> *Ibid*, at 576.

2.11 This appears to us to be the foundation of, and the justification for, the rule of *res judicata*, that it is in the public interest that those engaged in a litigation, whether directly or indirectly, should be able, and should indeed be required, to carry on with their business in the future on the basis that the decision reached by the courts is final. The corollary is that it is not in the public interest for (scarce) public resources and time to be occupied more than once in re-examining the same issue between the same private parties. Otherwise a party – or parties – who felt aggrieved by a judicial decision and who had the resources to fund further litigation could do so repeatedly, with detrimental effects on the general effectiveness of court decisions.

#### *Res judicata in criminal matters*

2.12 There are some factors which are common to both civil and criminal proceedings. In both cases there are rules as to how matters are presented to the court, in both the process is adversarial, and in both the judge acts as an independent arbiter. But there are equally important differences, principally because there are different public interests involved. The starting point in criminal matters is the public interest in the efficient and effective prosecution of crime. Unlike most private litigants, the public prosecutor is under a continuing duty to prosecute, or at least to consider prosecution. Moreover, while there is a clear interest in securing the conviction of criminals, there is an equally clear interest in securing, so far as possible, that no innocent person is convicted of a crime.

2.13 When society arrogates to itself the right to take proceedings against a person who is alleged to have inflicted some injury upon a fellow citizen, or upon society generally, it can only be on the basis that the investigation of the offence, and the system for determining whether the accused person is guilty, and the penalty imposed on a guilty party, will be acceptable to society generally. The efficiency of the police and the prosecution services is therefore a matter of intense political interest. Since criminal proceedings may put the individual at risk of losing his reputation, his money and his liberty, the interest in ensuring that no innocent person is convicted is also very strong.

2.14 A society which saw the interests of the Executive as predominant would take a robust approach to these matters. Scots law owes much to the principles of Roman civil law, but it has not, at least since the late seventeenth century, followed the imperial view of the position of the Executive. In the Civil law as developed during the Empire, the emperor's rulings trumped all other forms of law.<sup>7</sup> It appears to have been by way of application of that Civil law principle<sup>8</sup> that the French monarchy rationalised the introduction and use of *lettres de cachet*, by which a royal decree committing a person to prison replaced the time-consuming legal processes of court proceedings and the hearing of evidence. The later Stuarts' tendency to maintain that aspect (among others) of the divine right of kings was finally repudiated in the provisions preventing the king from setting aside the laws which found their way into both the (English) Bill of Rights (in 1688) and the (Scottish) Claim of Right (in 1689).

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<sup>7</sup>D.1.4.1 (Ulpian): ". . . whatever the emperor has determined by a letter over his signature or has decreed on judicial investigation or has pronounced in an interlocutory matter or has prescribed by an edict is undoubtedly law." And of D.1.3.31 (Ulpian): "The emperor is not bound by statutes." (Translation in Mommsen, Kruger & Watson (eds.), *The Digest of Justinian* (1985)).

<sup>8</sup> Cf Jean Bodin, *The Six Books of a Commonweale* (Richard Knolles trans., 1606 ed.), at 92: "a king or sovereign prince cannot be subject to his own laws", as quoted in Stéphane Beaulac, "The Social Power of Bodin's 'Sovereignty' and International Law" (2003) 4 *Melbourne Journal of International Law* 1 at 15.

2.15 The system developed over time in Scotland gives great weight to the importance of not convicting an innocent person. Thus, we start with the proposition that everyone is innocent until proven guilty. Both the "not proven" verdict and the "not guilty" verdict are verdicts of acquittal. In either case the evidence advanced by the State against the accused person has not persuaded the jury of his guilt.

2.16 Scottish criminal procedure further protects the accused by requiring the allegations against him to be proved "beyond a reasonable doubt", and by requiring corroboration of every substantive fact. In civil proceedings it is sufficient to prove matters "on a balance of probabilities". But in criminal matters we require more. Further, although the Crown has to prove its allegations beyond a reasonable doubt, the defence need do nothing. If the jury do not accept the Crown evidence, they acquit even if no evidence is led by or on behalf of the accused. Where the accused does give evidence, it is sufficient for the defence to succeed if he states that he did not commit the crime and the jury believe him. These are aspects of the deliberate weighting of the scales of justice in favour of the individual, which is designed to protect the innocent individual against the risk of wrongful conviction. They are in addition to the (present) application of the principle of *res judicata*.

2.17 Finally, the principle of *res judicata* does not operate against a convicted person. After the termination of the appeal processes available to him immediately following upon his trial, he can appeal on the ground that there has been a miscarriage of justice, based on the existence and significance of evidence not led at the trial.<sup>9</sup> Thereafter, he retains the right to apply for renewed consideration of the case against him on the basis that there has been a miscarriage of justice, and that it is in the interests of justice that his case be referred back to the High Court of Justiciary.<sup>10</sup> In one such reference<sup>11</sup> a period of 35 years had elapsed since the trial, and some 13 years since the previous consideration of the case by the High Court. Where there has been an acquittal, a successful Crown reference on a point of law may establish that the trial judge's view of the law was wrong; but that will not enable the Crown to prosecute again. These are aspects of what has been called the "principled asymmetry between convictions and acquittals",<sup>12</sup> the recognition that the avoidance of wrongful conviction is more important than the avoidance of wrongful acquittal.

2.18 Leaving aside for the moment a general public interest in finality, the rule against double jeopardy can therefore also be seen as part of this fabric of protection which attaches to the ordinary citizen. Once an accused person has "tholed his assize",<sup>13</sup> once he has undergone a trial, he cannot be tried again for the same offence. Various justifications, of differing weight, have been advanced for the rule.

#### *Increased risk of wrongful conviction*

2.19 First, it is said that a second trial would increase the risk of a wrongful conviction.<sup>14</sup> In the sense that any human process must be fallible, and that the more often a fallible process

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<sup>9</sup> 1995 Act, s 106(3)(a).

<sup>10</sup> *Ibid*, s 194C.

<sup>11</sup> George Beattie: referred to High Court by Scottish Criminal Cases Review Commission on 13 July 2001. (See [www.sccrc.org.uk/conviction.aspx?start=37](http://www.sccrc.org.uk/conviction.aspx?start=37) (accessed 15 December 2008)).

<sup>12</sup> Cf Paul Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 MLR 393 at 402.

<sup>13</sup> The precise significance of the phrase is more carefully explored in Part 3.

<sup>14</sup> Cf Law Commission, *Double Jeopardy*, CP 156 (1999) at para 4.5: "If it is accepted that juries do on occasion return perverse verdicts of guilty, the chance that a particular defendant will be perversely convicted must increase if he or she is tried more than once."

is repeated, the more chance there must be of its reaching a wrong conclusion, that must be correct. It is, however, difficult to justify the proposition on any satisfactory evidential basis.<sup>15</sup>

2.20 Related to this, there is the likelihood that a second trial upon the same facts and on, presumably, much of the same evidence will be materially different from a first such trial. That is because the prosecution will have notice of the line which the defence may take and will be able to adjust its tactics accordingly. While the same is of course true for the defence, the defence will be at a decided disadvantage in such circumstances. The prosecution has an institutional memory which will probably be denied to the defence. It has access to much greater resources in terms of preparation and examination of evidence before any proceedings are instituted. A new trial which proceeded upon much of the same evidence might be expected, therefore, to be of more advantage to the prosecution than to the defence. This would particularly be the case where the second prosecution occurred at some considerable time after the first. On the other hand, the important safeguards mentioned in paragraphs 2.15 and 2.16 are built into the system of criminal prosecution to reduce the risk of a wrongful conviction. These will apply to a second trial as they apply to a first. On balance, we do not consider the notionally increased risk of wrongful conviction to be a persuasive argument.

#### *The effect on police and prosecutors*

2.21 Second, the rule against double jeopardy is said to promote the proper carrying out of the function of investigating and prosecuting crime – or at least to prevent, or discourage, impropriety in those functions.<sup>16</sup> If it were not there, it is said, then there would be a tendency for police and prosecutors not to exert themselves unduly before a first prosecution, because there would always be the opportunity of a second chance.

2.22 This is of course an unprovable proposition in relation to any society where there is currently a rule against double jeopardy: even jurisdictions which permit of exceptions tend to define them so narrowly that police and prosecutors could not sensibly assume that a further trial would be possible. But, in an article on the operation of the English legislation providing for exceptions to the rule, Professor Rudstein has found some evidence of a possible willingness on the part of police to adapt to a different regime.<sup>17</sup>

2.23 There is certainly no evidence that any such tendency would develop in Scotland if substantial exceptions were made to the rule against double jeopardy; we would certainly not assume that that would happen. We would rather expect that the professional standards and sense of public duty of the relevant authorities would impel them to continue to seek out and present all available and relevant evidence. Nevertheless, the rule, in its present form,

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<sup>15</sup> Cf the discussion in Paul Roberts, "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 MLR 393 at 397-405.

<sup>16</sup> Cf Ian Dennis, "Rethinking Double Jeopardy" [2000] Crim LR 933 at 941: "The double jeopardy rule is said to promote efficient investigation and prosecution of offenders because the police and the CPS know that they have only one chance of conviction. . . This argument clearly has force." And see also Robert Marshall-Andrews MP during the debates on the Criminal Justice Bill 2002: ". . . concern arises not from some liberal adherence to the rights of defendants, but from the fact that double jeopardy is the primary rule that discourages rotten policing." (*Hansard*, HC Debs, 4 December 2002, col 924.)

<sup>17</sup> David Rudstein, "Retrying the Acquitted in England" (2007) 8 San Diego International Law Journal 387 at 415, fn 143: "A number of veteran police officers. . . told me that given the heavy case loads of their departments, they (and their fellow officers) would be much more willing to "wrap up" an investigation and "move on to the next case" at an earlier point under a regime that allowed the government to retry an individual should he or she be acquitted at trial than under the present regime that bars a subsequent prosecution following an acquittal."

has been in place for a long time. No-one can say with confidence what effect any weakening of it would have on the practices of the police and prosecution authorities, or the courts. At present, by its very existence it prevents any reopening of criminal proceedings after a final acquittal. It accordingly effectively supports and sustains the natural inclination and efforts of the police and prosecution authorities to gather all available evidence before undertaking a prosecution. Its weakening might not cause any diminution in that inclination or those efforts. But, in general, we are of the view that any institution's professional predisposition to act properly can only benefit from rules requiring it to do so.

#### *Distress caused to the accused by the process*

2.24 Third, it is said that the actual process of a trial, being uniquely distressing for the accused, should not, as a matter of public policy, be repeated.<sup>18</sup> This was the principal basis upon which Hume justified the rule against double jeopardy:

"... the panel can never again be challenged or called in question, or made to *thole an assize*. . . on the matter or charge that has been tried. The ground of which maxim lies in this obvious and humane consideration, that a person is substantially punished, in being twice reduced to so anxious and humiliating a condition, and standing twice in jeopardy of his life, fame, or person."<sup>19</sup>

It is also reflected in Justice Black's classic statement of the rationale for the rule in America, which specifically mentions two aspects of the distress argument:

"The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, 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."<sup>20</sup> (emphasis added)

2.25 But we note also that these views are not universally shared. In the Law Commission's discussion paper on Double Jeopardy, the Commission said:

"The anxiety and distress occasioned by trial justifies a *general* rule against retrials, but not, in our view an *absolute* one."<sup>21</sup>

Commentators are less persuaded even than the Law Commission. Professor Roberts, in his commentary on the (England and Wales) White Paper *Justice For All*, remarks:

"[I]t is doubtful that the desire to minimise distress, well intentioned though it is, justifies any *rule* against retrials, of any degree of generality. . . [I]f the justification for retrial is otherwise irresistible, the unavoidable distress of further proceedings will almost never be a decisive objection."<sup>22</sup>

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<sup>18</sup> This argument will not of course apply to legal, as opposed to natural, persons, except where officers of the legal person concerned are personally involved in the alleged criminal conduct.

<sup>19</sup> Hume, ii, 465: and see Part 3.

<sup>20</sup> *Green v United States* 355 US 184 (1957), per Black J at 187-188.

<sup>21</sup> Law Commission, *Double Jeopardy*, CP 156 (1999) at para 5.11. Cf Part IV of the Report on *Double Jeopardy and Prosecution Appeals*, LC 267, in which the Law Commission recognised that considerable weight should be given to the independent value of finality.

<sup>22</sup> Paul Roberts, "Justice for all? Two bad arguments (and several good suggestions) for resisting double jeopardy reform" (2002) *International Journal of Evidence and Proof* 197 at 210.

2.26 In these days of statutory regulation of a wide range of activities, and the corresponding imposition of statutory penalties for strict liability offences, there are a large number of offences at the lower end of the scale of seriousness which may be, and in many cases no doubt are, accepted as part of the incidents of modern life, imputing little moral iniquity on the part of person convicted. But where the conduct in question is widely regarded as morally reprehensible, there can be no doubt that any criminal process – particularly (but not exclusively) where the crime is serious – is stressful to a very considerable degree. Even without the ultimate sanction of the death penalty being available (and Hume did not limit the principle to cases involving the death penalty), the accused person is at risk of his reputation, his income, and his liberty. He may well be at risk of losing his family and friends as well.

2.27 For example, a teacher may be accused of attempting to have sexual intercourse with a 15 year old female student. If he is convicted, the criminal sanction may well be severe, and he will lose his present job and his prospects of future employment in his chosen profession. Whatever the result, his reputation among his wider acquaintance may be permanently tarnished. He is forced to wait upon the outcome of a trial process which is certainly geared so as to prevent wrongful convictions, but which cannot guarantee that they will never occur. A criminal trial is particularly distressing and traumatic to an innocent person.

2.28 There are already cases in which the law permits a retrial in Scotland, and it is apparently not uncommon in England and Wales, in the event of a jury failing to reach a view. But these are cases which can reasonably be said to be part of the original process, steps on the way to reaching the "final" decision which is the starting point for the application of the rule.<sup>23</sup>

2.29 In our view the rationale identified by Hume, coupled with the "continuing state of anxiety and insecurity" identified by Justice Black,<sup>24</sup> would together fully justify a general rule against double jeopardy. It is the degree of distress and trauma to which the innocent citizen is exposed in a criminal trial which provides the human component of the finality argument addressed below.

### *Finality*

2.30 The principal rationale for the rule against double jeopardy lies in the loss of finality. This has two aspects. The first, as in civil proceedings,<sup>25</sup> is the general interest of society in treating final judgments of the courts as conclusive, so that parties and others can carry on with their lives on the basis that their dispute is behind them. As a corollary, this aspect of the principle of finality, by avoiding the possibility of conflicting judicial decisions on the same point, constitutes a valuable and indeed necessary support for public confidence in the general efficacy of the courts as a means of determining issues. As indicated by the High Court of Australia in the case of *R v Carroll*:<sup>26</sup>

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<sup>23</sup> We consider below, in Part 7, the effect of Part 10 of the Criminal Justice Act 2003, which provides for retrial on the basis of new evidence.

<sup>24</sup> *Green v United States* 355 US 184 (1957), per Black J at 187-188.

<sup>25</sup> Cf paragraphs 2.8 to 2.11 above.

<sup>26</sup> [2002] HCA 55 at para 86; (2002) 194 ALR 1 at 21.

"The interests at stake. . . touch upon matters fundamental to the structure and operation of the legal system and to the nature of judicial power. First, there is the public interest in concluding litigation through judicial determinations which are final, binding and conclusive. Secondly, there is the need for orders and other solemn acts of the courts (unless set aside or quashed) to be treated as incontrovertibly correct. This reduces the scope for conflicting judicial decisions, which would tend to bring the administration of justice into disrepute."

2.31 As mentioned in paragraph 2.17, the important exception to that aspect of the principle of finality is the exception in favour of a person who has been wrongly convicted.

2.32 The second aspect of treating an acquittal or conviction as final is that not to do so would be to alter one of the most fundamental elements of the relationship between the citizen and the State. This is a very widely recognised basis for the rule, across many jurisdictions. We have referred above to the formulation in the United States.<sup>27</sup> There are similar expressions in other common law jurisdictions. As Charles Parkinson points out:

"Thus, having once submitted to the criminal process and having been found innocent or guilty, the state's moral and political authority to subject the citizen to continued scrutiny for that act is exhausted. . . It is this political dimension of the double jeopardy rule that is its most compelling feature, and any derogation of the rule is a symbolic devaluation by the state of its commitment to civil rights."<sup>28</sup>

2.33 While we would agree with Mr Parkinson's sentiments, we would regard the devaluation of a state's commitment to civil rights as actual, rather than merely symbolic. Professor Ian Dennis has observed:<sup>29</sup>

"Fairness to the defendant – again an aspect of the state's concern to treat all citizens with respect for their liberty and autonomy – results in a claim that a final judgment of acquittal should represent a line drawn under the past. The defendant should be able to get on with the rest of his life in a state of security from further prosecution."

It is this aspect of the principle of finality upon which Professor Roberts founds, as follows:

"We are now approaching what might fairly be called the *constitutional core* of the double jeopardy prohibition. . . If governments could accept or reject acquittal verdicts much as it suited them, criminal proceedings would soon be exposed as a sham trial of guilt, and jury acquittal would lose its current practical and symbolic meaning."<sup>30</sup>

2.34 We agree with the underlying proposition that the rule against double jeopardy is a fundamental recognition of the importance of the individual in relation to the executive arm of government and, indeed, in relation to society as a whole.

2.35 The European Court of Justice has recognised the principle underlying the rule against double jeopardy. The European position, both under Community law and under the

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<sup>27</sup> *Green v United States* 355 US 184 (1957), per Black J at 187-188.

<sup>28</sup> Charles Parkinson, "Double Jeopardy Reform: the New Evidence Exception for Acquittals" (2003) 26 UNSWLJ 603 at 618.

<sup>29</sup> Ian Dennis, "Rethinking double jeopardy" [2000] Crim LR 933 at 941.

<sup>30</sup> Paul Roberts "Double Jeopardy Law Reform: A Criminal Justice Commentary" (2002) 65 MLR 393 at 410.

European Convention on Human Rights, is more fully discussed in Part 4 below. For the present it is sufficient to refer, as one source among many, to the opinion of Advocate General Colomer in the joined cases of *Götzütok* and *Brügge*.<sup>31</sup>

"The principle [*ne bis in idem*] rests on two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings."

2.36 At present, whatever the factual position may be, every citizen is presumed to be innocent of crime until it is proved against him by the procedures recognised in the law. If he is charged with a crime, and the Crown is unable to satisfy the court that he is guilty of that crime, then his state of innocence remains unimpaired in law. The State, exercising its rights and accepting its obligations and responsibilities under the rules imposed by the criminal justice system, has carried out its investigations, prepared its charges, and, finally, has brought him to trial. It has produced its evidence which is, at least in the view of the prosecutor, sufficient to demonstrate his guilt according to the law.

2.37 And it has failed. The court, whether a single judge or a jury, and acting as an independent arbiter in the adversarial dispute between the State and the individual, has found that the case against the citizen has not been proved. He therefore remains innocent. He can carry on with his life secure in the knowledge that he is no longer liable to be prosecuted for that offence.<sup>32</sup>

#### *Development of the double jeopardy rule*

2.38 This security from repeated prosecution is in Scotland a right long recognised by the common law. As shown in Part 3 below, it is a right which has been developed by the courts as attaching to an individual – and, notably, at a time when courts perhaps deferred more to the interests of central government than they do now. The right was not incorporated into early statutes, either in Scotland or in England. That, in itself, is not remarkable. There is no tradition of broad constitutional statutes in either jurisdiction. But there is recognition in statute of the principle. Thus, Part 1 of the Extradition Act 2003 contains, at section 12, specific provision for the operation of the rule;<sup>33</sup> and there is a long-standing statutory prohibition on double punishment.<sup>34</sup>

2.39 While the rule against double jeopardy has been a principle of Scots criminal law for a long time, we do not suggest that mere age justifies its continuation. Protections or rights,

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<sup>31</sup> Conjoined cases C-187/01 and C-385/01, *Huseyin Gözütok and Klaus Brügge*, [2003] ECR I-5689 at para 40.

<sup>32</sup> Though the criminal judgment will not protect the acquitted person from subsequent civil proceedings: see para 3.51 below.

<sup>33</sup> "Rule against double jeopardy.

A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption—

(a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;

(b) that the person were charged with the extradition offence in that part of the United Kingdom."

<sup>34</sup> Cf Interpretation Act 1978, s 18: "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished more than once for the same offence." (This is more fully discussed at para 3.38 below.)

whether at common law or in statute, may be, on the one hand, a reflection of a passing attitude which has outlived its usefulness or, on the other, a contemporary statement of an enduring and fundamental principle. Thus, the longevity of the protection against repeated prosecution may not be a safe guide to its continuing justification. It is accordingly sensible to carry out from time to time a review such as this, to see whether the rule continues to serve a useful purpose.

## Part 3 Double jeopardy: the existing law

### GENERAL

3.1 The protection of the criminal accused from multiple prosecutions has a long history. It has been claimed that the principle finds recognition in the Bible; that it originates in Canon law; and also that it has its roots in Civil Law. The rule in England is sometimes supposed to have come into the English common law as a result of the dispute between Henry II and Thomas Beckett over whether clerks, having been tried by church courts, should be subject to the jurisdiction of the King's courts.<sup>1</sup> At least one US court has claimed to trace the principle to Magna Carta.<sup>2</sup> One writer on the topic has concluded that all that can be said with any certainty regarding the origins of the protection is that it is, and undoubtedly will remain, a matter of speculation.<sup>3</sup>

### EARLY LAW

3.2 Some recognition of the finality of criminal judgments is found in the earliest written materials of Scots law. *Regiam Majestatem* states that if a thief has been hanged but falls from the gallows, he shall thereafter be free from the consequences of that theft.<sup>4</sup> Instead of there being further proceedings against the thief, the man who hanged him would be liable in a fine to the King.<sup>5</sup> In certain manuscripts of *Quoniam Attachiamenta*, it is said that:

"No assise may be held concerning an issue about which there has already been an assise; nor probation when there has already been probation; nor compurgation when there has already been compurgation."<sup>6</sup>

3.3 It would not be safe to conclude from these references that the law of medieval Scotland recognised a rule against multiple trials to the same extent or for the same reasons as we now do. A system which recognises trial by combat<sup>7</sup> and admits evidence obtained by

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<sup>1</sup> For varying approaches to the history of double jeopardy in common law systems, see Jay A Sigler, "A History of Double Jeopardy" (1963) 7 Am J Legal Hist 283; M L Friedland, *Double Jeopardy* (1969); Jill Hunter, "The Development of the Rule Against Double Jeopardy" (1984) 5(1) J Legal Hist 3; and David S Rudstein, "A Brief History of the Fifth Amendment Guarantee against Double Jeopardy" (2005-6) 14 William and Mary Bill of Rights Journal 193. Some reflection of the principle is to be found in the *Digest of Justinian* D.28.2.7: "the governor should not permit the same person to be again accused of a crime of which he had been acquitted"; but the Roman system of prosecution at the instance of the aggrieved party is too distant from modern state-based prosecutions to make the comparison meaningful.

<sup>2</sup> Though Sigler notes that the Court was mistaken when it said: "We are mindful of the fact that this rule was deemed of such importance that it was given a place in Magna Charta [sic], and that it was regarded so vital to the maintenance of the Anglo-Saxon concept of individual liberty that it was made a part of the Constitution of the United States" *State v Felch*, 92 Vt 477 (1918) at 482, quoted in Sigler, *op cit*, at 284.

<sup>3</sup> Jill Hunter, *op cit*, at 1.

<sup>4</sup> The Rt Hon Lord Cooper (ed and trans), *Regiam Majestatem and Quoniam Attachiamenta* (1947) at 48. *Regiam Majestatem* purports to have been compiled by King David I (1112-1148), but is a 13<sup>th</sup> or 14<sup>th</sup> Century work largely based upon *Glanvill*, a 12<sup>th</sup> Century text on English Law.

<sup>5</sup> *Ibid*, at 81.

<sup>6</sup> T David Fergus (ed and trans) *Quoniam Attachiamenta* (1996) Appendix 6, s 41; in the earlier edition by Lord Cooper, substantially the same text was included as ch 82: Lord Cooper, *op cit* at 371. *Quoniam Attachiamenta* is believed to date from the 14<sup>th</sup> Century; the earliest surviving manuscript dates from around 1424: Fergus, *op cit*, at 5-6.

<sup>7</sup> See David M Walker, *A Legal History of Scotland: Volume 1, The Beginnings to AD 1286* (1988) at 286-295.

torture<sup>8</sup> is unlikely to found its rules regarding repeated trials upon anything like the modern notion of the rights of the accused. Nevertheless, it is interesting to observe that some recognition of a rule against multiple prosecutions is found from the earliest times.

3.4 Sir George Mackenzie of Rosehaugh, writing in 1678, recognised that a person once absolved could not generally be pursued for the same crime, although he regarded the question as "intricat[e]"; he noted that another (un-named) writer was of the opinion that a post-acquittal confession might allow a further prosecution.<sup>9</sup> Nearly a century later, Lord Kames felt able to write that "[n]o verdict pronounced in a criminal cause was ever reviewable. For though the jury should be found guilty of perjury by a great assize, yet their verdict is declared to be *res judicata*, whether for or against the pannell."<sup>10</sup>

3.5 By the close of the eighteenth century, the basic rule against multiple trials was sufficiently well established that Hume was able to describe not tholing an assize twice as a maxim of Scots law:

"The prime benefit of a sentence of absolvitor is, that the pannel can never again be challenged or called in question, or made to thole an assize (as our phrase for it is) on the matter or charge that has been tried. The ground of which maxim lies in this obvious and humane consideration, that a person is substantially punished, in being twice reduced to so anxious and humiliating a condition, and standing twice in jeopardy of his life, fame or person. The rule applies, therefore, in the case even of a new prosecution, at instance of a different accuser, if it be laid for the same conclusions: That is to say, neither the Lord Advocate, nor the party injured can insist for the pains of law, or atonement to the public, if the pannel have already been acquitted in a prosecution for those pains at the instance of the other. Neither does the rule fail in those situations, of which there are a few, where a person is liable to prosecution at instance of a number of individuals; for instance in a case of perjury by taking the oath of trust and possession: Certainly, a person cannot be made to undergo successive trials for the same act, at instance of as many of the freeholders as may choose to harass him in this sort, but shall have his quietus on acquittal in the first prosecution, at instance of one of them only. As little shall it vary the rule, that the new prosecutor chooses to alter the shape of the former charge, and lay his libel for the same facts, under a new denomination of crime; stating them as fraud perhaps instead of theft, falsehood instead of forgery, assault or riot instead of

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<sup>8</sup> The English common law never admitted evidence obtained by torture. The English Privy Council did, and granted warrants to torture until losing its criminal jurisdiction in 1640. Torture by warrant of the Privy Council or Parliament continued to be available in Scotland throughout the remainder of the 17<sup>th</sup> century, being abolished "in ordinary crimes or without evidence" in the Claim of Right 1689 and definitively outlawed, by statute of the British Parliament, in 1708 (7 Anne c 21). See Brian P Levack, "Judicial Torture in Scotland During the Age of Mackenzie" in Stair Society *Miscellany IV* (2002). There is at least one recorded instance of a prisoner being taken from England to be interrogated and tried in Scotland (an early example of "extraordinary rendition"): see David Hope, "Torture" (2004) 53 ICLQ 807.

<sup>9</sup> Sir George Mackenzie of Rosehaugh, *The Laws and Customes of Scotland in Matters Criminal, wherein is to be seen how the Civil Law and the law and customes of other nations doth agree with and supply ours* (1678) at 580.

<sup>10</sup> Lord Kames, *Historical Law Tracts* (4<sup>th</sup> edn, 1792; first published 1758) at 291. The reference to the conviction of the members of the jury for perjury is to the "assize of error", abolished in 1689, whereby members of a jury which wilfully acquitted in the face of the evidence could be tried by a "great assize" of 25 nobles. The potential punishment for such jurors was forfeiture of moveables and a year's imprisonment. By statute (1475 c 63), the conviction of jurors by a great assize did not affect the acquittal of the accused in the original trial. Actual assizes of error seem to have been rare, and reserved principally for political trials; but the threat of an assize of error was sometimes made by the Lord Advocate in addressing the jury in ordinary criminal trials – see, for example, "The Ordeal of Philip Stanfield" in William Roughead, *Twelve Scots Trials* (1903, reprinted 1995). On assizes of error generally, see the chapter "Wilful Error" in Ian Douglas Willock, *The Origins and Development of the Jury in Scotland* (1963) and Clare Jackson, "'Assize of Error' and the Independence of the Criminal Jury in Restoration Scotland" (2004) 10 Scottish Archives 1.

deforcement or hamesucken, or the like. The Judge will not suffer the law to be evaded on such easy pretences; but will look to the substance of the case, and the situation of the pannel, who still is prosecuted twice for the pains of the same act."<sup>11</sup>

3.6 The maxim applied even where the acquittal had proceeded on a formal error without addressing the merits, as in the case of *John Hannah*, cited by Hume, where the indictment incorrectly designed the victim as the daughter of a wright rather than as the daughter of a tailor. Although, in Hume's view, this level of detail in the indictment was unnecessary, the prosecutor consented to acquittal on the indictment, intending to raise a fresh prosecution under a correct indictment. The Court held that the pannel had substantially been in jeopardy, and peril of his life: the original defect might well not have come to light, and the pannel might have been convicted and hanged upon the first indictment. Hume cites this case as an example of the broad nature of the Scots maxim of tholed assize, in contrast to the English law as shown in the case of *Vandercomb and Abbot*.<sup>12</sup>

"If once found relevant, and sent to a jury, an indictment is, with us, absolutely conclusive of the prisoner's fate. No matter how much the evidence may vary from it, or how unsuitable soever it may be found for trial of the true state of fact, the prisoner, acquitted on that indictment, is safe from all further trial, not only on that same charge, but also (which is more than the English practice does for him,) on any charge which is substantially, though not formally or precisely, relative to or concerning the same occurrence. No man, says our maxim, can be made to *thole an assize twice* for the same matter; and of the disposition of the Court to give this maxim not only a fair, but a favourable construction, the above-mentioned case of *Hannah* is a signal example."<sup>13</sup>

Alison puts it thus:

"A sentence, whether absolvitor or condemnatory, is a complete bar, not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*, whether at the instance of the public or private property."<sup>14</sup>

3.7 The conclusive nature of an indictment, once sent to the jury, remains a particular feature of Scots law: any indictment which reaches the jury will inevitably result either in an acquittal or a conviction. If eight or more jurors vote to find the accused guilty, he will be convicted; otherwise, he will be acquitted. Unlike in England and Wales (and systems derived from English law), there is no possibility in Scotland of a "hung jury" and a retrial based upon the failure of the jury to agree on a verdict. It also bears pointing out that "not proven" is as much a verdict of acquittal as "not guilty"; there is no substance in the view, occasionally expressed by those with little knowledge of Scots law, that a not proven verdict allows the prosecution to have a retrial.

3.8 Hume's discussion of tholed assize suggests that whatever similarities might have existed between the Scottish and English rules prohibiting multiple proceedings – and it is clear that *Regiam Majestatem* at least was largely derived from English law – Scots law had, by the close of the eighteenth century, developed its own rule which was broader and less narrowly technical than the English special pleas of *autrefois acquit* and *autrefois convict*.

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<sup>11</sup> Hume, ii, 465.

<sup>12</sup> *R v Vandercomb and Abbot* (1796) 2 Leach 708. Cf para 6.19 below.

<sup>13</sup> Hume, ii, 466 fn 1.

<sup>14</sup> Archibald Alison, *Practice of the Criminal Law of Scotland* (1833; reprinted 1989) at 652. Alison's justification for this "old and fundamental principle of the Scotch law" is a paraphrase of Hume.

For this reason, we consider it unlikely that the detailed rules elaborated in legal systems based upon English law will be of direct relevance to Scots law. (A number of these jurisdictions are considered in Appendix 2.)

## THE REQUIREMENTS OF A PLEA OF *RES JUDICATA*

3.9 The doctrine of *res judicata* in the criminal law is not limited to the plea of tholed assize. As well as being required to respect prior decisions on the guilt or innocence of the accused under an indictment, a criminal court may be bound to respect an earlier decision on the relevancy of an indictment or, in certain cases, its competency. The plea of *res judicata* is thus seen to have two forms: the first based upon a previous decision on a preliminary plea, the second upon the accused's having already tholed an assize.

### Previous decisions on relevancy and competency

3.10 In *Longmuir v Baxter*,<sup>15</sup> the libel against the accused was found by the sheriff-substitute to be irrelevant. The Crown then charged the accused in identical terms before the sheriff, who found the indictment relevant. On appeal, it was held that the matter should have been treated as *res judicata*, since the sheriff court was one and the same court, whether presided over by the sheriff or a sheriff-substitute. Lord Cowan observed:

"A judge who has decided a point in one way is not entitled afterwards to decide in another way in a suit betwixt the same parties as to the same subject-matter of dispute, with the same averments and the same *media concludendi*. No judge, and particularly no inferior judge, is entitled to review his own judgment. There has been a judicial contract betwixt the parties to abide by the decision of the Court, and that decision can only be given once in the same case. I am clearly of the opinion that a judge, having disposed of the relevancy of a libel in one way, cannot afterwards dispose in another way of the relevancy of the same libel."<sup>16</sup>

3.11 Lord Cowan's reasoning here has two strands. First, he analyses the problem in the same terms which would apply in a plea of *res judicata* in a civil case, noting the identity of parties, subject-matter and *media concludendi*, and suggesting that there was a judicial contract between the prosecutor and the accused to abide by the decision of the court.<sup>17</sup> Second, he holds that a judge cannot review his own decisions; on this argument, while a judge would be bound by his own past decisions, another judge would be free to decide differently.

3.12 On the first of Lord Cowan's grounds, one would expect the plea of *res judicata* to succeed wherever the parties, subject-matter and *media concludendi* were the same. It appears, however, that a decision of the sheriff court as to the relevancy of an indictment will not bind the High Court. In *George Fleming*, the accused was tried in the High Court on an indictment which had been found irrelevant by the sheriff, the High Court holding that it cannot "be held bound by the decision of an inferior judge".<sup>18</sup>

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<sup>15</sup> (1858) 3 Irv 287.

<sup>16</sup> *Ibid*, at 291.

<sup>17</sup> Read literally, this is unconvincing: criminal proceedings, unlike contracts, are compulsory.

<sup>18</sup> *George Fleming* (1866) 5 Irv 287, per Lord Cowan at 292. This apparent anomaly is discussed further at paras 6.67-6.68 below.

3.13 In order for a plea of *res judicata* to succeed on the basis that a libel charging the same crime has previously been dismissed as irrelevant, the charge must be substantially identical to that in the earlier trial. In *HMA v Mullen*<sup>19</sup> the accused was charged in the Sheriff Court with lewd and libidinous practices. The indictment was dismissed as irrelevant on the grounds that the time periods in the indictment stating when the offences were alleged to have taken place were too wide and too vague. The accused was then re-indicted with more precise time periods being stated in the indictment. The accused pled *res judicata*. The sheriff accepted the plea and dismissed the indictment. However, the High Court overturned this decision stating that the test for *res judicata* in criminal cases is whether the second libel is identical to the previous libel at the instance of the same prosecutor and charges exactly the same crime. The High Court found that there was a material difference between the two indictments and therefore the plea of *res judicata* could not be sustained.

3.14 It appears that a plea of *res judicata* may sometimes succeed not only on the basis of a decision as to relevancy, but also on the basis of decisions on other preliminary pleas. In *McNab*,<sup>20</sup> the indictment was dismissed by the sheriff on the basis of a preliminary plea to its competency, based upon undue delay on the part of the Crown. The Crown appealed to the High Court, which allowed the appeal and reversed the sheriff's decision. The accused was then re-indicted in the sheriff court on the same charges. It transpired, however, that neither the accused nor her solicitor had been notified of the appeal, and while counsel had purported to appear for the accused at the appeal, he had done so without instructions. The accused petitioned the *nobile officium* of the High Court to set aside the decision in the earlier appeal, and the preliminary diet on the second indictment was postponed awaiting the outcome of this petition. The High Court, of consent, set aside the earlier appeal decision. The accused then advanced, before the sheriff, a plea of *res judicata*. The sheriff held, following *Longmuir v Baxter*, that since the competency of the indictment had already been decided, the matter was *res judicata*.

3.15 *McNab* seems correct in principle: the sheriff's original ruling that there had been excessive delay was still extant, and problems of excessive delay cannot be resolved by further delay.<sup>21</sup> There is nevertheless some doubt about the extent to which a plea of *res judicata* will apply to decisions on pleas in bar of trial. Chalmers and Leverick suggest, on the basis of *McNab*, that the principle of *res judicata* applies generally to pleas in bar of trial;<sup>22</sup> *Renton and Brown* says that the concept of *res judicata* will not necessarily apply to pleas in bar of trial, and in particular that a plea in bar of trial on the ground of unfitness to plead may be renewed in relation to successive indictments on the same charge.<sup>23</sup>

3.16 There are two issues here: first, whether a decision on a plea in bar of trial will allow the accused to plead *res judicata* in respect a subsequent prosecution; second, whether such a decision can ever apply against the accused, preventing him from raising the same plea in bar in relation to a subsequent complaint or indictment.

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<sup>19</sup> *HMA v Mullen* 1987 SLT 475. See also *Simpson v McLeod* 1986 SCCR 237, where 2 Irish warrants under the Backing of Warrants (Republic of Ireland) Act 1965 were found to be materially different so the quashing of the earlier one did not create a bar to the second. Both warrants referred to the same debt but the first had referred to a breach of s 13(2) of the Debtors (Ireland) Act 1872 whilst the second had referred to a breach of s 13(1).

<sup>20</sup> *McNab v HMA* 1994 SCCR 633.

<sup>21</sup> However, it is only a sheriff court decision, and the sheriff's note makes it clear not only that there was some confusion as to the precise order made by the appeal court but also that the report of *Longmuir*, which the sheriff purported to follow, had not been available in his court's library.

<sup>22</sup> Chalmers and Leverick at para 15.14.

<sup>23</sup> *Renton and Brown* at para 9.13.

3.17 *McNab* suggests that there are at least some pleas in bar which will give rise to *res judicata*. That case was concerned with delay, and it clearly makes sense to regard an earlier decision that there has been undue delay as binding. In contrast, some other pleas in bar, such as insanity in bar of trial or oppression on the ground of unfair publicity, are sensitive to changing facts: the mental health of the accused may improve, such that he is able to face a later trial, or it may be possible to try the accused in a place where the risk of prejudice arising from publicity is not so great.

3.18 The answer to the second question is less clear. There is only one case in point, *Stewart v HMA*.<sup>24</sup> In that case, the accused was indicted for trial at the sitting of the High Court in Inverness. His plea in bar of trial was rejected by the trial judge, and his appeal against this ruling was unsuccessful. However, by the time the appeal had been disposed of, the sitting at Inverness had come to an end without the indictment being called. The Crown was given permission to bring a fresh indictment, and Stewart's case was called at a sitting of the High Court in Aberdeen. At the preliminary diet, the accused advanced the same plea which had been rejected at the previous diet. The trial judge, Lord Abernethy, held that the plea was irrelevant in the absence of a material change of circumstances. On appeal, the High Court held that the terms of section 54(1) (insanity in bar of trial) of the 1995 Act indicated that the finding was with reference to a particular trial rather than any trial which might take place at any later stage after the discharge of the trial diet and, as insanity included not only insanity by reason of some permanent condition, but also insanity by reason of a condition which might alter from time to time, so a finding made with reference to a particular trial would not necessarily be appropriate in regard to a trial held at some later stage. Noting that there was nothing in the terms of the legislation that excluded the right of the accused to submit a plea in bar of trial because it was in the same terms and on the same basis as one which he unsuccessfully submitted in respect of a previous indictment, the High Court reversed Lord Abernethy's decision on the relevancy of the plea, and appointed that the plea in bar of trial be heard at a preliminary diet.

3.19 This case is cited by Chalmers and Leverick as authority for the proposition that *res judicata* in respect of pleas in bar of trial does not apply against the accused,<sup>25</sup> and by *Renton and Brown* for the proposition that the concept of *res judicata* will not necessarily apply to pleas in bar of trial. The latter proposition strikes us as clearly correct: a decision on a plea such as insanity in bar of trial, or oppression on the ground of prejudicial publicity, is a decision about the state of affairs at the time that the plea is decided. Common sense suggests that such a decision should not be *res judicata*, since that state of affairs might be open to change.<sup>26</sup> Whether or not any decision on a preliminary plea could be held as *res judicata* against the accused is a more difficult question. Logically, there is no reason why a decision on a plea to the relevancy should not be good for all time, since relevancy is a pure question of law – does the indictment set forth facts relevant and sufficient to constitute an indictable offence? – the answer to which will not be modified by changing facts (as opposed to amendments to the indictment). Other pleas, such as oppression or insanity, are sensitive to changing facts: the accused was held not to be insane at the hearing on the first

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<sup>24</sup> *Stewart v HMA (No 2)* 1997 JC 217. The lack of other authority is unsurprising, as it will only be in very rare cases that the accused, having failed to persuade the court of the merit of his plea in bar, will be in a position to raise the plea again: generally, the plea having failed, the trial will continue to a verdict.

<sup>25</sup> Chalmers and Leverick at para 15.14.

<sup>26</sup> Contrast a plea of *res judicata* on the merits, where what is determined is a judgment about past events rather than a present state of affairs.

indictment, but he may be insane now. We would not expect such decisions to found a plea of *res judicata*.<sup>27</sup>

### "Tholed assize"

3.20 The second type of case in which a plea of *res judicata* applies is where the accused is able to show that he has already been tried for the offence to which the present charge relates. Following Hume's language, this is sometimes referred to as a plea of "tholed assize": the accused asserts that he has already endured (or "tholed") a trial (or "assize"; the traditional term for a jury, and, by extension, a trial). There are a number of requirements which must be satisfied before a plea of *res judicata* on the basis of tholed assize can succeed. We examine these below.

#### *A concluded trial*

3.21 A plea of *res judicata* on the basis of tholed assize will be upheld only where a previous trial against the accused for has been brought to a conclusion by the delivery of a verdict, whether of conviction or acquittal.<sup>28</sup> (It is clear that where the result of the first trial is an acquittal, the prosecution might wish to bring fresh proceedings if allowed to do so. There might also be a temptation to seek further proceedings following conviction in a case where the conduct of the accused amounted to more than one offence in law.)<sup>29</sup>

3.22 Where an accused has been convicted following a not guilty plea, it is not necessary that sentence should have been passed before a plea of *res judicata* can succeed. It is sufficient that a verdict should have been delivered.<sup>30</sup> Solemn proceedings, once the jury has been empanelled, may only be brought to a conclusion by a verdict of the jury or by desertion *simpliciter*.<sup>31</sup>

3.23 The effect of the acceptance of a guilty plea is less clear.

3.24 In summary proceedings, it appears that the acceptance by the prosecutor of a guilty plea will bring the proceedings to a conclusion and ground a plea of *res judicata* in respect of any subsequent proceedings on the charges in respect of which the plea was accepted. The matter was summarised by Lord Justice Clerk Ross in *Milne v Guild*:

"It is clear that a plea of tholed assize will fall to be sustained, in solemn procedure, where the trial has been concluded with a determination by the jury of guilt or innocence. In my opinion, a plea of tholed assize will also fall to be sustained in summary procedure where an accused has been convicted or acquitted, or where the proceedings have reached the stage where a plea of guilty has been accepted by the prosecutor and has been recorded. Despite apparent statements to the contrary

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<sup>27</sup> A decision on any of these points seems unlikely, since the accused would need to advance his plea, have that plea repelled, have the original indictment fall, be re-indicted, and then advance precisely the same plea.

<sup>28</sup> *Dunlop v HMA* 1974 JC 59. Note that the court held that the desertion of a case *pro loco et tempore* permits a fresh indictment to be raised against the accused and so will not support a plea of *res judicata*.

<sup>29</sup> See, for example, *Glen v Colquhoun* (1865) 5 Irv 203, discussed at paras 3.35-3.36 below.

<sup>30</sup> *Fraser* (1852) 1 Irv 66.

<sup>31</sup> So a confession made before the jury, followed by desertion *pro loco et tempore*, does not found a plea of *res judicata*: *Dunlop v HMA* 1974 JC 59.

in Alison, it is not necessary that a sentence or penalty should have been imposed before a plea of tholed assize can be upheld."<sup>32</sup>

3.25 The position of the accused who pleads guilty in solemn proceedings before a jury is empanelled<sup>33</sup> is unclear. In *Pattison v Stevenson*,<sup>34</sup> the accused, appearing on indictment on a charge of embezzlement, pleaded guilty before the sheriff. The plea was noted and the sheriff remitted him for sentence to the High Court. After he had been remitted for sentence, Crown counsel formed the view that the indictment upon which the guilty plea had been entered was irrelevant, and the Lord Advocate took the decision not to move for sentence. The case was not called before the High Court, and four days after the diet at which he had pled guilty, Pattison was released from jail. That same day, he was rearrested and charged on a fresh indictment. His plea of *res judicata* was repelled by the High Court. Lord Moncreiff said that the case "must be considered just as if after the plea was recorded the Sheriff had been prepared himself to pronounce sentence; but the [prosecutor], instead of moving for sentence, had moved to desert the diet *pro loco et tempore*."<sup>35</sup> It appears that the High Court proceeded on the basis that the prosecutor had done nothing to accept the guilty plea, although it seems strange that the remit to the High Court for sentencing should have been made without the prosecutor having moved for sentence. In its terms, *Pattison v Stevenson* appears to be authority for the proposition that, in solemn proceedings, a plea of guilty will only found a plea of *res judicata* if followed by sentence. There is some doubt as to whether *Pattison v Stevenson* is good law. It has been suggested that the case is wrongly decided, even on its own terms,<sup>36</sup> and in one subsequent High Court appeal it was suggested, *obiter*, that the prosecutor's accepting a guilty plea and moving for sentence would constitute a determination of the accused's guilt and so ground a plea of *res judicata*.<sup>37</sup>

3.26 We note that the Judicial Committee of the Privy Council has held, in an appeal from Jamaica, that the underlying rationale of *autrefois convict* is to prevent duplication of punishment, and that the plea does not arise where the first conviction was not followed by sentence.<sup>38</sup> Whether or not the acceptance of a guilty plea or a guilty verdict should be sufficient to found a plea of *res judicata* is a question to which we return in paragraphs 6.64-6.65 below.

3.27 A second trial at the instance of the Crown will be barred by proceedings in which no verdict has been returned, but the proceedings have been deserted *simpliciter*. Where the proceedings are deserted *pro loco et tempore* prior to the return of a verdict, no plea of *res judicata* will lie.<sup>39</sup>

"Once an accused has been remitted to the knowledge of an assize, one of four events must occur before the trial can be formally ended—a verdict of conviction or acquittal; a withdrawal of the charge by the prosecutor, with a consequent verdict of acquittal; or a desertion of the diet either *pro loco et tempore* or *simpliciter*. As a

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<sup>32</sup> *Milne v Guild* 1986 SLT 431 at 434; 1985 SCCR 464 at 467. Prof Davidson suggests, on the basis of *Herron v McCrimmon*, 1969 SLT (Sh Ct), that the accused must have been sentenced before a plea of *res judicata* will be available (Fraser Davidson, *Evidence* (2007) para 2.23). *Herron* was cited before the trial court in *Milne v Guild*, and is inconsistent with the decision of the High Court in that case.

<sup>33</sup> Following the procedure in s 76 of the 1995 Act.

<sup>34</sup> [1903] F(J) 44.

<sup>35</sup> *Ibid*, at 48.

<sup>36</sup> See the Commentary to *Milne v Guild* at 1985 SCCR 464.

<sup>37</sup> *Thomson, petr* 1996 SCCR 879, per Lord Justice Clerk Ross (*obiter*) at 886A-B.

<sup>38</sup> *Richards v The Queen* [1993] AC 217 (PC).

<sup>39</sup> *Dunlop v HMA* 1974 JC 59.

withdrawal of the charge must lead to a verdict of acquittal, that infers that that accused has tholed his assize and cannot thereafter be brought to trial on that identical charge. Desertion of the diet *simpliciter* has the same consequence, but desertion of the diet *pro loco et tempore* permits the raising of a new indictment."<sup>40</sup>

3.28 Desertion *simpliciter* will bar the Crown from taking further proceedings against the accused in respect of the same offence.<sup>41</sup> However, while desertion *simpliciter* will bar the prosecutor from raising a fresh libel in respect of the same offence, it will not prevent the bringing of a private prosecution where this is otherwise competent.<sup>42</sup>

#### *A valid trial*

3.29 In order to found a plea of *res judicata*, the original proceedings must have been competent. So, for example, no plea of *res judicata* lay where an accused was first tried on an indictment which was time-barred;<sup>43</sup> where the first indictment failed to specify the locus of the offence;<sup>44</sup> where the accused had been tried on indictment for a statutory offence which could only be tried summarily;<sup>45</sup> where, at the first trial, a minor had sat on the jury;<sup>46</sup> where proceedings were incompetently held before a single justice rather than two or more;<sup>47</sup> or where proceedings had concluded with a purported verdict delivered by an incompletely reconvened jury.<sup>48</sup>

3.30 Hume also notes two cases in which the High Court dismissed a plea of *res judicata* on the basis that the earlier proceedings did not represent a proper trial. The first involved an alleged assault on an officer of the revenue. The accused maintained that he had already been tried before the Justices of the Peace in Forfar, at the instance of the Justices' procurator fiscal. The Crown in the second prosecution averred that the previous trial had been collusive, intended to protect the accused from the consequences of his crime. The Court agreed, and the plea of *res judicata* was repelled. Similarly, when a person accused of riot said that she had already been acquitted by the Magistrates of Dunbar, the High Court accepted the prosecution's claim that this had been a mock trial, "contrived at the desire, and for the benefit of the persons accused." Hume concludes that a plea of *res judicata* will not succeed where the earlier proceedings relied upon were collusive, aimed not at answering the purposes of justice but rather at screening the accused from punishment under cover of a previous trial.<sup>49</sup>

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<sup>40</sup> *Ibid*, per Lord Cameron at 65; approved by Lord Justice General Emslie at 67.

<sup>41</sup> Where desertion is by the court, statute provides that the prosecutor may not raise a fresh libel unless the court's decision is reversed on appeal: 1995 Act, ss 72C(1) (desertion at preliminary hearing in solemn procedure), 81(1) (desertion at trial in solemn procedure); s 152(3) (summary procedure).

<sup>42</sup> *H v Sweeney* 1983 SLT 48, where Lord Justice General Emslie observed (at 55) "the only effect of desertion of a diet simpliciter on the prosecutor's motion is to disable that prosecutor from taking fresh proceedings against the accused upon the same charge or charges."

<sup>43</sup> *Whitelaw v Dickinson* 1993 SLT 599.

<sup>44</sup> *Thomson, petr* 1996 SCCR 879.

<sup>45</sup> *McGlynn v HMA* 1996 JC 224.

<sup>46</sup> *Menzies* (1790), Hume, ii, 469.

<sup>47</sup> *William McLellan* (1824), cited by Alison at 619.

<sup>48</sup> *Dunlop v HMA* 1974 JC 59.

<sup>49</sup> Hume, ii, 468, referring to the cases of *John Wallace* (1730) and *Janet Macrachan* (1758). It is hard to see how similar irregularities could arise today.

### 'Same Offence'

3.31 A plea of *res judicata* will be successful where the accused has previously stood trial, which has been brought to a formal conclusion, for the "same offence." Every legal system which recognises a rule against double jeopardy must wrestle with the question of what is meant by the same offence, and it may be seen from our survey of comparative law (in Appendix 2) that different legal systems take different approaches to this question. Some frame the test for double jeopardy in terms of the legal elements of the two charges, so that only if the accused could have been convicted of the second charge in his first trial would the second trial be barred. Others adopt a broader, act-based approach which would bar a second trial for the same act, even if that act could be seen in law as constituting more than one offence. The problem of deciding what is and is not "the same offence" has been described by one American scholar as the most complex problem in double jeopardy law.<sup>50</sup>

3.32 The few Scots cases to touch upon the issue do not supply a rule of law for determining when two charges relate to the same offence. We have already noted that Hume referred to the rule of tholed assize as barring a subsequent trial "on any charge which is substantially, though not formally or precisely, relative to or concerning the same occurrence",<sup>51</sup> and that Alison referred to the rule as applying "not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*".<sup>52</sup> However, this characterisation of the rule now appears inadequate in view of the creation, since Alison's day, of numerous statutory offences which overlap each other and the common law.

3.33 The authorities suggest that a plea of *res judicata* will not succeed merely because a second charge arises out of the same broad circumstances as the first, or relies upon overlapping evidence.

3.34 In *Galloway v Somerville*<sup>53</sup> the accused had been charged with contravening section 2 of the Poaching Act 1862. The complaint narrated that he had been found on the public road in possession of lead shot and a hare, which game he had obtained by unlawfully going on land in search or pursuit of game, the particular land being to the prosecutor unknown. The charge was found to be not proven. The accused was then charged, in connection with the same incident of being found in possession of a hare, with an offence under section 3 of the Preservation of Game Act,<sup>54</sup> which prohibited the carrying of game by anyone other than a person qualified to kill game in Scotland or one having the leave or order of such a person. In bar of this second trial, Somerville pleaded *res judicata*, in respect that the same *species facti* had been already ruled upon by the Justice of the Peace at the first trial. This plea succeeded before the sheriff-substitute, but on a prosecution appeal the Circuit Court of Justiciary at Glasgow held that the two charges were quite different. "Under [section 2] the possession of game was no doubt the fact upon which Constables and Peace-officers were to proceed in seeking a conviction, but the offence for which a party was to be prosecuted was not the having game in his possession, but the unlawfully going on land, and there taking or killing game. But [the second charge] was quite different. The offence there

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<sup>50</sup> George C Thomas III, *Double Jeopardy: The History, the Law* (1998) at 51.

<sup>51</sup> Hume, ii, 466 fn 1.

<sup>52</sup> Archibald Alison, *Practice of the Criminal Law of Scotland* (1833; reprinted 1989) at 652.

<sup>53</sup> *Galloway v Somerville* (1863) 4 Irv 444.

<sup>54</sup> 13 Geo III c 54.

consisted in carrying a hare or other game without having the proper qualification. There was nothing, therefore, inconsistent in the respondent being acquitted of the first charge and convicted of the second, the prosecutions depending upon entirely different facts and different evidence."<sup>55</sup>

3.35 In *Glen v Colquhoun*,<sup>56</sup> Colquhoun and three others were charged on complaint<sup>57</sup> with contravening section 11(1) and (4) of the Salmon Fisheries (Scotland) Act 1862. The offences under that section consisted of fishing for salmon other than by rod and line and during the weekly close time, and in fishing for salmon with a net having a mesh contrary to relevant byelaws. The accused pleaded *res judicata* on the basis of a previous conviction under section 27 of that Act on a complaint which libelled the discovery of the accused, at the same time and place narrated in the later charges, upon the river with intent illegally to take salmon and having in their possession a net and boat with such intent. The plea succeeded before the Justices, and Glen appealed to the Circuit Court of Justiciary at Glasgow. Lord Ardmillan said, without hearing the respondents, that he was clearly of opinion that the Justices had done right to dismiss the complaint in relation to the charge of fishing by means of a boat and net during the close time, and directed counsel to focus their arguments solely upon the charge of using a net with an unlawful mesh. It was argued for the respondents that the complaint was founded upon precisely the same *species facti* under which the respondents had already been tried and convicted. Lord Ardmillan, however, held that the charge of using a net with an unlawful mesh was not excluded by the previous proceedings or by the plea of *res judicata*.

3.36 *Glen v Colquhoun* is unsatisfactory inasmuch as Lord Ardmillan gives no justification whatever for his interlocutor. It is notable, however, that the charge which he thought the Justices to have been clearly correct to dismiss was not identical to the earlier offence of which the respondents had been convicted: that offence was one of being in possession of a boat and net with intent illegally to fish, whereas the second charge was of the completed offence of fishing. This may suggest that while it will often be identity of charges which is relevant, there may be cases in which the similarity of the factual allegations against the accused, or the similarity of evidence required to prove each charge, are such that a plea of *res judicata* may succeed notwithstanding a difference in the legal elements of the first and second charges.<sup>58</sup> Alternatively, it may be that the two statutory provisions were seen as providing merely alternative modes of proof of the same underlying offence of fishing other than by rod and line and during the weekly close time.

3.37 In considering a plea of *res judicata*, the court will look to the substance of the complaint against the accused and not merely to its form. In *McGlynn v HMA*,<sup>59</sup> the appellant had been charged with driving a vehicle while disqualified from driving, contrary to

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<sup>55</sup> *Galloway v Somerville* (1863) 4 Irv 444, per Lord Justice Clerk Inglis at 446.

<sup>56</sup> *Glen v Colquhoun* (1865) 5 Irv 203.

<sup>57</sup> At the instance not of the public prosecutor, but of William Glen, "fish-watcher to Sir James Colquhoun of Luss".

<sup>58</sup> It was argued for the respondents that it was incompetent to charge the completed act of fishing after a conviction for intent to fish. This was argued to be "as incompetent as it would be to prosecute a panel with assault with intent to kill, and after obtaining a conviction, to make the same facts the foundation of a charge of murder." However, it is unclear from the report whether this argument, seemingly based on oppression or abuse of process in splitting the charges, had any bearing on Lord Ardmillan's decision. It certainly seems to be directed only at the charge which Lord Ardmillan found to have been correctly dismissed by the Justices, and upon which the report relates that he did not wish to hear argument.

<sup>59</sup> *McGlynn v HMA* 1996 SLT 895.

section 103(1)(b) of the Road Traffic Act 1988. He pled *res judicata* on the basis that he had previously been convicted under that section in relation to the same incident. The plea was repelled by the sheriff and McGlynn appealed to the High Court. The previous conviction was for obtaining a licence while disqualified. This, a breach of section 103(1)(a) of the Road Traffic Act 1988, had erroneously been labelled as a breach of section 103(1)(b). The court held that as offences under section 103(1)(a) could only be brought summarily, the first indictment had been incompetent and so the purported conviction was of no effect and could not found a plea of *res judicata*. However, the court went on to observe that even if there had been a valid conviction at the first trial, the second indictment would not have been *res judicata* as the substance of the two cases differed. Although the appellant had been indicted twice for a contravention of section 103(1)(b) of the Road Traffic Act, it was clear that the first case had related to the offence of obtaining a driving licence while disqualified, whilst the second case related to the offence of driving while disqualified. Lord Justice Clerk Ross stated:

"In our opinion what has to be compared is the wording of the two charges and not merely the statutory denomination of the charges. Because of the different wording, there is no question of the appellant now being tried for what Alison has described as "for the same facts under an amended denomination." On the contrary the intention is now to try him on different facts."<sup>60</sup>

#### *The effect of section 18 of the Interpretation Act 1978*

3.38 Section 18 of the Interpretation Act 1978, which re-enacts section 33 of the Interpretation Act 1889, provides:

"Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished more than once for the same offence."

3.39 At first sight, this section might be read as suggesting that there can be only one punishment in respect of a single act or omission, and, by extension, no trial for an offence once there had been a prior conviction in respect of the same act. This interpretation was adopted at one point in a leading English textbook,<sup>61</sup> which suggested that section 33 of the 1889 Act would have been clearer if it had said "act or omission" instead of "offence". In the English case of *R v Thomas*<sup>62</sup> the Court of Appeal rejected this interpretation of the statute, observing that "[i]t is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case, and the Interpretation Act itself does not say so."<sup>63</sup> Professor Friedland observes that there were a number of early English cases which suggested that the enactment of a statutory offence would impliedly repeal earlier legislation or make common-law offences inoperative, and others which suggested that if the common-law were not superseded by the statute, an offender might be punished for both the statutory and the common-law offence. Noting *R v Thomas*, he suggests that the only

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<sup>60</sup> *Ibid*, per Lord Justice Clerk Ross at 897-8.

<sup>61</sup> *Archbold's Criminal Pleading*, referred to in argument in *R v Thomas* [1950] 1 KB 26 at 27.

<sup>62</sup> [1950] 1 KB 26.

<sup>63</sup> *Ibid*, per Humphreys J at 31.

purpose of the Interpretation Act provision is to avoid either of these consequences, and that the section casts no light on the proper scope of double jeopardy protection.<sup>64</sup>

### **No "issue estoppel"**

3.40 Certain jurisdictions, including the USA, observe a rule of "issue estoppel", sometimes referred to as "collateral estoppel", whereby the prosecution is barred from bringing proceedings which seek a finding inconsistent with factual issues which have been determined, or are taken to have been determined, by the verdict in earlier criminal proceedings: ". . . when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit."<sup>65</sup> That Scots law recognises no such rule may be seen from its approach to two types of case: that of the acquitted person later prosecuted for perjury, and that of the person tried once for assault and subsequently for murder following the death of the victim.

#### *Perjury*

3.41 The acquittal of the accused on a substantive charge will not bar his later prosecution for perjury in relation to sworn evidence given by him at his trial. In *HMA v Cairns*<sup>66</sup> the accused had been tried and acquitted of murdering a fellow inmate in Barlinnie jail by stabbing him to death. At his trial, he had given evidence that he did not assault and stab the deceased. The jury had returned a verdict of not proven. Following his acquittal, Cairns bragged of having committed the murder, selling his story to a national newspaper. Cairns was subsequently indicted for perjury in relation to the evidence which he gave at his trial. The accused argued that what was once determined by an assize must be taken for truth, and that it was accordingly incompetent for the Crown, in order to establish a charge of perjury, to seek to prove the commission of a crime of which the accused had already been acquitted by a jury. It was held that the accused had not tholed his assize as the charge of perjury was entirely different in nature from the assault charge, and was libelled as having taken place at a different place and time. Lord Justice Clerk Grant quoted MacDonald who stated that, "the previous trial must have been for the same crime, depending on the same evidence, and not for what is truly another crime."<sup>67</sup> Lord Wheatley said "[t]he Lord Advocate summed up the situation by saying that where a supervening event takes place which could form the subject of a radically different charge, then that latter charge can be competently laid notwithstanding that this involves inquiry into the previous crime for which the panel has been tried and either convicted or acquitted. In my opinion the Lord Advocate's argument was well-founded and correctly represents the legal position. . . The issue in the present case is the truth or otherwise of the allegation that the panel committed perjury on the occasion libelled, and I do not see why the evidence on that issue should be circumscribed because some of the facts relevant to the charge were the subject-matter of a jury's verdict on a previous occasion in relation to an entirely different charge."<sup>68</sup>

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<sup>64</sup> Martin L Friedland, *Double Jeopardy* (1969) at 110-113.

<sup>65</sup> *Ashe v Swenson* (1970) 397 US 436 at 443.

<sup>66</sup> *HMA v Cairns* 1967 JC 37.

<sup>67</sup> *MacDonald on the Criminal Law of Scotland* (5th ed, 1948) at 272 (as noted in *HMA v Cairns* 1967 JC 37 at 41).

<sup>68</sup> *HMA v Cairns* 1967 JC 37, per Lord Wheatley at 46, 47.

## Assault and homicide

3.42 A person who has been tried and acquitted, or tried and convicted, on a charge of assault may subsequently be tried on a charge of murder or culpable homicide if, after the first trial, the victim dies. The origin of the rule whereby a person who is acquitted of assault may later be tried for murder is found in the nineteenth century case of *Isabella Cobb or Fairweather*.<sup>69</sup> In that case, the accused was acquitted in the Police Court on a charge of assault. When the victim later died of her injuries, the accused was indicted on a charge of murder. The High Court repelled her plea of *res judicata* by the narrowest of margins.<sup>70</sup> As Chalmers and Leverick note,<sup>71</sup> it appears that the reasons advanced by the majority may no longer hold: in particular, the decision appears to have been motivated at least in part by concern that the High Court should not be bound by decisions in the Police Court, which, by statute, had a limited jurisdiction. Nevertheless, *Cobb or Fairweather* has been treated as binding authority in a number of subsequent cases<sup>72</sup> (though each of these was concerned with a prior conviction rather than a prior acquittal). In *James Stewart*, Lord Ardmillan, following *Cobb or Fairweather*, reasoned that "there never can be the crime of murder till the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation; but it creates a new crime."<sup>73</sup> This approach continues to be followed by the appeal court:

"[I]t matters not whether the accused was convicted or acquitted of assault at the initial trial. These cases also show that it is not necessary at the subsequent prosecution for murder or culpable homicide to show that there is any new mode of assault. The subsequent prosecution for murder or culpable homicide is justified because death has occurred. As Lord Ardmillan stated, death is a new element and creates a new crime."<sup>74</sup>

## Foreign Verdicts

3.43 *Renton and Brown* states that for a plea of tholed assize to succeed "[t]he assize need not be tholed in Scotland."<sup>75</sup> This is almost certainly the case; however, there is little domestic authority on the topic.

3.44 It is assumed that a verdict of a court of another United Kingdom jurisdiction would found a plea of *res judicata* in Scotland. The only authority cited by *Renton and Brown* in support of this proposition is *Macgregor and Inglis*,<sup>76</sup> in which the accused was charged with

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<sup>69</sup> (1836) 1 Swin 354.

<sup>70</sup> See Chalmers and Leverick at para 15.09 fn 59. The rule at the time was that the presiding judge at a sitting of the High Court had no vote unless the other judges were equally divided. The court sat with six judges, Lord Justice Clerk Boyle presiding. The other judges divided 3-2 in favour of repelling the plea. The Lord Justice Clerk's opinion in favour of allowing the plea did not form part of the court's decision. Despite the High Court's opinion that a prosecution for murder was competent, no such charge was ultimately brought against Isabella Cobb or Fairweather: (1863) 1 Swin 354 at 392 fn 1.

<sup>71</sup> Chalmers and Leverick at para 15.10.

<sup>72</sup> *John Stevens* (1850) J Shaw 287; *James Stewart* (1866) 5 Irv 310; *Patrick O'Connor* (1882) 5 Coup 206.

<sup>73</sup> (1866) 5 Irv 310 at 314.

<sup>74</sup> *Tees v HMA* 1994 JC 12, per Lord Justice Clerk Ross at 16. Note too *McNab v HMA* 2000 JC 80 in which the accused was prosecuted for murder having previously, and prior to the death of the victim, pled guilty to and been convicted of attempted murder. In that case the point raised was one of delay in terms of Art 6 ECHR and no plea of *res judicata* was advanced.

<sup>75</sup> *Renton and Brown*, para 9-09.

<sup>76</sup> (1846) Ark 49.

committing fraud by sending a letter to a tradesman in England, inducing him to deliver goods to Scotland. It was argued on behalf of the accused that the Scottish courts had no jurisdiction: ". . . the effect of the letters was produced in England, and it is that which constitutes the crime. There cannot be two *loci delicti*. If the pannel be put upon his trial for this offence in England, it will not avail him to plead that he has already been tried and punished for it in Scotland."<sup>77</sup> In the course of rejecting this argument, Lord Justice Clerk Hope said (albeit *obiter*):

"We must hold that the Courts of England would do justice. If a man has been tried for theft in England, we would not try him again here. There may be two countries where he may be tried."<sup>78</sup>

3.45 Though *obiter*, there is no reason to doubt this statement of the law.<sup>79</sup> The degree of mutual trust and respect to be expected between Scottish courts and those of the rest of the United Kingdom is such that common sense dictates that English verdicts should be capable of barring further proceedings in Scotland. In any case, it seems likely that a failure to recognise the judgments of the courts of other United Kingdom jurisdictions would be incompatible with the international obligations of the United Kingdom under the International Covenant on Civil and Political Rights.<sup>80</sup>

3.46 There is no Scottish case which addresses whether a foreign (non-United Kingdom) judgment is capable of justifying a plea of *res judicata*. However, the United Kingdom is now obliged, by virtue of its participation in Article 54 of the Convention Implementing the Schengen Agreement,<sup>81</sup> to protect those who have had criminal charges against them finally disposed of in another contracting State from further prosecution in respect of the same act.<sup>82</sup>

### Appeals and Fresh Proceedings

3.47 There is a sense in which the availability of appeals against conviction represents an exception to the principle of finality of judgments. If so, it is unproblematic: the benefits of finality are clearly outweighed in such cases by the cardinal principle that the law should not convict the innocent. Such appeals have been a feature of Scots law since their introduction by the Criminal Appeals (Scotland) Act 1926. Of more significance to double jeopardy are prosecution appeals (to the extent that these are allowed) and cases in which the High Court, following a successful appeal against conviction, authorises the Crown to bring fresh proceedings against the accused.

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<sup>77</sup> (1846) Ark 49 at 60, cited by Chalmers and Leverick at para 15.12. Chalmers and Leverick note that the statement about English law was probably incorrect at the time, and is certainly incorrect now.

<sup>78</sup> *Ibid.*

<sup>79</sup> It also seems to have been assumed, in passing, by Lord Justice General Hope in *Clements v HMA* 1991 JC 62 at 71.

<sup>80</sup> See paras 4.15-4.25 below.

<sup>81</sup> Council Decision of 29.5.2000, OJ L 131, 1.6.2000, p43; Council Decision of 22.12.2004, OJ L 395, 31.12.2004, p70.

<sup>82</sup> We discuss Article 54, and its implications for Scots law, in Appendix 1.

### *Prosecution appeals*

3.48 At present, the prosecution cannot appeal against a verdict in solemn proceedings, whether that verdict be pronounced by the jury or by the judge on a submission of no case to answer under section 97 of the 1995 Act. If the recommendations of our report on *Crown Appeals* are implemented, it will be possible for the Crown to appeal against acquittals by the trial judge on a submission of no case to answer, but not against a verdict of the jury.

3.49 In summary proceedings, the prosecutor may appeal to the High Court by way of stated case on a point of law against an acquittal or against the disposal ordered on conviction.<sup>83</sup> By such an appeal on a point of law, a prosecutor "may bring under review of the High Court any alleged miscarriage of justice".<sup>84</sup> Where an appeal against acquittal is sustained, the High Court may convict and sentence the respondent, remit the accused to the inferior court with instructions to convict and sentence the respondent, or remit the case to the inferior court with their opinion thereon.<sup>85</sup> There is no provision for a prosecution appeal to be followed by a further trial on the same charge. We do not consider the prosecution appeal by stated case to be truly an exception to the principle against double jeopardy: rather than permitting further proceedings following a final judgment in the first trial, it simply represents a further stage that may have to be undertaken before the inferior court's disposal becomes final.

### *Retrials following appeal*

3.50 Following a successful appeal against conviction in either solemn or summary proceedings, the High Court has power, among other disposals, to grant authority to bring a new prosecution.<sup>86</sup> Where such authority is granted, a new prosecution may be brought charging the accused with the same or any similar offence arising out of the same facts; and the proceedings out of which the appeal arose shall not be a bar to such prosecution.<sup>87</sup> The accused may not be charged with an offence more serious than that of which he was convicted under the earlier proceedings, and no sentence may be passed upon conviction which could not have been passed on conviction under those proceedings.<sup>88</sup> The new proceedings must be commenced within two months of the date of the order granting authority to bring the prosecution; if not, that order has the effect, for all purposes, of an acquittal.<sup>89</sup>

### **The Civil / Criminal divide**

3.51 A decision of the court in a civil litigation will not found a plea of *res judicata* in a subsequent criminal prosecution based upon the same facts. Nor will a prior criminal

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<sup>83</sup> 1995 Act, ss 175(3), 176(1).

<sup>84</sup> *Ibid*, s 175(5E).

<sup>85</sup> *Ibid*, s 183(6).

<sup>86</sup> *Ibid*, s 118(1)(c) (solemn); s 183(1)(d) (summary). In practice, the High Court far more commonly quashes the conviction without granting authority for a new prosecution.

<sup>87</sup> *Ibid*, s.119(1) (solemn); s 185(1) (summary).

<sup>88</sup> *Ibid*, s 119((2)(3); s 185(2)(3).

<sup>89</sup> *Ibid*, s 119(5),(9); s 185(5),(9).

prosecution at the instance of the public prosecutor found a plea of *res judicata* in civil proceedings relating to the same facts.<sup>90</sup>

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<sup>90</sup> *Thomas v The Council of the Law Society of Scotland* [2005] CSIH 81; 2006 SLT 183 per Lord Justice Clerk Gill at para 17. Cf *Young v Mitchell* (1874) 1 R 1011, in which a dismissed employee had brought a complaint against his employer under the Master and Servant Act 1867 alleging illegal dismissal and claiming damages. Although the court regarded these proceedings as being criminal in nature (per Lord President Inglis at 1013; Lord Deas at 1014), they were held to bar subsequent civil proceedings by the same ex-employee and based upon the same facts. Lord Justice Clerk Gill in *Thomas* at para 16 notes that this was an unusual and exceptional case.

## Part 4            Transnational Provisions

4.1     In this Part, we examine the extent to which the legislative competence of the Scottish Parliament to abolish, alter or make exceptions to the rule against double jeopardy may be affected by international agreements and legal regimes.

4.2     There are a number of international instruments and legal regimes which provide for restrictions on successive criminal proceedings. For our purposes it is convenient to divide these provisions into two categories. First, there are provisions that have transnational effect; that is, provisions which address the question of how one state should act in relation to criminal proceedings which have been concluded, or are to be brought, in another state. We might label these "inter-state" provisions. Second, there are what might be termed "intra-state" provisions which, though the product of international agreements, address the question of how a state may act in relation to legal proceedings which take place entirely within that state. We address inter-state and intra-state provisions in turn, before considering the provisions of EU law – both general principles and the Charter of Fundamental Rights – which would have both inter- and intra-state effects.

### INTER-STATE PROVISIONS

4.3     There are two principal contexts in which the recognition of foreign criminal judgments might be an issue. The first arises where a person who is present in State A is charged with an offence by the authorities of State A, and claims that his trial should be barred on the basis that he has already been tried and convicted or acquitted in relation to the same matter in State B. Here, the question is whether the criminal judgments of State B will be recognised by State A's rule against double jeopardy. The second context is that of extradition: if State B requests the extradition of a person from State A, should State A refuse the extradition request on the basis that that person has already been tried and convicted or acquitted in relation to the same matter in State A (or perhaps even in State C)?

### Double Jeopardy

#### *Schengen*

4.4     The question of how far Scottish courts will recognise criminal proceedings in other jurisdictions as founding a plea of *res judicata* is mentioned briefly in Part 3, at paragraphs 3.43 to 3.46. As noted in paragraph 3.46, the only international instrument which presently binds the United Kingdom to recognise foreign judgments for the purposes of double jeopardy is the Schengen Convention.<sup>1</sup> For the purposes of the present discussion it is sufficient to note that Article 54 of the Convention provides:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being

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<sup>1</sup> We discuss in para 4.53 below how this Convention comes to bind the UK.

enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

4.5 The point about the *ne bis in idem* provision in the Schengen Convention is that, like all the other international agreements, apart from Protocol 7 to the ECHR (see below, paragraphs 4.31–4.34), it makes no provision for a new trial in the light of new evidence or a tainted acquittal. Of course, the purpose of the Schengen Convention was to promote free movement of individuals between the Contracting Parties to the Convention. That is clear from the decided cases. In the case of *Van Esbroeck*,<sup>2</sup> the Court observed:

"The above findings are further reinforced by the objective of Article 54 of the [Schengen Convention], which is to ensure that no one is prosecuted for the same acts in several Contracting States on account of his having exercised his right to freedom of movement...[T]hat right to freedom of movement is effectively guaranteed only if the perpetrator of an act knows that, once he has been found guilty and served his sentence, or, where applicable, been acquitted by a final judgment in a Member State, he may travel within the Schengen territory without fear of prosecution in another Member State on the basis that the legal system of that Member State treats the act concerned as a separate offence."<sup>3</sup>

4.6 The same point is made in the case of *Van Straaten*,<sup>4</sup> where the Court quotes from the judgement in *Van Esbroeck* approvingly.

4.7 There is further analysis of the ECJ jurisprudence on the Schengen Convention at Appendix 1. Although the Schengen provisions are the only inter-state double jeopardy provisions of general application currently in force, the United Kingdom is also a party to two other European Conventions which contain specific double jeopardy provisions.

#### *Convention on the Protection of the European Communities' Financial Interests*

4.8 Article 7 of the Convention on the Protection of the European Communities' Financial Interests<sup>5</sup> incorporates the *ne bis in idem* principle and states that a person whose trial has been finally disposed of in one member state may not be prosecuted in another in respect of the same facts, so long as any penalty which was imposed has been enforced, is being enforced or can no longer be enforced. It will be noted that, although the Article makes complicated provisions as to the circumstances in which the basic rule may apply, it makes no provision for new trials on the basis of new evidence or a tainted acquittal.

#### *Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union*

4.9 The Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union<sup>6</sup> defines conduct, whether active or passive, on the part of officials either of the Union or of the Member States which is to be considered as constituting corruption. Article 10 requires that member states include

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<sup>2</sup> Case C-436/04; [2006] ECR I-9199; [2007] 1 CMLR 12.

<sup>3</sup> *Ibid*, at paras 33-34.

<sup>4</sup> Case C-150/05.

<sup>5</sup> Drawn up on the basis of Article K.3 of the Treaty on European Union in 1995. Council Act of 26 July 1995, OJ C 316, 27.11.1995.

<sup>6</sup> Drawn up on the basis of Article K.3 of the Treaty on European Union in 1997. Council Act of 26 May 1997, OJ C 195, 25.6.1997.

the *ne bis in idem* principle, which is defined in the same way as in Article 7 of the Convention on the Protection of the European Communities' Financial Interests, in their national criminal laws. Like Article 7 of the former Convention, it makes no provision for a new trial on the basis of new evidence or a tainted acquittal.

#### *Other instruments*

4.10 For completeness, we should mention two other international instruments relating to inter-state double jeopardy, although the United Kingdom is a party to neither. Article 53 of the European Convention on the International Validity of Criminal Judgments<sup>7</sup> provides that a person cannot be prosecuted, sentenced or subjected to criminal sanction in a contracting state for an act of which he or she has already been acquitted or convicted (with or without the imposition of a sanction) as a result of a European criminal judgment in another contracting state.<sup>8</sup> Article 53 of the European Convention on the Transfer of Proceedings in Criminal Matters<sup>9</sup> is in substantially the same terms. Neither provision mentions the possibility of an exception where a retrial is sought on the basis of new evidence or a defect in the original proceedings.

### **Extradition**

#### *European Convention on Extradition*<sup>10</sup>

4.11 The European Convention on Extradition was done at Paris in December 1957, and ratified by the United Kingdom in 1991. Article 9 – *non bis in idem* – provides that extradition will not be granted if there has been a final judgment or a decision to discontinue proceedings by the authorities of the requested party in respect of the offence(s) for which extradition is requested. It will be noted there is no provision in the Extradition Convention for a retrial in the light of new evidence (or, indeed, in the light of a tainted acquittal).

#### *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States*<sup>11</sup>

4.12 The Framework Decision on the European Arrest Warrant replaces the terms of the 1957 Extradition Convention and, indeed, all other instruments in relation to extradition, as between Member States. It is designed to enable speedy transfer of suspected persons from one Member State to another. It contains provisions bearing on the rule against double jeopardy. Article 3(2) provides, *inter alia*, that a member state shall refuse to execute a European arrest warrant when it is informed that the requested person has been finally judged by a Member State in respect of the same acts, as long as any sentence imposed has been served, is being served or can no longer be executed. There are also various non-mandatory provisions enabling the refusal of extradition, but there is no exception to the rule in the case of new evidence or of a tainted acquittal.

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<sup>7</sup> Done at The Hague in May 1970; the UK has neither signed nor ratified this Convention.

<sup>8</sup> There are certain exceptions to the obligation on contracting states to recognise the *ne bis in idem* principle.

<sup>9</sup> Done at Strasbourg in 1972; the UK has neither signed nor ratified this Convention.

<sup>10</sup> Council of Europe Treaty no. 24 (available at <http://conventions.coe.int/treaty/en/treaties/html/024.htm> (accessed 30 December 2008)).

<sup>11</sup> 2002/584/JHA.

4.13 The result would appear to be that where a person has been "finally judged" in a Member State in respect of the same acts, that judgment will bar extradition even where the requesting State alleges that there is new evidence.

## **INTRA-STATE PROVISIONS**

4.14 Apart from the EU Charter of Fundamental Rights,<sup>12</sup> there are only two international instruments which bear directly upon intra-state double jeopardy rules. These are the International Covenant on Civil and Political Rights and Protocol 7 to the European Convention on Human Rights.

### **International Covenant on Civil and Political Rights**

4.15 This Covenant was adopted and opened for signature, ratification and accession by a resolution of the General Assembly of the United Nations of 16 December 1966. It was ratified by the United Kingdom, and came into force, in 1976. Article 14(7) of the Convention provides:

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

4.16 This paragraph appears to make no provision for a new trial in the light of a tainted acquittal or the emergence of new evidence. The provisions of Article 14(7) were discussed by the Law Commission in their Report on Double Jeopardy and Crown Appeals:<sup>13</sup>

"Article 14 applies to the reopening of both convictions and acquittal. Read literally, it prohibits even the power of an appellate court to quash a criminal conviction and order a retrial if new evidence or a procedural defect is discovered after the ordinary appeals process has been concluded. In its General Comment on Article 14(7), however, the United Nations Human Rights Committee, the Treaty body charged with implementing the ICCPR, expressed the view that the reopening of criminal proceedings "justified by exceptional circumstances" did not infringe the principle of Double Jeopardy. The Committee drew a distinction between the "resumption" of criminal proceedings, which it considered to be permitted by Article 14(7), and "retrial" which was expressly forbidden. This distinction has not yet been expressly recognised in the law of England and Wales. It has, however, taken firm root in European Human Rights law, and is now reflected in Article 4(2) of Protocol 7 to the ECHR."

4.17 We would agree that, on its face, Article 14(7) makes no provision for a retrial on the basis of new evidence. We would accordingly have difficulty with the proposition that Article 14(7) would permit a new trial on the basis of new evidence. (Nor, as appears from our discussion of other international instruments, are we entirely persuaded that the distinction has taken firm root in human rights law.) In relation to the comments of the United Nations Human Rights Committee, what the Committee actually said was:

"In considering State reports differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It

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<sup>12</sup> Discussed below at para 4.38 onwards.

<sup>13</sup> Law Com No 267 (2001), at para 3.6.

seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to Article 14, paragraph 7."<sup>14</sup>

4.18 The difference which Continental systems appear to make between reopening of old proceedings, on the one hand, and new trials, on the other, is discussed below, in relation to Article 4(2) of Protocol 7 to the ECHR. If and when that Article is ratified by the United Kingdom, it will be necessary to consider how that distinction can be given effect in Scottish practice. We do not see its relevance in relation to Article 14(7) of the ICCPR. Nor are we persuaded that the views of the Committee set up under the Covenant<sup>15</sup> should be treated as authoritative on questions of its interpretation.

4.19 It is of course the case that the ICCPR has not been incorporated into United Kingdom law, so that, even if Article 14(7) has the restricted meaning which we would take from a literal interpretation of what it says, it may not prevent the Scottish Parliament from making provision inconsistent with it. That would be a question to be answered upon a consideration of the relevant provisions of the Scotland Act.

4.20 Section 29 of the Scotland Act 1998 provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament. While it is expressly declared that provisions incompatible with Community law or Convention rights are outside legislative competence,<sup>16</sup> no such provision is made in relation to international obligations generally.

4.21 In relation to the powers of Scottish Ministers, section 53 of the Scotland Act transfers functions of Ministers of the Crown to Scottish Ministers, so far as those functions are exercisable within "devolved competence". Section 54 of the Act defines devolved competence. The effect of section 54 is, broadly, that any action taken by a Scottish Minister is only within devolved competence if, had that action been included in a provision of an Act of the Scottish Parliament, it would have been within the legislative competence of the Parliament.

4.22 Schedule 5 to the Scotland Act sets out a list of matters in relation to which legislative competence is reserved to the United Kingdom Parliament. "International relations" is one of those matters,<sup>17</sup> (although "observing and implementing international obligations" is not.)<sup>18</sup> By virtue of sections 53 and 54 of the Scotland Act, it would therefore appear to be outwith the competence of Scottish Ministers to seek to enter into relations with other countries.

4.23 But an Act of the Scottish Parliament which changed the rule against double jeopardy incompatibly with Article 14(7) of the ICCPR would not itself relate to international relations. It would relate to criminal law and procedure in Scotland. If our view is correct, and such an Act would be incompatible with the United Kingdom's obligations under the ICCPR, that fact would not itself make the Act *ultra vires* the Parliament. In contrast to the position with

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<sup>14</sup> General comment 13(21), para 19. (Available at <http://tinyurl.com/a7gqen> (accessed 30 December 2008)).

<sup>15</sup> ICCPR, Article 28.

<sup>16</sup> Scotland Act 1998, s 29(2)(d).

<sup>17</sup> *Ibid*, Sch 5, Pt 1, para 7(1).

<sup>18</sup> *Ibid*, para 7(2)(a).

regard to Community Law and Convention rights, the fact that legislation of the Scottish Parliament is alleged to be incompatible with the international obligations of the United Kingdom does not raise a devolution issue in terms of Schedule 6 to the Scotland Act.

4.24 That is not to say that the Scottish Parliament could take such action with impunity. If the United Kingdom Government were of the view that a Bill passed by the Scottish Parliament were incompatible with an international obligation, it would be open to a Secretary of State by (judicially reviewable) order to prohibit the Presiding Officer from submitting the Bill for Royal Assent.<sup>19</sup> But if the Secretary of State chose not to exercise that discretion, there would appear to be no reason why the resulting Act would not be valid. It is difficult to see how an individual adversely affected by the change in law would be able to raise the matter in the courts. The Covenant, like other international treaties, is not justiciable in the UK courts,<sup>20</sup> and the United Kingdom has not ratified the First Optional Protocol, which enables individuals to raise alleged breaches with the Human Rights Committee.

4.25 Accordingly, while the matter has not yet been litigated, we are inclined to the view that, subject to the policy override conferred on the Secretary of State by section 35 of the Scotland Act 1998, an Act of the Scottish Parliament which was incompatible with the provisions of Article 14(7) of the ICCPR would not be outwith the competence of the Scottish Parliament.

#### *Reopening of cases in Continental systems*

4.26 It may be useful at this point to consider briefly the distinction between ordinary appeals and reopening of a case which is found in a number of Continental European legal systems.

4.27 In Germany, there are two ordinary routes of recourse against the disposal of a criminal charge by the trial court. *Berufung* is an appeal on the merits against a decision of the *Amtsgericht* (local court), which takes the form of a re-examination of the case on points of law and fact by the appeal court and the substitution of that court's verdict for the verdict of the *Amtsgericht*. Where the appeal is against a decision of the higher criminal courts, the only available appeal is *Revision*, an appeal on a point of law which must be lodged within one week of the pronouncement of the contested judgment. This form of appeal addresses breaches of the law by the trial court, either on an "absolute reason" such as absence of jurisdiction or a fundamental error of procedure, or a "relative reason" such as a misapplication of the law.

4.28 Separate from these modes of appeal is the appeal to reopen the case (*Wiederaufnahme des Verfahrens*), in which either party may seek to reopen the case on legal grounds. In contrast to the ordinary modes of appeal, there is no time limit for a request to reopen the case; and it may be that it is for this reason that it is seen as reopening the case after a final judgment rather than as an ordinary form of appeal. The grounds for reopening a case are that the decision was based upon false testimony, written forgeries or void procedure, or following a decision by the European Court of Human Rights that a judgment has been rendered in violation of the ECHR; that new evidence has been

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<sup>19</sup> Scotland Act 1998, s 35.

<sup>20</sup> *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976, per Lord Hoffmann at paras 27 and 39.

discovered to the advantage of the convicted person; additionally, the case may be reopened at the instance of the prosecution where the accused has, subsequent to his acquittal, confessed to the crime charged.<sup>21</sup>

4.29 France recognises a similar distinction between an appeal on the merits (*appel*), an appeal on point of law (*pourvoi en cassation*) and reconsideration of a conviction on the basis of new evidence (*révision*); though in contrast to the German position, *révision* is only available for the benefit of the convicted person.<sup>22</sup>

4.30 While these systems make a clear distinction between ordinary appeals, subject to time limits and taking place before a judgment becomes final, and the exceptional reopening of a case, it is not clear that any equivalent distinction exists in common law systems such as ours.

### **Protocol 7 to the ECHR**

4.31 The European Convention on Human Rights, as ratified by the United Kingdom in 1953, made no provision in relation to double jeopardy. Such provision is now made by Protocol 7 to the Convention, which was done at Strasbourg in 1984. The United Kingdom has neither signed nor ratified the Protocol, although we understand that it remains the intention of Her Majesty's Government to do so in due course. (As at October 2008, Germany, Belgium, Spain and The Netherlands had similarly not ratified the Protocol.) Article 4 of the Protocol provides that:

- "1. No-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention."

4.32 This was the first international Convention – and, so far, the only one – to make specific provision for the "reopening of the case" if there is "evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings". The effect of this exception would be that a reopening of the case in accordance with law and on the basis set out in paragraph 2 would not breach the prohibition in paragraph 1.<sup>23</sup> For present purposes, it is sufficient to say that we do not immediately see the difference between a new trial for the same offence and a "reopening of the case". Nor does the explanatory report on the Protocol assist greatly in that regard.<sup>24</sup>

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<sup>21</sup> This summary is derived from Mireille Delmas-Marty and J R Spencer (eds), *European Criminal Procedures* (2002) at 332-333.

<sup>22</sup> See Delmas-Marty and Spencer, *op cit*, at 274-275.

<sup>23</sup> A discussion of the case law of the European Court of Human Rights relating to Article 4 of Protocol 7 may be found in Appendix 1.

<sup>24</sup> See para 30 of the explanatory report: "A case may, however, be reopened in accordance with the law of the State concerned if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could affect the outcome of the case either in favour of the person

4.33 Protocol 7, as noted above, has not been ratified by all the Member States of the European Union. In itself, that fact would not necessarily prevent the European Court of Justice from having regard to it, since the Court has recognised the rights contained in the ECHR as general principles of Community law. In the case of *Festersen*,<sup>25</sup> a German citizen who had bought land in Denmark was prosecuted for breach of the obligation under Danish law to take up fixed residence on the land. In his defence he founded, *inter alia*, on Article 2(1) of Protocol 4 to the Convention on Human Rights, which provides for freedom of movement. In spite of the fact that not all Member States had ratified that Protocol the ECJ said ". . . that requirement restricts. . . the right of the acquirer to choose his place of residence freely, a right which he is, however, guaranteed by Article 2(1). . ." <sup>26</sup> and that "Article 6(2) EU states that 'the Union shall respect fundamental rights, as guaranteed by the [ECHR]. . . as general principles of Community law.'" <sup>27</sup>

4.34 The effect of Article 4 of Protocol 7 is further considered below, in the discussion of Article 50 of the Charter of Fundamental Rights.

## **EU LAW – THE CHARTER OF FUNDAMENTAL RIGHTS AND GENERAL PRINCIPLES OF COMMUNITY LAW**

### **European Court of Justice Practice**

4.35 It is clear that from the earliest days of its operation, the European Court of Justice has recognised the doctrine of *non bis in idem* as a general principle of law.

4.36 In July 1964 a Mr Max Gutmann, an official of the European Atomic Energy Community was made the subject of disciplinary proceedings which resulted in a decision to reprimand him for charging various private expenses to community funds. In January 1965 the EAEC sought to raise fresh disciplinary proceedings against him, apparently on the basis of the same actings. Mr Gutmann complained that the fresh proceedings violated the principle *non bis in idem*. The Court pointed out:

"However, neither in the terms of the contested decision nor in the items in the file submitted to it has the Court been able to find any assurance that the principle *non bis in idem* has been respected."<sup>28</sup>

The Court went on to say:

"In the light of the facts of this case the possibility cannot be excluded that two disciplinary proceedings have been initiated on the basis of the same set of facts known to the Commission at the opening of the earlier proceedings, and founded on the same complaint . . . the position would have been different if the two disciplinary proceedings had been based, not on general complaints capable of referring to an indeterminate and unverifiable number of reprehensible matters, but rather on the facts which are themselves sufficiently clearly defined to make it possible to distinguish them from all other earlier or later rounds of complaints. As a result, the

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or to his detriment." (Available at <http://conventions.coe.int/Treaty/en/Reports/Html/117.htm> (accessed 30 December 2008)).

<sup>25</sup> Case C-370/05; [2007] 2 CMLR 7.

<sup>26</sup> *Ibid*, at para 35.

<sup>27</sup> *Ibid*, at para 36.

<sup>28</sup> *Gutmann v Commission of the EAEC* [1965] ECR (English Special Edn) 61 at 65.

decision of 20 and 21 January 1965 and the decision of 13 May 1965 which is based thereon, must be annulled."<sup>29</sup>

## Schengen

4.37 The provisions of the Schengen Convention, now incorporated as part of the Third Pillar of the European Union, are discussed above at paragraphs 4.4-4.7.

## Charter of Fundamental Rights

4.38 The Charter of Fundamental Rights of the European Union (CFR) was first adopted on 7 December 2000 as a declaratory document. The European Council in Cologne in June 1999 saw:

"[a] need, at the present stage of the Union's development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union's citizens."

They accordingly mandated the preparation of a draft of such a Charter for consideration at the European Council in December 2000. They went on to say:

"It will then have to be considered whether and, if so, how the Charter should be integrated into the Treaties."<sup>30</sup>

The Charter was incorporated, as Part II, into the Treaty establishing a constitution for Europe, which was signed in Rome in October 2004 but which was rejected by France and The Netherlands in referenda in 2005. It reappeared, as noted above, in Article 6 of the Treaty on European Union, as approved in Lisbon in December 2007.

4.39 The Charter, and the explanations to it, were adjusted during the negotiations on the Treaty of Lisbon in December 2007 in the light of the desire of the Member States to give it legal effect. It is now given the same legal effect as the Treaties, by Article 6 of the Treaty on European Union as agreed by the Member States at Lisbon. Article 6 provides:

" 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

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<sup>29</sup> *Ibid*, at 66.

<sup>30</sup> Cologne European Council – 3/4 June 1999 – Conclusions of the Presidency – Annex IV. (Available at [www.europarl.europa.eu/summits/kol1\\_en.htm](http://www.europarl.europa.eu/summits/kol1_en.htm). (Accessed 30 December 2008)).

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

The Treaty of Lisbon was signed by the United Kingdom in December 2007 and, following the passage of the European Union (Amendment) Act 2008, was duly ratified by the United Kingdom. While the relevance of the Charter for this discussion is focused on Article 50, which provides for a rule against double jeopardy, it is necessary, in order to understand the effect of that Article, to look briefly at the development of the Charter and of the surrounding documents.

4.40 Between 2000, when the Charter was originally prepared, and 2007, when it was given the same legal value as the Treaties, work was done to change it from a political declaration into a legislative document. Article 6 of the Treaty provides that:

"the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

4.41 The provision with which we are concerned is Article 50 which provides:

"No-one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

In accordance with Article 6, that provision has to be read against the background of the general provisions governing the interpretation and application of the Charter. The first of these is Article 51 which, for present purposes, says that "the provisions of this Charter are addressed to . . . the Member States only when they are implementing Union law". It may therefore be supposed that Article 50 would primarily be of relevance to the United Kingdom when the relevant prosecution authorities were contemplating proceedings for offences created in order to give effect to Union law. It would also be of relevance when legislation was in prospect which might open the possibility of a second trial for such criminal offences, and which might apply to situations where the potential accused had already been acquitted or convicted of the same offence anywhere in the Union.

4.42 The next provision which is of particular relevance is Article 52(3) which provides:

"Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of these rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

This reference to the European Convention on Human Rights is taken up in the Explanations.<sup>31</sup> The Explanation relating to Article 50 begins by quoting Article 4 of Protocol 7 to the ECHR. It then goes on to point out that, unlike Article 4 of Protocol 7, Article 50 applies not only within the jurisdiction of one state but also within the jurisdictions of several

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<sup>31</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

Member States. Article 50 thus corresponds to the *acquis* in Union law. The Explanation then asserts that:

"As regards the situations referred to by Article 4 of Protocol 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR."

That assertion is reinforced by the Explanation on Article 52 which under the heading:

"Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider"

states that:

"Article 50 corresponds to Article 4 of Protocol 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States."

4.43 We find ourselves here in a difficulty foreseen by the House of Lords Select Committee on the European Union in their Report on the Charter of Fundamental Rights of 16 May 2000. At paragraph 1.38 the Committee observed:

"The ECHR is the "benchmark" standard of human rights protection in Europe, and the Charter should reflect this. We cannot, however, emphasise too strongly the need for the text of the Charter to avoid paraphrasing or revising the ECHR. Rewording the ECHR rights would run the risk of confusion, as it would open the door to reinterpretation of existing ECHR guarantees based upon the new wording. At the level of the individual, it would only confuse and mislead if the Charter were to do anything other than restate the ECHR's provisions in full including their qualifications and exceptions."

The importance of the matter lies in the fact that a provision of an Act of the Scottish Parliament is outside the competence of the Parliament if it is incompatible with Convention Rights or with Community law. So, if both Article 50 of the CFR and Protocol 7 to the Convention applied to Scotland, a provision of an Act of the Scottish Parliament which permitted retrials might be compatible with the Protocol but incompatible with the Charter.

4.44 The difficulty here is apparent from a simple comparison of the terms of Article 50 and of Article 4 of Protocol 7. Article 50, which is in terms similar to every other international Convention – and in particular to the various EU agreements and conventions – on the subject, makes no provision for a new trial on the basis of new evidence. Article 4 of Protocol 7, which the United Kingdom has neither signed nor ratified, is the only international Convention to make such provision. Nor is this the only difference between Article 50 and Article 4 of Protocol 7. Article 4 of Protocol 7 applies, and on its terms can only apply, to rights within a particular State. Article 50, like Article 54 of the Schengen Convention, applies across the whole of the European Union,<sup>32</sup> and both within and between Member States. So the reader of the two documents is asked to accept that a provision which applies across the whole of the European Union, and which confers a considerable degree

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<sup>32</sup> Cf the opinion of Advocate General Sharpston in *Gasparini* (Case 467/04; [2006] ECR I-9199; [2007] 1 CMLR 12) at fn 76: "Unfortunately, the scope of Article 4 of Protocol 7 to the ECHR is explicitly restricted to a domestic context. . . . For that reason, neither its actual text nor the interpretation given to it by the European Court of Human Rights is ultimately helpful as a guide to the proper interpretation of Article 54 of the [Schengen Convention]."

of protection on the individual "corresponds to" another provision which is drafted in different language, which applies only to proceedings within single states, and which provides for much less protection for the individual.

4.45 It may be unwise – it would certainly be premature – to speculate too far as to what a court might make of these provisions (in the event that either or both ever becomes applicable to the United Kingdom). But there may be some scope for taking the matter a little further forward. While Article 52(3), as noted above, provides that rights in the Charter corresponding to rights guaranteed by the Convention shall have the same meaning and scope, it also provides that:

"This provision shall not prevent Union law providing more extensive protection."

4.46 Neither Article 50 nor Article 4 of Protocol 7 is part of the law of the United Kingdom. The future of the Lisbon Treaty is uncertain and we have no information as to when the United Kingdom is likely to ratify Protocol 7 to the European Convention on Human Rights.

4.47 But we would hazard the view that, if both were in force within the United Kingdom, Scottish legislation permitting a retrial on the basis of new evidence of a person who had been previously acquitted in another Member State might well be held to be incompatible with Community law. An accused person facing the prospect of a retrial on the basis of new evidence, and seeking to rely on his rights under the Charter (or, as noted below, the Framework Decision) would be entitled to pray in aid any ambiguity between the two provisions.

4.48 Since Article 50 is consistent with the previous law and conventions of the European Union, and inconsistent with the provisions of paragraph 2 of Article 4 of Protocol 7, this may simply be an occasion where, in spite of the assertion in the Explanations, the Fundamental Right within the European Union is different from the Fundamental Right expressed in Article 4.

4.49 Even if, as set out in the Explanations, and in spite of the substantial difference in wording, Article 50 and Article 4 are to be taken as meaning the same, that is of course without prejudice to the Union's ability or competence to go further than the protections accorded by the Convention. As Lord Goldsmith QC pointed out, in expressing the UK Government's view of the relationship between the Charter and the Convention:

"So, notwithstanding any difference of language, the rule is that those Charter provisions which correspond to a provision in the ECHR have the same meaning and scope as the ECHR rights, including the meaning given to them by the jurisprudence of the Strasbourg Court. Of course the Union can *legislate* to go further than the ECHR, within the constraints of its existing powers."<sup>33</sup>

The Union has in fact legislated to go further in the protection of the rights of the individual than the ECHR, prior to (and following) both the Protocol and the Charter, and this has a direct effect on what the Scottish Parliament can competently do in this area.

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<sup>33</sup> In a speech of 4<sup>th</sup> November 2004 to the United Kingdom Association of European Lawyers.

### *Legislative competence of the Scottish Parliament*

4.50 The discussion above has been about a possible future conflict between Article 50 of the Charter of Fundamental Rights and Article 4 of Protocol 7 to the European Convention on Human Rights. In this section we examine the effect of current EU legislation on the competence of the Scottish Parliament to enact a provision in relation to a retrial of an acquitted person on the grounds that new evidence (however defined) had become available.

4.51 By section 29(2)(d), a provision is outside the competence of the Scottish Parliament so far as it is incompatible with any of the Convention rights or with Community law. "Community law" is defined as "all those rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties. . ." <sup>34</sup>

### *Framework Decision*<sup>35</sup>

4.52 As mentioned in paragraphs 4.12 and 4.13, the Framework Decision makes no provision for exceptions where there is new evidence or an allegation of a tainted acquittal. We mention it here for the sake of completeness. Since extradition is a matter reserved to the United Kingdom Parliament,<sup>36</sup> the position under the Decision has no implications for the legislative competence of the Scottish Parliament in relation to double jeopardy.

### *Schengen Convention – restraint on retrials*

4.53 The Schengen *acquis* was incorporated into Community law by the Schengen Protocol,<sup>37</sup> which was annexed to the Treaty of Amsterdam. Article 4 of the Schengen Protocol provides that "Ireland and the United Kingdom of Great Britain and Northern Ireland, which are not bound by the Schengen *acquis*, may at any time request to take part in some or all of the provisions of this *acquis*." Such a request was made in 1999 and, as a result of Council Decision 2000/365/EC, the United Kingdom is now bound by, amongst others, Article 54 of the Schengen Convention.<sup>38</sup>

4.54 Article 54 of the Schengen Convention<sup>39</sup> would currently prevent the Lord Advocate from prosecuting a person for a crime arising from acts for which that person had already been prosecuted in another EU Member State. It would also prevent the Scottish Parliament from legislating so as to permit the prosecution of crimes arising from acts which have already been the subject of criminal proceedings in another EU member state. As noted above, section 29(2)(d) of the Scotland Act states that a provision is outside the legislative competence of the Scottish Parliament so far as it is incompatible with any of the Convention rights or with Community law.

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<sup>34</sup> Scotland Act 1998, s 126(9)(a).

<sup>35</sup> 2002/584/JHA.

<sup>36</sup> By s B.11 of Pt 2 of Sch 5 to the Scotland Act 1998.

<sup>37</sup> Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community

<sup>38</sup> Council Decision 2000/365/EC, Article 1(a)(i).

<sup>39</sup> "54. A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party".

4.55 In that regard we have noted the exception to double jeopardy introduced in England and Wales by Part 10 of the Criminal Justice Act 2003 (which is more fully discussed at Part 7 of this paper). By virtue of section 76(4)(c), the Director of Public Prosecutions may only consent to an application for a retrial where he is satisfied that any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.<sup>40</sup>

4.56 By prohibiting the retrial of persons previously tried in another Member State, Article 54 of the Schengen Convention, and the case law of the European Court of Justice interpreting it, serves three purposes. First, it is clear that legislation to provide for such retrial would be incompatible with Community Law, and therefore outside the competence of the Scottish Parliament. Second, it definitively settles (at least in relation to the Member States of the European Union) the question of whether a trial abroad will justify a plea of *res judicata* in criminal proceedings (see paragraphs 3.43-3.46). Third, it raises a more general question: if someone who is first proceeded against abroad is protected from further proceedings in respect of the same acts, why should someone who is first tried in Scotland not be protected from further proceedings on the same basis?

### *Conclusions*

4.57 A provision of Scottish legislation would not be outside the legislative competence of the Scottish Parliament merely because it was incompatible with Article 14(7) of the ICCPR, since there is no provision in the Scotland Act requiring legislation of the Scottish Parliament to conform to the United Kingdom's international obligations; but the Secretary of State could by order prevent it from being submitted for Royal Assent.

4.58 Similarly, a provision of Scottish legislation introducing exceptions to the rule against double jeopardy could not be outside the legislative competence of the Parliament on the basis of Article 4 of Protocol 7 to the ECHR. That Article, whatever it means, has not been ratified by the United Kingdom and does not form one of the "Convention rights" which form a limit on the legislative competence of the Parliament.

4.59 Any provision of Scottish legislation which was inconsistent with Article 54 of the Schengen Convention would, to that extent, be outside the legislative competence of the Scottish Parliament. This incompatibility would arise only to the extent that the legislation applied (or purported to apply) to those exercising Community rights of free movement of persons.

4.60 Without prejudice to the preceding conclusion, when (or if) the Charter of Fundamental Rights comes into force, it is more likely than not that Article 50 would make it incompetent for legislation of the Scottish Parliament to provide for retrial on the basis of new evidence or tainted acquittal.

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<sup>40</sup> Council Decision 1999/436/EC declared Articles 31 and 34 TEU to be the Treaty base for the *ne bis in idem* provisions (Articles 54 to 58) of the Schengen *acquis*.

## Part 5 Options for Reform

5.1 Having examined the principles underlying the rule against double jeopardy (in Part 2), the existing Scots law (in Part 3) and the relevant international instruments (in Part 4), we can now identify six options for reform. These are:

1. Abolish the rule against double jeopardy;
2. Make no change to the existing law;
3. Make limited provision in statute to address anomalies and ambiguities in the existing law;
4. Restate the law of double jeopardy in statute, simultaneously addressing anomalies in the existing law;
5. Introduce an exception to the rule against double jeopardy to allow a retrial on the ground that the acquittal in the original trial was tainted by an offence such as intimidation of jurors or witnesses; and
6. Introduce an exception to the rule against double jeopardy to allow a retrial on the ground of new evidence.

5.2 In this Part, we shall briefly consider options 1 to 4. Option 4, a statutory restatement of the law of double jeopardy, is considered in more detail in Part 6, and possible exceptions to the rule against double jeopardy are considered in Part 7.

### **OPTION 1: ABOLISH THE RULE AGAINST DOUBLE JEOPARDY**

5.3 We raise the option of abolishing the rule against double jeopardy only to dismiss it. For the reasons explored in Part 2, we consider that the rule against double jeopardy forms an essential part of the rights of the citizen in relation to the State.

5.4 In our view, the rule against double jeopardy is essential to the rule of law. The prosecution cannot be allowed to say "heads I win, tails we play again".<sup>1</sup> While there may be arguments for exceptions to the rule against double jeopardy (and we consider these in Part 7) the core of the rule – that the verdicts of criminal courts should generally be final – is an essential part of our legal system.

5.5 For completeness, we should observe that Article 14(7) of the International Covenant on Civil and Political Rights obliges the United Kingdom to recognise a rule against double jeopardy.<sup>2</sup> The abolition of the rule against double jeopardy would place the United Kingdom in breach of its international obligations.

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<sup>1</sup> Cf Akhil Reed Amar, *Double Jeopardy Made Simple* [1997] 106 Yale Law Journal 1807.

<sup>2</sup> See paras 4.15-4.25 above.

5.6 We propose:

1. **The rule against double jeopardy should be retained.**

#### **OPTION 2: MAKE NO CHANGE TO THE EXISTING LAW**

5.7 Before proposing changes to the law, we should first ask whether there is any real need for change. Is the present Scots law of double jeopardy in need of reform, or can it be left as it is?

5.8 We would welcome the views of consultees as to whether the existing law leads to unsatisfactory results. As we note in our discussion of the present law, there are very few reported cases on the topic, which may suggest that the present law works well enough. On the other hand, a small number of reported cases may not tell us much: *res judicata* is a plea in bar of trial, and successful pleas based on double jeopardy would thus have tended not to generate written judicial opinions in the absence of a prosecution right of appeal.<sup>3</sup>

5.9 Regardless of whether it yields satisfactory results in practice, the present law lacks clarity. There is a general understanding that a person may not be tried more than once for the same offence; but what is meant by the same offence? What kinds of prior judgments or proceedings will found a plea of *res judicata*? As we note in Part 3, it appears that the doctrine, in its inception, was a broad one, aimed at protecting the accused from being harassed with multiple trials for the same act. Hume suggests that the protection against double jeopardy extends to multiple prosecutions for the same act, rather than for the same offence in law:

"As little shall it vary the rule [that the pannel can never again be made to thole an assize on the matter or charge that has been tried], that the new prosecutor chooses to alter the shape of the former charge, and lay his libel for the same facts, under a new denomination of crime; stating them as fraud perhaps instead of theft, falsehood instead of forgery, assault or riot instead of deforcement or hamesucken, or the like. The Judge will not suffer the law to be evaded on such easy pretences; but will look to the substance of the case, and the situation of the pannel, who still is prosecuted twice for the pains of the same act."<sup>4</sup>

5.10 However, it is far from clear whether this broad conception of *res judicata* has been consistently adopted in the later cases. As Chalmers and Leverick note, the case law has not warranted the development by the courts of any test for determining whether the "same offence" has been charged.<sup>5</sup> In the absence of such a judicially developed test, the precise boundaries of the present protection against double jeopardy in Scots law are unclear.

5.11 In terms of section 3 of the Law Commissions Act 1965, the function of the Scottish Law Commission is "to take and keep under review all the law with which [it is] concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary

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<sup>3</sup> A plea of *res judicata* in a solemn case, as a preliminary plea in terms of s 97(2)(a)(iii) of the 1995 Act, would now be a matter for consideration at a first diet in terms of s 71 of that Act, and the judge's decision open to appeal by either party in terms of s 74. Prior to 1 February 2005 there was no such appeal, and the new law has yet to give rise to any authority relevant to our study of double jeopardy.

<sup>4</sup> Hume, ii, 466.

<sup>5</sup> Chalmers and Leverick at para 15.06. Nor is the concept of "the same facts" entirely unproblematic; cf paras 6.39-6.40 below.

enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law". As our examination of the existing law in Part 3 shows, the present law cannot be stated with any certainty. Accordingly, we do not recommend leaving the law as it is.

5.12 We nevertheless ask:

**2. Is the present Scots law of double jeopardy in need of reform, or can it be left as it is?**

**OPTION 3: MAKE LIMITED PROVISION IN STATUTE TO ADDRESS ANOMALIES AND AMBIGUITIES IN THE EXISTING LAW**

5.13 In addition to uncertainty about the scope of the doctrine, a number of anomalies and ambiguities can be identified in the existing law. First, it appears that a sheriff's ruling on the relevancy of an indictment will not found a plea of *res judicata* in relation to an identical indictment later brought before the High Court.<sup>6</sup> The authority for this is a decision of the mid-nineteenth century, and it seems to us that in the modern context of a professional and highly skilled shrieval bench, the argument that the High Court "cannot be held bound by a decision of an inferior judge"<sup>7</sup> no longer has much merit. To hold that the High Court is not bound by the sheriff's decision on relevance is in effect to grant a right of appeal from the sheriff's ruling to the High Court, sitting as a trial court. Given the existence of statutory appeals from sheriff court decisions, including decisions on the relevancy of indictments, this seems truly anomalous.

5.14 Second, while one of the rationales for double jeopardy protection is the avoidance of inconsistent verdicts, it appears that the law does presently allow repeated trials for the same acts where events subsequent to the first trial have changed the nature of the offence: where the accused is tried for assault, he may later be tried for homicide if the victim dies of his injuries. It appears that Scots law currently allows such a prosecution for homicide even where the result of the earlier trial for assault was acquittal:

"[I]t matters not whether the accused was convicted or acquitted of assault at the initial trial. . . it is not necessary at the subsequent prosecution for murder or culpable homicide to show that there is any new mode of assault. The subsequent prosecution for murder or culpable homicide is justified because death has occurred. As Lord Ardmillan stated,<sup>8</sup> death is a new element and creates a new crime."<sup>9</sup>

On one view, this is an anomaly: while there may be a new crime, there is no act of the accused which has not already been authoritatively considered in the original prosecution. What changes in such a case is the result of the accused's action (and so, potentially, the appropriate punishment), and if the accused is initially found not to have committed the act of assaulting the victim, it is hard to see what justification there could be for disregarding that not guilty verdict.<sup>10</sup>

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<sup>6</sup> *George Fleming* (1866) 5 Irv 287.

<sup>7</sup> *Ibid*, per Lord Cowan at 292.

<sup>8</sup> In *HMA v Stewart* (1866) 5 Irv 310.

<sup>9</sup> *Tees v HMA* 1994 JC 12, Lord Justice Clerk Ross giving the opinion at the court at 15.

<sup>10</sup> Cf the Commentary to *Tees v HMA* 1994 SCCR 451 at 458.

5.15 Third, existing authority is largely silent on the question of whether a foreign judgment can found a plea of *res judicata*. *Renton and Brown* says that "[t]he assize need not be tholed in Scotland".<sup>11</sup> This must surely be correct, at least in relation to judgments of courts in other United Kingdom jurisdictions – it would certainly make no sense for Scots law to permit the re-trial in Scotland of someone who had already been acquitted of the same offence in England and Wales or Northern Ireland. But as Chalmers and Leverick point out,<sup>12</sup> there is no authority directly in point, and no domestic authority at all on the question of whether a non-United Kingdom judgment could found a plea of *res judicata*.

5.16 Fourth, there is the question of whether double jeopardy protection should extend in certain cases to preventing a second trial where the first trial was fundamentally defective. At present, the law requires there to have been a valid first trial before a plea of *res judicata* can succeed.<sup>13</sup> If an aim of the rule against double jeopardy is to protect those who have endured one set of criminal proceedings from having to fear that those proceedings will be repeated, it is arguable that it should operate wherever the accused has endured what he believed to have been valid proceedings, notwithstanding the later discovery of some fundamental defect in those proceedings.

5.17 It would be possible to address each of these anomalies and ambiguities in statute. However, we question whether it would make sense to address the gaps and anomalies in the existing law without addressing the whole of double jeopardy in a comprehensive manner. One aim of any reform must be to promote clarity in the law, an aim which would scarcely be furthered by addressing only what are presently seen as anomalies. Such an approach would risk casting doubt upon those aspects of the law of double jeopardy which retained their bases in common law.

#### **OPTION 4: RESTATE THE LAW OF DOUBLE JEOPARDY IN STATUTE, SIMULTANEOUSLY ADDRESSING ANOMALIES IN THE EXISTING LAW**

5.18 For the foregoing reasons, our provisional view is that the law of double jeopardy should be comprehensively restated in statute. This appears to us to be the only way in which clarity and definition can be brought to what is at present an underdeveloped area of Scots law. Given this underdevelopment, it is almost inevitable that any statutory formulation will alter the existing law, and so be more than mere restatement. It appears to us that placing the rule against double jeopardy on a statutory basis will be highly desirable if exceptions to the rule are also to be enacted. It also affords an opportunity to develop the law in a systematic and principled fashion and to address existing anomalies. We consider this proposed statutory statement, or restatement, in Part 6 of this Discussion Paper.

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<sup>11</sup> *Renton and Brown* at para 9-09.

<sup>12</sup> Chalmers and Leverick at para 15.12.

<sup>13</sup> See para 3.29 above.

# Part 6            Restatement of the law of double jeopardy

## THE NEED FOR RESTATEMENT AND REFORM

6.1     In Part 3 of this Discussion Paper we examined the present Scots law of double jeopardy. We concluded that there was little Scottish authority which cast light upon the question of which offences would be treated as the same for the purposes of a plea of *res judicata*.

6.2     There is no doubt that Scots law recognises a rule against being tried twice for the same offence. It is clear that some protection will apply to an accused who is charged with what is substantially the same wrong, even if he is charged with what is technically a distinct offence in law. But there is no clear rule which can be derived from the current Scottish case law, or indeed from the institutional and semi-institutional authority of Hume and Alison, that tells us when a subsequent charge is sufficiently similar to a previous charge to sustain a plea of *res judicata*.

6.3     Against this background, we have asked (Question 2, in Part 5 above) whether consultees are content with the present, ill-defined, state of the law. We noted that our own preliminary view is that the present state of the law is unsatisfactorily vague and merits restatement in a simplified and codified form.<sup>1</sup> As the details of the present law are unclear, it is highly likely that any such restatement will involve some alteration to the substance of the present law. We think it is important to acknowledge this at the outset, and to be open about the need, in codifying the law of double jeopardy, to make policy choices about the circumstances in which the rule should apply. In this Part of the Discussion Paper we consider options for a restatement and rationalisation of the rule against double jeopardy.

## WHEN SHOULD A SECOND PROSECUTION BE BARRED?

6.4     We should begin by asking what the proper scope of a rule against double jeopardy should be. Once an accused has been tried and convicted or acquitted, which subsequent charges should be barred? Should the test focus narrowly upon whether the second trial is for the same offence, or should a second trial be barred where it arises out of the same, or broadly similar, facts? Perhaps the appropriate rule would be to bar successive prosecutions in respect of the same act, or acts, of the accused?

6.5     In considering these questions, it is essential to have regard to the values that are served by the rule against double jeopardy. These were addressed in detail in Part 2, where we identified two particularly important benefits of such a rule: the promotion of finality in criminal litigation and the avoidance of unnecessary distress to the accused through repetition of the criminal process. These two values do, of course, overlap: one of the benefits of finality is that it allows the accused, having once been subjected to criminal

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<sup>1</sup> See para 5.18 above.

process, to draw a line under the past and continue with the rest of his life without having to fear a repetition of his ordeal. But finality also has an independent value. The purpose of the judicial system, broadly stated, is to determine disputed legal questions. If the prosecution is free effectively to disregard the outcome of a criminal trial and repeatedly to seek conviction on the same charge, the effectiveness and legitimacy of the criminal courts is undermined.

6.6 But respecting the finality of verdicts will not always be sufficient to protect the accused from the anxiety of further proceedings. Consider the following hypothetical example:

A, a twenty year old law student, is accused of raping his sixteen year old sister, C. At his first trial, he is acquitted.

In the first (hypothetical) scenario, the prosecution seek to retry him for rape, and propose to do so repeatedly until he is convicted.

In a second such scenario, the prosecution seek to try A not for rape, but for attempted rape.

In a third, the prosecution, having failed to secure a conviction for rape, seek to try A instead for incest.

6.7 In the first of these scenarios, a court has already determined that A is not guilty of the charge of rape; the prosecution attempt to re-litigate this same question undermines the authority of the courts by failing to treat the original verdict as final. To allow multiple prosecutions on the same charge would be to prevent the courts from discharging their purpose of settling disputes, since if there is always a risk of error in a trial, and the prosecution is free to re-litigate at will, then the ultimate determinant of whether the accused is finally acquitted or convicted is not the court but the prosecution: the prosecution simply stops only when it has obtained its preferred outcome.

6.8 The second scenario is more difficult. On one view, trying A for attempted rape after he has been acquitted of the completed offence is compatible with the first verdict: one can simultaneously be guilty of attempting to commit an offence and not guilty of the completed offence. On another view, there is an incompatibility between the verdicts, since it is always competent, on an indictment charging a completed offence, for a jury to find the accused guilty of the attempt. By inference, the jury at the first trial, in failing to return the competent alternative verdict of guilty of attempted rape, acquitted A of that charge. One can accordingly view the prohibition of the charge for attempted rape as required in order to respect the finality of the original verdict.

6.9 The third scenario illustrates the limit of finality – in the sense of legal certainty – as a protection for the accused. While the second set of charges arise out of the same factual situation as the first charge, and relate to the same conduct, they are clearly different offences. The substance of the offence of rape is sexual intercourse without the consent of the woman;<sup>2</sup> the relationship of the complainant to the accused is not relevant to proof of the

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<sup>2</sup> Though our Report on *Rape and Other Sexual Offences*, Scot Law Com No 209, (2007) recommends alterations to the definition of the offence: see para 3.28 of that Report.

offence. The substance of the offence of incest lies in the fact of sexual intercourse between a male person and a female person who are related to each other within specified degrees of relationship.<sup>3</sup> Consent, or its lack, is irrelevant to proof of a charge of incest.<sup>4</sup> A prosecution for incest following acquittal of rape cannot undermine the legal finality of the first verdict: the offences are quite distinct, and conviction or acquittal of either crime implies nothing about A's guilt or innocence of the other. One cannot say that the court at the first trial determined any question relevant to the charge at the second trial, nor that the second prosecution could in any way challenge the finality of the first court's determination.<sup>5</sup> Yet to allow such a prosecution would clearly subject A to considerable additional distress.

6.10 These examples show that while the values of finality and the protection of the accused from distress overlap, the finality of the verdict in the first trial can be respected without affording the accused adequate protection against the distressing prospect of further proceedings arising from the same incident. In order to respect the finality of the first court's verdict, one might ask (as in a plea of *res judicata* in a civil cause), "what was litigated and what was decided?"<sup>6</sup> If a charge was not made, either directly or by implication at the first trial, then a second trial which does make that charge cannot be a challenge to the legal finality of the first verdict. But the answer to the question of what was litigated and what decided should not exhaust the scope of double jeopardy protection, since it will often fail to protect the accused from multiple proceedings arising out of the same incident (as in the third example above). Here, the question is not merely what was litigated and what decided, but what *should* have been litigated and whether it is acceptable to prosecute again on the basis of substantially the same facts, or the same conduct, as gave rise to the first prosecution.

6.11 In recognising that a strict rule applying only to the same offence may afford inadequate protection to the accused, we should be wary of expanding the rule against double jeopardy too far. While it will always be wrong<sup>7</sup> for the prosecutor to try an accused twice for the same offence, it may sometimes be appropriate to try the accused again in respect of the same facts: the clearest example is when a first, relatively minor, offence is later discovered to have been a small part of a more significant crime.<sup>8</sup> Whatever the test, it must provide sufficient protection to the accused without unreasonably foreclosing prosecutions which would not be unfair and which would be in the public interest.

6.12 We do not think it likely that a single rule will adequately cover all cases. In his monograph on *Double Jeopardy*, Professor Martin Friedland observes:

"There have been attempts in the past to formulate a *single* test to determine when a second prosecution for a different offence should be barred. These have not met with success because no single mechanical test which disregards such considerations as whether the Crown was entitled to join the two offences in the one prosecution, the position taken by the accused, the result of the first trial and the

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<sup>3</sup> Criminal Law (Consolidation) (Scotland) Act 1995, s 1.

<sup>4</sup> At least so far as the charge against A is concerned.

<sup>5</sup> The jury at the first trial *might* have reached its decision on the basis that no act of sexual intercourse took place; but as the jury delivers merely a verdict of "guilty", "not guilty" or "not proven", its factual conclusions (as opposed to its legal conclusions) are largely unknowable.

<sup>6</sup> *Grahame v Secretary of State for Scotland* 1951 SC 368, per Lord President Cooper at 387.

<sup>7</sup> Save perhaps in the circumstances discussed in Part 7 below.

<sup>8</sup> The English case of *R v IK* [2007] EWCA Crim 971, [2007] 2 Cr App R 15 may be an example of this. In that case, the Court of Appeal held that the prior conviction of the appellants for forgery offences did not prevent their later prosecution for terrorist offences of which the forgery formed part of the evidence.

reason for that result, can effectively cope with the diverse situations that may arise."<sup>9</sup>

We think it likely that some combination of rules will be required to achieve the appropriate combination of protection for the rights of the accused and ability to prosecute crime in the public interest.

6.13 It is helpful to start by examining the various tests which have been applied, at different times and in different jurisdictions, in order to determine which charges should be barred by the outcome of a first prosecution. We consider, in turn, the tests applied to the English common-law pleas of *autrefois acquit* and *autrefois convict*, both in England and the Commonwealth; the American *Blockburger* test; the abuse of process doctrine established in England and Wales by the House of Lords in *Connelly v DPP*,<sup>10</sup> and the test developed by the European Court of Justice in interpreting the *ne bis in idem* provisions of the Schengen Convention. These are presented not as representing the current law of Scotland, or even as definitive statements of foreign law,<sup>11</sup> but rather as examples of possible rules which might be adopted, and of the benefits and drawbacks of each.

### **The common-law pleas of *autrefois***

6.14 The ancient common-law pleas of *autrefois acquit* and *autrefois convict*, which protect an accused against subsequent prosecution following, respectively, a prior acquittal and a prior conviction form an element of the double jeopardy rule in most legal systems which derive to any extent from English law. (The United States, which was the first to give the content of these rules a statutory basis, through the Fifth Amendment to the US Constitution, is discussed below). Despite this common origin, each jurisdiction has developed its own tests for the application of the *autrefois* rules. A number, including England and Wales and Australia, supplement these rules with broader principles based upon abuse of process.<sup>12</sup>

6.15 The most generally accepted test for the application of the *autrefois* pleas, applied in one form or another in the majority of those jurisdictions in which they are recognised, is the so called "in peril" test.<sup>13</sup> This bars a second prosecution if the accused has already been in peril of conviction on the former indictment. Given the availability of alternative verdicts, the rule applies not only to the offence actually charged in the first indictment but to any offence of which the accused could have been properly convicted on the trial of the first indictment.<sup>14</sup> So, for example, a person who is tried for murder must be taken to have been in peril of conviction not only for murder but for all of the lesser offences of which a jury might convict on an indictment charging murder, so barring a subsequent prosecution for manslaughter or assault.<sup>15</sup>

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<sup>9</sup> Martin L Friedland, *Double Jeopardy* (1969) at 94.

<sup>10</sup> [1964] 1 AC 1254.

<sup>11</sup> More detailed examination of comparative law is to be found in Appendix 2; even this should not be taken as definitive, since in most cases the foreign law is not itself entirely clear or consistent.

<sup>12</sup> Discussed below at paragraphs 6.27-6.34.

<sup>13</sup> Martin L Friedland, *Double Jeopardy* (1969) at 101; Andrew L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2<sup>nd</sup> edn, 2008) at 26.

<sup>14</sup> *Barron* 1914 2 KB 570, per Lord Reading CJ at 570.

<sup>15</sup> In both Canada (Criminal Code, s 609) and New Zealand (Crimes Act 1961, s 358), the test is extended to apply to any offence of which the accused might have been convicted on the first trial had all proper amendments been made that might have been made to the first indictment.

6.16 The "in peril" test is satisfied only where the legal elements of the first and second charges are the same.<sup>16</sup> A second prosecution, on a different legal basis, will not be barred by the "in peril" test merely because it rests upon the same facts or the same evidence. For example, in the hypothetical case considered in paragraph 6.6, A's initial acquittal of rape would bar his subsequent prosecution for attempted rape, since he could have been convicted of attempted rape at his first trial. The "in peril" test would not bar his subsequent prosecution for incest, since he could not competently have been convicted of incest on an indictment charging rape. While the "in peril" test respects the legal finality of the first verdict, it affords the accused only limited protection against multiple prosecution.

6.17 The test does not in itself prevent the trial of a greater offence following the trial of a lesser offence (for instance, a trial for assault to severe injury following a trial for assault), since the accused could not have been in peril of conviction of the greater offence on the trial of the lesser. In order to extend protection to those accused of an aggravated version of an offence of which they have already been tried, it is necessary to supplement the "in peril" test with a further rule or principle. Broadly speaking, two such rules have been recognised.

6.18 The first is a rule or principle barring the trial of an accused for an aggravated version of an offence for which he has already been tried. Such a principle against successively charging more serious versions of an offence is recognised in England and Wales at common law, as the *Elrington* principle ("whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form")<sup>17</sup> and is a statutory rule in both Canada and New Zealand.<sup>18</sup>

6.19 The second is what is sometimes referred to as the *Vandercomb* test,<sup>19</sup> in terms of which "[t]he test is . . . whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction."<sup>20</sup> This is the mirror image of the "in peril test", asking not whether the accused was in peril at his first trial of the offence now charged, but whether the present charge places him in peril of conviction of an offence of which he could have been convicted at his first trial. Under this test, for example, a prosecution for robbery would be barred following an earlier trial for theft, since on the charge of robbery it would be competent for a jury to convict of theft, the offence which was the subject of the first trial. A version of this test forms part of the Criminal Codes of the Northern Territory, Queensland, Tasmania and Western Australia.<sup>21</sup> In the majority of cases there will be little difference in outcome between this test and that described in the preceding paragraph.

### **The *Blockburger* test**

6.20 Broadly similar results are achieved by the application of the *Blockburger*<sup>22</sup> "included elements" test, which the US Supreme Court has developed to answer the question of what

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<sup>16</sup> *Connelly v DPP* [1964] 1 AC 1254 per Lord Devlin at 1339.

<sup>17</sup> *Elrington* (1861) 1 B&S 688; 121 ER 170, per Cockburn CJ. See the Law Commission, *Double Jeopardy*, CP 156, (1999) para 2.26.

<sup>18</sup> Criminal Code (Canada), s 610; Crimes Act 1961 (NZ), s 359(1).

<sup>19</sup> After *R v Vandercomb and Abbot* (1796) 2 Leach 708.

<sup>20</sup> *Connelly v DPP* [1964] 1 AC 1254, per Lord Morris of Borth-y-Gest at 1309.

<sup>21</sup> Criminal Code (Qld), s 17; Criminal Code (Tas), s 355(1)(b)(iv); Criminal Code (NT), s 18(c); Criminal Code (WA), s 17.

<sup>22</sup> After *Blockburger v US* 284 US 299 (1932).

constitutes the "same offense" for the purposes of the Double Jeopardy clause of the Fifth Amendment to the US Constitution.

6.21 Under that test, the court asks whether each offence requires proof of a fact not required by the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution. The effect of this is to bar successive prosecution either where the first and second offences have identical legal elements (and so are literally the same offence), or where one offence – regardless of whether this is the first or second-charged – is a lesser included offence of the other. Although the test is apparently simple, a considerable amount of US case law demonstrates that its application is often uncertain: as the US Supreme Court has itself noted, "While the clause itself simply states that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb,' the decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."<sup>23</sup>

6.22 The *Blockburger* test has also been recognised as the test at common law in Australia,<sup>24</sup> where it appears that the *autrefois* pleas will be available "wherever all of the elements of one offence (of which an accused stands, or stood, in jeopardy) are included in the other offence (of which that accused stands, or stood, in jeopardy)."<sup>25</sup>

6.23 The *Blockburger* test applies to bar a subsequent prosecution only where there is the requisite overlapping of the legal elements of the first and second offences. As with the "in peril" and *Vandercomb* tests, it does not matter if the first and second charges arise out of precisely the same evidence, or the same conduct of the accused, provided that the legal elements of the first and second charges are sufficiently distinct.<sup>26</sup> If each charge requires the proof of some element which the other does not, there may be multiple prosecutions (and indeed multiple punishments) in relation to the same conduct of the accused.<sup>27</sup>

6.24 Returning to the example given in paragraph 6.6, we can see that A's second prosecution for rape would be barred, since the two charges are identical. His prosecution for attempted rape would also be barred: the attempted rape charge requires the proof of no element that need not be proved to substantiate a charge of rape, which was the offence

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<sup>23</sup> *Albernaz v United States* 450 US 333 (1981) at 343. Akhil Reed Amar, "Double Jeopardy Law Made Simple", (1997) 106 Yale LJ 1807 draws attention to the inadequacies of the *Blockburger* test and catalogues a number of hard to reconcile decisions.

<sup>24</sup> By the majority of the High Court of Australia in *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610. The common law applies in New South Wales, South Australia and Victoria; cf the codified criminal law of Queensland, Tasmania, the Northern Territory and Western Australia, referred to in fn 21 above. However, in both code and common law jurisdictions, the technical rules may be supplemented by broader double jeopardy protection arising from the courts' inherent jurisdiction to prevent abuse of process: see *R v Carroll* [2002] HCA 55; (2002) 194 ALR 1 per Gaudron and Gummow JJ at paras 70-73.

<sup>25</sup> *Island Maritime Ltd v Filipowski* [2006] HCA 30, (2006) 228 ALR 1 per Kirby J at para 91.

<sup>26</sup> *US v Dixon et al* 509 US 688 (1993), the majority of the Supreme Court disapproving its earlier ruling (in *Grady v Corbin* 495 US 508 (1990)) that a second prosecution is not permitted for conduct comprising the criminal conduct charged in the first.

<sup>27</sup> However, the analysis appears sometimes to focus upon the elements which *actually were proved* at the first trial, rather than upon the minimum elements which would have had to have been proven to justify conviction on the first charge. In *US v Dixon et al* 509 US 688 (1993) the appellant Dixon was arrested and indicted for possession of cocaine with intent to distribute. On the basis of this, he was convicted of criminal contempt of court for violating a condition of his release on an unrelated offence forbidding him to commit "any criminal offense". The Supreme Court held that because Dixon's drug offence did not include any element not contained in his previous contempt offence, his subsequent prosecution for the drug offence violated the Double Jeopardy Clause (per Scalia J at 700). It did not approach the question by asking, in the abstract, what evidence was needed to convict of criminal contempt (answer: proof of "any criminal offense") but instead at what offence had actually been proved in support of the contempt charge.

charged at A's first trial. However, the *Blockburger* test would not prevent A's subsequent prosecution for incest, since the charges of rape and incest each require proof of an element that the other does not (for rape, an absence of consent; for incest, a relationship within the prohibited degrees).

### **The Schengen "same acts" test**

6.25 In the context of the Schengen *acquis*, the European Court of Justice has elaborated a test which is much broader than either of those so far considered in this paper. This test focuses not upon the legal elements of the first and second charges, but upon whether the charges relate to "the same acts". Two reasons seem to inform the broad approach taken by the European Court of Justice. The first is the inherent impracticality of applying a test based upon legal elements to prior prosecutions in states which have different legal systems, with different procedures and offence definitions. The second, related, reason is that the Court has identified one of the purposes of the Schengen provisions as removing barriers to the exercise of the right of free movement within the EU, a right which would be impeded if a person who had been prosecuted in one state could not be sure of being able to travel within the Union without facing other charges in respect of the same conduct.<sup>28</sup>

6.26 Article 54 of the Schengen Convention provides that:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

According to the European Court of Justice, acts are the same if they "constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter."<sup>29</sup> While recognising that the ultimate determination is for national courts, the European Court of Justice has suggested, for instance, that the act of importing contraband cigarettes into one EU member state and the act of possessing those same cigarettes in another member state with intent to distribute them there were, in principle, to be considered the same acts.<sup>30</sup> This act-based approach to double jeopardy is explicitly acknowledged to be aimed at ensuring that a person who has once been subjected to criminal proceedings should not have to fear further proceedings in respect of the same acts.

### **Same facts – double jeopardy and abuse of process**

6.27 In addition to the *autrefois* pleas, English law recognises a general principle barring successive prosecutions arising out of the same, or substantially the same, facts.

6.28 The majority of the House of Lords in *Connelly v DPP*<sup>31</sup> recognised, as an aspect of the inherent jurisdiction of the High Court, a power to prevent abuse of the court's process. This included making and enforcing a direction that the prosecution must normally join in the same indictment charges that are founded on the same facts, or form or are a part of a

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<sup>28</sup> The Schengen provisions and the European Court of Justice jurisprudence are discussed in more detail in Appendix 1.

<sup>29</sup> See Appendix 1, paras 23-30.

<sup>30</sup> *Kretzinger*, Case C-288/05; [2007] ECR I-6441; [2007] 2 CMLR 43.

<sup>31</sup> *Connelly v DPP* [1964] 1 AC 1254.

series of offences of the same or a similar character, and enforcing such a direction by staying a second indictment if they are satisfied that its subject-matter ought to have been included in the first.<sup>32</sup> The result, as explained by the Court of Appeal in *R v Beedie*,<sup>33</sup> is that a second prosecution arising from substantially the same facts as an earlier prosecution should be stayed as an abuse of process unless the prosecution can show special circumstances which justify a further trial.

6.29 In *Beedie*, the appellant was the landlord of a property where an improperly-maintained gas fire caused the death of a resident from carbon monoxide poisoning. He was prosecuted by the Health and Safety Executive and pled guilty to and was convicted of an offence under the Health and Safety at Work etc. Act 1974 arising from a breach of his duty to maintain the fire. At the inquest into the tenant's death, Beedie gave evidence on the basis that he could not be prosecuted further in respect of the death. He was then charged with, and convicted of, manslaughter. On appeal, the Court of Appeal held that the manslaughter prosecution should have been stayed as an abuse of process, because the allegation of manslaughter was based on substantially the same facts as the earlier summary prosecution and there were no special circumstances which justified the prosecution going ahead. In rejecting the prosecution argument that special circumstances did exist, the court observed:

"The public interest in a prosecution for manslaughter and the understandable concerns of the victim's family were, no doubt, good reasons for allowing the prosecution to proceed. They did not, however, give rise to special circumstances."<sup>34</sup>

6.30 There is some inherent ambiguity in the notion of "substantially the same facts". The test cannot be applied by looking simply at the facts relevant to the proof of the first charge, since this would reduce the test to one of common legal elements. When the English courts refer to the same, or substantially the same, facts, it seems that they are referring to the whole circumstances surrounding the first charge, and not merely to those facts which are legally relevant to that charge.<sup>35</sup>

6.31 *Beedie* establishes that, in terms of the *Connelly* principle, the onus is on the prosecution to demonstrate the existence of "special circumstances" before an indictment arising out of substantially the same facts as a former charge will be allowed to proceed. It also establishes that neither the interests of the victim, nor the interest of the public in the prosecution of serious crime, in themselves constitute such "special circumstances".

6.32 While it may be difficult to establish the special circumstances necessary to justify a second prosecution on substantially the same facts, the *Connelly* principle does not amount to an absolute prohibition on such prosecutions. In *Connelly*, Lord Devlin declined to provide a comprehensive definition of what might constitute special circumstances justifying a second prosecution, but gave as an example the situation where the prosecution decides to bring two charges separately with the knowledge and acquiescence of the accused. From

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<sup>32</sup> *Ibid*, per Lord Devlin at 1347. His Lordship continued: "I think that the appropriate form of order to make in such a case is that the indictment remains on the file marked 'not to be proceeded with.'"

<sup>33</sup> [1998] QB 356.

<sup>34</sup> *Ibid*, per Rose W at 366.

<sup>35</sup> For instance, consider *Beedie* (referred to above at para 6.29). There, the Court of Appeal considered that the *Connelly* principle applied to bar a prosecution for manslaughter after the appellant had been convicted of an offence under the Health and Safety at Work etc Act 1974; but in order for Beedie to have been guilty of the health and safety offence, it was not necessary for his failure to have resulted in death.

this, it is reasonable to infer that special circumstances would exist where the separation of trials was on the motion of the accused. Beyond this, there is little authority for what would constitute "special circumstances".<sup>36</sup> As well as some inherent vagueness about what might constitute "special circumstances", the *Connelly* principle raises the question of what should be regarded as the same or similar facts. We are aware of two cases which suggest that the doctrine may not be as expansive as it at first appears. In *R v Ishaque*<sup>37</sup> the accused, a landlord, was prosecuted for harassment under section 1(3)(a) of the Protection from Eviction Act 1977. The accusation against him was that he had, with the intention of causing the occupier of the rented premises to give up occupation, committed acts likely to interfere with peace or comfort, or persistently withdrawn or withheld services reasonably required for occupation. He had previously been convicted of an assault which formed part of the alleged harassment. The Court of Appeal held:

"... the offence of harassment . . . related to a course of conduct . . . which may be said to have included the assault but was not simply based upon the fact of the assault. The assault was a separate and distinct offence. Whilst it is clear that as a matter of sensible administration it would have been better for the two offences to have been charged together, the fact that they were not does not amount to an abuse of process. The mischief to which *Beedie* was directed does not exist in this case."<sup>38</sup>

6.33 In *R v IK*<sup>39</sup> the Court of Appeal held that the prior conviction of the appellants for forgery offences did not bar their later prosecution for terrorist offences in relation to which the forgery formed a part.

6.34 It may thus be the case that the *Connelly* principle applies only where the earlier prosecution was in respect of the whole (or substantially the whole) of the facts which are to be relied upon in the second prosecution.<sup>40</sup>

## DISCUSSION

6.35 We are drawn to an approach whereby a reasonably narrow core rule against double jeopardy is supplemented by a broader principle against unreasonably splitting cases. A rule against double jeopardy which applies only where the "in peril" test is satisfied will fail to protect against successive prosecutions for legally distinct offences arising out of a single set of facts. However, a hard-edged rule that a person can never be charged with an offence arising out of the same facts upon which he was previously tried may extend protection too far, and introduce too much uncertainty. There may well be circumstances in which it is quite appropriate for one set of facts to give rise to more than one set of criminal proceedings. Indeed, there may be cases where the interests of justice demand this: for instance where the proof of one of the charges will inevitably involve the admission of evidence which would be prejudicial to the prospect of a fair trial on the others. (Perhaps the

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<sup>36</sup> The Law Commission, citing *Attorney General for Gibraltar v Leoni* (Court of Appeal for Gibraltar, Criminal Appeal No 4 of 1998, judgment of 19 March 1999, unreported), suggests that the discovery of new evidence may amount to a special circumstance for the purpose of the *Connelly* principle: Law Commission, *Double Jeopardy* (CP 156, 1999) at para 2.24.

<sup>37</sup> [2006] EWCA Crim 2538 (CA).

<sup>38</sup> *Ibid*, at para 10.

<sup>39</sup> [2007] EWCA Crim 971, [2007] 2 Cr App R 15.

<sup>40</sup> Cf the US Supreme Court's holding in *Garrett v US* 471 US 773 (1985) that prosecution for being engaged in a continuing criminal enterprise was not barred by the accused's prior conviction of one of the offences alleged to have formed part of the continuing criminal enterprise.

most obvious example would be where the accused was charged with causing death by dangerous driving, and with driving while disqualified. The latter charge would inevitably involve the disclosure of the accused's past driving convictions which led to the disqualification, something which could prejudice the accused's trial on the charge of causing death by dangerous driving). In contrast – and subject to Part 7 below – there are no circumstances in which it is appropriate to re-prosecute someone, following the conclusion of his first trial, for exactly the same offence.

### **The core rule**

6.36 It is beyond doubt that Scots law presently recognises a rule that nobody may be tried again for exactly the same offence for which he has once been tried and acquitted or convicted. We would welcome consultees' views as to whether the core rule requires to be restated in statute and, if so, whether it needs to be extended or elaborated upon. If there is a general principle that all of the charges relating to a single incident or set of facts should be included in a single indictment, it may not matter whether (for example) culpable homicide and causing death by dangerous driving should properly be viewed as "the same", since successive charging of these offences would almost always be prevented by the broader principle. On the other hand, it may be helpful in the interests of clarity to have a clearly elaborated test for determining which charges will be absolutely barred following a first conviction or acquittal. Our preliminary view is that such a statement would be helpful.

6.37 We propose:

**3. A second prosecution should be prohibited where a person has previously been convicted or acquitted of an offence and:**

**(a) the second indictment or complaint charges an offence of which it would have been competent to convict the accused on the first indictment or complaint (so, for instance, an earlier verdict on a trial for murder will bar subsequent prosecution for attempted murder, culpable homicide, assault etc.); or**

**(b) the second indictment or complaint charges an offence which is an aggravated form of the offence charged on the first occasion (so, for instance, a previous conviction or acquittal of assault will bar a subsequent prosecution for assault to severe injury).**

### **A broader principle?**

6.38 If the law is to recognise a broader principle that aims to allow a person who has once been tried to rest easy knowing that he will not be tried again, how should this principle be framed? Should it apply to bar charges arising from the same facts as the charge that has been determined? Or from substantially the same facts? Or from the same act (or acts) of the accused?

6.39 A test which applies only where the facts are precisely the same as those which gave rise to the first charge may offer little protection against inappropriate repetition of proceedings. If the facts which must be "the same" are the facts which *require to be proved* in order to justify conviction on the first and second charges, then the test of same facts is practically indistinguishable from the *Blockburger* test of "same offence", and could allow

multiple prosecutions for the same conduct. To return to the hypothetical example in paragraph 6.6 above, a "same facts" test based upon the facts which are required to be proved in order to substantiate a charge of rape would not prevent a subsequent prosecution for incest based upon the same (alleged) act of sexual intercourse, since each charge requires the proof of a fact which the other does not.<sup>41</sup>

6.40 In England and Wales, the *Connelly* principle comes into play where the second charge relates to substantially the same facts as the first. The virtue of the reference to "substantially" the same facts is that it highlights the need to look beyond the facts which require to be proved in order to prove each offence and look instead at the broader facts and circumstances surrounding the first charge. However, the test is inherently vague, since there is no principled way of deciding, in the abstract, which facts are relevant. Returning to the example in paragraph 6.6, is it clear that the charge of incest should properly be seen as arising out of "substantially the same facts" as the earlier charge of rape? The answer may depend upon the way in which the evidence came out at the first trial, and whether that evidence included evidence of the relationship between A and C; if it did not, then it might well be open to the court to conclude that the "facts" were substantially different. Or consider the case of *Glen v Colquhoun*, referred to at paragraphs 3.35-3.36 above. Does the offence of fishing with an illegally sized mesh arise out of the "same facts" as that of being upon the river with a net and boat and the intention unlawfully to take salmon? We see no clear and uncontroversial answer to these questions. It therefore seems that a test of "substantially the same facts" would be uncertain in operation, and may sometimes allow a second prosecution in relation to the same act of the accused, and in relation to charges which might competently and practicably have been brought together.

6.41 In relation to those who have already been subjected to criminal proceedings elsewhere in the EU, the Lord Advocate is already bound to apply the Schengen test, refraining from bringing criminal proceedings in Scotland where these relate to "the same acts" as earlier European proceedings. More specifically, the test which must be applied in this context is that of whether the acts in question "constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter." While the case law of the European Court of Justice supplies a number of examples of sets of facts which are, in principle, to be regarded as "inextricably linked",<sup>42</sup> each case will turn upon its own facts. However, it does appear that a test of "same acts" would generally afford broader protection than a test based upon whether the "facts" are the same, or substantially the same. A "same acts" test would unambiguously bar a second prosecution in the example given in paragraph 6.6, since regardless of whether the legal wrong is rape or incest, the charges relate to a single act of the accused (that is, having sexual intercourse with C). It would bar a second prosecution on the facts of *Glen v Colquhoun*,<sup>43</sup> since the second charge arose out of the same act of fishing as the first (the characteristics of the net itself being merely another respect in which the same act might constitute an offence). It would probably also bar a second trial on the facts of *Galloway v Somerville*.<sup>44</sup> Poaching and possessing game without a licence may be seen as separate acts, and are certainly separate offences, but it

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<sup>41</sup> This appears to have been much the approach taken by the High Court in the poaching case of *Galloway v Somerville* (1863) 4 Irv 444, discussed at para 3.34 above, where the two charges of poaching and possession of game without a licence were held to depend "upon entirely different facts".

<sup>42</sup> See the discussion of the European Court of Justice's Schengen jurisprudence in Pt 2 of Appendix 1.

<sup>43</sup> (1865) 5 Irv 203.

<sup>44</sup> (1863) 4 Irv 444; see para 3.34 above.

could readily be supposed that the alleged act of poaching and the possession of game without a licence "constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter."

6.42 There is nothing novel in the suggestion that the prosecution should generally bring all outstanding charges against an accused in the same proceedings. Indeed, this has long been recognised as the policy of the Lord Advocate. As Lord Justice General Emslie observed in *Reid v HMA*:

"For centuries it has been the practice to try all outstanding charges against an accused on a single indictment at the same time. It is pointed out in Hume, volume ii, page 172:

'This is allowed not only for the sake of doing justice as expeditiously, and with as little expense and trouble as may be to the public, but also (provided it is kept within certain bounds) for the advantage of the pannel; that he may be relieved of the long confinement, and of the anxiety and distress, which would attend a series of successive trials.'

It is only where a material risk of real prejudice to the accused can be demonstrated that a trial judge will normally be justified in granting a motion for separation of charges. . ." <sup>45</sup>

6.43 This long-standing practice may extend to the charging in the same indictment of entirely separate offences.<sup>46</sup> The case for combining offences in the same indictment is strongest where the offences are connected in time, circumstances and character,<sup>47</sup> and weakest where the crimes are evidentially distinct.<sup>48</sup> For the prosecution to charge separately different offences arising from the same set of facts, or from the same acts of the accused, would be contrary to this established practice. It might therefore be suggested that there is no need for a rule *requiring* the prosecution to join all outstanding charges in a single indictment.

6.44 Three points might be made in response. First, as we remarked in Part 2, any institution's professional predisposition to act properly can only benefit from rules requiring it to do so. Second, as our examination of the existing law has shown, the practice of the Lord Advocate regarding the contents of indictments may be of little relevance where the first prosecution was before a summary court, though this objection should now be of little force given the organised and professional nature of the modern Crown Office and Procurator Fiscal Service. Third, excessive reliance upon the practice of the Lord Advocate fails to take account of the Lord Advocate's status as "master of the instance", and her consequent freedom to vary her practice at any time.

6.45 The importance of this last point may be seen from the case of *HMA v Cairns*.<sup>49</sup> In that case, the appellant had been tried for murder and acquitted. At his trial he denied on oath that he had stabbed the victim. Following his acquittal, he confessed to the murder,

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<sup>45</sup> 1984 SCCR 153 at 155.

<sup>46</sup> *Ibid.*

<sup>47</sup> *HMA v Bickerstaff* 1926 JC 65.

<sup>48</sup> So the High Court has held that care must be shown in murder cases to avoid prejudice to an accused by indicting him also for crimes not said to be evidentially relevant to the murder and its surrounding circumstances: *HMA v M'Guinness* 1937 JC 37.

<sup>49</sup> 1967 JC 37; discussed at para 3.41 above.

selling his story to a national newspaper. He was then charged with perjury. In addition to considering, and repelling, the accused's plea of *res judicata*, the High Court considered whether, as a matter of equity, the Lord Advocate should be prevented from proceeding with the perjury charge. The court considered that equity did not favour the appellant's position – it was not appropriate that perjury by the accused should go unpunished – but that even if it had done, the decision as to what to charge was in the sole discretion of the Lord Advocate. Lord Justice Clerk Grant said:

"Practice is a matter for the Lord Advocate of the day and the decision whether to prosecute or not must in each case rest with him as master of the instance. He is not bound by any practice which may have been followed by his predecessors nor is it for us to lay down what practice should or should not be adopted by him."<sup>50</sup>

Lord Wheatley went further:

". . . our system of public prosecution in Scotland. . . has its ultimate foundation in the person, in the impartiality and in the discretion of the Lord Advocate. This system has stood the test of time and, while it remains, there is no reason to suppose that the standards of fairness, impartiality and equity will be relaxed. . . [T]he proper exercise of his discretion by Her Majesty's Advocate in Scotland is the guarantee against excesses and abuses or unfairness, injustice or inequity in bringing prosecutions."<sup>51</sup>

6.46 Thus, while it is likely that the existing Crown Office practice will prevent a person who has once been tried from being tried again in respect of the same incident, it would be open to the Lord Advocate to vary this practice at any time. *Cairns* suggests that were the Lord Advocate to do so, the accused would have little prospect of having the second set of proceedings barred. It may be that such a prosecution could, in certain circumstances, give rise to a plea of oppression; but the onus would clearly be on the accused to demonstrate the existence of special circumstances which would justify the plea:

"As the authorities show, the High Court does have power to intervene to prevent the Lord Advocate from proceeding upon a particular indictment but this power will be exercised only in special circumstances which are likely to be rare. The special circumstances must indeed be such as to satisfy the Court that, having regard to the principles of substantial justice and of fair trial, to require an accused to face trial would be oppressive. Each case will depend upon its own merits, and where the alleged oppression is said to arise from events alleged to be prejudicial to the prospects of a fair trial, the question for the Court is whether the risk of prejudice is so grave that no direction of the trial Judge, however careful, could reasonably be expected to remove it."<sup>52</sup>

In the absence of special circumstances showing that the second set of proceedings would be unfair, there is presently no legal bar to the successive prosecution of different charges arising out of the same incident. We would welcome consultees' opinions on whether this is satisfactory. Our preliminary view is that it is not, and that the core rule against repeated prosecution for the same offence should be supplemented by a broader rule allowing the courts to enforce what we understand to be, in practice, the established policy of the Lord Advocate.

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<sup>50</sup> *Ibid*, at 41.

<sup>51</sup> *Ibid*, at 48.

<sup>52</sup> *HMA v Stuurman* 1980 JC 111, per Lord Justice General Emslie, giving the opinion of the court, at 123.

6.47 We would also welcome comments on whether, if a broader test were to be implemented, this should be stated as applying to bar further prosecution on the basis of (a) substantially the same facts as the first prosecution, or (b) in respect of the same acts of the accused. The former is the test for the application of the English *Connelly* principle; the latter, the test which must be applied to those already tried in another EU member state. Our preliminary view is that the "same acts" test may be more appropriate: that test is already required by Schengen and, all other things being equal, the law would be clearer and simpler if there were two tests for double jeopardy rather than three.

6.48 We ask the following questions:

4. **In addition to a rule against trying a person again for an offence of which he has already been convicted or acquitted, should Scots law recognise a broader principle (enforceable by the courts) that a person should not be tried again:**
  - (a) **in relation to the same facts, or substantially the same facts, as gave rise to the earlier prosecution; or**
  - (b) **in relation to the same acts which gave rise to that prosecution?**
5. **If such a principle were to be recognised, should this be expressed:**
  - (a) **as a rule barring any such prosecution save in particular specified circumstances (for example, where the accused had himself sought a separation of trials);**
  - (b) **as a discretionary power of the trial judge to bar a second prosecution?**
6. **If the barring of a second prosecution arising out of the same facts (or same acts) is to be a matter for the discretion of the trial judge, should there be a presumption that the second prosecution will be barred unless the Crown can satisfy the judge that there are special circumstances justifying the separation of trials?**

### **Homicide Following Assault**

6.49 We noted in our discussion of the present Scots law that a person who has stood trial for assault may subsequently be tried for murder or culpable homicide if, following the verdict of the assault trial, the victim has died as a result of the assault. Authority establishes that this is so regardless of whether the verdict in the assault trial was one of guilt or acquittal.<sup>53</sup> In the case of *James Stewart*,<sup>54</sup> Lord Ardmillan reasoned that:

"... there never can be the crime of murder until the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of

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<sup>53</sup> *Isabella Cobb or Fairweather* (1836) 1 Swin 354.

<sup>54</sup> (1866) 5 Irv 310.

the injured person's death is not merely a supervening aggravation; but it creates a new crime."<sup>55</sup>

6.50 Approached from the perspective of the "in peril" test, Lord Ardmillan's reasoning is impeccable. It is clearly the case that the accused on trial for assault could not have been in peril of conviction for murder before the victim died. Lord Ardmillan appears also to have had in mind the principle that a person should not be tried again for an aggravated version of the same offence, and goes out of his way to comment that the "death is not merely a supervening aggravation, but . . . creates a new crime."<sup>56</sup>

6.51 Viewed from the perspective of the accused, the result is harsh. Having once been tried in relation to his (alleged) assault of the accused, he is then retried on the basis of precisely the same act. Nothing new need be averred about the circumstances of the assault; the only additional fact is the death of the accused (though the jury in the second trial will also have to be satisfied that the assault was performed with the *mens rea* of murder). The result seems particularly harsh where the assault charge resulted in an acquittal, since common sense suggests that an acquittal for assault is incompatible with conviction for murder arising out of that assault.

6.52 Other jurisdictions adopt a range of approaches to trial for homicide following a prior prosecution for the act which is alleged to have led to the death. English law allows such prosecutions, regardless of whether the first trial resulted in conviction or acquittal. The reasoning of the English courts is substantially identical to that adopted in Scotland; so, for instance, in a case where the accused was tried for manslaughter after a prior conviction for assault, Williams J remarked:

". . . the indictment for manslaughter is not a charge in a new form based upon the facts supporting the former charge, nor is it the former charge with the addition of matters of aggravation or of newly alleged consequences. It is a charge based upon new facts; and the circumstance that some of those facts have been made the basis of a former charge of a different class is immaterial. The difference is not of degree merely. The characteristic new fact here is the death. That death is a new fact, and not a mere matter of aggravation or a mere consequence, is plain from the consideration that in cases of manslaughter, where the charge is based upon death resulting from culpable negligence, there is no criminal offence unless death ensues and gives rise to a charge of manslaughter."<sup>57</sup>

6.53 Similarly, US law does not regard assault and homicide as the "same offense" in terms of the Double Jeopardy clause of the Fifth Amendment, where at the time of the first trial death had not yet ensued.<sup>58</sup> In New Zealand, the Crimes Act 1961 makes specific provision for trials for homicide following an earlier trial for an offence against the person of the deceased. If on the former trial the accused might, if convicted, have been sentenced to imprisonment for 3 years or upwards, the court must direct that the accused be discharged

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<sup>55</sup> (1866) 5 Irv 310 at 314.

<sup>56</sup> Cf, however, the dictum of Lord Justice General Clyde in *McAdam v HMA* 1960 JC 1 to the effect that non-capital homicide is effectively a form of aggravated assault.

<sup>57</sup> *R v Friel* (1890) 17 Cox CC 325 at 327; see too *R v Thomas* [1950] 1 KB 26.

<sup>58</sup> *Diaz v US* 223 US 442 (1912); this is an exception to the *Blockburger* rule, on a strict application of which the homicide prosecution would be barred by the earlier trial for a lesser included offence.

from the homicide indictment; if the first trial was for a less serious offence, the trial for homicide may proceed.<sup>59</sup>

6.54 In most Australian states and territories, it appears to be possible to try an accused for homicide following an earlier conviction for assault, but not following an earlier acquittal. The Criminal Codes of the Northern Territory, Tasmania and Queensland allow for the conviction and punishment of an accused for homicide where the death occurs after conviction for the act or omission which led to the death.<sup>60</sup> Each of these codes allows a trial for homicide following conviction of a lesser offence; trial for homicide following upon an acquittal is barred by the Codes' general provisions on double jeopardy,<sup>61</sup> and would also be barred by the common law doctrine that a prosecution which seeks to deny the accused the benefit of an earlier acquittal is to be stayed as an abuse of process.<sup>62</sup> Western Australia's Criminal Code contains no special provision for the death of the victim following a trial for assault, and a prosecution for homicide following such a trial would appear to be barred by its general rule against double jeopardy.<sup>63</sup>

6.55 Given the different approaches adopted to this question in other jurisdictions, we think that the decision as to whether trials for homicide following a prior acquittal or conviction for an offence arising out of the act or omission which caused the death should be permitted is ultimately one of policy. On the one hand, there is the important public policy that an accused should not be unduly harassed by successive trials; on the other, the concern that no-one should be permitted (quite literally) to get away with murder.

6.56 Similar issues may arise where the original prosecution is not for assault but from a statutory offence which does not infer evil intent. Two examples illustrate this possibility. First, imagine that in the case of *Beedie*,<sup>64</sup> the tenant's death had come after Beedie's conviction for the health and safety offence. Should the prosecution for manslaughter have been barred? Or consider the case of the driver, involved in a collision with a pedestrian, who is convicted of careless driving.<sup>65</sup> If the pedestrian then dies from injuries sustained in the collision, should the law allow the prosecution of the driver for culpable homicide, or for causing death by dangerous driving,<sup>66</sup> or for causing death by careless driving?<sup>67</sup>

6.57 Our preliminary view is that the rule against double jeopardy should not prevent the prosecution of a person for murder or culpable homicide where that person has previously been convicted of an offence involving the assault which is alleged to have resulted in the death of the victim, but that such a prosecution should be prohibited where the result of the first trial was acquittal.<sup>68</sup> We consider that the case for allowing a second prosecution is strongest where the first conviction was for an offence involving an assault against the victim, and seek comments on whether a second prosecution should be allowed in cases

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<sup>59</sup> Crimes Act 1961 (NZ), s 359(3); an equivalent provision here would be problematic, as Scots law does not have a fixed scale of sentences, the sentence for any common law crime being limited only by the sentencing power of the court before which the charge is brought.

<sup>60</sup> Criminal Code (NT), s 19; Criminal Code (Tas), s 11; Criminal Code (Qld), s 16.

<sup>61</sup> See Criminal Code (Qld) s 17; Criminal Code (Tas) s 355(1)(b); Criminal Code (NT) s 18.

<sup>62</sup> *R v Carroll* [2002] HCA 55; (2002) 194 ALR 1.

<sup>63</sup> Criminal Code (WA), s 17.

<sup>64</sup> [1998] QB 356, discussed at para 6.29 above.

<sup>65</sup> Contrary to s 3 of the Road Traffic Act 1988.

<sup>66</sup> Contrary to s 1 of the Road Traffic Act 1988.

<sup>67</sup> Contrary to s 20 of the Road Safety Act 2006.

<sup>68</sup> Cf para 2 of the Commentary to *Tees v HMA Advocate* 1994 SCCR 451 at 548.

where the first offence does not disclose any evil intent towards the victim, as in the examples given in the preceding paragraph.

6.58 We ask the following questions:

7. **Should Scots law continue to permit the trial of a person for murder or culpable homicide where that person has previously been tried, prior to the victim's death, for an offence involving an assault against the victim?**
8. **If so, should the second prosecution be permitted regardless of whether the result of the first trial was conviction or acquittal, or only in cases in which the accused was convicted at the first trial?**
9. **Should Scots law permit the trial of a person for culpable homicide, or for a statutory offence of unintentionally causing death, where that person has previously been tried, prior to the victim's death, for an offence relating to the act or omission which is alleged to have caused the death?**
10. **If so, should a second prosecution be permitted only where first trial concluded in a finding of guilt?**

#### **The need for a valid first trial**

6.59 It may be suggested that if one of the principal functions of a rule against double jeopardy is to protect the accused from the stress of repeated trials, then it should not matter if the first trial was defective: a defective trial, upon which the accused faced no risk of a valid conviction, may be quite as stressful as a trial upon which the accused might validly have been convicted.

6.60 However, one of the settled features of the present Scots law is the requirement that, in order to ground a plea of *res judicata*, the first proceedings must have been valid.<sup>69</sup> The same requirement applies in all of the legal systems which we have surveyed. (Analytically, this is what one would expect: double jeopardy cannot arise where the accused was never truly in jeopardy at the first trial).

6.61 We analyse this question in terms of the two values already identified, namely respect for finality of verdicts and protection of the accused from the distress of multiple proceedings. It is clear that respect for finality of verdicts does not require that there should be no further proceedings following a first trial which was a fundamental nullity, since in law there was no first trial and no legal verdict. Indeed, the principle that it is for the courts, through their proper process, to resolve questions of criminal liability argues in the other direction; if the first proceedings were not validly conducted, they did not (by definition) resolve the criminal accusation according to law, and respect for the legal process may be seen to demand that the accusation be considered in a valid trial.

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<sup>69</sup> See paras 3.29-3.30 above.

6.62 If, however, one regards the most important concern as being the protection of the accused from the stress of multiple proceedings, then there does seem to be a case for preventing repeated proceedings where the first proceedings, despite having proceeded to what seemed to be a conclusion (by the delivery of a verdict or desertion *simpliciter*) are discovered to have been a nullity. We think it plain that there cannot be a rule that a purported verdict in an invalid first trial will always bar further proceedings, but it may nevertheless be appropriate for the court to be able to bar such proceedings, in particular cases, where the defect in the original trial is not attributable to the fault of the accused and such further proceedings would place him under unnecessary strain.<sup>70</sup>

6.63 We ask the question:

11. **Should a court have power to bar further proceedings in relation to a charge which has been the subject of prior criminal proceedings which ended in an apparent verdict but which were later discovered to have been fundamentally null?**

## OTHER ISSUES

### Should a sentence be required?

6.64 As we noted in Part 3, there is presently some uncertainty about whether a verdict of guilt, or the acceptance of a guilty plea, must be followed by sentence before a second trial will be barred. The Scottish authorities as they stand suggest that in summary proceedings, a plea of *res judicata* may be based upon the acceptance of a guilty plea by the prosecutor, regardless of whether any sentence or penalty has been imposed and, in solemn procedure, such a plea will fall to be sustained where the trial has been concluded by a determination by the jury of guilt or innocence.<sup>71</sup> However, there is one case – *Pattinson v Stevenson*<sup>72</sup> – which suggests that the acceptance by the prosecutor of a guilty plea in solemn proceedings before the jury is empanelled will not ground a plea of *res judicata*. As we noted in paragraph 3.25 above, it has been doubted whether *Pattinson* is good law; certainly, we find it hard to see why the position of the accused who pleads guilty to a charge on indictment should be any different from that of the accused who pleads guilty to a charge on complaint. We suggest that the rule should be the same regardless of whether solemn or summary procedure applies.

6.65 It is one thing to say that the rule should be the same under solemn and summary procedure, and quite another to say what the rule should be. Here, there are two possibilities: either protection against double jeopardy on the basis of a prior conviction arises following the determination of guilt, by verdict of the court or acceptance of a guilty plea, or it arises only when the determination of guilt is followed by the imposition of a sentence. In the Jamaican case of *Richards v The Queen*,<sup>73</sup> the Judicial Committee of the Privy Council held that the underlying rationale of the plea of *autrefois convict* was to protect against duplication of punishment, and so the plea did not arise where conviction was not

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<sup>70</sup> A similar issue arose in *Island Maritime Ltd v Filipowski* (2006) 228 ALR 1, where the High Court of Australia concluded that a further trial following initial proceedings erroneously brought under an inapplicable statutory provision did not constitute an abuse of process.

<sup>71</sup> See paras 3.24-3.25 above.

<sup>72</sup> (1903) 4 Adam 124.

<sup>73</sup> [1993] AC 217 (PC).

followed by sentence. On the other hand, there may still be a value in protecting even the guilty from multiple proceedings, and merit in allowing double jeopardy protection to arise regardless of whether conviction is followed by sentence. It seems to us that the point is a narrow one, and unlikely often to be of practical importance: generally, the acceptance of a guilty plea, or a finding of guilt by a jury, will be followed by sentence. Our preliminary view is that it is better to err in favour of protecting the accused from successive trials and to recognise the rule against double jeopardy on the basis of a prior conviction as applying wherever a plea of guilty has been accepted by the prosecution, regardless of whether a sentence follows.

6.66 We ask the question:

- 12. Should the rule against double jeopardy apply to bar a subsequent prosecution where there has been a finding of guilt, or the acceptance by the prosecutor of a guilty plea, regardless of whether sentence has been imposed?**

### **Decisions on relevancy**

6.67 Another anomaly which we recognised in our discussion of the existing law<sup>74</sup> is the line of authority which holds that the High Court of Justiciary will not be bound by a decision of the sheriff on the relevancy of an indictment – that is, the legal question of whether the terms of the indictment disclose a crime known to the law of Scotland. In the case of *George Fleming*,<sup>75</sup> the High Court accepted an indictment which had been held irrelevant by the sheriff, holding that the High Court could not "be held bound by the decision of an inferior judge".<sup>76</sup>

6.68 It may be that this decision was appropriate to the mid-nineteenth century; even if so, it is clearly inappropriate today. The 1995 Act requires preliminary pleas, including a plea to the relevancy or competency of the indictment, to be dealt with at the first diet or at a preliminary hearing, and provides for appeals to the High Court, with leave of the court of first instance, against a decision at any such diet or hearing.<sup>77</sup> Simply re-laying an indictment which has been found irrelevant by the sheriff before the High Court would be incompatible with this statutory appeal: if the prosecutor wishes to take issue with the sheriff's decision on a preliminary plea, he should be required to do so via the statutory appeal route. We are confident, given the existing provisions of the 1995 Act, that the High Court would now regard decisions of the sheriff on relevancy as binding on it, except where those decisions had been reversed on appeal.

### **The status of foreign verdicts**

6.69 A restatement of the law of double jeopardy should also clarify the status of foreign verdicts. The Schengen Convention obliges the United Kingdom to respect criminal judgments obtained in other Member States; but what about prior proceedings in non-EU States?

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<sup>74</sup> At para 3.12 above.

<sup>75</sup> (1866) 5 Irv 287.

<sup>76</sup> *Ibid*, per Lord Cowan at 292.

<sup>77</sup> 1995 Act ss 71(2), 72(3), 74(1) and 79(1), (2).

6.70 If the rule against double jeopardy is justified by the accused person's interest in finality, and by the desire to avoid repeatedly subjecting individuals to the stress of the criminal process, then it should not matter where the original proceedings took place. In principle, then, we would suggest that foreign verdicts should be treated for the purposes of a rule against double jeopardy in broadly the same manner as domestic verdicts.

6.71 However, it must be recognised that there may be cases in which it would be inappropriate to allow a foreign verdict to bar a Scottish prosecution for the same offence. The transnational *ne bis in idem* rule which applies under the Schengen Convention is said to have its basis in the mutual trust and recognition between Member States of the EU; while the legal systems of Member States may differ, each is held to have a fundamental trust in the validity of the others' systems. This assumption of trustworthiness cannot be made in relation to all states, for two reasons. First, it is, regrettably, a fact that corruption is prevalent in many parts of the world, and there may sometimes be good grounds for believing that a purported trial was aimed at shielding the accused from responsibility for his crimes rather than at calling him to account for them. Second, problems may arise where there is too great a divergence between the foreign system and our own, either in terms of procedure or of substantive law.

6.72 We doubt whether it would be either practicable or appropriate to have a defined list of countries whose courts' judgments should be recognised for the purposes of the Scottish rule against double jeopardy. Rather, our preliminary view is that all foreign judgments should be respected, save where the Scottish court is satisfied that it would be inappropriate to do so. An appropriate precedent may be that provided by Article 20(3) of the Rome Statute on the International Criminal Court, which allows the trial of an accused, despite a prior trial on the same facts, where the first trial was in a different jurisdiction and was designed to shield the suspect from prosecution elsewhere, or was not independent, impartial or consistent with an intent to bring the perpetrator to justice.

6.73 We would welcome comments on the following proposal:

- 13. A verdict of conviction or acquittal by a foreign court should bar a subsequent prosecution in Scotland in respect of the same acts which gave rise to the first prosecution; but the Scottish court should be permitted to disregard an acquittal or conviction in a foreign jurisdiction where it is satisfied that it is in the interests of justice to do so. In considering whether to disregard the foreign verdict, the court should have regard to whether it appears that the foreign proceedings**
  - (a) were held for the purpose of shielding the accused from criminal responsibility;**
  - (b) were not conducted independently or impartially; or**
  - (c) were conducted in a manner which was inconsistent with an intent to bring the perpetrator of the alleged offence to justice.**

## Part 7 Possible exceptions to the core rule against double jeopardy

7.1 In Part 6 we asked whether the rule against double jeopardy should be enacted in clear statutory terms. In this part of the paper we look at whether exceptions should be made to the rule. The two specific matters considered are first, whether there should be exceptions to the rule where an acquittal is in some way tainted and, second, whether there should be general exceptions to the rule on the basis of new or fresh evidence (however defined). There is separate consideration of the question of whether the actings of the person acquitted could justify a retrial.

### General

7.2 The rule against double jeopardy derives from a variety of aspects of the public interest. As an instance of the general principle of *res judicata*, it reflects the considerations of public policy, equity and common sense which underpin the finality principle in civil litigation.<sup>1</sup> As a matter of humane administration, it prevents the citizen from being twice exposed to the stress and anxiety of a criminal trial for the same offence.<sup>2</sup> And, perhaps as a corollary to that second consideration, it ensures that the acquitted person can carry on with his life without the threat of possible further proceedings for the same offence hanging over his head.<sup>3</sup> Apart from these more practical considerations, the social and constitutional virtue of the rule may be seen in its affirmation of the position of the individual citizen in relation to the state.

7.3 Of course the rule operates – and has always been known to operate – so as to protect a person who has actually committed the offence of which he has been acquitted – a "factually guilty" person – as well as a person who has not committed the offence – a "factually innocent" person. The law has always recognised that it can at times be extremely difficult, if not impossible, to determine whether or not a person is factually guilty. Instead, the law proceeds on the assumption that everyone is innocent until proven to be guilty. While the presumption of innocence is made to protect and preserve the position of the factually innocent, a factually guilty person may also benefit from the presumption. Any decision to alter the rule against double jeopardy involves at least two issues: (i) whether there is evidence that a change will produce more convictions of factually guilty persons and (ii) whether any increase in convictions outweighs diminishing the protection which the rule affords the factually innocent citizen. There are a number of options.

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<sup>1</sup> Cf the dictum of Lord President Cooper in *Grahame v Secretary of State for Scotland* 1951 SC 368 at 387, quoted at para 2.9 above.

<sup>2</sup> Hume, ii, 465: "... [T]he panel can never again be challenged or called in question, or made to thole an assize . . . on the matter or charge that has been tried. The ground of which maxim lies in this obvious and humane consideration, that a person is substantially punished, in being twice reduced to so anxious and humiliating a condition, and standing twice in jeopardy of his life, fame, or person."

<sup>3</sup> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity" *Green v United States* 355 US 184 (1957), per Black J at 187-188.

## Simple abolition

7.4 For the reasons given earlier in this Paper,<sup>4</sup> we do not consider further the option of a simple abolition of the rule against double jeopardy. In that connection we note that the reference to this Commission followed the collapse of the proceedings in the World's End prosecution. In that particular case there seems little prospect of new evidence becoming available; such assistance as could be derived from advances in science was already in the hands of the Crown before the trial began. For the purposes of that case, therefore, it would seem that nothing short of a complete abolition of the rule against double jeopardy would suffice to permit a retrial.<sup>5</sup>

## Tainted acquittals

7.5 It would be possible to make an exception to the rule where some offence against the administration of justice has occurred in the original proceedings, and has skewed the process so as to lead to the possibility that a wrong verdict has been delivered. In those circumstances it could be said that the acquittal is "tainted" and has no effect for the purpose of the rule. Consequently, the rule should not afford any protection against a retrial.

7.6 We deal below with the question of perjury by the accused. The more general kind of tainted acquittal will result from cases in which the process has allegedly been subverted or perverted by someone bribing or threatening witnesses, jurors or, in extreme cases, the judge. Such an interference with the trial process raises the question of whether there has been a valid trial at all. An acquittal which has been obtained through some criminal act directed at the proper functioning of the judicial system can scarcely attract the protection of the double jeopardy rule. The whole basis of the plea of *res judicata* rests upon a proper decision reached in accordance with the relevant rules. There can be no public interest in recognising finality in a judgment produced otherwise than in accordance with those rules. Since the principle relies partly at least upon equitable considerations, it seems inequitable to allow an accused person who has, directly or indirectly, skewed the process to claim that he was in fact in jeopardy of a conviction. Even in the United States, where the rule against double jeopardy is a constitutional right, exceptions have been made for cases in which the trial process has been subverted.

7.7 For example, in *Aleman v Honorable Judges of Cook County*,<sup>6</sup> it was alleged that, in 1977, a man accused of murder had bribed a County Court Judge to acquit him. In 1993, after evidence of the bribery had emerged, he was re-indicted on the murder charge, and pled the 5<sup>th</sup> Amendment bar on double jeopardy, pointing to a series of decisions in which the Supreme Court had held that an acquittal on a charge unequivocally bars retrial on that charge. The United States Court of Appeals for the Seventh Circuit said:

"The Illinois courts viewed the authority cited by Aleman as begging the question; the Double Jeopardy rule may well be absolute when it applies . . . but determining if it applies is the real issue in this case. Similarly, the State argues that the protections of the Double Jeopardy Clause only extend to a defendant who was once before in jeopardy of conviction on a particular criminal charge; the State contends that, by bribing Judge Wilson, Aleman created a situation in which he was never in jeopardy

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<sup>4</sup> Part 2, paras 2.20-2.40; Part 5, paras 5.3-5.6.

<sup>5</sup> Although there is always the possibility that the accused might later confess: cf paras 7.26-7.30 below.

<sup>6</sup> *Aleman v Honorable Judges of the Circuit Court of Cook County*, 138 F.3d 302 (7<sup>th</sup> Cir, 1998).

at his first trial. The first trial, therefore, was a sham and the acquittal there rendered has no effect for double jeopardy purposes. Under this theory, the State was free to re-indict him because he has never been in jeopardy of conviction on the Logan murder charge."<sup>7</sup>

The Court went on to hold that:

"To allow Aleman to profit from his bribery and escape all punishment for the Logan murder would be a perversion of justice, as well as establish an unseemly and dangerous incentive for criminal defendants. . . For these reasons, we affirm the district court's rejection of the double jeopardy claims contained in Aleman's petition."<sup>8</sup>

7.8 While extreme cases such as *Aleman* excite natural sympathy for the position taken by the court, matters are rarely so clear-cut, and it is necessary to consider carefully whether they found a sound basis for departing from the rule. It may be useful to examine the matter by way of an example. In England and Wales there has been a rule enabling retrial following a tainted acquittal since 1996. Sections 54 to 57 of the Criminal Procedure and Investigations Act 1996 provide that where it appears that an acquittal has been obtained following some interference with the course of justice<sup>9</sup> it should be possible to try the accused person again. The Act provides, broadly, for a three stage process. First, it is necessary for the offence against the administration of justice to be proved by the conviction of the person responsible (who need not be the person originally acquitted). Second, the court which deals with the administration of justice offence has to certify that there *is a real possibility* that, had it not been for the commission of that offence, the accused would have been convicted. Third, on the basis of that certificate, an application may be made to the High Court for an order quashing the original acquittal and authorising a retrial. Before the High Court can make such an order, it must be satisfied that, had it not been for the administration of justice offence, *it is likely* that the acquitted person would not have been acquitted.<sup>10</sup> The High Court must also consider that a new trial would not otherwise be contrary to the interests of justice. (While these provisions are not retrospective, they have been in force since July 1996. So far as appears from the case reports, they have not yet been used.)

7.9 These are important safeguards. The fact that any second prosecution can only follow upon a successful prosecution for an administration of justice offence, and a decision by the court as to the likely effect of that offence upon the result of the previous trial, must largely remove the possibility of these provisions being a threat to those who have been acquitted following a valid trial. Further, we are conscious of the possibility that organised gangs might well seek to subvert the criminal justice process. A properly constructed exception to the rule against double jeopardy on the basis of interference with the administration of justice is one of the ways in which such activity can be discouraged.

7.10 It appears to us that all the stages of the process are important. First, the allegation that there has been some attempt to subvert the process in the original trial must be properly proved. The conviction of those responsible for that must be the correct standard. But that

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<sup>7</sup> *Ibid*, at para 19.

<sup>8</sup> *Ibid*, at paras 22-23.

<sup>9</sup> The administration of justice offences are listed in s 54(6), and include perverting the course of justice, and intimidation etc. of witnesses.

<sup>10</sup> Criminal Procedure and Investigations Act 1996, ss 54(2)(a), 55(1).

in itself is not enough. While it must always be proper for offences against the administration of justice to be pursued vigorously, it does not follow that a conviction for such an offence will demonstrate that the wrong verdict was reached in the trial. For example, where a witness has been paid to give false evidence, is caught out during the trial in some erroneous statement, and effectively admits, during cross-examination, that he has lied on oath, it may well be appropriate to prosecute him for perjury, and his paymaster with an attempt to pervert the course of justice. But it would be difficult to see how that evidence, exposed as fallacious in the original trial, could have influenced the jury's decision to acquit. The accused would have been acquitted in spite of the administration of justice offence, rather than because of it.

7.11 Accordingly, the second element in the process, that the offence against the administration of justice must have contributed to the allegedly wrongful acquittal, also appears to be necessary. As noted in paragraph 7.8 above, the Westminster legislation requires that the court which tries the offence against the administration of justice should certify that it appears to that court that there was a "real possibility" that, but for the commission of that offence, the outcome of the first trial would not have been acquittal. Thereafter, for a new trial to be authorised, it must appear to the High Court "likely that, but for the interference or intimidation, the acquitted person would not have been acquitted."

7.12 So far as the third element is concerned, there are a number of considerations including, but not limited to, the lapse of time since the original trial, which might make it unjust to prosecute for a second time the person originally accused. Some discretion should be left to the court in that regard.

7.13 These second and third elements raise the question, which occurs below in relation to retrials where there is in fact new evidence, of the role of the court in quashing an acquittal and authorising a retrial. Against what standard should the court test the allegation that the interference with the previous trial may have affected the result? Should it be that the interference may possibly have affected the result, or that, on a balance of probabilities, it did so, or that the court is satisfied beyond a reasonable doubt that it did so?

7.14 Whatever standard the court is required to apply, there is clearly a risk that the court's view will become known to the jury in any subsequent trial. But there is no reason why, if appropriate precautions are taken as to publicity, that that should be so. Even if the fact does become known, it can be counter-balanced by appropriate directions from the trial judge.

7.15 We would accordingly ask the following questions:

14. **Should there be an exception to the rule against double jeopardy where the previous acquittal has been "tainted" by some offence against the administration of justice in relation to the original trial?**
15. **If so, should a retrial require to be authorised by a court following a conviction of someone for such an offence?**

16. **Should the process leading to the authorisation include, in addition to the conviction of someone for such an offence, a judgment by the court that the offence had a significant effect on the result of the previous trial?**
17. **In that connection, what test should the court be required to apply?**
18. **Whatever tests the court should be required to apply, should the court have an overriding discretion to refuse to authorise a retrial where a refusal appears to the court to be in the interests of justice?**
19. **Should steps be able to be taken to limit publication of the result of the court's consideration, with a view to preventing publication of that result influencing the jury in any subsequent trial?**

*The scope of a "tainted acquittal" exception*

7.16 If an exception were to be made in relation to "tainted acquittals", there would then arise a further question as to whether an exception for tainted acquittals should apply to all acquittals, or only to acquittals on serious charges.

7.17 In principle, there seems no reason why there should be any restriction on the cases to which the exception should apply. It is important that the administration of justice should proceed properly in relation to less serious as well more serious offences. If it is in the public interest for any prosecution to go ahead, then it must equally be in the public interest for that prosecution to proceed without interference. The subversion, or attempted subversion, of the administration of justice is itself a very serious offence. That offence could and no doubt would be prosecuted, in appropriate cases, even if no retrial was possible.

7.18 But if someone were prepared to commit that offence in relation to what might be considered a relatively unimportant original offence, and the interference had in fact skewed the result, it would be difficult to say that it was not in the public interest for there to be a retrial conducted without interference. For example, if a person accused of driving with more than the prescribed amount of alcohol in his blood had successfully escaped conviction by bribing a chemist to misrepresent the results of the analysis, there seems no reason why the original prosecution should not be repeated after the prosecution for suborning a witness.

7.19 Indeed, if there were a suggestion that the exception should be limited in some way, that would be a matter of some difficulty. In a system such as ours, where a very large number of common law offences are in theory punishable with life imprisonment, it is difficult to define a category of offences to which some such exception should apply by reference to the seriousness of the offence, or to the punishment which could potentially be imposed. On the other hand, there is a practical standard applied by the prosecution authorities, who prosecute offences in the High Court or the Sheriff Court by reference to the sentence which they envisage will be imposed in the event of a conviction. If it were thought necessary to have some limit on the number of cases to which an exception should apply, then perhaps the exception to the rule against double jeopardy could be confined to cases prosecuted in the High Court of Justiciary.

7.20 In some jurisdictions consideration has been given to the question of whether a retrial may be ordered if it cannot be established that the accused person was in some way

personally involved in the perversion of the course of justice. On one view, it would be unfair to try him again if he had not been responsible for, or in some way participated in, the criminal acts which led to the perversion of the original trial process. If the accused had not been involved, he would have believed himself to be in jeopardy, and would have suffered all the anguish so eloquently referred to by Hume.<sup>11</sup> It appears to us to be inherently unlikely that any deliberate attempt to pervert the course of justice will be made otherwise than to benefit the accused, even if it has been made, or is said to have been made, without his direct knowledge or connivance. In any event, regardless of the accused's knowledge or complicity, the acquittal would still have been tainted.

7.21 We invite views on the following questions:

- 20. If there is to be an exception to the rule against double jeopardy on the basis of a tainted acquittal, should it apply to all cases, or should it be limited?**
- 21. If some limitation is thought desirable, how should it be defined?**
- 22. Should it be possible to authorise a retrial following a tainted acquittal in a case where it is established that the accused played no part in the offence against the administration of justice which affected the original trial?**
- 23. If not, how is the non-participation of the accused to be established?**

### **Actings by the original accused**

7.22 It appears to us that actings – and in particular statements – by the original accused fall into a distinct category, and deserve particular consideration. There are two separable issues here. The first is whether untruthful statements by the accused at the original trial should justify his prosecution for perjury. The second is a particular aspect of the discussion, below, of the general question of retrials on the basis of new evidence: it is whether a confession or admission by the original accused, subsequent to the original trial, should justify a retrial.

#### *Perjury in evidence by the original accused*

7.23 Where the accused person is alleged to have perjured himself at his original trial, there is a question as to whether it is proper to charge him with that offence, proof of which will probably throw doubt on the verdict in the original trial.<sup>12</sup> We note that most legal systems do not consider that the rule against double jeopardy prevents the trial of a person for perjury at an earlier trial at which he was acquitted.

7.24 The Canadian case of *Gushue v R*<sup>13</sup> established that public policy prevented issue estoppel being available to the accused who was charged with making contradictory statements with intent to mislead the court after having been acquitted of murder. *Grdic v*

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<sup>11</sup> Hume, ii, 465.

<sup>12</sup> There is a discussion of that matter in relation to Scotland at paragraph 3.40-3.42.

<sup>13</sup> [1980] 1 SCR 798.

*R*<sup>14</sup> further held that relitigation of issues will not be prevented when there is evidence of fraud in the determination of those issues at an earlier trial, so long as there is fresh evidence which was not available at the first trial. The position in the United States is that a previous trial will not bar a subsequent trial for perjury which is related to the original offence, since "perjury at a former trial is not the same offense as the substantive offense" so double jeopardy does not apply.<sup>15</sup> In *DPP v O'Connor*,<sup>16</sup> an Irish case, the decision to stay proceedings for perjury and conspiracy to pervert the court of justice following the accused's acquittal of the earlier, related offence was overturned because the judge was satisfied that the prosecution was not trying to 'get behind' the original acquittal verdict nor attempting to re-try the first case. It was deemed important that the prosecution was relying on fresh evidence which was not available at the time of the first trial. Similarly, in the Scottish case of *HMA v Cairns*,<sup>17</sup> a charge of perjury was allowed to stand, despite the accused being acquitted of the previous, connected offence of murder. The court reached this decision on the basis that the crime of perjury was a different crime from murder. In Australia, by contrast, in the case of *R v Carroll*,<sup>18</sup> the High Court upheld a lower court's decision to stay perjury proceedings against Carroll on the basis that it would controvert his earlier acquittal for murder. It was the outcry following the perceived injustice of this approach which led to the Australian decision to provide in statute for prosecution for administration of justice offences committed in connection with a previous acquittal, when there is fresh evidence of the commission of such an offence.

7.25 It would appear that the present law is consistent with practice in most other jurisdictions. We propose:

- 24. It should continue to be possible to prosecute a person for perjury where there is evidence that he committed perjury in giving evidence on his own behalf in prior criminal proceedings.**

*Subsequent confession/admission by acquitted person*

7.26 The second aspect of the actings of the original accused, which may be seen as a subset of the consideration of retrials on the basis of new evidence, is the case where the new evidence comprises a confession or admission by the acquitted person. There have been a number of cases in which the accused has subsequently admitted his guilt of the original offence. We understand that in the case of *Cairns*,<sup>19</sup> the accused, no doubt relying on the rule against double jeopardy, boasted in a public house of how he had committed the crime. In other cases the admission has been to cell-mates, or friends; and there is no doubt the possibility of some religious conversion.

7.27 However it may come about, such a confession appears to us to be qualitatively different from other forms of possible new evidence, and from the considerations in relation to tainted acquittals. One of the parties to the original proceedings is admitting that the basis upon which those proceedings were conducted by him or on his behalf was simply wrong.

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<sup>14</sup> [1985] 1 SCR 810.

<sup>15</sup> *US v Williams* 341 US 58 (1951) at para 62.

<sup>16</sup> *DPP v O'Connor* (HC) unreported, 13 July 1994 (as noted in Paul A McDermott, *Res Judicata and Double Jeopardy* (2<sup>nd</sup> edn, 2007) at 282-283).

<sup>17</sup> 1967 JC 37.

<sup>18</sup> [2002] HCA 55; (2002) 194 ALR 1.

<sup>19</sup> 1967 JC 37.

To the extent that the rule against double jeopardy is based on equitable considerations, it would be inequitable to allow the acquitted person to claim the benefit of the rule if he was at the same time admitting that he had committed the offence.

7.28 We suggest in Part 2 of this Paper that the principal rationale for the rule against double jeopardy is a combination of finality in criminal proceedings and the right of the innocent citizen not to be permanently at risk of repeated prosecutions. It is difficult to see how either of those justifications would be offended by the retrial of a person who had credibly admitted or confessed to the crime of which he had been acquitted.

7.29 It is of course the case that not all confessions or admissions are credible, and appropriate safeguards would no doubt be necessary to ensure that the statement was properly established, and true. But, as a general proposition, we would suggest that it would be legitimate to have an exception to the rule against double jeopardy where an acquitted person subsequently admitted his guilt.

7.30 We consider the English provisions for retrial on the basis of new evidence later in this Part. We note that the only two cases which have so far been considered under those provisions have been cases where the acquitted person has subsequently confessed. We would accordingly ask the question:

- 25. Should there be an exception to the rule against double jeopardy in the case of an acquitted person who subsequently admits that he has committed the crime of which he has been acquitted?**

#### **Exceptions on the basis of "fresh/new/compelling" evidence**

7.31 As we indicated at the beginning of this Part, the current rule against double jeopardy, which has in essence been adopted by all modern legal systems, reflects part of the balancing of different aspects of the public interest. There is a public interest in the efficient and effective prosecution of crime. There is a public interest in finality in legal proceedings, criminal as well as civil. There is a public interest in recognising and maintaining the right of the innocent citizen who has been acquitted of a crime to carry on with his life free from the risk of repeated prosecution.

7.32 We have already said that simple abolition of the rule, so as to permit a retrial on the same evidence as was led at the original trial, is not something which we would recommend, and which would in any event certainly be incompatible with the United Kingdom's international obligations. Any general exception to the rule on the basis of new evidence would devalue the concept of finality which is reflected in the plea of *res judicata*. It would also diminish the position of the citizen in relation to the state.

7.33 Leaving aside the case where the previous acquittal is called into question by the actings of the accused person, the general issue is whether a retrial on the basis of new evidence should be permitted at the instance of the prosecutor, either at his own instance or by way of authorisation by the court. Given the fundamental importance of the rule against double jeopardy, we suggest that it would be necessary to find some substantial justification for such a departure from the current position: some compelling evidence that significant numbers of factually guilty persons are escaping justice because of the rule.

7.34 In that connection the experience in England and Wales is of interest. During consideration of what subsequently became Part 10 of the Criminal Justice Act 2003,<sup>20</sup> much was said of the importance of the proposed change. The Select Committee on Home Affairs, which heard evidence on the issue in the spring of 2000, was told by the police that there were as many as "35 murder investigations where the police have closed the file because the suspected offender has been acquitted".<sup>21</sup> The "new evidence" provision which was inserted into the legislation was wide enough to include, in some circumstances, evidence which had been available, but simply not led, at the original trial.

7.35 One of the justifications which is mentioned for a change in the rule is the emergence of new technology, such as DNA evidence, which in appropriate cases provides much stronger evidence as to the identity of persons involved in crimes. It may be that among the cases which prosecutors would wish to revisit there are some which might depend on DNA evidence. Or it may be that fingerprint technology will be advanced by some new discovery, so that accurate comparisons will be able to be made on the basis of fewer similar characteristics. Either of these instances might enable cases of acquittals to be re-examined.

7.36 In fact, the only two cases which have been raised to date under the Criminal Justice Act 2003 have been cases in which the only "new evidence" was a subsequent admission by the acquitted person. Only one of those actually resulted in a conviction for the original murder.<sup>22</sup>

7.37 We would not regard the experience in England and Wales as supplying the compelling evidence which would justify a general departure from the rule against double jeopardy. It would seem that an exception for admissions made by the acquitted person would cover all the cases which have actually occurred.<sup>23</sup>

7.38 Nevertheless, there can be no doubt that the Westminster legislation has had a marked effect on the position of everyone who has been acquitted of an offence to which the new legislation applies. Each of them is now at risk of further prosecution. The nature of the protection afforded by the rule against double jeopardy has materially changed. Prior to the enactment of Part 10 it was a rule which effectively prevented them from being harassed by the police or prosecution authorities in relation to the earlier offence. It is no longer an absolute rule. The protection which the rule previously conferred upon the acquitted person is substantially diminished.

7.39 We are not aware of any modern Scottish case in which the existence of the rule has operated so as to prevent, or apparently to prevent, the bringing to justice of a criminal. But that is a question upon which we invite comment. We do not know whether police and/or prosecutors have a list of cases which they would wish to revisit, and where new evidence has emerged which in their view would or might lead to a conviction.

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<sup>20</sup> A detailed note on the operation of Part 10 is attached as Appendix 3, and the text of Part 10 is set out in Appendix 4.

<sup>21</sup> Select Committee on Home Affairs, Third Report, HC 190 (2000) at paragraph 20.

<sup>22</sup> *R v Dunlop* [2006] EWCA Crim 1354; [2007] 1 WLR 1657. In *R v Miell* [2007] EWCA Crim 3130; [2008] 1 WLR 627 the prosecution's application was refused. See Appendix 3.

<sup>23</sup> Cf paragraphs 7.26-7.30 above.

7.40 Even if there were such cases, this might not necessarily justify an alteration to the rule. The rule exists principally for the two purposes which we identified in Part 2 – the securing of finality in criminal proceedings, and the protection of the innocent citizen from repeated prosecutions.

7.41 We therefore ask the question:

**26. Should there be an exception to the rule against double jeopardy on the basis of new evidence?**

**Possible restrictions on a new evidence exception**

7.42 In this section we consider the appropriate scope of any new evidence exception and the conditions which might apply to its operation.

*To what offences might an exception apply?*

7.43 The Law Commission recommended<sup>24</sup> that any exception should apply only to a very narrow range of offences.<sup>25</sup> The Criminal Justice Act 2003, as enacted, included a wide range.<sup>26</sup> In Scotland, the considerations identified in paragraphs 7.16 to 7.19 will apply equally to any attempt to fix a class of offences to which any exception should apply. But it may be more acceptable, in the case of retrial on the basis of new evidence, to seek to confine the exceptions to particularly serious offences. In this case it may be appropriate to limit any exception to cases which, at least by reference to the court in which they have been tried, fall into the more serious category. We would accordingly invite comment on whether any exception should apply to specified offences, or whether it should apply, perhaps, to any offence where the original trial was in the High Court.

**27. Should any exception to the rule against double jeopardy be available only in relation to cases prosecuted in the High Court of Justiciary; if not, on what basis should the exception be formulated?**

*Time limit*

7.44 The next question is whether any exception should be retrospective. If part of the rationale for an exception is to be the availability of new technology which might provide convincing proof of a matter which was previously uncertain, then a time limit would appear to be inappropriate. On the other hand, as we have observed, the only cases in which the procedures in Part 10 of the 2003 Act have been used are cases where the new evidence was an alleged admission by the acquitted person. We have already discussed whether that should form a discrete exception to the rule. We accordingly ask the question:

**28. If there is to be a general exception to the rule against double jeopardy on the basis of new evidence, should the exception be retrospective?**

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<sup>24</sup> Law Com No 267 (2001), at para 4.42.

<sup>25</sup> Murder and genocide consisting in the killing of any person; *ibid.*

<sup>26</sup> As set out in Schedule 5 to that Act; see Appendix 4.

*What evidence would be "new"?*

7.45 Leaving aside considerations of principle, and the lack of evidence that such a change would result in a significant number of acquitted persons being retried, there is also difficulty in deciding what may be meant by "new" or "fresh" evidence. As noted elsewhere in this Paper, Article 4 of Protocol 7 to the European Convention on Human Rights provides:

"Article 4 – Right not to be tried or punished twice

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

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

3 No derogation from this Article shall be made under Article 15 of the Convention."

7.46 It is relatively easy to give substance to the reference to fundamental defects. It might well cover the kind of tainted acquittal exception which we discuss above. Some of the other concepts in the Article are more difficult. The distinction between the prohibition on retrying a case, in paragraph 1, and "reopening a case", in paragraph 2, is not immediately apparent, although it may be that the discussion on the position in Germany in Part 4 sets out the situation for continental systems. It is not a concept which is readily comprehensible in the context of an adversarial system such as ours. Nevertheless, on the assumption that the Article were to be ratified by the UK Government, it would be necessary to give some effect to it. As an exception to the general rule set out in Article 4(1), it could not justify a simple retrial of the acquitted person on the basis of the same evidence. It might be taken as justifying such a retrial where there is new evidence.

7.47 It appears from the explanatory report<sup>27</sup> that "evidence of new or newly discovered facts . . . which could affect the outcome of the case" was intended to include new means of proof relating to previously existing facts.<sup>28</sup> That might well cover evidence which has emerged as a result of scientific discovery, such as DNA evidence in recent years, or fingerprint evidence in the past. We might surmise that "new facts" is a reference to evidence as to the offence which has always been in existence, but not known to the

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<sup>27</sup> Explanatory Report prepared by the Steering Committee for Human Rights in relation to Protocol 7 (ETS No 117), available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm> (accessed 30 December 2008).

<sup>28</sup> At paras 30 to 31, the Explanatory Report states:

"30. A case may, however, be reopened in accordance with the law of the State concerned if there is evidence of new or newly discovered facts, or if it appears that there has been a fundamental defect in the proceedings, which could affect the outcome of the case either in favour of the person or to his detriment.

31. The term "new or newly discovered facts" includes new means of proof relating to previously existing facts. Furthermore, this article does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person."

prosecutor or police. An example might be an eye-witness of whose presence no-one was aware, and who for some reason was not prepared to come forward for the original trial.

*In what circumstances could such evidence not be led?*

7.48 There is, however, some guidance to be derived from decisions of the European Court of Human Rights, not so much on the substance of what evidence may be considered to be "new", but on the circumstances in which it may be legitimate to use it. In *Xheraj v Albania*<sup>29</sup> and in *Radchikov v Russia*<sup>30</sup> the Court has made it clear that the attempted reopening of a case because of errors made by the prosecution authorities or by the courts will not be justified under Article 4(2):

"The Court considers that the mistakes or errors of the state authorities should serve to the benefit of the defendant. In other words, the risk of any mistake made by the prosecuting authority, or indeed a court, must be borne by the state and the errors must not be remedied at the expense of the individual concerned."

7.49 Any decision of the European Court of Human Rights is made on the facts and circumstances of the individual case which comes before it. Against that background, and on the assumption that the UK does indeed sign and ratify the Protocol, it would appear that domestic provision to provide for a retrial would not be compatible with Article 4 if the ground for operating the provision in a particular case arose from some perceived deficiency in the conduct of the proceedings by the prosecution or the court.

7.50 In that connection we note the formulation of the exceptions to the rule which have been introduced in the rest of the United Kingdom. Section 78 of the Criminal Justice Act 2003<sup>31</sup> sets out the requirements for evidence to be regarded as "new". 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). In order for evidence to be "new evidence" it is not essential that it was unavailable at the time of the original trial, or that it could have been made available by a duly diligent prosecutor; these only constitute factors to be taken into account by the Court in determining whether setting aside the acquittal and ordering a new trial would be in the interests of justice.<sup>32</sup>

7.51 For the purposes of the position in relation to the jurisprudence on Article 4(2) of Protocol 7, the Criminal Justice Act 2003 was enacted before the decisions of the European Court of Human Rights referred to in paragraph 7.36 above. It may be that, if the only reason for evidence not having been led at the original trial is that the prosecutor neglected – or chose not – to use it, then the courts would refuse to authorise a retrial on the basis of section 79(2)(c); it may also be that, following the decisions of the European Court of Human Rights, a court might be obliged to do so. This must be a matter of speculation, because the only two cases in which the provisions have been used arose from confessions by the acquitted person.

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<sup>29</sup> Application 37959/02 (judgment July 2008) at para 58.

<sup>30</sup> Application 65582/01 (judgment November 2007) at para 50.

<sup>31</sup> See Appendix 2.

<sup>32</sup> Criminal Justice Act 2003, s 79(2)(c) and (d).

7.52 We ask the question:

- 29. In order to justify a retrial, should "new" evidence be evidence which was not, and could not with the exercise of ordinary diligence have been, available at the original trial?**

*Procedure*

7.53 The jurisdictions which permit a new evidence exception generally provide for a vetting process by both the public prosecutor and the court – normally, as in the case of England and Wales, an appellate court. We ask the question:

- 30. Should any retrial on the basis of new evidence require to be authorised by the High Court of Justiciary sitting as the Court of Criminal Appeal, on an application by the Lord Advocate?**

*Effect upon the outcome of the case*

7.54 Our own provisional view is that any application for a retrial should be subject to consideration by the appeal court of the likelihood that the new evidence would substantially improve the chances of a conviction. We have noted above the difficult position in which that requirement places the court which has to decide the matter. A decision to allow the case to proceed amounts to a declaration by the court that they, at least, consider the new evidence compelling. Similar issues arise in the case of retrials on the basis of new evidence as arise in the case of retrials on the basis of tainted acquittals. We ask the questions:

- 31. What standard should be applied by the court to the question of the effect which the new evidence would in their opinion have on the result of any new trial?**
- 32. Should the court considering whether to authorise a retrial have a discretion not to authorise where it appears to the court not to be in the interests of justice for it to do so?**
- 33. Should steps be able to be taken to limit publication of the result of the court's consideration, with a view to preventing publication of that result influencing the jury in any subsequent trial?**

## Part 8 List of proposals and questions

1. The rule against double jeopardy should be retained.

(Paragraph 5.6)
2. Is the present Scots law of double jeopardy in need of reform, or can it be left as it is?

(Paragraph 5.12)
3. A second prosecution should be prohibited where a person has previously been convicted or acquitted of an offence and:
  - (a) the second indictment or complaint charges an offence of which it would have been competent to convict the accused on the first indictment or complaint (so, for instance, an earlier verdict on a trial for murder will bar subsequent prosecution for attempted murder, culpable homicide, assault etc.); or
  - (b) the second indictment or complaint charges an offence which is an aggravated form of the offence charged on the first occasion (so, for instance, a previous conviction or acquittal of assault will bar a subsequent prosecution for assault to severe injury).

(Paragraph 6.37)
4. In addition to a rule against trying a person again for an offence of which he has already been convicted or acquitted, should Scots law recognise a broader principle (enforceable by the courts) that a person should not be tried again:
  - (a) in relation to the same facts, or substantially the same facts, as gave rise to the earlier prosecution; or
  - (b) in relation to the same acts which gave rise to that prosecution?

(Paragraph 6.48)
5. If such a principle were to be recognised, should this be expressed:
  - (a) as a rule barring any such prosecution save in particular specified circumstances (for example, where the accused had himself sought a separation of trials);
  - (b) as a discretionary power of the trial judge to bar a second prosecution?

(Paragraph 6.48)

6. If the barring of a second prosecution arising out of the same facts (or same acts) is to be a matter for the discretion of the trial judge, should there be a presumption that the second prosecution will be barred unless the Crown can satisfy the judge that there are special circumstances justifying the separation of trials?  

(Paragraph 6.48)
7. Should Scots law continue to permit the trial of a person for murder or culpable homicide where that person has previously been tried, prior to the victim's death, for an offence involving an assault against the victim?  

(Paragraph 6.58)
8. If so, should the second prosecution be permitted regardless of whether the result of the first trial was conviction or acquittal, or only in cases in which the accused was convicted at the first trial?  

(Paragraph 6.58)
9. Should Scots law permit the trial of a person for culpable homicide, or for a statutory offence of unintentionally causing death, where that person has previously been tried, prior to the victim's death, for an offence relating to the act or omission which is alleged to have caused the death?  

(Paragraph 6.58)
10. If so, should a second prosecution be permitted only where first trial concluded in a finding of guilt?  

(Paragraph 6.58)
11. Should a court have power to bar further proceedings in relation to a charge which has been the subject of prior criminal proceedings which ended in an apparent verdict but which were later discovered to have been fundamentally null?  

(Paragraph 6.63)
12. Should the rule against double jeopardy apply to bar a subsequent prosecution where there has been a finding of guilt, or the acceptance by the prosecutor of a guilty plea, regardless of whether sentence has been imposed?  

(Paragraph 6.66)
13. A verdict of conviction or acquittal by a foreign court should bar a subsequent prosecution in Scotland in respect of the same acts which gave rise to the first prosecution; but the Scottish court should be permitted to disregard an acquittal or conviction in a foreign jurisdiction where it is satisfied that it is in the interests of justice to do so. In considering whether to disregard the foreign verdict, the court should have regard to whether it appears that the foreign proceedings

- (a) were held for the purpose of shielding the accused from criminal responsibility;
- (b) were not conducted independently or impartially; or
- (c) were conducted in a manner which was inconsistent with an intent to bring the perpetrator of the alleged offence to justice.

(Paragraph 6.73)

14. Should there be an exception to the rule against double jeopardy where the previous acquittal has been "tainted" by some offence against the administration of justice in relation to the original trial?

(Paragraph 7.15)

15. If so, should a retrial require to be authorised by a court following a conviction of someone for such an offence?

(Paragraph 7.15)

16. Should the process leading to the authorisation include, in addition to the conviction of someone for such an offence, a judgment by the court that the offence had a significant effect on the result of the previous trial?

(Paragraph 7.15)

17. In that connection, what test should the court be required to apply?

(Paragraph 7.15)

18. Whatever tests the court should be required to apply, should the court have an overriding discretion to refuse to authorise a retrial where a refusal appears to the court to be in the interests of justice?

(Paragraph 7.15)

19. Should steps be able to be taken to limit publication of the result of the court's consideration, with a view to preventing publication of that result influencing the jury in any subsequent trial? If there is to be an exception to the rule against double jeopardy on the basis of a tainted acquittal, should it apply to all cases, or should it be limited?

(Paragraph 7.15)

20. If there is to be an exception to the rule against double jeopardy on the basis of a tainted acquittal, should it apply to all cases, or should it be limited?

(Paragraph 7.21)

21. If some limitation is thought desirable, how should it be defined?  
(Paragraph 7.21)
22. Should it be possible to authorise a retrial following a tainted acquittal in a case where it is established that the accused played no part in the offence against the administration of justice which affected the original trial?  
(Paragraph 7.21)
23. If not, how is the non-participation of the accused to be established?  
(Paragraph 7.21)
24. It should continue to be possible to prosecute a person for perjury where there is evidence that he committed perjury in giving evidence on his own behalf in prior criminal proceedings.  
(Paragraph 7.25)
25. Should there be an exception to the rule against double jeopardy in the case of an acquitted person who subsequently admits that he has committed the crime of which he has been acquitted?  
(Paragraph 7.30)
26. Should there be an exception to the rule against double jeopardy on the basis of new evidence?  
(Paragraph 7.41)
27. Should any exception to the rule against double jeopardy be available only in relation to cases prosecuted in the High Court of Justiciary; if not, on what basis should the exception be formulated?  
(Paragraph 7.43)
28. If there is to be a general exception to the rule against double jeopardy on the basis of new evidence, should the exception be retrospective?  
(Paragraph 7.44)
29. In order to justify a retrial, should "new" evidence be evidence which was not, and could not with the exercise of ordinary diligence have been, available at the original trial?  
(Paragraph 7.52)

30. Should any retrial on the basis of new evidence require to be authorised by the High Court of Justiciary sitting as the Court of Criminal Appeal, on an application by the Lord Advocate?

(Paragraph 7.53)

31. What standard should be applied by the court to the question of the effect which the new evidence would in their opinion have on the result of any new trial?

(Paragraph 7.54)

32. Should the court considering whether to authorise a retrial have a discretion not to authorise where it appears to the court not to be in the interests of justice for it to do so?

(Paragraph 7.54)

33. Should steps be able to be taken to limit publication of the result of the court's consideration, with a view to preventing publication of that result influencing the jury in any subsequent trial?

(Paragraph 7.54)

# Appendix 1

## EU and Human Rights Law

### PART 1

#### THE EUROPEAN CONVENTION ON HUMAN RIGHTS

##### Article 6 of the Convention

1. Article 6(1) of the European Convention on Human Rights states that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . ."

2. The European Court of Human Rights has held that Article 6 does not require protection against double jeopardy.<sup>1</sup> However, where domestic legal systems do permit offences to be retried, both the procedure for ordering a retrial and the procedure at the retrial itself will be covered by the fair trial guarantee in Article 6:

"The mere possibility of reopening a criminal case is therefore prima facie compatible with the Convention, including the guarantees of Article 6. However, certain special circumstances of the case may reveal that the actual manner in which it was used impaired the very essence of a fair trial. In particular, the Court has to assess whether, in a given case, the power to launch and conduct a supervisory review was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests of the individual and the need to ensure the effectiveness of the system of criminal justice."<sup>2</sup>

##### Article 4 of Protocol No. 7

3. The rule against double jeopardy is enshrined in Article 4 of Protocol 7 to the Convention, which provides:

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

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

3. No derogation from this Article shall be made under Article 15 of the Convention."

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<sup>1</sup> *S v Federal Republic of Germany* (1983) 38 DR 43.

<sup>2</sup> *Nikitin v Russia* (Application 50178/99) at para 57.

The United Kingdom has neither signed nor ratified Protocol 7, and its provisions presently have no effect in domestic law. However, the UK Government has indicated its intention to sign the Protocol in due course.

### **The scope of Article 4(1)**

#### *"Criminal Proceedings" and "penal procedure"*

4. To be subject to the provisions of Article 4, proceedings or procedure must be regarded as "criminal" by the Court, which will approach the question of what constitutes a criminal charge under Article 4 of Protocol 7 on the same basis as it would under Article 6 of the Convention, in particular having regard to:

"...such factors as the legal classification of the offence under national law; the nature of the offence; the national legal characterization of the measure; its purpose, nature and degree of severity; whether the measure was imposed following conviction for a criminal offence, and the procedures involved in the making and implementation of the measure."<sup>3</sup>

#### *"Finally acquitted or convicted"*

5. Article 4(1) applies only when the accused has been "finally acquitted or convicted" of the offence with which he or she is now charged, "in accordance with the law and penal procedure" of the prosecuting state. The European Court of Human Rights has repeatedly emphasised that the aim of Article 4 is to "prohibit the repetition of criminal proceedings that have been concluded by a final decision."<sup>4</sup> According to the Explanatory Report to Protocol 7, a decision is regarded as final:

"If, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them."<sup>5</sup>

6. It has been decided by the European Court of Human Rights that the decision to acquit an accused becomes final at the end of the time limit during which an appeal against the decision to acquit could be lodged.<sup>6</sup> However, the concept of finality also appears to have an autonomous meaning under the Convention, and cases may arise in which a decision which is not regarded as final under domestic law will be regarded as such by the Court for the purposes of Article 4. In *Nikitin v Russia*,<sup>7</sup> the decision to acquit the applicant was regarded as 'final' by the European Court of Human Rights, despite the fact that under Russian law, the decision would not be considered final. The domestic law allowed application to be made for supervisory review and clearly did not regard decisions as final until the time limit for making such an application had passed. The Court did not treat the

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<sup>3</sup> *Ibid*, at para 29.

<sup>4</sup> *Gradinger v Austria* (A 328-C (1995) 23 October 1995) at para 53 and reiterated in *Franz Fischer v Austria* (Application 37950/97, 29 August 2001), *Isaksen v Norway* (Application 13596/02), *Maszni v Romania* (Application 59892/00, 21 September 2006), *Ponsetti and Chesnel v France* (joint applications 36855/97 and 41731/98).

<sup>5</sup> Explanatory Report to Protocol 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms paras 29 and 22.

<sup>6</sup> *Xheraj v Albania* (Application 37959/02, 29 July 2008) at para 15.

<sup>7</sup> *Nikitin v Russia* (Application 50178/99, 20 July 2004).

decision as final because it considered a supervisory request for annulment of a final judgment to be a form of extraordinary appeal. The reason for this was that a supervisory review is not directly accessible to the defendant in a criminal case and because its application depends on the discretion of authorised officials.<sup>8</sup> In addition, the Court had, in previous judgments, declined to accept supervisory review as an effective domestic remedy, instead regarding it as an extraordinary remedy.<sup>9</sup>

#### *Prosecution for the same offence*

7. As noted above, Article 4 prevents repeated trials or punishment for "an offence for which [a person] has already been finally acquitted or convicted". The European Court of Human Rights has produced conflicting authority regarding which offences will be regarded as the same for the purposes of Article 4. *Gradinger v Austria*<sup>10</sup> suggests that offences will be the same for the purposes of Article 4 if they are both based upon the same conduct. In contrast, in *Oliveria v Switzerland*<sup>11</sup> the Court recognised that a single act might constitute more than one offence, and held that successive prosecutions need not infringe Article 4 provided that they are for legally separate offences.

8. *Gradinger v Austria*<sup>12</sup> concerned an applicant who, whilst driving his car after consuming alcohol, caused an accident which led to the death of a cyclist. The applicant was convicted of causing death by negligence, but his blood alcohol level was such that it fell short of the level required for his conviction of an aggravated form of the offence – causing death while under the influence of alcohol. Subsequent to his conviction for the less serious offence, the applicant was issued with a "sentence order" imposing on him a fine for the offence of driving under the influence of drink. This second penalty was issued on the basis of a new medical report which found the applicant's blood alcohol level to be greater than it was reported to be in the medical report which was available at the time of the applicant's conviction. The applicant argued that the fine he had received punished him in respect of *exactly the same facts* on which it had been decided that he had no case to answer for causing death while under the influence of alcohol, and that this breached Article 4.

9. The Court took the view that although the two relevant offences were different in their nature and purpose,<sup>13</sup> and although the second offence represented only one aspect of the first offence, because the offences were *based on the same conduct* there had been a violation of Article 4. It is interesting to note, as the Law Commission did in their Consultation Paper on Double Jeopardy, that there was no discussion in the case of Article 4(2), even though the case seemingly involved "new or newly discovered facts", i.e. the different blood alcohol levels that the two reports disclosed. The Law Commission

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<sup>8</sup> *Ibid.*, at para 39.

<sup>9</sup> Regarding a civil law issue, the Court held in *Tumilovich v Russia* (decision 47033/99) that a supervisory review was an extraordinary remedy and did not constitute an effective domestic remedy within the meaning of Article 35(1). Furthermore, in *Berdzenishvili v Russia* (decision 31697/03) the Court likened a supervisory review to an application for a retrial and found it not to be a remedy under Article 35(1).

<sup>10</sup> *Gradinger v Austria* (A 328-C (1995), 23 October 1995).

<sup>11</sup> *Oliveria v Switzerland* (Judgment of 30 July 1998, Report 1998-V).

<sup>12</sup> *Gradinger v Austria* (A 328-C (1995), 23 October 1995).

<sup>13</sup> The Court recognised that the first offence of causing death while under the influence of alcohol served to punish homicide committed while under the influence of drink and the second offence punished the mere fact of driving a vehicle while intoxicated.

suggested that this may have been because there was no relevant law or penal procedure providing for the reopening of the earlier proceedings available at that time in Austria.<sup>14</sup>

10. In *Oliveira v Switzerland*,<sup>15</sup> the applicant was involved in a road traffic accident in which another motorist was seriously injured. As a result, the applicant was convicted of the offence of failing to control her vehicle and for this she received a fine. Seventeen months later, the district attorney's office issued a penal order for a much larger fine to be imposed on the applicant for the more serious offence of negligently causing physical injury. The applicant complained that this constituted her being prosecuted twice in respect of the same offence. The Court held that this was a "typical example of a single act constituting various offences", adding that "[t]here is nothing in that situation which infringes Article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*concoirs idéal d'infractions*) one criminal act constitutes two separate offences."<sup>16</sup> To distinguish the decision from the decision in *Gradinger v Austria*,<sup>17</sup> the Court seemed to rely on the fact that in *Gradinger* the two different courts came to inconsistent findings on the applicant's blood alcohol level. However, in his dissenting judgment, Judge Repik acknowledged the discrepancy between the two decisions, stating that that "no difference can be seen between the *Gradinger* case and the *Oliveira* case that can justify these two wholly conflicting decisions."<sup>18</sup>

11. Some clarification of the apparent conflict of authority posed by the *Gradinger* and *Oliveira* judgments was provided by the case of *Fischer v Austria*.<sup>19</sup> In this case the applicant complained that he had been punished twice for driving under the influence of drink, once by a fine imposed on him for a number of road traffic offences and then again by his conviction under the Criminal Code of causing death by negligence. After reiterating the judgments of *Gradinger* and *Oliveira*, the Court pointed out that Article 4 does not refer to the "same offence" but rather to "trial and punishment again for an offence for which the applicant has already been finally acquitted or convicted" and said:

"Thus, while it is true that the mere fact that a single act constitutes more than one offence is not contrary to this Article, the Court must not limit itself to finding that an applicant was, on the basis of one act, tried or punished for nominally different offences. . . there are cases where one act, at first sight, appears to constitute more than one offence, whereas a closer examination shows that only one offence should be prosecuted because it encompasses all the wrongs contained in the others...An obvious example would be an act which constitutes two offences, one of which contains precisely the same elements as the other plus an additional one. There may be other cases where the offences only slightly overlap. Thus, where different offences based on one act are prosecuted consecutively, one after the final decision of another, *the Court has to examine whether or not such offences have the same essential elements.*"<sup>20</sup> (emphasis added)

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<sup>14</sup> Law Commission, *Double Jeopardy*, CP 156 (1999) at para 3.21.

<sup>15</sup> *Oliveira v Switzerland* (Judgment of 30 July 1998, Report 1998-V).

<sup>16</sup> *Ibid*, at para 26.

<sup>17</sup> *Gradinger v Austria* (A 328-C (1995), 23 October 1995).

<sup>18</sup> *Oliveira v Switzerland* (Judgment of 30 July 1998, Report 1998-V)

<sup>19</sup> *Fischer v Austria* (Application 37950/97, 29 August 2001).

<sup>20</sup> *Ibid*, at para 25. The Court relied on *Ponsetti and Chesnel v France* (joint applications 36855/97 and 41731/98) as authority for the "essential elements" test. In this case the Court drew a distinction between two separate penalties for tax offences on the ground that the "constitutive elements" of the two offences were different. The "essential elements" test has received judicial support in the judgments of *Sailer v Austria* (Application 38237/97, *Zolotukhin v Russia* (Application 14939/03, 7 June 2007) and *Schutte v Austria* (case 18015/03, 26 July 2007.)

12. The Court was of the opinion that the "essential elements" test could be used to distinguish *Gradinger* from *Oliveira*. It reasoned that in *Gradinger*, the essential elements of the administrative offence of drunken driving did not differ from the special circumstances of the offence of which the applicant was initially convicted, whereas there was no such overlap of essential elements in *Oliveira*.<sup>21</sup> However, whether this argument successfully eliminates the apparent contradiction in the two judgments depends very much on whether one accepts that the "essential elements" of the two offences in *Gradinger* were driving a vehicle while having a sufficiently high blood alcohol level, as the Court in *Fischer* clearly did.<sup>22</sup> It could equally well be argued that the essential element of the first offence was causing death whilst having a sufficiently high blood alcohol level and that the essential element of the second offence was driving a vehicle whilst intoxicated,<sup>23</sup> and it is not clear that the apparent conflict between *Gradinger* and *Oliveira* has in fact been resolved.

### **The scope of Article 4(2)**

#### *Reopening of the case*

13. Article 4(2) draws a distinction between a retrial for an offence for which a person has already been finally acquitted or convicted and reopening such cases. The former is expressly prohibited, whereas the latter is permissible on the basis of "evidence of new or newly discovered facts" or when there has been a "fundamental defect in the previous proceedings." What is meant by this distinction?

14. It has been suggested that the distinction may not as always operate to disallow retrials *per se*, and that a retrial under certain circumstances should be regarded as "reopening" proceedings and therefore allowable subject to the conditions set out in Article 4(2). In its report on the Criminal Justice Bill 2003,<sup>24</sup> which became the Criminal Justice Act 2003, the UK Parliament's Joint Committee on Human Rights determined that the sections of the Bill which allowed for a *retrial* after an acquittal in special circumstances would not be in conflict with Article 4. Those special circumstances are when the offence is a "qualifying offence", when there is new and compelling evidence, when it is in the interests of justice to do so and only on application to the Court of Appeal by a prosecutor who has the written consent of the Director of Public Prosecutions.<sup>25</sup> Because the Bill created a legislative scheme to regulate the circumstances in which a case could be reopened (i.e. a retrial following an acquittal) and because this type of reopening was limited to cases where there is new evidence, the Committee saw no difficulty in deeming the Bill compatible with Article 4.<sup>26</sup>

15. A practical example of the distinction between retrial and reopening is found in *Nikitin v Russia*.<sup>27</sup> The relevant issue in this case was whether a request for a supervisory review of

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<sup>21</sup> *Fischer v Austria* (Application 37950/97, 29 August 2001) at para 27.

<sup>22</sup> *Ibid*, at para 27.

<sup>23</sup> This was the view taken by the Court *Gradinger* (A 328-C (1995), 23 October 1995). It further recognised the different purposes of the two offences – one being to penalise acts that cause death and threaten public safety and the other being to ensure a smooth flow of traffic (at para 54).

<sup>24</sup> HL Paper 40/HC 374.

<sup>25</sup> The provisions are summarised in para 43 of the Report. They received enactment in the Criminal Justice Act 2003.

<sup>26</sup> Joint Committee on Human Rights, Second Report of 2003, "Criminal Justice Bill", HL Paper 40/HC 374 at para 52.

<sup>27</sup> *Nikitin v Russia* (Application 50178/99, 20 July 2004).

a decision to acquit the applicant constituted a second trial, or a form of reopening the proceedings. The Court explained that the system of supervisory review allowed review of a case on the grounds of judicial error concerning points of law and procedure. The subject matter of the supervisory review was the same criminal charge on which the acquittal had been granted and the validity of the previous decision. If the request for review was granted then the ultimate effect would be to annul all decisions previously taken by the courts and to determine the criminal charge in a new decision. For this reason the Court held that the effect of a supervisory review is the same as reopening and continuing the proceedings, as opposed to an attempt at a retrial.<sup>28</sup>

## PART 2

### THE SCHENGEN CONVENTION

16. Articles 54 to 58 of the Schengen Convention of 1990 establish a rule against double jeopardy in respect of successive prosecutions in contracting States. Article 54 provides:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."

17. Following the Treaty of Amsterdam, the Convention Implementing the Schengen Agreement (the Schengen Convention) was incorporated into the Third Pillar of the EU,<sup>29</sup> with the European Court of Justice having competence under Title VI EU to interpret the Convention.

18. Although not a party to the Schengen Convention, the United Kingdom has opted to participate in certain aspects of the Schengen *acquis*, including the *ne bis in idem* provisions of Articles 54 to 58.<sup>30</sup> Although the UK does not recognise the jurisdiction of the European Court of Justice over Title VI matters and UK courts cannot therefore refer questions arising under the Schengen Convention to the Court, participation in the Schengen *acquis* requires the UK to apply the *acquis* as interpreted by the Court.

19. The European Court of Justice first considered Article 54 of the Schengen Convention in 2003 in the joint cases of *Gözütok and Brügge*,<sup>31</sup> and has since developed its

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<sup>28</sup> *Ibid*, at para 46. This decision was confirmed in *Fadin v Russia* (Application 58079/00, 27 July 2006).

<sup>29</sup> Under then Articles 31 and 34 TEU: Council Decision 1999/435/EC, OJ L176/17.

<sup>30</sup> Article 4 of the Protocol annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, *On the Schengen Acquis Integrated into the Framework of the European Union* (OJ C 115/290, 9.5.2008) provides for the United Kingdom at any time to request to take part in some or all of the provisions of the Schengen *acquis*. This right was exercised in respect of Articles 54 to 58, among other provisions, by Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen *acquis* (OJ L141/43, 1/6/2000) and Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen *acquis* by the United Kingdom of Great Britain and Northern Ireland (OJ L395/70, 31.12.2004). The latter Decision provides for the provisions referred to in the former Decision to be "put into effect for the United Kingdom as from 1 January 2005" (art 1).

<sup>31</sup> Joint Cases C187/01 and C385/01, *Gözütok and Brügge*, 2003 ECR I-1345.

jurisprudence in a number of cases, elaborating a distinct principle of protection against multiple criminal proceedings arising from the right to free movement within the EU.

### The ECJ on Article 54

#### *"Finally disposed of"*

20. *Ne bis in idem* under Article 54 may apply not only where the accused has been finally acquitted or convicted by a court, but also where the prosecutor has definitively halted the prosecution without judicial involvement following the acceptance of an offer of a fixed penalty.<sup>32</sup>

21. However, where the decision to discontinue proceedings in one Member State is taken solely on the basis that proceedings in respect of the same act have been instituted in another Member State, the decision of the first Member State to discontinue proceedings does not have a *ne bis in idem* effect.<sup>33</sup>

22. *Ne bis in idem* will also apply in the case where, a prosecution having been instituted in one Member State, that prosecution is subject to a statutory time bar.<sup>34</sup>

#### *"The same acts"*

23. Article 54 applies to prosecution in respect of the same "acts", not of the same "offence".

24. In assessing what constitute the "same acts", "the relevant criterion . . . is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected."<sup>35</sup> The "definitive assessment . . . of whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter" is a question for the national courts.

25. However, the Court has held, in a number of cases, that certain offences are in principle to be regarded as "the same acts" for the purposes of Article 54. These include:

The export from one Member state to another Member state, and the importation into the second Member state, the same narcotic drugs;<sup>36</sup>

The illegal import of goods into one Member State and the subsequent marketing of those goods in another Member state;<sup>37</sup>

Receiving contraband foreign tobacco in one Member State and importing that tobacco into another Member State and being in possession of it there.<sup>38</sup>

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<sup>32</sup> Joint Cases C187/01 and C385/01, *Gözütok and Brügge*, 2003 ECR I-1345.

<sup>33</sup> *Miraglia*, Case C-469/03, 10 March 2005.

<sup>34</sup> *Gasparini*, Case C-467/04, 28 Sep 2006.

<sup>35</sup> *Van Esbroek*, Case C-436/04, [2006] ECR I-2333 at para 42.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Gasparini*, Case C-467/04, 28 Sept 2006 at para 57.

<sup>38</sup> *Kretzinger*, Case C-288/05, 18 July 2007.

26. The Court has held, in the context of a prosecution for drugs offences, that it is not necessary that the quantities of drugs referred to or the other parties alleged to have been involved in the two cases should be identical, as it is possible that a situation in which such identity is lacking nevertheless involves a set of facts which, by their nature, are inextricably linked.<sup>39</sup> However, such a link will not be established merely by a common criminal intention: the holding in one contracting State the proceeds of drug trafficking and the exchanging in *bureaux de change* in another contracting State of sums of money also originating from such trafficking could not be regarded as "the same acts" merely because of a common criminal intention.<sup>40</sup>

27. Article 54 applies where it is in effect at the time of the second trial; it is not necessary for *ne bis in idem* to arise that the Schengen Convention should have been in effect as between the two states concerned at the time of the first trial.<sup>41</sup>

28. The *ne bis in idem* principle, enshrined in Article 54, does not apply to persons other than those whose proceedings have been finally disposed of in a Contracting State.<sup>42</sup> The protection does not extend to other participants in the same criminal transaction in respect of whom no prior proceedings were brought.

29. For the purposes of Article 54, a penalty imposed by a court of a contracting State "has been enforced" or is "actually in the process of being enforced" if the convicted person has been given a suspended custodial sentence.<sup>43</sup> Periods of pre-trial detention do not in themselves amount to a sentence being enforced, regardless of whether such periods would count towards any subsequent enforcement of a custodial sentence under the law of the State in which judgment was given.<sup>44</sup>

30. Generally, it is clear that the European Court of Justice interprets the *ne bis in idem* provisions of the Schengen Convention purposively, viewing the aim of the rule as being the removal of barriers to the exercise of the right of free movement within the EU. This involves a divergence from the commonly understood rationales for double jeopardy, including the notion that the protection against a second trial arises only when society has already had one full chance to settle its accounts with the individual it suspects of having committed an offence against it, and from the principle of *ne bis in idem* otherwise applying in Community law.<sup>45</sup>

## Limitations on Article 54

### *Temporal*

32. As noted above, it is not necessary, in order for *ne bis in idem* to arise under Article 54, that the states concerned should have been subject to Article 54 at the time of the first trial. The relevant consideration is whether Article 54 applies as between the two states

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<sup>39</sup> *Van Straaten*, Case C-150/05, 28 Sept 2006 at paras 49-50.

<sup>40</sup> *Kraaijenbrink*, Case C-367/05, 18 July 2007 at para 36.

<sup>41</sup> *Van Esbroeck* at paras 18-24.

<sup>42</sup> *Gasparini* at paras 37-37.

<sup>43</sup> *Kretzinger* at paras 38-44.

<sup>44</sup> *Ibid*, at paras 45-52.

<sup>45</sup> In this connection, see the Opinion of Advocate General Sharpston in *Gasparini* [2006] ECR I-09199, especially paras 72-84. See too Steve Peers, "Double Jeopardy and EU Law: Time for a Change?" (2006) 8 Eur J L Reform 199.

concerned at the time of the second criminal proceedings.<sup>46</sup> Article 54 applies as between the UK and all EU Member States, with the addition of Norway and Iceland and the exception, at present, of Ireland.<sup>47</sup>

### *Territorial*

33. Article 55(1)(a) allows a state (call it State A) to declare that it is not bound by Article 54 where the acts to which the foreign judgment relates took place in whole or in part in its own territory. In the case of acts which took place only partly in State A's territory, the exception does not apply where the acts took place in part in the territory of the state where the judgment was delivered.

34. The United Kingdom has made a declaration under Article 55(1)(a), and is therefore not bound to recognise *ne bis in idem* in relation to the judgments of states where none of the allegedly criminal acts took place.<sup>48</sup>

### *National Security and Crimes of Officials*

35. Article 55(1)(b) and (c) respectively permit a state to declare that it is not bound by Article 54 where the acts to which the foreign judgment relates constitute an offence (of a category specified by that state) against national security or other equally essential interest of that state, and where those acts were committed by officials of that state in violation of the duties of their office.

36. The United Kingdom has not made a declaration under either of these provisions.<sup>49</sup>

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<sup>46</sup> *Van Esbroeck* at paras 18-24.

<sup>47</sup> Commission Staff Working Document, Annex to the Green Paper *On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, SEC(2005) 1767 at 45, para 11.2(aa).

<sup>48</sup> Declarations are not published, but according to the European Commission, as at December 2005 seven EU Member States (AT, DE, DK, EL, FI, SE and UK) had made a declaration under art 55(1)(a): Commission Staff Working Document, Annex to the Green Paper *On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, SEC(2005) 1767 at 45, para 11.2(aa).

<sup>49</sup> As at December 1995, four EU states (AT, DK, EL and FI) had made a declaration under Article 55(1)(b), and none under 55(1)(c): Commission Staff Working Document, Annex to the Green Paper *On Conflicts of Jurisdiction and the Principle of ne bis in idem in Criminal Proceedings*, SEC(2005) 1767 at 45, para 11.2(aa).

# Appendix 2

## Double jeopardy in other jurisdictions

### ENGLAND AND WALES

#### The rules against double jeopardy

1. In England and Wales, the common law pleas of *autrefois acquit* and *autrefois convict* bar the prosecution of a person for an offence of which he or she has previously been acquitted or convicted. For the pleas to apply, the offence with which the defendant is charged must be identical in law and substantially the same in fact as the offence of which he or she has been previously convicted or acquitted.<sup>1</sup> Before there can be a plea of *autrefois*, there must be a valid acquittal or conviction.<sup>2</sup>

2. Even where the *autrefois* pleas do not apply, a prosecution may be prevented on the ground that it constitutes an abuse of process. The case of *Connelly*<sup>3</sup> established that it is *prima facie* oppressive to try a person on a set of facts upon which that person has already stood trial; it will normally be considered that the second charge should have been addressed at the same time as the first. There is a presumption that a subsequent prosecution for a different offence on the same facts should be stayed unless there are special circumstances to justify it.<sup>4</sup>

3. The common law also bars prosecution for an aggravated form of an offence of which the defendant has already been convicted or acquitted.<sup>5</sup> However, this does not operate to prevent a person who has been tried for assault from being charged with murder or manslaughter, if the victim of the assault subsequently dies, on the theory that homicide is not merely an aggravated form of assault but an entirely distinct crime.<sup>6</sup>

#### Exceptions to the rules

4. The Criminal Procedure and Investigations Act 1996 introduced an exception to the rule against double jeopardy to allow retrials following tainted acquittals. A retrial can be granted when a person (not necessarily the person acquitted of the original offence) is convicted of an administration of justice offence in any proceedings which led to the acquittal and the court before which the administration of justice offence is heard considers that there is a real possibility that, but for the administration of justice offence, the acquitted person would not have been acquitted.<sup>7</sup> An application for retrial must be made to the High Court

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<sup>1</sup> *Connelly v DPP* [1964] AC 1254, per Lord Devlin at 1339-1340.

<sup>2</sup> There can be no plea if the court which convicted or acquitted the accused did not have competent jurisdiction, if the proceedings were *ultra vires* or if the original proceedings were a nullity. (Law Commission, *Double Jeopardy*, CP 156 (1999) at para 2.7).

<sup>3</sup> *Connelly v DPP* [1964] AC 1254, per Lord Devlin at 1359-1360.

<sup>4</sup> *R v Beedie* [1998] QB 356.

<sup>5</sup> *Elrington* (1861) 1 B & S 688.

<sup>6</sup> See *De Salvi* (1857) 10 Cox 481; *R v Miles* (1890) 24 QBD 423; *R v Friel* (1890) 17 Cox CC 325; *R v Thomas* [1950] 1 KB 26.

<sup>7</sup> Criminal Procedure and Investigations Act 1996, s 54.

which must be satisfied that it is likely that, but for the interference or intimidation, the acquitted person would not have been acquitted; that it is not contrary to the interests of justice to take proceedings against the acquitted person; that the acquitted person has had reasonable opportunity to make written representations and that the conviction for an administration of justice offence will stand.<sup>8</sup> There have, to date, been no reported applications for retrial under the provisions of the 1996 Act.

5. Following public outcry over the failed prosecution of the alleged killers of Stephen Lawrence, an independent inquiry was held under Sir William Macpherson of Cluny. One of the suggestions resulting from the inquiry was that Parliament should consider the introduction of an exception to the rule against double jeopardy where new evidence emerges or the accused subsequently admits his or her guilt.<sup>9</sup> The Home Secretary referred the issue to the Law Commission, which recommended the introduction of an exception to the rule against double jeopardy in cases of murder on the basis of new and compelling evidence.<sup>10</sup> The Criminal Justice Act 2003 went beyond the Law Commission's recommendations in providing for retrials for a range of "qualifying offences"<sup>11</sup> following the discovery of new and compelling evidence. Evidence is "new and compelling" if it was not adduced in the original proceedings and it is reliable, substantial and appears highly probative of the case against the acquitted person.<sup>12</sup> An application for retrial must be made to the Court of Appeal, which must be satisfied that there is new and compelling evidence and that a retrial would be in the interests of justice.<sup>13</sup> The Court of Appeal may restrict publication of any matter which it feels would prejudice the administration of justice in a retrial.<sup>14</sup> To date there have been only two applications made under the 2003 Act, each of which concerned a post-acquittal confession by the accused.<sup>15</sup>

## AUSTRALIA

### The rules against double jeopardy

6. The Australian States and Territories differ in the extent to which they have codified their laws; some remain governed primarily by the common law, while others have chosen to cast the bulk of their laws in legislative form. The criminal laws of Victoria, South Australia, and New South Wales remain based in the common law. Queensland, Western Australia, the Northern Territory, Tasmania and the Australian Capital Territory have enacted criminal codes. Despite the codification of the criminal law in these states and territories, the courts may still look to the common law when making their judgments. For example, in the Queensland case of *R v Carroll*<sup>16</sup> common law principles founded the decision of the court to stay perjury proceedings as an abuse of process. In giving his opinion, McHugh J came to the conclusion that the words of the code did not alter the fundamental rule of the common

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<sup>8</sup> Criminal Procedure and Investigations Act 1996, s 55.

<sup>9</sup> *The Stephen Lawrence Inquiry – Report of an Inquiry by Sir William Macpherson of Cluny*, Cm 4262 (1999) at para 43.47.

<sup>10</sup> Law Commission, *Double Jeopardy and Prosecution Appeals*, Law Com No 267 (2001), para 4.42.

<sup>11</sup> The 29 "qualifying offences" are listed in Pt 1 of Sch 5 to the Criminal Justice Act 2003. They include murder and related offences as well as a number of sexual offences, drugs offences and offences involving criminal damage.

<sup>12</sup> Criminal Justice Act 2003, s 78.

<sup>13</sup> *Ibid*, ss 76, 77; s 79 outlines the considerations relevant in deciding if a retrial is in the interests of justice.

<sup>14</sup> *Ibid*, s 82.

<sup>15</sup> *R v Dunlop* [2006] EWCA Crim 1354; [2007] 1 WLR 1657 (application granted); *R v Miell* [2007] EWCA Crim 3130; [2008] 1 WLR 627 (application refused). Both are discussed in more detail in Appendix 3.

<sup>16</sup> [2002] HCA 57, per Gaudron & Gummow JJs at paras 70-73.

law that an acquittal of a criminal charge may not be called in question by evidence which would tend to overturn the verdict.<sup>17</sup> Therefore, the common law principles of double jeopardy have some, albeit varying, application in all Australian jurisdictions.

#### *Common law principles*

7. The pleas of *autrefois acquit* and *autrefois convict* apply to offences ". . .in which the elements of the offences charged are identical or in which all of the elements of one offence are wholly included in the other."<sup>18</sup> For the pleas to apply, the first proceedings must have been legally valid, such that the accused was truly at risk of conviction.<sup>19</sup>

8. Prosecution for a different offence on the same or substantially the same facts which formed the basis of a previous conviction or acquittal may be stayed as an abuse of process. The High Court has held that, in considering whether a stay should be granted, courts should balance a variety of factors including, amongst others, fairness to the accused and the need to maintain public confidence in the administration of justice.<sup>20</sup>

9. It has been held that it is an abuse of process to seek to re-litigate fundamental factual issues<sup>21</sup> which were resolved in the accused's favour at an earlier trial.<sup>22</sup> It has also been held to be an abuse of process to seek to lead evidence,<sup>23</sup> or to bring proceedings, with the aim of challenging an earlier acquittal or diminishing the benefit of that verdict to the accused.

#### *Statutory provisions*

10. The Queensland, Western Australia, Northern Territory and Tasmania criminal codes provide protection from repeated prosecution when:

"...the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged."<sup>24</sup>

11. An exception is made where the victim dies following the accused's trial for an offence which is alleged to have led to the death. In these circumstances it is permissible for

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<sup>17</sup> *Ibid*, at 146.

<sup>18</sup> *Pearce v R* [1998] HCA 57 per McHugh, Hayne & Callinan JJ at para 24. The ruling in *Pearce* was followed in *Island Maritime Ltd v Filipowski* [2006] HCA 30 (per Kirby J at para 91) where it was held that double jeopardy applied "wherever all of the elements of one offence (of which an accused stands, or stood, in jeopardy) are included in the other offence (of which that accused stands, or stood in jeopardy)".

<sup>19</sup> So the plea was not available where the first prosecution had proceeded on the basis of an inapplicable statutory provision: *Island Maritime Ltd v Filipowski* [2006] HCA 30, following *Broome v Chenoweth* [1946] HCA 53.

<sup>20</sup> *Rogers* (1994) 181 CLR 251, *Pearce* [1998] HCA 57 as noted by the Law Commission, *Double Jeopardy*, CP No 156 (1999) at para B.1.

<sup>21</sup> That is, issues which were essential to the determination of the first trial.

<sup>22</sup> (1994) 181 CLR 251.

<sup>23</sup> *Garrett v R* [1977] HCA 67; *R v Storey* [1978] HCA 39.

<sup>24</sup> Criminal Code Act 1899 (Qld), s 17. The test to be applied in the other states is similar, with protection being extended to "similar offences" in the Northern Territory and to "a crime arising out of the same facts and substantially the same crime as that charged in that indictment" in Tasmania (Criminal Code Act Compilation Act 1913 (WA), s 17; Criminal Code Act (NT), s 18; Criminal Code Act 1924 (Tas), s 355(1)(b))

that person to be convicted of an offence, notwithstanding that he or she has already been found guilty of another offence pertaining to the same acts or omissions.<sup>25</sup>

12. The rule against trying a person again for an offence of which that person has been finally acquitted or convicted is also recognised in the human rights statutes of the Australian Capital Territory and Victoria.<sup>26</sup>

### Exceptions to the rules

13. In *R v Carroll*,<sup>27</sup> the defendant's conviction for murdering a baby was quashed and, following his acquittal, new evidence emerged which suggested that he was in fact guilty. Carroll could not be retried for murder due to the protection against double jeopardy provided by the Queensland Criminal Code, but he was charged with perjury. However, the High Court ruled that the perjury proceedings against Carroll should have been stayed as an abuse of process since they inevitably sought to controvert his murder acquittal. The public perception of this decision as fundamentally unfair prompted reform of Australian double jeopardy law.

14. In 2003, the Model Criminal Code Officers Committee (MCCOC) of the Standing Committee of Attorneys-General (SCAG) produced a model for reform which recommended three exceptions to the double jeopardy rule: prosecution for administration of justice offences committed in connection with a previous acquittal when there is fresh evidence of the commission of the administration of justice offence,<sup>28</sup> retrial for an offence for which a previous acquittal appears tainted and retrial on the basis of newly discovered fresh and compelling evidence.<sup>29</sup>

15. The MCCOC recommended that the tainted acquittal exception should apply to offences which carry a sentence of fifteen or more years' imprisonment.<sup>30</sup> An acquittal is "tainted" if the accused or another person has been convicted of an administration of justice offence in connection with the original trial, and it is "more likely than not" that, but for the administration of justice offence, the acquittal would not have occurred.<sup>31</sup> It was recommended that, if the administration of justice offence contradicts or directly attacks the acquittal, the prosecution should choose either to prosecute for the administration of justice offence or to retry the accused for the original offence.<sup>32</sup>

16. The recommendations state that the new evidence exception should apply only to very serious offences.<sup>33</sup> Evidence is defined as "fresh" and "compelling" if it was not and could not with due diligence have been adduced in the first proceedings, and if the Court of

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<sup>25</sup> Criminal Code Act 1899 (Qld), s 16; Criminal Code Act 1924 (Tas), s 11; Criminal Code Act (NT), s 19.

<sup>26</sup> Human Rights Act 2004 (ACT), s 24; Charter of Human Rights and Responsibilities 2006 (Vic), s 26.

<sup>27</sup> [2002] HCA 55.

<sup>28</sup> An "administration of justice offence" includes bribery of, or interference with, a juror, witness or judicial officer; the perversion of (or a conspiracy to pervert) the course of justice and perjury (MCCOC Discussion Paper *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (November 2003) at para 2.8.1).

<sup>29</sup> MCCOC Discussion Paper, *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (November 2003) at paras 2.8.2 & 2.8.5.

<sup>30</sup> *Ibid.*, at para 2.8.7.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, at para 2.8.3. This is to prevent so-called "triple jeopardy".

<sup>33</sup> Defined as murder, manslaughter, serious drug offences (carrying a life sentence), aggravated rape and robbery.

Criminal Appeal deems it reliable, substantial and highly probative of the case against the acquitted person.<sup>34</sup>

17. In respect of both types of retrial, a number of safeguards were recommended to ensure fairness to the defendant. The Director of Public Prosecutions must authorise any police investigation and, before a retrial is allowed, application must be made to the Court of Appeal which must be satisfied that it is in the interests of justice to allow the proceedings to go ahead.<sup>35</sup> If permission is granted for a retrial, the Court of Appeal may prohibit the publication of any material which poses a substantial risk of prejudice to the administration of justice.<sup>36</sup> In addition, the prosecution may not refer to the Court of Appeal's finding that there is fresh and compelling evidence or that the acquittal appears to be tainted.<sup>37</sup> Only one application for retrial should be allowed, except when it appears that the retrial was tainted.<sup>38</sup>

18. In July 2006, the Council of Australian Governments (COAG) produced a model for reform, based on the MCCOC's recommendations, which all Australian jurisdictions, except Victoria and the Australian Capital Territory, have agreed to implement. To date, reform has been carried out in New South Wales, Queensland, South Australia and Tasmania.<sup>39</sup>

## **NEW ZEALAND**

### **The rules against double jeopardy**

#### *Statutory provisions*

19. The New Zealand Bill of Rights Act 1990 provides that "[n]o one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."<sup>40</sup>

20. A court is required to discharge an accused if: ". . . it appears that the matter on which the accused was formerly charged is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made that might then have been made, have been convicted of all the offences of which he may be convicted on any count to which the plea is pleaded . . ."<sup>41</sup>

21. The statutory protection extends beyond second trials for charges of which the accused could competently have been convicted on the first charge as it stood: it also bars

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<sup>34</sup> MCCOC Discussion Paper *Issue Estoppel, Double Jeopardy and Prosecution Appeals Against Acquittals* (November 2003) at paras 2.8.2 & 2.8.6.

<sup>35</sup> *Ibid*, at paras 2.8.11 & 2.8.5. The Court must also consider other factors such as whether any police officer or prosecutor failed to act with reasonable diligence or expedition in connection with the retrial (para 2.8.8).

<sup>36</sup> *Ibid*, at para 2.8.12.

<sup>37</sup> *Ibid*, at para 2.8.10.

<sup>38</sup> *Ibid*, at para 2.8.5.

<sup>39</sup> Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 (NSW); Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld); Criminal Law Consolidation Act 1935 (SA), Part 10 & Criminal Code Act 1924 (Tas), Chapter 44. The New South Wales and Queensland reform does not provide for trying an accused with an administration of justice offence following an acquittal of an earlier, related offence. This may be because the reform was carried out before the COAG agreement of 2006. The reform measures of each state also differ in the offences to which the exceptions apply.

<sup>40</sup> S 26(2).

<sup>41</sup> Crimes Act 1961 (NZ), s 358(1).

the trial of any offences of which the accused could have been convicted at the first trial had all the necessary amendments been made to the first charge.<sup>42</sup>

22. In *Ministry of Transport v Hyndman*,<sup>43</sup> in order to decide whether two offences were the same for the purposes of section 358(1), the court sought to discover the "essence" of the offences. It was held that driving a motor car with excess breath alcohol and driving under the influence of drink were not the same offence because it would be possible to embody the essence of one of the offences without embodying the essence of the other and vice versa.

23. There is also a statutory rule barring prosecution "[w]here an indictment charges substantially the same offence as that with which the accused was formerly charged, but adds a statement of intention or circumstances of aggravation. . ."<sup>44</sup>

24. A conviction or acquittal on an indictment for murder or manslaughter or infanticide is a bar to a second indictment for the same homicide charging it as any one of these crimes.<sup>45</sup>

25. New Zealand law makes particular provision for the case in which the victim of a crime dies after an accused has been tried for an offence which is alleged to have led to the death. If the offence of which the accused was first convicted or acquitted carried a maximum sentence of three years or more, a subsequent prosecution for homicide is barred. If the first offence was charged was a less serious one, carrying a maximum sentence of under three years, there will be no bar to a homicide prosecution where the victim dies after the first trial of the accused.<sup>46</sup>

### Exceptions to the rules

26. *R v Moore*<sup>47</sup> provided the impetus for reform of double jeopardy law in New Zealand. Moore had been tried for murder and acquitted on the basis of alibi evidence in his favour. He was subsequently convicted of conspiracy to pervert the course of justice in relation to the alibi evidence, but could not be retried for the murder due to the New Zealand rules against double jeopardy. In March 2001, the New Zealand Law Commission recommended that it should be possible, with approval of the High Court, to retry an accused for an offence carrying a sentence of 14 or more years when he or she has been convicted of an

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<sup>42</sup> *Ministry of Transport v Hyndman* [1990] 3 NZLR 480 referred to the differing judicial opinions as to what can be considered "all proper amendments". *Ministry of Transport v Creagh* (Rotorua, M 146/84, 25 July 1985) held that substituting a charge of excess breath-alcohol for a charge of excess blood-alcohol was a "proper amendment", whereas in *Moncur v Leung Chiu* (High Court, Auckland, M 1675/85, 7 October 1986) and in *Police v Haines* (High Court, Christchurch, M 341/83, 15 April 1985) the Court felt that "all proper amendments" did not extend to substituting a different offence.

<sup>43</sup> [1990] 3 NZLR 480.

<sup>44</sup> Crimes Act 1961 (NZ), s 359(1). *R v Lee* [1973] NZLR 13 is an example of the section in operation where a conviction for possession of narcotics allowed the accused, who had previously been charged with possession of narcotics, to be discharged from a charge of possessing narcotics with the purpose of selling them; the purpose of selling was regarded as an added statement of intention.

<sup>45</sup> Crimes Act 1961 (NZ), s 359(2).

<sup>46</sup> *Ibid*, s 359(3): "[i]f on the trial of an issue on a plea of previous acquittal or conviction to an indictment for [homicide] it appears that the former trial was for an offence against the person alleged to have been now killed, and that the death of that person is now alleged to have been caused by the offence previously charged, but that the death happened after the trial on which the accused was acquitted or convicted, as the case may be, then, if it appears that on the former trial the accused might if convicted have been sentenced to imprisonment for 3 years or upwards, the Court shall direct that the accused be discharged from the indictment before it. If it does not so appear the Court shall direct that he plead over."

<sup>47</sup> [1998] 3 NZLR 385.

administration of justice offence.<sup>48</sup> It recommended that the exception should not apply if the administration of justice offence was committed by a third party and the accused was not involved.<sup>49</sup> Before granting a retrial, the High Court should be satisfied, amongst other things, that it is more likely than not that, but for the administration of justice crime, the acquitted person would not have been acquitted and that a retrial would not be contrary to the interests of justice.<sup>50</sup> The Commission did not consider there to be a case for a new evidence exception to be introduced in New Zealand.<sup>51</sup>

27. The Criminal Procedure Bill, presently before the New Zealand Parliament, would create exceptions to the rule against double jeopardy for both tainted acquittals and new evidence in terms largely similar to those recommended by COAG in Australia.<sup>52</sup>

## CANADA

### The rules against double jeopardy

#### *Statutory provisions*

28. Sections 607 to 610 of the Canadian Criminal Code provide for the pleas of *autrefois acquit*, *autrefois convict* and pardon. For protection against double jeopardy to apply, there must first have been a valid trial.<sup>53</sup>

29. The tests to determine when the pleas apply are virtually identical to those in the New Zealand Crimes Act 1961. An accused cannot be tried again for offences of which that accused could have been convicted at the first trial, had all the necessary amendments been made to the first charge,<sup>54</sup> or for an aggravated version of an offence already charged.<sup>55</sup>

30. Section 11(h) of the Canadian Charter of Rights and Freedoms<sup>56</sup> states that "any person charged with an offence has the right, if finally acquitted of the offence, not to be tried for it again and, if finally found guilty or punished for the offence, not to be tried or punished for it again." The extent of the protection offered under the Charter is still largely unclear. The Law Commission of England and Wales stated in their consultation paper on double jeopardy that section 11(h) appears to apply only where the offences tried in one trial are exactly the same as those charged in a later trial, and that it therefore provides narrower protection than the *autrefois* pleas in the Criminal Code.<sup>57</sup> However, the Law Reform

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<sup>48</sup> New Zealand Law Commission, *Acquittal Following Perversion of the Course of Justice*, Report 70 (2001) at paras 40 & 44-45.

<sup>49</sup> *Ibid*, at para 30.

<sup>50</sup> *Ibid*, at para 45.

<sup>51</sup> *Ibid*, in the preface to the Report.

<sup>52</sup> The Bill and related documents may be found at : <http://tinyurl.com/yvr4zm> (accessed 9 December 2008).

<sup>53</sup> The Supreme Court of Canada, in *R v Moore* (1988), 41 CCC (3d) 289 at 311 as cited in *R v George* 1993 4609 (N SC), held that "...if the charge is an absolute nullity... the doctrine of *autrefois acquit* is never a bar to the relaying of the charge because the accused was never in jeopardy".<sup>53</sup>

<sup>54</sup> With reference to "all proper amendments" being made at the former trial, it has been held that it is not relevant to consider whether the prosecutor could have laid some other charge; the question is whether the charge which was laid could have been amended at the first trial to include the offence which the accused now faces (*R v Bremnar*, 2007 NSCA 53 at para 69 (Nova Scotia Court of Appeal).)

<sup>55</sup> It appears that the new element of death will prevent a charge of homicide from being regarded as "substantially the same offence" as an earlier assault, and that section 610(1) will therefore not bar prosecution for murder or manslaughter if the victim dies following the accused's trial for assault or attempted murder. (*R v Hall*, 1999 ABQB 231 at paras 68-70.)

<sup>56</sup> Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK).

<sup>57</sup> Law Commission, *Double Jeopardy*, Consultation Paper No. 156 (1999) at para B.12.

Commission of Canada state that in several cases considering the application of section 11(h), the courts have used the analysis laid down in *R v Prince*<sup>58</sup> to assess whether an offence charged in a trial is the same as a previous offence for which the defendant has already been acquitted or convicted.<sup>59</sup>

### *Common law principles*

31. Canadian law recognises a principle barring multiple convictions for the same act, whether in the same or subsequent trials. This principle is a rule of statutory construction, which may be displaced by clear evidence of Parliamentary intent to allow multiple prosecution or punishment for the offences in question. In order for the principle to apply, there must be sufficient proximity between the facts and between the offences which form the basis of two or more charges. Factual proximity will normally be established if each of the charges stems from the same act of the accused. In isolating one act, the court will consider the proximity of events in time and place, any relevant intervening events and whether the accused's actions were connected by a common objective. Offences will be sufficiently proximate if there is no additional distinguishing element in the second offence, for example if the second offence is merely a particularisation of or an alternative means of proving the first offence. The question is whether the same cause, matter or delict underlies both charges.<sup>60</sup>

32. Canadian law also recognises a rule of issue estoppel, whereby the prosecution is barred from challenging, in subsequent proceedings, an issue which has already been resolved in favour of the accused at a previous trial. In order for the doctrine to apply, "[a] finding on the relevant issue must be the only rational explanation of the verdict of the jury."<sup>61</sup> Furthermore, it was held that issue estoppel was not available to an accused who committed the statutory equivalent of perjury on policy grounds.<sup>62</sup> In *Grdic v R* it was decided that issue estoppel will not prevent re-litigation of issues when there is evidence of fraud, provided that there is fresh evidence of the commission of the original crime which was not available with due diligence at the original trial.<sup>63</sup>

33. In their 1991 working paper *Double Jeopardy, Pleas and Verdicts*,<sup>64</sup> The Law Reform Commission of Canada recommended legislation to codify the pleas of *autrefois convict* and *autrefois acquit*, the rule against multiple convictions, the rule against unreasonably splitting a case and the doctrine of issue estoppel.<sup>65</sup> These recommendations were not enacted.

### **Exceptions to the rules**

34. Canadian law does not recognise new evidence or tainted acquittal exceptions to its rules against double jeopardy.

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<sup>58</sup> [1986] 2 S.C.R. 480.

<sup>59</sup> Law Reform Commission of Canada, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63 (1991), p 16. This test is considered below at para 2.24.

<sup>60</sup> *Kienapple v R* [1975] 1 SCR 729; *R v Prince* [1986] 2 SCR 480, per Dickson CJ at paras 20, 31-32 and 34-39.

<sup>61</sup> *Gushue v R* [1980] 1 SCR 798 at 807, the Supreme Court of Canada adopting Professor Friedland's statement in Martin L Friedland, *Double Jeopardy* (1969) at 134.

<sup>62</sup> *Gushue v R* [1980] 1 SCR 798, per Laskin CJ at 802 and 805-806.

<sup>63</sup> *Grdic v R* [1985] 1 SCR 810, per the majority of the court at para 20.

<sup>64</sup> Law Reform Commission of Canada, *Double Jeopardy, Pleas and Verdicts*, Working Paper 63 (1991).

<sup>65</sup> *Ibid*, at 63, 55, 50 & 59, respectively.

## IRELAND

### The rules against double jeopardy

35. Article 38.1 of the Constitution of Ireland states that "[n]o person shall be tried on any criminal charge save in due course of law." It has been suggested that this article could provide protection from double jeopardy but, since the scope of the Article has not yet defined, this is not beyond doubt.<sup>66</sup>

36. The pleas of *autrefois acquit* and *autrefois convict* are available in Ireland when the defendant can show that he was liable to suffer lawful imprisonment in his first trial, when the parties to both sets of proceedings are the same and when the two offences charged are the same.<sup>67</sup> There does not seem to be a single, clear definition of "same offence" in Irish law. *R v James Foy*<sup>68</sup> was one of the first Irish cases in which there was an attempt to formulate such a test. The "same evidence" test<sup>69</sup> was one of the tests put forward in that case and has since been followed in a number of Irish cases.<sup>70</sup> A different test was used in *The People (AG) v O'Brien* where it was held that "[i]f all the elements necessary to constitute the first offence are also necessary ingredients in the second offence then the two offences are considered as being substantially the same. . . But if only a portion of the ingredients to the first offence are requisite to the commission of the second offence the plea will not lie." The *autrefois* pleas extend in their application to offences of which the accused could have been convicted at the first trial.<sup>71</sup>

37. In *DPP v O'Connor*,<sup>72</sup> the High Court overturned the trial judge's decision to stay perjury proceedings which related to an offence of which the defendant had been acquitted on the basis that they were an abuse of process. It was decided that the Director of Public Prosecutions was not attempting to challenge the verdict of the original trial, nor was he attempting to retry the defendant on the original charges, so the trial was allowed to proceed.

### Exceptions to the rules

38. The Irish Law Reform Commission considered a new evidence exception to the rule against double jeopardy in their 2006 Report on *Prosecution Appeals and Pre-Trial Hearings*, but concluded that such derogation from the existing law was beyond the scope of their remit.<sup>73</sup> In 2007, the Balance in the Criminal Law Review Group, appointed by the Minister for Justice and Law Reform, recommended that legislation ought to be enacted to allow the prosecution to complain in respect of a miscarriage of justice on the basis of new

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<sup>66</sup> Paul A. McDermott, *Res Judicata*, (2<sup>nd</sup> edition, 2007), at 208-209. In *Feeney v District Justice Clifford* [1989] IR 668 (HC) at 673 Justice Barr suggested that exposing a defendant to double jeopardy would deprive him of his "constitutional right to fair procedures."

<sup>67</sup> McDermott, *op cit*, at 208-209 & 231. For these purposes, the Attorney General, Director of Public Prosecutions, the State and the Commissioner of An Garda Síochána (the Irish police force) have the necessary privity to trigger the double jeopardy rules.

<sup>68</sup> *R v James Foy Vern & Scriv* (1788) 540 at 595 (as noted by McDermott, *op cit*, at 221).

<sup>69</sup> ". . . Foy upon the indictment for murder, might have been found guilty upon evidence of his having procured the murder. If so, is it not equally a necessary consequence, that by his being acquitted of having committed the murder, he is impliedly acquitted of having procured the murder, and therefore not to be tried again for the same offence." (*R v James Foy Vern & Scriv* (1788) 540, per Henn J at 595 (as noted by McDermott, *op cit*, at 221).

<sup>70</sup> *R (Flynn) v Justices of Cork* (1909) 43 ILTR 154 (KB) and *R v Burke* (1913) 47 ILTR 111 (as noted by McDermott, *op cit*, at 222).

<sup>71</sup> *The People (AG) v O'Brien* [1963] IR 92 at 96.

<sup>72</sup> *DPP v O'Connor* (HC) unreported, 13 July 1994 (as noted by McDermott, *op cit*, at 282-283).

<sup>73</sup> The Law Reform Commission, *Report: Prosecution Appeals and Pre-Trial Hearings* (2006), at 11.

or newly discovered evidence. It proposed that a new evidence exception ought to have an "exacting threshold" and that judicial approval for an appeal against an acquittal ought to be required.<sup>74</sup>

39. In addition, the Review Group recommended that acquittals should be able to be reviewed where there was interference with the trial process, whether in respect of the jury or otherwise.<sup>75</sup> It was recommended that in these circumstances the Supreme Court should be satisfied that there is sufficient evidence to warrant the acquittal being quashed.<sup>76</sup>

40. In June 2008 it was reported that Minister for Justice Dermot Ahern intended to introduce a Bill by early 2009 to allow for retrials for serious crime such as rape, manslaughter and murder in light of new evidence and if an acquittal appears to be tainted,<sup>77</sup> and it was announced in September 2008 the new Bill was advancing at "a good pace".<sup>78</sup>

## UNITED STATES

### The rules against double jeopardy

41. The rule against double jeopardy is enshrined in the Fifth Amendment to the United States Constitution: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

42. In order for a defendant to be protected from double jeopardy, the first trial must have been valid. In *US v Scott* it was held that "[w]hen a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy."<sup>79</sup>

43. Protection from double jeopardy is enforceable in both state and federal prosecutions<sup>80</sup> but does not prevent separate prosecution for (prima facie) the same offence by both state and federal governments.<sup>81</sup>

44. *Blockburger v United States*<sup>82</sup> set out the test for deciding if offences are "the same" for double jeopardy purposes: offences are the same unless each offence requires proof of a fact that the other does not. A series of cases tried to distinguish the tests for when there are successive prosecutions and when there are multiple punishments from a single prosecution. In *United States v Dixon*<sup>83</sup> it was confirmed that the test which applies both to successive prosecutions and to multiple punishments is the *Blockburger* test, i.e. the same elements test.

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<sup>74</sup> Balance in the Criminal Law Review Group, *Final Report* (2007), at 204 & 209. The report is available at [www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf](http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf) (accessed 9 December 2008).

<sup>75</sup> *Ibid.*, at 214.

<sup>76</sup> *Ibid.*

<sup>77</sup> [www.irishtimes.com/newspaper/breaking/2008/0619/breaking45.htm](http://www.irishtimes.com/newspaper/breaking/2008/0619/breaking45.htm) (accessed 9 December 2008).

<sup>78</sup> [www.independent.ie/national-news/new-push-to-speed-abolition--of-double-jeopardy-1478951.html](http://www.independent.ie/national-news/new-push-to-speed-abolition--of-double-jeopardy-1478951.html) (accessed 9 December 2008).

<sup>79</sup> *US v Scott* 437 US 83 (1978), per Rehnquist J at 92, following *Lee v. United States*, 432 US 30 (1977).

<sup>80</sup> *Benton v Maryland* 395 US 784 (1969).

<sup>81</sup> *Bartkus v Illinois* 359 US 121 (1959); *United States v Lanza* 260 US 377 (1922).

<sup>82</sup> 284 US 299 (1932).

<sup>83</sup> 509 U.S. 688 (1993)

45. *Ashe v Swenson*<sup>84</sup> established that the Fifth Amendment embodies the rule of collateral estoppel, and defined it as ". . .when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be re-litigated between the same parties in any future lawsuit." For collateral estoppel to apply the court must consider whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. If the jury could not have done so then the prosecution will not be allowed. *Dowling v US*<sup>85</sup> confirmed that the collateral estoppel rule only applies to the ultimate fact to be established and not to all evidence of relevant and probative value, just because it relates to alleged criminal conduct for which the accused has already been acquitted.

46. In the United States, there is a general rule against offence-splitting which means that prior prosecutions for less serious offences bar prosecutions for greater offences which include the lesser. However, a charge of homicide made after the death of a person is not barred by an acquittal of assault with intent to kill, since the event of death constitutes a new fact on which the defendant could not previously have been convicted or tried. It is not possible to be in jeopardy for the offence of homicide before the alleged victim has died, so it is reasoned that former jeopardy at an assault trial cannot be a bar to a subsequent prosecution for homicide.<sup>86</sup>

47. In *Dowling v US*, the Supreme Court declined to extend the Fourteenth Amendment, which enshrines the right to due process, to provide protection from double jeopardy where it is not provided by the Fifth Amendment.<sup>87</sup>

### **Exceptions to the rule against double jeopardy**

48. Double jeopardy protection will apply wherever there has been an acquittal of the same offence, even if the acquittal at the first trial is based on an "egregiously erroneous foundation."<sup>88</sup> It may be that the Double Jeopardy Clause will not prevent a second trial where the first trial is shown to have been a sham (for instance, where the judge has been bribed to deliver an acquittal), on the theory that the accused was never truly in jeopardy at his first trial.<sup>89</sup>

49. United States law can be considered as an exception to the general understanding that prosecution rights of appeal do not truly engage double jeopardy, since they are available before a decision can be regarded as final. It was held in *Kepner v US*<sup>90</sup> that the Double Jeopardy Clause of the Fifth Amendment bars a federal appeal of an acquittal. Holmes J dissented, opining that "...a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause"<sup>91</sup> and so retrial after an appeal would not in fact place the defendant in second jeopardy. In addition, it has been held that, in relation to a state appeal of an acquittal, that "whether the trial is to a jury or to the bench, subjecting the

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<sup>84</sup> 397 US 436 (1970).

<sup>85</sup> 493 US 342 (1990).

<sup>86</sup> *Diaz v US* 233 US 442 (1912), *People v Harrison*, 70 N E2d 596 (Ill 1946).

<sup>87</sup> *Dowling v US* 493 US 342 (1990), at 354 (*per curiam*).

<sup>88</sup> *Fong Foo v US* 369 US 141 (1962), at 143 (*per curiam*).

<sup>89</sup> *Aleman v Honorable Judges of Circuit Court of Cook County*, 138 F.3d 302 (7th Cir 1998).

<sup>90</sup> 195 US 100 (1904), following *United States v Sanges* (1892) 144 US 310 in which a plethora of supporting authority is cited.

<sup>91</sup> *Kepner v US* 195 US 100 (1904), per Holmes J at 135.

defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause.<sup>92</sup>

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<sup>92</sup> *Smalis v Pennsylvania* 476 US 140 (1986), per White J at 145.

## Appendix 3

# The New Evidence Exception in England and Wales

### CRIMINAL JUSTICE ACT 2003, PART 10<sup>1</sup>

1. Part 10 of the Criminal Justice Act 2003, which came into force on 4 April 2005, introduces a new evidence exception to the rule against double jeopardy. The exception is available in relation to the "qualifying offences" listed in Part 1 of Schedule 5 to that Act. By section 75(6), Part 10 applies whether the acquittal was before or after the passing of the 2003 Act.

2. Section 76 allows a prosecutor to apply to the Court of Appeal for an order quashing a person's acquittal for a qualifying offence and ordering him to be retried for that offence. Only one application may be made in relation to an acquittal (section 76(5)). Such an application may only be made with the written consent of the Director of Public Prosecutions. The DPP may only consent if satisfied that there is new and compelling evidence against the acquitted person in relation to the qualifying offence that appears to meet the requirements of section 78, that it is in the public interest for the application to succeed, and that any new trial would not be inconsistent with obligations of the United Kingdom under article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.

### Part 10 in Practice

3. Part 10 of the 2003 Act came into force on 4 April 2005. At the time of writing, more than three years later (December 2008), there have only been two reported applications under Part 10, each of which has been based upon a post-acquittal confession by the original accused.

### *R v Dunlop*

4. In the first, *R v Dunlop*,<sup>2</sup> the application was successful. Dunlop had been tried, in 1991, for the murder of Julie Hogg. At his first trial, the jury failed to agree a verdict and was discharged. A retrial was ordered, and at that trial too the jury failed to reach a verdict. The Crown then formally offered no evidence and a "not guilty" verdict was recorded. Although two juries had failed to reach a guilty verdict, there was substantial evidence linking Dunlop to the crime. On the last night on which Julie Hogg was seen alive, he had told a friend that he "might pop round to Julie's". Fibres from his tracksuit were found on the blanket in which the corpse of the victim was wrapped and a set of the victim's house keys, bearing Dunlop's fingerprints, was found hidden under Dunlop's floorboards. In 1998, while in prison for unrelated offences, Dunlop admitted that he had murdered Julie Hogg. In 1999 he was charged with two counts of perjury, one in relation to each of his trials for the murder. In

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<sup>1</sup> The relevant provisions of Part 10 of the 2003 Act, and of Schedule 5 to that Act, are set out in Appendix 4.

<sup>2</sup> [2006] EWCA Crim 1354; [2007] 1 WLR 1657.

2000 he pleaded guilty to each count, and was sentenced to six years' imprisonment on each count, to run concurrently.

5. The Court of Appeal had little difficulty in deciding that the murder acquittal should be set aside and a new trial ordered. Counsel for Dunlop conceded that there was no conflict between the Crown's application and European law, as the existence of Article 4(2) of the Seventh Protocol to the ECHR showed that it was permissible, in European law, for an appellate court to reopen a case in accordance with the provisions of domestic law if there was evidence of new or newly discovered facts. It was submitted that an order would not be in the interests of justice for three reasons: (i) it would not be fair for Dunlop to be prejudiced by his confessions and his plea of guilty to perjury when these were made as a result of representations, or alternatively in reliance on a belief, that he could not and would not be tried again for murder; (ii) a fair trial would be unlikely because of (a) prejudicial publicity from acquittal to the present day and (b) the fact that there would be unavoidable reference to the previous trials; and (iii) the periods of delay prior to the application under Part 10 had been so great as to render a retrial contrary to the interests of justice.

6. The Court found, on examination of the circumstances of Dunlop's confessions and pleas, that there was no substance in the claim that these had been made because he believed, or had been led to believe, that he could not be retried for murder. The Court also rejected the argument that the delay of 17 years between the original offence and the new prosecution was inherently unfair, noting that such delays quite commonly arose in the trials of historic sex offences. In the Court's view, there was little difference between the delay in charging a sex offender, who may have been lulled into a sense of false security by the absence of any charge over many years, and the delay in retrying a defendant who has been lulled into a false sense of security by the existence of a rule against double jeopardy.<sup>3</sup>

7. In relation to publicity, the Court was of the view that the general publicity surrounding the case should not lead to unfairness if, using accepted techniques of jury management, a jury was selected which was not prejudiced by the recollection of such publicity. In response to the argument that the jury would inevitably be aware that Dunlop was being retried after acquittal, and that some would know that it was to be inferred from this that an appeal court must have been satisfied that there was "compelling evidence" of guilt, the Court said this:

"So far as the implications of Dunlop's retrial are concerned, we consider that there would be no difficulty in ensuring that members of the jury were unaware of the legal requirements for a retrial, for we doubt whether many members of the public are aware of these, notwithstanding that a press release issued by the Crown Prosecution Service in relation to the application to retry Dunlop unfortunately stated that the DPP was satisfied as to the requirement of compelling new evidence against him."<sup>4</sup>

8. In any event, the Court noted that any prejudicial effect of publicity would be insignificant given that the jury would inevitably be told that Dunlop pleaded guilty to perjury, and that by doing so he had accepted that he lied when he denied being guilty of the murder

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<sup>3</sup> One possible distinction, not canvassed in *Dunlop*, is that in the one case the delay has occurred between charge and ultimate conviction, whereas in the case of the historic sex offender all of the delay was pre-charge. While the ECHR does not prevent the re-opening of cases in light of fresh evidence, the normal ECHR guarantees, including the right to a trial within a reasonable time, continue to apply.

<sup>4</sup> *R v Dunlop* [2006] EWCA Crim 1354; [2007] 1 WLR 1657, at para 22.

of Julie Hogg. By virtue of section 74(3) of the Police and Criminal Evidence Act 1984 (PACE), Dunlop would, because of his conviction for perjury, "be taken to have committed that offence unless the contrary is proved". Accordingly, the jury would properly proceed on the basis that Dunlop had lied when he denied being guilty of the murder, unless he proved to the contrary. The Court of Appeal concluded that in reliance on the belief that he was immune from retrial, Dunlop had, by his confessions and his conviction for perjury, provided new evidence which was not merely compelling, but overwhelming. The order setting aside the acquittal and ordering a new trial was granted. Dunlop subsequently pleaded guilty to murder.

### *R v Miell*

9. In *R v Miell*,<sup>5</sup> the second application to be made under Part 10 of the 2003 Act, the respondent had been one of two men who had initially confessed to the fatal stabbing of Stephen Burton, before withdrawing their confessions. The Crown case at Miell's trial was that the crime could only have been committed by Miell or by the other man, Rollinson, that the confessions made by Rollinson were not true and that the confessions made by Miell were true. At trial, Miell's version of events, which accorded with that which he had earlier given to the police, was that Rollinson had stabbed the deceased while he, Miell, had been out of the room. The jury returned a verdict of not guilty.

10. While serving a sentence for unrelated offences, Miell began to undergo counselling and also to receive visits from Jehovah's Witness prison visitors. He confessed to having murdered Burton, maintaining in his police interview that he was admitting the offence because he was studying with the Jehovah's Witnesses and needed to clear his conscience before he could be baptised. Miell was charged with, and pled guilty to, perjury and was sentenced to three years' imprisonment to be served consecutively with the sentences that he was already serving for robberies and burglaries. In the following year he was baptised as a Jehovah's Witness.

11. In July 2007, Miell was arrested on suspicion of murder and interviewed under caution. He withdrew his earlier confessions, claiming that he had invented them in order to show that he had normal feelings like other people and in order to solicit increased attention from the Jehovah's Witnesses. According to this version, the confession had been a game, and he had deliberately confessed to facts which did not correspond with what he knew of the forensic evidence. In particular, he had claimed to have struck the victim twice with the same knife, while the evidence showed that two separate weapons had been used.

12. In the Crown's application under section 76 of the 2003 Act to have Miell's acquittal set aside and a new trial ordered, it was common ground that his confessions, including that implicit in his plea of guilty to perjury, constituted new evidence. However, the respondent submitted that the new evidence was not reliable and therefore not compelling, and that it would not be in accordance with the interests of justice to accede to the prosecution's application.

13. The Court of Appeal was of the opinion that parts of Miell's confession were manifestly untrue, and that this would be likely to leave the jury in doubt as to whether the respondent was telling the truth when he said that he had murdered Mr Burton. It was likely

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<sup>5</sup> [2007] EWCA Crim 3130; [2008] 1 WLR 627.

that the jury at any new trial would be in as much doubt as to the truth of Miell's confession as the jury at the first trial had been. The Court accordingly found that the new evidence was not compelling, reliable and highly probative in the case against the respondent, and refused the Crown's application.

14. The cases of *Dunlop* and *Miell* together suggest that the test to be applied by the Court of Appeal in considering an application under section 76 of the 2003 Act may sometimes require the court, in effect, to form its own view of the accused's guilt. In *Dunlop*, the Court recognised that the jury in any retrial would have to proceed on the basis that it was for the accused to displace the presumption raised by his perjury conviction that he was in fact guilty of the murder.<sup>6</sup> That the Court saw no difficulty in this can only reflect its view that the new evidence against Dunlop was not merely compelling, but overwhelming.<sup>7</sup> In contrast, the *Miell* court seems to have been troubled by section 74 of PACE precisely because, in its estimation, the conviction of Miell would have been unsafe.

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<sup>6</sup> [2006] EWCA Crim 1354; [2007] 1 WLR 1657 at paras 23-24.

<sup>7</sup> *Ibid*, para 42.

# Appendix 4

## Excerpts from the Criminal Justice Act 2003

### PART 10 RETRIAL FOR SERIOUS OFFENCES

#### *Cases that may be retried*

#### **75 Cases that may be retried**

(1) This Part applies where a person has been acquitted of a qualifying offence in proceedings—

(a) on indictment in England and Wales,

(b) on appeal against a conviction, verdict or finding in proceedings on indictment in England and Wales, or

(c) on appeal from a decision on such an appeal.

(2) A person acquitted of an offence in proceedings mentioned in subsection (1) is treated for the purposes of that subsection as also acquitted of any qualifying offence of which he could have been convicted in the proceedings because of the first-mentioned offence being charged in the indictment, except an offence—

(a) of which he has been convicted,

(b) of which he has been found not guilty by reason of insanity, or

(c) in respect of which, in proceedings where he has been found to be under a disability (as defined by section 4 of the Criminal Procedure (Insanity) Act 1964 (c. 84)), a finding has been made that he did the act or made the omission charged against him.

(3) References in subsections (1) and (2) to a qualifying offence do not include references to an offence which, at the time of the acquittal, was the subject of an order under section 77(1) or (3).

(4) This Part also applies where a person has been acquitted, in proceedings elsewhere than in the United Kingdom, of an offence under the law of the place where the proceedings were held, if the commission of the offence as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of a qualifying offence.

(5) Conduct punishable under the law in force elsewhere than in the United Kingdom is an offence under that law for the purposes of subsection (4), however it is described in that law.

(6) This Part applies whether the acquittal was before or after the passing of this Act.

(7) References in this Part to acquittal are to acquittal in circumstances within subsection (1) or (4).

(8) In this Part “qualifying offence” means an offence listed in Part 1 of Schedule 5.

*Application for retrial*

**76 Application to Court of Appeal**

(1) A prosecutor may apply to the Court of Appeal for an order—

- (a) quashing a person’s acquittal in proceedings within section 75(1), and
- (b) ordering him to be retried for the qualifying offence.

(2) A prosecutor may apply to the Court of Appeal, in the case of a person acquitted elsewhere than in the United Kingdom, for—

- (a) a determination whether the acquittal is a bar to the person being tried in England and Wales for the qualifying offence, and
- (b) if it is, an order that the acquittal is not to be a bar.

(3) A prosecutor may make an application under subsection (1) or (2) only with the written consent of the Director of Public Prosecutions.

(4) The Director of Public Prosecutions may give his consent only if satisfied that—

- (a) there is evidence as respects which the requirements of section 78 appear to be met,
- (b) it is in the public interest for the application to proceed, and
- (c) any trial pursuant to an order on the application would not be inconsistent with obligations of the United Kingdom under Article 31 or 34 of the Treaty on European Union relating to the principle of *ne bis in idem*.

(5) Not more than one application may be made under subsection (1) or (2) in relation to an acquittal.

**77 Determination by Court of Appeal**

(1) On an application under section 76(1), the Court of Appeal—

- (a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;
- (b) otherwise, must dismiss the application.

(2) Subsections (3) and (4) apply to an application under section 76(2).

(3) Where the Court of Appeal determines that the acquittal is a bar to the person being tried for the qualifying offence, the court—

- (a) if satisfied that the requirements of sections 78 and 79 are met, must make the order applied for;
- (b) otherwise, must make a declaration to the effect that the acquittal is a bar to the person being tried for the offence.

(4) Where the Court of Appeal determines that the acquittal is not a bar to the person being tried for the qualifying offence, it must make a declaration to that effect.

### **78 New and compelling evidence**

(1) The requirements of this section are met if there is new and compelling evidence against the acquitted person in relation to the qualifying offence.

(2) 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).

(3) Evidence is compelling if—

(a) it is reliable,

(b) it is substantial, and

(c) in the context of the outstanding issues, it appears highly probative of the case against the acquitted person.

(4) The outstanding issues are the issues in dispute in the proceedings in which the person was acquitted and, if those were appeal proceedings, any other issues remaining in dispute from earlier proceedings to which the appeal related.

(5) For the purposes of this section, it is irrelevant whether any evidence would have been admissible in earlier proceedings against the acquitted person.

### **79 Interests of justice**

(1) The requirements of this section are met if in all the circumstances it is in the interests of justice for the court to make the order under section 77.

(2) That question is to be determined having regard in particular to—

(a) whether existing circumstances make a fair trial unlikely;

(b) for the purposes of that question and otherwise, the length of time since the qualifying offence was allegedly committed;

(c) whether it is likely that the new evidence would have been adduced in the earlier proceedings against the acquitted person but for a failure by an officer or by a prosecutor to act with due diligence or expedition;

(d) whether, since those proceedings or, if later, since the commencement of this Part, any officer or prosecutor has failed to act with due diligence or expedition.

(3) In subsection (2) references to an officer or prosecutor include references to a person charged with corresponding duties under the law in force elsewhere than in England and Wales.

(4) Where the earlier prosecution was conducted by a person other than a prosecutor, subsection (2)(c) applies in relation to that person as well as in relation to a prosecutor.

## **80 Procedure and evidence**

(1) A prosecutor who wishes to make an application under section 76(1) or (2) must give notice of the application to the Court of Appeal.

(2) Within two days beginning with the day on which any such notice is given, notice of the application must be served by the prosecutor on the person to whom the application relates, charging him with the offence to which it relates or, if he has been charged with it in accordance with section 87(4), stating that he has been so charged.

(3) Subsection (2) applies whether the person to whom the application relates is in the United Kingdom or elsewhere, but the Court of Appeal may, on application by the prosecutor, extend the time for service under that subsection if it considers it necessary to do so because of that person's absence from the United Kingdom.

(4) The Court of Appeal must consider the application at a hearing.

(5) The person to whom the application relates—

(a) is entitled to be present at the hearing, although he may be in custody, unless he is in custody elsewhere than in England and Wales or Northern Ireland, and

(b) is entitled to be represented at the hearing, whether he is present or not.

(6) For the purposes of the application, the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice—

(a) order the production of any document, exhibit or other thing, the production of which appears to the court to be necessary for the determination of the application, and

(b) order any witness who would be a compellable witness in proceedings pursuant to an order or declaration made on the application to attend for examination and be examined before the court.

(7) The Court of Appeal may at one hearing consider more than one application (whether or not relating to the same person), but only if the offences concerned could be tried on the same indictment.

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## **82 Restrictions on publication in the interests of justice**

(1) Where it appears to the Court of Appeal that the inclusion of any matter in a publication would give rise to a substantial risk of prejudice to the administration of justice in a retrial, the court may order that the matter is not to be included in any publication while the order has effect. . .

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## *Retrial*

### **84 Retrial**

(1) Where a person—

(a) is tried pursuant to an order under section 77(1), or

(b) is tried on indictment pursuant to an order under section 77(3),

the trial must be on an indictment preferred by direction of the Court of Appeal.

(2) After the end of 2 months after the date of the order, the person may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal gives leave.

(3) The Court of Appeal must not give leave unless satisfied that—

(a) the prosecutor has acted with due expedition, and

(b) there is a good and sufficient cause for trial despite the lapse of time since the order under section 77.

(4) Where the person may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order and—

(a) for any direction required for restoring an earlier judgment and verdict of acquittal of the qualifying offence, or

(b) in the case of a person acquitted elsewhere than in the United Kingdom, for a declaration to the effect that the acquittal is a bar to his being tried for the qualifying offence.

(5) An indictment under subsection (1) may relate to more than one offence, or more than one person, and may relate to an offence which, or a person who, is not the subject of an order or declaration under section 77.

(6) Evidence given at a trial pursuant to an order under section 77(1) or (3) must be given orally if it was given orally at the original trial, unless—

(a) all the parties to the trial agree otherwise,

(b) section 116 applies, or

(c) the witness is unavailable to give evidence, otherwise than as mentioned in subsection (2) of that section, and section 114(1)(d) applies.

(7) At a trial pursuant to an order under section 77(1), paragraph 5 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (use of depositions) does not apply to a deposition read as evidence at the original trial.

## *Investigations*

### **85 Authorisation of investigations**

(1) This section applies to the investigation of the commission of a qualifying offence by a person—

- (a) acquitted in proceedings within section 75(1) of the qualifying offence, or
  - (b) acquitted elsewhere than in the United Kingdom of an offence the commission of which as alleged would have amounted to or included the commission (in the United Kingdom or elsewhere) of the qualifying offence.
- (2) Subject to section 86, an officer may not do anything within subsection (3) for the purposes of such an investigation unless the Director of Public Prosecutions—
- (a) has certified that in his opinion the acquittal would not be a bar to the trial of the acquitted person in England and Wales for the qualifying offence, or
  - (b) has given his written consent to the investigation (whether before or after the start of the investigation).
- (3) The officer may not, either with or without the consent of the acquitted person—
- (a) arrest or question him,
  - (b) search him or premises owned or occupied by him,
  - (c) search a vehicle owned by him or anything in or on such a vehicle,
  - (d) seize anything in his possession, or
  - (e) take his fingerprints or take a sample from him.
- (4) The Director of Public Prosecutions may only give his consent on a written application, and such an application may be made only by an officer who—
- (a) if he is an officer of the metropolitan police force or the City of London police force, is of the rank of commander or above, or
  - (b) in any other case, is of the rank of assistant chief constable or above.
- (5) An officer may make an application under subsection (4) only if—
- (a) he is satisfied that new evidence has been obtained which would be relevant to an application under section 76(1) or (2) in respect of the qualifying offence to which the investigation relates, or
  - (b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.
- (6) The Director of Public Prosecutions may not give his consent unless satisfied that—
- (a) there is, or there is likely as a result of the investigation to be, sufficient new evidence to warrant the conduct of the investigation, and
  - (b) it is in the public interest for the investigation to proceed.
- (7) In giving his consent, the Director of Public Prosecutions may recommend that the investigation be conducted otherwise than by officers of a specified police force or specified team of customs and excise officers.

## **86 Urgent investigative steps**

(1) Section 85 does not prevent an officer from taking any action for the purposes of an investigation if—

(a) the action is necessary as a matter of urgency to prevent the investigation being substantially and irrevocably prejudiced,

(b) the requirements of subsection (2) are met, and

(c) either—

(i) the action is authorised under subsection (3), or

(ii) the requirements of subsection (5) are met.

(2) The requirements of this subsection are met if—

(a) there has been no undue delay in applying for consent under section 85(2),

(b) that consent has not been refused, and

(c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that consent before taking the action.

(3) An officer of the rank of superintendent or above may authorise the action if—

(a) he is satisfied that new evidence has been obtained which would be relevant to an application under section 76(1) or (2) in respect of the qualifying offence to which the investigation relates, or

(b) he has reasonable grounds for believing that such new evidence is likely to be obtained as a result of the investigation.

(4) An authorisation under subsection (3) must—

(a) if reasonably practicable, be given in writing;

(b) otherwise, be recorded in writing by the officer giving it as soon as is reasonably practicable.

(5) The requirements of this subsection are met if—

(a) there has been no undue delay in applying for authorisation under subsection (3),

(b) that authorisation has not been refused, and

(c) taking into account the urgency of the situation, it is not reasonably practicable to obtain that authorisation before taking the action.

(6) Where the requirements of subsection (5) are met, the action is nevertheless to be treated as having been unlawful unless, as soon as reasonably practicable after the action is taken, an officer of the rank of superintendent or above certifies in writing that he is satisfied that, when the action was taken—

(a) new evidence had been obtained which would be relevant to an application under section 76(1) or (2) in respect of the qualifying offence to which the investigation relates, or

(b) the officer who took the action had reasonable grounds for believing that such new evidence was likely to be obtained as a result of the investigation.

*Arrest, custody and bail*

**87 Arrest and charge**

(1) Where section 85 applies to the investigation of the commission of an offence by any person and no certification has been given under subsection (2) of that section—

(a) a justice of the peace may issue a warrant to arrest that person for that offence only if satisfied by written information that new evidence has been obtained which would be relevant to an application under section 76(1) or (2) in respect of the commission by that person of that offence, and

(b) that person may not be arrested for that offence except under a warrant so issued. . .

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**SCHEDULE 5**

QUALIFYING OFFENCES FOR PURPOSES OF PART 10

PART 1

LIST OF OFFENCES FOR ENGLAND AND WALES

Offences Against the Person

*Murder*

1 Murder.

*Attempted murder*

2 An offence under section 1 of the Criminal Attempts Act 1981 (c. 47) of attempting to commit murder.

*Soliciting murder*

3 An offence under section 4 of the Offences against the Person Act 1861(c. 100).

*Manslaughter*

4 Manslaughter.

*Kidnapping*

5 Kidnapping.

Sexual Offences

*Rape*

6 An offence under section 1 of the Sexual Offences Act 1956 (c. 69) or section 1 of the Sexual Offences Act 2003 (c. 42).

*Attempted rape*

7 An offence under section 1 of the Criminal Attempts Act 1981 of attempting to commit an offence under section 1 of the Sexual Offences Act 1956 or section 1 of the Sexual Offences Act 2003.

*Intercourse with a girl under thirteen*

8 An offence under section 5 of the Sexual Offences Act 1956.

*Incest by a man with a girl under thirteen*

9 An offence under section 10 of the Sexual Offences Act 1956 alleged to have been committed with a girl under thirteen.

*Assault by penetration*

10 An offence under section 2 of the Sexual Offences Act 2003 (c. 42).

*Causing a person to engage in sexual activity without consent*

11 An offence under section 4 of the Sexual Offences Act 2003 where it is alleged that the activity caused involved penetration within subsection (4)(a) to (d) of that section.

*Rape of a child under thirteen*

12 An offence under section 5 of the Sexual Offences Act 2003.

*Attempted rape of a child under thirteen*

13 An offence under section 1 of the Criminal Attempts Act 1981 (c. 47) of attempting to commit an offence under section 5 of the Sexual Offences Act 2003.

*Assault of a child under thirteen by penetration*

14 An offence under section 6 of the Sexual Offences Act 2003.

*Causing a child under thirteen to engage in sexual activity*

15 An offence under section 8 of the Sexual Offences Act 2003 where it is alleged that an activity involving penetration within subsection (2)(a) to (d) of that section was caused.

*Sexual activity with a person with a mental disorder impeding choice*

16 An offence under section 30 of the Sexual Offences Act 2003 where it is alleged that the touching involved penetration within subsection (3)(a) to (d) of that section.

*Causing a person with a mental disorder impeding choice to engage in sexual activity*

17 An offence under section 31 of the Sexual Offences Act 2003 where it is alleged that an activity involving penetration within subsection (3)(a) to (d) of that section was caused.

#### Drugs Offences

*Unlawful importation of Class A drug*

18 An offence under section 50(2) of the Customs and Excise Management Act 1979 (c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971 (c. 38)).

*Unlawful exportation of Class A drug*

19 An offence under section 68(2) of the Customs and Excise Management Act 1979 alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971).

*Fraudulent evasion in respect of Class A drug*

20 An offence under section 170(1) or (2) of the Customs and Excise Management Act 1979 (c. 2) alleged to have been committed in respect of a Class A drug (as defined by section 2 of the Misuse of Drugs Act 1971 (c. 38)).

*Producing or being concerned in production of Class A drug*

21 An offence under section 4(2) of the Misuse of Drugs Act 1971 alleged to have been committed in relation to a Class A drug (as defined by section 2 of that Act).

#### Criminal Damage Offences

*Arson endangering life*

22 An offence under section 1(2) of the Criminal Damage Act 1971 (c. 48) alleged to have been committed by destroying or damaging property by fire.

*Causing explosion likely to endanger life or property*

23 An offence under section 2 of the Explosive Substances Act 1883 (c. 3).

*Intent or conspiracy to cause explosion likely to endanger life or property*

24 An offence under section 3(1)(a) of the Explosive Substances Act 1883.

#### War Crimes and Terrorism

*Genocide, crimes against humanity and war crimes*

25 An offence under section 51 or 52 of the International Criminal Court Act 2001 (c. 17).

*Grave breaches of the Geneva Conventions*

26 An offence under section 1 of the Geneva Conventions Act 1957 (c. 52).

*Directing terrorist organisation*

27 An offence under section 56 of the Terrorism Act 2000 (c. 11).

*Hostage-taking*

28 An offence under section 1 of the Taking of Hostages Act 1982 (c. 28).

Conspiracy

*Conspiracy*

29 An offence under section 1 of the Criminal Law Act 1977 (c. 45) of conspiracy to commit an offence listed in this Part of this Schedule.

[PART 2 of the Schedule sets out equivalent offences for Northern Ireland]



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