Doctrine of Double Jeopardy and Its Applications

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1. An Overview

The principle of double jeopardy or *ne bis in idem* prohibits a person for being tried twice for the same conduct, and stems from concerns of fairness to defendants and motivation for thorough investigations and prosecutions. Every civilized society maintains a criminal justice system in order to control crime and impose penalties on those who violate laws. It operates on the basis of conformity with the constitutional requirements. The "double jeopardy" principle is one such value protected by the system. It is a procedural safeguard, which bars a second trial then an accused person is either convicted or acquitted after a full-fledged trial by a court of competent jurisdiction.

The basic idea behind double jeopardy is deceptively simple, as provided by Art 20 (6) of Constitution of Nepal: "No person shall be tried and punished for the same offence in a court". The rule against double jeopardy originally flows from the maxim "*nemo debet bis vexari pro uno et eadem causa*" which means that no person shall be vexed twice for the same cause. The term “double jeopardy” expresses the idea of a person being put in peril of conviction more than once for the same offence.

"Double jeopardy" simply refers to the danger of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted. The evil sought to be avoided by prohibiting double jeopardy is second prosecution for the same offence after acquittal or conviction or multiple punishments for same offence. This means that if a person is prosecuted or convicted once cannot be punished again for that criminal act.

And if a person is indicated again for the same offence in the court then he has the plea of Double Jeopardy as a valid defence. Five policy considerations underpin the double jeopardy doctrine:

a. preventing the government to erroneously convict innocent persons;
b. protecting individuals from the financial, emotional, and social consequences of successive prosecutions;
c. preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes;
d. restricting prosecutorial discretion over the charging process; and

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e. eliminating judicial discretion to impose cumulative punishments that the legislature has not authorized.

2. Historical Background

The doctrine is considered to have its origin in the controversy between Henry II and Archbishop Thomas Becket in 12th century. At that time two courts of law have existed, the royal and the ecclesiastical. The king wanted the clergy subject to be punished in the royal court even after the ecclesiastical court punished him. Archbishop Thomas Becket viewed that the repeated punishments would violate the maxim nimo bis in idipsum. Followed by the dispute over the rights and privileges of the Church, King's knights murdered Archbishop Thomas Becket in 1170, and despite of this King Henry exempted the accused from further punishment in 1176. This concession given by King Henry is considered as responsible for the introduction of the principle in English common law. 

In the twelfth century, the res judicata doctrine had been introduced in English civil as well as criminal law due to the influence of teachings of Roman law in England. In eighteenth century, Blackstone stated:

“First, the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life for more than once for the same offence and hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence he may plead such acquittal in bar of any subsequent accusation for the same crime.”

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

3. Double Jeopardy: Protection under Nepalese Law

In Nepal, the principle of res judicata existed prior to the commencement of the Constitution. According to Dias, "res judicata means that the final judgment of a competent court may not

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4 Res judicata is the Latin term for "a matter already judged", and may refer to two concepts: in both civil law and common legal systems, a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) continued litigation of a case on same issues between the same parties.
6 For instance, Article 14(7) of the International Covenant on Civil and Political Rights; Article 4(1) , Protocol 7 to the European Convention of Human Rights; Article 50 of the Charter of Fundamental Rights of the European Union.
7 For instance, in countries such as Nepal, U.S.A and India, it is accepted as a constitutional right. In particular, Article 20(6) of the Constitution of Nepal, Fifth Amendment to Constitution of USA and Article 20(2) of the Constitution of India. Conversely, in England and Canada, it is the part of Common Law and Statute Law.
be disputed by the parties or their successors or any third parties in any subsequent legal proceeding."

It was recognized under the provision of Civil Code, Number 85 provisions: "After a case is filed in and adjudged by the office, a plaint in the same case against the same litigant shall not be received and tried, if it is not an appeal against the judgment in accordance with law. Even though it is received, it shall be revoked." The protection against double jeopardy has been a constitutional right in Nepal; as below:

<table>
<thead>
<tr>
<th>Constitutions of Nepal</th>
<th>Provisions</th>
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<tr>
<td>Government of Nepal Act, 2004 (1948)</td>
<td>Article 4 &quot;…Equality before the laws, Cheap and Speedy Justice&quot;</td>
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<tr>
<td>The Interim Government of Nepal Act, 2007 (1951)</td>
<td>Article 18(2) &quot;No person is prosecuted and punished for the same offence more than once.&quot;</td>
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<tr>
<td>Constitution of the Kingdom of Nepal, 2015 (1959)</td>
<td>Article 20(6) &quot;No person shall be prosecuted or punished for the same offence in a court of law more than once.&quot;</td>
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<td>The Constitution of Nepal, 2019 (1962)</td>
<td>Article 11(4) &quot;No person shall be prosecuted and punished more than once for the same offence in any court.&quot;</td>
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<tr>
<td>Constitution of the Kingdom of Nepal, 2047 (1990)</td>
<td>Article 14(2) &quot;No person shall be prosecuted or punished for the same in the court more than once.&quot;</td>
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<td>The Interim Constitution of Nepal, 2063 (2007)</td>
<td>Article 24(6) &quot;No person shall be prosecuted or punished for the same offence in a court of law more than once.&quot;</td>
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<td>Constitution of Nepal 2072</td>
<td>Article 20(6) &quot;No person shall be tried and punished for the same offence in a court.&quot;</td>
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The Constitution of Nepal, thus, recognizes *autrefois prosecution, autrefois convict* and *autrefois acquit* as well. This constitutional protection under clause (6) of Article 20 is in line with Article 20(2) of Constitution of India: “no person shall be prosecuted or punished for the same offence more than once”. It restricts second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial.

**3.1 Can the proceeding of administrative authorities be considered as judicial proceedings to attract Double Jeopardy?**

The issue has been discussed and explained well in the landmark decision, *Ram Prasad Sitaula and others v Timber Corporation of Nepal and others*\(^{10}\). In this case, the appellant was taken a disciplinary action for violating the corporation's code of conduct. Afterwards, he was charged before the court pursuant to Corruption Act, 2059. At trial, the appellant raised the plea of *autrefois convict*, on the ground that he had already been prosecuted and punished by the Department. By rejecting his plea, the court held that the proceedings of the

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\(^9\) Number 85, Chapter on Court Management, Civil Code, 1920.

\(^{10}\) NKP 2064, D.N. 7816, p 154.
departmental action cannot be considered as a judicial proceeding of a criminal nature. The court also held that the proceedings conducted before the departmental authorities were not prosecution and the action was not the punishment inflicted by judicial tribunal. The appellant, therefore, cannot be said to have been prosecuted and punished for the same offence. To operate as a bar under double jeopardy, the second prosecution and the consequential punishment must be for the same offence, i.e., an offence whose ingredients are the same.

In India, it has been settled well in *Maqbool Hussain v. State of Bombay*\(^{11}\). In this case, the appellant, an Indian citizen, was arrested in the airport for the illegal possession of gold under Sea Customs Ac, 1878, and the gold was confiscated. Afterwards, he was charged before the court pursuant to Foreign Exchange Regulation Act, 1947. At trial, the appellant raised the plea of double jeopardy, however, court rejected his plea on the ground that the Sea Customs Authorities cannot be considered as a judicial proceedings because it was not a court or judicial tribunal. Similarly, in *Roshan Lal & ors v. State of Punjab*\(^{12}\), the accused had disappeared the evidence of two separate offences under section 330 & section 348 Indian Penal Code. So, it was held by the court that the accused was liable to be convicted for two separate sentences.

Therefore, it can be viewed that the requirements for the protection against double jeopardy under Article 20(6) of the Constitution rests on:

- Firstly, that there should be previous conviction or acquittal from the charge on criminal nature,
- Secondly, the conviction or acquittal must be by the court of competent jurisdiction, and
- Thirdly, the subsequent proceeding must be for the same offence.

The expression 'same offence' shows that the offence for which the accused has been tried and the offence for which he is again being tried must be identical, and based on the same set of facts\(^{13}\).

### 3.2 Response of the judiciary with respect to the protection of Double Jeopardy

Some of the landmark judgments delivered by the Supreme Court of Nepal are cited below to throw light on the response of the Judiciary with respect to the protection of Double Jeopardy as enshrined in the Constitution.

*Lal Bahadur Karki v Land Reform Ministry and others*:\(^ {14}\)

'It does not seem that HMG has extended the expired time limit and has filed a suit. In a case of any offence, once it has been litigated and a final verdict has been made by the court on it, proceedings cannot be taken on the same course of action or issue. Article 11(4) of The Constitution of Nepal, 2019 has enshrined the right against double jeopardy by stating that no person shall be prosecuted and punished more than once for the same offence in any court. Hence, the decision of HMG to breach that fundamental right and prosecute again in the case once decided finally is contrary to law'.

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1. AIR 1953 SC 325.
2. AIR 1965 SC 1413.
4. NKP 2047, D.N. 4069, p. 135.
Bal Krishna KC and others v District Police Office, Dailekh and others: ¹⁵

'Whether a lawsuit is filed by an individual or the government, if a person is prosecuted for the same offence time and again then the personal freedom is jeopardized and that person gets troubled. The principle of double jeopardy is not centred on who filed the case, rather it focuses on the fact that a person is not prosecuted and punished more than once for the same offence and thus a threat is not imposed time and again in the life of that person. Thus irrespective of whoever files the case, until and unless the verdict is made void, once a lawsuit is filed or a person is prosecuted and final verdict has been given on it by the court, the government cannot prosecute and investigate again on the ground that it was filed by an individual (for being an individual party case). There is no any law and principle allowing doing so. Once a case finalized by a court having given a final verdict, and if the verdict has not been declared void, then as per the principle of finality of the judgment, the same case cannot be prosecuted more than once'.

Ms. Sunita Kumari Gautam on behalf of Govinda Bahadur Batala "Jeebit" v Office of Prime Minister and the Council of Ministers and others ¹⁶

'If a person is taken away from his/her home, assaulted and then after murdered, then those acts are the continuity of the same crime/offence. According to the Chapter on Kidnapping and Hostage Taking, if a person who is kidnapped or who has been taken into a hostage, is murdered then the law on homicide is applied that is to say one is made liable as per the Chapter on Homicide. In such case, along with the intention, the result/consequence of action and expectation of the result/consequence are the essential elements. Accordingly, if one result is expected and if different actions are done, from the beginning to the end in different stages of the same offence, resulting in that one consequence, then those actions are considered to be conducted as a whole resulting in one action.

Once a person has been prosecuted and punished for the offence, involving the actions that took place sequentially in an order, as per the Chapter on Homicide, No.1 and 13(3), and has even completed the sentence, then based on the same crime, prosecuting the same person, after 3 years, for the offence of kidnapping and hostage taking is contradictory with No.73 of the Chapter on Court Management of Muluki Ain.

The person who is prosecuted and the person who prosecutes both must obey and follow the judicial judgment made on the case. It is not such that if a person is convicted then he/she is sentenced with life imprisonment with the confiscation of the property and if not then any other case can be filed on the accused.

Once a person is prosecuted for the main offence, he or she cannot be prosecuted again and again for other subsidiary actions done in the course of the offence. Once the convict has completed the sentence in the case of homicide, prosecuting the same person for the kidnapping just because of the word being mentioned in the FIR and putting him in the custody for further investigation is contradictory with No.73 of the Chapter on the Court Management, Muluki Ain and Article 24(6) of the Interim Constitution of Nepal, 2063'.

5. Conclusion

¹⁵ NKP 2067, D.N. 8459, p.1514.
¹⁶ NKP 2068, DN 8638, P.1054
The underlying idea of double jeopardy includes the desire to protect an individual from repeat prosecutions that would subject him to live in a continuing state of anxiety and insecurity. Protection against double jeopardy is a fundamental right, that enshrines the concept of *autrefois acquit*

17 and *autrefois convict*

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Double Jeopardy law in Nepal essentially protects a person from multiple punishments or successive prosecution based on same facts of a case where the elements of multiple prosecutions are similar to those for which the accused has already been prosecuted or has been acquitted/punished by the court. Going by the basic principle of law, a new charge cannot be framed against a person on same facts. Prosecuting or punishing defendant second time is victimization of an accused.

However, the proceeding of administrative authorities cannot be considered as judicial proceedings, and do not attract Double Jeopardy. Lord Devlin in *Connelly v. Public Prosecutions*, (1964) UKHL, 1254:

“For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word 'offence' embraces both the facts, which constitute the crime, and the legal characteristics, which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.”

References


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17 A person acquitted of a crime cannot be retried second time in the same offence.

18 A person convicted of an offence cannot be tried or punished a second time in the same offence.