

Autrefois Convict and Autrefois Acquit in Ghanaian Criminal Jurisprudence: A Search for Relevance in the 21st Century

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Introduction

The rule against double jeopardy, otherwise known as autrefois convict or autrefois acquit, has traditionally been thought of as a hallowed canon of the common law, a golden rule which sits at the heart of all English common law systems. Double jeopardy is revered as a principle vital to the protection of personal freedom. It is claimed that the rule underpins the legitimacy of the legal system because it recognises the incontrovertibility of verdicts, which are transformed, via the declared judgment, into a record of a 'higher nature'.¹ At common law, the principle against double jeopardy was expressed by the four pleas in bar, autrefois acquit, autrefois convict, autrefois attain and former pardon. However, given that the former two pleas in bar are most relevant to contemporary criminal procedure, they will be the focus of this article.

1. The Nature and Scope of the Principle

The common law rule that a man should not be put in peril twice can only be sustained where a plea of autrefois convict or autrefois acquit will avail. And it can be so sustained if the defendant has previously been in peril on a charge for the same or practically the same offence.² It is not enough to show that the evidence which will be offered on the second charge is the same as that offered to prove the first.

Where a criminal charge has been adjudicated upon by a Court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offence³. A plea of autrefois convict is one in which the defendant claims to have been previously convicted of the same offence and that he or she therefore cannot be tried for it again.⁴ The plea is based upon the legal maxim *nemo debet bis vexari pro una eadem causa*⁵.

Professor Glanville Williams explained the doctrine and its terminology in this way:

*"Suppose that a transgressor is charged and acquitted for lack of evidence, and evidence has now come to light showing beyond doubt that he committed the crime. Even so, he cannot be tried a second time. He has what is termed, in legal French, the defence of autrefois acquit. Similarly, if he is convicted, even though he is let off very lightly, he cannot afterwards be charged on fresh evidence, because he will have the defence of autrefois convict. These uncouth phrases have never been superseded, though they might well be called the defence of 'previous acquittal' and 'previous conviction'; and 'double jeopardy' makes an acceptable generic name for both. Another general title is *res judicata*."*⁶

The autrefois rule also prevents a person from being tried for an offence in respect of which he could have been convicted at a previous trial.⁷ In *R. v. Barron*⁸ Lord Reading C.J. observed:

"The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. If, therefore, he has been acquitted, i.e. found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter." Archer JSC stated in *Kwakyie v. Attorney-General*⁹ that:

¹ *Davern v Messel* (1983) 155 CLR 21, 62 (Murphy J).

² Crabbe J (as he then was), stated in *Republic v. Inspector-General Of Police; Ex Parte Wood* [1975] 1 GLR 127-140: "To succeed, therefore, where such a plea in bar to a prosecution is alleged, it is essential that it be established that the cause is the same. But we do know that when an appellate court deals with such matters, it also has powers to declare that there should be a retrial. In such cases the plea of autrefois acquit is no defence. One has, therefore, to look at the particular facts of the case and act accordingly."

³ *R. v. Miles* (1890) 24 Q.B.D. 423 at 431 (Q.B.) per Hawkins J.

⁴ http://en.wikipedia.org/wiki/Peremptory_plea last visited on 23/01/14

⁵ Per Crabbe J. in *Republic v. Inspector-General Of Police; Ex Parte Wood* [1975] 1 GLR 127-140

⁶ G Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978), at 24.

⁷ *Archbold Hong Kong 2010* (Sweet & Maxwell), at para 4-32, referring in particular to *Connelly v DPP* [1964] AC 1254.

⁸ (1914) 10 Cr.App.R. 81 at p. 87, C.C.A.

⁹ [1981] GLR 944-1071

“Furthermore, in criminal jurisprudence, there is a special plea called "autrefois convict." This plea is open to an accused who maintains that he has been previously convicted of the offence with which he is charged and the test is whether the prisoner has been convicted of an offence which is the same or practically the same offence as that with which he is charged.”

The plea of *autrefois convict* is applicable where the defendant has been previously convicted on a charge for the same offence as that in respect of which he has been arraigned; the plea is applicable not only to the offence actually charged in the first indictment, but to any offence to which he could have been properly convicted on the trial of the first indictment.¹ The principle depends on the effect of a valid acquittal or conviction which binds both the Republic and the accused.² The special pleas of *autrefois acquit* and *autrefois convict* are based on the fundamental principle that a person should not be punished twice for the same offence. In Ghana, this principle was first enacted in 1960 under sections 113, 114, 116, 117 and 237 of the Criminal Procedure Code³. It has also received constitutional backing in article 19(7) of the 1992 Constitution which provides as follows:

“No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal”.

Section 113 of Act 30 almost reproduces the exact words of article 19(7) of the Constitution. Section 237 of Act 30 provides: *“237 (1) An accused may, upon indictment⁴, plead— (a) that he has been previously convicted or acquitted, as the case may be, of the same offence; or (b) that he has obtained the President's Pardon⁵ for his offence.”*

The practical effect of the principle against double jeopardy is the proscription against retrials for the same criminal offence following an acquittal or conviction. Strictly speaking, pleading double jeopardy is not to be equated with a defence to a criminal charge, the former operating to prevent the second prosecution from proceeding *ab initio*, and the latter being a mitigating factor against the accused's criminal liability which the trial court may take into consideration when imposing sentence. What is important, and perhaps deserves emphasis, is that the plea of *autrefois convict* or *acquit* does not raise a bar to an action brought on the same act from which emanate separate triable causes of action. The same act of the accused therefore can legitimately be a basis for two offences.⁶ As it was pointed out in *R. v. Thomas*⁷, *“It is not the law that a person shall not be liable to be punished twice for the same act.”*⁸ Therefore, where the same act of the accused constituted separate offences under separate enactments, the counts were not bad in law.⁹ It must also be noted that the principle does not preclude multiple prosecution in personal violence if the consequence of the accused person's act affects different victims.¹⁰ Further, the plea of *autrefois* will fail if the court that made the previous trial was not competent to try the subsequent offence.¹¹ Where an act constitutes an offence under two or more enactments the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be

¹ Republic v. Dufa and Another [1976] 2 GLR 18-24, per Mensa Boison J.

² In *Sambasivam v. Public Prosecutor*; [1950] AC 458, Lord Mac Dermot propounded: *“The effect of verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the jurisdiction.”*

³ Criminal Procedure Code, 1960 (Act 30). The principle is further provided for under section 9 of the Criminal and Other Offences Act, 1960 (Act 29)

⁴ The mention of ‘indictment’ appears to make this provision applicable only to trial on indictment and the remaining sections applicable to summary trial.

⁵ It is important to note the addition made to the scope of the rule under section 237 of Act 30 by the introduction of the President's pardon.

⁶ *Essien v. The State* [1965] GLR 44-46, where Djabonor J. stated that: *“It is not the law that a person shall not be punished twice for the same act. The law is that a person shall not be punished twice for the same offence.”*

⁷ [1950] 1 K.B. 26 at p. 31, C.C.A.

⁸ As Blackstone put it in his *Commentaries* (1769) Book IV p. 329, *“no man is to be brought into jeopardy of his life more than once for the same offence.”* In *Republic v. General Court Martial; Ex Parte Mensah* [1974] 1 GLR 355-362, the appellant could not rely on his destoolment for not attending traditional council meeting when he was subsequently tried for the same act under Chieftaincy (Amendment) Decree 1966 (N.L.C.D. 112), para. 5A which made the appellant's act an offence.

⁹ *Essien v. The State* [1965] GLR 44-46, per Djabonor J.

¹⁰ In *R. v. Prince* [1986] 2 S.C.R. 480 at 506-507 (S.C.), Dickson C.J. explained that: *“...at least in so far as crimes of personal violence are concerned, the rule against multiple convictions is inapplicable when the convictions relate to different victims.”*

¹¹ Section 116 of Act 30.

liable to be punished twice for the same offence.¹

Notwithstanding the dearth of consensus on the tests to be applied in considering the plea of *autrefois*, Jiagge JA speaking for the Court of Appeal in *Republic v. General Court Martial; Ex Parte Mensah*² stated that:

"The plea of autrefois convict is a formal plea in bar and the test often applied is whether the acquittal on the first trial necessarily involved an acquittal on the charge in the second trial. A test that has often found favour is—"whether the evidence necessary to support the second indictment, or the facts constituting the second offence, would have been sufficient to procure conviction on the first indictment either of the offence charged or an offence of which the accused could have been convicted on that indictment."

It has been held that the test of *autrefois* convict is not whether the facts relied on in the two trials are the same. It is whether the prisoner has been convicted of an offence which is the same or practically the same offence as that with which he is charged.³

2. Elements of the Principle

For the plea of *autrefois* acquit or *autrefois* convict to be upheld, it must be established that certain elements or conditions exist. It must be noted that the law places an obligation on the accused person to prove a special plea in bar (e.g. *autrefois* acquit, *autrefois* convict and pardon)⁴. The accused may prove a previous trial, acquittal or conviction by an extract certified and personally signed by the officer having custody of the records of the court in which the conviction or the acquittal was recorded, or by a certificate signed personally by the officer in charge of the prison in which the punished was inflicted, or by the production of the warrant of commitment under which the punishment was suffered⁵. The conditions to be established are discussed below.

a) Existence of a valid trial

For the plea to be sustained, the accused must prove to the court that he has been previously tried on the same charge by a court of competent jurisdiction. The accused person must show that he has been charged with that criminal offence, evidence laid against him, that he was given the opportunity to defend himself and the court must have given a decision against him or acquitted him.

b) A court of competent jurisdiction

For the purpose of *autrefois*, a competent court is the court which has the jurisdiction to deal with a particular offence. For example, if an accused is convicted for murder in the District Court earlier, he cannot plead *autrefois* acquit if he is charged before the High Court with the same offence. This is because the District Court is not competent to try murder cases. In some cases, too, disciplinary committees have been held to be incompetent.⁶ It should be stated that a conviction or acquittal by a foreign court of competent jurisdiction is sufficient to place the accused in jeopardy for the purposes of an *autrefois* plea.⁷

c) The trial must have ended with a conviction or acquittal

What is essential to a plea of *autrefois* acquit or *autrefois* convict is proof of a final verdict of acquittal or conviction recorded by a court of competent criminal jurisdiction. The accused must demonstrate that his previous trial ended in either conviction or acquittal. A plea of *autrefois* will not be accepted if there was no valid acquittal or conviction on the previous charge. Acquittals or convictions arrived at under the certain situations would become invalid.⁸ The acquittal or conviction of the accused of the previous offence must have been final. A plea of *autrefois* would not succeed if there was no final adjudication and disposal of the previous charge.⁹ A person relying on *autrefois* acquit therefore has to show that there was a valid acquittal at the previous

¹ Section 9(1) of Act 29

² [1974] 1 GLR 355-362

³ *Republic v. Assistant Superintendent of Police, Jasikan; Ex Parte Dzanyiekpor* [1974] 2 GLR 303-308, per Ando J; *R. v. Kendrick and Smith* (1931) 23 Cr.App.R. 1, C.C.A. following *R. v. Barron* [1914] 2 K.B. 570, C.C.A.

⁴ *Asare v. The Republic* [1978] GLR 193-199

⁵ Section 117(1) of Act 30; for proof of conviction or acquittal outside Ghana, see section 117(3) of Act 30.

⁶ In *R v Jinadu (1949) 12 WACA 368*, a police officer was brought before the police disciplinary committee and was convicted for misconduct. Subsequently he was brought before the court on the same facts. He pleaded *autrefois* acquit. It was held that the trial of the police was not before a court of competent jurisdiction because they cannot try criminal offences and therefore his plea was strike out. The West African Court of Appeal held that: "*Proceedings against a police officer in a Police Orderly Room for an offence against discipline are not proceedings in a court having jurisdiction to hear and determine a criminal charge and therefore the special pleas of autrefois acquit or autrefois convict cannot be raised upon a criminal prosecution of the police officer for an offence against the Criminal Code arising out of the same facts.*"

⁷ Section 117 (3) of Act 30

⁸ Such situations include defective charge or indictment, court lacked jurisdiction, proceedings were otherwise ultra vires, proceedings were so irregular as to be a nullity, withdrawal of summons (before pleading) and discharge at committal proceedings or discharge following the entry of a nolle prosequi.

⁹ Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156,

at para 2.8. The English Law Commission observed that: "The need for an acquittal or conviction at the end of the first trial

trial. Therefore, discharge of the accused on nolle prosequi cannot avail the accused of the plea.¹

d) The previous and subsequent offences must be the same

As noted above, under the autrefois doctrine, a person cannot be tried for the same offence for which he has been previously acquitted or convicted. The present offence laid against the accused must be in law the same offence as the one for which the accused has been acquitted or convicted in a previous trial. Further, he cannot be tried for an offence for which he could have been convicted in a previous trial (such as a lesser alternative charge).² This issue is undoubtedly the most problematic and most litigated element of double jeopardy jurisprudence.³ There appears to be a divergence of views on the question of how similar 'the same offence' must be. It has been argued that "[t]he charge in the first and second indictment must either be the same or be substantially the same, or the charge on the second indictment must not be one in respect of which the accused could have been lawfully convicted."⁴ Charles Crabbe J (as he then was) has stated that, "[i]o succeed, therefore, where such a plea in bar to a prosecution is alleged, it is essential that it be established that the cause is the same."⁵

Bruce and McCoy also note that: "[t]hese special pleas are based on the fundamental principle that an accused should not be placed in double jeopardy, that is, the accused should not be prosecuted twice for the same offence or one substantially similar to that for which he has been previously acquitted or convicted."⁶

The majority of the House of Lords in *Connelly v DPP*⁷ applied a narrower test of what would amount to "the same offence" for the purposes of an autrefois plea. Lord Devlin said: "*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. Robbery is not in law the same offence as murder (or as manslaughter, of which the accused could also have been convicted on the first indictment) and so the doctrine does not apply in the present case.*"⁸

This case seems to be the widely accepted view. According to this view, an offence which was considered to be "substantially the same" as the one for which the accused was previously convicted or acquitted, even on the same or similar facts, would not be sufficient to establish an autrefois plea. This aspect of the autrefois doctrine was expounded by Stock JA in *Yeung Chun Pong & Others v Secretary for Justice*⁹:

"The test of autrefois acquit is one directed at the elements of the two offences under comparison. By this is meant a comparison of the constituent elements in law of the offences charged, and the facts asserted in the charges themselves. 'For the doctrine to apply it must be the same offence both in law and in fact'. This is a 'purely legal test of whether the person's acquittal in the first proceedings necessarily in law involves an acquittal in the second' and covers an 'implied alternative acquittal... where the jury could lawfully have convicted the defendant on an alternative charge to the one being tried but have returned no verdict on it."

3. Justification of the Principle

The doctrine of autrefois convict and autrefois acquit seems to be at the center stage in modern criminal jurisprudence of many common law states. Many reasons have been forcefully found to support the doctrine. This section of the paper presents a précis of the underlying rationales for double jeopardy.

a) Prevent abuse of the criminal process

The jurisdiction of the court to prevent abuse of the court process extends to any category of case in which court

means that the autrefois rule does not apply where the defendant is discharged in committal proceedings, where a summons is withdrawn before the defendant has pleaded to it, where the information is dismissed owing to the non-appearance of the prosecutor, or where the information was so faulty that the accused could never have been in jeopardy on it. In these cases, there is no finding of the court which amounts to an acquittal."

¹Section 54 of Act 30. See also *State (Walsh) v Lennon* [1942] I.R. 112 (S.C.) where O'Sullivan C.J. held that: "*In no case has it been decided that the entering of a nolle prosequi by the Attorney General [now the D.P.P.] is a bar to a fresh indictment for the same criminal offence, and it is well established that the discharge of an accused under a nolle prosequi does not amount to an acquittal...*"

²Lord Hodson said in *R v Connelly* [1964] AC 1254, at 1332. , "... where there is an acquittal of a lesser offence which is in law an essential ingredient to [a greater offence], it is plainly not possible to convict on the greater without in effect reversing the acquittal on the other and lesser offence."

³*Connelly v DPP* [1964] A.C. 1254 (H.L.) where Lord Hodson opined: "*What is meant or involved in the words 'the same crime'?* It is in the answer to this question that so much difficulty has arisen and so much argument has been entertained down to the present day not only in this country but in other countries where the common law prevails."

⁴A Bruce, *Criminal Procedure: Trial on Indictment* (Butterworths, Issue 19), Division VI, at para 454; see *In Republic v. General Court Martial; Ex Parte Mensah* [1974] 1 GLR 355-362, per Jiage J.

⁵*Republic v. Inspector-General Of Police; Ex Parte Wood* [1975] 1 GLR 127-140

⁶A Bruce and G McCoy, *Criminal Evidence in Hong Kong* (Butterworths), at [1001] of Division VII.

⁷[1964] AC 1254, at 1332.

⁸*Connelly v DPP* [1964] AC 1254, at 1339 to 1340.

⁹[2008] 3 HKLRD 1, at paras18-19.

processes may be used as instruments of injustice or unfairness.¹ Jaggie JA in *Republic v. General Court Martial; Ex Parte Mensah*² basing himself on the dictum of Lord Pearce in *Connelly v. Director of Public Prosecutions*³ stated the rationale for the doctrines as follows: "Just as in civil cases the court has constantly had to guard against attempts to relitigate decided matters, so, too, the court's criminal procedure needed a similar protection against the repetition of charges after an acquittal or even after a conviction which was not followed by a punishment severe enough to satisfy the prosecutor. It was, no doubt, to meet those two abuses of criminal procedure that the court from its inherent power evolved the pleas of *autrefois acquit* and *autrefois convict*. For obvious convenience these were pleas in bar and, as such, fell to be decided before the evidence in the second case was known."⁴

It would be an abuse of the court process if the prosecution could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence.⁵

b) Avoids the repeated distress of the trial process

Another reason for the doctrine is the fact that it avoids the repeated distress of the trial process. It is argued that criminal trials involve distress which affects not only the accused, but also his family, witnesses on both sides, and, of course, the victim. Thus the rule operates in the interest of both the public and the accused.⁶ It has been observed that "... for this rule two reasons are always assigned: the one, public policy, for interest *rei publicae ut sit finis litium*; the other, the hardship on the individual that he should be twice vexed for the same cause."⁷

Thus the doctrine is grounded in public policy and the need to protect the accused. A similar observation was made by the New Zealand Law Commission in a report in 2001, where it was observed that:

"Any participant in the process of a criminal trial is familiar with the sense of relief that accompanies a verdict – that there has been an end to a process which may have been gruelling for all involved and even hideous in very different ways for the victim, the accused, witnesses and their families. Any proposal to reopen that process must recognise both the cost to the particular parties of such course and the effect on parties to other cases of the possibilities that, despite the verdict, closure is incomplete."⁸

There are also important individual values protected by double jeopardy. In the US, these values are considered to be one of the foremost justifications for double jeopardy protections.⁹ In *Green v United States*¹⁰, Black J explained the reasons why a person should not be prosecuted more than once for the same offence:

"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."

At the core of this argument is the consideration of making the criminal process less burdensome and thereby ensuring that the accused is not subjected to undue embarrassment and ordeal.

c) Reduces the risk of a wrongful conviction

The doctrine of *autrefois* operates to reduce the risk of wrongful conviction of the accused. It has been argued that if it is accepted that juries do, on appropriate occasions, return perverse verdicts of guilty, the chances of a wrongful conviction must increase if an individual is tried more than once for the same offence.¹¹ It has been further argued that the likelihood of conviction, whether the defendant was guilty or not, might be greater at a

¹ *Pearce v R* (1998) 194 CLR 610, 620.

² [1974] 1 GLR 355-362

³ *Supra*, at p. 207

⁴ *Connelly v. Director of Public Prosecutions* (1964) 48 Cr.App.R. 183 at p. 184, H.L., per Lord Pearce said at p. 276:

⁵ *Ibid*

⁶ It is worth noting that the individual's interest in finality arises from the State's duty to treat its citizens with humanity. It is an aspect of the 'liberal imperative to treat all citizens with dignity and respect': Ian Dennis, 'Rethinking Double Jeopardy: Justice & Finality in Criminal Process' (2000) *Criminal Law Review* 933, 940.

⁷ *Broom's Legal Maxims* (9th ed.), pp. 225-226, quoted with approval in *Republic v. Inspector-General Of Police; Ex Parte Wood* [1975] 1 GLR 127-140

⁸ New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 13. <<http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/DoubleJeopardy.pdf>> last visited, 24/01/14

⁹ Prosecution for a serious criminal offence is undoubtedly an enormously stressful event in the life of an accused individual: Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65 *Modern Law Review* 393.

¹⁰ *Green v United States* (1957) 355 US 184, at 187 to 188.

¹¹ English Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.5.

second trial as the prosecution may have acquired, because of the first trial, a tactical advantage.¹ Furthermore, an innocent person may not have the stamina or resources to fight a second charge and may easily abandon apparently defensible charges.

The Scottish Law Commission has noted that the prosecution had an institutional memory which would probably be denied to the defence, and the prosecution also had access to much greater resources for preparation and examination of evidence before instituting proceedings.² Hence, a new trial which proceeded upon much of the same evidence might be expected to be of more advantage to the prosecution, especially when the second prosecution occurs at some considerable time after the first.

d) To limit (abuse of) State power

The corollary of the notion that individuals have a right to freedom from vexation is the notion that State powers are, in some way, limited. One of the most compelling rationales for maintaining strong double jeopardy protections concerns its capacity to operate as a check on the abuse of State power. This protects the accused. Thus, having submitted himself to the criminal justice system, once the final verdict is delivered, whether guilty or innocent, the State's political and moral authority to scrutinise the accused's conduct is exhausted.³ Any attempt to whittle down the doctrine of *autrefois* amounts to an attempt by the State to renege on the criminal justice deal and perpetuate its dominance over the accused. It has been argued that that a second prosecution on the same charge is illegitimate *per se*, regardless of the merits of the case or the motivations of the prosecutor.⁴ Another concern is the idea that citizens could be subject to malicious or illegitimately motivated prosecutions. It's possible, of course, that a police officer could develop personal animus against an acquitted accused. More plausible is the concern expressed by many commentators that media campaigns may drive politically-motivated prosecutions.⁵

e) Promotes finality in the criminal justice system

One of the primary aims of double jeopardy jurisprudence is the preservation of the finality of judgments.⁶ It is clearly desirable from the point of view of all parties (whether victims, witnesses, the prosecutors or the accused) that there is a point in time at which the circumstances of the offence can be put behind them. This argument is emboldened by the need for finality in the criminal justice process and "*the virtue in putting a line under emotive and contentious events, so that life can move on.*"⁷ This is particularly important in an adversarial system where trials are expensive both to the state and to the defendant.

By preventing harassment and inconsistent results the rule against double jeopardy promotes confidence in court proceedings and the finality of verdicts. There are two aspects to this argument. The first 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.⁸ Second, avoiding the possibility of conflicting judicial decisions on the same case is important for maintaining public confidence in the general efficacy of the courts. Finality promotes confidence in the judicial outcomes.⁹ Related to that argument is the notion that our system is underpinned by the sanctity of the jury verdict.¹⁰ Subsequent trials of matters already finalized smacks of jury shopping and undermines the jury

¹ The defence strategy will be known and the prosecution's case can be adapted to answer it. Areas of presentational weakness in the first prosecution case can be polished. These advantages may make it easier the second time around for the prosecution to discharge the burden of proof.

² Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at 2.20. In the same paragraph, the Commission said: "*On balance, we do not consider the notionally increased risk of wrongful conviction to be a persuasive argument.*"

³ Charles Parkinson, 'Double Jeopardy Reform: The New Evidence Exception for Acquittals' (2003) 26(3) *UNSW Law Journal* 603, 618-619.

⁴ Jill Hunter, 'Abuse of Process Savages Criminal Issue Estoppel' (1995) 18(1) *UNSW Law Journal* 151, 168.

⁵ This argument is rooted in the basic awareness that in our political society citizens are able to influence re-prosecution of acquitted persons or release convicted ones.

⁶ *Crist v. Bretz* (1978) 437 U.S. 28 at 33 (S.C.) *per* Stewart J. Finality promotes closure after potentially tragic events, allowing a line to be drawn indicating that a crime and its aftermath are now closed: Justice Michael Kirby, 'Carroll, double jeopardy & international human rights law' (2003) 27 *Crim LJ* 231, 236.

⁷ English Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.8. However, in the same paragraph, the Commission also observed that, "this consideration may well be outweighed by others, such as the need to avoid miscarriages of justice."

⁸ The strongest argument against changing the law of double jeopardy is the principle of *res judicata*. The doctrine of *res judicata* is one which places an emphasis on the finality of a judgment and thus creates an obstacle to the argument that a retrial should occur if fresh evidence is presented after an acquittal.

⁹ *R v Carroll* (2002) 194 ALR 1, 21, (Gaudron & Gummow JJ): "*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.*"

¹⁰ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, 'Chapter 2: Issue Estoppel,

as an institution.

f) Encourages the efficient investigation of crime

Another public interest argument suggests that double jeopardy promotes diligence in investigations and prosecutions.¹ The idea is that police and prosecutors know that they have only one opportunity to convict an offender. The argument has been made that if the prosecution were able to prosecute once again a defendant who has been acquitted or convicted, there would be a risk that the initial investigation might not be carried out as diligently as it should be. It has been observed that "[t]he fact that there is but one chance to convict a defendant operates as a powerful incentive to efficient and exhaustive investigation."² The basis for this argument is that an opportunity for the Republic to revisit its case after acquittal of the accused would provide perverse disincentives to getting it right at the outset.³ This may discourage investigative and prosecutorial efficiency. The doctrine of *autrefois* must encourage the prosecution to diligently make careful investigations before bringing an accused to court, always bearing in mind that there cannot be a second bite at the cherry.

g) Autrefois prevents unfairness and injustice to the accused

The rationale for the development of double jeopardy jurisprudence is that it would be unfair to punish an individual twice if he has only committed one act that results in one harm. Justice Brennan has observed in *Ashe v. Swenson*⁴ that the double jeopardy rule "*responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all the issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience.*"

4. Objections to the Principle

While there are sound justifications for the rule against double jeopardy, powerful arguments also exist against its operation in modern criminal jurisprudence. Whereas some people argue for the total abolition of the doctrine, others argue in favour of relaxing the rule in certain circumstances. In considering whether exceptions should be made to the strict rule against double jeopardy, one of the questions to be asked is whether society would be worse off if the rule remains unchanged. It is the focus of this part of the article to discuss some of the arguments against the doctrine of *autrefois* convict and *autrefois* acquit.

a) New and compelling evidence

The most forceful argument in favour of relaxing the doctrine is premised on the logic that the doctrine should not apply where new and compelling evidence is brought to light after the completion of the original proceedings which points to the guilt of an acquitted defendant. This situation is increasingly likely to arise with the rapid advances in recent years. Lord Justice Auld has highlighted the crux of the matter in the following terms:

*"... If there is compelling evidence, say in the form of DNA or other scientific analysis or of an unguarded admission, that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards of the sort proposed by the Law Commission, what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen?"*⁵

There may be circumstances where other compelling evidence comes to light after the conclusion of the original trial, perhaps from a newly identified witness or documentary source. It has been argued that the emergence of new evidence pointing to the guilt of the accused calls into question the legitimacy of an acquittal and suggests that a mistake may have been made at the first trial. A retrial in such circumstances will serve to "*resolve the legitimacy problem of the first acquittal and forward the aims of criminal justice if the defendant is in fact guilty.*"⁶ A strict adherence to the rule may run counter to the interests of justice where subsequent revelation of compelling evidence as a result of, for example, scientific breakthrough proves the guilt of an acquitted person.

b) Undermines the legitimacy of the criminal justice system

Proponents of double jeopardy reform assert that the legitimacy of the criminal justice system depends on a commitment to the delivery of accurate judgments. The legitimacy of the criminal justice system is seriously

Double Jeopardy & Prosecution Appeals against Acquittals' Discussion Paper Model Criminal Code (2003), 72.

¹ A number of commentators consider this to be a weak argument in support of double jeopardy. Even if it were true that the work ethic of police and prosecutors is driven by case outcomes, as a matter of logic their diligence would be unaltered by the reforms of the rule: see, Ian Dennis, 'Rethinking Double Jeopardy: Justice & Finality in Criminal Process' (2000) Criminal Law Review 933, 941.

² English Law Commission, *A Consultation Paper: Double Jeopardy* (1999), Consultation Paper No 156, at para 4.11.

³ New Zealand Law Commission, *Report on Acquittal Following Perversion of the Course of Justice* (2001), Report No 70, at para 16. See also, Scottish Law Commission, *Discussion Paper on Double Jeopardy* (2009), Discussion Paper No 141, at 2.21.

⁴ 397 U.S. 436 (1970) (S.C.).

⁵ The Right Honourable Lord Justice Auld, *Report on Review of the Criminal Courts of England and Wales* (The Stationery Office, 2001), Chapter 12, at para 51.

⁶ I Dennis, "Rethinking Double Jeopardy" [2000] Crim L R 933, at 945, referred to in English Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.4.

challenged when new evidence casts doubt on the veracity of previous verdicts or when offenders perpetrate a fraud on the system that allows them to escape justice. The plea of *autrefois* is criticised as being a technical obstruction to justice. Where there is tension between the demands of substantive and procedural justice, the rules should favour delivering substantive justice. There is simply no merit in doggedly demanding respect for a judgment which is strongly suspected of being wrong.¹

Certainly, there is little doubt that public outrage is generated when a presumptively guilty offender exploits the system and escapes justice. The community has a valid interest in ensuring that known offenders are punished.² On that view, double jeopardy reform is simply another crime control proposal.³

c) Reduces public confidence

The criminal justice system is likely to be even more acutely undermined if an acquitted person cannot be brought to justice, despite his subsequent confession to a serious crime. This could be expected to spark public disquiet and reduce public confidence in the criminal justice system. As regards the social impact of failing to convict a person of a serious offence where new evidence has been unearthed after his acquittal which unequivocally points to his guilt, it has been forcefully argued that:

*"There is ... the spectre of public disquiet, even revulsion, when someone is acquitted of the most serious of crimes and new material (such as that person's own admission) points strongly or conclusively to guilt. Such cases may undermine public confidence in the criminal justice system as much as manifestly wrong convictions. The erosion of that confidence, caused by the demonstrable failure of the system to deliver accurate outcomes in very serious cases, is at least as important as the failure itself."*⁴

d) Victim's right to see accused punished

There is also an argument that victims have a 'right' to see guilty offenders punished. There has been, in recent decades, growing recognition of victims' needs, and of the role that the criminal justice system can play in assisting their recovery.⁵ It has been asserted that victims suffer trauma when the acquitted accused cannot, despite new evidence, be re-prosecuted.⁶ It is suggested that the unfairness to the victim of the failure to re-prosecute is equal to the unfairness of subjecting an acquitted accused to another trial.⁷

5. Conclusions

From the arguments hereinbefore canvassed, it is plain that the doctrine of *autrefois* convict and *autrefois* acquit constitutes an important aspect of our criminal jurisprudence. It is the respectful view of the writer that there is currently no great need to make changes to this ancient rule. However, the author readily concedes that the law, the criminal justice system and its processes should be flexible and responsive to social and cultural changes and therefore need to be continually updated and modernised. The doctrine of *autrefois* is of fundamental importance in our criminal justice system, and apart from the exceptions already contained in our law,⁸ no attempt to whittle it down should be entertained. It is suggested that the rule against double jeopardy should be retained as it fosters and protects the interest of the accused against whom the plenteous resources of the state are marshaled. The doctrine is relevant for protecting individuals from financial, emotional, and social consequences of successive prosecutions. The doctrine further gains firmer ground by the hackneyed aphorism that, "*It is better to free nine guilty persons than to imprison one innocent man*".⁹

The present writer rejects the 'fresh and compelling evidence' argument as absurd and contrary to the tenets of our adversarial system of justice. If the argument is to be accepted, there will be no end to prosecution, and the process of the court will be employed for whimsical ends. It is suggested that the prosecution should have a second bite at the cherry. The merits for retaining the doctrine substantially outweigh the reasons advanced for its abolition or relaxation. In our quest to achieve justice and whip up public confidence in the justice system, we must remember the wisdom-laden advice of Justice Vincent which invites us to recall:

"the complex nature of the relationships between our basic rights and the criminal law and, of course, the need for careful consideration of the effect upon those relationships of making superficially attractive changes in the

¹ Ian Dennis, 'Rethinking Double Jeopardy: Justice & Finality in Criminal Process' (2000) *Criminal Law Review* 933, 945.

² That interest is legitimately retributive - guilty criminals should receive their just deserts

³ Ben Fitzpatrick, 'Double Jeopardy: One Idea and Two Myths from the Criminal Justice Bill 2002' (2003) 67(2) *Journal of Criminal Law* 149, 159.

⁴ English Law Commission, *Report: Double Jeopardy and Prosecution Appeals* (2001), Law Com Report No 267, at para 4.5.

⁵ See, for example, Adam Crawford & Jo Goodey (Eds), *Integrating a Victim Perspective within Criminal Justice* (2000).

⁶ The satisfaction derived by a victim of crime from the punishment of the accused cannot be assessed. What is known is that victims often get moral satisfaction when they believe that a just verdict has been delivered, whereas unfavourable court outcomes are known to cause disappointment and even moral outrage. What this argument forgets is the fact that re-prosecution causes secondary victimization and stress since the accused is always a witness for the prosecution.

⁷ This argument falls flat in the face of the basic notion that trials are not run for therapeutic purposes.

⁸ See generally, Sections 115, 116 of Act 30; articles 19(16)(b) and 40(3) of the 1992 Constitution.

⁹ *Republic v. Nana Osei Kwadjo II* (2008) SC

law designed to deal with perceived problems in particular cases. It must not be overlooked that alterations of the system to achieve what is presumed to be justice in a specific type of situation may occasion serious injustice to others.”¹

Truth and justice are both fundamental values in our legal system. It is hoped that in advancing the cause of either, we do not surrender rights too easily which have been long evolving for our protection.

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¹ Justice Frank Vincent, ‘Human Rights & the Criminal Law’ (14th Sir Leo Cussen Memorial Lecture), Melbourne, 16 Oct. 2003, <<http://www.leocussen.vic.edu.au/content.asp?p=188>> at 18 January, 2014.

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