

# THE CONSTITUTIONAL STATUS OF THE DOUBLE JEOPARDY PRINCIPLE

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*This rule (or principle), which is sometimes referred to as the rule against double jeopardy, is but an aspect of the canon of fundamental fairness of legal procedures, inherent in our Constitution, which is expressed in the maxim nemo debet bis vexari pro eadem causa.<sup>1</sup>*

## INTRODUCTION

The principle of double jeopardy operates as a proscription against retrials for the same criminal offence following a trial on the merits by a court of competent criminal jurisdiction concluding in an acquittal or conviction.<sup>2</sup> The principle developed at common law in response to the draconian punishments traditionally imposed on defendants and the deficiencies in medieval criminal procedure to the advantage of the prosecution.<sup>3</sup> The common law immunity from re prosecution gradually developed in response to the injustice in permitting retrials for the same offence following an acquittal or conviction. The principle was also designed to prevent the imposition of multiple punishments for the same criminal transgression in separate proceedings. Typically this would include proceedings

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1. *The People (DPP) v Quilligan (No 2)* [1989] IR 46, at 57 (SC), *per* Henchy J. The maxim *nemo debet bis vexari pro eadem causa* stipulates that no one ought to be twice troubled or harassed for one and the same cause, or risk being punished twice for the same criminal offence.
2. A court of competent criminal jurisdiction is one established by the Constitution or statute to determine the criminal charges against the accused and to impose the appropriate sentence up to an including the statutory maxima. It must be a properly constituted court, as opposed to a *coram non iudice*, and must not have acted *ultra vires* in the determination of the guilt or innocence of the accused.
3. See Jill Hunter, "The Development of the Rule against Double Jeopardy" (1984) 5 *Journal of Legal History* 3; Jay Sigler, "A History of Double Jeopardy" (1963) 7 *American Journal of Legal History* 283.

for the confiscation of criminal assets and the proceeds of crime, professional disciplinary proceedings, and occasionally the sentencing process.<sup>4</sup>

The common law principle against double jeopardy is a fundamental right of the accused in accordance with the rule of law.<sup>5</sup> With the exception of the United Kingdom and Australia,<sup>6</sup> this fundamental principle of criminal justice and procedure has been elevated to constitutional status in most common law jurisdictions including the United States,<sup>7</sup> Canada,<sup>8</sup> New Zealand,<sup>9</sup> India,<sup>10</sup> and South Africa.<sup>11</sup> The principle is included in most European constitutions<sup>12</sup> and also in several international conventions,<sup>13</sup> where it is known as the principle of *ne bis in idem*.<sup>14</sup> The Irish Constitution does not include an express provision

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4. The issue here is that if a defendant's conviction is quashed and a retrial ordered then, the court, when imposing sentence on reconviction must take into consideration the period of imprisonment served on the initial albeit void conviction. Likewise, if the DPP appeals an unduly lenient sentence in accordance with section 2 of the Criminal Justice Act 1993, if the Court of Criminal Appeal quashes the original sentence imposed by the trial court and imposes a sentence it considers appropriate, the defendant must be credited with time served on the original sentence; see Gerard Coffey, "The Influence of Double Jeopardy on the Sentencing Process" (2006) 16 *ICLJ* 8.
  5. See Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 *LQR* 195; TRS Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 *LQR* 221.
  6. Legal protection against double jeopardy in these jurisdictions is based on the common law pleas in bar *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted).
  7. Constitution of the United States, Amendment V.
  8. Canadian Charter of Rights and Freedoms, section 11(h).
  9. New Zealand Bill of Rights Act 1990, section 26(2).
  10. Constitution of India, Article 20(2).
  11. Constitution of the Republic of South Africa, Article 35(3)(m).
  12. Basic Law of the Federal Republic of Germany, Article 103(3); Charter of Fundamental Rights and Freedoms of the Czech Republic, Article 40(5); Constitution of the Republic of Estonia, Article 23(3); Constitution of the Republic of Lithuania, Article 31; Constitution of Malta, Article 39(9); Constitution of the Portuguese Republic, Article 29(5); Constitution of the Republic of Slovenia, Article 31; Constitution of the Slovak Republic, Article 50(5).
  13. European Convention on Human Rights, Protocol No 7, Article 4; International Covenant on Civil and Political Rights, Article 14(7); Rome Statute of the International Criminal Court, Article 20; Charter of Fundamental Rights of the European Union, Article 50; Convention Implementing the Schengen Agreement, Article 54.
  14. The principle of *ne bis in idem* stipulates that no proceeding can be instituted twice for the same cause of action. It is a legal concept derived from Greek and Roman civil law and reflects the common law double jeopardy principle in international law. See Christine van den Wyngaert and Guy Stessens, "The International *Non*

against double jeopardy and therefore the constitutional status of the protection against retrials in this jurisdiction is uncertain.

Liberal democratic states provide for fundamental rights by virtue of a constitution or bill of rights, the interpretation of which is a fundamental part of the legal process.<sup>15</sup> The superior courts are vested with the task of identifying the intent of the framers (original authors) of the Constitution as to the meaning and extent of individual provisions,<sup>16</sup> which may be modified over time.<sup>17</sup> Thus, certain rights may be implied in accordance with express constitutional provisions as determined by the superior courts. There are many fundamental constitutional rights of the accused in the criminal justice process, which undoubtedly include the common law immunity against retrials.

This article evaluates the constitutional status of the common law principle against retrials, generally referred to as “the rule against double jeopardy.” It examines the most relevant provisions of the Irish Constitution and judicial pronouncements by the superior courts pertaining to the constitutional status of this fundamental principle of criminal justice. The right to personal liberty (Article 40.4.1<sup>o</sup>), equality (Article 40.1), personal rights (40.3.1<sup>o</sup>), trial by jury (Article 38.5) and fair procedures in the criminal justice process are undoubtedly pertinent to the constitutional status of the double jeopardy principle.<sup>18</sup> However, the thesis of this article suggests that the constitutional mandate that trials proceed “in due course of law” (Article 38.1) is the source of the unenumerated constitutional right against double jeopardy.

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*Bis in Idem* Principle: Resolving Some of the Unanswered Questions” (1999) 48 *International and Comparative Law Quarterly* 779; Jennifer Costa, “Double Jeopardy and *Non Bis in Idem*: Principles of Fairness” (1998) 4 *University of California Davis Journal of International Law and Policy* 181; Gerard Coffey, “The Principle of *Ne Bis in Idem* in Criminal Proceedings” (2008) 18 *JCLJ* 2; European Commission Green Paper on “Conflicts of Jurisdiction and the Principle of *Ne Bis in Idem* in Criminal Proceedings” COM(2005) 696.

15. See Brian Walsh, “Existence and Meaning of Fundamental Rights in Ireland” (1980) 1 *Human Rights Law Journal* 171. Cf Luigi Ferrajoli, “Fundamental Rights” (2001) 14 *International Journal for the Semiotics of Law* 1.
16. See Aileen Kavanagh, “Original Intention, Enacted Text, and Constitutional Interpretation” (2002) 47 *American Journal of Jurisprudence* 255; Raoul Berger, “Originalist Theories of Interpretation” (1988) 73 *Cornell Law Review* 351; Richard Humphreys, “Constitutional Interpretation” (1993) 15 *DULJ* 59.
17. See William Rehnquist, “The Notion of a Living Constitution” (1976) 54 *Texas Law Review* 693; Stephen Munzer and James Nickel, “Does the Constitution Mean What it Always Meant?” (1977) 77 *Columbia Law Review* 1029; Aileen Kavanagh, “The Idea of a Living Constitution” (2003) 26 *Canadian Journal of Law and Jurisprudence* 55.
18. While these provisions may refer to the “citizen,” as a general rule the superior courts have accepted that these are universal rights for all human persons and not necessarily confined by reference to ethnicity.

## DOUBLE JEOPARDY LAW REFORM

In view of recent statutory reforms in the United Kingdom,<sup>19</sup> New South Wales,<sup>20</sup> and Queensland,<sup>21</sup> it is reasonable to assume that the double jeopardy principle will be reviewed in this jurisdiction in due course.<sup>22</sup>

Double jeopardy law reform in the United Kingdom has been the model for reform in other common law jurisdictions. The spur to reform in the United Kingdom was the failed prosecution of five youths alleged to have murdered Stephen Lawrence in 1993. The accused were acquitted principally because of police incompetence in the investigation of the murder and the ineffective prosecution of the case by the prosecuting authorities.<sup>23</sup> As a consequence of this case, the then Home Secretary, Mr Jack Straw MP, established the *Macpherson Inquiry*,<sup>24</sup> to review the police investigation, alleged institutional racism, and the failed prosecution of the case. The report of the *Macpherson Inquiry* produced many recommendations including the proposed reform of the common law principle against double jeopardy in circumstances where fresh and viable evidence of an accused's guilt is discovered following an acquittal.<sup>25</sup> The Law Commission subsequently published a Consultation Paper<sup>26</sup> and Report,<sup>27</sup> which reviewed the common law double jeopardy principle. Part 10 of the Criminal Justice Act 2003 modified the law in the United Kingdom with the result that an acquittal may be reviewed by the Court of Appeal (Criminal Division) in view of fresh and compelling evidence of the accused's guilt and a retrial ordered for the same offence.

The first acquittal to be challenged was that of William "Billy" Dunlop, who had formerly been twice tried for murder; in the first instance the jury failed to agree on a verdict and he was acquitted following a retrial. The accused

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19. Criminal Justice Act 2003, Part 10.

20. Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006.

21. Criminal Code (Double Jeopardy) Amendment Act 2007.

22. See comments by the Minister for Justice, Equality and Law Reform pertaining to the proposed statutory reform of the double jeopardy principle in this jurisdiction, "Dermot Ahern Announces Justice for Victims Initiative" [www.justice.ie/en/JELR/Pages/Dermot%20Ahern%20announces%20Justice%20for%20Victims%20Initiative](http://www.justice.ie/en/JELR/Pages/Dermot%20Ahern%20announces%20Justice%20for%20Victims%20Initiative) (visited 26 August 2008).

23. See Lee Bridges, "The Lawrence Inquiry: Incompetence, Corruption, and Institutional Racism" (1999) 26 *Journal of Law and Society* 298.

24. Macpherson Inquiry, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999).

25. *Ibid*, recommendation 38 states: "That consideration should be given to the Court of Appeal being given power to permit prosecution after acquittal where fresh and viable evidence is presented."

26. Law Commission, *Double Jeopardy: A Consultation Paper* (CP No 156, 1999).

27. Law Commission, *Double Jeopardy and Prosecution Appeals* (Report No 267, Cm 5048, 2001).

subsequently confessed to the murder to a prison officer in a taped conversation while serving a seven-year term of imprisonment for a serious assault on another victim. He was convicted in 2000 for perjury. In 2005, the Crown Prosecution Service referred the case to the Court of Appeal (Criminal Division), which now has the power to quash an acquittal and order a retrial where there is fresh and compelling evidence of guilt. The accused pleaded guilty to the murder for which he had been formerly acquitted, and in 2006 was sentenced to life imprisonment.

The dilemma for this jurisdiction is whether the Oireachtas would be permitted to enact reforming legislation that would make provision for the prosecution authorities to appeal an acquittal based on fresh and compelling evidence of the accused's guilt in order that a retrial could proceed for the same criminal offence.

#### TRIAL IN DUE COURSE OF LAW

Article 38.1 provides that “no person shall be tried on any criminal charge save in due course of law,” which incorporates the common law principle against double jeopardy.<sup>28</sup> This provision is applicable to trials on indictment<sup>29</sup> and summary trials,<sup>30</sup> therefore issues of inequality in the criminal justice process would not arise in the scope and application of the constitutional protection against double jeopardy.

A prominent feature of the various judicial statements pertaining to double jeopardy jurisprudence is the uncertainty with regard to the legal basis of the principle. Typically, judicial statements have based the principle exclusively on the common law, although it must be emphasised that the Irish superior courts have not been afforded the appropriate opportunity to consider this issue in greater detail due to the relative lack of litigation concerning double jeopardy law in the jurisdiction. Consequently, judicial statements pertaining to this fundamental principle of criminal justice and procedure have not necessarily been definitive. This may be contrasted with other common law jurisdictions,

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28. James Casey, *Constitutional Law in Ireland* (3<sup>rd</sup> ed, Sweet & Maxwell, 2000), at 539, writes: “This common law rule was enshrined in the Fifth Amendment of the American Constitution and it has, like the privilege against self-incrimination, been held binding on the States *via* the Fourteenth Amendment’s due process clause .... No doubt Article 38.1’s guarantee of trial in due course of law incorporates a similar idea ...”; see also Gerard Hogan and Gerard Whyte eds, *JM Kelly: The Irish Constitution* (4<sup>th</sup> ed, Tottel Publishing, 2003), at 1053-1064; Paul Anthony McDermott, *Res Judicata and Double Jeopardy* (Butterworths, 1999), at 208; Tom O’Malley, “Prosecution Appeals against Sentence” (1993) 11 *ILT* 121, at 123.

29. *The People (DPP) v O’Shea* [1982] IR 384 (SC).

30. *Attorney General (Ó Maonaigh) v Fitzgerald* [1964] IR 458 (SC).

principally the United States, where double jeopardy jurisprudence has been developed in many decisions of the superior courts. Unlike the Constitution of the United States, the Irish Constitution does not have an express provision against placing an accused twice in jeopardy for the same criminal offence. However, as will be seen, it is implicit from the superior Court's reading of Article 38.1 that this fundamental principle of criminal justice has constitutional status.

While Article 38.1 does not delineate the exact scope of a trial "in due course of law," the superior courts have identified fundamental rights to fair procedures in accordance with the requirement of a fair criminal trial.<sup>31</sup> This provision has been interpreted so as to provide for multifarious rights to safeguard the presumption of innocence of the accused and to ensure the integrity of a fair trial.<sup>32</sup> The judicial considerations of this constitutional provision have been summarised in the following terms:

The phrase "due course of law" may therefore be best regarded as conveying a bundle of principles and maxims more or less generally accepted in the common law world, most of them ancient, some of them of modern origin, although the scope of the guarantee is not confined or circumscribed by its common law roots. Some of these principles are so well established and so much taken for granted that it is not easy to illustrate them by reference to recent instances in which Irish courts have found it necessary to affirm them.<sup>33</sup>

Once the accused has been tried before a court of competent criminal jurisdiction and either acquitted or convicted following a trial on the merits, a retrial for the same criminal offence would constitute an infringement of Article 38.1. A purported retrial for the same offence in these circumstances would constitute an infringement not only of the common law principle against retrials but also the accused's constitutional right to a trial "in due course of law."

The constitutional protection against retrials is predicated on a final verdict of acquittal or conviction following a trial on the merits.<sup>34</sup> This issue was considered

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31. See Declan McGrath, "Trial in Due Course of Law" in William Binchy and Catherine Finnegan eds, *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (Clarus Press, 2006), at 327-353.

32. The right to a fair trial is also provided for by Article 6(1) of the European Convention on Human Rights; see Andrew Ashworth, "Article 6 and the Fairness of Trials" (1999) *Crim LR* 261.

33. Hogan and Whyte, note 28, at 1050; see also *Report of the Constitution Group* (Stationery Office, 1996), at 191.

34. The following criteria must be satisfied before the special pleas in bar can be raised against a retrial: (1) jeopardy, or peril of conviction, had attached to the former criminal trial; (2) a final verdict acquittal or conviction following a trial on the merits; (3) the second trial (retrial) is for the same or substantially same criminal

in *The People (DPP) v Quilligan (No 2)*, where Walsh J stated:

Article 38.1 of the Constitution provides that no person shall be tried on any criminal charge save in due course of law. That does not confer any right upon an accused person to claim that a trial which was manifestly not in due course of law should be a bar to a trial which would be in due course of law where the verdict reached in the first trial is set aside. An acquittal on the merits includes an acquittal on all legal pleas or defences....<sup>35</sup>

Consequently, in circumstances where the former criminal trial was defective, perhaps due to jury or witness intimidation or bribery, or where the former trial court was subsequently deemed a *coram non iudice*, a retrial would not constitute an infringement of the constitutional right against double jeopardy.

There has been a divergence of judicial opinion regarding the legal basis of the double jeopardy principle in the Irish criminal justice system.

### Cases Suggesting a Common Law Principle

In *The State (Tynan) v District Justice Keane*,<sup>36</sup> the applicant referred to the Fifth Amendment to the United States Constitution in support of his double jeopardy plea under Irish law and the Supreme Court *inter alia* relied on United States case law in determining the issue. Walsh J stated:

The applicant's case was based upon the broad general principles of the common law – that a man shall not be twice vexed for one and the same cause, that a man ought not to be punished twice for the same offence, and that a man is not to be put twice in peril - and reference was made to the Fifth Amendment of the Constitution of the United States that 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb....' The last provision was referred to as being a statement of the general principle relied upon by the applicant.<sup>37</sup>

He concluded that "[i]n this country... the power vested in the Court of Criminal Appeal to order a retrial upon the quashing of a conviction is also a clear indication that this principle is not a fundamental principle of law."<sup>38</sup>

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offence. See Edward Ryan and Philip Magee, *The Irish Criminal Process* (Mercier Press, 1983), at 272-275; Dermot Walsh, *Criminal Procedure* (Thomson Round Hall, 2002), at 784-795; Gerard Coffey, "Raising the Pleas in Bar against a Retrial for the Same Criminal Offence" (2005) 5 *JSIJ* 124.

35. [1989] IR 46, at 50 (SC).

36. [1968] IR 348 (SC).

37. *Ibid*, at 354 (SC).

38. *Ibid*, at 355 (SC).

In the judgment of Walsh J there is “a clear indication” that the common law principle against double jeopardy is “not a fundamental principle of law,” which indicates that it does not have constitutional status. However, Walsh J was speaking of a retrial following the quashing of a conviction by the Court of Criminal Appeal. A retrial in these circumstances is based on statute law,<sup>39</sup> which may render this judicial statement confined to the facts of the case.

In view of the close similarities between the constitutions of the United States and Ireland, double jeopardy jurisprudence emanating from the United States Supreme Court would have significant persuasive authority when the constitutional status of the double jeopardy principle is considered by the Irish superior courts.<sup>40</sup> In *Conroy v Attorney General*,<sup>41</sup> Kenny J described the historical origin of the underlying rationale of Article 38.1 in the following terms:

... section 1 of the Article is an echo of the clause in the great charter of Ireland granted in 1216. ... [The] phrase “due process of law” was adopted by those who drafted the Fifth Amendment to the Constitution of the United States of America which prevents any person being deprived of life, liberty or property without due process of law. I think that section 1 of the Article gives a constitutional right to every person to be tried in accordance with the law and in accordance with due course or due process of law.<sup>42</sup>

The jurisprudence of the United States Supreme Court pertaining to the scope and application of the principle against double jeopardy, although not binding in this jurisdiction, would undoubtedly provide influential assistance in the interpretation of Article 38.1 as being the source of this unenumerated constitutional right. The prohibition against double jeopardy is an entrenched right in the United States Constitution by virtue of the Fifth Amendment, therefore United States case law on double jeopardy jurisprudence must be read with a certain degree of circumspection as an unenumerated constitutional right against double jeopardy would not necessarily provide the same level

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39. Criminal Procedure Act 1993, section 3(1)(c) and section 4; Courts of Justice Act 1928, section 5(2).

40. Paul O’Mahony, “The Constitution and Criminal Justice” in Tim Murphy and Patrick Twomey eds, *Ireland’s Evolving Constitution, 1937-1997: Collected Essays* (Hart Publishing, 1999), 183, at 184, writes: “It is likely that the Constitution of the United States was an important model for de Valera and other framers of the Irish Constitution, and both Constitutions are most obviously successful at the work of fashioning governmental structures.”

41. [1965] IR 411 (HC & SC).

42. [1965] IR 411, at 415. In *Goodman International v Hamilton (No 1)* [1992] 2 IR 542 (HC & SC), at 609, McCarthy J stated that Article 38.1 was “an echo of the phrase ‘due process of law’ in the Fifth Amendment of the US Constitution.”



of protection as a specified right; unspecified constitutional rights are not “entrenched” against legislative encroachment.<sup>43</sup>

In *O’Leary v Cunningham*, the Supreme Court based the plea of double jeopardy, or more specifically a former acquittal, on the common law. Kenny J stated:

It was submitted for the defendant... that the Circuit Court judge could not find the defendant guilty of robbery because he had been in jeopardy of conviction on that charge in the District Court and, as he was found not guilty of it by the District Judge, the defendant was entitled to the benefit of the doctrine of *autrefois acquit* in relation to the robbery charge. No authorities in support of this contention were cited but, after much anxious consideration, I have come to the conclusion that it is correct. “It is an established rule of the common law that a man may not be put twice in peril for the same offence....” This is the basis of *autrefois acquit*.<sup>44</sup>

In view of the fact that the Court did not consider the constitutional status of double jeopardy, this judicial reluctance may be indicative that the Court did not consider the principle to be an unenumerated constitutional right.

In *The People (DPP) v O’Shea*, O’Higgins CJ stated that “the plea is founded on natural justice and is based on the common-law maxim *nemo debet bis vexari... pro una et eadem causa*.”<sup>45</sup> To prosecute and punish an accused on more than one occasion for the same criminal offence would indeed constitute a violation of the basic tenets of natural (constitutional) justice.

Thus, while the superior courts readily acknowledged the common law principle against retrials, there appears to have been a certain degree of judicial uncertainty with regard to the constitutional status of the double jeopardy principle.

### Cases Suggesting a Constitutional Right

While the judgment by Walsh J in *The State (Tynan) v Keane*,<sup>46</sup> indicates that the common law principle against double jeopardy may not have constitutional status, over two decades later in *The People (DPP) v Quilligan (No 2)*,<sup>47</sup> the Supreme Court indicated that the principle does indeed have constitutional status. Henchy J explained that:

The rule of *autrefois acquit* means that if an accused duly and successfully

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43. Cf Gary DiBianco, “Truly Constitutional? The American Double Jeopardy Clause and its Australian Analogues” (1995) 33 *American Criminal Law Review* 123.

44. [1980] IR 367, at 378 (SC).

45. [1982] IR 385, at 406 (SC).

46. [1968] IR 348 (SC).

47. [1989] IR 46 (SC).

raises the plea that he has already been tried in a court of competent jurisdiction, acting within jurisdiction, for the offence now charged, and that he was acquitted of that charge in that court, the second trial for that offence may not take place.<sup>48</sup>

He then described the special plea in bar, *autrefois acquit*, as “an aspect of the canon of fundamental fairness of legal procedures, inherent in our Constitution,”<sup>49</sup> thus effectively conferring constitutional status on the double jeopardy principle.

The constitutional basis for the double jeopardy principle, in the requirement of fairness of procedures inherent in the Constitution, would suggest that the prohibition is implicit in Article 38.1 as an essential requirement of a fair trial.<sup>50</sup> In *Feeney v District Justice Clifford*, Barr J stated:

... if the respondent decided to convict the applicant of the offences charged and, having heard evidence of previous convictions and sentences, then became aware that he could not impose a custodial sentence which he regarded as being appropriate in all the circumstances, he would not be entitled at that stage to change his mind and decide that the charges in question were not fit to be tried summarily, as that would create a situation of double jeopardy which would deprive the defendant of his constitutional right to fair procedures.<sup>51</sup>

Thus, the constitutional protection against double jeopardy is an inherent due process value in the criminal justice process.

The most decisive judicial statement pertaining to the unspecified right against double jeopardy as an aspect of Article 38.1 was provided in *Heaney v Ireland*.<sup>52</sup> The plaintiff claimed that certain common law principles in the criminal justice process have been identified as unenumerated constitutional rights and referred to Article 38.1 as being the source of these rights. The High Court *per Costello J* explained that this provision:

... implies a great deal more than a simple assertion that trials are to be held in accordance with laws enacted by parliament. It is an Article couched in pre-emptory language and has been construed as a constitutional guarantee

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48. *Ibid*, at 57.

49. *Ibid*, at 57.

50. In *Donnelly v Ireland* [1998] 1 IR 321, at 350 (SC), Hamilton CJ stated: “...the words ‘in due course of law’ in Article 38.1 of the Constitution make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures shall be fair and that the person accused will be afforded the opportunity to defend himself.”

51. [1989] IR 668 (HC), at 673.

52. [1994] 3 IR 593 (HC).

that criminal trials will be conducted in accordance with basic concepts of justice. Those basic principles may be of ancient origin and part of the long established principles of the common law, or they may be of more recent origin and widely accepted in other jurisdictions and recognised in international conventions as a basic requirement of a fair trial. Thus, the principle that an accused is entitled to the presumption of innocence, that an accused cannot be tried for an offence unknown to the law, *or charged a second time with the same offence*, the principle that an accused must know the case he has to meet and that evidence illegally obtained will generally speaking be inadmissible at his trial, are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection from this Article.<sup>53</sup>

Thus, Costello J affirmed the constitutional status of the double jeopardy principle as one of the unspecified fundamental rights of the accused in accordance with Article 38.1.

In *The State (O'Callaghan) v O'hUadhaigh*,<sup>54</sup> the High Court approved an order of prohibition to prevent the trial of the accused on charges in respect of which the prosecution had entered a *nolle prosequi*. Finlay P held that that to permit a fresh prosecution would:

... create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively, and... give the Director such a relative independence from the decision of the court in any trial, would be to concur in a proposition of law which signally failed to import fairness and fair procedure.<sup>55</sup>

Therefore, if an accused is deprived of the right to fair procedures during the course of a criminal trial this could constitute a violation of the constitutional right to a trial “in due course of law” as mandated by Article 38.1. In *O'hUadhaigh*, this was extended to preventing the prosecution from indicting the accused on a second occasion for the same criminal offence, especially in consideration of the fact that the accused could not terminate the criminal trial in the same manner as the prosecuting authorities. While a *nolle prosequi* is generally insufficient to raise the plea of *autrefois acquit*, which is predicated on a final verdict of acquittal, in this instance the prosecution had entered a *nolle prosequi* apparently for the sole purpose of avoiding a ruling by the trial court in the accused's favour. The ruling in *O'hUadhaigh* has been described as providing a “limited guarantee against double jeopardy.”<sup>56</sup>

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53. *Ibid*, at 605. Emphasis added.

54. [1977] IR 42 (HC).

55. *Ibid*, at 54.

56. Michael Forde, *Constitutional Law* (2<sup>nd</sup> ed, FirstLaw, 2004), at 437.

In *Considine v Shannon Regional Fisheries Board*,<sup>57</sup> the plaintiff argued that in the absence of a specified constitutional right against double jeopardy, Articles 38.1 and 40.3.1<sup>o</sup> provide an unenumerated constitutional immunity against retrials for the same criminal offence.<sup>58</sup> The plaintiff further argued that the principle against double jeopardy is a fundamental right implicit in the Constitution.<sup>59</sup> Hamilton CJ, having referred to the plaintiff's claim that Article 38.1 is the source of the constitutional right to double jeopardy protection, said "[i]t is, however, clear from a consideration of all the authorities that, while this was the general rule, it was subject to the right of the legislature to provide for an appeal in specified cases."<sup>60</sup>

He concluded:

... the common law rule that there should be no appeal from an acquittal of a criminal charge was subject to the right of the legislature to provide for such an appeal provided that such right was given in clear and unambiguous language and that a trial "in due course of law" did not necessarily involve the preclusion of a right of appeal in the event of an acquittal.<sup>61</sup>

Although this decision pertains to the appellate process rather than a retrial following an acquittal by a court of competent criminal jurisdiction, Hamilton CJ appears to have endorsed the constitutional status of the double jeopardy principle.<sup>62</sup>

The constitutional status of double jeopardy was considered in *S(D) v Judges of the Cork Circuit and the DPP*,<sup>63</sup> where the applicant sought a permanent injunction against the respondents from prosecuting him as he had previously been tried twice for the same criminal offence. However, the former two trials had not concluded with a verdict of acquittal or conviction as the jury could not agree. The applicant submitted that a purported third trial for the same offence

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57. [1997] 2 IR 404 (SC).

58. The plaintiff proceeded with a constitutional challenge arguing that section 310 of the Fisheries (Consolidation) Act 1959, was unconstitutional as it allowed the DPP to appeal a dismissal in the District Court to the Circuit Court.

59. [1997] 2 IR 404 (SC), at 410. Counsel for the plaintiff submitted "[w]hile there is no express provision in our Constitution which provides immunity for the citizen against double jeopardy, there are certain rights of natural law which are antecedent to the Constitution. In the light of those rights, the combined effect of [Article 40.3.1<sup>o</sup>] and Article 38.1 is to provide such immunity."

60. [1997] 2 IR 404 (SC), at 420.

61. *Ibid*, at 421.

62. Tom O'Malley, *Sentencing Law and Practice* (Round Hall, 2000), at 382, referring to *Considine* writes "[t]he court stopped short of conferring constitutional status on the rule against double jeopardy, although it readily acknowledged its common law existence."

63. 16 October 2006 (HC).

in these circumstances would infringe his right to a fair trial. The High Court held that a third trial in these circumstances would not constitute a trial “in due course of law.” O’Neill J stated:

... the ancient common law prohibition on multiple trials known as the double jeopardy principle has application to this case, although it might more aptly be described as the triple jeopardy principle. It follows that a third trial of a person for the same offence where in the two previous trials a jury has disagreed, would not in my opinion be a trial in due course of law as required by Article 38(1) of the Constitution.

However, in this case the Court applied the double jeopardy prohibition in the absence of a former verdict of acquittal or conviction and therefore is not strictly speaking a double jeopardy issue. The more appropriate course of action, given the circumstances of this case, would have been to invoke the power of the criminal courts to estop a prosecution from proceeding where it would be inappropriate for the prosecution to continue. The courts may exercise their inherent power to prevent the continuance of proceedings that would constitute an abuse of the process of court.<sup>64</sup> Consequently, while this decision effectively confers constitutional status on the double jeopardy principle in accordance with Article 38.1, it must be read with a degree of circumspection as there was no former verdict of acquittal or conviction upon which to raise the special pleas in bar. This decision could also be interpreted as conferring a broader application of double jeopardy law thus incorporating the courts inherent power to prevent the abuse of the process of court; in this context it would be applicable notwithstanding the absence of a former verdict of acquittal or conviction. On appeal, the Supreme Court held that the double jeopardy principle had no application to the circumstances of this case as the applicant had not been acquitted or convicted. The Supreme Court, however, affirmed the order of the High Court on the grounds of abuse of prosecutorial discretion and fair procedures; it would be oppressive and unfair to instigate a third trial.<sup>65</sup>

### **Substantive or Procedural Constitutional Right?**

A fundamental issue regarding the constitutional status of double jeopardy is whether it is a substantive or procedural right.<sup>66</sup> The issue here is whether the

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64. See Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2<sup>nd</sup> ed, Oxford University Press, 2008); Andrew Choo, “Halting Criminal Proceedings: The Abuse of Process Doctrine Revisited” (1995) *Crim LR* 864; Rosemary Pattenden, “Abuse of Process in Criminal Litigation” (1989) 53 *Journal of Criminal Law* 341.

65. *DS v Judges of the Cork Circuit Court and the DPP* 10 June 2008 (SC).

66. Cf Larry Alexander, “Are Procedural Rights Derivative Substantive Rights?”

accused is confined to pleading double jeopardy at the beginning or during the course of a criminal trial, or alternatively whether the accused is permitted to raise the special pleas in bar, *autrefois acquit* and *autrefois convict*, when initially charged with the commission of a criminal offence. If the double jeopardy principle is a substantive constitutional right the prosecution would be estopped from indicting the accused for the same criminal offence for which he had formerly been acquitted or convicted following a trial on the merits. Conversely, a procedural right could be pleaded either at the outset or during the course of the criminal trial.

A trial “in due course of law” as mandated by Article 38.1 does not delimit the rights of the accused to ensure a fair and impartial in accordance with this constitutional provision. Referring to this ambiguity in *The State (Healy) v Donoghue*, Gannon J considered Article 38.1 to be:

... a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function.<sup>67</sup>

Gannon J refers to “matters of practice and procedure” which could indicate that the double jeopardy principle is a procedural right. However, if the common law immunity against retrials is a constitutional right to fair procedures, the issue is whether the protection this confined to ensuring that the accused is tried “in due course of law,” that is, a trial according to positively enacted laws. Alternatively, a substantive constitutional right against double jeopardy in accordance with Article 38.1 could be interpreted as proscribing a retrial for the same criminal offence *ab initio* as a retrial in these circumstances would not be “in due course of law” in view of the fact that the guilt or innocence of the accused was formerly determined by a court of competent criminal jurisdiction.<sup>68</sup>

Given the stipulation in Article 38.1, and the unenumerated rights identified

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(1998) 17 *Law and Philosophy* 19; Larry Alexander, “The Relationship Between Procedural Due Process and Substantive Constitutional Rights” (1987) 39 *University of Florida Law Review* 323.

67. [1976] IR 325 (HC), at 335.

68. Substantive law defines the legal relationships (rights and duties) between citizens and also between citizens and the State, which may be contrasted with procedural rules of law that provide the machinery for enforcing those rights and duties; the method by which substantive law is administered. In the criminal justice process, substantive law defines criminal offences, defences and punishments, whereas procedural law is designed to ensure a fair, consistent and impartial application of due process values.

by the superior courts in accordance with this provision,<sup>69</sup> constitutional protection against double jeopardy could be identified as a procedural right. However, procedural rules are more concerned with the adjudication process in the criminal trial rather than conferring any substantive right on the accused, and therefore may not in fact merit constitutional status. They would instead be provided for under relevant criminal procedure legislation. The constitutional right against double jeopardy is more aptly described as a substantive right in the criminal justice process especially in consideration of the rationale for the development of the double jeopardy principle at common law.<sup>70</sup>

### Hypothesis

An applicant seeking relief under Article 38.1 must establish that there is a “real or serious risk” that he would not receive a trial “in due course of law.”<sup>71</sup> Consequently, it is reasonable to assume that the protection against double jeopardy is an implicit right in accordance with this constitutional provision, thus prohibiting a retrial for the same criminal offence following an acquittal or conviction on the merits by a court of competent criminal jurisdiction.

A trial “in due course of law” as mandated by Article 38.1 is a fundamental requirement of criminal justice systems in liberal democracies. It stipulates, *inter alia*, that during the course of a criminal trial the accused is presumed innocent of the criminal charges in the indictment until proven guilty following a trial on the merits;<sup>72</sup> the right of appeal against conviction;<sup>73</sup> and the right not to be retried for the same criminal offence.<sup>74</sup> It follows that this constitutional provision incorporates the unenumerated constitutional right against retrials, or indeed the imposition of multiple punishments for the same criminal offence. This is significant for the accused in view of the fact that an unenumerated constitutional right against double jeopardy is a fundamental right against retrials as opposed to a common law principle *per se*.

Certain rights and principles are designed to ensure that in the interests

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69. See Hogan and Whyte, note 28, at 1050-1143; *Report of the Constitution Review Group*, note 33, at 191-193.

70. See text accompanying notes 2-4.

71. *JO’C v Director of Public Prosecutions* [2000] 3 IR 478, at 485 (SC), *per* Keane CJ; *Z v Director of Public Prosecutions* [1994] 2 IR 476, at 506-507 (SC), *per* Finlay CJ; *D v Director of Public Prosecutions* [1994] 2 IR 465, at 467 (SC), *per* Finlay CJ.

72. *O’Leary v Attorney General* [1995] 1 IR 254 (SC).

73. *The People (AG) v Conmey* [1975] IR 341 (SC). See James Casey, “Confusion in Criminal Appeals: The Legacy of *Conmey*” (1975) 10 *Ir Jur* 271; James Casey, “Criminal Appeals: The Confusion Persists” (1981) 16 *Ir Jur* 271; Gerard Hogan, “Criminal Appeals: A New Departure” (1983) 5 *DULJ* 254.

74. *The People (DPP) v O’Shea* [1982] IR 382 (SC).

of justice the accused receives a fair criminal trial in accordance with Article 38.1. A large body of case law has identified these rights and principles and the Constitution Review Group has recommended that the protections, which are implicit in this constitutional provision, should be made explicit and that the rights protected by it should be enumerated.<sup>75</sup> Among these is the right “not to be tried a second time for the same offence following upon a valid conviction or acquittal.”<sup>76</sup> The Review Group concluded that the double jeopardy principle is an unenumerated constitutional right in accordance with Article 38.1.

The Constitution is “the fundamental law of the State.”<sup>77</sup> As a general rule, the constitutional status of double jeopardy in accordance with Article 38.1 would be superior to common law and legislation purporting to assert the contrary,<sup>78</sup> although it could be curtailed by legislation. Indeed, the *Report of the Constitution Review Group* noted, “[t]he fact that the right in question has been held to be implicitly protected by Article 38.1 does not, however, mean that it cannot be validly restricted where appropriate by the Oireachtas.”<sup>79</sup>

This may prove to be a contentious issue when the Oireachtas ultimately adopts the policy of several common law jurisdictions where the double jeopardy principle has been reformed thus providing a statutory exception where fresh and compelling evidence of the accused’s guilt is discovered following an acquittal.<sup>80</sup>

In view of the fact that Article 38.1 incorporates the double jeopardy

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75. *Report of the Constitution Review Group*, note 33, at 191. This could be done in terms that would provide constitutional protection for defendants against retrials or the imposition of multiple punishments for the same criminal offence. This could also permit the Oireachtas to make legislative provision for the DPP to make one application for a retrial in the case of fresh and compelling evidence of guilt or indeed where there has been a tainted acquittal. This would accord with the proposed reform of the double jeopardy principle in this jurisdiction and would also safeguard the fundamental right of the accused against more than one application for retrial, which could require a constitutional referendum as opposed to amending proposed reforming legislation.

76. *Ibid.*, at 192-193.

77. *The People (DPP) v O’Shea* [1982] IR 384, at 397 (SC), *per* O’Higgins CJ.

78. See TRS Allan, “Constitutional Rights and Common Law” (1991) 11 *Oxford Journal of Legal Studies* 453, at 456, stating “[t]here are... some significant differences between the common law protection of individual rights and that afforded by formally enacted bills of rights, especially when accompanied by a power of judicial review of legislation.” See Ailbhe O’Neill, “The Effect of a Finding that Legislation is Unconstitutional: The Approach of the Irish Supreme Court” (2007) 36 *Common Law World Review* 220.

79. *Report of the Constitution Review Group*, note 33, at 194.

80. See Gerard Hogan, *Balance in the Criminal Law Review Group Final Report* (March, 2007), at 203-214. [www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf](http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf) (visited 26 August 2008).



principle, it follows that this constitutional provision is not purely a procedural guarantee in the criminal justice process.

#### TRIAL BY JURY

With noted exceptions Article 38.5 provides that “no person shall be tried on any criminal charge without a jury.” In *The People (DPP) v O’Shea*, Henchy J stated:

I am satisfied that the indissoluble attachment to trial by jury of the right after acquittal to raise the plea of *autrefois acquit* was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial with a jury as the normal mode of trying major offences.<sup>81</sup>

This provision affirms the constitutional status of the double jeopardy principle on the basis that in the case of a trial on indictment once the jury has determined the guilt or innocence, the accused could thereafter raise the special pleas in bar against a retrial for the same criminal offence. A purported retrial in these circumstances would constitute a violation not only of the common law principle against double jeopardy but also of the defendant’s right to trial by jury and finality of verdict in the criminal justice process.<sup>82</sup> Given that Article 38.5 suggests a principle against retrials for jury trials, then Article 40.1, the equality guarantee, would provide an extension of the principle to other types of trials.

Article 5 of the Constitution provides that “Ireland is a sovereign, independent, democratic state,” which denotes that government authority is derived from the consent of the governed and the People maintain legitimacy through participation in a representative democracy. Popular sovereignty, that is, the State is the creation of the People,<sup>83</sup> is also expressed by the Preamble. Legitimate authority of government is derived from the consent of the governed,<sup>84</sup> and in constitutional democracies the People delegate authority and confer legitimacy while retaining sovereignty, thus possessing the final check on governmental authority.<sup>85</sup>

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81. [1982] IR 384 (SC), at 432.

82. Cf Ian Dennis, “Rethinking Double Jeopardy: Justice and Finality in Criminal Process” (2000) *Crim LR* 933.

83. In *de Búrca v Attorney General* [1976] IR 38, at 47 (HC & SC), Pringle J stated “[a] democracy... is a form of government in which the sovereign power resides in the people as a whole and is exercised by the people either directly or through their elected representatives.”

84. See the judgment of Walsh J in *Webb v Ireland* [1988] IR 353 (SC), and also in *Byrne v Ireland* [1972] IR 241 (SC).

85. Cf David Gwynn Morgan, *Constitutional Law of Ireland: The Law of the Executive*,

Dawson contends that the concept of popular sovereignty should be final and unappealable.<sup>86</sup> Thus, the prosecution authorities must not undermine this process by disregarding the verdict of the jury and re-prosecuting an accused for the same criminal offence. It is arguable that in consideration of a jury verdict of acquittal or conviction that the prosecution authorities should not be authorised to review this verdict with the objective of re-prosecuting an accused for the same criminal offence. Conversely, what must also be considered is that the jury's determination occasionally must be reconciled with human infallibility with the result that verdict of the jury should not necessarily be unalterable.

#### EQUALITY IN THE CRIMINAL JUSTICE PROCESS

Article 40.1, provides that "all citizens shall, as human persons, be held equal before the law." This provision was designed to prevent "arbitrary, unreasonable or unjust (invidious) discrimination."<sup>87</sup> The equality guarantee may be invoked to strike down legislation, or any provision thereof, that is deemed unconstitutional, and is also applicable to common law rules in the criminal justice process.<sup>88</sup> Thus, in *The State (DPP) v Walsh*,<sup>89</sup> the Supreme Court held that common law defence of marital coercion, which was only available to a wife who allegedly committed a criminal offence in the presence of her husband, did not survive the enactment of the Constitution.

Article 40.1 may be invoked in support of the thesis that the common law principle against double jeopardy has constitutional status where an accused is indicted on a second occasion for the same criminal offence following an acquittal or conviction. There could be an issue of constitutional inequality in the criminal justice process if it could be established that individuals in similar circumstances have not been indicted and tried, or indeed retried, for the same criminal offence.

If the constitutional protection against double jeopardy were applicable only to trials on indictment there could also be issues of constitutional inequality in the criminal justice process. In *The People (DPP) v Quilligan (No 2)*, Henchy J in the context of the court's jurisdiction to order a retrial stated:

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*Legislature and Judicature* (2<sup>nd</sup> ed, Round Hall Press, 1990), at 28, criticising the distinction between the People and the State as they are "artificial entities, with no clear demarcation of purpose between them" and arguing that there is "no advantage to analyse them as legally distinct bodies."

86. Michael Dawson, "Popular Sovereignty, Double Jeopardy and the Dual Sovereignty Doctrine" (1992) 102 *Yale Law Journal* 281, at 282-283.

87. *O'B v S* [1984] IR 316, at 335 (SC), *per* Walsh J.

88. See Oran Doyle, *Constitutional Equality Law* (Round Hall, 2004), at 176-184.

89. [1981] IR 412 (SC).

... if the legislature were to confer a jurisdiction to order a retrial in a case of acquittal in a trial on indictment, such a statutory provision would have to comply with the constitutional requirement as to equality before the law. Its constitutionality on that score would be questionable if it unequally and selectively applied only to appeals from the Central Criminal Court. Whereas, if it applied to all trials on indictment, its constitutionality might also be open to question on grounds such as that it would not accord with fundamental fairness or that it would not be compatible with what is inherent in the constitutional guarantee of trial by jury.<sup>90</sup>

If, in other words, the constitutional right against double jeopardy were applicable only to the trial of offences on indictment this could be constitutionally suspect for failing to accord protection against retrials for summary offences. Conversely, an argument can be made that the abuse of process doctrine is more relevant in the case of summary offences rather than a strict application of the double jeopardy principle.

A conviction for an indictable offence typically results in the deprivation of personal liberty in accordance with a sentence of a specified term of imprisonment, in addition to the adverse social stigma associated with a criminal trial and conviction for a serious criminal offence. In circumstances where the accused has been charged with a multiplicity of summary offences this may have the combined effect of causing a considerable measure of (unreasonable) harassment and distress to the accused. A case in point is the scenario involving Mr McBrearty wherein the accused was issued with more than 160 summonses mainly relating to alleged breaches of licensing laws and road traffic offences.<sup>91</sup> Although all of the summonses were subsequently withdrawn the combined effect of such a prosecution, if the accused were convicted on all charges, would undoubtedly have the effect of unduly distressing the accused, perhaps to the extent of being charged with an indictable offence. Accordingly, if an accused has been acquitted of a multitude of summary offences and the prosecution authorities subsequently issue fresh summonses for these same offences, this could constitute an infringement of the fundamental rationale of the double jeopardy principle. Therefore, the constitutional protection against double jeopardy would be available to an accused charged with indictable and summary offences, and offences triable either way. However, in the *McBrearty* case, as the summonses were subsequently withdrawn and the case did not proceed to verdict, the appropriate course of action would be to prevent the prosecuting authorities from re-issuing the summonses as this would constitute an abuse of the process of the court rather than an application of the double jeopardy principle, which is predicated on a final verdict of acquittal or conviction.<sup>92</sup>

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90. [1989] IR 46 (SC), at 56.

91. *McBrearty v Judge O'Donnell and DPP* 22 November 1999 (SC).

92. See Dennis, note 88, at 935, stating:

Article 40.1 may support the constitutional status of the common law principle against double jeopardy. The equality guarantee may be invoked by an accused where it is alleged that a statute (or provision thereof) or common law rule pertaining to double jeopardy law is arbitrary or unreasonable in the criminal justice process.

#### PERSONAL RIGHTS AGAINST RETRIALS

Article 40.3.1° of the Constitution provides that “the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”<sup>93</sup> It is an established principle of constitutional interpretation that certain provisions should be construed based on a hierarchy of constitutional rights. In *The State (Healy) v Donoghue*, Ó Higgins CJ stated:

Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34... [and] with Article 40.3.1°.... Being so considered, it is clear that the words “due course of law” in Article 38 make it mandatory that every criminal trial shall be conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights.<sup>94</sup>

Consequently, a fair trial in accordance with Article 38 is guaranteed by the Constitution and a failure by the State to “defend and vindicate” this constitutional right would constitute an infringement of the accused’s personal rights in the criminal justice process. This implies that the State would be prohibited from retrying an accused for the same criminal offence following a trial on the merits by a court of competent criminal jurisdiction. In *D v Director of Public Prosecutions*, Denham J stated:

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The protection does not take the form of a single self-contained rule similar to that contained in the human rights instruments. In essence it consists of a core rule of criminal jurisdiction, supplemented by a judicial discretion to stay criminal proceedings on the ground that they are an abuse of process. The core rule comprises the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*.

93. See RFV Heuston, “Personal Rights Under the Irish Constitution” (1976) 11 *Ir Jur* 205; *Report of the Constitution Review Group*, note 33, at 246-247.

94. [1976] IR 325 (SC), at 349.

The applicant's constitutional rights must be protected. Under the Constitution, Article 38.1: - "No person shall be tried on any criminal charge save in due course of law." The unenumerated rights of Article 40.3 incorporate a right to fairness of procedures. ... The applicant's right to a fair trial is one of the most fundamental constitutional rights accorded to persons. On a hierarchy of constitutional rights it is a superior right.<sup>95</sup>

The purported retrial of an accused, notwithstanding a former verdict of acquittal for the criminal offence, would constitute a violation of the constitutional right to a fair trial "in due course of law." Moreover, in the case of a retrial for the same offence the personal rights of the citizen to "fairness of procedures" might also be infringed. The fundamental injustice in prosecuting an accused for the same criminal offence following an acquittal or conviction necessitates intervention of the Constitution "as the fundamental law of the State."<sup>96</sup>

In a constitutional democracy it is clear that the personal rights of the citizen include the right not to be unduly harassed by the State through repeated attempts to prosecute and convict an accused for the same criminal offence. Consequently, the prosecution of an accused on more than one occasion for the same offence would constitute a violation of the accused's constitutional right to fair procedures.<sup>97</sup> Furthermore, the adverse standing of the accused in the criminal justice process, as opposed to the power and resources available to the State in the prosecution of criminal offences, necessitates the intervention of the constitutional protection against such procedures.

It is significant that Article 40.3.1° includes the term "as far as practicable" which signifies that this is not an absolute guarantee to "defend and vindicate the personal rights of the citizen," as it is subject to appropriate exceptions where this is necessitated based on a hierarchy of constitutional rights. Therefore, assuming the double jeopardy principle is a personal right of the citizen, it would not be an absolute right but rather subservient to other provisions based on a hierarchy of constitutional rights in the criminal justice process. This is significant for the collective interests of society to ensure that individuals who have committed serious criminal offences are tried and punished accordingly, even if this involves a retrial for the same offence such as in the case of a mistrial, or possibly a retrial following an acquittal where fresh and compelling evidence of the accused's guilt is subsequently discovered.

While this constitutional provision would not by itself incorporate an

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95. [1994] 2 IR 465 (SC), at 473-474.

96. *The People (DPP) v O'Shea* [1982] IR 384, at 397 (SC), per O'Higgins CJ.

97. *In re Haughey* [1971] IR 217 (SC), at 264, O'Dálaigh CJ stated: "Article 40.3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness and it is the duty of the Court to underline that the words of Article 40.3 are not political shibboleths but provide a positive protection for the citizen...."

unenumerated constitutional right against retrials for the same criminal offence, it may be invoked in support a more substantive line of reasoning in favour of a constitutional right against being placed twice in jeopardy for the same criminal offence.<sup>98</sup>

#### MULTIPLE PUNISHMENTS FOR THE SAME CRIMINAL OFFENCE

Article 40.4.1<sup>o</sup> provides that “no citizen shall be deprived of his personal liberty save in accordance with law.” This provision is pertinent to the double jeopardy proscription given that a conviction by a court of competent criminal jurisdiction typically results in the deprivation of personal liberty in accordance with a specified term of imprisonment.<sup>99</sup> In *The State (Tynan) v Keane*, Henchy J stated:

[The applicant]... says he has a right not to be put in peril of being deprived of his liberty again for the same offence.... He could have invoked and, in fact, did invoke Article 40, section 4, subs 1<sup>o</sup>, of the Constitution in respect of that imprisonment. That is the only constitutional provision relied on today, but I find it inapplicable to the present position under the pending summons.... The fact that the applicant has served part of a void sentence of imprisonment does not, on constitutional or other grounds, debar a new trial for the same offence. The Court of Criminal Appeal has never considered that its jurisdiction to order a new trial is inhibited by the fact that an appellant has served part of the quashed sentence.<sup>100</sup>

The imprisonment of a defendant following a conviction by a court of competent criminal jurisdiction following a trial on the merits constitutes punishment by means of the deprivation of “personal liberty... in accordance with law.”<sup>101</sup> If the criminal trial had proceeded on the merits of the case concluding in a verdict of acquittal or conviction, then a purported retrial for the same criminal offence resulting in the deprivation of personal liberty would constitute an infringement of Article 40.4.1<sup>o</sup>. However, in this instance the conviction was quashed on the basis that it was *ultra vires* the jurisdiction of the trial court and therefore void *ab initio*. Consequently, in these circumstances there is no legal impediment *per*

98. See *Report of the Constitution Review Group*, note 33, at 247, stating “[t]he broad wording of Article 40.3.1<sup>o</sup> has had the important advantage of being flexible and allowing the scope of constitutional protections to develop gradually and to be extended to new important areas....”

99. *The State (Cannon) v Kavanagh* [1937] IR 428 (HC).

100. [1968] IR 348 (HC), at 350.

101. See the judgment by O’Higgins CJ in *The State (McDonagh) v Frawley* [1978] IR 131, at 136-137 (SC).

se against a retrial for the same criminal offence, provided that the defendant is credited with the period of imprisonment served on the original, albeit void, conviction.<sup>102</sup> This is significant in view of the fact that the principle against double jeopardy was not only designed to prevent multiple prosecutions but also operates to prevent the imposition of multiple punishments for the same criminal offence.<sup>103</sup>

Whereas the deprivation of liberty may be imposed subsequent to a finding of guilt, the rationale for pleading double jeopardy is to prevent a second trial for the same offence from proceeding *ab initio*. Thus, while this constitutional provision has double jeopardy connotations it does not by itself form the basis of the constitutional right against double jeopardy. Nevertheless, this provision may provide influential assistance in support of a more pertinent line of reasoning in favour of a constitutional right against retrials and the imposition of multiple punishments for the same criminal offence.

#### AN UNQUALIFIED CONSTITUTIONAL RIGHT?

The Constitution clearly stipulates that certain provisions are not absolute but rather subject to exceptions in appropriate circumstances. A fundamental issue to be resolved is whether the constitutional protection against double jeopardy is an unconditional right or alternatively subject to an exception where fresh and compelling evidence of guilt is discovered following an acquittal. This is significant in the light of recent and proposed legislative reforms of double jeopardy law in several common law jurisdictions, including Ireland.<sup>104</sup> These reforms do not advocate a complete abolition of the common law principle but rather that it would be subject to an exception where fresh and compelling evidence of the guilt is discovered following an acquittal, especially in consideration of new forensic procedures for gathering evidence of criminal activity.

An accused could be retried where his conviction has been quashed or where there had been procedural irregularities, such as a tainted acquittal, that nullify the former criminal trial. Consequently, the constitutional protection against double jeopardy would not preclude a retrial for the same criminal offence in

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102. See text accompanying note 4.

103. The proscription against the imposition of multiple punishments for the same offence, under common law or statute, is provided for by section 14 of the Interpretation Act 1937 which provides: "Where any act, whether of commission or omission, constitutes an offence under two or more statutes or under a statute 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 statutes or at common law, but shall not be liable to be punished twice for the same offence."

104. See text accompanying notes 19-27.

circumstances where the former criminal trial was quashed on appeal on the basis that the decision of the trial court was *ultra vires*, or the trial court was deemed a *coram non iudice*.<sup>105</sup> However, legislation which permitted the prosecution authorities to petition the Court of Criminal Appeal to quash an acquittal in the light of fresh and compelling evidence of guilt, and order a retrial, could constitute a substantial inroad in the fundamental rights of the accused in the criminal justice process.

The Constitution is founded upon the premise *inter alia* “that the dignity and freedom of the individual may be assured, true social order attained.”<sup>106</sup> The contentious issue is whether it would be in the interests of the preservation of a just and ordered society to unconditionally prohibit retrials for the same criminal offence where fresh and compelling evidence of the accused’s guilt is discovered following an acquittal. The thesis of this article suggests that the double jeopardy principle is an unspecified constitutional right in accordance with Article 38.1. The issue to be determined is whether this would be an absolute right or, alternatively, subject to a hierarchy of constitutional rights; thus permitting a retrial, albeit in strictly limited circumstances, by proposed reforming legislation.

While numerous implicit rights have been interpreted in accordance with Article 38.1 as essential to a trial “in due course of law,” these are not necessarily absolute rights. The Constitution provides a hierarchy of rights and the Supreme Court has identified certain rights as superior to others in the criminal justice process. In *The People (DPP) v Shaw*, concerning the right to life of the victim as opposed to the right to personal liberty of the accused, Griffin J explained that:

... the hierarchy or priority of the conflicting rights must be examined, both as between themselves and in relation to the general welfare of society. This may involve the toning down or even the outing into temporary abeyance of a particular guaranteed right so that, in a fair and objective way, the more pertinent and important right in a given set of circumstances may be preferred and given application.<sup>107</sup>

In the context of Article 38.1, O’Higgins CJ in *In re Criminal Law (Jurisdiction)*

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105. In these circumstances, as the accused would not have been in jeopardy or peril of conviction on a former occasion, there would be no legal impediment *per se* against a retrial for the same criminal offence.

106. Constitution of Ireland 1937, Preamble, at [4]. In *Attorney General v Southern Industrial Trust* (1957) 94 ILTR 161, at 175, Lavery J stated “[t]he words of the Preamble declaring the purpose of the People in adopting, enacting, and giving to themselves the Constitution may help in determining the meaning of and the effect to be given to particular provisions.”

107. [1982] IR 1 (SC), at 56.



*Bill 1975*, stated “[t]he phrase ‘in due course of law’ requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society.”<sup>108</sup>

While the accused is entitled to the benefit of fair procedures during the course of the criminal trial, this must be reconciled with the preservation of a just and ordered society through the prosecution of individuals deemed to have committed serious criminal offences. In other words, the collective interest of a democratic society in the prosecution and punishment of offenders may result in the accused’s right to a trial “in due course of law” or what is otherwise known as the right to due process,<sup>109</sup> occasionally being subservient to society’s collective interest in the investigation and prosecution of individuals who have committed serious criminal offences. This is not to suggest substantial inroads in the fundamental rights of the accused in the criminal justice process but rather to provide for an exception in circumstances where fresh and compelling evidence of the accused’s guilt is discovered following an acquittal, or indeed where there had been a tainted acquittal. This is an issue that will need to be resolved if the Oireachtas adopts the policy of other common law jurisdictions in reforming the law on double jeopardy providing for a statutory exception to the double jeopardy principle. Would it be in the interests of a justly ordered society to permit a prosecution for the same offence following an acquittal, or would this constitute a violation of the accused’s unenumerated constitutional right not to be placed twice in jeopardy for the same offence? While policy considerations will determine this issue, these may not be determinative of the constitutional rights of the accused in the criminal justice process.<sup>110</sup>

An argument could be made that there would be no legal or constitutional impediment against permitting retrials in limited circumstances as the unenumerated constitutional right against double jeopardy would be subject to a hierarchy of rights in the criminal justice process. As a general rule, the accused’s right to a fair trial is superior to the collective interests of society in the prosecution of serious criminal offences.<sup>111</sup> However, in circumstances where fresh and compelling evidence of the accused’s guilt is discovered following an acquittal, or where the former criminal trial was a nullity, the issue of contention is whether it would be contrary to the effective administration of the criminal

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108. [1977] IR 129 (SC), at 152. In the High Court decision of *Enright v Ireland and the Attorney General* [2003] 2 IR 321, Finlay Geoghegan J stated: “The guarantee of fair procedures as it applies to a criminal trial under Articles 38.1 and 40.3 is not an absolute guarantee.”

109. See Barry Siegal, “Double Jeopardy and Due Process” (1968) 59 *Journal of Criminal Law, Criminology and Political Science* 247.

110. See Gerard Coffey, “Evaluating the Common Law Principle against Retrials” (2007) 29 *DULJ* 26.

111. *D v Director of Public Prosecutions* [1994] 2 IR 465 (SC); *Z v Director of Public Prosecutions* [1994] 2 IR 476 (HC & SC).

justice system of a justly ordered society to permit a retrial for the same criminal offence, albeit in strictly limited circumstances.

It is implicit from the judgement of O'Higgins CJ in *Re Criminal Law (Jurisdiction) Bill 1975* that a retrial following an acquittal could proceed in accordance with policy considerations pertaining to the prosecution of individuals who have committed serious criminal offences. Consequently, the unenumerated constitutional right against double jeopardy in accordance with Article 38.1 may not be an absolute right against retrials but rather subject to (proposed) statutory reform applicable in circumstances where fresh and compelling evidence of the accused's guilt is discovered following an acquittal.

In *The People (DPP) v O'Shea*,<sup>112</sup> the Supreme Court held that the DPP could appeal an acquittal from the Central Criminal Court to the Supreme Court, notwithstanding the status of the common law principle against double jeopardy in the Irish criminal justice system. The Supreme Court in *O'Shea* adopted a literal interpretation of Article 34.4.3<sup>o</sup> and, in so doing, held "all decisions of the High Court" including an acquittal in the Central Criminal Court,<sup>113</sup> could be appealed to the Supreme Court. This ruling has been repealed by statutory provision.<sup>114</sup>

Article 4(1) of Protocol 7 to the European Convention on Human Rights provides for the prohibition against retrials for the same offence within the jurisdiction of the same state. However, Article 4(1) ECHR is not an absolute guarantee against double jeopardy and may be circumvented in accordance with the law and criminal procedure of signatory states to the ECHR in consideration of fresh and compelling evidence of guilt, or indeed where there has been a fundamental defect in the former criminal proceedings.<sup>115</sup> Given the legal status of the ECHR under Irish law, Article 4 ECHR would provide influential authority for the Oireachtas and Irish superior courts when determining the constitutional status of the double jeopardy principle.<sup>116</sup>

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112. [1982] IR 384 (SC). Forde, note 60, at 437, writes:

The appeal in *O'Shea* was against an acquittal at the direction of the trial judge and not an acquittal by the jury having considered the entire evidence. An acquittal that was secured by flagrantly improper means may very well fall within the *autrefois acquit* rule at common law but it is hardly protected by whatever right against double jeopardy as exists under the Constitution.

113. An appeal from the Court of Criminal Appeal to the Supreme Court would therefore have been excluded from this process.

114. Section 11 of the Criminal Procedure Act 1993 as amended by section 44 of the Court and Court Officers Act 1995, with the exception of an appeal on a point of law to the Supreme Court without prejudice to a verdict in favour of the accused under section 34 of the Criminal Procedure Act 1967.

115. ECHR, Protocol 7, Article 4(2).

116. The European Convention on Human Rights Act 2003 incorporated the ECHR into Irish domestic law; see Gerard Hogan, "The European Convention on Human Rights Act 2003" (2006) 12 *European Public Law* 331.

While it is reasonable to assume that the common law immunity from re-prosecution is implicit in Article 38.1, this may not necessarily be an absolute right but rather subject to (proposed) statutory exception. With reference to the statutory restriction of implicit rights under Article 38.1, the *Report of the Constitution Review Group* stated:

Naturally, such rights should not be gratuitously or arbitrarily curtailed and, accordingly, the Review Group considers that any such qualifying clause should require that any restriction be proportionate and necessary to safeguard important public interests, such as the protection of the public, [and] the detection of crime.... Even applying these principles, it is difficult to envisage circumstances which would justify qualifying or limiting some of the rights [implicit in Article 38.1]....<sup>117</sup>

In *Heaney v Ireland*, the Supreme Court *per* O’Flaherty J stated that there must be “...a proper proportionality in the provision between any infringement of the citizen’s rights with the entitlement of the State to protect itself.”<sup>118</sup> In the High Court,<sup>119</sup> Costello J had held that while Article 40.6.1<sup>o</sup>.i protects the right to silence, as a corollary of freedom of expression, it is not an absolute right. The Supreme Court ruled that the legislative provision at issue was constitutional notwithstanding the fact that it provided for an offence where an accused failed to answer questions regarding his whereabouts when arrested.<sup>120</sup> Furthermore, the Court held that the provision had struck a proportionate balance between the rights of an accused and the general public interest in the prosecution of serious criminal offences.<sup>121</sup>

Where a conflict arises, the superior courts would determine whether a fair and just balance was struck between the interests of society in the detection and prosecution of serious crime and the fundamental rights of the accused in the criminal justice process. In *A v Governor of Arbour Hill Prison*,<sup>122</sup> the Supreme Court indicated that the duty on the State to protect society, and in particular

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117. Constitution Review Group, note 33, at 195.

118. [1996] 1 IR 580 (SC), at 590.

119. *Heaney v Ireland* [1994] 3 IR 593 (HC).

120. Offences against the State Act 1939, section 52.

121. See Kai Moller, “Balancing and the Structure of Constitutional Rights” (2007) 5 *International Journal of Constitutional Law* 453; Robert Alexy, “Constitutional Rights, Balancing, and Rationality” (2003) 16 *Ratio Juris* 131; Ben Emmerson, Andrew Ashworth and Alison Macdonald eds, *Human Rights and Criminal Justice* (2<sup>nd</sup> ed, Sweet & Maxwell, 2007), at 107-113; Benjamin Goold, Liora Lazarus and Gabriel Swiney, *Public Protection, Proportionality and the Search for Balance* (Ministry of Justice Research Series No 10, 2007), at 1-2. [www.justice.gov.uk/publications/research270907.htm](http://www.justice.gov.uk/publications/research270907.htm) (visited 26 August 2008).

122. 10 July 2006 (SC).

victims of crime, may, on occasion, counter-balance the rights of the accused in the criminal justice process.

If the Oireachtas enacts legislation reforming the law on double jeopardy that would make provision for retrials in circumstances where fresh and compelling evidence of guilt is discovered following an acquittal, this should not be disproportionate to the objective sought to be attained.<sup>123</sup>

#### CONCLUSION

Fundamental rights in the criminal justice process are not limited to those enumerated in the text of the Constitution but have also been identified by the superior courts as unspecified or unenumerated constitutional rights. While several provisions have been considered as providing the constitutional basis for the common law double jeopardy principle, it is submitted that Article 38.1 is the source of this right. However, in view of the fact that it is an unenumerated right, it seems likely that the Oireachtas would be permitted to enact legislation, or statutory provision, reforming the law on double jeopardy. This would empower the Court of Criminal Appeal, with the possibility of an appeal to the Supreme Court, to review an acquittal, which may be quashed and a retrial ordered where the Court is satisfied that there is fresh and compelling evidence of the accused's guilt or indeed where there has been a tainted acquittal.

The law on double jeopardy was not designed to provide absolute immunity from re-prosecution but rather to prohibit unreasonable retrials by the State. However, it is essential that prospective reforming legislation strike an appropriate and proportionate balance between the fundamental rights of an accused in a criminal trial and the right of society to be protected against serious crime.

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123. See *eg Cox v Ireland* [1992] 2 IR 503 (SC) in the context of punishment for criminal offences and legislative intervention on personal rights.