UNIVERSITA’ COMMERCIALE “LUIGI BOCCONI”
PhD SCHOOL

PhD program in Legal Studies
Cycle: XXXIII
Disciplinary Field: IUS/17

ARE MULTIPLE SANCTIONING SYSTEMS CONTRARY TO THE *NE BIS IN IDEM*?

Critical Analysis of the Case Law of the European Court of Human Rights and the Court of Justice of the European Union Regarding the Lawfulness of Multiple Sanctioning Systems under the *Ne Bis in Idem* and a Proposal of Reconstruction

Advisor: Francesco VIGANÒ

PhD Thesis by:
Javier Ignacio ESCOBAR VEAS
ID number: 3053502

Year 2021

TABLE OF CONTENTS

TABLE OF CONTENTS 1

INTRODUCTION.. 6

FIRST PART -- INTERNATIONAL AND COMPARATIVE CASE LAW REGARDING THE LAWFULNESS OF MULTIPLE SANCTIONING SYSTEMS UNDER THE *NE BIS IN IDEM*.12

1. Case Law of the Supreme Court of the United States 13

1.1. Brief History of the Double Jeopardy Protection 14

1.2. Protections Afforded by the Double Jeopardy Clause and Underlying Policies.......17

1.3. “Same Offence” Requirement...18

1.3.1. The Same Elements Test: *Blockburger v. United States*. 19

1.3.2. Greater Inclusive Offence and Lesser Included Offence: *Brown v. Ohio*. 22

1.3.3. “Same Offence” Requirement in Contexts of Multiple Prosecutions. 24

1.3.3.1. The Road to Grady: From *Brown v. Ohio* to *Illinois v. Vitale*. 25

1.3.3.2. The Same Conduct Test: *Grady v. Corbin*. 26

1.3.3.3. Returning to the Blockburger Test: *United States v. Dixon*. 28

1.4. The Dual Sovereignty Doctrine..31

1.4.1. The Evolution of the Dual Sovereignty Doctrine. 32

1.4.1.1. The Development of the Doctrine: *United States v. Lanza*. 32

1.4.1.2. Solidification of the Dual Sovereignty Doctrine: *Bartkus v. Illinois* and *Abbate v. United States*..34

1.4.1.3. Successive Prosecutions by Different States: *Heath v. Alabama*...............35

1.4.2. Definition of Sovereign for the Purposes of Double Jeopardy...........................36

1.4.3. The Sham Exception...38

1.4.4. The Petite Policy. 38

1.5. Protection against Multiple Prosecutions for the Same Offence 39

1.5.1. The Moment from Which the Defendant Is in Jeopardy. 40

1.5.2. Second Prosecution Following an Acquittal...41

1.5.3. Second Prosecution Following a Conviction...42

1.6. Protection against Multiple Punishments for the Same Offence 43

1.6.1 Protection against Multiple Punishments in a Single Prosecution. 44

1.6.2 Parallel Criminal and Non-Criminal Sanctions for the Same Facts. 45

1.6.2.1. The Early Cases: *United States v. La Franca* and *Various Items of Personal Property et al. v. United States*. 46

1.6.2.2. The Statutory Construction Analysis of *Helvering v. Mitchell* and Its Subsequent Application. 47

1.6.2.3. The "Kennedy Criteria": *Kennedy v. Mendoza-Martinez*............................49

1.6.2.4. The Two-Prong Analysis: *United States v. Ward*. 50

1.6.2.5. The Expansion of the Ward Analysis: *United States v. Halper*. 53

1.6.2.6. The Aftermath of Halper: *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*. 55

1.6.2.7. Reversing the Direction: *United States v. Ursery*. 58

1.6.2.8. Overruling Halper and Returning to Ward: *Hudson v. United States*. 61

1.7. Issue Preclusion as a Constitutional Requirement of the Double Jeopardy Clause 64

1.7.1. General Remarks on Issue Preclusion. 64

1.7.2. Issue Preclusion in Criminal Proceedings: Utilisation of a Judgment of Acquittal in Subsequent Criminal Proceedings. 68

1.7.2.1. The Early Cases: *United States v. Adams* and *Sealfon v. United States*. ..69

1.7.2.2. The Recognition of the Constitutional Status of the Doctrine of Issue Preclusion: *Ashe v. Swenson*. 70

1.7.2.3. The Case Law after *Ashe v. Swenson*: Extensions and Restrictions..........72

1.7.3. Issue Preclusion between Criminal and Civil Proceedings: Utilisation of a Judgment of Acquittal in Subsequent Civil Proceedings...76

1.8. Summary of the Case Law of the Supreme Court of the United States 81

2. Case Law of the Supreme Court of Canada..84

2.1. Charged with an Offence..85

2.1.1. Application of the above Criteria to Disciplinary Proceedings. 88

2.1.2. Application of the above Criteria to Civil Monetary Sanctions. 88

2.1.3. Application of the above Criteria to Civil Forfeiture Mechanisms. 92

2.2. "Same Offence" Requirement..93

2.3. Summary of the Case Law of the Supreme Court of Canada 99
3. Case Law of the Constitutional Court of Spain 101
3.1. Protection against Multiple Punishments 101
3.1.1. Concept of "Sanctioning Decision". 103
3.1.2. The Threefold Condition of Identity. 104
3.1.3. Consequences of a violation of the Prohibition of Multiple Punishments. 106
3.1.4. The Procedural Consequences of the Prohibition of Multiple Punishments. ...107
3.2. Protection against Multiple Prosecutions 109
3.3. Summary of the Case Law of the Constitutional Court of Spain 110
4. Case Law of the European Court of Human Rights..112
4.1. Criminal Nature of the Proceedings: The "Engel criteria".....................................114
4.2. The "Same Offence" Requirement 118
4.2.1. The Different Approaches before *Zolotukhin v. Russia*.................................118
4.2.2. *Zolotukhin v. Russia* and the Current Interpretation. 119
4.3. The "Final Decision" Requirement..121
4.4. The "Duplication of Proceedings" Requirement 122
4.4.1. The Case Law before *A and B v. Norway*..123
4.4.2. The Development of the "Sufficiently Close Connection in Substance and Time Exception": *A and B v. Norway*. 125
4.4.3. The Case Law after *A and B v. Norway*. 129
4.5. The Exception of the Second Paragraph of Article 4 of Protocol 7 133
4.6. Summary of the Case Law of the European Court of Human Rights 135
5. Case Law of the Court of Justice of the European Union 137
5.1. Criminal Nature of the Proceedings..139
5.2. The "Same Offence" Requirement 141
5.3. The "Final Decision" Requirement..143
5.4. Duplication of Proceedings as a Legitimate Restriction of the *Ne Bis in Idem* 144
5.5. Summary of the Case Law of the Court of Justice of the European Union............147

SECOND PART -- CRITICAL ANALYSIS OF THE CASE LAW OF THE ECtHR AND THE CJEU REGARDING THE LAWFULNESS OF MULTIPLE SANCTIONING SYSTEMS UNDER THE *NE BIS IN IDEM* 148

1. Lawfulness of Multiple Sanctioning Systems under the *Ne Bis in Idem*: Five Different Approaches to Resolve the Same Problem....149

2. First Problem: Lack of Clarity Regarding the Rationale of the *Ne Bis in Idem* 152

3. Second Problem: The Dead End of the Thesis of the Criminal Nature 156

3.1. Has the Current Approach Produced Coherent Results?....157

3.2. The "All-or-Nothing" Reasoning of the Current Approach 163

4. Third Problem: Incorporation of Criteria Unrelated to the Protection against Multiple Persecution....166

4.1. Vagueness of the Factors Listed by the ECtHR and the CJEU....167

4.2. Duplications in the Collection and the Assessment of the Evidence 170

4.3. Overlap between the Protection against Multiple Prosecutions and the Prohibition of Disproportionate Sanctions 171

THIRD PART -- RECONSTRUCTING THE PROHIBITION OF MULTIPLE PUNISHMENTS AND THE PROHIBITION OF MULTIPLE PROSECUTIONS 174

1. Understanding Multiple Sanctioning Systems: Models of Organisation 175

1.1. Subsidiary Model....176

1.2. Complementary Model 177

2. Overcoming the Dead End of the Thesis of the Criminal Nature 180

3. Remodelling the *Ne Bis in Idem*....183

3.1. Two Competing *Ne Bis in Idem* Models....183

3.1.1. First Model: Substantive *Ne bis in idem*. 183

3.1.2. Second Model: Procedural *Ne bis in idem*....184

3.2. Analysis of the Protection against Multiple Punishments and the Protection against Multiple Prosecutions 184

3.2.1. Protection against Multiple Punishments....185

3.2.1.1. Rationale of the Prohibition of Multiple Punishments. 185

3.2.1.2. Interpreting the "Same Offence" Requirement. 189

3.2.1.3. Scope of Application of the Prohibition of Multiple Punishments. 191

3.2.2. Protection against Multiple Prosecutions. 193

3.2.2.1. Rationale of the Prohibition of Multiple Prosecutions. 193

3.2.2.2. Interpreting the "Same Offence" Requirement. 198

3.2.2.3. Scope of Application of the Prohibition of Multiple Prosecutions. 200

3.3. Summary of the Proposed Alternative Interpretation 202

FOURTH PART -- LOOKING BEYOND THE *NE BIS IN IDEM*: RECALLING THE PROHIBITION OF DISPROPORTIONATE SANCTIONS AND THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME 205

1. Looking Beyond the *Ne Bis in Idem* 206

2. Recalling the Prohibition of Disproportionate Sanctions and the Right to Be Tried Within a Reasonable Time 207

2.1. The Prohibition of Disproportionate Sanctions 207

2.2. The Right to Be Tried within a Reasonable Time 211

FINAL REMARKS 216

BIBLIOGRAPHY 221

TABLE OF CASES 248

INTRODUCTION

The *ne bis in idem*, known as double jeopardy in common law systems,[1] is extensively proclaimed by national legal systems and international human rights instruments.[2] At the international level, the *ne bis in idem* has been stipulated in the International Covenant on Civil and Political Rights,[3] the American Convention on Human Rights,[4] Protocol 7 to the European Convention on Human Rights,[5] the Statute of the International Criminal Court,[6] and the Charter of Fundamental Rights of the European Union, among others.[7] It has been pointed out, however, that the *ne bis in idem* is not part of customary international law[8] and, therefore, that there is therefore no rule of international law imposing an obligation to recognise the *ne bis in idem* between different states.[9]

In general terms, the *ne bis in idem* has been defined as the prohibition to punish or prosecute a person for an offence for which he or she has already been acquitted or convicted by a final decision.[10] It is necessary to emphasise, nevertheless, that at a

---

[1] Carl-Friedrich Stuckenberg, 'Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions', in *The Oxford Handbook of Criminal Process*, ed. Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser (Oxford University Press, 2019), 458.

[2] Immi Tallgren and Astrid Reisinger Coracini, 'Article 20. Ne Bis in Idem', in *The Rome Statute of the International Criminal Court. A Commentary*, ed. Otto Triffterer and Kai Ambos, 3rd ed. (C. H. Beck – Hart – Nomos, 2016), 904–5; Goran P. Ilić, 'Observations on the Ne Bis in Idem Principle in Light of the European Court of Human Rights' Judgment: Milenkovic v. Serbia', *Journal of Eastern-European Criminal Law*, no. 1 (2017): 218; David Rudstein, 'Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges' Rulings of "No Case to Answer"', *San Diego International Law Journal* 13, no. 1 (2011): 27–28; Gerard Conway, 'Ne Bis in Idem and the International Criminal Tribunals', *Criminal Law Forum* 14, no. 4 (2003): 355; Dax Eric Lopez, 'Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem', *Vanderbilt Journal of Transnational Law* 33, no. 5 (1 November 2000): 1271; Lynn Hall, 'Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper, 109 S. Ct. 1892 (1989)', *Washington Law Review* 65, no. 2 (1990): 439.

[3] Article 14.7.

[4] Article 8.4.

[5] Article 4.

[6] Article 20.

[7] Article 50.

[8] Wolfgang Schomburg, 'Criminal Matters: Transnational Ne Bis in Idem in Europe—Conflict of Jurisdictions—Transfer of Proceedings', *ERA Forum* 13, no. 3 (2012): 313; Pier Paolo Paulesu, 'Ne Bis in Idem and Conflicts of Jurisdiction', in *Handbook of European Criminal Procedure*, ed. Roberto E. Kostoris (Springer, 2018), 398.

[9] John A. E. Vervaele, 'The Transnational e Bis in Idem Principle in the EU. Mutual Recognition and Equivalent Protection of Human Rights', *Utrecht Law Review* 1, no. 2 (2005): 102; Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2010), 91.

[10] ECtHR, Göktan v. France, § 47 [2002]; Ponsetti and Chesnel v. France, § 5 [1999]; CJEU, Menci, § 25 [2018]; UNHRC, General Comment no. 32, § 54.

comparative level there are different definitions of the *ne bis in idem*.[11] For instance, the American Convention on Human Rights solely prohibits retrying a person for the same acts following an acquittal. Moreover, in the United States a final verdict is not required to bar a second prosecution for the same offence.[12]

Notwithstanding the extended national and international recognition of the *ne bis in idem*, there is an evident lack of consensus on it,[13] and several difficulties arise when the courts apply the protection to concrete cases.[14]

Justice Rehnquist once complained that the double jeopardy was one of the least understood protections and that the United States Supreme Court had done little to alleviate the confusion.[15] Indeed, it has been noted that "in no other area of criminal procedure has the Supreme Court so frequently overruled its own recently created precedent".[16] The same Court on one occasion recognised that its case law on double jeopardy had not been consistent, characterising it as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator".[17]

Consensus is not greater among scholars. Walter Schaefer once remarked that although there was "enough double risk writing to satisfy the most avid scholar", there were still undetermined issues.[18] Monroe McKay has defined double jeopardy theory as a perplexing puzzle because even in the best assemblage it is still possible to find some odd angles.[19] Barbara Mack has underlined that commentators disagree on the history, the aim, and the scope of the double jeopardy clause. "What the commentators

---

[11] M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', *Duke Journal of Comparative & International Law* 3, no. 2 (1993): 288.
[12] Supreme Court of the United States, United States v. Scott, 92 [1978]; Green v. United States, 188 [1957].
[13] María Jesús Gallardo, *Los Principios de La Potestad Sancionadora. Teoría y Práctica* (Iustel, 2008), 294; Mercedes Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Mercedes Pérez Manzano, Juan Antonio Lascuraín Lascuraín, and Marina Mínguez Rosique (Springer, 2018), 75.
[14] Eli Richardson, 'Eliminating Double Talk from the Law of Double Jeopardy', *Florida State University Law Review* 22, no. 1 (1994): 121–22; John Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?', *Utrecht Law Review* 9, no. 4 (2013): 212.
[15] Supreme Court of the United States, Whalen v. United States, 699 (Rehnquist, J., dissenting) [1980].
[16] Lissa Griffin, 'Untangling Double Jeopardy in Mixed-Verdict Cases', *SMU Law Review* 63, no. 3 (2010): 1033–34.
[17] Supreme Court of the United States, Albernaz v. United States, 343 [1981]; Alfredo Garcia, *The Fifth Amendment: A Comprehensive Approach* (Praeger, 2002), 171.
[18] Walter V. Schaefer, 'Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe', *California Law Review* 58, no. 2 (1970): 391.
[19] Monroe G. McKay, 'Double Jeopardy: Are the Pieces the Puzzle', *Washburn Law Journal* 23, no. 1 (1983): 1.

do agree on is that double jeopardy is a realm of law so confusing, so replete with contradictions, corrections, and exceptions to the rules, that after 120 years no sensible meaning or policy has evolved".[20]

The above uncertainty is even greater in the context of parallel civil and criminal sanctioning proceedings,[21] as the evolution of the comparative case law has shown. Throughout this work, the concepts of "civil offence", "civil sanction" and "civil proceeding" will be utilised in the sense of "non-criminal". Therefore, those concepts include administrative and disciplinary sanctions, as well as civil sanctioning actions.

Because historically the scope of application of the *ne bis in idem* was limited to proceedings defined as criminal under national law, multiple sanctioning systems were not a major problem from the perspective of the *ne bis in idem*. The situation changed when the European Court of Human Rights (hereafter ECtHR) and the Court of Justice of the European Union (hereafter CJEU) developed an autonomous notion of criminal offence. By virtue of this autonomous concept, the European courts have characterised as criminal proceedings that national law labelled as civil, thereby triggering the application of the *ne bis in idem*.[22]

This work aims to resolve the question of whether multiple sanctioning systems are contrary to the *ne bis in idem* under the regulation provided by Protocol 7 to the European Convention on Human Rights and the European Union Charter of Fundamental Rights. By "multiple sanctioning system" I understand a law enforcement system in which the same facts constitute two or more offences, which fall in the competence of different authorities. These authorities can be government agencies or courts, and the offences can be civil or criminal. For instance, a case of water pollution can lead to the initiation of two sanctioning proceedings, one by the environmental protection agency and another by the public health protection agency; a case of market abuse can lead to the initiation of two sanctioning proceedings, one by the securities and exchange commission and another by the public prosecutor.

---

[20] Barbara A. Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', *Seattle University Law Review* 19, no. 2 (1996): 217–18.

[21] Francisco de León, 'Sobre el sentido del axioma ne bis in idem', in *El principio de ne bis in idem en el derecho penal europeo e internacional*, ed. Luis Arroyo Zapatero and Nieto Martín, Adán (Ediciones de la Universidad de Castilla-La Mancha, 2007), 19.

[22] Zoran Buric, 'Ne Bis in Idem in European Criminal Law: Moving in Circles Topic 4: Criminal Law and Procedure', *EU and Comparative Law Issues and Challenges Series* 3 (2019): 508; Manuel Gómez, 'Non bis in idem en los casos de dualidad de procedimientos penal y administrativo. Especial consideración de la jurisprudencia del TEDH', *Indret: Revista para el Análisis del Derecho*, no. 2 (2020): 429.

The relevance of the problem can be exemplified with the following case: “X”, while driving her car over the speed limit, causes an accident which leads to the death of a child. Based on this accident, the government brings an administrative and a criminal proceeding against the defendant. In the administrative proceeding, the government charges “X” with two minor traffic offences: failure to slow to avoid an accident and speeding. In the criminal proceeding, the government charges “X” with manslaughter. The traffic authority concludes the proceeding first and fines “X” €500 for each offence. The criminal prosecution for manslaughter is still ongoing. Should the administrative sanction bar the criminal prosecution for manslaughter?

The structure of the thesis is divided into four parts. The First Part studies the evolution and the current state of the case law of the United States Supreme Court, the Canadian Supreme Court, the Spanish Constitutional Court, the ECtHR and the CJEU regarding the lawfulness of multiple sanctioning systems under the *ne bis in idem*. These three national courts were chosen because they have developed different approaches to solving the problem of multiple sanctioning systems and the *ne bis in idem* than the two European courts. In this way, the comparative study of these five jurisprudences will allow, firstly, to demonstrate the existence of different views to solve the same problem and, secondly, to critically assess, in comparative terms, the virtues and difficulties of the approaches of the ECtHR and CJEU.

A comparative study regarding this matter is needed for two reasons. Firstly, because to interpret international instruments, it is vital to have a broad knowledge of the legal systems and legal traditions of the states that participate in those instruments. Comparative law is helpful to identify those principles and minimum standards recognised as such by most of the international community.[23] Secondly, a comparative study is necessary because there are different approaches regarding the problem at issue. However, there has been no sufficient dialogue between them. For instance, while the CJEU applies a purely factual approach concerning the "same offence" requirement, the United States Supreme Court applies a normative one. While the Spanish Constitutional Court distinguishes the protection against multiple punishments from the protection against multiple prosecutions, the ECtHR has developed only the latter.

[23] Masha Fedorova and Goran Sluiter, ‘Human Rights as Minimum Standards in International Criminal Proceedings’, *Human Rights & International Legal Discourse* 3, no. 1 (2009): 11.

After analysing the comparative case law on *ne bis in idem* and multiple sanctioning systems, the Second Part of the thesis aims to critically analyse three problems with the case law of the ECtHR and the CJEU.

The first problem is the lack of clarity on the rationale of the protection against multiple prosecutions. The ECtHR and the CJEU have not addressed the issue of the rationale of the protection against multiple prosecutions. The European courts have held only that the protection against multiple prosecutions aims to prohibit the repetition of criminal proceedings against the same person based on the same facts. Nevertheless, it is clear that prohibiting the repetition of criminal proceedings is neither the rationale nor the aim of the protection against multiple prosecutions, but the consequence of its application.

The second problem concerns the uncertainty that the application of the autonomous concept of "criminal offence" has caused. According to the ECtHR and the CJEU, the *ne bis in idem* applies only to criminal offences and proceedings, as opposed to those that are non-criminal in nature. However, both European courts have held that the characterisation of the offence under national law cannot be the sole criterion to determine its nature, developing an autonomous concept of criminal offence. By applying this autonomous notion, in several cases the European courts have characterised as criminal proceedings and offences that national law labelled as civil. The problem with the application of the concept of criminal offence is that its results are often neither predictable nor coherent.

Finally, the third problem to address is the incorporation of criteria unrelated to the protection against multiple prosecutions for the purpose of determining whether it has been violated. In their latest decisions, the ECtHR and the CJEU have held that the protection against multiple prosecutions does not necessarily prohibit to criminally prosecuting the same defendant twice for the same offence. The ECtHR has held that the duplication of criminal sanctioning proceedings is not contrary to the *ne bis in idem* if the proceedings are sufficiently connected in substance and time. The CJEU has affirmed that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the *ne bis in idem* because the accumulation can be a legitimate limitation of this right in conformity with Article 52 of the EU Charter. Three problems with the new approaches of the ECtHR and the CJEU will be reviewed: the vagueness of the factors listed by the ECtHR and the CJEU; the problematic criterion of avoiding as far as possible any duplication in the collection and the assessment of the evidence;

and the overlap between the prohibition of multiple prosecutions and the ban of disproportionate sanctions.

The critical review on these three problems will demonstrate that neither the ECtHR nor the CJEU have developed a coherent standpoint regarding the lawfulness of multiple sanctioning systems under the *ne bis in idem*. For this reason, it is necessary to develop a new interpretation on the matter under study.

The Third Part of the thesis aims to propose an alternative interpretation regarding the lawfulness of multiple sanctioning systems under the *ne bis in idem*. Before proposing an alternative interpretation, however, it will be necessary to address multiple sanctioning systems, examining the cases in which it is reasonable for a legislature to provide for this type of law enforcement system, as well as their possible models of organisation. Afterwards, an alternative interpretation will be proposed, which requires to differentiate the protection against multiple prosecutions from the protection against multiple punishments since both protections have a different rationale, scope of application and different requirements.

Finally, the last part aims to address, of course only in general terms, other possible protections against multiple sanctioning systems. It should be emphasised, because it is often overlooked, that the *ne bis in idem* is not the sole safeguard that limits multiple sanction systems, but only one of the many limitations on this type of law enforcement system. Two other safeguards that limit multiple sanctioning systems, which will be analysed in this Fourth Part, are the prohibition of disproportionate sanctions and the right to be tried within a reasonable time.

FIRST PART

--

INTERNATIONAL AND COMPARATIVE CASE LAW REGARDING THE LAWFULNESS OF MULTIPLE SANCTIONING SYSTEMS UNDER THE *NE BIS IN IDEM*

1. Case Law of the Supreme Court of the United States

The Fifth Amendment guarantee against double jeopardy is one of the basic protections afforded defendants by the United States Constitution.[24] The Fifth Amendment reads in part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb".

The double jeopardy clause was largely inspired by what are referred to in English law as pleas in bar.[25] The United States Supreme Court (hereafter in this section: Supreme Court) has characterised the protection against double jeopardy as a fundamental right and a cardinal principle that lies at the foundation of criminal law.[26] Moreover, in *Benton v. Maryland*, decided in 1969, the Court held that the protection against double jeopardy is enforceable against the states through the Fourteenth Amendment.[27]

Even though the wording of the double jeopardy clause could suggest that it only applies to proceedings in which only the most serious penalties can be inflicted, the scope of application of the clause is far broader than its literal wording.[28] In *Ex parte Lange*, decided in 1873, the Supreme Court held that the constitutional provision applies to all cases where a second criminal punishment is attempted to be inflicted

[24] Jay A. Sigler, 'Federal Double Jeopardy Policy', *Vanderbilt Law Review* 19, no. 2 (1966): 375.
[25] Gerard Conway, 'Ne Bis in Idem in International Law', *International Criminal Law Review* 3, no. 3 (2003): 222; Andrea Koklys, 'Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard', *John Marshall Law Review* 40, no. 1 (2006): 379; Brian L. Summers, 'Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition', *Ohio State Law Journal* 56, no. 5 (1995): 1595.
[26] Daniel A. Principato, 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts', *Cornell International Law Journal* 47, no. 3 (2014): 769.
[27] Supreme Court of the United States, Benton v. Maryland, 787 [1969]. See also Justices of Boston Municipal Court v. Lydon, 306 [1984]. Benton v. Maryland overruled Palko v. Connecticut, [1937], in which the Supreme Court had rejected to incorporate the protection against double jeopardy into the Fourteenth Amendment.
[28] William S. McAninch, 'Unfolding the Law of Double Jeopardy', *South Carolina Law Review* 44, no. 3 (1993): 421; David Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution* (Praeger, 2004), 44.

for the same offence.[29] Accordingly, in the constitutional sense jeopardy describes the risk that is traditionally associated with a criminal prosecution.[30]

Nowadays it is well settled that the double jeopardy clause applies not only to prosecutions for felonies, but also to prosecutions for any offence punishable by imprisonment or monetary penalties,[31] including misdemeanours,[32] municipal ordinance violations[33] and even to delinquency proceedings in a Juvenile Court.[34]

1.1. Brief History of the Double Jeopardy Protection

There is no doubt that the double jeopardy has a long history.[35] The rule was not entirely unknown to the Greeks and Romans, who established some form of protection against double jeopardy.[36] The rule found final expression in the Digest of Justinian as the precept that "the governor should not permit the same person to be again accused of a crime of which he had been acquitted".[37]

---

[29] Supreme Court of the United States, Ex parte Lange, 170-173 [1873]. See also Hudson v. United States, 99 [1997]; Andrew Z. Glickman, 'Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after United States v. Halper', *Virginia Law Review* 76, no. 6 (1990): 1254; Nelson T. Abbott, 'United States v. Halper: Making Double Jeopardy Available in Civil Actions', *BYU Journal of Public Law* 6, no. 3 (1992): 552; Patrick S. Nolan, 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery', *Marquette Law Review* 80, no. 4 (1997): 1086; Stephen Limbaugh, 'The Case of Ex Parte Lange (Or How the Double Jeopardy Clause Lost Its Life or Limb)', *American Criminal Law Review* 36, no. 1 (1999): 54; Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 44.

[30] Supreme Court of the United States, Breed v. Jones, 528 [1975]; Joseph A. Colussi, 'An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions', *Indiana Law Journal* 55, no. 4 (1980): 672; Jonathan Blumberg, 'Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy', *North Carolina Law Review* 64, no. 1 (1985): 146.

[31] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch [1994].

[32] Supreme Court of the United States, Brown v. Ohio [1977].

[33] Supreme Court of the United States, Robinson v. Neil [1973]; Waller v. Florida [1970].

[34] Supreme Court of the United States, Breed v. Jones, 541 [1975]. Regarding the state of the discussion previous to Breed v. Jones, see David S. Rudstein, 'Double Jeopardy in Juvenile Proceedings', *William and Mary Law Review* 14, no. 2 (1972): 266–311.

[35] Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 220; Forrest G. Alogna, 'Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction', *Cornell Law Review* 86, no. 5 (2001): 1137.

[36] Supreme Court of the United States, Bartkus v. Illinois, 151-152 (Black, J., dissenting) [1959]; Jay A. Sigler, 'A History of Double Jeopardy', *American Journal of Legal History* 7, no. 4 (1963): 283; Nyssa Taylor, 'England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes', *Temple International and Comparative Law Journal* 19, no. 1 (2005): 195.

[37] Sigler, 'A History of Double Jeopardy', 283.

Regarding English law, no early statutory law included double jeopardy. Neither the Magna Carta nor the English Bill of Rights of 1689 made any reference to the double jeopardy clause.[38]

The first mention in English law of an individual raising a plea of a former acquittal to bar a prosecution for the same offence appears to have occurred at the beginning of the thirteenth century.[39] In a case decided in 1201, Goscelin brought a private suit seeking punishment against Adam for killing his brother, Ailnoth. As a defence, Adam claimed that he had already been prosecuted for the same killing on another occasion where the wife of Ailnoth brought a private suit against him.[40] In a case decided two years later, Ralph brought a private suit seeking punishment against Richard for homicide. The defendant claimed that the action was barred because another person had previously brought a private suit for the same killing against him. The court, however, did not decide the case based on this plea.[41] In another case, decided in 1221, Sibil brought a private suit against Engelram as an accessory in the killing of her husband, Simon. Engelram defended on the ground that Sibil had previously brought a private suit against him in another county for the same killing and that he had been acquitted. Once again, the court did not determine the validity of this plea and dismissed the case on different grounds.[42]

However, over the next five hundred years, the protection against double jeopardy became firmly entrenched in the common law in the form of the pleas of former acquittal (autrefoits acquit), former conviction (autrefoits convict), and pardon.[43]

---

[38] Sigler, 284; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 236; Erin M. Cranman, 'The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right', *Emory International Law Review* 14, no. 3 (2000): 1647; Péter Mezei, '"Not Twice for the Same": Double Jeopardy Protections Against Multiple Punishments', in *Fair Trial and Judicial Independence: Hungarian Perspectives*, ed. Attila Badó (Springer, 2014), 199; Jacqueline R. Kanovitz, Jefferson L. Ingram, and Christopher J. Devine, *Constitutional Law for Criminal Justice*, 15th ed. (Routledge, 2018), 448.

[39] David Rudstein, 'A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy', *William & Mary Bill of Rights Journal* 14, no. 1 (2005): 202.

[40] Rudstein, 203.

[41] Rudstein, 203.

[42] Rudstein, 204.

[43] Supreme Court of the United States, United States v. Scott, 87 [1978]; McKay, 'Double Jeopardy: Are the Pieces the Puzzle', 9; McAninch, 'Unfolding the Law of Double Jeopardy', 414; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 220; Lopez, 'Not Twice for the Same', 1268–69; Erwin Chemerinsky and Laurie L. Levenson, *Criminal Procedure: Adjudication*, 3rd ed. (Wolters Kluwer, 2018), 497; Robert E. Wagner, 'Corporate Criminal Prosecutions and Double Jeopardy', *Berkeley Business Law Journal* 16, no. 1 (2019): 219.

By the second half of the eighteenth century, William Blackstone pointed out that the plea of former acquittal is grounded on the universal maxim of the common law that "no man is to be brought into jeopardy of his life more than once for the same offence".[44]

In North America, the first protection against double jeopardy appeared in 1641 when the General Court of the Massachusetts Bay Colony enacted its Body of Liberties.[45] After the independence, the Constitution of New Hampshire of 1784 was the first state Constitution that incorporated a double jeopardy provision, which provided: "No subject shall be liable to be tried, after an acquittal, for the same crime or offense".[46]

The original version of the Constitution of the United States did not contain a bill of rights. The states protested, demanding the incorporation of a bill of rights. Some of them even ratified the Constitution only after it was assured that a bill of rights would be added to the Constitution in the form of subsequent amendments. Some of them even ratified the Constitution only after it was assured that a bill of rights would be added to the Constitution in the form of subsequent amendments.[47]

In June 1789, Representative James Madison proposed a series of amendments. One of those proposals was a double jeopardy clause, which stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence".[48] In August 1789, the House of Representatives approved the double jeopardy clause as phrased by Madison and sent it to the Senate.

The Senate substituted the latter half of the proposal of Madison with "be twice put in jeopardy of life or limb by any public prosecution".[49] The wording of the clause was different from all of the prior statutes, including colonial codes and state

[44] Supreme Court of the United States, United States v. Wilson, 340 [1975]; William Blackstone, *Commentaries on the Laws of England*, vol. 4 (J. B. Lippincott & Co., 1893), 334; Joshua Dressler and George C. Thomas III, *Criminal Procedure: Principles, Policies and Perspectives*, 6th ed. (West Academic Publishing, 2017), 1471.
[45] Sigler, 'A History of Double Jeopardy', 298; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 221; Rudstein, 'A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy', 221–22; Carissa Byrne Hessick and F. Andrew Hessick, 'Double Jeopardy as a Limit on Punishment', *Cornell Law Review* 97, no. 1 (2011): 51.
[46] Sigler, 'A History of Double Jeopardy', 300; Rudstein, 'A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy', 223.
[47] Rudstein, 'A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy', 226–27.
[48] Supreme Court of the United States, United States v. Wilson, 341 [1975]; George C. Thomas III, *Double Jeopardy: The History, The Law* (New York University Press, 1998), 84; Garcia, *The Fifth Amendment: A Comprehensive Approach*, 28.
[49] Supreme Court of the United States, United States v. Wilson, 341-342 [1975].

constitutions.[50] Afterwards, the Senate eliminated the words "by any public prosecution", approving the following proposed double jeopardy clause: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".[51]

The House of Representatives agreed with the version of the Senate and the double jeopardy clause became part of the Fifth Amendment following its ratification by the states in 1791.[52] The final wording of the double jeopardy clause turned out to be similar to the universal maxim of Blackstone that no man is to be brought into jeopardy of his life more than once for the same offence.[53]

1.2. Protections Afforded by the Double Jeopardy Clause and Underlying Policies

In *North Carolina v. Pearce*, decided in 1969, the Supreme Court held that the double jeopardy clause consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense".[54]

Regarding the underlying policies to these protections, in *Green v. United States*, decided in 1957, the Supreme Court affirmed: "The underlying idea, one that is deeply

---

[50] Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 222.

[51] Rudstein, 'A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy', 232.

[52] Rudstein, 232.

[53] James Gordon, 'Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach', *California Law Review* 69, no. 3 (1981): 865; Thomas III, *Double Jeopardy*, 85. This should not be surprising because, as the same Supreme Court has recognised, many elements of the common law were carried into the jurisprudence of the United States through the medium of Blackstone and his Commentaries. See Supreme Court of the United States, Benton v. Maryland, 795 [1969].

[54] Supreme Court of the United States, North Carolina v. Pearce, 717 [1969]. See also United States v. Wilson, 343 [1975]; United States v. Dinitz, 606 [1976]; Illinois v. Vitale, 415 [1980]; Justices of Boston Municipal Court v. Lydon, 306-307 [1984]; Ohio v. Johnson, 498 [1984]; Grady v. Corbin, 516 [1990]; United States v. Dixon, 696 [1993]; United States v. Ursery, 273 [1996]; Monge v. California, 524 U.S. 727-728 (1998); Sattazahn v. Pennsylvania, 106 [2003]; Rudstein, 'Double Jeopardy in Juvenile Proceedings', 270–71; Peter J. Henning, 'Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy', *American Criminal Law Review* 31, no. 1 (1993): 8; Eric Michael Anielak, 'Double Jeopardy: Protection against Multiple Punishments', *Missouri Law Review* 61, no. 1 (1996): 171; Philip A. Talmadge, 'Preface: Double Jeopardy in Washington and Beyond Double Jeopardy: The Civil Forfeiture Debate', *Seattle University Law Review* 19, no. 2 (1996): 211; Ed Neafsey and Edward R. Bonanno, 'Parallel Proceedings and the Fifth Amendment's Double Jeopardy Clause Symposium', *Fordham Environmental Law Journal* 7, no. 3 (1996): 720; Adam C. Wells, 'Multiple-Punishment and the Double Jeopardy Clause: The United States v. Ursery Decision', *St. John's Law Review* 71, no. 1 (1997): 161; Paul A. McDermott, *Res Judicata and Double Jeopardy* (Bloomsbury Professional, 1999), 198.

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 offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".[55] It is possible to identify two independent principles in the above reasoning: first, a second prosecution against the same defendant may increase his chances of being found guilty even if innocent,[56] and second, it is wrong to subject someone to undergo the stress, embarrassment and expense of a second criminal prosecution for the same offence.[57]

The Supreme Court further explained the foregoing reasoning in *United States v. Wilson*, distinguishing two hypotheses. When a defendant "has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense".[58] On the other hand, "when a defendant has been acquitted of an offense, the Clause guarantees that the state shall not be permitted to make repeated attempts to convict him, 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".[59]

Both protections will be analysed in the following sections. Before that, however, it is necessary to address the "same offence" requirement.

1.3. "Same Offence" Requirement

[55] Supreme Court of the United States, Green v. United States, 187-188 [1957]. See also Benton v. Maryland, 795-796 [1969]; United States v. Jorn, 479 [1971]; United States v. Wilson, 343 [1975]; United States v. Jenkins, 370 [1975]; Serfass v. United States, 387-388 [1975]; Burks v. United States, 11 [1978]; United States v. Scott, 87 [1978]; United States v. Di Francesco, 127-128 [1980]; Justices of Boston Municipal Court v. Lydon, 307 [1984]; Ohio v. Johnson, 498-499 [1984]; Morris v. Mathews, 247 [1986]; Blueford v. Arkansas, 605 [2012], among others.

[56] Andrew Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (Oxford University Press, 2008), 22. The Supreme Court has frequently stated that the protection against double jeopardy "represents a constitutional policy of finality for the defendant's benefit". See United States v. Jorn, 479 [1971]; Crist v. Bretz, 33 [1978]; United States v. Di Francesco, 128 [1980].

[57] Jere Lamont Fox, 'Breed v. Jones: Double Jeopardy and the Juvenile', *Pepperdine Law Review* 3, no. 2 (1976): 414.

[58] Supreme Court of the United States, United States v. Wilson, 343 [1975].

[59] Supreme Court of the United States, United States v. Wilson, 343 [1975].

Since the double jeopardy clause only prohibits multiple punishments and multiple prosecutions for the same offence, it is crucial to resolve what constitutes the same offence.[60]

1.3.1. The Same Elements Test: *Blockburger v. United States.*

In *Blockburger v. United States*, decided in 1932, the Supreme Court held that to determine whether two offences are the same for the purposes of double jeopardy, the right approach is the "same elements test",[61] commonly referred to as the "Blockburger test".[62] In this case, the defendant was charged with violating provisions of the Narcotic Act. The indictment contained five counts and the jury convicted him on the second, third and fifth count only. All these counts charged a sale of drugs to the same purchaser. The second count charged a sale on a specified day of ten grains of the drug not in or from the original stamped package; the third count charged a sale on the following day of eight grains of the drug not in or from the original stamped package; and the fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. The court sentenced the defendant to five years' imprisonment and a fine of $2,000 on each count.[63]

Regarding the question of whether the defendant had been convicted twice for the same offence, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact which the other does not".[64] The test emphasises the elements of the two offences since, to be considered different offences, each of them must require something that the other does not,[65] notwithstanding a substantial overlap in

---

[60] Ramona Lennea McGee, 'Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel', *Cornell Law Review* 77, no. 3 (1992): 696; McAninch, 'Unfolding the Law of Double Jeopardy', 447; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 225.
[61] Supreme Court of the United States, United States v. Dixon, 696 [1993].
[62] Supreme Court of the United States, Brown v. Ohio, 166 [1977].
[63] Supreme Court of the United States, Blockburger v. United States, 301 [1932].
[64] Supreme Court of the United States, Blockburger v. United States, 304 [1932]; Mezei, '"Not Twice for the Same": Double Jeopardy Protections Against Multiple Punishments', 211. The Supreme Court had already suggested this idea in Gavieres v. United States, 342 [1911] and Morgan v. Devine, 632 [1915].
[65] Stephen Saltzburg and Daniel Capra, *American Criminal Procedure: Cases and Commentary*, 4 edition (West Academic Publishing, 1992), 1215; Akhil Amar and Jonathan L. Marcus, 'Double Jeopardy Law after Rodney King', *Columbia Law Review* 95, no. 1 (1995): 28; Taryn A. Merkl, 'The Federalization of Criminal Law and Double Jeopardy', *Columbia Human Rights Law Review* 31, no. 1 (1999): 189;

the proof offered to establish the crimes.[66] The Blockburger test focuses on the statutory elements of each offence,[67] not on the evidence needed to be presented in trial.[68]

The Supreme Court later applied the foregoing reasoning to the case in question. Regarding the second and third counts, the Supreme Court held that they were distinct offences because they were based on separate transactions.[69] Concerning the third and fifth counts, since they were based on the same transaction, the Court analysed whether each provision required proof of a fact which the other did not. In this regard, the Court observed that while Section 1 of the Narcotic Act sanctioned the selling of any of the forbidden drugs except in or from the original package, Section 2 thereof sanctioned the selling of any such drugs not in pursuance of a written order of the person to whom the drug is sold.[70] Therefore, even though both Sections were violated by one transaction, the defendant had committed two different offences because each of them required proof of a different element: Section 1 required to prove that the selling of the drugs had not been "in or from the original package", whereas Section 2 required to prove that the selling of the drugs had not been "in pursuance of a written order" of the buyer.[71]

The Supreme Court has underlined that if two offences are the same for the for the purpose of barring cumulative sentences at a single trial, they also should be considered the same offence for the purpose of barring successive prosecutions.[72]

The assumption underlying the Blockburger test is that Congress ordinarily does not intend to punish the same offence under two different statutes. Accordingly, where

---

Jordan Padover, 'State Constitutional Law - Criminal Procedure - The Constitutional Guarantee of Protection against Double Jeopardy Is Not Violated When a Defendant Is Convicted Of, and Punished for, Separate Offenses That Contain Different Elements', *Rutgers Law Journal* 40, no. 4 (2009): 973.

[66] Supreme Court of the United States, Iannelli v. United States, 785 (note 17) [1975]; Lewis v. United States, 176-177 (Scalia, J., concurring) [1998]. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 77; Padover, 'State Constitutional Law - Criminal Procedure - The Constitutional Guarantee of Protection against Double Jeopardy Is Not Violated When a Defendant Is Convicted Of, and Punished for, Separate Offenses That Contain Different Elements', 974.

[67] Anthony J. Donofrio, 'Double Jeopardy Clause of the Fifth Amendment--The Supreme Court's Cursory Treatment of Underlying Conduct in Successive Prosecutions Supreme Court Review', *Journal of Criminal Law and Criminology* 83, no. 4 (1993): 775.

[68] Supreme Court of the United States, Illinois v. Vitale, 416 [1980].

[69] Supreme Court of the United States, Blockburger v. United States, 301-303 [1932].

[70] Supreme Court of the United States, Blockburger v. United States, 303-304 [1932].

[71] Supreme Court of the United States, Blockburger v. United States, 304 [1932]; Diane M. Resch, 'High Comedy But Inferior Justice: The Aftermath of Grady v. Corbin', *Marquette Law Review* 75, no. 1 (1991): 269.

[72] Supreme Court of the United States, Brown v. Ohio, 166 [1977], citing Gavieres v. United States and In re Nielsen, 187-188 [1889].

two offences are the same under the Blockburger test, cumulative sentences are not permitted unless there is a clear indication of contrary legislative intent.[73] For the foregoing reason, the Supreme Court has affirmed that the Blockburger test is not a constitutional standard,[74] but a rule of statutory construction[75] which aims to identify legislative intent.[76] In case of doubt regarding the legislative intent, cumulative punishments should not be admitted.[77]

Three cases are particularly useful to understand the application of the Blockburger test. In *Whalen v. United States*, the Supreme Court addressed the question of whether the offences of rape and of killing the same victim in the perpetration of the crime of rape were different offences. Applying the Blockburger test, the Court noted that a conviction for killing the same victim in the course of rape needed to prove all the elements of the rape offence. Therefore, the Court concluded that both offences were the same for the purposes of double jeopardy.[78]

In *Albernaz v. United States*, the defendants were separately convicted of conspiracy to import marihuana and conspiracy to distribute marihuana.[79] After applying the Blockburger test, the Supreme Court held that the two offences in question were different since each provision specified diverse ends: the first was conspiracy to import and the second was conspiracy to distribute.[80] This conclusion was consistent with the decision of the Supreme Court in *American Tobacco Co. v. United States*, a case in which the Court had already held that conspiracy in restraint of trade and

---

[73] Supreme Court of the United States, Rutledge v. United States, 297 [1996]; Whalen v. United States, 691-693 [1980]. See also Missouri v. Hunter, 366 [1983]; Albernaz v. United States, 344 [1981]; Christopher W. Carlton, 'Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States', *Cornell Law Review* 66, no. 4 (1981): 828; McAninch, 'Unfolding the Law of Double Jeopardy', 448.

[74] Supreme Court of the United States, Missouri v. Hunter, 368 [1983].

[75] Supreme Court of the United States, Whalen v. United States, 691 [1980]; McKay, 'Double Jeopardy: Are the Pieces the Puzzle', 5; McGee, 'Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel', 702.

[76] Supreme Court of the United States, Albernaz v. United States, 340 [1981]; Iannelli v. United States, 785 (note 17) [1975].

[77] Supreme Court of the United States, Albernaz v. United States, 342 [1981]; Whalen v. United States, 694 [1980].

[78] Supreme Court of the United States, Whalen v. United States, 693-694 [1980]; Carlton, 'Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States', 829.

[79] Supreme Court of the United States, Albernaz v. United States, 334 [1981].

[80] Supreme Court of the United States, Albernaz v. United States, 339 [1981].

conspiracy to monopolise were different offences because of the different aims of the conspiracies.[81]

The third decision is *Missouri v. Hunter*. In this case, the defendant was sentenced to concurrent terms of ten years' imprisonment for first degree robbery while using a dangerous or deadly weapon and to fifteen years' imprisonment for armed criminal action.[82] In determining whether the two offences for which the defendant had been convicted were the same offence, the Supreme Court recalled that the Blockburger test aims to prevent the sentencing court from prescribing greater punishments than the legislature intended.[83] Therefore, where two offences are the same under the Blockburger test, cumulative sentences are not permitted unless elsewhere authorised by Congress.[84] If Congress intended to impose multiple punishments, imposition of such sentences will not violate the double jeopardy clause. After all, the Blockburger test "is not a constitutional rule requiring courts to negate clearly expressed legislative intent".[85] Regarding the case in question, the Supreme Court noted that, although the two offences did not contain different elements, there was a clear legislative intent to authorise cumulative punishments. Consequently, there was no violation of the double jeopardy clause.[86]

The rule laid down in *Whalen*, *Albernaz*, and *Hunter* is straightforward: legislative intent controls in defining crimes and fixing punishments.[87]

1.3.2. Greater Inclusive Offence and Lesser Included Offence: *Brown v. Ohio*.

---

[81] Supreme Court of the United States, Albernaz v. United States, 338-339 [1981]; American Tobacco Co. v. U.S., 788 [1946].
[82] Supreme Court of the United States, Missouri v. Hunter, 360-362 [1983].
[83] Supreme Court of the United States, Missouri v. Hunter, 366 [1983]. See also Rutledge v. United States, 297 [1996].
[84] Supreme Court of the United States, Missouri v. Hunter, 367 [1983].
[85] Supreme Court of the United States, Missouri v. Hunter, 368 [1983].
[86] Supreme Court of the United States, Missouri v. Hunter, 368-369 [1983].
[87] Deborah L. Schmitt, 'Fifth Amendment--Double Jeopardy: Legislative Intent Controls in Crimes and Punishments Supreme Court Review', *Journal of Criminal Law and Criminology* 74, no. 4 (1983): 1306.

Under the Blockburger test, greater inclusive and lesser included offences are the same offence.[88] A lesser included offence exists when all its elements constitute the elements necessary to establish a more serious offence.[89]

In *Brown v. Ohio*, the defendant stole a car and drove it for nine days, violating two Ohio statutory provisions: first, joyriding, defined as unlawfully taking or operating a car without the consent of the owner, and second, auto theft. Because all the elements of joyriding were included in the offence of auto theft, the Supreme Court concluded that joyriding was a lesser included offence in the greater inclusive offence of auto theft. The Court then ruled that greater inclusive offence is by definition the same offence as any lesser offence included in it.[90] The Supreme Court explained that not only a prosecution for a greater inclusive offence bars a following prosecution for a lesser included offence, but also a prosecution for a lesser included offence prohibits a subsequent prosecution for a greater inclusive offence.[91]

However, the Supreme Court has recognised some exceptions to this rule. A first exception exists "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence".[92] Another exception exists when the defendant expressly asks for separate trials on the greater and the lesser offences and the trial grants his request.[93] A third exception allows the government to continue the prosecution for a greater inclusive offence when, over the objection of the government, the accused entered a plea of guilty to a lesser included offence in a procedure in which he was charged with both offences.[94] A final exception

---

[88] McGee, 'Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel', 701; Charles William Hendricks, '100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct', *Drake Law Review* 48, no. 2 (2000): 2000; Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 78.

[89] Martin L. Friedland, *Double Jeopardy* (Oxford University Press, 1969), 209; McGee, 'Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico's Achilles' Heel', 701; Amar and Marcus, 'Double Jeopardy Law after Rodney King', 28–29; Juan Pablo Mañalich, 'El Concurso de Delitos: Bases Para Su Reconstrucccion En El Derecho Penal de Puerto Rico', *Revista Juridica Universidad de Puerto Rico* 74, no. 4 (2005): 1068–69.

[90] Supreme Court of the United States, Brown v. Ohio, 168 [1977].

[91] "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense". See Supreme Court of the United States, Brown v. Ohio, 169 [1977].

[92] Supreme Court of the United States, Brown v. Ohio, 169 (note 7) [1977]. See also Jeffers v. United States, 151 [1977].

[93] Supreme Court of the United States, Jeffers v. United States, 152 [1977].

[94] In Ohio v. Johnson, as a result of a killing and a theft of property, the defendant was charged with murder, involuntary manslaughter, aggravated robbery and grand theft. At his arraignment, the trial court, over the objection of the government, accepted the guilty pleas of the defendant to involuntary

exists when a defendant breaches a plea agreement he entered into with the government under which he pleaded guilty to a lesser included offence of the crime charged and undertook certain other obligations, such as testifying against an alleged accomplice, in exchange for the dismissal of the greater inclusive offence.[95]

1.3.3. "Same Offence" Requirement in Contexts of Multiple Prosecutions.

Nowadays, the Blockburger test is the only rule for determining whether two offences are the same for the purposes of double jeopardy.[96] However, this has not always been the case. In *Grady v. Corbin*, decided in 1990, the Supreme Court held that the double jeopardy clause also bars a subsequent prosecution if the government, to establish an essential element of an offence charged in that prosecution, has to prove a conduct that constitutes an offence for which the defendant has previously been prosecuted.[97]

---

manslaughter and grand theft, and then granted his motion to dismiss the remaining charges, to which he had pleaded not guilty, on the ground that their further prosecution was barred by the double jeopardy clause. The Supreme Court reversed the judgment of the trial court, holding that the principles of finality and prevention of prosecutorial overreaching did not reach this case. Moreover, no interest of the defendant protected by the double jeopardy clause was implicated by continuing the prosecution on the remaining charges brought in the indictment: the defendant had not been exposed to conviction on the charges to which he pleaded not guilty. On the other hand, ending prosecution at this time would deny the government its right to one full and fair opportunity to convict the defendant for the greater inclusive offence. See Supreme Court of the United States, Ohio v. Johnson, 501-502 [1984].

[95] In Ricketts v. Adamson, the defendant was charged with first degree murder. He and the government reached an agreement whereby the defendant agreed to plead guilty to a charge of second degree murder and to testify against two other individuals who were allegedly involved in the same murder. Specifically, the defendant agreed to "testify fully and completely in any Court, State or Federal, when requested by proper authorities against any and all parties involved in the murder". The agreement provided that in the case of breach the entire agreement would be null and void and the original charge for first degree murder would be automatically reinstated. The defendant testified against the other two accused, who were convicted of first degree murder. However, the conviction was reversed and the case remanded for retrial. The state sought the testimony of the defendant in preparation for the retrial of the two accused, but the defendant refused to cooperate. Deeming that the defendant had breached the plea agreement, the government charged and tried the defendant for first degree murder, he was convicted and sentenced to death. The Supreme Court firstly noted that the plea agreement provided that if the respondent refused to testify "this entire agreement is null and void and the original charge will be automatically reinstated", which had been understood by the defendant. The defendant undoubtedly knew that if he breached the agreement he could be retried for first degree murder. Therefore, the result of the breach of the plea agreement and its nullification was that the defendant was returned to the position he occupied prior the execution of the plea agreement: he stood charged with first degree murder. Consequently, the trial on that charge did not violate the double jeopardy clause. See Supreme Court of the United States, Ricketts v. Adamson, 3-10 [1987].

[96] Supreme Court of the United States, United States v. Dixon, 688 [1993]; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 226.

[97] Supreme Court of the United States, Grady v. Corbin, 521 [1990]; Henning, 'Precedents in a Vacuum', 2.

Grady was overruled three years later, in *United States v. Dixon*, where the Supreme Court reinstated the Blockburger test as the only test for determining whether two prosecutions concern the same offence.[98] The development of the case law on this matter will be studied in the following.

1.3.3.1. The Road to Grady: From *Brown v. Ohio* to *Illinois v. Vitale*.

Even though the Supreme Court decided *Brown v. Ohio* by applying the same elements test, the Court pronounced an important dictum, affirming: "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first".[99]

In the same term when *Brown* was decided, the Supreme Court handed down its decision in *Harris v. Oklahoma*. In this case, the defendant was convicted of felony murder after his companion shot a clerk in the course of a robbery. The defendant was thereafter convicted in a separate trial for robbery with firearms. Even though under the Blockburger test felony murder and robbery with firearms are not the same offence, the Supreme Court stated that where "conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one".[100] The reasoning of the Supreme Court is interesting because it implied a concrete application of the Blockburger test rather than an abstract one, upholding the dictum of Brown.[101]

The idea laid down in Brown and Harris was reiterated in *Illinois v. Vitale.* The defendant struck two children while driving his vehicle, both of whom died. A police

---

[98] Supreme Court of the United States, United States v. Dixon, 688 [1993]; Henning, 2; Talmadge, 'Preface: Double Jeopardy in Washington and Beyond Double Jeopardy: The Civil Forfeiture Debate', 211; Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 226–27.

[99] Brown v. Ohio, 166-167 (note 6) [1977]. In supporting its statement, the Supreme Court cited Ashe v. Swenson [1970] and In re Nielsen [1889], two cases in which, even though under the Blockburger test the two offences were not the same, the Court decided that successive prosecutions and multiple sentences were barred by the double jeopardy clause.

[100] Supreme Court of the United States, Harris v. Oklahoma, 682 (1977).

[101] Donofrio, 'Double Jeopardy Clause of the Fifth Amendment--The Supreme Court's Cursory Treatment of Underlying Conduct in Successive Prosecutions Supreme Court Review', 776–77.

officer at the scene of the accident issued a traffic citation charging the defendant with failing to reduce speed to avoid an accident in violation of the Vehicle Code. The defendant was convicted and fined $15.[102] The government thereafter charged the defendant with two counts of involuntary manslaughter. The defendant filed a motion to dismiss on double jeopardy grounds, which was granted.[103] The Supreme Court granted certiorari to resolve the question of whether the prosecution for involuntary manslaughter was prohibited by the double jeopardy clause. The Court confirmed the Blockburger test as the appropriate approach for determining whether failing to reduce speed to avoid an accident and involuntary manslaughter were the same offence. Nevertheless, the Court stated that, if under Illinois law a careless failure to reduce speed is always a necessary element of manslaughter by automobile, then both offences should be considered the same under the Blockburger.[104] Because there was no certainty on the relationship between the two offences under Illinois law, and also because the reckless act the government intended to prove the manslaughter charge was unknown, the Supreme Court remanded the case for further proceedings.[105]

1.3.3.2. The Same Conduct Test: *Grady v. Corbin*.

The decisions in *Brown*, *Harris* and *Vitale* show that the Supreme Court was slowly moving away from the exclusive use of the Blockburger test in determining whether two offences were the same in the context successive prosecutions. In 1990 the Court took the final step in *Grady v. Corbin*.[106] In this case, the defendant, while driving his car, crossed the double yellow line of a highway and struck two oncoming vehicles, causing the death of one person and injuring another. The defendant was served with two traffic tickets.[107] He pleaded guilty and was sentenced to pay a fine of $360 and surrender his license for six months.[108] Two months later, the defendant was charged with reckless manslaughter, second degree vehicular manslaughter, criminally

[102] Supreme Court of the United States, Illinois v. Vitale, 411-412 [1980].
[103] Supreme Court of the United States, Illinois v. Vitale, 413-415 [1980].
[104] Supreme Court of the United States, Illinois v. Vitale, 419-420 [1980].
[105] Supreme Court of the United States, Illinois v. Vitale, 421 [1980].
[106] Phillip Green, 'Constitutional Law - Goodbye Grady - Blockburger Wins the Double Jeopardy Rematch', *University of Arkansas at Little Rock Law Journal* 17, no. 2 (1995): 380.
[107] Supreme Court of the United States, Grady v. Corbin, 511 [1990].
[108] Supreme Court of the United States, Grady v. Corbin, 512-513 [1990].

negligent homicide, and third degree reckless assault. The defendant filed a motion to dismiss on double jeopardy grounds, which was granted.[109]

The Supreme Court began its reasoning stating that to determine whether two prosecutions concern the same offence a court must first apply the Blockburger test. If under this test two offences are the same, the inquiry must cease and the subsequent prosecution will be barred.[110] However, the Court then affirmed that the Blockburger test was not the only step of the inquiry.[111] The Supreme Court recalled that the Blockburger test was developed in cases of multiple punishments in a single trial. In this context, the double jeopardy clause only prevents the imposition of a greater punishment than the legislature intended.[112] Conversely, the Court stated that multiple prosecutions "raise concerns that extend beyond merely the possibility of an enhanced sentence".[113] For instance, multiple prosecutions give the government the opportunity to improve its presentation of proof, increasing the risk of an erroneous conviction for one or more of the offences charged.[114] The Court noted that the Blockburger test did not sufficiently protect the defendant from the burdens of multiple prosecutions[115] because under this test the government could try the defendant in four consecutive trials: failure to keep right of the median; driving while intoxicated; assault; and homicide.[116] "Thus, a subsequent prosecution must do more than merely survive the Blockburger test".[117]

The Supreme Court then added the "same conduct standard" as a second level of the question of whether two prosecutions concern the same offence, holding that the double jeopardy clause bars any subsequent prosecution "in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has

---

[109] Supreme Court of the United States, Grady v. Corbin, 514 [1990].
[110] Supreme Court of the United States, Grady v. Corbin, 515 [1990].
[111] Supreme Court of the United States, Grady v. Corbin, 519 [1990]. In supporting its statement, the Court cited In re Nielsen [1889]; Brown v. Ohio [1977]; Harris v. Oklahoma [1977]; and Illinois v. Vitale [1980].
[112] Supreme Court of the United States, Grady v. Corbin, 516-517 [1990].
[113] Supreme Court of the United States, Grady v. Corbin, 518 [1990].
[114] Supreme Court of the United States, Grady v. Corbin, 518 [1990], citing Tibbs v. Florida, 41 [1982].
[115] Supreme Court of the United States, Grady v. Corbin, 520 [1990].
[116] Supreme Court of the United States, Grady v. Corbin, 520 [1990].
[117] Supreme Court of the United States, Grady v. Corbin, 521 [1990].

already been prosecuted".[118] The relevant question is what conduct the government will prove, not what evidence will be used to prove that conduct.[119]

Because the government recognised that the conduct it would prove to establish the homicide and assault offences was the same conduct for which the defendant had been convicted in the first prosecution,[120] the Supreme Court concluded that the second prosecution was barred by the double jeopardy clause.[121]

Grady represented the acme of a gradual movement of the Supreme Court toward limiting multiple prosecutions.[122] *Grady* affirmed that even though a subsequent prosecution survived the Blockburger test, the double jeopardy clause could still bar it if the government, to establish an essential element of the offence charged, intended to prove conduct that constituted an offence for which the defendant has already been prosecuted.[123]

1.3.3.3. Returning to the Blockburger Test: *United States v. Dixon*.

The same conduct test adopted by the Supreme Court in Grady proved to be short-lived.[124] Only three years later, in *United States v. Dixon*, the Supreme Court held that Grady had been a mistake and overruled it. The Court returned to the Blockburger test, stating that it is the sole test for ascertaining whether two offences are the same for the purposes of double jeopardy.[125]

Dixon consisted of two consolidated cases. In the first case, the defendant, Alvin Dixon, was charged with second degree murder and was released on bond. The release was conditional, and the commission of any criminal offence would subject the

---

[118] Supreme Court of the United States, Grady v. Corbin, 521 [1990];
[119] Supreme Court of the United States, Grady v. Corbin, 521 [1990]; Resch, 'High Comedy But Inferior Justice: The Aftermath of Grady v. Corbin', 274; McAninch, 'Unfolding the Law of Double Jeopardy', 456.
[120] Supreme Court of the United States, Grady v. Corbin, 523 [1990].
[121] Supreme Court of the United States, Grady v. Corbin, 523 [1990];
[122] Eli J. Richardson, 'Matching Tests for Double Jeopardy Violations with Constitutional Interests Recent Developments', *Vanderbilt Law Review* 45, no. 1 (1992): 274–75.
[123] Philip S. Khinda, 'Undesired Results under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions against Civilly-Sanctioned Defendants', *Columbia Journal of Law and Social Problems* 25, no. 1 (1991): 141.
[124] Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 81.
[125] Kirstin Pace, 'Fifth Amendment--The Adoption of the Same Elements Test: The Supreme Court's Failure to Adequately Protect Defendants from Double Jeopardy', *Journal of Criminal Law and Criminology* 84, no. 4 (1994): 769; William H. Theis, 'The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy', *SMU Law Review* 49, no. 2 (1996): 275–76; Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 81.

defendant to prosecution for contempt of court.[126] While awaiting his trial, the defendant was indicted for possession of cocaine with intent to distribute. The defendant was convicted for criminal contempt and sentenced to 180 days in jail.[127] The defendant later filed a motion to dismiss the cocaine indictment on double jeopardy grounds, which was granted by the court.[128] The government appealed the decision.[129]

In the second case, the wife of the defendant, Michael Foster, secured a protection order requiring him not to threaten or physically abuse her.[130] Afterwards, she denounced several violations of the protection order, which included three separate instances of threats (on 12 November 1987, 26 March and 17 May 1988) and two assaults (on 6 November 1987 and 21 May 1988). In this latter episode, the defendant caused the victim head injuries that caused her to lose consciousness. The trial court convicted the defendant on four counts of criminal contempt.[131] The defendant was later indicted for simple assault; threatening to injure another; and assault with intent to kill.[132] The defendant filed a motion to dismiss on double jeopardy grounds, which was rejected. The defendant appealed the ruling.[133]

The Court of Appeal consolidated both cases and, relying on *Grady v. Corbin*, held that both subsequent prosecutions were barred by the double jeopardy clause.[134] The government made a petition for certiorari, which was granted.[135]

In the first place, the Supreme Court reiterated that where two offences are the same under the Blockburger test, the double jeopardy bar applies. This is true for purposes of both the prohibition of multiple punishments and the prohibition of multiple prosecutions.[136] However, the Court recognised that it had recently held in *Grady* that, in addition to surviving the Blockburger test, a subsequent prosecution must also survive the same conduct test.[137]

Regarding the defendant Dixon, the Supreme Court held that, since his release order incorporated the entire criminal code, the statutory elements were identical in

---

[126] Supreme Court of the United States, United States v. Dixon, 691 [1993].
[127] Supreme Court of the United States, United States v. Dixon, 692 [1993].
[128] Supreme Court of the United States, United States v. Dixon, 692 [1993].
[129] Supreme Court of the United States, United States v. Dixon, 693 [1993].
[130] Supreme Court of the United States, United States v. Dixon, 692 [1993].
[131] Supreme Court of the United States, United States v. Dixon, 693 [1993].
[132] Supreme Court of the United States, United States v. Dixon, 693 [1993].
[133] Supreme Court of the United States, United States v. Dixon, 693 [1993].
[134] Supreme Court of the United States, United States v. Dixon, 693-694 [1993].
[135] Supreme Court of the United States, United States v. Dixon, 694 [1993].
[136] Supreme Court of the United States, United States v. Dixon, 696 [1993].
[137] Supreme Court of the United States, United States v. Dixon, 697 [1993].

both proceedings. Thus, the second prosecution was barred by the double jeopardy clause.[138] With reference to the defendant Foster, the Court ruled that the Blockburger test barred the second prosecution for simple assault, but not for the other offences: assault with intent to kill and threats to injure. Having found that the second prosecution was not entirely barred, the Supreme Court now had to resolve whether it was barred by the test announced in *Grady*.[139] The Court concluded that the second prosecution against Foster was undoubtedly barred by *Grady* because the government intended to prove the same conduct for which the defendant had already been prosecuted.

Nevertheless, the Supreme Court then held that *Grady* had to be overruled.[140] Besides lacking constitutional roots, the same conduct test was wholly inconsistent with earlier case law.[141] The Court noted that the centrepiece of *Grady* was the idea that in the context of successive prosecutions the "same offence" requirement had a different meaning from the context of multiple punishments, a notion that the Court rejected.[142] The Supreme Court underlined that *Grady* was not only wrong in principle, but it also proved unstable in application. In *United States v. Felix*, decided two years after *Grady*, the Court was forced to recognise an exception to the same conduct test, concluding that a subsequent prosecution for conspiracy to manufacture methamphetamine was not barred by a previous conviction for attempt to manufacture the same substance.[143] The Court justified the exception arguing that it was a long-established rule that conspiracy to commit an offence and the offence itself are different offences for the purposes of double jeopardy.[144] However, the existence of this large and longstanding exception "to the *Grady* rule gave cause for concern that the rule was not an accurate expression of the law".[145]

The Supreme Court acknowledged that *Grady* was a mistake. It contradicted an unbroken line of decisions, contained less than accurate historical analysis and had produced confusion.[146] The Court concluded that the second prosecution against

---

[138] Supreme Court of the United States, United States v. Dixon, 698 [1993].
[139] Supreme Court of the United States, United States v. Dixon, 703 [1993]; Green, 'Constitutional Law - Goodbye Grady - Blockburger Wins the Double Jeopardy Rematch', 383.
[140] Supreme Court of the United States, United States v. Dixon, 704 [1993].
[141] Supreme Court of the United States, United States v. Dixon, 704 [1993].
[142] Supreme Court of the United States, United States v. Dixon, 704 [1993].
[143] Supreme Court of the United States, United States v. Felix, 388-392 [1992]; Theis, 'The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy', 274–75.
[144] Supreme Court of the United States, United States v. Dixon, 709 [1993]. See also United States v. Bayer, 542-543 [1947].
[145] Supreme Court of the United States, United States v. Dixon, 709-710 [1993].
[146] Supreme Court of the United States, United States v. Dixon, 711 [1993].

Dixon, as well as the second prosecution against Foster for the offence of simple assault, were barred by the double jeopardy clause. On the contrary, the subsequent prosecution against Foster for assault with intent to kill and threats to injure was not barred.[147]

1.4. The Dual Sovereignty Doctrine

In a federal political system, conflicts of jurisdiction between federal and states governments are a complex topic, especially when they concern criminal justice. The existence of overlapping state and federal criminal statutes has been defined as a concomitant of federalism.[148]

Since the nineteenth century, the Supreme Court has developed the dual sovereignty doctrine, according to which different sovereigns may prosecute an individual without violating the double jeopardy clause if the act of the individual act violated the laws of each sovereign, even though the offences contain identical elements.[149]

The dual sovereignty doctrine is related to the "same offence" requirement. Indeed, the Supreme Court has held that the essence of the dual sovereignty doctrine is the common law idea of crime as an offence against the sovereignty of the government.[150] If the conduct of the defendant violates the peace and dignity of two sovereigns by breaking the laws of each of them, he will have committed two different offences.[151] The dual sovereignty doctrine was originally recognised to protect principles of federalism.[152] The Supreme Court was concerned that an expansive reading of the double jeopardy clause would bar either the federal or state

---

[147] Supreme Court of the United States, United States v. Dixon, 712 [1993].

[148] Leonard G. Miller, *Double Jeopardy and the Federal System* (Chicago University Press, 1968), 1–2.

[149] Russell Weaver et al., *Principles of Criminal Procedure*, 4th ed. (West Academic Publishing, 2012), 446; Adam J. Adler, 'Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem', *Yale Law Journal* 124, no. 2 (2014): 177–78.

[150] Supreme Court of the United States, Heath v. Alabama, 88 [1985].

[151] Supreme Court of the United States, Heath v. Alabama, 88 [1985]; United States v. Lanza, 382 [1922]; Jay Brickman, 'The Dual Sovereignty Doctrine and Successive State Prosecutions: Health v. Alabama', *Chicago-Kent Law Review* 63, no. 1 (1987): 176; Anthony J. Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory', *Washington University Law Review* 86, no. 4 (2009): 779.

[152] Supreme Court of the United States, United States v. Wheeler, 320 [1978]; Walter T. Fisher, 'Double Jeopardy, Two Sovereignties and the Intruding Constitution', *University of Chicago Law Review* 28, no. 4 (1961): 599; Cranman, 'The Dual Sovereignty Exception to Double Jeopardy', 1654.

governments from enforcing their respective criminal laws.[153] A contrary rule would allow one government to nullify the law of other government.[154]

Although the dual sovereignty doctrine has been highly criticised,[155] the Supreme Court has not been receptive to those criticisms. The last time the Supreme upheld the dual sovereignty doctrine was in 2019, in *Gamble v. United States*.[156]

1.4.1. The Evolution of the Dual Sovereignty Doctrine.

1.4.1.1. The Development of the Doctrine: *United States v. Lanza*.

The Supreme Court developed the dual sovereignty doctrine in *United States v. Lanza*, decided in 1922. In this case, the defendants were charged in a federal court with manufacturing, transporting and possessing intoxicating liquor. The defendants argued that the federal prosecution was barred by the double jeopardy clause because they had previously been convicted in Washington under a state statute for the same offence.[157]

Firstly, the Supreme Court underlined that there were two different sovereignties, each of them capable of dealing with the same matter within the same territory. In determining what shall be an offence against its peace and dignity, each of these sovereigns is exercising its own sovereignty, not that of the other.[158] Accordingly. an act denounced as a crime by both federal and state sovereigns is an offence against the peace and dignity of both and may be punished by each.[159] Therefore, in the present case the defendant had committed two different offences, one against the

[153] Cranman, 'The Dual Sovereignty Exception to Double Jeopardy', 1654; Principato, 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts', 773.

[154] James E. King, 'The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution', *Stanford Law Review* 31, no. 3 (1979): 477.

[155] Michael A. Dawson, 'Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine', *Yale Law Journal* 102, no. 1 (1992): 299–302; Cranman, 'The Dual Sovereignty Exception to Double Jeopardy', 1667–69.

[156] For a general note on Gamble v. United States [2019], see Javier Escobar Veas, 'Double Jeopardy and Dual Sovereignty Doctrine: Gamble v. United States', *Revista de Derecho* 20, no. 2 (2019): 225–42.

[157] Supreme Court of the United States, United States v. Lanza, 378-380 [1922].

[158] Supreme Court of the United States, United States v. Lanza, 382 [1922].

[159] Supreme Court of the United States, United States v. Lanza, 382 [1922]; Brickman, 'The Dual Sovereignty Doctrine and Successive State Prosecutions', 177.

State of Washington and another against the United States.[160] The following federal prosecution, thus, was not barred by the double jeopardy clause.[161]

The Supreme Court argued that its view of the Fifth Amendment was supported by three pre-civil war cases: *Fox v. Ohio; United States v. Marigold;* and *Moore v. Illinois*. In *Fox*, the Supreme Court condoned the possibility of concurrent criminal jurisdiction, holding that the nature of the crime or its effects on public safety might well demand separate prosecutions.[162] Three years later, in *Marigold*, the Supreme Court stated that, to avoid conflicts between state and federal jurisdictions, the same act might constitute an offence against both a state and the Federal Government, and its commission might entail the penalties intended by either.[163] Finally, in *Moore*, the Supreme Court held that admitting that the defendant may be punished under both state and federal law does not mean that he would be punished twice for the same offence since an offence in its legal signification means the transgression of a law.[164] If a same act transgresses the laws of two sovereignties, concluded the Court, the idea that either or both may punish such an offender cannot be doubted.[165]

The dual sovereignty doctrine developed in *Lanza* was subsequently applied in several cases. Four years later, in *Hebert v. Louisiana*, the Supreme Court upheld a state conviction following a federal prosecution for the same conduct. The Court held that where the same conduct constitutes an offence under both state and federal law, the person that engages therein commits two distinct offences and may be punished in both jurisdictions without violating the double jeopardy clause.[166] One year later, in *Westfall v. United States*, the Supreme Court stated that a single act may perfectly be criminal under the laws of both jurisdictions.[167] Afterwards, in *Jerome v. United States* the Supreme Court held that the double jeopardy clause does not stand as a bar to federal prosecution although a state conviction based on the same acts has already

---

[160] Supreme Court of the United States, United States v. Lanza, 382 [1922].
[161] Dawson, 'Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine', 292.
[162] Supreme Court of the United States, Fox v. The State of Ohio, 435 [1847]; David Bryan Owsley, 'Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study', *Washington University Law Quarterly* 81, no. 3 (2003): 771.
[163] Supreme Court of the United States, United States v. Marigold, 569 [1850].
[164] Supreme Court of the United States, Moore v. Illinois, 19 [1852]; Ronald Allen and John Ratnaswamy, 'Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court', *Journal of Criminal Law and Criminology* 76, no. 4 (1986): 812.
[165] Supreme Court of the United States, Moore v. Illinois, 20 [1852].
[166] Supreme Court of the United States, Hebert v. Louisiana, 314 [1926].
[167] Supreme Court of the United States, Westfall v. United States, 258 [1927].

been obtained.[168] Finally, in *Screws v. United States*, the Court held that when a conduct is a crime under both national and state sovereignties, the defendant may be punished by each without violating the double jeopardy clause.[169]

1.4.1.2. Solidification of the Dual Sovereignty Doctrine: *Bartkus v. Illinois* and *Abbate v. United States*.

In *Bartkus v. Illinois* and *Abbate v. United States*, both decided in 1959, the Supreme Court upheld and solidified the dual sovereignty doctrine.[170]

In *Bartkus v. Illinois*, the Supreme Court upheld a state conviction after a federal acquittal for the same facts.[171] The defendant had been acquitted in a federal court for robbery of a savings and loan association. Afterwards, the defendant was indicted for the same facts by a jury in Illinois. The accused filed a motion to dismiss on double jeopardy grounds, but the trial court overturned it. The defendant was convicted and sentenced to life imprisonment.[172] In the first place, the Supreme Court observed that the dual sovereignty doctrine had been repeatedly upheld since *Lanza*,[173] not only by the Supreme Court, but also by state and federal courts.[174] For the Supreme Court, it was essential to assure that states did not forfeit their right to enforce their criminal laws for the purpose of permitting federal prosecutions,[175] especially considering that state and federal offences criminalising the same conduct often carry drastically different penalties. If states were barred from prosecuting a defendant for a serious offence after a federal prosecution for a minor offence based on the same facts, the result would be a shocking deprivation of the historic right and obligation of the states to maintain peace and order within their confines.

---

[168] Supreme Court of the United States, Jerome v. United States, 105 [1943].
[169] Supreme Court of the United States, Screws v. United States, 108 (note 10) [1945].
[170] Miller, *Double Jeopardy and the Federal System*, 60; Owsley, 'Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study', 773.
[171] Marc Martin, 'Health v. Alabama: Contravention of Double Jeopardy and Full Faith and Credit Principles', *Loyola University of Chicago Law Journal* 17, no. 4 (1986): 732; Daniel A. Braun, 'Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism', *American Journal of Criminal Law* 20, no. 1 (1992): 3.
[172] Supreme Court of the United States, Bartkus v. Illinois, 121-122 [1959].
[173] Supreme Court of the United States, Bartkus v. Illinois, 132 [1959].
[174] Supreme Court of the United States, Bartkus v. Illinois, 136 [1959].
[175] Cranman, 'The Dual Sovereignty Exception to Double Jeopardy', 1655.

In *Abbate v. United States*, the Supreme Court upheld a federal conviction after a state conviction for the same facts.[176] The defendants had been convicted and sentenced by a state court to three months' imprisonment for conspiring to dynamite facilities of a telephone company during a labour dispute. Subsequently, the defendants were convicted in a federal court of conspiracy to destroy integral parts of a communication system. Both convictions were based on the same transaction.[177] The Supreme Court held that *Lanza* had clearly established that a prior state conviction did not bar a subsequent federal prosecution,[178] and that there was no persuasive reason to abandon that firmly established principle. The Court noted that if *Lanza* were overruled, undesirable consequences would follow. If a state prosecution would bar a following federal prosecution based on the same facts, federal law enforcement would necessarily be hindered. However, it would also be a mistake to suggest, in order to maintain the effectiveness of federal law enforcement, displacing state power to prosecute crimes based on acts which might also violate federal law.[179] Just as in *Bartkus*, the Supreme Court was concerned about the disparity in penalties provided by state and federal law. While the defendants had been convicted to three months' imprisonment under state law, under federal law they could be convicted to up to five years' imprisonment.[180]

1.4.1.3. Successive Prosecutions by Different States: *Heath v. Alabama*.

In *Heath v. Alabama*, decided in 1985, the Supreme Court faced the question of whether the double jeopardy clause bars successive prosecutions under the laws of different states. In this case, the defendant met with two men in Georgia, hired them to kill his wife and led them back to his residence in Alabama. The two men kidnapped the victim from her home and killed her.[181] Both Georgia and Alabama authorities initiated an investigation. In 1981 the defendant was convicted and sentenced in Georgia to life imprisonment.[182] In 1982 the defendant was indicted by a grand jury in

[176] Martin, 'Health v. Alabama', 733; Braun, 'Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism', 3.
[177] Supreme Court of the United States, Abbate v. United States, 187-189 [1959].
[178] Supreme Court of the United States, Abbate v. United States, 193 [1959].
[179] Supreme Court of the United States, Abbate v. United States, 195 [1959].
[180] Supreme Court of the United States, Abbate v. United States, 195 [1959].
[181] Supreme Court of the United States, Heath v. Alabama, 83-84 [1985].
[182] Supreme Court of the United States, Heath v. Alabama, 84 [1985].

Alabama. He filed a motion to dismiss on double jeopardy grounds, but it was rejected. The defendant was tried, convicted and sentenced to death.[183]

After reiterating that the double jeopardy clause only bars successive prosecutions if they concern the same offence,[184] the Supreme Court stated that the dual sovereignty doctrine compels the conclusion that successive prosecutions by two states for the same facts are not barred by the double jeopardy clause.[185] The Supreme Court noted that states have been considered as separate sovereigns with respect to the Federal Government because their power to prosecute is derived from their own inherent sovereignty, not from the Federal Government.[186] In this context, states are no less sovereign with respect to each other than they are with respect to the Federal Government, because their powers to undertake criminal prosecutions derive from separate and independent sources of power".[187] The Court held that denying a state its power to enforce its criminal laws because another state has won the race to the courthouse would be a shocking deprivation of the right and obligation of the states to maintain peace and order within their confines.[188] After all, the interest of a state in "vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another state's enforcement of its own laws".[189]

1.4.2. Definition of Sovereign for the Purposes of Double Jeopardy.

According to the Supreme Court, the dual sovereignty doctrine permits successive prosecutions in three cases: (i) successive prosecutions of an individual by different state governments; (ii) successive prosecutions of an individual by a state and the federal government; and (iii) successive prosecutions of an individual by a state or the Federal Government and a foreign government.[190] By contrast, successive prosecutions for the same offence by the same sovereign are prohibited by the double

[183] Supreme Court of the United States, Heath v. Alabama, 85-86 [1985].
[184] Supreme Court of the United States, Heath v. Alabama, 87 [1985].
[185] Supreme Court of the United States, Heath v. Alabama, 88 [1985].
[186] Supreme Court of the United States, Heath v. Alabama, 89 [1985].
[187] Supreme Court of the United States, Heath v. Alabama, 89 [1985].
[188] Supreme Court of the United States, Heath v. Alabama, 93 [1985].
[189] Supreme Court of the United States, Heath v. Alabama, 93 [1985]. For a critical comment on the arguments of the Supreme Court, see Allen and Ratnaswamy, 'Heath v. Alabama', 814–24.
[190] Cranman, 'The Dual Sovereignty Exception to Double Jeopardy', 1644; Principato, 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts', 773; Chemerinsky and Levenson, *Criminal Procedure: Adjudication*, 524.

jeopardy clause.[191] Accordingly, it is crucial to determine whether the entities that seek to prosecute the defendant for the same facts can be termed separate sovereigns.[192]

The Supreme Court has indicated that the question of whether two entities are separate sovereigns "turns on whether the two entities draw their authority to punish the offender from distinct sources of power".[193] Thus, the sovereignty of two entities is determined by the ultimate source of the power under which the respective prosecutions were undertaken.[194] If two entities have the same ultimate source of power, they both should be deemed as one sovereign.[195] Regarding the concept of last source of power, two entities are separate sovereigns when each of them has the power to independently determine what shall be an offence against its authority and to punish such offences.[196]

Applying the above reasoning, the Supreme Court has ruled that a state and its municipalities are the same sovereign.[197] Therefore, a state and its municipality are barred from prosecuting an individual for the same offence.[198] Similarly, the Federal Government and its territories have been deemed the same sovereign.[199] On the contrary, Native American nations and the Federal Government have been considered as separate sovereigns.[200]

In conclusion, if an entity derives its sovereignty from another entity then those entities should be regarded as the same sovereign for the purposes of double jeopardy.[201]

---

[191] Principato, 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts', 774.
[192] Supreme Court of the United States, Heath v. Alabama, 88 [1985].
[193] Supreme Court of the United States, Heath v. Alabama, 88 [1985].
[194] Supreme Court of the United States, United States v. Lara, 199 [2004]; Heath v. Alabama, 90 [1985]; United States v. Wheeler, 320 [1978].
[195] Colangelo, 'Double Jeopardy and Multiple Sovereigns', 774.
[196] Supreme Court of the United States, Heath v. Alabama, 89 [1985].
[197] Supreme Court of the United States, Waller v. Florida, 394-395 [1970]. See also Reynolds v. Sims, 575 [1964].
[198] Supreme Court of the United States, Waller v. Florida, 394-395 [1970].
[199] Supreme Court of the United States, United States v. Wheeler, 318 [1978]; Puerto Rico v. Shell Co., 262-264 [1937]. For instance, in Grafton v. United States, after noting that "the government of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by the authority of the United States", the Supreme Court ruled that the Philippines and the Federal Government should be considered the same sovereign. See Grafton v. United States, 354 [1907].
[200] Supreme Court of the United States, United States v. Wheeler, 328-330 [1978]; McAninch, 'Unfolding the Law of Double Jeopardy', 469.
[201] Principato, 'Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts', 775.

1.4.3. The Sham Exception.

Even though in *Bartkus v. Illinois* the Supreme Court ruled that the double jeopardy clause did not bar a state prosecution after a federal prosecution, the Court stated that a successive prosecution by one sovereign might be barred in cases where it is merely a cover and a tool of another sovereign seeking to prosecute the same defendant. If this were the case, the prosecution brought by the second sovereign would not seek to vindicate its own interest, but it would be pursued only on behalf of the interest of the first sovereign.[202] This hypothesis is referred to as the "sham exception".[203]

In *Bartkus*, however, the Court found that the degree of federal participation in the state prosecution was not sufficient to apply the exception.[204] In this regard, the Court affirmed that the record of the case established that the following prosecution was undertaken by state officials within their discretionary responsibility.[205] Moreover, the record established that "federal officials acted in cooperation with state authorities, as is the conventional practice between the two sets of prosecutors throughout the country".[206] Consequently, the Court rejected the claim that the prosecution brought by the State of Illinois had been a tool of the federal authorities.[207]

1.4.4. The Petite Policy.

Shortly after *Bartkus*, the United States Department of Justice announced, in *Petite v. United States,*[208] the "Petite Policy", formally called "Dual and Successive Prosecution Policy".[209]

[202] Lopez, 'Not Twice for the Same', 1277–78.
[203] Christina Galye Woods, 'The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole', *University of Baltimore Law Review* 24, no. 1 (1994): 188; Lopez, 'Not Twice for the Same', 1277.
[204] Woods, 'The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole', 188.
[205] Supreme Court of the United States, Bartkus v. Illinois, 123 [1959].
[206] Supreme Court of the United States, Bartkus v. Illinois, 123 [1959].
[207] Supreme Court of the United States, Bartkus v. Illinois, 123-124 [1959].
[208] Supreme Court of the United States, Petite v. United States, 529 [1960].
[209] United States Department of Justice, 'Justice Manual. Title 9-2.031 - Dual and Successive Prosecution Policy ("Petite Policy")', accessed 22 June 2020, https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals.

The Petite Policy restricts the prosecutorial discretion of the Federal Government,[210] thereby preventing arbitrary successive prosecutions.[211] The policy establishes guidelines for the exercise of discretion by the officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same facts involved in a prior state prosecution. The Petite Policy aims to vindicate substantial federal interests through appropriate federal prosecutions; to protect persons charged with criminal offences from the burdens associated with multiple prosecutions for substantially the same facts; to promote efficient utilisation of resources of the Department of Justice; and to promote coordination and cooperation between federal and state prosecutors.[212]

Under the Petite Policy, a federal prosecution after a state prosecution based on substantially the same facts is allowed if three requirements are met: first, the matter must involve a substantial federal interest; second, the state prosecution must have left that interest unvindicated; and third, the conduct of the defendant must constitute a federal offence and the admissible evidence should be sufficient to convict the defendant. In addition, the federal prosecution must be approved by the Assistant Attorney General.[213]

While the Federal Government has discretion to dismiss cases when the Petite Policy is violated,[214] defendants are not afforded the same opportunity[215] since the Petite Policy is not a matter of constitutional law.[216] Therefore, failing to adhere to the internal guidelines of the Department of Justice is not sufficient to warrant court action.[217]

1.5. Protection against Multiple Prosecutions for the Same Offence

---

[210] Dawson, 'Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine', 293.
[211] Woods, 'The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole', 189; Owsley, 'Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study', 793.
[212] United States Department of Justice, 'Justice Manual. Title 9-2.031 - Dual and Successive Prosecution Policy ("Petite Policy")'.
[213] Ellen S. Podgor, 'Department of Justice Guidelines: Balancing Discretionary Justice', *Cornell Journal of Law and Public Policy* 13, no. 2 (2004): 177–78; Cynthia Lee, L. Song Richardson, and Tamara Lawson, *Criminal Procedure. Cases and Materials* (West Academic Publishing, 2016), 949.
[214] For instance, Supreme Court of the United States, Thompson v. United States [1980]; Marakar v. United States [1962].
[215] Lee, Richardson, and Lawson, *Criminal Procedure. Cases and Materials*, 950.
[216] Podgor, 'Department of Justice Guidelines: Balancing Discretionary Justice', 180 (notes 75 and 76).
[217] Podgor, 179–80; King, 'The Problem of Double Jeopardy in Successive Federal-State Prosecutions', 489–90; Dawson, 'Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine', 293.

The protection against multiple prosecutions lies at the heart of the double jeopardy clause,[218] barring a second prosecution for the same offence after either an acquittal or a conviction.[219]

In *Grafton v. United States*, the Supreme Court affirmed that it is indisputable that before a person can be said to have been put in jeopardy the court in which he was tried must have had jurisdiction to try him for the offence charged.[220] Consequently, the prohibition of multiple prosecutions only applies when the first prosecution was in a court having jurisdiction over both the defendant and the subject matter.[221] If the court that delivered the first judgment lacked jurisdiction, a second prosecution for the same offence will not be barred.[222]

1.5.1. The Moment from Which the Defendant Is in Jeopardy.

The protections afforded by the double jeopardy clause are only implicated when the defendant has been placed in jeopardy.[223] Therefore, it is crucial to determine the moment at which the defendant has been put in jeopardy. For these purposes, the courts have resorted to the concept of "attachment of jeopardy",[224] which has been defined as "the point at which it is too late for the government to turn back and retain the right to prosecute".[225]

The Supreme Court has stated that while in a jury trial jeopardy attaches when the jury is empanelled and sworn, in a bench trial jeopardy attaches when the judge begins to receive evidence.[226]

---

[218] Supreme Court of the United States, Jeffers v. United States, 150 [1977]. See also United States v. Wilson, 343 [1975]; Sanabria v. United States, 63 [1978].
[219] Supreme Court of the United States, North Carolina v. Pearce, 717 [1969].
[220] Supreme Court of the United States, Grafton v. United States, 345 [1907].
[221] Supreme Court of the United States, United States v. Ball, 669 [1896]; McAninch, 'Unfolding the Law of Double Jeopardy', 419; David Rudstein, 'Double Jeopardy and the Fraudulently-Obtained Acquittal', *Missouri Law Review* 60, no. 3 (1995): 617; Weaver et al., *Principles of Criminal Procedure*, 446.
[222] In Ball v. United States, the Supreme Court held that an acquittal before a court having no jurisdiction is absolutely void and therefore no bar to subsequent prosecution in a court which has jurisdiction. See United States v. Ball, 669 [1896].
[223] Supreme Court of the United States, United States v. Martin Linen Supply Co., 569 [1977]; Serfass v. United States, 388 [1975].
[224] Supreme Court of the United States, Serfass v. United States, 388 [1975]. Similarly, Crist v. Bretz, 38 [1978].
[225] Kanovitz, Ingram, and Devine, *Constitutional Law for Criminal Justice*, 449.
[226] Supreme Court of the United States, United States v. Martin Linen Supply Co., 569 [1977]; Wagner, 'Corporate Criminal Prosecutions and Double Jeopardy', 222.

Because in the United States the double jeopardy prohibition does not require a final verdict to bar a second prosecutions for the same offence,[227] the Supreme Court has stated that the double jeopardy clause also protects the right of the defendant to have his trial completed by a particular tribunal.[228] However, the double jeopardy clause does not mean that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment".[229] In many cases unforeseeable circumstances may arise during a trial that make its completion impossible, such as the failure of a jury to agree on a verdict[230] or where a trial judge discovers facts that indicate that one member of the jury might be biased, a situation in which the judge will discharge the jury and order a retrial. Denying the possibility in these cases to put the defendant to trial again might frustrate the purpose of criminal law to protect society from crimes.[231]

1.5.2. Second Prosecution Following an Acquittal.

The double jeopardy clause accords absolute finality to an acquittal, barring the government from seeking review of an acquittal regardless of any new evidence that surfaces.[232] "The fundamental nature of this rule is manifested by its explicit extension to situations where an acquittal is based on an egregiously erroneous foundation".[233] Not even a fraudulent acquittal constitutes an exception to this rule.[234]

When a person is tried for two different offences but is convicted of one and acquitted of the other, the double jeopardy clause bars a second trial for the offence

---

227 Supreme Court of the United States, United States v. Scott, 92 [1978]; Green v. United States, 188 [1957].
228 Supreme Court of the United States, Arizona v. Washington, 503 [1978].
229 Supreme Court of the United States, Wade v. Hunter, 688 [1949].
230 Supreme Court of the United States, Ex parte Lange, 173-174 [1873]; Illinois v. Somerville, 468-471 [1973]; Richardson v. United States, 323-324 [1984]; Chemerinsky and Levenson, *Criminal Procedure: Adjudication*, 512.
231 Supreme Court of the United States, Arizona v. Washington, 505 [1978]; Wade v. Hunter, 688-689 [1949].
232 Supreme Court of the United States, Burks v. United States, 16 [1978]. See also Tibbs v. Florida, 41 [1982]; Bullington v. Missouri, 442 [1981]; Rudstein, 'Double Jeopardy and the Fraudulently-Obtained Acquittal', 613–14; Koklys, 'Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard', 379. Rudstein, Retrying part III, pp. 48-50.
233 Supreme Court of the United States, Sanabria v. United States, 64 [1978], citing Fong Foo v. United States, 143 [1962] and Green v. United States, 188 [1957].
234 Rudstein, 'Double Jeopardy and the Fraudulently-Obtained Acquittal', 620.

for which the defendant was acquitted, even if he successfully appealed the conviction and obtained a new trial.[235]

An acquittal must not necessarily be explicit to bar a second prosecution. Rather, it may be implied in a conviction for one offence when the factfinder was given a full opportunity to find the accused guilty of a greater inclusive offence.[236] For instance, in *Green v. United States,* the judge instructed the jury that they could find the defendant guilty of either first degree murder or second degree murder. The jury found him guilty of second degree murder and was silent on the charge of first degree murder. On appeal, the conviction was reversed and the case was remanded for a new trial. In the second trial, the jury convicted the defendant of first degree murder.[237] The Supreme Court concluded that the defendant could not be retried for first degree murder because he had been implicitly acquitted on that charge in the first trial.[238]

The double jeopardy clause does not prohibit an appeal by the government if a second trial would not be required in the event the appeal is granted. For instance, where a jury returns a verdict of guilty but then the trial court enters a judgment of acquittal, the government can appeal because, if the appeal is granted, a second prosecution would not be necessary. The error would be corrected on remand by the entry of a judgment on the original verdict of the jury.[239] For the same reason, the government can appeal when in a bench trial the judge finds the defendant guilty but then sets aside that finding and enters a judgment of acquittal because he concludes that some of the evidence on which the guilty verdict was based should not have been admitted. In that case, an eventual reversal of the ruling by the appellate court would not require a second trial but merely a reinstatement of the finding of guilt.[240]

1.5.3. Second Prosecution Following a Conviction.

The double jeopardy clause generally accords finality to a conviction, barring the government from prosecuting the defendant a second time for the same offence.[241] The

[235] Supreme Court of the United States, Benton v. Maryland, 796 [1969].
[236] Supreme Court of the United States, Green v. United States, 190 [1957]; Price v. Georgia, 329 [1970].
[237] Supreme Court of the United States, Green v. United States, 184 [1957].
[238] Supreme Court of the United States, Green v. United States, 198 [1957];
[239] Supreme Court of the United States, United States v. Jenkins, 365 [1975].
[240] Supreme Court of the United States, United States v. Ceccolini, 270-271 [1978].
[241] Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 93.

primary purpose of foreclosing a second prosecution after a conviction is to prevent multiple punishments for the same offence.[242]

Nevertheless, a conviction ends jeopardy only if the defendant does not successfully challenge it. In *United States v. Ball*, the Supreme Court rejected the view that the double jeopardy clause bars a second trial when a conviction is set aside on appeal,[243] formulating the concept of "continuing jeopardy", which applies when the criminal procedure against an individual has not run its full course.[244] In *Price v. Georgia*, the defendant was tried for murder and convicted of the lesser included offence of voluntary manslaughter. The verdict made no reference to the charge of murder. The defendant appealed and the Court of Appeal reversed the conviction, ordering a new trial. In the second trial, the defendant was tried again for murder and the jury convicted him of voluntary manslaughter.[245] The Supreme Court recognised that the principle of continuing jeopardy applied to this case, therefore the second trial was not barred by the double jeopardy clause. Nevertheless, the second prosecution was limited to the lesser included offence of voluntary manslaughter because in the first trial the defendant had been implicitly acquitted of murder.[246]

In *Burks v. United States*, however, the Supreme Court recognised an important exception to the continuing jeopardy principle. According to the Court, the double jeopardy clause precludes a second prosecution where the defendant obtained a reversal of his conviction on the ground that the evidence was insufficient to convict him. In this instance, the only remedy available for the appellate court is acquitting the defendant.[247]

1.6. Protection against Multiple Punishments for the Same Offence

[242] Supreme Court of the United States, Justices of Boston Municipal Court v. Lydon, 307 [1984].

[243] Supreme Court of the United States, United States v. Ball, 671-672 [1896]. See also Green v. United States, 189 [1957]; North Carolina v. Pearce, 720 [1969]; Bullington v. Missouri, 441-442 [1981]; Justices of Boston Municipal Court v. Lydon, 305 [1984].

[244] Supreme Court of the United States, Price v. Georgia, 326 [1970].

[245] Supreme Court of the United States, Price v. Georgia, 324-325 [1970].

[246] Supreme Court of the United States, Price v. Georgia, 326-327 [1970].

[247] Supreme Court of the United States, Burks v. United States, 18 [1978]. See also Bullington v. Missouri, 442 [1981].

The Supreme Court recognised the prohibition of multiple punishments in *Lange*.[248] In this case, the defendant was sentenced to both a fine and imprisonment. After the defendant fully paid the fine, the judge realised that the statute allowed only either the fine or imprisonment. The judge then vacated the judgment and imposed a new imprisonment sentence.[249]

The Supreme Court affirmed that there was no doubt that the Constitution prevented both the defendant from being twice punished for the same offence and from being twice tried for it.[250] Since the defendant had already suffered one of the alternative punishments, the power to punish him had gone. Therefore, the second sentence was contrary to the double jeopardy clause.[251]

1.6.1 Protection against Multiple Punishments in a Single Prosecution.

The Supreme Court has formulated a coherent interpretation of the protection against multiple punishments in the same prosecution.[252] In this context, the prohibition of multiple punishments "is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature".[253] The prohibition aims to assure

[248] Carlton, 'Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States', 821; George C. Thomas III, 'Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter or Don Quixote, the Sargasso Sea, and the Gordian Knot', *Washington University Law Review* 62, no. 1 (1984): 88; Nolan, 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery', 1085; Lisa Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', *Journal of Criminal Law and Criminology* 89, no. 3 (1999): 1010; Adler, 'Dual Sovereignty, Due Process,and Duplicative Punishment', 452.
[249] Supreme Court of the United States, Ex parte Lange, 164 [1873].
[250] Supreme Court of the United States, Ex parte Lange, 173 [1873]. See also United States v. Benz, 307-308 [1931].
[251] Supreme Court of the United States, Ex parte Lange, 176 [1873]. In 1943 the Supreme Court decided a strikingly similar case to Ex parte Lange. The defendant was convicted to six months' imprisonment and to pay a fine of $500. The sentence was erroneous because under the relevant legal provision the sentence could only be a fine or imprisonment. The court realised that the sentence was erroneous and amended it by omitting any fine and retaining only the imprisonment, but the defendant had already paid the fine. The Supreme Court stated that when the defendant paid the fine, he had complied with a portion of the sentence which could lawfully have been imposed, therefore the power of the court was at an end. Because of this, the subsequent amendment of the sentence could not avoid the satisfaction of the judgment, and the attempt to accomplish that end was a nullity. See In re William v. Bradley 51-52 [1943].
[252] Richardson, 'Matching Tests for Double Jeopardy Violations with Constitutional Interests Recent Developments', 277.
[253] Supreme Court of the United States, Ohio v. Johnson, 499 [1984]. See also Jones v. Thomas, 381 [1989]; United States v. Halper, 451 [1989]; Missouri v. Hunter, 366 [1983]; Brown v. Ohio, 165 [1977].

that the courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislature.[254]

Because the power to prescribe crimes and determine their punishments belongs to the legislature,[255] the question of whether multiple punishments are admissible under the double jeopardy clause in a single trial is essentially a matter of statutory construction[256] in reference to what punishment the legislature has authorised.[257] Therefore, the question of what punishments are constitutionally permissible in a single trial is not different from the question of what punishments the legislative branch intended to impose. If Congress intended to impose multiple punishments, the imposition of such sentences will not violate the Constitution.[258]

1.6.2 Parallel Criminal and Non-Criminal Sanctions for the Same Facts.

When the government seeks to impose both a criminal and a civil sanction on the same defendant for the same offence, the prohibition of multiple punishments is called into question.[259] Unfortunately, a great deal of doubt surrounds the application of the double jeopardy clause in this case.[260] For the double jeopardy clause to apply in this context, the two sanctions sought by the government should constitute criminal punishment. If one of them cannot be considered as criminal punishment, its imposition will not trigger

[254] Supreme Court of the United States, Jones v. Thomas, 381 [1989]; Padover, 'State Constitutional Law - Criminal Procedure - The Constitutional Guarantee of Protection against Double Jeopardy Is Not Violated When a Defendant Is Convicted Of, and Punished for, Separate Offenses That Contain Different Elements', 972.

[255] For instance, in Albrecht v. United States, the Supreme Court explained that there was "nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction". See Albrecht v. United States, 11 [1927]

[256] Supreme Court of the United States, Ohio v. Johnson, 499 [1984]; Gore v. United States, 390-391 [1958]; Helvering v. Mitchell, 399 [1938].

[257] Supreme Court of the United States, Whalen v. United States, 693 [1980].

[258] Supreme Court of the United States, Whalen v. United States, 344 [1981]; Garrett v. United States, 778 [1985].

[259] Summers, 'Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition', 1595; Laurel Albin, 'Notes: Constitutional Limitations of Civil in Rem Forfeiture and the Double Jeopardy Dilemma: Civil in Rem Forfeiture Constitutes Punishment and Is Subject to Excessive Fines Analysis. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), Cert. Denied, 116 S. Ct. 916 (1996)', *University of Baltimore Law Review* 26, no. 1 (1996): 186.

[260] Glickman, 'Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after United States v. Halper', 1254.

the double jeopardy clause.[261] The evolution of the case law of the Supreme Court on this matter will be analysed in the following.

1.6.2.1. The Early Cases: *United States v. La Franca* and *Various Items of Personal Property et al. v. United States*.

On the same day in 1931, the Supreme Court decided two relevant cases. In the first case, *United States v. La Franca*, after the defendant was convicted in a criminal proceeding, the government sued him for non-payment of liquor taxes alleging the same unlawful sales of liquor for which he had been convicted. The defendant filed a motion to dismiss on double jeopardy grounds. The District Court overruled the motion but the Court of Appeal reversed the judgment holding that the civil action was barred by the prior conviction.[262] After a reasoning that has been characterised as "an egregious example of bootstrapping",[263] the Supreme Court held that "an action to recover a penalty for an act declared to be a crime is, in its nature, a punitive proceeding, although it takes the form of a civil action".[264] The Supreme Court concluded that the civil action was barred by the previous criminal conviction, affirming the judgment of the Court of Appeal.[265]

The second decision was *Various Items of Personal Property et al. v. United States*. In this case, the government filed a civil forfeiture action to forfeit a distillery, warehouse and denaturing plant on the ground that the defendant had conducted its distilling business with intent to defraud, and had defrauded, the government of the related tax.[266] The defendant had previously been criminally convicted for the same facts indicated in the civil action.[267] Firstly, the Supreme Court explained that even though in *United States v. La Franca* it had held that a civil action to recover a penalty was punitive in character, the situation in the present case was different because it

[261] Frederick T. Davis, *American Criminal Justice: An Introduction* (Cambridge University Press, 2019), 79.
[262] Supreme Court of the United States, United States v. La Franca, 569-570 [1931].
[263] Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 229.
[264] Supreme Court of the United States, United States v. La Franca, 575 [1931].
[265] Supreme Court of the United States, United States v. La Franca, 575 [1931].
[266] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 578 [1931].
[267] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 579 [1931].

was about a civil proceeding to forfeit property used in committing a criminal offence.[268] The Court explained that where Congress has provided for a civil proceeding to forfeit property used in committing a criminal offence, the property is primarily considered as the offender, or rather the offence is attached primarily to the thing.[269] In contrast, "in a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished".[270] Therefore, the Court concluded that the double jeopardy clause did not apply to this case because the civil forfeiture was not criminal punishment.[271]

1.6.2.2. The Statutory Construction Analysis of *Helvering v. Mitchell* and Its Subsequent Application.

A paramount case was *Helvering v. Mitchell*, decided in 1938. The defendant was tried for and acquitted of tax evasion. Subsequently, the tax authority imposed on him a civil penalty which amounted to fifty percent of his tax deficiency.[272] The defendant contended that the sanction imposed by the tax authority was barred under the double jeopardy clause because it was a criminal penalty intended to punish him.[273]

Firstly, the Supreme Court recognised that a civil sanction following a criminal prosecution may be barred by the double jeopardy clause. However, this will only happen if the civil sanction constitutes criminal punishment.[274] The Court then stated that, since Congress may impose both a criminal and a civil sanction in respect of the same conduct, the inquiry regarding the nature of the sanction is one of statutory construction.[275] The Court noted that the sanction aimed to protect the revenue and to reimburse the government for the heavy expense of investigation and the loss resulting from the fraud of the taxpayer.[276] Moreover, Congress had provided in a civil statute a

---

[268] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 580 [1931].
[269] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 580 [1931].
[270] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 581 [1931].
[271] Supreme Court of the United States, Various Items of Personal Property et al. v. United States, 581 [1931].
[272] Supreme Court of the United States, Helvering v. Mitchell, 395 [1938].
[273] Supreme Court of the United States, Helvering v. Mitchell, 398-399 [1938]. Since the defendant had been acquitted in the criminal prosecution, Helvering v. Mitchell was not a multiple punishments case, but a rather a multiple prosecution case. Nolan, 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery', 1088.
[274] Supreme Court of the United States, Helvering v. Mitchell, 398-399 [1938]; Nolan, 1087.
[275] Supreme Court of the United States, Helvering v. Mitchell, 399 [1938].
[276] Supreme Court of the United States, Helvering v. Mitchell, 401 [1938].

separate civil procedure for the collection of the additional tax, which indicated that the sanction at stake had been intended as a civil sanction. Therefore, the Court concluded that the statute at issue was intended as civil in nature.[277]

The statutory construction analysis of *Helvering v. Mitchell* became the standard for subsequent cases involving the application of the double jeopardy clause to parallel criminal and civil convictions.[278]

In *United States ex rel. Marcus v. Hess*, decided in 1943, the Supreme Court reaffirmed the statutory construction analysis of *Helvering*.[279] In this case, the defendants were criminally convicted of defrauding the government by collusively bidding on public works projects. A statute at that time allowed the government to bring a civil action to collect $2,000 for each violation and double the amount of damages. The defendants had violated the statute on fifty six occasions and thus owed a total of $315,000.[280] They filed a motion to dismiss on double jeopardy grounds, arguing that the civil sanction was barred by their previous criminal conviction.[281] Although the civil sanction probably exceeded the amount of the perpetrated fraud, the Supreme Court explained that a remedial action does not lose its civil nature just because more than the precise amount of actual damage is recovered.[282] The Court noted that the purpose of the civil sanction was to provide for restitution to the government of money taken from it by fraud.[283] Therefore, the Court rejected the argument of the defendants and concluded that the following proceeding was not barred by the double jeopardy clause.[284]

The next case on double jeopardy and parallel criminal and civil sanctions was *Rex Trailer Co., Inc. v. United States*, decided in 1956. The defendant was convicted under the Surplus Property Act for defrauding the government during the purchase of five trucks. Afterwards, the government brought a civil action against the defendant under the same Act and sought $2,000 in penalties for each violation. The defendant contended that the civil action was barred by the double jeopardy clause because it

---

[277] Supreme Court of the United States, Helvering v. Mitchell, 402 [1938]; Anielak, 'Double Jeopardy', 172.
[278] Summers, 'Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition', 1597.
[279] Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1012.
[280] Supreme Court of the United States, United States ex rel. Marcus v. Hess, 539-540 [1943].
[281] Supreme Court of the United States, United States ex rel. Marcus v. Hess, 548 [1943].
[282] Supreme Court of the United States, United States ex rel. Marcus v. Hess, 550-551 [1943].
[283] Supreme Court of the United States, United States ex rel. Marcus v. Hess, 551 [1943].
[284] Supreme Court of the United States, United States ex rel. Marcus v. Hess, 551-552 [1943].

was actually criminal.[285] After applying the statutory construction analysis, the Supreme Court concluded that the second sanction was civil in nature.[286] The Court noted that the sanction was "comparable to the recovery under liquidated-damage provisions which fix compensation for anticipated loss".[287] The Court stated that even though specific damages resulting from the fraud could be difficult to ascertain, "it is the function of liquidated damages to provide a measure of recovery in such circumstances".[288] Therefore, it could not be said that the civil action brought against the defendant was "so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty".[289]

1.6.2.3. The "Kennedy Criteria": *Kennedy v. Mendoza-Martinez*.

A paramount case regarding the question of whether a civil sanction can be considered as criminal punishment was *Kennedy v. Mendoza-Martinez*, decided in 1963.[290] In this case, the Supreme Court addressed the constitutionality of a statutory provision which without prior proceeding provided for the expatriation of any citizen for evading military service during time of war or national emergency.[291] The Court had to determine whether the relevant legal provision was criminal and, consequently, had deprived the defendants of their citizenship without due process of law.[292]

The Supreme Court indicated that in determining the real nature of a statute the following criteria are relevant: (i) whether the sanction involves an affirmative disability or restraint;[293] (ii) whether it has historically been regarded as a punishment; (iii) whether it comes into play only on a finding of *scienter*; (iv) whether its operation will promote the traditional aims of punishment (retribution and deterrence); (v) whether

[285] Supreme Court of the United States, Rex Trailer Co., Inc. v. United States, 149-150 [1956].
[286] Supreme Court of the United States, Rex Trailer Co., Inc. v. United States, 151 [1956].
[287] Supreme Court of the United States, Rex Trailer Co., Inc. v. United States, 153 [1956].
[288] Supreme Court of the United States, Rex Trailer Co., Inc. v. United States, 153-154 [1956].
[289] Supreme Court of the United States, Rex Trailer Co., Inc. v. United States, 154 [1956].
[290] Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1014.
[291] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 146 [1963]; Michael H. Levin, 'OSHA and the Sixth Amendment: When Is a Civil Penalty Criminal in Effect', *Hastings Constitutional Law Quarterly* 5, no. 4 (1978): 1020.
[292] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 164 [1963].
[293] The Supreme Court has stated, however, that "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment". United States v. Salerno, 746 [1987]; Kansas v. Hendricks, 363 [1997].

the behaviour to which it applies is already a crime;[294] (vi) whether an alternative purpose to which it may rationally be connected is assignable for it; and (vii) whether it appears excessive in relation to the alternative purpose assigned.[295] The cited factors must be considered in relation to the statute on its face.[296] Although these factors may sometimes point in differing directions, they are all relevant to the inquiry.[297] After considering the foregoing criteria, the Supreme Court concluded that the punitive nature of the statute was evident because its primary function was to serve as an additional punishment for the offender[298]

Nine years later, in *One Lot Emerald Cut Stones v. United States*, the defendant had been tried for and acquitted of having entered the United States without declaring to the customs authority one lot of emerald cut stones and one ring.[299] Following the acquittal, the government brought a civil forfeiture action of the goods involved. The defendant argued that his previous acquittal barred the forfeiture proceeding.[300] After recalling that Congress may impose both a criminal and a civil sanction in respect of the same conduct[301] and that the question of the nature of a sanction is one of statutory construction,[302] the Supreme Court held that the forfeiture in question was civil.[303] The Court noted that the forfeiture was intended to aid in the enforcement of tariff regulations. It prevented forbidden merchandise from circulating in the market and, by its monetary penalty, it provided a reasonable form of liquidated damages for violation of the inspection provisions and served to reimburse the government for investigation and enforcement expenses.[304]

1.6.2.4. The Two-Prong Analysis: *United States v. Ward*.

---

[294] Regarding the application of this criterion, the Court cited Lipke v. Lederer 562 [1922]; United States v. La Franca 572-573 [1931]; and United States v. Constantine, 295 [1935].
[295] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 168-169 [1963]; John Hildy, 'Fifth Amendment--Double Jeopardy and the Dangerous Drug Tax', *Journal of Criminal Law and Criminology* 85, no. 4 (1995): 940.
[296] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 169 [1963].
[297] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 169 [1963].
[298] Supreme Court of the United States, Kennedy v. Mendoza-Martinez, 169-170 [1963].
[299] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 232 [1972].
[300] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 233 [1972].
[301] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 235 [1972].
[302] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 237 [1972].
[303] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 237 [1972].
[304] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 237 [1972].

Even though *United States v. Ward* was not a double jeopardy case, it is a cardinal case in the evolution of the case law on double jeopardy and parallel criminal and civil sanctions. In this case, the Supreme Court added a second level to the statutory construction approach, adopting a two-prong analysis.[305] The controversy in *Ward* was focused on two legal provisions of the Federal Water Pollution Control Act. The first one provided for a fine or imprisonment for failure of a person in charge of an onshore or offshore oil facility to report to the appropriate agency a spillage of oil or any hazardous substance. The second provision provided for a civil penalty against the owner of any such oil spilling facility.[306] After the defendant discovered an oil leak from his property, he reported the leak to the environmental authority. Based on this information, the government assessed a civil penalty against him. The defendant appealed, arguing that the civil penalty was actually criminal in nature and, therefore, it was contrary to his privilege against compulsory self-incrimination.[307]

The Supreme Court began its reasoning recalling that the question of whether a sanction is either civil or criminal is one of statutory construction.[308] The Court then stated that the inquiry on this matter is compounded of two levels. Firstly, a court should determine whether the sanction established was intended to be civil. Where Congress has intended to establish a civil sanction, the second step of the inquiry is to ascertain whether the statutory scheme is “so punitive either in purpose or effect as to negate that intention”.[309] Concerning this latter inquiry, “only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground”.[310]

In applying this two-prong analysis to the present case, the Supreme Court found that it was clear that Congress intended to impose a civil penalty. The Court noted that the statute provided for separately criminal and civil sanctions and that Congress had expressly labelled the sanction in question as civil.[311] With reference to the second

---

[305] Anielak, ‘Double Jeopardy’, 176.
[306] Supreme Court of the United States, United States v. Ward, 244-245 [1980].
[307] Supreme Court of the United States, United States v. Ward, 246-247 [1980]; Lauren Clapp, ‘United States v. Halper: Remedial Justice and Double Jeopardy’, *North Carolina Law Review* 68, no. 5 (1990): 989.
[308] Supreme Court of the United States, United States v. Ward, 248 [1980]. See also Allen v. Illinois, 368 [1986]; Kansas v. Hendricks, 361 [1997].
[309] Supreme Court of the United States, United States v. Ward, 248-249 [1980]; Melenyzer, ‘Double Jeopardy Protection from Civil Sanctions after Hudson v. United States’, 1015; Janeice T. Martin, ‘Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game’, *Florida Law Review* 46, no. 4 (1994): 666–67.
[310] Supreme Court of the United States, United States v. Ward, 249 [1980].
[311] Supreme Court of the United States, United States v. Ward, 249 [1980].

inquiry, the Supreme Court referred to the seven criteria set out in *Kennedy*. In this regard, the Court observed that only one criterion -whether the behaviour to which the penalty applies is already a crime- supported the allegation of the defendant.[312] Accordingly, the Court concluded that the sanction imposed on the defendant was civil in nature.[313]

The reasoning of *Ward* was followed four years later in *United States v. One Assortment of 89 Firearms*. In this case, the defendant was tried for and acquitted of engaging in the business of dealing in firearms without a license.[314] Following the criminal acquittal, the government instituted a forfeiture action of the seized firearms. Based on his earlier acquittal, the defendant argued that the forfeiture proceeding was barred by the double jeopardy clause.[315] The Supreme Court stated once again that, unless the forfeiture had been intended as criminal punishment, the double jeopardy clause did not apply.[316] To determine the nature of the forfeiture, the Court applied the two-prong analysis.[317] Regarding the first level, the Court concluded that Congress had designed the forfeiture in question as a civil sanction.[318] It noted that the purpose of the forfeiture was to discourage unregulated commerce in firearms and keep potentially dangerous weapons out of the hands of unlicensed dealers and that it covered broader conduct than the criminal statute.[319] Concerning the second level of the analysis, the Court reiterated that only the clearest proof of the punitive character of the forfeiture could be suffice to override the original preference of the Congress.[320] The Supreme Court observed that only one of the Kennedy criteria -whether the behaviour to which the penalty applies is already a crime- supported the argument of the defendant. However, this indication was not sufficient since Congress may impose both a criminal and a civil sanction in respect of the same conduct.[321] The Court thus concluded that the forfeiture at issue was civil in nature.[322]

---

[312] Supreme Court of the United States, United States v. Ward, 249-250 [1980].
[313] Supreme Court of the United States, United States v. Ward, 255 [1980].
[314] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 355-356 [1984].
[315] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 356 [1984].
[316] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 362 [1984].
[317] Martin, 'Final Jeopardy', 667; Abbott, 'United States v. Halper: Making Double Jeopardy Available in Civil Actions', 556–57.
[318] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 363 [1984].
[319] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 363-364 [1984].
[320] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 365 [1984].
[321] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 365 [1984].
[322] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 366 [1984].

1.6.2.5. The Expansion of the Ward Analysis: *United States v. Halper*.

In *United States v. Halper*, decided in 1989, the Supreme Court expanded the scope of application of the double jeopardy clause,[323] by holding that a civil sanction that does not bear a rational relation to the goal of compensating the government for its loss constitutes criminal punishment.[324]

In this case, the defendant, while working as a manager for a medical lab, submitted 65 false claims, causing the government to unnecessarily pay out $585 in disbursements. A criminal prosecution was brought against the defendant under the False Claims Act. The defendant was convicted and sentenced to two years' imprisonment and fined $5,000.[325] Afterwards, the government brought a civil action against the defendant under the same Act. The District Court found the defendant civilly liable and, under the formula of the False Claims Act, imposed a fine of $2,000 for each of the 65 violations, thus a total of $130,000.[326] However, the District Court held that an additional sanction of $130,000 on the defendant would constitute an inadmissible second punishment under the double jeopardy clause because the amount of the sanction bore no rational relation to the sum of the actual loss and costs of the government.[327] The government took a direct appeal to the Supreme Court.[328]

The Supreme Court pointed out that the sole question to decide was whether the sanction of $130,000 for false claims amounting to $585 constituted an inadmissible second punishment.[329]

The Supreme Court stated that the problem in question had not been previously faced: whether and under what circumstances a civil sanction may constitute punishment for the purposes of double jeopardy.[330] The Court noted that even though

---

[323] Hall, 'Crossing the Line Between Rough Remedial Justice and Prohibited Punishment', 437; Clapp, 'United States v. Halper', 990; Elizabeth M. Apisson, 'Double Jeopardy and the Civil Monetary Penalties Dilemma: Is Hudson the Cure for Health Care Fraud and Abuse?', *Administrative Law Review* 51, no. 1 (1999): 291.
[324] Hall, 'Crossing the Line Between Rough Remedial Justice and Prohibited Punishment', 437; Clapp, 'United States v. Halper', 990; Apisson, 'Double Jeopardy and the Civil Monetary Penalties Dilemma', 291.
[325] Supreme Court of the United States, United States v. Halper, 437 [1989].
[326] Supreme Court of the United States, United States v. Halper, 438 [1989].
[327] Supreme Court of the United States, United States v. Halper, 438-439 [1989].
[328] Supreme Court of the United States, United States v. Halper, 440 [1989].
[329] Supreme Court of the United States, United States v. Halper, 441 [1989].
[330] Supreme Court of the United States, United States v. Halper, 441-446 [1989].

the statutory construction analysis was appropriate to determine the nature of a proceeding or the constitutional safeguards that must accompany those proceedings, the approach was not well suited to the context of the human interests safeguarded by the double jeopardy clause. Because the protection against double jeopardy is intrinsically personal,[331] the Court held that its violation can only be identified by assessing the character of the actual sanction imposed on the defendant.[332]

In determining whether a given civil sanction constitutes punishment, the Supreme Court stated that its label is not of paramount importance. Instead, the determination requires a particularised assessment of the sanction imposed and the purposes that the sanction may fairly be said to serve. The Supreme Court held that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment".[333] Consequently, under the double jeopardy clause "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterised as remedial, but only as a deterrent or retribution".[334]

Where a civil sanction bears no rational relation to the goal of compensating the government for its loss, but rather appears to qualify as punishment, the defendant is entitled to an accounting of the loss and costs of the government to determine if the sanction sought constitutes a second punishment.[335] In these circumstances, the trial court will have to determine the amount of the civil sanction the government may receive without crossing the line between remedy and punishment.[336] The Supreme Court vacated the judgment of the District Court and remanded the case for further proceedings.[337]

---

331 Supreme Court of the United States, United States v. Halper, 447 [1989].
332 Supreme Court of the United States, United States v. Halper, 447 [1989].
333 Supreme Court of the United States, United States v. Halper, 448 [1989].
334 Supreme Court of the United States, United States v. Halper, 448-449 [1989].
335 Supreme Court of the United States, United States v. Halper, 449 [1989]; Elizabeth S. Jahncke, 'United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses', *New York University Law Review* 66, no. 1 (1991): 132; Khinda, 'Undesired Results under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions against Civilly-Sanctioned Defendants', 139; Luis Garcia-Rivera, 'Dodging Double Jeopardy: Combined Civil and Criminal Trials', *Stetson Law Review* 26, no. 1 (1996): 382.
336 Supreme Court of the United States, United States v. Halper, 449-450 [1989].
337 Supreme Court of the United States, United States v. Halper, 452 [1989].

The Supreme Court recognised that it will be difficult for a court to determine the precise dollar amount at which a civil sanction takes on the quality of punishment.[338] Possibly in an attempt to limit the effects of the new ruling, the Supreme Court made some final remarks.[339] Firstly, the Court described the decision in *Halper* as a rule for rare cases, where a legal provision subjects an offender to a sanction overwhelmingly disproportionate to the damages he has caused.[340] Secondly, the Court held that the government was not prevented "from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding".[341] In this context, the protection against multiple punishments is limited "to ensuring that the total punishment did not exceed that authorized by the legislature".[342] Thirdly, the Court explained that nothing in its decision precluded a "private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment".[343]

1.6.2.6. The Aftermath of Halper: *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*.

After *Halper*, the Supreme Court decided two important cases in which it applied its expansive definition of punishment: *Austin v. United States* and *Department of Revenue of Montana v. Kurth Ranch*.

In *Austin v. United States*, the Supreme Court characterised a civil forfeiture as punishment for the purposes of the excessive fines clause of the Eighth Amendment.[344] Prior to *Austin*, the Supreme Court had only considered the excessive fines clause in *Browning-Ferris Industries v. Kelco Disposal*, a case in which the Court had held that the excessive fines clause does not apply to damages awarded in disputes between

[338] Supreme Court of the United States, United States v. Halper, 449 [1989], citing Rex Trailer Co., Inc. v. United States, 153 [1956].
[339] Garcia-Rivera, 'Dodging Double Jeopardy', 382.
[340] Supreme Court of the United States, United States v. Halper, 449 [1989]; Hall, 'Crossing the Line Between Rough Remedial Justice and Prohibited Punishment', 444; Neafsey and Bonanno, 'Parallel Proceedings and the Fifth Amendment's Double Jeopardy Clause Symposium', 722.
[341] Supreme Court of the United States, United States v. Halper, 450 [1989].
[342] Supreme Court of the United States, United States v. Halper, 450 [1989].
[343] Supreme Court of the United States, United States v. Halper, 451 [1989]; Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1018.
[344] In the same term that Austin was decided, the Supreme Court handed down its decision in Alexander v. United States, where it characterised a criminal forfeiture as punishment for the purposes of the excessive fines clause. See Alexander v. United States, 558-559 [1993].

private parties because it had been "intended to limit only those fines directly imposed by, and payable to, the government".[345]

Because the case involved the excessive fines clause rather than the double jeopardy clause, the Court followed the principle of Halper but not its method.[346] In this case, the defendant was convicted of possessing cocaine with intent to distribute and was sentenced to seven years' imprisonment. Afterwards, the government filed an *in rem* action seeking forfeiture of the mobile home and the auto body shop of the defendant.[347] The District Court rejected the argument of the defendant that forfeiture of his properties would violate the excessive fines clause and granted summary judgment on the basis of an affidavit from a police officer that the defendant had brought two grams of cocaine from the mobile home to the body shop for consummating a prearranged sale there. The Court of Appeal upheld the decision of the District Court and the Supreme Court granted certiorari.[348]

The Supreme Court firstly noted that unlike other provisions of the Bill of Rights, such as the self-incrimination clause of the Fifth Amendment, which are expressly confined to criminal cases, neither the text nor the history of the Eighth Amendment include such a limitation.[349] The purpose of the Eighth Amendment was to limit the power of the government to punish.[350] Regarding the excessive fines clause, it limits the power of the government to extract payments as punishment for some offence.[351] Therefore, the Supreme Court affirmed that, in the context of the excessive fines clause, the relevant question is not whether the forfeiture is civil or criminal, but rather

---

[345] Supreme Court of the United States, Browning-Ferris Industries v. Kelco Disposal, 268 [1989]; W. David George, 'Finally, an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States', *Baylor Law Review* 46, no. 2 (1994): 510; Albin, 'Notes: Constitutional Limitations of Civil in Rem Forfeiture and the Double Jeopardy Dilemma: Civil in Rem Forfeiture Constitutes Punishment and Is Subject to Excessive Fines Analysis. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), Cert. Denied, 116 S. Ct. 916 (1996)', 166; Matthew C. Solomon, 'The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion Note', *Georgetown Law Journal* 87, no. 3 (1999): 871.

[346] Martin, 'Final Jeopardy', 673; Solomon, 'The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion Note', 860.

[347] Supreme Court of the United States, Austin v. United States, 604 [1993].

[348] Supreme Court of the United States, Austin v. United States, 605-606 [1993]; Cynthia Sherrill Wood, 'Asset, Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States', *Wake Forest Law Review* 29, no. 4 (1994): 1378.

[349] Supreme Court of the United States, Austin v. United States, 607-608 [1993]; Barry L. Johnson, 'Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after United States v. Bajakajian', *University of Illinois Law Review*, no. 2 (2000): 472.

[350] Supreme Court of the United States, Austin v. United States, 609 [1993], citing Browning-Ferris Industries v. Kelco Disposal, 275 [1989].

[351] Supreme Court of the United States, Austin v. United States, 609-610 [1993].

whether it constitutes punishment.[352] The Court next embarked upon a long historical journey,[353] concluding that forfeitures have been historically understood, at least in part, as punishment.[354]

The Supreme Court noted that the forfeiture in question expressly provided for an innocent owner defence,[355] an exemption that serves to focus the inquiry on the culpability of the owner.[356] Moreover, when Congress established the forfeiture it argued that traditional criminal sanctions had been inadequate to deter and punish the enormously profitable trade in dangerous drugs, hence additional measures were necessary.[357] Because of the above, the Supreme Court held that the forfeiture in question constituted punishment for the purposes of the excessive fines clause.[358] The Court refused the invitation of the defendant to establish a test to determine whether a forfeiture is excessive, arguing that lower courts should consider the question.[359] The Supreme Court remanded the case for a determination of proportionality.[360]

In the second case, *Department of Revenue of Montana v. Kurth Ranch*, the Supreme Court addressed the question of whether a tax on the possession of illegal drugs constituted punishment for the purposes of double jeopardy. The Montana Dangerous Drug Tax Act imposed a tax on the possession and storage of dangerous drugs. In 1986 the police raided the farm of the defendants, confiscated drugs and other materials and arrested them.[361] The defendants were criminally convicted.[362] The

---

[352] Supreme Court of the United States, Austin v. United States, 610 [1993]; George, 'Finally, an Eye for an Eye', 515; Andrew L. Subin, 'The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation', *Seattle University Law Review* 19, no. 2 (1996): 261.
[353] Supreme Court of the United States, Austin v. United States, 611-618 [1993].
[354] Supreme Court of the United States, Austin v. United States, 618 [1993]; Henning, 'Precedents in a Vacuum', 65; Robin M. Sackett, 'The Impact of Austin v. United States: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings', *Golden Gate University Law Review* 24, no. 2 (1994): 509; Wood, 'Asset, Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States', 1379.
[355] Subin, 'The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation', 26.
[356] Supreme Court of the United States, Austin v. United States, 619 [1993].
[357] Supreme Court of the United States, Austin v. United States, 620 [1993]; George, 'Finally, an Eye for an Eye', 515.
[358] Supreme Court of the United States, Austin v. United States, 621-622 [1993]; Henning, 'Precedents in a Vacuum', 66–67; Beth A. Colgan, 'The Excessive Fines Clause: Challenging the Modern Debtors' Prison', *UCLA Law Review* 65, no. 1 (2018): 18.
[359] Supreme Court of the United States, Austin v. United States, 622-623 [1993]; Douglas Reinhart, 'Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality', *William & Mary Law Review* 36, no. 1 (1994): 243.
[360] Supreme Court of the United States, Austin v. United States, 623 [1993].
[361] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 771 [1994].
[362] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 772 [1994].

government filed a civil forfeiture action seeking recovery of cash and equipment used in the drugs operation. The defendants settled the forfeiture action with an agreement to forfeit $18,016.83 in cash and various items of equipment.[363] In addition, the Department of Revenue of Montana attempted to collect almost $900,000 in taxes, interest and penalties under the Dangerous Drug Tax Act. The defendants then filed a petition for bankruptcy. The Bankruptcy Court found that an assessment of $181,000 was authorised by the Dangerous Drug Tax Act.[364] Nevertheless, the Bankruptcy Court held that the purpose of the drug tax was to deter and punish, and therefore it constituted an impermissible second punishment under the double jeopardy clause.[365]

The Supreme Court granted certiorari to determine whether the tax in question constituted an impermissible second punishment.[366] In this regard, the Supreme Court stated that the Drug Tax Act had a remarkably high taxation rate and that its purpose was to deter people from possessing drugs.[367] Moreover, the tax was conditioned on the commission of a crime.[368] Based on these reasons, the Supreme Court concluded that the tax at issue constituted an impermissible second punishment under the double jeopardy clause.[369]

1.6.2.7. Reversing the Direction: *United States v. Ursery*.

After *Austin* and *Kurth Ranch*, the next decision of the Supreme Court on double jeopardy and civil sanctions was anticipated with great interest.

This next decision was *United States v. Ursery*, where the Court held that a civil forfeiture did not constitute punishment for purposes of double jeopardy, reversing the direction started by *Halper* and followed by *Austin* and *Kurth Ranch*.[370]

---

[363] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 772 [1994].
[364] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 773 [1994].
[365] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 773-774 [1994].
[366] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 776 [1994].
[367] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 780 [1994]; Hildy, 'Fifth Amendment--Double Jeopardy and the Dangerous Drug Tax', 947.
[368] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 781 [1994].
[369] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 783-784 [1994]; Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1020.
[370] Garcia-Rivera, 'Dodging Double Jeopardy', 395; Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1021; Solomon, 'The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion Note', 864; Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1023.

In *Ursery*, the Court consolidated two cases to determine whether a civil forfeiture in addition to a criminal prosecution for the same offence violated the double jeopardy clause.[371]

In the first case, the police discovered a marijuana manufacturing operation in the home of the defendant, Guy Ursery. The government instituted a civil forfeiture proceeding to recoup the residence because it was used in the manufacturing operation. The defendant settled the forfeiture suit by paying the federal government $13,250.167. Subsequently, the defendant was criminally convicted of manufacturing marijuana.[372] The defendant appealed, arguing that, since the forfeiture constituted punishment, his criminal conviction was barred by the double jeopardy clause.[373] The Court of Appeal, relying on *Halper*, *Austin* and *Kurth Ranch*, agreed with the defendant and reversed his conviction.[374]

In the second case, *United States v. $405,089.23 in U. S. Currency et al.*, the defendants were convicted of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and numerous counts of money laundering.[375] The government also instituted a contemporaneous civil forfeiture proceeding against the property used in the illegal operations.[376] After the conclusion of the criminal procedure, the District Court granted the motion of the government for summary judgment in the forfeiture proceeding.[377] The defendants appealed the decision on double jeopardy grounds. The Court of Appeal, also relying on *Halper*, *Austin* and *Kurth Ranch*, held that the forfeiture constituted a second impermissible punishment under the double jeopardy clause.[378]

In both cases, Ursery and $405,089.23, the Supreme Court granted certiorari and reversed the decisions of the appellate courts, holding that a civil forfeiture may be

---

[371] Amy E. Watkins, 'Double Jeopardy Clause - Government May Bring Parallel Criminal Prosecution and In Rem Forfeiture Actions without Violating the Double Jeopardy Clause Survey: Fifth Amendment', *Seton Hall Constitutional Law Journal* 7, no. 1 (1996): 287.
[372] Supreme Court of the United States, United States v. Ursery, 271 [1996].
[373] J. Andrew Vines, 'United States v. Ursery: The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil in Rem Forfeiture', *Arkansas Law Review* 50, no. 4 (1997): 803.
[374] Supreme Court of the United States, United States v. Ursery, 271 [1996].
[375] Supreme Court of the United States, United States v. Ursery, 271 [1996].
[376] Nolan, 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery', 1101.
[377] Supreme Court of the United States, United States v. Ursery, 272 [1996].
[378] Supreme Court of the United States, United States v. Ursery, 272 [1996].

brought in conjunction with a criminal trial without violating the double jeopardy clause.[379]

The Supreme Court firstly underlined that it had consistently held that civil forfeiture is a remedial civil sanction, and therefore does not constitute punishment for the purposes of double jeopardy.[380]

Because both courts of appeals based their decisions on *Halper*, *Austin* and *Kurth Ranch*, the Supreme Court addressed the question of whether those rulings actually supported the judgments of the courts of appeal.[381] After analysing the facts and holdings of those three cases,[382] the Court distinguished each of them from *Ursery*:[383] "*Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the Excessive Fines Clause. None of those cases dealt with the subject of these cases: *in rem* civil forfeitures for purposes of the Double Jeopardy Clause".[384] Thus, the Supreme Court held that the courts of appeal had misread *Halper*, *Austin* and *Kurth Ranch*.

After negating the precedential value of *Halper*, *Austin* and *Kurth Ranch*, the Supreme Court examined the forfeitures in question under the two-prong analysis.[385] Regarding the first part of the analysis, the Court found several procedural mechanisms that indicated that Congress had intended these forfeitures to be civil in nature.[386] For instance, the Court noted that Congress had structured these forfeitures to target the property itself.[387] Moreover, when the government could not identify any interested party with regard to the seized article, actual notice was not required.[388] Moving to the second part of the analysis, the Supreme Court found little evidence suggesting that the forfeitures were so punitive as to render them criminal. The Court

---

[379] Watkins, 'Double Jeopardy Clause - Government May Bring Parallel Criminal Prosecution and In Rem Forfeiture Actions without Violating the Double Jeopardy Clause Survey: Fifth Amendment', 288.
[380] Supreme Court of the United States, United States v. Ursery, 274-278 [1996]. The Supreme Court referred to Various Items of Personal Property et al., One Lot Emerald Cut Stones and One Assortment of 89 Firearms.
[381] Supreme Court of the United States, United States v. Ursery, 279 [1996].
[382] Supreme Court of the United States, United States v. Ursery, 282-287 [1996].
[383] Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1022.
[384] Supreme Court of the United States, United States v. Ursery, 288 [1996].
[385] Supreme Court of the United States, United States v. Ursery, 288 [1996]; Vines, 'United States v. Ursery', 828; Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1022.
[386] Supreme Court of the United States, United States v. Ursery, 288 [1996].
[387] Supreme Court of the United States, United States v. Ursery, 288-289 [1996].
[388] Supreme Court of the United States, United States v. Ursery, 289 [1996].

underlined that civil forfeitures serve important non-punitive goals, such as guaranteeing that persons do not profit from their illegal acts, or encouraging property owners to take care in managing their property, ensuring that they will not permit that property to be used in illegal activities.[389] Besides, the Court remarked that forfeitures at issue did not require proving *scienter*.[390] Based on the foregoing considerations, the Supreme Court ruled that civil forfeiture is not criminal punishment for the purposes of double jeopardy.[391] Therefore, the double jeopardy clause does not bar the government from bringing parallel criminal and civil forfeiture proceedings for the same offence.[392]

1.6.2.8. Overruling Halper and Returning to Ward: *Hudson v. United States*.

Even though some commentators lauded the decision in *Halper*,[393] the judgment was extensively criticised.[394] In *Hudson v. United States*, decided in 1997, the Supreme Court overruled the analysis used in *Halper* and returned to the two-prong analysis.[395]

In 1989 the Office of the Comptroller of the Currency imposed monetary penalties and occupational debarment on the three defendants, Hudson, Rackley and Baresel, for violating banking statutes by causing two banks in which they were officials to make loans to the defendant Hudson in an unlawful manner. The sanctions were of $100,000 against Hudson and $50,000 each against Rackley and Baresel.[396] When the defendants were later indicted for conspiracy, misapplication of bank funds and making false bank entries, they moved to dismiss on double jeopardy grounds. The District Court granted the motion, but the Court of Appeal reversed, holding that under *Halper* the civil sanction imposed was not so grossly disproportional as to render it criminal

[389] Supreme Court of the United States, United States v. Ursery, 290-291 [1996].
[390] Supreme Court of the United States, United States v. Ursery, 291 [1996].
[391] Supreme Court of the United States, United States v. Ursery, 270-271 [1996]; Wells, 'Multiple-Punishment and the Double Jeopardy Clause: The United States v. Ursery Decision', 161; Caleb Nelson, 'The Constitutionality of Civil Forfeiture', *Yale Law Journal* 125, no. 8 (2016): 2491.
[392] Nolan, 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery', 1111.
[393] For instance, Stanley E. Cox, 'Halper's Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep', *Saint Louis University Law Journal* 39, no. 4 (1995): 1267.
[394] Khinda, 'Undesired Results under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions against Civilly-Sanctioned Defendants', 145–54; Linda S. Eads, 'Separating Crime from Punishment: The Constitutional Implications of United States v. Halper', *Washington University Law Quarterly* 68, no. 4 (1990): 932; Henning, 'Precedents in a Vacuum', 53–56; Robin Sardegna, 'No Longer in Jeopardy: The Impact of Hudson v. United States on the Constitutional Validity of Civil Monetary Penalties for Violations of Securities Laws Under the Double Jeopardy Clause', *Valparaiso University Law Review* 33, no. 1 (2011): 133–38.
[395] Supreme Court of the United States, Hudson v. United States, 95-96 [1997].
[396] Supreme Court of the United States, Hudson v. United States, 95-97 [1997].

punishment.[397] The Supreme Court granted certiorari "because of concerns about the wide variety of novel double jeopardy claims spawned in the wake of Halper".[398]

The Supreme Court commenced its reasoning stating that the double jeopardy clause only prohibits the imposition of multiple criminal punishments for the same offence,[399] and that the question of whether a sanction is either civil or criminal is one of statutory construction. This question should be determined by applying the two-prong analysis: first, a court must resolve whether the sanction established was intended to be civil. If Congress intended to establish a civil sanction, the second step is to ascertain whether the sanction is so punitive either in purpose or effect as to negate that intention and transform the sanction into a criminal penalty.[400] In making this latter determination, the seven Kennedy criteria are useful guideposts: (i) whether the sanction involves an affirmative disability or restraint; (ii) whether it has historically been regarded as a punishment; (iii) whether it comes into play only on a finding of *scienter*; (iv) whether its operation will promote the traditional aims of punishment (retribution and deterrence); (v) whether the behaviour to which it applies is already a crime; (vi) whether an alternative purpose to which it may rationally be connected is assignable for it; and (vii) whether it appears excessive in relation to the alternative purpose assigned. These factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been intended a civil remedy into a criminal penalty.[401]

Before applying the two-prong analysis to the case in question, the Supreme Court criticised the analysis applied in *Halper*.[402] First, *Halper* bypassed the threshold question: whether the second sanction was a criminal punishment. Instead, it focused on whether the sanction was so grossly disproportionate to the harm caused as to constitute punishment. By doing so, *Halper* elevated a single Kennedy criterion - whether the sanction is excessive in relation to its nonpunitive purposes- to dispositive status. Second, cases after *Halper* demonstrated that its method is unworkable. If a sanction must be solely remedial to avoid implicating the double jeopardy clause, then

397 Supreme Court of the United States, Hudson v. United States, 97-98 [1997].
398 Supreme Court of the United States, Hudson v. United States, 98 [1997].
399 Supreme Court of the United States, Hudson v. United States, 99 [1997]; Apisson, 'Double Jeopardy and the Civil Monetary Penalties Dilemma', 293.
400 Supreme Court of the United States, Hudson v. United States, 99 [1997].
401 Supreme Court of the United States, Hudson v. United States, 99-100 [1997].
402 Melenyzer, 'Double Jeopardy Protection from Civil Sanctions after Hudson v. United States', 1028–29.

no civil sanction is beyond the scope of the clause because all civil penalties have some deterrent effect.[403] Third, *Halper* focused on the actual effects of the sanction, rather than evaluating the statute on its face. If to determine whether the double jeopardy clause is implicated a court must consider the sanction actually imposed, it will not be possible to ascertain whether the clause has been violated until the defendant has been sentenced. This would contradict the idea that the double jeopardy clause forbids the government from initiating a second prosecution for the same offence.[404] Finally, the Supreme Court stated that some of the ills at which *Halper* was directed are addressed by other constitutional provisions. For instance, the due process clause[405] and the prohibitions of cruel and unusual punishments and excessive fines.[406]

The Supreme Court concluded that the additional protection afforded by *Halper* was more than offset by the confusion created by attempting to distinguish between punitive and nonpunitive penalties.[407] For this reason, the Court affirmed that the deviation of *Halper* from the longstanding double jeopardy doctrine was ill considered.[408]

Afterward, the Supreme Court applied the two-prong analysis to the case in question. Regarding the first part of the test, the Court stated that it was evident that the sanctions imposed were intended to be civil in nature. The sanctions in question were expressly labelled as civil and the authority to impose those sanctions was conferred to administrative agencies.[409] Concerning the second stage of the analysis, the Court evaluated the seven *Kennedy* criteria, concluding that there was little evidence suggesting that the sanctions were so punitive as to render it criminal.[410] First, the sanctions imposed did not involve an affirmative disability or restraint. While defendants have been prohibited from further participating in the banking industry, this was nothing approaching imprisonment.[411] Second, neither money penalties nor

[403] Supreme Court of the United States, Hudson v. United States, 101-102 [1997].
[404] Supreme Court of the United States, Hudson v. United States, 102 [1997].
[405] Supreme Court of the United States, Hudson v. United States, 102-103 [1997].
[406] Supreme Court of the United States, Hudson v. United States, 103 [1997].
[407] Supreme Court of the United States, Hudson v. United States, 103 [1997].
[408] Supreme Court of the United States, Hudson v. United States, 101 [1997].
[409] Supreme Court of the United States, Hudson v. United States, 103 [1997].
[410] Supreme Court of the United States, Hudson v. United States, 104 [1997].
[411] Supreme Court of the United States, Hudson v. United States, 104 [1997].

debarment had historically been deemed as punishment.[412] Third, sanctions in this case were not imposed upon a finding of *scienter*.[413] Fourth, although the sanctions in question could deter other possible offenders, the presence of a deterrent purpose is not decisive to render a sanction criminal since deterrence may serve civil as well as criminal goals. If the mere presence of a deterrent purpose renders such sanctions criminal for the purposes of double jeopardy, it would severely undermine the ability of the government to engage in effective regulation of institutions such as banks.[414] Finally, even though the conduct for which the defendant was sanctioned may also be criminal, this circumstance is insufficient by itself to render the money penalties and debarment sanctions criminally punitive.[415]

Based on the foregoing considerations, the Supreme Court concluded that there was very little showing that the sanctions imposed by the Office of the Comptroller of the Currency were criminal. Therefore, the double jeopardy clause did not bar the subsequent criminal trial.[416]

1.7. Issue Preclusion as a Constitutional Requirement of the Double Jeopardy Clause

The doctrine of issue preclusion, which bars reconsidering issues already litigated and determined in a previous judgment, is an additional safeguard against the burdens of multiple prosecutions. In *Ashe v. Swenson*, decided in 1970, the Supreme Court recognised the constitutional dimension of the doctrine of issue preclusion in criminal law, stating that it is embodied as a constitutional requirement in the double jeopardy clause.[417]

1.7.1. General Remarks on Issue Preclusion.

[412] Supreme Court of the United States, Hudson v. United States, 104 [1997]. The Supreme Court had previously recognised that revocation of a privilege voluntarily granted is not a criminal punishment. See Supreme Court of the United States, Flemming v. Nestor, 617 [1960].
[413] Supreme Court of the United States, Hudson v. United States, 104 [1997].
[414] Supreme Court of the United States, Hudson v. United States, 105 [1997].
[415] Supreme Court of the United States, Hudson v. United States, 105 [1997].
[416] Supreme Court of the United States, Hudson v. United States, 105 [1997].
[417] Supreme Court of the United States, Ashe v. Swenson, 436 [1970]. See also Simpson v. Florida, 385 [1971]; Harris v. Washington, 56 [1971]; Turner v. Arkansas, 368 [1972]; Schiro v. Farley, 232 [1994]; Bravo-Fernandez v. United States, 1 [2016].

The idea that a question determined by a court of competent jurisdiction cannot be disputed again between the same parties is a fundamental precept of common law adjudication.[418]

Two consequences of the above idea are the doctrines of claim preclusion, also called *res judicata*,[419] and issue preclusion, sometimes named collateral estoppel.[420] Claim preclusion forecloses reconsideration of any cause of action already decided in an earlier action between the same parties. Issue preclusion precludes reconsideration of specific issues actually litigated and decided in a prior action.[421]

Res judicata and issue preclusion are independent institutions,[422] even though the latter is sometimes regarded as part of the former.[423] They both are part of the wider doctrine of preclusion by prior adjudication,[424] and their application is central to the main purpose of the adjudication system: the conclusive resolution of disputes.[425]

The distinction between claim preclusion and issue preclusion was articulated by the Supreme Court in *Cromwell v. County of Sac*, decided in 1877.[426] On that occasion,

---

418 Supreme Court of the United States, Montana v. United States, 153 [1979], citing Southern Pacific R. Co. v. United States, 48-49 [1897]; Nina Shreve, 'Expanded Application of Collateral Estoppel Defense in Criminal Prosecutions (United States Ex Rel. Rogers v. LaVallee)', *St. John's Law Review* 50, no. 2 (1975): 339.

419 Allan D. Vestal, 'Preclusion/Res Judicata Variables: Nature of the Controversy', *Washington University Law Quarterly*, no. 2 (1965): 158; Michael J. Waggoner, 'Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not', *Review of Litigation* 12, no. 2 (1993): 392; Michelle S. Simon, 'Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back', *University of Memphis Law Review* 34, no. 4 (2004): 753-754 (note 1).

420 In Yeager v. United States, 120 (note 4) [2009], the Supreme Court indicated that currently the term "issue preclusion" is preferable because it is more descriptive than the term "collateral estoppel". See also Bravo-Fernandez v. United States, 1 (note 1) [2016].

421 Supreme Court of the United States, Montana v. United States, 153-154 [1979]; Austin Wakeman Scott, 'Collateral Estoppel by Judgment', *Harvard Law Review* 56, no. 1 (1942): 2; Gary R. Cunningham, 'Collateral Estoppel: The Changing Role of the Rule of Mutuality', *Missouri Law Review* 41, no. 4 (1976): 521; Rose Alexander et al., 'Collateral Estoppel', *University of Richmond Law Review* 16, no. 2 (1982): 344.

422 Rollin M. Perkins, 'Collateral Estoppel in Criminal Cases Current Problems in Criminal Law (I)', *University of Illinois Law Forum*, no. 4 (1960): 541; Rex R. Perschbacher, 'Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings', *University of Florida Law Review* 35, no. 3 (1983): 424.

423 For instance, see Supreme Court of the United States Oklahoma v. Texas, 85 [1921]; Arnold Kapiloff, 'Collateral Estoppel and the Civil Fraud Penalty', *Bulletin of the Section of Taxation, American Bar Association* 20, no. 2 (1967): 137; Kevin M. Clermont, 'Res Judicata as Requisite for Justice', *Rutgers University Law Review* 68, no. 3 (2016): 1071.

424 Alexander et al., 'Collateral Estoppel', 342–43.

425 Supreme Court of the United States, Montana v. United States, 153 [1979]; Hart Steel Co. v. Railroad Supply Co., 299 [1917]; Southern Pacific R. Co. v. United States, 49 [1897]; Perschbacher, 'Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings', 445.

426 Scott, 'Collateral Estoppel by Judgment', 3–4; Adrian P. Schoone, 'Collateral Estoppel in Negligence Actions', *Marquette Law Review* 41, no. 4 (1958): 456; William Sam Byassee, 'Collateral Estoppel without Mutuality: Accepting the Bernhard Doctrine', *Vanderbilt Law Review* 35, no. 6 (1982): 1431.

the Supreme Court held that there is a difference between the effect of a judgment as a bar against a second procedure upon the same claim and its effect as an estoppel in a second proceeding between the same parties upon a different cause of action. In the first case, the final judgment constitutes an absolute bar against a subsequent action. The judgment is final not only regarding the claim and the questions discussed but also to any other admissible issue which might have been litigated. On the contrary, where the second procedure is about a different cause of action, the prior proceeding is final only as to those issues actually litigated and determined in that verdict. Therefore, the relevant question in this case is what issues were actually litigated and determined by the prior judgment, not what issues might have been discussed. Only upon the issues actually litigated and determined the judgment is conclusive in another action.[427]

Regarding the underlying policies of issue preclusion and claim preclusion, the Court has stated that once a matter has been fully and fairly litigated, precluding further discussions protects adversaries from the expense and vexation of further litigation, conserves judicial resources, and fosters reliance on the adjudication system by minimising the possibility of inconsistent decisions.[428] From the reasoning of the Court it is possible to identify three different policies.[429] Firstly, judicial economy: preclusion by prior adjudication conserves the resources of the society and promotes an effective adjudication system by minimising repetitious litigation.[430] Secondly, *res judicata* and issue preclusion give finality in the resolution of those matters determined by the adjudication system, thereby protecting litigants from the burden and vexation of multiple litigation.[431] Since for any rational adjudication system it is important to maintain internal and external coherence, manifestly inconsistent determinations should be prevented.[432]

---

[427] Supreme Court of the United States, Cromwell v. County of Sac, 352-353 [1877]. See also Montana v. United States, 153 [1979]; Allen v. McCurry, 94 [1980]; New Hampshire v. Maine, 748-749 [2001].
[428] Supreme Court of the United States, Montana v. United States, 153-154 [1979]. See also Allen v. McCurry, 94 [1980]; United States v. Mendoza, 158 [1984].
[429] Christopher Murray, 'Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule', *Southern California Law Review* 46, no. 3 (1973): 930.
[430] Douglas W. MacDougal, 'Collateral Estoppel: Its Application and Misapplication', *Washington and Lee Law Review* 29, no. 1 (1972): 110; Perschbacher, 'Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings', 448–49.
[431] Murray, 'Collateral Estoppel in Criminal Prosecutions', 931; Adam Siegler, 'Alternative Grounds in Collateral Estoppel', *Loyola of Los Angeles Law Review* 17, no. 4 (1984): 1085.
[432] Murray, 'Collateral Estoppel in Criminal Prosecutions', 950; Blumberg, 'Implications of the 1984 Insider Trading Sanction Act', 932.

The original doctrine of issue preclusion, which was formulated in the context of civil litigation,[433] only prevented relitigation of issues that were actually litigated and essential to an earlier decision on a different cause of action binding the same parties.[434] Over the decades, however, a broader doctrine of issue preclusion has been developed.[435] For instance, it is now accepted that issue preclusion applies to both legal and factual issues.[436] Moreover, the Supreme Court has ruled that issue preclusion also applies to decisions of nonjudicial bodies, as long as they have operated in their adjudicative capacity.[437]

Additionally, the courts have abandoned the requirement of mutuality.[438] Under the requirement of mutuality, neither party can use a prior judgment as an estoppel against the other unless both parties are bound by the judgment.[439] In *Blonder-Tongue v. University of Illinois Foundation*, the Supreme Court rejected a flat mutuality requirement in a case of defensive issue preclusion.[440] Defensive issue preclusion occurs when a plaintiff is barred from relitigating an issue decided against him in a prior action.[441] In rejecting the mutuality requirement, the Court held that the operative criterion to decide the application of issue preclusion is "whether the party against whom the plea is asserted had a full and fair opportunity to litigate the issue in a prior adjudication".[442] Consequently, issue preclusion will not preclude a plaintiff from

---

[433] Cynthia L. Randall, 'Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence', *University of Pennsylvania Law Review* 141, no. 1 (1992): 284 (note 6); Dressler and Thomas III, *Criminal Procedure: Principles, Policies and Perspectives*, 1502.
[434] Supreme Court of the United States, Cromwell v. County of Sac, 353 [1877].
[435] Perschbacher, 'Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings', 424.
[436] Supreme Court of the United States, United States v. Stauffer Chemical Co., 170-171 [1984]; United States v. Mendoza, 158 [1984].
[437] Supreme Court of the United States, United States v. Utah Construction. Co., 421-422 [1966]; Perschbacher, 'Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings', 432–33; Merry Evans, 'Collateral Estoppel and the Administrative Process', *Missouri Law Review* 53, no. 4 (1988): 1988.
[438] Siegler, 'Alternative Grounds in Collateral Estoppel', 1085.
[439] Supreme Court of the United States, Parklane Hosiery Co. v. Shore, 326-327 [1979]. Similarly, Cunningham, 'Collateral Estoppel', 522.
[440] Supreme Court of the United States, Blonder Tongue v. University of Illinois Foundation, 349-350 [1971]. The Supreme Court joined the growing number of state jurisdictions that had already abandoned the mutuality requirement. Byassee, 'Collateral Estoppel without Mutuality', 1442.
[441] Supreme Court of the United States, Parklane Hosiery Co. v. Shore, 326 (note 4) [1979]; Blumberg, 'Implications of the 1984 Insider Trading Sanction Act', 129.
[442] Supreme Court of the United States, Blonder Tongue v. University of Illinois Foundation, 333 [1971]; Murray, 'Collateral Estoppel in Criminal Prosecutions', 929–30.

relitigating an issue if he can demonstrate that the first action failed to allow him a "fair opportunity procedurally, substantively, and evidentially to pursue his claim".[443]

Eight years later, in *Parklane Hosiery Co. v. Shore*, the Supreme Court extended the rejection of mutuality to offensive issue preclusion.[444] Offensive issue preclusion occurs when a defendant is barred from relitigating an issue decided against him in a previous action.[445] The Supreme Court recognised, however, that offensive issue preclusion does not promote judicial economy in the same manner as defensive issue preclusion. The Court also acknowledged that offensive issue preclusion may be unfair to the defendant in various ways.[446] For these reasons, the Supreme Court considered it preferable to grant trial courts broad discretion to determine when offensive issue preclusion should be applied, stating that the general rule should be that "in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant, a trial judge in the exercise of his discretion should not allow the use of offensive collateral estoppel".[447]

1.7.2. Issue Preclusion in Criminal Proceedings: Utilisation of a Judgment of Acquittal in Subsequent Criminal Proceedings.

A judgment of acquittal in a criminal proceeding precludes the government from relitigating in a subsequent criminal proceeding any issue that was actually litigated and necessarily determined in that judgment of acquittal.[448] The essence of issue preclusion in this context is that the second prosecution must be dismissed if the second jury could not return a verdict of guilty without an adverse finding on the issue

---

[443] Supreme Court of the United States, Blonder Tongue v. University of Illinois Foundation, 328-329 [1971].
[444] Linda J. Soldo, 'Parklane Hoisery: Offensive Use of Nonmutual Collateral Estoppel in Federal Courts', *Catholic University Law Review* 29, no. 2 (1980): 511.
[445] Supreme Court of the United States, Parklane Hosiery Co. v. Shore, 326 (note 4) [1979]; Douglas J. Gunn, 'The Offensive Use of Collateral Estoppel in Mass Tort Cases', *Mississippi Law Journal* 52, no. 4 (1982): 767; Blumberg, 'Implications of the 1984 Insider Trading Sanction Act', 129.
[446] Supreme Court of the United States, Parklane Hosiery Co. v. Shore, 329-331 [1979].
[447] Supreme Court of the United States, Parklane Hosiery Co. v. Shore, 331 [1979]; David Wilmoth, 'Civil Procedure: Collateral Estoppel: Collateral Estoppel Applied Offensively Where Plaintiffs Were Not Parties or Privies in Prior Action. (Parklane Hosiery Co. v. Shore).', *Marquette Law Review* 63, no. 1 (1979): 118–19; Soldo, 'Parklane Hoisery: Offensive Use of Nonmutual Collateral Estoppel in Federal Courts', 521–22.
[448] Shreve, 'Expanded Application of Collateral Estoppel Defense in Criminal Prosecutions (United States Ex Rel. Rogers v. LaVallee)', 339; Joseph J. DeMott, 'Rethinking Ashe v. Swenson from an Originalist Perspective', *Stanford Law Review* 71, no. 2 (2019): 418.

which was determined in favour of the defendant in the first proceeding.[449] The courts have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually litigated and determined by the previous judgment of acquittal.[450]

Consequently, a judgment of acquittal bars not only a subsequent prosecution for the same offence, but also the relitigation of issues resolved in that judgment.[451] Unlike a defence of double jeopardy, issue preclusion does not require that the second prosecution concerns the same offence.[452]

Regarding the application of offensive issue preclusion in criminal proceedings, the Supreme Court has not explicitly addressed the question of whether the government can invoke offensive issue preclusion in a criminal proceeding to prevent the defendant from relitigating an issue that was decided in favour of the government in a previous criminal trial.[453] Lower courts are divided on this matter.[454]

The evolution of the case law on issue preclusion in criminal proceedings will be studied in the following.

1.7.2.1. The Early Cases: *United States v. Adams* and *Sealfon v. United States*.

The Supreme Court made the doctrine of issue preclusion applicable to criminal cases in *United States v. Oppenheimer*, decided in 1916.[455]

Fourteen years later, the Supreme Court delivered its decision in *United States v. Adams*. In this case, the Court dismissed the motion of the defendant on issue

---

[449] Perkins, 'Collateral Estoppel in Criminal Cases Current Problems in Criminal Law (I)', 543; Simon, 'Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back', 765.

[450] Supreme Court of the United States, Dowling v. United States, 350 [1990]; Schiro v. Farley, 233 [1994];

[451] Supreme Court of the United States, Brown v. Ohio, 166-167 (note 6) [1977]; Clermont, 'Res Judicata as Requisite for Justice', 1115.

[452] Colussi, 'An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions', 680.

[453] Richard B. Kennelly Jr., 'Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases', *Virginia Law Review* 80, no. 6 (1994): 1380, https://doi.org/10.2307/1073610; Simon, 'Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back', 756.

[454] Kennelly Jr., 'Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases', 1382; Simon, 'Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back', 756-757 (note 15).

[455] Supreme Court of the United States, United States v. Oppenheimer, 87 [1916]. See also Ashe v. Swenson, 443 [1970]; Yeager v. United States, 9 (note 4) [2009]; Anne Bowen Poulin, 'Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal', *University of Cincinnati Law Review* 58, no. 1 (1989): 3; Daniel K. Mayers and Fletcher L. Yarbrough, 'Bis Vexari: New Trials and Successive Prosecutions', *Harvard Law Review* 74, no. 1 (1960): 30–31.

preclusion grounds because the prior acquittal had not determined the issue whose relitigation the defendant pretended to foreclose.[456] Even though the motion of the defendant was dismissed, the Court implicitly reaffirmed the application of issue preclusion to criminal proceedings.

The first time the Supreme Court applied defensive issue preclusion in criminal proceedings was in *Sealfon v. United States*, decided in 1948. In this case, the defendant was tried for and acquitted of conspiracy to defraud the government by presenting false invoices and making false representations. The defendant was subsequently tried for the commission of the substantive offence. This time the defendant was convicted and sentenced to five years' imprisonment and fined $12,000.[457] The defendant then moved to quash his conviction on double jeopardy grounds.[458] The Supreme Court held that although the second prosecution was not barred by the double jeopardy clause, it could still be barred by the doctrine of issue preclusion.[459] To determine whether the second prosecution was estopped by the previous acquittal, the Court stated that the relevant question was whether the judgment of acquittal had determined in favour of the defendant the facts to convict him of the substantive offence.[460] After analysing the record of the case, the Supreme Court concluded that this had been the case. Therefore, the second trial was collaterally estopped by the prior acquittal.[461]

1.7.2.2. The Recognition of the Constitutional Status of the Doctrine of Issue Preclusion: *Ashe v. Swenson*.

Before *Ashe v. Swenson*, cases on issue preclusion in criminal proceedings had not been decided on constitutional grounds.[462] The case was different in *Ashe v. Swenson*,

---

456 Supreme Court of the United States, United States v. Adams, 204-205 [1930].
457 Supreme Court of the United States, Sealfon v. United States, 576-578 [1948].
458 Supreme Court of the United States, Sealfon v. United States, 578 [1948].
459 Supreme Court of the United States, Sealfon v. United States, 578 [1948].
460 Supreme Court of the United States, Sealfon v. United States, 578-579 [1948].
461 Supreme Court of the United States, Sealfon v. United States, 580 [1948].
462 Poulin, 'Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal', 5. Indeed, in Hoag v. New Jersey the Supreme Court had affirmed that it had doubts whether issue preclusion could be regarded as a constitutional requirement. See Supreme Court of the United States, Hoag v. New Jersey, 471 [1958].

where the Supreme Court held that issue preclusion is embodied as a constitutional requirement in the double jeopardy clause.[463]

In *Ashe*, six participants in a poker game were robbed by three or four masked gunmen. The gunmen stole a car and fled.[464] Four men, one of whom was the petitioner, were arrested and charged with seven separate offences: the armed robbery of each of the six poker players and the theft of the car. The petitioner was tried on the charge of robbing one of the participants in the poker game, named Ronald Knight.[465] The trial judge instructed the jury that if a robbery was proved and if the petitioner was one of the robbers, he was guilty even if he had not himself robbed Knight. The verdict was not guilty due to insufficient evidence.[466] Afterwards, the defendant was tried for the robbery of another participant in the poker game. The petitioner filed a motion to dismiss on double jeopardy grounds, but it was rejected. The defendant was convicted and sentenced to thirty-five years' imprisonment.[467]

In the first place, the Supreme Court explained that issue preclusion means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit".[468] Although it may be difficult to apply issue preclusion in criminal proceedings because a general verdict of acquittal does not clearly specify which issues were determined in favour of the defendant,[469] the Supreme Court rejected the restrictive approach employed by some courts,[470] holding that issue preclusion in criminal proceedings is not to be applied with the hypertechnical approach of the nineteenth century, but with realism and rationality.[471] Therefore, where a previous judgment of acquittal was based upon a general verdict, issue preclusion requires the court to examine the record of the proceeding, taking into account all the relevant matters, "and conclude whether a

[463] Robert Ruyle Edmiston, 'Ashe v. Swenson: A New Look at Double Jeopardy', *Tulsa Law Journal* 7, no. 1 (1971): 68; Bruce J. Downey, 'Criminal Procedure -- Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions', *North Carolina Law Review* 49, no. 2 (1971): 352.
[464] Supreme Court of the United States, Ashe v. Swenson, 437 [1970].
[465] Supreme Court of the United States, Ashe v. Swenson, 438 [1970].
[466] Supreme Court of the United States, Ashe v. Swenson, 439 [1970].
[467] Supreme Court of the United States, Ashe v. Swenson, 439-440 [1970].
[468] Supreme Court of the United States, Ashe v. Swenson, 443 [1970]; Downey, 'Criminal Procedure -- Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions', 351–52.
[469] Poulin, 'Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal', 7; Randall, 'Acquittals in Jeopardy', 285. The Supreme Court had previously recognised this difficulty in Emich Motors Corp. v. General Motors Corp., 569 [1951].
[470] Mark Brodin, 'Case Note: Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts', *Columbia Law Review* 71, no. 2 (1971): 322.
[471] Supreme Court of the United States, Ashe v. Swenson, 444 [1970].

rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration”.[472]

After analysing the record of the first proceeding, the Supreme Court noted that the single “issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not”.[473] Since the verdict determined the relevant issue in favour of the defendant, the Supreme Court concluded that the doctrine of issue preclusion precluded the government from relitigating the issue of the identity of Ashe as one of the robbers in the second trial, in the hope that a different jury might find that evidence more convincing.[474]

Ashe was a quintessential case of issue preclusion because the sole issue litigated in the first proceeding was the identity of the defendant as one of the robbers. Therefore, the Court could easily conclude that the acquittal had determined the above issue in favour of the defendant.[475]

1.7.2.3. The Case Law after *Ashe v. Swenson*: Extensions and Restrictions.

After *Ashe v. Swenson*, the Supreme Court has continued modelling the scope of application of the doctrine of issue preclusion in criminal proceedings.

For instance, the Supreme Court somewhat extended the scope of application of the doctrine in three cases: *Simpson v. Florida; Harris v. Washington; and Turner v. Arkansas*.

In *Simpson v. Florida*, the Supreme Court held that issue preclusion applies even if the acquittal was preceded by a conviction.[476] In this case, a store manager and a customer were robbed by two armed men. The defendant was found guilty and convicted of armed robbery of the store manager, but the conviction was reversed on appeal. The defendant was retried on the same charge and this time he was acquitted. Subsequently, the defendant was charged with robbing the customer. His motion to dismiss on double jeopardy grounds was overruled and the jury found him guilty of

---

[472] Supreme Court of the United States, Ashe v. Swenson, 444 [1970], citing Mayers and Yarbrough, ‘Bis Vexari: New Trials and Successive Prosecutions’, 38–39. See also Schiro v. Farley, 236 (1994); Yeager v. United States, 120 [2009].
[473] Supreme Court of the United States, Ashe v. Swenson, 445 [1970].
[474] Supreme Court of the United States, Ashe v. Swenson, 445-446 [1970]; Brodin, ‘Case Note’, 323.
[475] Poulin, ‘Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal’, 7.
[476] Poulin, 8 (note 35).

armed robbery.[477] The Court of Appeal declined to examine the record of the second trial, stating that while the acquittal at the second trial entitled the defendant to invoke issue preclusion, his conviction at the first trial gave rise to a double collateral estoppel. The Supreme Court rejected the interpretation of the Court of Appeal that issue preclusion did not apply to this case because the defendant had been convicted in the first trial. Thus, the Supreme Court remanded the case to the Court of Appeal to examine the record of the second trial and decide the motion of the defendant.[478]

Afterwards, in *Harris v. Washington* the Supreme Court held that the doctrine of issue preclusion applies irrespective of whether the jury in the first proceeding considered all the relevant evidence and irrespective of the good faith of the government in bringing successive prosecutions.[479]

One year later, the Supreme Court delivered its decision in *Turner v. Arkansas*. The defendant had been acquitted of murder in the course of a robbery. When the defendant was next charged with robbery of the same victim, he filed a motion to dismiss on double jeopardy grounds, which was rejected.[480] Because murder and robbery are not the same offence, the Supreme Court noted that the present case was one of issue preclusion. Therefore, the relevant question was what issues had been resolved by the acquittal at the murder trial.[481] After examining the record of the proceeding, the Supreme Court noted that if the jury had found the defendant present at the crime scene, it would have convicted him for murder. Therefore, the only logical conclusion was that the jury found the defendant not present at the scene of the murder and robbery, a finding that precluded the government from prosecuting the defendant in a second proceeding for robbery.[482]

In other cases, however, the Supreme Court has restricted the scope of application of issue preclusion.[483] For instance, in *Standefer v. United States*, the defendant was indicted for aiding and abetting a public officer in accepting unlawful compensation. Prior to the indictment, the public officer was acquitted of those violations which the petitioner was accused of aiding and abetting. Because of the

---

[477] Supreme Court of the United States, Simpson v. Florida, 384-385 [1971].
[478] Supreme Court of the United States, Simpson v. Florida, 386-387 [1971].
[479] Supreme Court of the United States, Harris v. Washington, 55 [1971]; McAninch, 'Unfolding the Law of Double Jeopardy', 439–40.
[480] Supreme Court of the United States, Turner v. Arkansas, 366-367 [1972].
[481] Supreme Court of the United States, Turner v. Arkansas, 368-369 [1972].
[482] Supreme Court of the United States, Turner v. Arkansas, 369 [1972]; DeMott, 'Rethinking Ashe v. Swenson from an Originalist Perspective', 418.
[483] Poulin, 'Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal', 7–8.

above, the defendant filed a motion to dismiss on issue preclusion grounds, which was denied. The case then proceeded to trial and the defendant was convicted on all counts. The petitioner appealed his conviction claiming, among other things, that he could not be convicted of aiding and abetting a principal when that principal had been acquitted of the charged offense. The Court of Appeal rejected that contention.[484]

The Supreme Court stated that even though nonmutual issue preclusion had been accepted in civil cases,[485] criminal cases have certain characteristics that should be considered. First, due to several aspects of criminal law, the government is often without a full and fair opportunity to litigate all the issues. For instance, the discovery rights of the prosecution are limited; it is prohibited from being granted a directed verdict no matter how clear the evidence in support of guilt; it cannot secure a new trial on the ground that an acquittal was contrary to the weight of the evidence; and it cannot secure appellate review where a defendant has been acquitted.[486] Second, the application of nonmutual issue preclusion in criminal cases can also be problematic because of the existence of unique rules of evidence. For example, evidence inadmissible against one defendant can be admissible against another.[487] Finally, criminal cases involve the important interest in the enforcement of criminal law. While civil proceedings are disputes over private rights between private litigants,[488] the purpose of criminal proceedings is not to provide a forum for the ascertainment of private rights, but rather vindicating the public interest in the enforcement of criminal law.[489] The Supreme Court upheld the judgment of the Court of Appeal.[490]

To apply issue preclusion, it is fundamental that the acquittal has resolved the issue whose relitigation the defendant seeks to foreclose in the following proceeding.[491] In *Haring v. Prosise*, the defendant pleaded guilty to a charge of manufacturing a controlled substance. At the hearing at which the respondent pleaded guilty, one police officer gave a brief account of the search of the apartment of the defendant that led to the discovery of the evidence. Afterwards, the defendant brought a suit seeking damages against the police officers that had participated in the search of his

[484] Supreme Court of the United States, Standefer v. United States, 10-14 [1980].
[485] Supreme Court of the United States, Standefer v. United States, 21 [1980].
[486] Supreme Court of the United States, Standefer v. United States, 22 [1980].
[487] Supreme Court of the United States, Standefer v. United States, 23-24 [1980].
[488] Supreme Court of the United States, Standefer v. United States, 24 [1980].
[489] Supreme Court of the United States, Standefer v. United States, 25 [1980].
[490] Supreme Court of the United States, Standefer v. United States, 26 [1980].
[491] Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 128.

apartment, alleging that they have violated his Fourth Amendment rights.[492] The District Court held that the civil action of the defendant was barred by his previous criminal conviction.[493] The Supreme Court explained that issue preclusion should not apply in this case because the legality of the search and seizure of the apartment of the plaintiff had not litigated in the criminal proceeding. The only issue determined by the criminal verdict had been whether the defendant unlawfully engaged in the manufacture of a controlled substance.[494] Accordingly, the Supreme Court concluded that the plaintiff was not precluded from litigating the validity of the search and seizure conducted by the police officers in his damages action.[495]

Seven years later, the Supreme Court delivered its decision in D*owling v. United States*. In this case, the petitioner was charged with bank robbery and armed robbery. During the trial, the government called a woman named Vena Henry, who testified that, two weeks after the bank robbery, a masked and armed man had entered her home. Henry testified that a struggle ensued and that she unmasked the intruder, whom she identified as Dowling. The defendant argued that the testimony of Henry was inadmissible because he had been acquitted in the Henry case. The government explained that it believed that the testimony of Henry strengthened the identification of Dowling as the bank robber. The District Court permitted the introduction of the testimony and twice instructed the jury about Dowling's acquittal and the limited purpose for which the testimony was being admitted. The defendant was convicted of bank robbery and sentenced to seventy years' imprisonment.[496] The Supreme Court granted certiorari to consider the argument of the defendant that Henry's testimony was inadmissible under the double jeopardy clause.[497]

The Supreme Court recalled that when an acquittal is based on a general verdict, to determine the issues resolved in that judgment the courts must examine the record of the proceeding.[498] After analysing the record of the Henry case, the Supreme Court noted that the defendant had not contested his presence in the house, but rather he had claimed that a robbery had not taken place because he had merely come to

[492] Supreme Court of the United States, Haring v. Prosise, 308-309 [1983].
[493] Supreme Court of the United States, Haring v. Prosise, 309 [1983].
[494] Supreme Court of the United States, Haring v. Prosise, 316 [1983].
[495] Supreme Court of the United States, Haring v. Prosise, 317 [1983].
[496] Supreme Court of the United States, Dowling v. United States, 344-346 [1990].
[497] Supreme Court of the United States, Dowling v. United States, 346-347 [1990].
[498] In Yeager v. United States, 122 [2009], the Supreme Court explained that to identify what issues a jury necessarily determined at trial, courts should scrutinize the decisions of the jury, not its failures to decide.

retrieve money from a person in the house.[499] Therefore, the issue of the identity of the defendant as the robber was not determined in his favour in the previous proceeding. Accordingly, the Supreme Court concluded that the defendant had failed to demonstrate that his acquittal in his first trial represented a jury determination that he was not one of the men who entered Ms. Henry's home.[500]

In *Currier v. Virginia*, decided in 2018, the defendant was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted person. Because the government could introduce evidence of his prior convictions to prove the last charge, and worried that the evidence might prejudice the consideration of the jury of the other charges, the defendant and the government asked the court to try the burglary and larceny charges first. The third charge could follow in a second trial. The trial court granted the request and the promised two trials followed.[501] At the first trial the jury acquitted. Then, before the second trial could follow the defendant filed a motion to dismiss on double jeopardy grounds. Relying on *Ashe v. Swenson*, the defendant suggested the court to forbid the government from relitigating in the second trial any issue resolved in his favour at the first. The trial court overruled the motion and at the second trial the defendant was convicted.[502]

The Supreme Court granted certiorari and addressed the question of whether the second trial was precluded by the doctrine of issue preclusion. The Court noted that a critical characteristic of the present case was that the defendant had consented to have separate trials.[503] Therefore, the case in question was similar to *Jeffers v. United States*. On that occasion, the Court held that where a single trial on multiple charges had prevented any violation of the double jeopardy clause, there cannot be a violation of the same protection if the defendant chose to have the offences tried separately.[504] Therefore, the Supreme Court affirmed the judgment of the Court of Appeal.[505]

1.7.3. Issue Preclusion between Criminal and Civil Proceedings: Utilisation of a Judgment of Acquittal in Subsequent Civil Proceedings.

---

[499] Supreme Court of the United States, Dowling v. United States, 350-351 [1990].
[500] Supreme Court of the United States, Dowling v. United States, 352 [1990]; Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 128.
[501] Supreme Court of the United States, Currier v. Virginia, 2 [2018].
[502] Supreme Court of the United States, Currier v. Virginia, 3 [2018].
[503] Supreme Court of the United States, Currier v. Virginia, 5 [2018].
[504] Supreme Court of the United States, Currier v. Virginia, 5-6 [2018].
[505] Supreme Court of the United States, Currier v. Virginia, 16 [2018].

The Supreme Court has also addressed the question of whether in a civil proceeding a party can invoke a prior criminal verdict to preclude the other party from relitigating an issue litigated and determined in that criminal judgment. In principle, the Supreme Court has accepted this possibility, provided that the specific requirements of issue preclusion are met.[506]

The first judgment on this matter was *Coffey v. United States*, decided in 1886. In this case, the defendant was acquitted on charges of removing and concealing distilled spirits with the intent to defraud. Afterwards, the government brought a civil forfeiture action of the distilling equipment. The Supreme Court held that the civil forfeiture proceeding was barred by the previous acquittal of the defendant because the acts covered by the judgment of acquittal embraced all the relevant acts of the forfeiture action.[507]

In *Allen v. McCurry*, decided in 1980, the defendant was charged with possession of heroin and assault with intent to kill. At a hearing before the trial judge, the defendant filed a motion to suppress evidence that had been seized by the police, which was dismissed. The defendant was convicted of both offences. Subsequently, the defendant filed a suit seeking damages against the police officers who had entered his home and seized the evidence in question. The District Court rejected the suit, holding that issue preclusion prevented the plaintiff from relitigating the legality of the search and seizure at issue.[508] The Court of Appeal reversed the judgment and remanded the case for trial, arguing that because the suit was the only route of the plaintiff to a federal forum for his constitutional claim the doctrine of issue preclusion should not preclude the claim of the defendant.[509] The Supreme Court reversed the judgment of the Court of Appeal and remanded the case for further proceedings,[510] stating that it was an error to hold that the inability of the defendant to obtain constitutional relief in another way rendered the doctrine of issue preclusion inapplicable to his suit.[511]

Even though the Supreme Court has accepted the possibility to invoke a prior criminal verdict in a following civil proceeding, the different standard of proof in criminal

---

[506] Supreme Court of the United States, Emich Motors Corp. v. General Motors Corp., 568 [1951]; Frank v. Mangum, 334 [1915]; Alexander et al., 'Collateral Estoppel', 384.
[507] Supreme Court of the United States, Coffey v. United States, 442-445 [1886].
[508] Supreme Court of the United States, Allen v. McCurry, 91-93 [1980].
[509] Supreme Court of the United States, Allen v. McCurry, 93-94 [1980]
[510] Supreme Court of the United States, Allen v. McCurry, 105 [1980]
[511] Supreme Court of the United States, Allen v. McCurry, 102-105 [1980]

and civil proceedings has usually been the main obstacle to implement issue preclusion between those two types of proceedings.[512]

The Supreme Court has defined the standard of proof as "the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion".[513] The various standards of proof reflect the decision of the legal system about the allocation of the risk of error between litigants, as well as the relative importance of the issues under discussion.[514] From the lowest to the highest degree of certainty required, the three main standards of proof in common law are: (i) preponderance of the evidence; (ii) clear and convincing evidence; and (iii) beyond a reasonable doubt.[515]

Preponderance of the evidence, which translates into "more-likely-than-not", is the standard of proof for most issues in civil litigation.[516] The standard results in a roughly equal allocation of the risk of error between litigants.[517] The case of the plaintiff solely needs to be more probable than its negation.[518] "This suggests that the best interpretation is that a degree of belief of just over 0.5 is required".[519]

Conversely, to convict a person in criminal proceedings, the most rigorous standard of proof is required:[520] beyond a reasonable doubt.[521] Because in criminal

---

[512] McAninch, 'Unfolding the Law of Double Jeopardy', 442.

[513] Supreme Court of the United States, Microsoft Corp. v. i4i Ltd. Partnership, 100 (note 4) [2011].

[514] Supreme Court of the United States, Colorado v. New Mexico, 315-316 [1984]; Herman & MacLean v. Huddleston, 389-390 [1983]; Addington v. Texas, 423 [1979]; David L. Schwartz and Christopher B. Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', *Harvard Journal of Law & Technology* 26, no. 2 (2013): 435; Paulo de Sousa Mendes, 'El Estándar de Prueba y Las Probabilidades: Una Propuesta de Interpretación Inspirada En El Derecho Comparado', in *Fundamentos de Derecho Probatorio En Materia Penal*, ed. Kai Ambos and Ezequiel Malarino (Tirant lo Blanch, 2019), 133.

[515] Supreme Court of the United States, Addington v. Texas, 423-424 [1979]; Kevin M. Clermont, 'Procedure's Magical Number Three Psychological Bases for Standards of Decision', *Cornell Law Review* 72, no. 6 (1987): 1119–20; Schwartz and Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', 435.

[516] Supreme Court of the United States, Colorado v. New Mexico, 316 [1984]; Schwartz and Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', 435.

[517] Supreme Court of the United States, Grogan v. Garner, 286 [1991]; Addington v. Texas, 423 [1979]; Fleming James, 'Burdens of Proof', *Virginia Law Review* 47, no. 1 (1961): 53; Clermont, 'Procedure's Magical Number Three Psychological Bases for Standards of Decision', 1119; Mike Redmayne, 'Standards of Proof in Civil Litigation', *The Modern Law Review* 62, no. 2 (1999): 168; Schwartz and Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', 435–36.

[518] de Sousa Mendes, 'El Estándar de Prueba y Las Probabilidades: Una Propuesta de Interpretación Inspirada En El Derecho Comparado', 130–32.

[519] Redmayne, 'Standards of Proof in Civil Litigation', 168.

[520] Kevin Clermont states that beyond a reasonable doubt means proof to a virtual certainty. See Clermont, 'Procedure's Magical Number Three Psychological Bases for Standards of Decision', 1120.

[521] Supreme Court of the United States, In re Winship, 358 [1970]; Eithan Y. Kidron, 'Understanding Administrative Sanctioning as Corrective Justice', *University of Michigan Journal of Law Reform* 51, no. 2 (2018): 335.

cases the interests of the defendant are of great magnitude, they have historically been protected by standards of proof designed to exclude as nearly as possible erroneous convictions.[522] The reasonable doubt standard allocates almost all risk upon the prosecution rather than the defendant, strongly preferring erroneous acquittals to erroneous convictions.[523] The Supreme Court recognised the constitutional dimension of standard of beyond a reasonable doubt in *Winship*, decided in 1970. On that occasion, the Court stated that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged".[524] The reasonable doubt standard has been characterised as a fundamental element of the criminal justice system.[525]

Finally, the standard of clear and convincing evidence, which could be translated as "much-more-likely-than-not", is an intermediate standard of proof between preponderance of the evidence and proof beyond a reasonable doubt.[526] The clear and convincing evidence standard is typically employed in civil proceedings in which there are important individual interests involved, which are considered to be more substantial than mere loss of money.[527]

Where Congress has not prescribed the required standard of proof in a civil proceeding, it is an issue to be resolved by the judiciary.[528] However, where Congress has prescribed a standard of proof the Supreme Court has deferred to the power of Congress to prescribe rules of evidence and standards of proof absent countervailing constitutional constraints.[529] For instance, in *Cooper v. Oklahoma,* the Supreme Court examined whether a state could require a defendant to prove his incompetence to

---

522 Supreme Court of the United States, Addington v. Texas, 423 [1979].
523 Schwartz and Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', 436.
524 Supreme Court of the United States, In re Winship, 364 [1970]; Thomas Mulrine, 'Reasonable Doubt: How in the World Is It Defined?', *American University International Law Review* 12, no. 1 (1997): 199; Melissa Corwin, 'Defining Proof Beyond a Reasonable Doubt for the Criminal Jury: The Third Circuit Accepts an Invitation to Tolerate Constitutionally Inadequate Phraseology', *Villanova Law Review* 46, no. 4 (2001): 830; Larry Laudan, *Truth, Error, and Criminal Law* (Cambridge University Press, 2006), 34.
525 Supreme Court of the United States, In re Winship, 363 [1970]; Corwin, 'Defining Proof Beyond a Reasonable Doubt for the Criminal Jury: The Third Circuit Accepts an Invitation to Tolerate Constitutionally Inadequate Phraseology', 829.
526 James, 'Burdens of Proof', 54; Clermont, 'Procedure's Magical Number Three Psychological Bases for Standards of Decision', 1119; Schwartz and Seaman, 'Standards of Proof in Civil Litigation: An Experiment from Patent Law', 436–37.
527 Supreme Court of the United States, Addington v. Texas, 424 [1979]. For instance, the Supreme Court has applied the clear and convincing standard in deportation (Woodby v. Immigration Service, 285-286 [1966]) and denaturalisation proceedings (Chaunt v. United States, 353 [1960]).
528 Supreme Court of the United States, Steadman v. SEC, 95 [1981].
529 Supreme Court of the United States, Steadman v. SEC, 95-96 [1981]; Vance v. Terrazas, 265 (1980).

stand trial by clear and convincing evidence.[530] Although in *Medina v. California* the Court had upheld one state statute that required a defendant to prove his incompetence by preponderance of the evidence,[531] in *Cooper* the Court ruled that the heightened clear and convincing evidence standard violated the right of the defendant not to be tried while incompetent because it allowed trying a defendant who was more likely than not incompetent, thereby increasing the potential for an erroneous decision.[532]

As can be seen, the standard of proof applicable in criminal cases is beyond a reasonable doubt, the standard of proof in civil proceedings is less rigorous, such as preponderance of the evidence or clear and convincing evidence.[533] Therefore, an acquittal in a criminal proceeding does not necessarily equate to an affirmative finding of innocence. An acquittal may have merely resulted because the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.[534] As a consequence, an acquittal will not always bar the government from seeking to establish the same facts in a subsequent civil proceeding under a less rigorous standard of proof.[535] Indeed, even though there was not enough evidence to convict the defendant in a criminal proceeding, there may be sufficient evidence to convicted him in a civil proceeding.[536]

The case of O. J. Simpson illustrates this point. In 1994 Simpson was charged and acquitted of murdering his former wife and another person. Thereafter the families of the victims filed suit seeking damages against Simpson for the same facts. The civil court ordered Simpson to pay the plaintiffs $33.5 million in damages.[537] Even though these two verdicts may seem inconsistent, they are not since the juries resolved different questions. On the one hand, the issue before the criminal jury was whether

---

[530] Supreme Court of the United State, Cooper v. Oklahoma, 350 [1996]; Alaya Meyers, 'Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence', *Journal of Criminal Law and Criminology* 87, no. 3 (1997): 1016.
[531] Supreme Court of the United States, Medina v. California, 452 [1992].
[532] Supreme Court of the United State, Cooper v. Oklahoma, 354-369 [1996]; Meyers, 'Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence', 1025.
[533] McAninch, 'Unfolding the Law of Double Jeopardy', 442.
[534] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 359 [1984]; One Lot Emerald Cut Stones v. United States, 235 [1972]; Helvering v. Mitchell, 397 [1938]; Lewis v. Frick, 302 [1914].
[535] Supreme Court of the United States, One Lot Emerald Cut Stones v. United States, 235 [1972]; Helvering v. Mitchell, 397 [1938]; Murphy v. United States, 631-632 [1926]; Stone v. United States, 188 [1897].
[536] Alexander et al., 'Collateral Estoppel', 386.
[537] Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, 53–54.

the defendant was proved guilty of the murderers beyond a reasonable doubt. On the other hand, the issue before the civil jury was whether it was more likely than not that the defendant had killed his former wife and another person. Taken together, the juries indicated that they believed the defendant probably did it but there was room for reasonable doubt.[538]

Based on the above considerations, the Supreme Court rejected to apply issue preclusion in *Helvering v. Mitchell*, *One Lot Emerald Cut Stones v. United States* and *United States v. One Assortment of 89 Firearms*. In all these cases, the government brought a civil action against the defendant after his criminal acquittal. The reasoning of the Court in these three cases was the same: since the acquittal was merely an adjudication that the proof was not sufficient to overcome the reasonable doubt standard, it did not constitute an adjudication in favour of the defendant on the standard of proof applicable in the subsequent civil proceeding.[539] Thus, the government was not precluded from trying to prove the relevant issue in the following civil proceeding under a less rigorous standard of proof.

1.8. Summary of the Case Law of the Supreme Court of the United States

The double jeopardy clause applies to all cases where a second criminal punishment is attempted to be inflicted for the same offence, protecting the defendant from both a second prosecution and a second punishment.

Concerning the "same offence" requirement, the Supreme Court has held that where the same act constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offences is whether each provision requires proof of a fact which the other does not.

The protection against multiple prosecutions bars a second prosecution for the same offence against the defendant after either an acquittal or a conviction. The prohibition of a second prosecution applies only when the first prosecution was in a court having jurisdiction over both the defendant and the subject matter.

[538] Fredrick E. Vars, 'Toward a General Theory of Standards of Proof', *Catholic University Law Review* 60, no. 1 (2011): 2.

[539] Supreme Court of the United States, United States v. One Assortment of 89 Firearms, 359 [1984]; One Lot Emerald Cut Stones v. United States, 235 [1972]; Helvering v. Mitchell, 397 [1938].

The prohibition of multiple punishments for the same offence in the context of a single prosecution aims to ensure that the courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislature. Thus, the question of whether cumulative sentences in a single trial are admissible is one of statutory construction. If Congress intended to impose multiple punishments, the imposition of such sentences will not violate the Constitution.

Regarding parallel criminal and civil sanctions, when the government seeks to impose both a criminal and a civil sanction on the same defendant for the same offence, the prohibition of multiple punishments is called into question. To apply the double jeopardy clause in this context, the civil sanction sought by the government must constitute criminal punishment. According to the Supreme Court, the question of whether a sanction is either civil or criminal is one of statutory construction, which should be determined applying a two-prong analysis: first, a court must resolve whether the sanction established was intended to be civil. If Congress intended to establish a civil sanction, the second step is to ascertain whether the sanction is so punitive either in purpose or effect as to negate that intention and transform the sanction into a criminal penalty. In making this latter determination, the Supreme Court considers the seven criteria announced in *Kennedy*: (i) whether the sanction involves an affirmative disability or restraint; (ii) whether it has historically been regarded as a punishment; (iii) whether it comes into play only on a finding of *scienter*; (iv) whether its operation will promote the traditional aims of punishment (retribution and deterrence); (v) whether the behaviour to which it applies is already a crime; (vi) whether an alternative purpose to which it may rationally be connected is assignable for it; and (vii) whether it appears excessive in relation to the alternative purpose assigned. These factors must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been intended a civil remedy into a criminal penalty.

In all its history, the Supreme Court has characterised a civil sanction as criminal punishment for the purposes of double jeopardy in only three cases: *La Franca*; *Halper*; and *Kurth Ranch*. However, in *Hudson v. United States* the Supreme Court overruled the reasoning utilised in *Halper* and *Kurth Ranch*. After *Hudson*, the Supreme Court has never again characterised a civil sanction as criminal punishment for the purposes of double jeopardy.

An additional safeguard of the defendant from the burdens of multiple prosecutions is the doctrine of issue preclusion, which bars reconsidering issues already litigated and determined in a previous judgment. The Supreme Court has recognised the constitutional dimension of the doctrine of issue preclusion in criminal law, stating that issue preclusion is embodied as a constitutional requirement in the double jeopardy clause.

2. Case Law of the Supreme Court of Canada

Section 11 of the Canadian Charter of Rights and Freedoms sets out several rights to anyone who is "charged with an offence". Section 11 (h) of the Charter, which aims to protect the defendant against double jeopardy,[540] states:

> "11. Any person charged with an offence has the right:
> h. if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again".

The Supreme Court of Canada (hereafter in this section: Supreme Court) has held that Section 11 (h) provides for both a protection against multiple prosecutions for the same offence and a protection against multiple punishments for the same offence.[541]

The prohibition of multiple prosecutions prevents the government from trying the defendant for the same offence after an acquittal or a conviction.[542] To apply the protection against multiple prosecutions, the defendant must have been finally acquitted or convicted, which means that the appellate procedures have been completed.[543] The Supreme Court has explained that the protection against multiple prosecutions is related to the moment at which an attempt is made to retry the accused.[544]

Concerning the protection against multiple punishments, it applies where a defendant has been sentenced even if no separate proceeding has taken place.[545] Therefore, the prohibition of multiple punishments is also applicable to cases of single trial. The prohibition of multiple punishments prevents not only the imposition of a second punishment for the same offence but also the retrospective changes of existing sanctions.[546] In *Canada v. Whaling*, the Supreme Court addressed the constitutionality of retrospective changes to the parole system. Firstly, the Court noted that

---

[540] Supreme Court of Canada, Canada v. Whaling, 407, § 33 [2014]; Colin Campbell, 'Application of the Charter to Civil Penalties in the Income Tax Act', *Canadian Tax Journal* 50, no. 1 (2002): 21.
[541] Supreme Court of Canada, Canada v. Whaling, 415-416, § 54 [2014].
[542] Supreme Court of Canada, R. v. Shubley, 15 [1990]; Canada v. Whaling, 417, § 56 [2014].
[543] Supreme Court of Canada, R. v. Morgentaler, 156 [1988].
[544] Supreme Court of Canada, Corp. Professionnelle des Médecins v. Thibault, 1046-1047 [1988].
[545] Supreme Court of Canada, Canada v. Whaling, 408, § 36 [2014].
[546] Supreme Court of Canada, Canada v. Whaling, 415-416, § 54 [2014]; Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 6 edition (Irwin Law, 2017), 338.

retrospective modifications of the imposed sanction may have the effect of increasing the punishment of the offender. If such modifications acquire a punitive character by being applied retrospectively, they could be barred by Section 11 (h).[547] However, not every retrospective change will necessarily constitute punishment for the purposes of Section 11 (h).[548] Only retrospective changes to the parole system that affect the expectation of liberty of a sentenced offender to such an extent that they amount to new punishment will trigger Charter protection.[549] "At one extreme, a retrospective change to the rules governing parole eligibility that has the effect of automatically lengthening the offender's period of incarceration constitutes additional punishment contrary to Section 11 (h) of the Charter. A change that so categorically thwarts the expectation of liberty of an offender who has already been sentenced qualifies as one of the clearest of cases of a retrospective change that constitutes double punishment in the context of Section 11 (h)".[550]

Both the protection against multiple prosecutions and the protection against multiple punishments require that the person has been charged with an offence and that both offences are the same. Both requirements will be separately analysed in the following.

2.1. Charged with an Offence

The first requirement to apply the protections of Section 11 is that the person has been charged with an offence.[551] Thus, Section 11 only applies when a person falls within the sense of this phrase.[552] Regarding its meaning, the Supreme Court has taken an approach that seeks to harmonise as much as possible all the protections of Section 11.[553]

---

547 Supreme Court of Canada, Canada v. Whaling, 417, § 56 [2014].

548 Supreme Court of Canada, Canada v. Whaling, 418, § 58 [2014].

549 Supreme Court of Canada, Canada v. Whaling, 419, § 59 [2014].

550 Supreme Court of Canada, Canada v. Whaling, 419, § 60 [2014].

551 Supreme Court of Canada, R. v. Rodgers, 596, § 58 [2006]. The Supreme Court has ruled that extradition proceedings do not engage the protections of Section 11, as a person in that context is not charged in Canada by any of the governments to which the Charter applies. See Supreme Court of Canada, Argentina v. Mellino, 547 [1987]; Canada v. Schmidt, 518-519 [1987].

552 Supreme Court of Canada, Guindon v. Canada, 30, § 44 [2015]; Martineau v. M.N.R., 746, § 23 [2004]; R. v. Shubley, 19 [1990].

553 Supreme Court of Canada, R. v. MacDougall, 53, § 11 [1998]; R. v. Potvin, 908 [1993].

The leading case of the Supreme Court on this matter is *R. v. Wigglesworth*, decided in 1987.[554] After recognising that it was difficult to formulate a precise test to determine whether a specific proceeding is criminal,[555] the Supreme Court ruled that a person should be considered to be charged with an offence if (i) subject to proceedings that are criminal in nature; or (ii) potentially subject to penal consequences.[556]

Regarding the first criterion, a proceeding is criminal in nature when it aims to promote public order and welfare within a public sphere of activity.[557] On the contrary, regulatory, protective and disciplinary proceedings are primarily intended to maintain discipline and professional standards or to regulate conducts within a limited sphere of activity.[558] In *Martineau v. M.N.R.*, decided in 2004, the Supreme Court set out three factors to consider in determining the criminal or civil nature of a proceeding: (i) the objectives of the legislation; (ii) the objectives of the sanction; and (iii) the process leading to the imposition of the sanction.[559] For instance, in *Goodwin v. British Columbia,* the Supreme Court characterised as civil in nature proceedings related to driving prohibitions for impaired driving under traffic law,[560] arguing that they concerned the regulation of drivers and the maintenance of highway safety.[561]

Since the same conduct can give rise to both criminal and civil consequences,[562] the Supreme Court has underlined that the nature of the proceeding does not depend on the nature of the act which gave rise to it or the nature of the sanction, but rather it depends on the nature of the proceeding itself.[563] The Supreme Court has noted that "there are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction".[564] Consequently, it cannot be held

[554] Campbell, 'Application of the Charter to Civil Penalties in the Income Tax Act', 10; Tim Quigley, *Procedure in Canadian Criminal Law*, 2nd ed. (Thomson Carswell, 2005), 18–15.
[555] Supreme Court of Canada, R. v. Wigglesworth, 559 [1987].
[556] Supreme Court of Canada, R. v. Wigglesworth, 559 [1987]. Likewise, R. v. K. R. J., 931, § 38 [2016]; Martineau v. M.N.R., 745, § 19 [2004].
[557] Supreme Court of Canada, R. v. Wigglesworth, 560 [1987]. See also Goodwin v. British Columbia, 273-274, § 40 [2015]; Martineau v. M.N.R., 746, § 21 [2004].
[558] Supreme Court of Canada, R. v. Wigglesworth, 560 [1987]. See also Goodwin v. British Columbia, 274, § 41 [2015]; Guindon v. Canada, 30-31, § 45 [2015].
[559] Supreme Court of Canada, Martineau v. M.N.R., 746, § 24 [2004]. The reasoning has been subsequently confirmed in Goodwin v. British Columbia, 274, § 41 [2015]; Guindon v. Canada, 33, § 52 [2015].
[560] Supreme Court of Canada, Goodwin v. British Columbia, 274-275, § 43 [2015].
[561] Supreme Court of Canada, Goodwin v. British Columbia, 282, § 63 [2015].
[562] Supreme Court of Canada, Guindon v. Canada, 39, § 68 [2015].
[563] Supreme Court of Canada, Martineau v. M.N.R., 747, § 30 [2004]; R. v. Shubley, 18-19 [1990]; Supreme Court of Canada, Guindon v. Canada, 37-38, § 64 [2015].
[564] Supreme Court of Canada, R. v. Richard, 538, § 19 [1996]; R. v. Wigglesworth, 559 [1987].

that just because an offence leads to a minor consequence that offence does not fall within Section 11.[565]

Concerning the second criterion, initially the Supreme Court stated in *R. v. Wigglesworth* that a penal consequence will arise from "imprisonment or a fine that by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity".[566] Since imprisonment is always a penal consequence,[567] if a legal provision includes the possibility of imprisonment it should be considered criminal.[568] For instance, in *Wigglesworth,* the Supreme Court held that although the defendant had been convicted to pay a fine of $300 for a disciplinary offence,[569] he had faced a penal consequence because the maximum penalty for such an offence was imprisonment for one year.[570]

In *R. v. Rodgers*, decided in 2006, the Supreme Court extended the ruling of *Wigglesworth*.[571] In this regard, the Court held that criminal punishment refers to the arsenal of sanctions to which an accused may be liable upon conviction for a particular criminal offence.[572] Therefore, a consequence will constitute criminal punishment when "it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing".[573]

The Supreme Court has explained that the criteria of the nature of the proceeding and the penal consequence evaluate two different ways in which a person may be considered as being charged with an offence under Section 11.[574] "The criminal in nature test identifies provisions that are criminal because (…) or the legislature has provided for proceedings whose attributes and purpose show that the penalty is to be imposed via criminal proceedings".[575] On the contrary, "the true penal consequence test looks at whether an ostensibly administrative or regulatory provision nonetheless

---

[565] Supreme Court of Canada, R. v. Richard, 538, § 19 [1996]; R. v. Wigglesworth, 559 [1987].
[566] Supreme Court of Canada, R. v. Wigglesworth, 561 [1987]. See also R. v. Shubley, 21 [1990] and Martineau v. M.N.R., 752-753, § 57 [2004].
[567] Supreme Court of Canada, Guindon v. Canada, 42, § 76 [2015].
[568] Supreme Court of Canada, R. v. Wigglesworth, 561-562 [1987].
[569] Supreme Court of Canada, R. v. Wigglesworth, 548 [1987].
[570] Supreme Court of Canada, R. v. Wigglesworth, 563-564 [1987].
[571] Supreme Court of Canada, R. v. Rodgers, 598, § 61 [2006].
[572] Supreme Court of Canada, R. v. Rodgers, 598, § 62 [2006].
[573] Supreme Court of Canada, R. v. Rodgers, 599, § 63 [2006].
[574] Supreme Court of Canada, Guindon v. Canada, 32, § 50 [2015].
[575] Supreme Court of Canada, Guindon v. Canada, 32, § 49 [2015].

engages Section 11 of the Charter because it may result in punitive consequences”.[576] Therefore, while the criminal in nature test focuses on the proceeding, the penal consequences test focuses on its potential impact on the defendant.[577]

2.1.1. Application of the above Criteria to Disciplinary Proceedings.

Concerning professional and employment disciplinary proceedings, the Supreme Court has ruled that they neither are criminal in nature nor subject the defendant to a penal consequence.[578]

In relation to prison disciplinary proceedings, the Supreme Court has also characterised them as non-criminal. In *R. v. Shubley*, the Court held that the prison proceeding to which the defendant was subject was not criminal in nature, but rather disciplinary because the accused was not called to account to society for a crime violating the public interest. Instead, he was called to account to the prison officials for breach of his obligations as an inmate under the prison rules. The purpose of the proceeding was to maintain order in the prison.[579] The Supreme Court also concluded that the prison disciplinary proceeding did not subject the defendant to a penal consequence because it did not involve fine or imprisonment.[580]

2.1.2. Application of the above Criteria to Civil Monetary Sanctions.

Regarding civil monetary sanctions, the leading case of the Supreme Court is *Guindon v. Canada*, decided in 2015. In this case, the tax authority fined the defendant $546,747 under Section 163.2 of the Income Tax Act for having made false statements.[581] The defendant contended that the sanction imposed was criminal and therefore he was entitled to the safeguards provided for in Section 11 of the Canadian Charter.[582]

---

[576] Supreme Court of Canada, Guindon v. Canada, 32, § 50 [2015].
[577] Supreme Court of Canada, Guindon v. Canada, 32, § 50 [2015].
[578] Supreme Court of Canada, Pearlman v. Manitoba Law Society Judicial Committee, 869 [1991]; Trimm v. Durham Regional Police, 589 [1987]; Trumbley and Pugh v. Metropolitan Toronto Police, 580 [1987]; Burnham v. Metropolitan Toronto Police, 575 [1987].
[579] Supreme Court of Canada, R. v. Shubley, 20 [1990].
[580] Supreme Court of Canada, R. v. Shubley, 21 [1990]; Sharpe and Roach, *The Charter of Rights and Freedoms*, 338.
[581] Supreme Court of Canada, Guindon v. Canada, 14-15, § 1-2 [2015].
[582] Supreme Court of Canada, Guindon v. Canada, 15, § 3 [2015].

The Supreme Court began recognising that a monetary sanction may constitute a penal consequence when it is punitive either in purpose or effect.[583] To determine whether the monetary sanction is punitive, some useful factors to consider are the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing and whether there is a stigma associated with the sanction.[584] Although the magnitude of the sanction is a factor to consider, it is not decisive. Large monetary sanctions sometimes are necessary to deter non-compliance with regulatory schemes.[585] After all, monetary sanctions cannot be considered just another cost of doing business.[586] Regarding the case in question, the Supreme Court noted that Section 163.2 of the Income Tax Act was enacted to discourage individuals from making false statements.[587] The Supreme Court next noted that the magnitude of penalties under Section 163.2 was directly tied to the objective of deterring noncompliance with the Income Tax Act. The sanction considered the magnitude of the tax that was avoided and the personal gain of the violator, without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flowed from the imposition of the sanction.[588] The Supreme Court concluded that the monetary sanction did not constitute a penal consequence.[589]

As well as the Supreme Court, the Federal Court of Appeal and the courts of appeal have not been receptive to arguments that civil monetary penalties constitute penal consequences.

The Federal Court of Appeal addressed this matter in *United States Steel Corporation v. Canada*. In this case, Sections 39 and 40 of the Investment Canada Act allowed the Minister of Industry to demand a foreign investor in control of a Canadian corporation the compliance with the Act. If the Minister was not satisfied with the response of the investor, the Minister could apply to a superior court which could grant

583 Supreme Court of Canada, Guindon v. Canada, 42, § 76 [2015].
584 Supreme Court of Canada, Guindon v. Canada, 42, § 76 [2015].
585 Supreme Court of Canada, Guindon v. Canada, 42, § 77 [2015].
586 Supreme Court of Canada, Guindon v. Canada, 43-44, § 80 [2015].
587 Supreme Court of Canada, Guindon v. Canada, 45, § 83 [2015]. The Supreme Court had already held in Cartaway Resources Corp. (Re) that deterrence is "an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative", and that the notion of general deterrence "is neither punitive nor remedial". See Supreme Court of Canada, Cartaway Resources Corp. (Re), 697, § 60 [2004]
588 Supreme Court of Canada, Guindon v. Canada, 45, § 84 [2015].
589 Supreme Court of Canada, Guindon v. Canada, 46-47, § 89 [2015].

several forms of relief.[590] In 2009, the Minister commenced an application before the Federal Court concerning two written undertakings given by the defendants United States Steel Corporation and U.S. Steel Canada Inc.[591] The government sought to impose on the defendants a sanction of $10,000 per day per breach of the relevant undertakings.[592] The defendants argued that Sections 39 and 40 of the Act were contrary to the rights provided for in Section 11 of the Canadian Charter.[593]

To ascertain whether the proceeding was criminal in nature, the Federal Court applied the three factors set out in *Martineau v. M.N.R*: (i) the objectives of the statute; (ii) the purpose of the sanction; and (iii) the process leading to imposition of the sanction.[594] Regarding the first criterion, the Court stated that the aim of the Act and of Sections 39 and 40 was to maintain compliance with the Act and with undertakings made under it, thereby stimulating economic development and employment opportunities.[595] Concerning the second criterion, the Court pointed out that the purpose of the sanction was to encourage and promote timely compliance and to enforce compliance with the Act in question.[596] Finally, respecting the third criterion, the Federal Court noted that the process lacked the indicia of penal proceedings[597] because it did not involve the laying of charges, arrest powers, criminal courts or a criminal record.[598] Therefore, the Court concluded that the proceeding was not criminal in nature.[599]

Regarding the question of whether the sanction constituted a penal consequence, the Federal Court underlined that the magnitude of the sanction was not determinative.[600] Large fines do not necessarily point to a punitive character because they are necessary to deter major corporations from absorbing the penalties as simply another cost of doing business.[601] Moreover, the civil sanction in question did not create a stigma comparable to a criminal conviction. The Court then held that the sanction in

---

[590] Federal Court of Appeal, United States Steel Corporation v. Canada, § 1 [2011].
[591] Federal Court of Appeal, United States Steel Corporation v. Canada, § 2 [2011].
[592] Federal Court of Appeal, United States Steel Corporation v. Canada, § 9 [2011].
[593] Federal Court of Appeal, United States Steel Corporation v. Canada, § 3 [2011].
[594] Federal Court of Appeal, United States Steel Corporation v. Canada, § 46 [2011].
[595] Federal Court of Appeal, United States Steel Corporation v. Canada, § 52 [2011].
[596] Federal Court of Appeal, United States Steel Corporation v. Canada, § 57 [2011].
[597] Federal Court of Appeal, United States Steel Corporation v. Canada, § 59 [2011].
[598] Federal Court of Appeal, United States Steel Corporation v. Canada, § 60 [2011].
[599] Federal Court of Appeal, United States Steel Corporation v. Canada, § 73 [2011].
[600] Federal Court of Appeal, United States Steel Corporation v. Canada, § 74 [2011].
[601] Federal Court of Appeal, United States Steel Corporation v. Canada, § 77 [2011]. The British Columbia Court of Appeal utilised the same argument in Michaels v. British Columbia Securities Commission, § 127 [2016].

question did not constitute a penal consequence, concluding therefore that Section 11 of the Charter was not applicable.[602]

In *Lavallee v. Alberta (Securities Commission)*, the defendants were charged with breaches of the Securities Act which, if proven, could subject them to a civil sanction of up to $1 million for each contravention.[603] The defendants argued that the potential civil sanction constituted a penal consequence and, therefore, the safeguards of Section 11 of the Charter were engaged.[604] The Court of Appeal of Alberta rejected the argument, noting the need to consider the purpose of the sanction and not just its magnitude.[605] In this regard, the purpose of the Securities Act included the protection of investors and the public, the efficiency of the capital markets, and ensuring public confidence in the system.[606] The Court stated that the "increase in the magnitude of administrative penalties reflects a legislative intent to ensure that the penalties are not simply considered another cost of doing business".[607] Finally, the Court noted that general deterrence is an appropriate and necessary consideration in making orders that are both protective and preventive, and that the notion of general deterrence is neither punitive nor remedial. In conclusion, the sanction was not a penal consequence and Section 11 was not applicable to the case in question.[608]

In *Rowan v. Ontario Securities Commission*, the Court of Appeal for Ontario considered a similar question to that of *Lavallee v. Alberta (Securities Commission).* Section 127 of the Ontario Securities Act provided for a sanction of up to $1 million for each contravention.[609] The defendants challenged the constitutionality of Section 127 of the Act, contending that it was contrary to the rights provided for in Section 11 of the Canadian Charter. Considering the decision of the Supreme Court in *R. v. Wigglesworth*,[610] the Court of Appeal dismissed the argument of the defendants.[611] The Court indicated that the civil sanction of up to $1 million per infraction aimed to regulate the capital markets, which involve enormous sums of money. Thus, large sanctions

[602] Federal Court of Appeal, United States Steel Corporation v. Canada, § 81 [2011].
[603] Court of Appeal of Alberta, Lavallee v. Alberta (Securities Commission), § 2 [2010].
[604] Court of Appeal of Alberta, Lavallee v. Alberta (Securities Commission), § 23 [2010].
[605] Similar argument can be found in Court of Appeal of Alberta, R. v. Peers, § 14 [2015].
[606] Court of Appeal of Alberta, Lavallee v. Alberta (Securities Commission), § 23 [2010].
[607] Court of Appeal of Alberta, Lavallee v. Alberta (Securities Commission), § 23 [2010]. The Court recalled Alberta Securities Commission v. Brost, § 54 [2008].
[608] Court of Appeal of Alberta, Lavallee v. Alberta (Securities Commission), § 23 [2010].
[609] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 28 [2012].
[610] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 35 [2012].
[611] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 37 [2012].

are necessary to remove economic incentives for non-compliance with market rules.[612] The Court underlined that civil sanctions should not be viewed as another cost of doing business or a licensing fee.[613] Therefore, the Court concluded that the civil sanction of up to $1 million per breach of securities law did not amount to a penal consequence.[614]

A paramount decision was *R. v. Samji*, in which the British Columbia Court of Appeal held that a civil sanction of $33 million did not constitute a penal consequence. In this case, the defendant was fined $33 million for having operated a fraudulent scheme over nine years, which put at risk approximately $100 million from more than 200 investors.[615] The defendant was also charged with counts of theft and fraud. The defendant filed a motion to dismiss on double jeopardy grounds, arguing that the civil sanction of $33 million constituted a penal consequence.[616] After considering the magnitude of the fraud, the Court of Appeal noted that even though the civil sanction was substantial, it was not disproportionate to the amount required to deter non-compliance with the Securities Act.[617] Furthermore, the magnitude of the sanction should not be considered in isolation, but in connection with other relevant factors such as whether the proceeds are used for the benefit of third parties, whether the amount is determined by regulatory considerations, and whether the effect of the sanction creates a stigma comparable to a criminal conviction.[618] Moreover, the Court noted that the civil sanction "was determined by regulatory considerations that focused on general deterrence, distinct from the criminal law sentencing principles of denunciation and retribution".[619] Therefore, the Court concluded that the civil sanction did not amount to a penal consequence.[620]

2.1.3. Application of the above Criteria to Civil Forfeiture Mechanisms.

[612] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 49 [2012].
[613] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 49 [2012].
[614] Court of Appeal for Ontario, Rowan v. Ontario Securities Commission, § 53 [2012].
[615] British Columbia Court of Appeal, R. v. Samji, § 3 [2017].
[616] British Columbia Court of Appeal, R. v. Samji, § 4 [2017].
[617] British Columbia Court of Appeal, R. v. Samji, § 77 [2017].
[618] British Columbia Court of Appeal, R. v. Samji, § 88 [2017].
[619] British Columbia Court of Appeal, R. v. Samji, § 101 [2017].
[620] British Columbia Court of Appeal, R. v. Samji, § 107 [2017]. Similarly, in Canada (Competition Bureau) v. Chatr Wireless Inc., § 546-558 [2013], the Ontario Superior Court of Justice ruled that a $10 million monetary penalty, provided for in the Competition Act, was not a penal consequence.

Regarding civil forfeiture mechanisms, the leading decision of the Supreme Court is *Martineau v. M.N.R.* In 1996 a customs officer ordered the defendant to pay $315,458, which amounted to the deemed value of the goods he allegedly attempted to export by making false statements.[621]

The Supreme Court had to determine whether the protections of Section 11 of the Charter were applicable to the forfeiture proceeding. Applying the criteria set out in *R. v. Wigglesworth*, the Court firstly explained that ascertained forfeiture was a civil mechanism used where it would be difficult or even impossible to seize goods related to an offence.[622] In such cases, instead of seizing the goods as forfeit, the officer may demand payment of an amount of money amounting to the value of the goods in question.[623] The Supreme Court rejected the argument that the forfeiture aimed to deter and punish the offender for three reasons. First, because the purpose of the forfeiture was to ensure compliance with the Customs Act by giving customs officers a timely and effective means of enforcing.[624] Second, the Supreme Court stated that although ascertained forfeiture was intended to produce a deterrent effect, this is understandable in the context of a self-reporting system. For the system to be viable, fraud must be discouraged and offences punished severely. An eventual deterrence purpose is not sufficient to consider civil sanctions as criminal.[625] Third, the Court underlined that there was nothing that would indicate that the ascertained forfeiture aimed to redress a wrong done to society.[626] "Principles of criminal liability and sentencing are totally irrelevant when fixing the amount to be demanded. Such a notice does not result in a criminal record for either the offender or the owner of the property".[627] Therefore, the Supreme Court concluded that Section 11 of the Charter did not apply to the case in question because the defendant could not be characterised as a person charged with an offence.[628]

2.2. "Same Offence" Requirement

---

[621] Supreme Court of Canada, Martineau v. M.N.R., 741, § 3 [2004].
[622] Supreme Court of Canada, Martineau v. M.N.R., 748, § 37 [2004].
[623] Supreme Court of Canada, Martineau v. M.N.R., 748, § 33 [2004].
[624] Supreme Court of Canada, Martineau v. M.N.R., 748, § 36 [2004].
[625] Supreme Court of Canada, Martineau v. M.N.R., 749, § 38 [2004].
[626] Supreme Court of Canada, Martineau v. M.N.R., 749, § 39 [2004].
[627] Supreme Court of Canada, Martineau v. M.N.R., 754, § 65 [2004].
[628] Supreme Court of Canada, Martineau v. M.N.R., 754, § 66 [2004].

The second requirement to apply Section 11 (h) is that the two offences which the defendant is charged with or punished for are the same.[629] According to the Supreme Court, two offences should be considered to be the same offence when they contain the same elements and arise out of the same set of circumstances.[630]

In *Kienapple v. R.*, decided in 1975, the Supreme Court held that where the same transaction gives rise to two offences with substantially the same elements the defendant should be convicted only of the most serious of those offences.[631] Under the Kienapple rule, the conviction for the most serious of the offences bars a conviction for the less serious charge, but not the contrary. In *R. v. Loyer et al.*, the Supreme Court explained: "if at the trial, there is a plea of guilty to the more serious charge, and a conviction is registered, an acquittal should be entered or directed on the less serious, alternative charge. However, if, as was the case here, the accused pleads guilty to the less serious charge, the plea should be held in abeyance pending the trial on the more serious offence. If there is a finding of guilty on that charge, and a conviction is entered accordingly, the plea already offered on the less serious charge should be struck out and an acquittal directed".[632]

To apply the Kienapple rule, the Supreme Court requires both a factual and legal nexus between the offences.[633]

The factual nexus is established where the charges arise out of the same transaction.[634] The factual nexus will be generally satisfied by an affirmative answer to the question of whether the same act of the accused grounds each of the charges.[635] The Supreme Court has recognised, however, that it is not always easy to define when one act ends and another begins.[636] To determine whether there is a factual nexus, the courts should consider the case in question, taking into consideration factors such as

[629] Supreme Court of Canada, R. v. G.R., § 41 [2005]; R. v. Van Rassel, 239 [1990].
[630] Supreme Court of Canada, R. v. Van Rassel, 239-240 [1990]; R. v. Wigglesworth, 566 [1987].
[631] Supreme Court of Canada, Kienapple v. R., 748-753 [1975]; James C. Jordan, 'Application and Limitations of the Rule Prohibiting Multiple Convictions: Kienapple v. the Queen to R. V. Prince', *Manitoba Law Journal* 14, no. 3 (1985): 341.
[632] Supreme Court of Canada, R. v. Loyer et al., 635 [1978].
[633] Supreme Court of Canada, R. v. Wigman, 256 [1987]; R. v. Prince, 495 [1986]; Gerard Coffey, 'Raising the Pleas in Bar against a Retrial for the Same Criminal Offence', *The Irish Judicial Studies Journal* 5, no. 2 (2005): 158–59. See also Court of Appeal for Ontario, R. v. Marleau, § 11 [2005].
[634] Supreme Court of Canada, Kienapple v. R., 750 [1975].
[635] Supreme Court of Canada, R. v. Prince, 492 [1986].
[636] Supreme Court of Canada, R. v. Prince, 492 [1986].

the proximity of the events in time and place, the presence of relevant intervening events and the existence of a common objective.[637]

The legal nexus is established where the offences constitute a single wrong or delict.[638] The Supreme Court has stated that this requirement is satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple rule.[639] As one Court of Appeal has recognised, difficulties with the application of the Kienapple rule usually arise regarding the legal nexus.[640]

In *R.* v. *Wigglesworth*, the Supreme Court held that there is ample authority for the view that disciplinary offences are distinct from criminal offences for the purposes of double jeopardy.[641] The defendant, who was Constable of the Royal Canadian Mounted Police, during an interrogation grabbed the person under custody by the throat, pushed him against a wall and slapped him across the face.[642] The defendant was separately charged with common assault contrary to Section 245 of the Criminal Code and with a major service offence contrary to Section 25 (I) of the Royal Canadian Mounted Police Act. In 1982 the defendant was convicted of the disciplinary offence and sentenced to pay a fine of $300.[643] In 1983 the defendant appeared before the criminal court for trial of the charge of common assault. The defendant filed a motion to dismiss on double jeopardy grounds, arguing that the criminal proceeding was barred by his prior conviction under the Royal Canadian Mounted Police Act.[644] The Supreme Court rejected the argument of the defendant, holding that the offences were different.[645] While the major service offence was a disciplinary offence which was related to the profession of the defendant, the common assault was a criminal offence of general application.[646] Therefore, the two offences were different. "While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions".[647]

---

[637] Supreme Court of Canada, R. v. Prince, 492 [1986]; Patrick J. Knoll, *Criminal Law Defences*, 2nd ed. (Carswell Legal Publishing, 1994), 175.
[638] Supreme Court of Canada, Kienapple v. R., 748 [1975].
[639] Supreme Court of Canada, R. v. Wigman, 256 [1987]; R. v. Prince, 498-499 [1986].
[640] British Columbia Court of Appeal, R. v. Deslisle [2003].
[641] Supreme Court of Canada, R. v. Wigglesworth, 565 [1987].
[642] Supreme Court of Canada, R. v. Wigglesworth, 547 [1987].
[643] Supreme Court of Canada, R. v. Wigglesworth, 547-548 [1987].
[644] Supreme Court of Canada, R. v. Wigglesworth, 548 [1987].
[645] Sharpe and Roach, *The Charter of Rights and Freedoms*, 338.
[646] Supreme Court of Canada, R. v. Wigglesworth, 566 [1987].
[647] Supreme Court of Canada, R. v. Wigglesworth, 566 [1987].

In *Sheppe v. The Queen*, the issue to resolve was whether the defendant could be convicted both for conspiracy to distribute heroin and for trafficking heroin.[648] After analysing the case, the Supreme Court concluded that the elements of both offences were different. The Court held that “the trafficking transaction had no element of culpability that was in any way common with the charge of conspiracy which depended on proof of a prior illegal agreement” and transcended any dependence on the trafficking transactions.[649]

Another interesting decision was *McKinney v. The Queen*. In this case, the defendants were convicted, under the Wildlife Act, of hunting out of season, and hunting at night with the use of lighting or reflecting equipment.[650] The appellants appealed, arguing that they had been convicted twice for the same offence. The Manitoba Court of Appeal dismissed the arguments of the defendants, holding that there were two distinct delicts. “One was hunting out of season on lands to which the accused had no right of access; the other was hunting with a nightlight. Hence both convictions can be supported and the appeals based on this ground should be dismissed”.[651] The Supreme Court of Canada upheld the decision of the Manitoba Court of Appeal, affirming that there was no reason for interfering with the conclusion reached by the Court of Appeal.[652]

In *R. v. Boychuk*, two accused were convicted of hunting within 500 yards of a dwelling, contrary to the Wildlife Act. Later, both defendants were charged with using a firearm in a careless manner or without reasonable precautions for the safety of other persons, contrary to Section 85 of the Criminal Code. The defendants argued that the second trial was precluded by the double jeopardy clause because both offences were the same. In the first place, the Court of Queen's Bench for Saskatchewan pointed out that two offences are the same if they contain the same elements and arise out of the same set of circumstances.[653] Subsequently, the Court noted that carelessness and a firearm were not elements of the charge of hunting within 500 yards of a dwelling. Consequently, this charge was different from the charge under Section 86 of the

[648] Supreme Court of Canada, Sheppe v. The Queen, 23-24 [1980].
[649] Supreme Court of Canada, Sheppe v. The Queen, 28 [1980].
[650] Manitoba Court of Appeal, R. v. McKinney, 568 [1979].
[651] Manitoba Court of Appeal, R. v. McKinney, 573 [1979].
[652] Supreme Court of Canada, McKinney v. The Queen, 401 [1980].
[653] Court of Queen's Bench for Saskatchewan, R. v. Boychuk [1995].

Criminal Code, which involved the use of a firearm in a careless manner. Thus, the Court rejected the argument that both offences were actually the same offence.[654]

The Supreme Court has underlined that the Canadian Charter does not prevent Parliament from creating offences that may overlap. Therefore, Section 11 (h) applies only to proceedings, not to legal enactments.[655] However, unless there is a clear indication that multiple prosecutions and multiple convictions are envisaged, the Kienapple rule should be followed.[656] In other words, the Kienapple rule is subject to the dictates of Parliament: if a statutory provision expressly or by clear implication provides for multiple convictions for offences arising out of the same delict, the court must give effect to the legislative intention.[657] Furthermore, if the offences target different social interests, different victims, or prohibit different consequences, such distinctions will defeat a claim that there is a sufficient legal nexus for the purposes of the Kienapple rule.[658]

The Supreme Court stated that the Kienapple rule should be applied at least in the following cases:

1) Where the defendant has been convicted of a greater inclusive offence, the Kienapple rule bars a conviction for any lesser offence included in it, provided that there are no distinct additional elements in the lesser included offence.[659] For example, in *R. v. Loyer,* the Supreme Court applied the Kienapple rule to bar a conviction for possession of a weapon with the purpose of committing an offence because the defendant had been convicted of attempted armed robbery by use of a knife, a more serious offence.[660]

2) The Supreme Court has stated that where an element of one offence is just a particularisation of an element of another offence, it should not be considered as a distinguishing element for the purposes of the Kienapple rule.[661] In the absence of some indication of Parliamentary intent that there should be multiple convictions or added punishment in the event of an overlap, the particularisation of an element ought not to

---

[654] Court of Queen's Bench for Saskatchewan, R. v. Boychuk [1995].
[655] Supreme Court of Canada, R. v. Nova Scotia Pharmaceutical Society, 645 [1992].
[656] Supreme Court of Canada, Kienapple v. R., 753 [1975].
[657] Supreme Court of Canada, R. v. Prince, 498 [1986]. Similarly, Court of Appeal for Ontario, R. v. Kinnear, § 40 [2005].
[658] Supreme Court of Canada, R. v. Van Rassel, 239-240 [1990]; R. v. Wigglesworth, 566 [1987].
[659] Supreme Court of Canada, R. v. Prince, 499 [1986].
[660] Supreme Court of Canada, R. v. Loyer et al., 631-632 [1978].
[661] Supreme Court of Canada, R. v. Prince, 500 [1986].

be taken as a sufficient distinction to preclude the operation of the Kienapple rule.[662] For instance, in *Krug v. The Queen,* the defendant, while trying to take back possession of his repossessed vehicles, used a rifle to gain entry, loaded it, and pointed it before police arrived and disarmed him. Following this incident, four charges were laid: (i) attempting to steal while armed (Section 302 (d) of the Criminal Code); (ii) using a firearm while attempting to commit an indictable offence (Section 83); (iii) having unlawful possession of a weapon (Section 85); and (iv) unlawfully pointing a firearm (Section 84). The defendant pleaded guilty to the first charge and was found guilty on the second and fourth charges.[663] The Supreme Court ruled that the Kienapple rule prevented the accused from being convicted of pointing a firearm in view of his conviction for using a firearm while attempting to commit an indictable offence because it is obvious that pointing a gun is a manner of using it.[664] Moreover, Section 83 provided for a far more serious sanction than Section 84, fourteen years' imprisonment with minimum periods of imprisonment as opposed to five years.[665]

3) The Kienapple rule should also apply where there is more than one method, embodied in more than one offence, to prove a single criminal act.[666] For instance, in *R. v. Gushue,* the accused was charged with giving evidence in a judicial proceeding contrary to his own previous evidence, and with perjury. The Court of Appeal for Ontario concluded that both offences were the same under the Kienapple rule.[667] The Supreme Court of Canada agreed with the Court of Appeal, holding that even though the elements of both offences were diverse, the difference was clearly not a reflection of any legislative intent to add extra punishment when both offences arise from the same transaction.[668] The Court explained that Parliament had established the offence of giving contradictory evidence merely to facilitate proof of false evidence, although no one particular false statement can be proven.[669]

4) Finally, the Kienapple rule also applies where Parliament has deemed a particular element to be satisfied by proof of another element, not because logic

[662] Supreme Court of Canada, R. v. Prince, 500-501 [1986].
[663] Supreme Court of Canada, Krug v. The Queen, 255 [1985].
[664] Supreme Court of Canada, Krug v. The Queen, 268 [1985].
[665] Supreme Court of Canada, Krug v. The Queen, 270 [1985].
[666] Supreme Court of Canada, R. v. Prince, 501 [1986].
[667] Court of Appeal for Ontario, R. v. Gushue [1976].
[668] Supreme Court of Canada, R. v. Prince, 501 [1986].
[669] Supreme Court of Canada, R. v. Prince, 501 [1986].

compels that conclusion, but because of social policy or difficulties of proof.[670] For instance, in *Kienapple v. R.,* the defendant was charged with rape contrary to Section 143 of the Criminal Code and unlawful carnal knowledge of a female under fourteen years of age contrary to Section 146 (1). The accused was convicted on both counts and sentenced to two concurrent terms of ten years. Firstly, the Supreme Court noted that it was clear that Parliament had defined two different offences in Sections 143 and 146 (1), therefore they were not lesser included and grater inclusive offences.[671] Nevertheless, there was an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. In such a case, if the accused is charged with rape and with a Section 146 (1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge. Correlatively, if the jury finds the accused not guilty of rape, they may still find him guilty under Section 146 (1) where sexual intercourse with a girl under age fourteen has been proved.[672] The Supreme Court concluded that Section 146 (1) was an alternative charge to rape, unnecessary where there was no consent, but available where proof of consent could not be made or was doubtful.[673]

2.3. Summary of the Case Law of the Supreme Court of Canada

Section 11 (h) of the Canadian Charter of Rights and Freedoms provides for both a protection against multiple prosecutions for the same offence and a protection against multiple punishments for the same offence.

To apply the protections provided by Section 11 (h), the person must be charged with an offence and both offences must be the same.

Regarding the first requirement, the Supreme Court held in *R. v. Wigglesworth* that a person should be considered to be charged with an offence if (i) subject to proceedings that are, by their very nature, criminal proceedings; or (ii) potentially subject to penal consequences. With reference to the first criterion, a proceeding is criminal by nature when it aims to promote public order and welfare within a public sphere of activity. The Supreme Court has set out three relevant factors to consider:

---

[670] Knoll, *Criminal Law Defences*, 176.
[671] Supreme Court of Canada, Kienapple v. R., 743-744 [1975].
[672] Supreme Court of Canada, Kienapple v. R., 744 [1975].
[673] Supreme Court of Canada, Kienapple v. R., 753-754 [1975].

(i) the objectives of the legislation; (ii) the objectives of the sanction; and (iii) the process leading to the imposition of the sanction.[674] Concerning the second criterion, the Supreme Court has held that a sanction will constitute a penal consequence when it forms part of the arsenal of sanctions to which an accused may be liable for a criminal offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing. Applying those criteria, the Canadian courts have never characterised a civil sanctioning proceeding as criminal in nature. Regarding the second criterion, only in one case, *R. v. Wigglesworth*, the Canadian courts characterised a civil sanction as a penal consequence, but just because the maximum sanction provided by the disciplinary statute was one year's imprisonment.[675]

The second requirement for Section 11 (h) to apply is that the two offences with which the defendant is charged or for which the defendant is punished are the same. According to the Kienapple rule, two offences can be considered as the same offence if they contain the same elements and arise out of the same set of circumstances. To apply the Kienapple rule the Supreme Court requires both a factual and legal nexus between the offences. The factual nexus is established where the charges arise out of the same transaction. The legal nexus is established where the offences constitute a single wrong or delict. The legal nexus is satisfied if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by the Kienapple rule.

[674] Supreme Court of Canada, Martineau v. M.N.R., 746, § 24 [2004]. See also Goodwin v. British Columbia, 274, § 41 [2015]; Guindon v. Canada, 33, § 52 [2015].
[675] Supreme Court of Canada, R. v. Wigglesworth, 563 [1987]; Quigley, *Procedure in Canadian Criminal Law*, 18–16.

3. Case Law of the Constitutional Court of Spain

Even though the *ne bis in idem* is not expressly established in the Spanish Constitution, the Constitutional Court has recognised the constitutional dimension of both the protection against multiple punishments and the protection against multiple prosecutions.[676]

The protection against multiple punishments, which also applies to cases of single trial,[677] prohibits the accumulation of punishments in the case of unity of offender, identity of facts and unity of legal basis. The protection against multiple prosecutions prohibits a second criminal proceeding in the case of unity of offender, identity of facts and unity of legal basis.

Since the threefold condition of identity is the main requirement to apply both protections,[678] the *ne bis in idem* does not bar a second prosecution nor a second punishment on the same defendant for the same facts if there is no unity of legal basis between the different offences.

3.1. Protection against Multiple Punishments

The Spanish Constitutional Court (hereafter in this section: Constitutional Court) has mainly understood the *ne bis in idem* as a prohibition of multiple punishments.[679] The Court recognised the protection against multiple punishments in judgment 2-1981.[680] In this case, the defendant had been sanctioned for the same facts by both the

[676] Constitutional Court of Spain, judgment 2-2003, FJ 3; Manuel Cobo del Rosal and Tomás Salvador [et al Vives Antón, *Derecho Penal: Parte General*, 5th ed. (Tirant Lo Blanch, 1999), 91–92; Rafael Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento: Discrepancias Sobre El "Bis in Idem" En El Tribunal Europeo de Derecho Humanos y En El Tribunal Constitucional', *Justicia Administrativa: Revista de Derecho Administrativo*, no. 61 (2013): 27; Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 76.

[677] Constitutional Court of Spain, judgments 204-1996, FJ 2; 154-1990, FJ 3.

[678] Constitutional Court of Spain, judgments 126-2011, FJ 16; 188-2005, FJ 2; 229-2003, FJ 3; 2-2003, FJ 5.

[679] Luis Arroyo Zapatero, 'Principio de legalidad y reserva de ley en materia penal', *Revista española de derecho constitucional* 3, no. 8 (1983): 19; Guillermo Benlloch, 'El Principio de Non Bis in Idem En Las Relaciones Entre El Derecho Penal y El Derecho Disciplinario', *Revista Del Poder Judicial*, no. 51 (1998): 307; María Jesús Gallardo, 'La Concurrencia de Sanciones Penales y Administrativas: Una Prohibición En Desuso', *Administración de Andalucía: Revista Andaluza de Administración Pública*, no. 61 (2006): 60; Lucía Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador* (Iustel, 2008), 19; Manuel Rebollo et al., *Derecho Administrativo sancionador* (Lex Nova, 2010), 359.

[680] García, *Non Bis in Idem Material y Concurso de Leyes Penales* (Cedecs, 1995), 53.

administrative authority and the criminal court. The Constitutional Court held that the *ne bis in idem* prohibits the accumulation of punishments in the case of unity of offender, identity of facts and unity of legal basis.[681] Therefore, where the same facts constitute a violation of two distinct statutory provisions, if those offences share the same legal basis, the *ne bis in idem* will bar the conviction of the defendant for all of them. In the case in question, the Constitutional Court found no identity of facts and therefore dismissed the defendant's motion.[682]

After judgment 2-1981, the Constitutional Court gradually began modelling the legal basis of the protection against multiple punishments.[683] The Constitutional Court has held that the protection in question is linked, first, to the general principle of proportionality,[684] and second, to the principle of legality.[685]

The Constitutional Court has stated that the accumulation of punishments in the case of threefold identity would mean the imposition of a harsher sanction than that

---

[681] Constitutional Court of Spain, judgment 2-1981, FJ 4; García, 63; Mercedes Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'* (Tirant Lo Blanch, 2002), 23–24; Elena Górriz, 'Sentido y Alcance Del "Ne Bis in Idem" Respecto a La Preferencia de La Jurisdicción Penal, En La Jurisprudencia Constitucional (De La STC 2/1981, 30 de Enero a La STC 2/2003, 16 de Enero)', *Estudios Penales y Criminológicos*, no. 24 (2002): 199; Belén Marina, 'La Problemática Solución de La Concurrencia de Sanciones Administrativas y Penales: Nueva Doctrina Constitucional Sobre El Principio Non Bis in Idem', *Revista de Administración Pública*, no. 162 (2003): 175; Francisco Puerta, 'La Prohibición de Bis in Idem En La Legislación de Tráfico', *Documentación Administrativa*, no. 284 (2009): 224, https://doi.org/10.24965/da.v0i284-285.9657; Marta Navas-Parejo, 'La Aplicación Del Principio "Non Bis in Idem" En El Ámbito Del Derecho Del Trabajo y de La Seguridad Social', *Temas Laborales: Revista Andaluza de Trabajo y Bienestar Social*, no. 124 (2014): 69.

[682] Constitutional Court of Spain, judgment 2-1981, FJ 5.

[683] Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 76.

[684] Constitutional Court of Spain, judgments 152-2001, FJ 1; 154-1990, FJ 3; Górriz, 'Sentido y Alcance Del "Ne Bis in Idem" Respecto a La Preferencia de La Jurisdicción Penal, En La Jurisprudencia Constitucional (De La STC 2/1981, 30 de Enero a La STC 2/2003, 16 de Enero)', 200–201; Miguel Díaz y García, 'Ne bis in idem material y procesal', *Revista de Derecho*, no. 9 (2004): 10; Javier Boix, 'La Jurisprudencia Constitucional Sobre El Principio Non Bis in Idem', in *Responsabilidad Penal Por Defectos En Productos Destinados a Los Consumidores*, ed. Javier Boix and Alessandro Bernardi (Iustel, 2005), 73; Rebollo et al., *Derecho Administrativo sancionador*, 362; Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 76.

[685] Constitutional Court of Spain, judgments 152-2001, FJ 1; 94-1986, FJ 4; 66-1986, FJ 2; 2-1981, FJ 5; Boix, 'La Jurisprudencia Constitucional Sobre El Principio Non Bis in Idem', 72; Vicente Gimeno, *Derecho Procesal Penal*, 2nd ed. (Colex, 2007), 83; María Lourdes Ramírez, 'El Criterio de Interpretación Del Principio Non Bis in Ídem Previsto En El Artículo 45.3 de La Constitución Española', *Revista Ius et Praxis* 16, no. 1 (2010): 289; M. Carmen Alastuey and Estrella Escuchuri, 'Ilícito penal e ilícito administrativo en materia de tráfico y seguridad vial', *Estudios penales y criminológicos*, no. 31 (2011): 65–66; Carlos Gómez-Jara and Luis Chiesa, 'Spain', in *The Handbook of Comparative Criminal Law*, ed. Kevin Jon Heller and Markus Dubber (Stanford University Press, 2011), 492; Tomás Cano, *Sanciones Administrativas* (Francis Lefebvre, 2018), 64.

legally established by the legislature. Consequently, the prohibition of multiple punishments aims to prevent the imposition of a disproportionate sanction.[686]

Since the principle of legality, recognised in Article 25.1 of the Spanish Constitution,[687] applies to both criminal and civil sanctions, the Constitutional Court has always applied the prohibition of multiple punishments to both of them.[688] Therefore, the protection against multiple punishments is considered a general guarantee, applicable to the entire sanctioning system.[689] Nevertheless, to apply the guarantees provided for in Article 25 the authority must have sanctioned the defendant.[690] Therefore, the concept of "sanctioning decision" becomes crucial.

3.1.1. Concept of "Sanctioning Decision".

The Constitutional Court has held that the guarantees recognised by Article 25 solely apply to sanctioning decisions of the authority that represent an effective exercise of the power of the state to punish.[691] Accordingly, those guarantees will not apply to decisions that are not sanctioning in nature.[692]

To determine the nature of the decision, the Constitutional Court has underlined that neither the label of the decision nor what the authority has declared at the moment of the imposition are decisive factors.[693] Similarly, the detrimental character of the decision is not sufficient by itself to consider it a sanctioning decision.[694] In judgment

[686] Constitutional Court of Spain, judgments 1-2020, FJ 8; 91-2009, FJ 6; 48-2007, FJ 3; 180-2004, FJ 4; 2-2003, FJ 3; 177-1999, FJ 3; Manuel Cancio Meliá and Mercedes Pérez Manzano, 'Principios Del Derecho Penal (II)', in *Manual de Introducción al Derecho Penal*, ed. Juan Antonio Lascuraín Sánchez (Agencia Estatal Boletín Oficial del Estado, 2019), 84–85.

[687] "1. No one may be convicted or sentenced for actions or omissions which when committed did not constitute a criminal offence, misdemeanour or administrative offence under the law then in force".

[688] Juan Bustos, *Manual de Derecho Penal. Parte General*, 4th ed. (PPU, 1994), 144; Luca Masera, *La Nozione Costituzionale Di Materia Penale* (Giappichelli, 2018), 135–36.

[689] Constitutional Court of Spain, judgments 2-2003, FJ 3; 2-1981, FJ 4; Jesús García, 'Consideraciones sobre el principio "ne bis in idem" en la doctrina constitucional', *Revista del Ministerio Fiscal*, no. 1 (1995): 74; Gómez-Jara and Chiesa, 'Spain', 492; David Carpio, 'Europeización y Reconstitución Del Non Bis in Idem. Efectos En España de La STEDH Sergey Zolotukhin v. Rusia de 10 de Febrero de 2009', in *Constitución y Sistema Penal*, ed. Santiago Mir Puig and Mirentxu Corcoy (Marcial Pons, 2012), 237.

[690] Constitutional Court of Spain, judgments 331-2006, FJ 4; 47-2001, 15 February 2001, FJ 10; 239-1988, 14 December 1988, FJ 2; Rebollo et al., *Derecho Administrativo sancionador*, 57.

[691] Constitutional Court of Spain, judgments 331-2006, FJ 4; 47-2001, FJ 10; 164-1995, 13 December 1995, FJ 4; 239-1988, FJ 2.

[692] García, 'Consideraciones sobre el principio "ne bis in idem" en la doctrina constitucional', 63; Rebollo et al., *Derecho Administrativo sancionador*, 58.

[693] Constitutional Court of Spain, judgments 276-2000, 16 November 2000, FJ 5; 164-1995, FJ 4; 239-1988, FJ 3.

[694] Rebollo et al., *Derecho Administrativo sancionador*, 65.

48-2003, the Court analysed the constitutionality of legal provisions that regulated the possibility of banning and dissolving a political party. The Court noted that even though the banning and dissolution of a political party are serious legal consequences, this single circumstance was not sufficient for them to be considered sanctions. If so, every unfavourable legal consequence would be a sanction.[695]

To determine whether a decision constitutes a sanction, the Court has held that it must be considered the function that the legal system assigns to it.[696] According to the case law of the Constitutional Court, a sanction is a measure that (i) restricts rights of the defendant; (ii) is imposed as a consequence of having committed an offence; and (iii) aims to punish the offender.[697] Therefore, if the measure in question is justified by other purposes, the sanctioning nature may be excluded.[698] The Constitutional Court has also affirmed that a deterrence purpose is not sufficient by itself to characterise a measure as a sanctioning decision because even though sanctions generally have deterrence as an aim, this does not mean that every measure with such objective is a sanction.[699]

In applying the foregoing criteria, the Constitutional Court has excluded the sanctioning nature of measures such as the demolition of buildings built violating the relevant legislation,[700] closing orders for not having the required license or permit,[701] civil suits seeking compensation for damages,[702] and expropriation decisions.[703]

3.1.2. The Threefold Condition of Identity.

The protection against multiple punishments only prohibits the accumulation of punishments in the case of unity of offender, identity of facts and unity of legal basis.[704]

[695] Constitutional Court of Spain, judgment 48-2003, FJ 9.
[696] Constitutional Court of Spain, judgments 48-2003, FJ 9; 276-2000, FJ 4; 164-1995, FJ 3-4.
[697] Constitutional Court of Spain, judgments judgment 98-2006, FJ 4; 26-2005, FJ 5; 100-2003, FJ 2; 48-2003, FJ 9; 132-2001, FJ 3; 276-2000, FJ 3; Manuel Rebollo et al., 'Panorama Del Derecho Administrativo Sancionador En España', *Revista Estudios Socio-Jurídicos* 7, no. 1 (2005): 24–25; Cano, *Sanciones Administrativas*, 25–26.
[698] Constitutional Court of Spain, judgment 48-2003, FJ 9.
[699] Constitutional Court of Spain, judgment 164-1995, FJ 4; Rebollo et al., *Derecho Administrativo sancionador*, 66.
[700] Constitutional Court of Spain, judgment 98-2006, FJ 4; Rebollo et al., 'Panorama Del Derecho Administrativo Sancionador En España', 25–26.
[701] Constitutional Court of Spain, judgment 119-1991, FJ 3.
[702] Constitutional Court of Spain, judgment, 100-2003, FJ 2.
[703] Rebollo et al., *Derecho Administrativo sancionador*, 78.
[704] Constitutional Court of Spain, judgments 86-2017, FJ 5; 189-2013, FJ 2; 70-2012, FJ 3; 1-2009, FJ 6; 91-2008, FJ 2; 2-2003, FJ 3; 177-1999, FJ 3; 204-1996, FJ 2; 66-1986, FJ 1; 23-1986, FJ 1; 159-

If there is no threefold identity between the different offences the *ne bis in idem* will not prevent their accumulation.[705]

Regarding the unity of offender, the Constitutional Court has ruled that there is no unity of offender where the proceedings concern natural and legal persons who are legally distinct.[706]

With respect to the identity of facts, the Constitutional Court has stated that the analysis is not purely naturalistic, but it also has to consider normative aspects.[707] This does not mean, however, that the comparison is between the different legal provisions. Rather, the ruling of the Constitutional Court means that factual elements that are irrelevant from a legal perspective should not be considered to assess whether there is identity of facts.[708]

Judgment 204-1996 is especially relevant for understanding the standpoint of the Constitutional Court. In May 1993, the defendant was convicted of professional misconduct for practicing as an optician without a licence from September 1988 to May 1990 in the optical shop Balear. In January 1994, the defendant was tried for the same offence but this time the period was from mid-1987 to early 1991 and the shop was the optical and acoustics shop Llompart. The defendant filed a motion to dismiss based on his previous conviction, but it was overruled. Because both convictions concerned the same person and the same offence, the issue to resolve was whether there was also identity of facts.[709] In this regard, the Constitutional Court noted that even though the period was not exactly the same and the optical shops were different, those factual differences were not sufficient to constitute separate facts since the offence in question, practicing as an optician without a licence, sanctioned a permanent and

1985, FJ 3; 77-1983, FJ 4; 2-1981, FJ 4; Francisco de León, *Acumulación de Sanciones Penales y Administrativas : Sentido y Alcance Del Principio 'Ne Bis in Idem'* (Bosch, 1998), 455–57; Cobo del Rosal and Vives Antón, *Derecho penal*, 91; Alejandra Boto, 'Sobre el principio non bis in idem y la importancia de la técnica legislativa (al hilo de la STC 188/2005, de 7 de julio)', *Revista española de derecho constitucional* 26, no. 76 (2006): 273–74; Cano, *Sanciones Administrativas*, 62.

[705] Constitutional Court of Spain, judgments 48-2003, FJ 9; 2-2003, FJ 5.

[706] Constitutional Court of Spain, judgment 70-2012, FJ 3; Cancio Meliá and Pérez Manzano, 'Principios Del Derecho Penal (II)', 88.

[707] Constitutional Court of Spain, judgments 77-2010, FJ 6; 2-1981, FJ 6; José Garberí, 'Principio "Non Bis in Ídem" y Cuestiones de Perjudicialidad', *Cuadernos de Derecho Judicial*, no. 11 (1997): 89; Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 96; Alastuey and Escuchuri, 'Ilícito penal e ilícito administrativo en materia de tráfico y seguridad vial', 70; Navas-Parejo, 'La Aplicación Del Principio "Non Bis in Idem" En El Ámbito Del Derecho Del Trabajo y de La Seguridad Social', 73.

[708] Garberí, 'Principio "Non Bis in Ídem" y Cuestiones de Perjudicialidad', 89; Díaz y García, 'Ne bis in idem material y procesal', 17.

[709] Constitutional Court of Spain, judgment 204-1996, FJ 4.

continuous conduct.[710] Therefore, the Court concluded that those differences of time and place were not enough to understand that there were two legally relevant sets of facts,[711] thereby finding a violation of the *ne bis in idem*.[712]

Finally, the third element of the threefold condition of identity is the unity of legal basis, which has always been the most disputed one.[713] The Constitutional Court has generally understood the unity of legal basis as identity of protected legal good or protected legal interest.[714] Thus, to dismiss the unity of legal basis the different offences must protect a different legal interest.[715] Based on the above, the Constitutional Court has frequently found no unity of legal basis in cases of concurrence of criminal and disciplinary sanctions.[716] For instance, in judgment 234-1991, the Constitutional Court held that there was no unity of legal basis between the criminal offence of perjury and the disciplinary offence of committing any intentional criminal offence under the Police Disciplinary Regulations.[717]

3.1.3. Consequences of a violation of the Prohibition of Multiple Punishments.

In judgment 177-1999, the Constitutional Court held that the accumulation of punishments in the case of threefold identity always constituted a violation of the *ne*

710 Constitutional Court of Spain, judgment 204-1996, FJ 4.
711 Constitutional Court of Spain, judgment 204-1996, FJ 5.
712 Constitutional Court of Spain, judgment 204-1996, FJ 5; Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 97–98.
713 José Cid Moliné, 'Garantías y Sanciones (Argumentos Contra La Tesis de La Identidad de Garantías Entre Las Sanciones Punitivas)', *Revista de Administración Pública*, no. 140 (1996): 163–64; José Ignacio Cubero Marcos, 'Las Aporías Del Principio "Non Bis in Ídem" En El Derecho Administrativo Sancionador', *Revista de Administración Pública*, no. 207 (2018): 267–68.
714 Constitutional Court of Spain, judgments 1-2020, FJ 8; 91-2009, FJ 6; 180-2004, FJ 6; 270-1994, FJ 8; Gabriel Garcías, 'Consecuencias del principio "non bis in idem" en Derecho penal', *Anuario de derecho penal y ciencias penales* 42, no. 1 (1989): 110; Garberí, 'Principio "Non Bis in Ídem" y Cuestiones de Perjudicialidad', 91; de León, *Acumulación de Sanciones Penales y Administrativas : Sentido y Alcance Del Principio 'Ne Bis in Idem'*, 488–89; Tomás Cano, 'Non Bis in Idem, Prevalencia de La Vía Penal y Teoría de Los Concursos En El Derecho Administrativo Sancionador', *Revista de Administración Pública*, no. 156 (2001): 195; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 47; Navas-Parejo, 'La Aplicación Del Principio "Non Bis in Idem" En El Ámbito Del Derecho Del Trabajo y de La Seguridad Social', 74.
715 Constitutional Court of Spain, judgment 234-1991, FJ 2; de León, *Acumulación de Sanciones Penales y Administrativas : Sentido y Alcance Del Principio 'Ne Bis in Idem'*, 494–95.
716 Garcías, 'Consecuencias del principio "non bis in idem" en Derecho penal', 117–22; Boto, 'Sobre el principio non bis in idem y la importancia de la técnica legislativa (al hilo de la STC 188/2005, de 7 de julio)', 274; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 48. With regard to the Spanish case law on *ne bis in idem* and disciplinary sanctions, see Rebollo et al., Derecho Administrativo sancionador, 423-42.
717 Constitutional Court of Spain, judgment 234-1991, FJ 2.

bis in idem, regardless of whether the second sanction had discounted the first one.[718] The order in which the different authorities had acted was considered irrelevant because the consequences of the violation of the *ne bis in idem* would always affect the second sanctioning decision. For instance, in judgment 177-1999, the Constitutional Court held that the constitutional remedy for a violation of the *ne bis in idem* was the annulment of the second sanction, which in this case had been imposed by the criminal court.[719]

However, in judgment 2-2003 the Constitutional Court changed its standpoint. The Constitutional Court held that the accumulation of punishments in the case of threefold identity is not contrary to the prohibition of multiple punishments if the authority that imposed the second sanction took into account the first one, deducting it from the second penalty.[720] In such a case, the final sanction imposed will not be disproportionate and the defendant will not suffer any punitive excess.[721]

The Constitutional Court applied this new interpretation in judgment 334-2005. In this case, the defendant was firstly convicted by the military disciplinary authority to eight days' imprisonment. Afterwards, the defendant was convicted for the same facts by the military criminal court to nine months' imprisonment. The court deducted the first sanction from this penalty.[722] The Constitutional Court held that this sole circumstance was sufficient to exclude a violation of the prohibition of multiple punishments because the court had prevented any possible punitive excess.[723]

3.1.4. The Procedural Consequences of the Prohibition of Multiple Punishments.

In judgment 77-1983, the Constitutional Court stated that one of the limits of administrative agencies is their subordination to the judiciary,[724] which implies three

---

[718] Constitutional Court of Spain, judgment 177-1999, FJ 4; Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento', 34; Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 76.
[719] Constitutional Court of Spain, judgment 177-1999, FJ 6.
[720] Marina, 'La Problemática Solución de La Concurrencia de Sanciones Administrativas y Penales: Nueva Doctrina Constitucional Sobre El Principio Non Bis in Idem', 182; Gimeno, *Derecho Procesal Penal*, 85; Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 76–77.
[721] Constitutional Court of Spain, judgment 2-2003, FJ 6.
[722] Constitutional Court of Spain, judgment 334-2005, FJ 2.
[723] Constitutional Court of Spain, judgment 334-2005, FJ 2. Criticizing the solution adopted by the Constitutional Court, Gallardo, *Los Principios de La Potestad Sancionadora. Teoría y Práctica*, 302–5.
[724] Constitutional Court of Spain, judgment 2-2003, FJ 3.

consequences. First, the possibility for the defendant sanctioned by the civil authority to file an appeal so that a court controls the sanctioning decision. Second, where the facts may constitute a criminal offence, the civil authority may not initiate a sanctioning proceeding, or continue a proceeding previously initiated, until the criminal proceeding has concluded. Third, the obligation to respect the issues of fact determined by the criminal court.[725]

In judgment 2-2003, the Constitutional Court held that if the civil authority does not respect the obligation to suspend the civil sanctioning proceeding or the prohibition to initiate one when the facts may constitute a criminal offence, and the defendant is finally sanctioned in both proceedings, the constitutional remedy will not be the annulment of the criminal sanction, but rather the annulment of the civil sanction. This conclusion is due to two reasons: first, because criminal courts have exclusive competence to judge criminal offences,[726] and second, because in criminal proceedings the defendant has higher guarantees than in civil proceedings.[727] Therefore, in cases of concurrence of civil and criminal sanctions concerning the same defendant, same facts and same legal basis, the criminal sanction should be preferred over the civil sanction.[728] However, if the criminal proceeding ends without convicting the defendant, the civil authority will be able to initiate or continue the civil sanctioning proceeding.[729]

Concerning the obligation of respecting the issues of fact determined by the criminal court, the Constitutional Court has explained that it is based on the impossibility that the same facts exist and do not exist for different authorities.[730] Accordingly, the civil authority must respect the issues of fact determined by the

---

[725] Constitutional Court of Spain, judgment 77-1983, FJ 3; Garcías, 'Consecuencias del principio "non bis in idem" en Derecho penal', 110; García, *Non Bis in Idem Material y Concurso de Leyes Penales*, 57–58; Górriz, 'Sentido y Alcance Del "Ne Bis in Idem" Respecto a La Preferencia de La Jurisdicción Penal, En La Jurisprudencia Constitucional (De La STC 2/1981, 30 de Enero a La STC 2/2003, 16 de Enero)', 201–3; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 100–101.
[726] Constitutional Court of Spain, judgment 2-2003, FJ 9.
[727] Constitutional Court of Spain, judgment 2-2003, FJ 10.
[728] Constitutional Court of Spain, judgment 2-2003, FJ 10; Cano, 'Non Bis in Idem, Prevalencia de La Vía Penal y Teoría de Los Concursos En El Derecho Administrativo Sancionador', 212; Manuel Rebollo and Manuel Izquierdo, 'El Régimen de Infracciones y Sanciones', in *Comentario a La Ley General de Subvenciones*, ed. Germán Fernández (Civitas, 2005), 633; Gimeno, *Derecho Procesal Penal*, 84; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 87–91.
[729] Gómez-Jara and Chiesa, 'Spain', 492.
[730] Constitutional Court of Spain, judgment 77-1983, FJ 4; Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 64; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 161; Rebollo et al., *Derecho Administrativo sancionador*, 415.

criminal court.[731] It is important to underline that only those issues of fact that were actually determined by the criminal court must be respected in the civil sanctioning proceeding. Therefore, the civil authority will not be obliged to respect those issues of fact that were not determined because the standard of proof was not satisfied.[732] In judgment 107-1989, the Constitutional Court held that the statement "it is proven that the defendant committed an act" is different from the declaration "it is not proven that the defendant committed an act".[733] Thus, if the defendant is acquitted because the court concluded that a fact was not proven, in the civil sanctioning proceeding the authority may nonetheless hold that the same fact has been proven and therefore convict the defendant. In this case, there will be no contradiction between the criminal judgment and the civil decision.[734]

3.2. Protection against Multiple Prosecutions

The Constitutional Court has also recognised the constitutional dimension of the protection against multiple prosecutions, which prohibits a second criminal proceeding in the case of threefold identity.[735]

The Constitutional Court has indicated that the protection against multiple prosecutions is related to *res judicata*[736] because once a court has finally decided a matter, it is not possible to discuss it again.[737] Initiating a new proceeding on the same matter would diminish the protection granted by the prior judgment.[738]

The requirements of the protection against multiple prosecutions are two: in the first place, the first proceeding must have ended with a final decision, which means a

[731] Constitutional Court of Spain, judgment 77-1983, FJ 4; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 164–65.
[732] Constitutional Court of Spain, judgment 98-1989, FJ 10.
[733] Constitutional Court of Spain, judgment 107-1989, FJ 4.
[734] Constitutional Court of Spain, judgments 22-1990, FJ 6; 107-1989, FJ 4.
[735] Constitutional Court of Spain, judgment 91-2008, FJ 2; 2-2003, FJ 3; Boix, 'La Jurisprudencia Constitucional Sobre El Principio Non Bis in Idem', 94; Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento', 27–28.
[736] Constitutional Court of Spain, judgments 3-2019, FJ 3; 126-2011, FJ 16; 60-2008, FJ 9; 2-2003, FJ 3; Górriz, 'Sentido y Alcance Del "Ne Bis in Idem" Respecto a La Preferencia de La Jurisdicción Penal, En La Jurisprudencia Constitucional (De La STC 2/1981, 30 de Enero a La STC 2/2003, 16 de Enero)', 243; Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento', 35; Cano, *Sanciones Administrativas*, 64.
[737] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 32.
[738] Constitutional Court of Spain, judgments 229-2003, FJ 3; 2-2003, FJ 3; 159-1987, FJ 2.

decision with the force of *res judicata*.[739] Secondly, the second proceeding must concern the same person, same facts and same legal basis.

With regard to civil sanctioning proceedings, the Constitutional Court has held that the protection against multiple prosecutions will apply only to those civil proceedings that can be equated to a criminal proceeding based on their degree of complexity and the sanction involved.[740] So far, the Constitutional Court has never equated a civil sanctioning proceeding to a criminal one.[741]

3.3. Summary of the Case Law of the Constitutional Court of Spain

The Constitutional Court of Spain has recognised the constitutional dimension of both the protection against multiple punishments and the protection against multiple prosecutions.

The protection against multiple punishments, which applies to both civil and criminal sanctions, prohibits the accumulation of punishments in the case of unity of offender, identity of facts and unity of legal basis. The Constitutional Court has held that since the accumulation of punishments in the case of threefold identity would mean the imposition of a harsher sanction than what has been legally established by the legislature.

The protection against multiple prosecutions prohibits a second criminal proceeding in the case of unity of offender, identity of facts and unity of legal basis. Regarding civil sanctioning proceedings, the Constitutional Court has stated that the protection against multiple prosecutions will apply only to those civil proceedings that can be equated to a criminal proceeding based on their degree of complexity and the sanction involved. So far, the Constitutional Court has never equated a civil sanctioning proceeding to a criminal one.

The threefold condition of identity is the main requirement of both the protection against multiple punishments and the protection against multiple prosecutions.

[739] Constitutional Court of Spain, judgments 3-2019, FJ 3; 126-2011, FJ 18; 60-2008, FJ 9; 246-2004, FJ 8; 229-2003, FJ 3; 222-1997, FJ 4.
[740] Constitutional Court of Spain, judgments 48-2007, FJ 3; 334-2005, FJ 2; 2-2003, FJ 8; Marina, 'La Problemática Solución de La Concurrencia de Sanciones Administrativas y Penales: Nueva Doctrina Constitucional Sobre El Principio Non Bis in Idem', 183; Gallardo, 'La Concurrencia de Sanciones Penales y Administrativas: Una Prohibición En Desuso', 63–64; Puerta, 'La Prohibición de Bis in Idem En La Legislación de Tráfico', 234; Rebollo et al., *Derecho Administrativo sancionador*, 419; Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento', 36.
[741] Constitutional Court of Spain, judgments 48-2007, FJ 3; 2-2003, FJ 8.

Regarding the unity of offender, the Constitutional Court has ruled that there is no unity of offender where the proceedings concern natural and legal persons who are legally distinct. Concerning the identity of facts, the analysis should not be purely naturalistic, but also consider normative aspects, which means that factual elements that are irrelevant from a legal perspective should not be considered to assess whether there is identity of facts. Finally, the unity of legal basis, it has been generally understood as identity of protected legal good or protected legal interest. Thus, to dismiss the unity of legal basis the different offences must protect a different legal interest.

4. Case Law of the European Court of Human Rights

The *ne bis in idem* was not recognised in the European Convention of Human Rights until its incorporation in Article 4 of Protocol 7,[742] which states:

> "Article 4 of Protocol No. 7 - Right not to be tried or punished twice
> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the state concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
> 3. No derogation from this Article shall be made under Article 15 of the Convention".

Before its incorporation in Protocol 7, the former European Commission on Human Rights had stated that the *ne bis in idem* was not part of Article 6 of the European Convention on Human Rights.[743]

The wording of the first paragraph of Article 4 of Protocol 7 clearly evokes the model of Article 14.7 of the International Covenant on Civil and Political Rights, which provides: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

[742] Pérez Manzano, 'Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)', 78; Mícheál Floinn, 'The Concept of Idem in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law', *Columbia Journal of European Law* 24, no. 1 (2017): 79.

[743] Vervaele, 'The Transnational e Bis in Idem Principle in the EU. Mutual Recognition and Equivalent Protection of Human Rights', 102; Allegrezza, 'Art. 4 Prot. 7', in *Commentario Breve Alla Convenzione Europea Dei Diritti Dell'uomo e Delle Libertà Fondamentali*, ed. Sergio Bartole, Pasquale De Sena, and Vladimiro Zagrebelsky (Cedam, 2012), 894; Xavier Groussot and Angelica Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation?', in *Ne Bis in Idem in EU Law*, ed. Bas Van Bockel (Cambridge University Press, 2016), 56.

Even though Article 4 of Protocol 7 prohibits both punishing and trying a person twice for the same offence,[744] the ECtHR has developed only the protection against multiple prosecutions,[745] resolving all the cases by applying this protection. Thus, it is clear that for the ECtHR the protection against multiple prosecutions is the real *ne bis in idem*.[746] Indeed, the ECtHR has persistently stated that the aim of Article 4 of Protocol 7 is to prohibit the repetition of criminal proceedings against the same person for the same offence.[747] Concerning the unity of offender, the ECtHR has ruled that there is no violation of the *ne bis in idem* where the proceedings concern natural or legal persons who are legally distinct.[748]

The evolution of the case law of the ECtHR on the prohibition of multiple prosecutions can be divided into two phases. The first phase, which covers until *Grande Stevens v. Italy,* decided in 2014,[749] is characterised by the continuous expansion of the scope of the guarantee. Due to a broad concept of criminal offence and the adoption of a purely factual concept of "same offence", during this time the ECtHR interpreted the prohibition of multiple prosecution as a "right to a single trial": once a defendant had been finally convicted or acquitted in a criminal proceeding, the government could not initiate any other criminal proceeding based on substantially the same facts.[750] It was argued that because a sanctioning proceeding is in itself a heavy burden for the defendant, it was unfair and arbitrary to perform two sanctioning proceedings for the same facts.[751] During this first stage, multiple sanctioning systems were considered in clear contrast with the *ne bis in idem*. For instance, in *Grande Stevens,* the ECtHR ruled that the Italian system of parallel civil and criminal

744 ECtHR, Rinas v. Finland, § 50 [2015]; Glantz v. Finland, § 57 [2014]; Bas Van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance', *ERA Forum* 13, no. 3 (2012): 330; Francesco Viganò and Enrico Maria Mancuso, 'Art. 4 Prot. N. 7', in *Corte Di Strasburgo e Giustizia Penale*, ed. Giulio Ubertis and Francesco Viganò (Giappichelli, 2016), 375.

745 Stefan Trechsel and Sarah Summers, *Human Rights in Criminal Proceedings* (Oxford University Press, 2005), 399; Alcácer, 'El Derecho a No Ser Sometido a Doble Procesamiento', 33.

746 Van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance', 330.

747 ECtHR, Šimkus v. Lithuania, § 46 [2017]; Dungveckis v. Lithuania, § 41 [2016]; Carlberg v. Sweden, § 64 [2009]; Garretta v. France, § 72 [2008]; Storbråten v. Norway [2007]; Mjelde v. Norway [2007]; Manasson v. Sweden, § 5 [2003]; Smirnova and Smirnova v. Russia, § 3 [2002]; Sailer v. Austria, § 23 [2002]; W. F. v. Austria, § 23 [2002]; Franz Fischer v. Austria, § 22 [2001]; Hangl v. Austria, § 1 [2001].

748 ECtHR, Pirttimäki v. Finland, § 51 [2014].

749 ECtHR, Grande Stevens and Others v. Italy [2014].

750 ECtHR, Sergey Zolotukhin v. Russia, § 82 [2009]; Francesco Caprioli, 'Editoriale Del Dossier "Giudicato Penale, Principio Di Legalità, Principio Di Colpevolezza"', *Revista Brasileira de Direito Processual Penal* 4, no. 3 (2018): 941.

751 Cano, 'Non Bis in Idem, Prevalencia de La Vía Penal y Teoría de Los Concursos En El Derecho Administrativo Sancionador', 200.

sanctioning proceedings for the offence of market abuse was contrary to the *ne bis in idem* because both proceedings were based on substantially the same facts.[752]

The second phase of this evolution commenced with the decision of the Grand Chamber in *A and B v. Norway*,[753] which somewhat modified the ruling of *Grande Stevens*.[754] In *A and B*, *t*he ECtHR firstly noted that multiple sanctioning systems were a widespread practice in the EU Member States, especially in fields such as taxation, environment and public safety.[755] Secondly, the Court recognised that its case law offered little guidance for cases where, instead of a duplication of proceedings, there had been an integrated combination of sanctioning procedures.[756] Considering the above, the ECtHR ruled that the *ne bis in idem* does not prevent the state from introducing a multiple sanctioning system,[757] as long as there is a sufficiently close connection in substance and time between the different sanctioning proceedings. Where this connection allows considering the different proceedings as an integrated scheme of sanctions, there will be no violation of the *ne bis in idem*.[758]

According to the ECtHR, the application of the *ne bis in idem* depends on (i) whether the proceedings are criminal in nature; (ii) whether the offence is the same in the different proceedings; (iii) whether there is a final decision; (iv) whether there is a new prosecution; and (v) whether the exception of the second paragraph of Article 4 of Protocol 7 is applicable.[759]

4.1. Criminal Nature of the Proceedings: The "Engel criteria"

The ECtHR has invariably stated that, according to the wording of Article 4 of Protocol 7, the *ne bis in idem* only applies to criminal proceedings.[760] The same interpretation

---

[752] ECtHR, Grande Stevens and Others v. Italy, § 227 [2014].
[753] ECtHR, A and B v. Norway [2016].
[754] Paulesu, 'Ne Bis in Idem and Conflicts of Jurisdiction', 401; Cristina Izquierdo, 'Preferencia Aplicativa y Diálogo Judicial', *Indret: Revista Para El Análisis Del Derecho*, no. 1 (2019): 11–12.
[755] ECtHR, A and B v. Norway, § 118 [2016].
[756] ECtHR, A and B v. Norway, § 111 [2016].
[757] ECtHR, A and B v. Norway, § 130 [2016].
[758] ECtHR, A and B v. Norway, § 130 [2016]; András Csúri and Michiel Luchtman, 'Procedural Safeguards for Heads of Business in Light of the ECrHR and CJEU Case Law', in *Punitive Liability of Heads of Business in the Eu: A Comparative Study*, ed. Katalin Ligeti and Marletta Angelo (Cedam, 2018), 295.
[759] ECtHR, Prina v. Romania, § 46 [2020]; Mihalache v. Romania, § 49 [2019]; Bjarni Ármannsson v. Iceland, § 39 [2019]; Matthildur Ingvarsdottir v. Iceland, § 44 [2018]; Xheraj v. Albania, § 53 [2008].
[760] ECtHR, Ruotsalainen v. Finland, § 41 [2009]; Nikitin v. Russia, § 35 [2004]; Gradinger v. Austria, § 53 [1995]; Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (Oxford University Press, 2014), 160; Christoffer Wong, 'Criminal Sanctions and

has been adopted by the United Nations Human Rights Committee regarding the *ne bis in idem* provided for in Article 14.7 of the International Covenant on Political and Civil Rights.[761]

Therefore, the *ne bis in idem* does not prohibit bringing parallel civil and criminal proceedings regarding the same offence.[762] However, the ECtHR has repeatedly held that the label of the proceeding under national law cannot be the only criterion to determine its nature.[763] Otherwise, the application of the criminal guarantees would be left to the discretion of the legislature, which might lead to results incompatible with the object and purpose of the Convention.[764]

Criminal proceedings are those that concern a criminal offence. Consequently, the concept of criminal proceeding must be interpreted in the light of the autonomous concept of criminal offence developed by the ECtHR in relation to Articles 6 and 7 of the European Convention.[765]

To ascertain the actual nature of the offence, the ECtHR applies three criteria set out in *Engel and Others v. Netherlands*, decided 1976. The three criteria, commonly referred to as the "Engel criteria", are (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the severity of the penalty that the person concerned risks incurring.[766]

Administrative Penalties: The Quid of the Ne Bis in Idem Principle and Some Original Sins', in *Do Labels Still Matter?: Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, ed. Francesca Galli and Anne Weyembergh (Université de Bruxelles, 2014), 225; Viganò and Mancuso, 'Art. 4 Prot. N. 7', 377.

[761] UNHRC, General Comment no. 32, § 57; J. G. v. New Zealand, § 4.4 [2015]; Gerardus Strik v. Netherlands, § 7.3 [2002]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed. (Oxford University Press, 2014), 518.

[762] ECtHR, Timofeyev and Postupkin v. Russia, § 86-87 [2021]; Serazin v. Croatia, § 91 [2018]; Toth v. Croatia, § 38 [2012]; J. G. Merrills and A. H. Robertson, *Human Rights in Europe*, 4th ed. (Juris Publishing, 2001), 268–69; Norel Neagu, 'The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation', *Leiden Journal of International Law* 25, no. 4 (2012): 958; David Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, 3rd ed. (Oxford University Press, 2014), 970; Izquierdo, 'Preferencia Aplicativa y Diálogo Judicial', 9.

[763] ECtHR, Mihalache v. Romania, § 53 [2019]; Serazin v. Croatia, § 64 [2018]; Šimkus v. Lithuania, § 41 [2017]; Palmén v. Sweden, § 20 [2016]; Rinas v. Finland, § 40 [2015]; Muslija v. Bosnia and Herzegovina, § 25 [2014]; Tomasovic v. Croatia, § 19 [2011]; Zolotukhin v. Russia, § 52 [2009].

[764] ECtHR, Serazin v. Croatia, § 64 [2018]; Kadusic v. Switzerland, § 82 [2018]; Glantz v. Finland, § 48 [2014]; Sergey Zolotukhin v. Russia, § 52 [2009]; Ezeh and Connors v. The United Kingdom, § 100 [2003].

[765] ECtHR, Timofeyev and Postupkin v. Russia, § 86 [2021]; Korneyeva v. Russia, § 48 [2019]; Serazin v. Croatia, § 64 [2018]; ECtHR, A and B v. Norway, § 107 [2016]; Glantz v. Finland, § 48 [2014]; Nykänen v. Finland, § 39 [2014]; Toth v. Croatia, § 26 [2012]; Tomasovic v. Croatia, § 19 [2011]; Haarvig v. Norway [2007]; Bas Van Bockel, 'The European Ne Bis in Idem Principle. Substance, Sources and Scope', in *Ne Bis in Idem in EU Law*, ed. Bas Van Bockel (Cambridge University Press, 2016), 17.

[766] ECtHR, Engel and Others v. Netherlands, § 81--83 [1976]. See also Velkov v. Bulgaria, § 45 [2020]; Orlen Lietuva Ltd. v. Lithuania, § 60 [2019]; A and B v. Norway, § 105-107 [2016]; Žaja v. Croatia, § 86 [2016]; Boman v. Finland, § 30 [2015]; Nykänen v. Finland, § 39 [2014]; Toth v. Croatia, § 26 [2012]; A.

The second and third criterion are alternative and not necessarily cumulative.[767] However, this does not exclude the possibility of a cumulative approach where a separate analysis of each criterion does not make it possible to reach a clear conclusion on the nature of the offence.[768]

Regarding the first Engel criterion, it serves only as a starting point.[769] If the national legislation classifies the offence as criminal, the analysis stops there. Otherwise, the ECtHR will look beyond the national classification and examine the second and third criterion.[770]

Menarini Diagnostics Srl v. Italy, § 38 [2011]; Ruotsalainen v. Finland, § 43 [2009]; Sergey Zolotukhin v. Russia, § 53 [2009]; Jussila v. Finland, § 30 [2006]; Hangl v. Austria, § 1 [2001]; Adamson v. The United Kingdom, § 1 [1999]; Pierre-Bloch v. France, § 54 [1997]; Öztürk v. Germany, § 50 [1984]; C. J. F. Kidd, 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights', *International and Comparative Law Quarterly* 36, no. 4 (1987): 858–59; McDermott, *Res Judicata and Double Jeopardy*, 287; Antoine Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', in *Do Labels Still Matter?: Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, ed. Francesca Galli and Anne Weyembergh (Université de Bruxelles, 2014), 138; Marco Ventoruzzo, 'When Market Abuse Rules Violate Human Rights: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US', *European Business Organization Law Review* 16, no. 1 (2015): 152; Anne Weyembergh and Nicolas Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed', *New Journal of European Criminal Law* 7, no. 2 (2016): 195–96; Bas Van Bockel, 'Right Not to Be Tried or Punished Twice', in *Theory and Practice of the European Convention on Human Rights*, ed. Pieter Van Dijk et al., 5th ed. (Intersentia, 2018), 983; Anna Błachnio-Parzych, 'Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle', *New Journal of European Criminal Law* 9, no. 3 (2018): 379; Katalin Ligeti, 'Fundamental Rights Protection Between Strasbourg and Luxembourg', in *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law*, ed. Katalin Ligeti and Gavin Robinson (Oxford University Press, 2018), 165.

[767] ECtHR, Muslija v. Bosnia and Herzegovina, § 30 [2014]; Tsonyo Tsonev v. Bulgaria, § 49 [2010]; Jussila v. Finland, § 31 [2006]; Peter Wattel, 'Ne Bis in Idem and Tax Offences in EU Law and ECHR Law', in *Ne Bis in Idem in EU Law*, ed. Bas Van Bockel (Cambridge University Press, 2016), 186; Van Bockel, 'Right Not to Be Tried or Punished Twice', 983.

[768] ECtHR, Navalnyy v. Russia, § 78 [2018]; Sancakli v. Turkey, § 29 [2018]; Maresti v. Croatia, § 57 [2009].

[769] ECtHR, Benham v. The United Kingdom, § 56 [1996]; Wong, 'Criminal Sanctions and Administrative Penalties: The Quid of the Ne Bis in Idem Principle and Some Original Sins', 224; J. Baron and E. Poelmann, 'Tax Penalties: Minor Criminal Charges?', *Intertax* 45, no. 12 (2017): 816; Ana Maria Maugeri, 'The Concept of Criminal Matter in the European Courts Case Law', in *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, ed. Rosaria Sicurella et al. (Giuffrè, 2017), 278.

[770] ECtHR, Timofeyev and Postupkin v. Russia, § 75 [2021]; Žaja v. Croatia, § 86 [2016]; Vernes v. France, § 25 [2011]; Kidd, 'Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights', 858; Giancarlo De Vero and Giuseppina Panebianco, *Delitti e Pene Nella Giurisprudenza Delle Corti Europee* (Giappichelli, 2007), 12–13; Jacob Öberg, 'The Definition of Criminal Sanctions in the EU', *European Criminal Law Review* 3, no. 3 (2014): 277; Van Bockel, 'The European Ne Bis in Idem Principle. Substance, Sources and Scope', 40; Mehmet Arslan, *Procedural Guarantees for Criminal and Administrative Criminal Sanctions: A Study of the European Convention on Human Rights* (Max-Planck-Institut für ausländisches und internationales Strafrecht, 2019), 7.

Concerning the second criterion, it is clear from the case law that it is the most important one.[771] To ascertain the very nature of the offence, the ECtHR examines factors such as whether the legal provision is directed toward all citizens or only to a group possessing a special status;[772] whether the imposition of the measure was following a finding of guilty;[773] whether the primary aim of the offence is punishing the offender;[774] and whether the legal interest protected by the offence has been usually protected by criminal law.[775]

Finally, regarding the third criterion, the ECtHR has affirmed that it should be determined by reference to the maximum potential penalty provided by the relevant provision.[776] The ECtHR has underlined that the relative lack of seriousness of the penalty cannot divest an offence of its inherently criminal character.[777] The criterion of the severity of the sanction is not always applied by the ECtHR, as it is considered a subsidiary element.[778]

Applying these criteria, the ECtHR has characterised as criminal, for instance, the withdrawal of the driving license for eighteen months,[779] a 10% tax surcharge,[780] a fine of 720 Finnish marks[781] and a fine of 60 Deutsche marks.[782]

---

[771] ECtHR. Ruotsalainen v. Finland, § 46 [2009]; Jussila v. Finland, § 38 [2006]; Öztürk v. Germany, § 52 [1984]; Campbell and Fell v. The United Kingdom, § 71 [1984]; Baron and Poelmann, 'Tax Penalties: Minor Criminal Charges?', 816; Arslan, *Procedural Guarantees for Criminal and Administrative Criminal Sanctions: A Study of the European Convention on Human Rights*, 8.

[772] ECtHR, Mihalache v. Romania, § 59 [2019]; Šimkus v. Lithuania, § 43 [2017]; Žaja v. Croatia, § 88 [2016]; Muslija v. Bosnia and Herzegovina, § 28 [2014]; Tomasovic v. Croatia, § 22 [2011]; Maresti v. Croatia, § 59 [2009]; Ruotsalainen v. Finland, § 46 [2009]; Ezeh and Connors v. The United Kingdom, § 103 [2003]; Bendenoun v. France, § 47 [1994]; Weber v. Switzerland, § 33 [1990]; Öztürk v. Germany, § 53 [1984].

[773] ECtHR, Escoubet v. Belgium, § 37 [1999]; Benham v. The United Kingdom, § 56 [1996]; Welch v. The United Kingdom, § 26 [1995].

[774] ECtHR, Serazin v. Croatia, § 84 [2018]; Šimkus v. Lithuania, § 43 [2017]; Palmén v. Sweden, § 26 [2016]; Nykänen v. Finland, § 40 [2014]; Grande Stevens and Others v. Italy, § 96 [2014]; Pirttimäki v. Finland, § 47 [2014]; Tomasovic v. Croatia, § 22 [2011]; Gardel v. France, § 43 [2009]; Maresti v. Croatia, § 59 [2009]; Ezeh and Connors v. The United Kingdom, § 102 [2003]; Bendenoun v. France, § 47 [1994]; Öztürk v. Germany, § 53 [1984].

[775] ECtHR, Mihalache v. Romania, § 59 [2019]; Milenković v. Serbia, § 35 [2016]; Sergey Zolotukhin v. Russia, § 55 [2009].

[776] ECtHR, Prina v. Romania, § 57 [2020]; Mihalache v. Romania, § 61 [2019]; Milenković v. Serbia, § 36 [2016]; Tomasovic v. Croatia, § 23 [2011]; Maresti v. Croatia, § 60 [2009]; Sergey Zolotukhin v. Russia, § 56 [2009]; Grecu v. Romania, § 54 [2006]; Ezeh and Connors v. The United Kingdom, § 120 [2003]; Campbell and Fell v. The United Kingdom, § 72 [1984].

[777] ECtHR, Kiiveri v. Finland, § 32 [2015]; Jussila v. Finland, § 31 [2006]; Öztürk v. Germany, § 54 [1984].

[778] Maugeri, 'The Concept of Criminal Matter in the European Courts Case Law', 280.

[779] ECtHR, Nilsson v. Sweden [2005].

[780] ECtHR. Jussila v. Finland, § 37-38 [2006].

[781] ECtHR, Ruotsalainen v. Finland, § 47 [2009].

[782] ECtHR, Öztürk v. Germany, § 50-54 [1984].

4.2. The "Same Offence" Requirement

The second element of the *ne bis in idem* is the identity of the offence, possibly the most contentious component.[783]

4.2.1. The Different Approaches before *Zolotukhin v. Russia*.

Before *Zolotukhin v. Russia*, decided in 2009, the ECtHR had developed three different approaches to ascertain the "same offence" requirement.

The first approach, the same conduct test, was adopted in *Gradinger v. Austria*. In this case, the defendant, whilst driving under the influence of alcohol, caused an accident which led to the death of a cyclist.[784] The Regional Court convicted the applicant of having caused the death of the cyclist by negligence and sentenced him to 200 day-fines.[785] Afterwards, the applicant was fined 12,000 Austrian schillings for driving under the influence of alcohol.[786] The ECtHR held that there had been a violation of the *ne bis in idem* because the two proceedings were based on the same conduct.[787]

The ECtHR overruled the same conduct test in *Oliveira v. Switzerland*, adopting the same crime test. The defendant, whilst driving her car, collided with another one, whose driver sustained serious injuries.[788] In 1991 the police authority fined the applicant 200 Swiss francs under the Federal Road Traffic Act for failing to control her vehicle.[789] In 1993 the district attorney issued a penal order fining the applicant 2,000 Swiss francs for negligently causing physical injury, contrary to Article 125 of the Swiss Criminal Code.[790] The ECtHR firstly noted that the case in question was an example of a single act constituting various offences, which are different and can be tried separately. Since the *ne bis in idem* prohibits trying the defendant twice for the same offence, and not for the same conduct, the ECtHR found no violation of the *ne bis in idem*.[791]

---

[783] Van Bockel, 'The European Ne Bis in Idem Principle. Substance, Sources and Scope', 47.
[784] ECtHR, Gradinger v. Austria, § 7 [1995].
[785] ECtHR, Gradinger v. Austria, § 8 [1995].
[786] ECtHR, Gradinger v. Austria, § 9 [1995].
[787] ECtHR, Gradinger v. Austria, § 55 [1995].
[788] ECtHR, Oliveira v. Switzerland, § 7 [1998].
[789] ECtHR, Oliveira v. Switzerland, § 10 [1998].
[790] ECtHR, Oliveira v. Switzerland, § 11 [1998].
[791] ECtHR, Oliveira v. Switzerland, § 26 [1998]; Neagu (n 16) 969.

The third approach was the same essential elements test, adopted in *Franz Fischer v. Austria*. In 1996 the applicant, whilst driving under the influence of alcohol, knocked down a cyclist who was fatally injured. After hitting the cyclist, the applicant drove off without stopping to give assistance.[792] The administrative authority sanctioned the applicant for a number of traffic offences, which included driving under the influence of alcohol. The total sentence was a fine of 22.010 Austrian schillings with twenty days' imprisonment in default.[793] Afterwards, the Regional Court convicted the applicant of causing death by negligence after allowing himself to become intoxicated through the consumption of alcohol, under Article 81 of the Criminal Code, and sentenced him to six months' imprisonment.[794] The defendant claimed that he had been tried twice for the same offence. Regarding the "same offence" requirement, the ECtHR held that where different offences based on the same conduct are prosecuted consecutively, the relevant question is whether such offences shared the same essential elements. If so, the second prosecution will be barred by the *ne bis in idem*.[795] In the present case, the ECtHR considered that both offences shared the same essential elements, thereby finding a violation of the *ne bis in idem*.[796]

4.2.2. *Zolotukhin v. Russia* and the Current Interpretation.

In *Zolotukhin v. Russia,* the ECtHR recognised that the existence of different approaches regarding the "same offence" requirement had caused legal uncertainty. Therefore, it was necessary to provide for a harmonised interpretation.[797] After examining the three different approaches, the Court established its current interpretation.[798] In the first place, the Court stated that an interpretation which emphasises the legal aspect of the offences would be too restrictive.[799] The Court then ruled that the *ne bis in idem* should be understood as prohibiting the prosecution of an

[792] ECtHR, Franz Fischer v. Austria, § 7 [2001].
[793] ECtHR, Franz Fischer v. Austria, § 8 [2001].
[794] ECtHR, Franz Fischer v. Austria, § 9 [2001].
[795] ECtHR, Franz Fischer v. Austria, § 25 [2001]. The "same essential elements" test was later applied in W. F. v. Austria, § 25-28 [2002], Sailer v. Austria, § 25-28 [2002], Hauser-Sporn v. Austria, § 42-46 [2006] and Schutte v. Austria, § 41-44 [2007] and Garretta v. France, § 92 [2008].
[796] ECtHR, Franz Fischer v. Austria, § 29-32 [2001].
[797] ECtHR, Sergey Zolotukhin v. Russia, § 78 [2009].
[798] ECtHR, Khodorkovskiy and Lebedev v. Russia (no. 2), § 603 [2020]; Nodet v. France, § 44 [2019]; Ramda v. France, § 81 [2017]; Jóhannesson and Others v. Iceland, § 45 [2017]; Šimkus v. Lithuania, § 48 [2017]; A and B v. Norway, § 108 [2016].
[799] ECtHR, Sergey Zolotukhin v. Russia, § 81 [2009].

individual for a second offence in so far as it arose from substantially the same facts as those underlying the first offence.[800] Therefore, research should focus on those facts that constitute a set of concrete circumstances, linked to each other in time and space.[801] Thus, same offence is the same factual conduct, at the same place and time, carried out by the same person.[802] The ruling of the ECtHR was inspired by the case law of the CJEU,[803] which in *Van Esbroeck* had already adopted a purely factual approach regarding the transnational application of the *ne bis in idem* provided for in Article 54 of the Convention Implementing the Schengen Agreement.

The approach set out in *Zolotukhin v. Russia* has been applied to all subsequent cases.[804] For instance, in *Tsonyo Tsonev v. Bulgaria,* the applicant entered an apartment and beat a person who was inside.[805] Based on the police report, the local police fined the applicant 50 Bulgarian levs for having breached the public order.[806] Afterwards, the defendant was tried for and convicted of inflicting bodily harm.[807] The ECtHR observed that the two proceedings had been based on the same facts. Therefore, the Court found that the applicant had been tried twice for the same offence, finding a violation of the *ne bis in idem*.[808]

In *Milenković v. Serbia*, a misdemeanour judge found that on 12 October 2006, around 5.30 p.m., applicant had punched another person several times on the head and injured him. The judge fined the applicant 4,000 Serbian dinars for having committed an offence against the public order. Afterwards, the public prosecutor charged the applicant with inflicting bodily harm. The applicant was found guilty as

---

[800] ECtHR, Sergey Zolotukhin v. Russia, § 82 [2009]; Giacomo Di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*', *European Public Law* 17, no. 2 (2011): 244; Carpio, 'Europeización y Reconstitución Del Non Bis in Idem. Efectos En España de La STEDH Sergey Zolotukhin v. Rusia de 10 de Febrero de 2009', 231; Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*, 161; Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, 972; Ventoruzzo, 'When Market Abuse Rules Violate Human Rights: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US', 156; Caprioli, 'Editoriale Del Dossier "Giudicato Penale, Principio Di Legalità, Principio Di Colpevolezza"', 936–37.

[801] ECtHR, Sergey Zolotukhin v. Russia, § 84 [2009].

[802] Wattel, 'Ne Bis in Idem and Tax Offences in EU Law and ECHR Law', 178.

[803] Groussot and Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation?', 57; Ilić, 'Observations on the Ne Bis in Idem Principle in Light of the European Court of Human Rights' Judgment: Milenkovic v. Serbia', 221; Buric, 'Ne Bis in Idem in European Criminal Law', 510.

[804] ECtHR, Mihalache v. Romania, § 67-68 [2019]; Marguš v. Croatia, § 114 [2014]; Kapetanios and Others v. Greece, § 62 [2015].

[805] ECtHR, Tsonyo Tsonev v. Bulgaria, § 6 [2010].

[806] ECtHR, Tsonyo Tsonev v. Bulgaria, § 7 [2010].

[807] ECtHR, Tsonyo Tsonev v. Bulgaria, § 8-10 [2010].

[808] ECtHR, Tsonyo Tsonev v. Bulgaria, § 52 [2010].

charged and sentenced to three months' imprisonment. The ECtHR noted that in both proceedings that applicant had been accused of punching another person on the head and injuring him on 12 October 2006.[809] Considering that the events described in both decisions took place during the same fight, the ECtHR concluded that the applicant had been tried twice for the same offence.[810]

4.3. The "Final Decision" Requirement

According to Article 4 of Protocol 7, the *ne bis in idem* requires that the defendant has previously been "finally acquitted or convicted in accordance with the law and penal procedure of that State" for the same offence. This requirement does not demand, however, the intervention of a court.[811]

The ECtHR has held that the words "acquitted or convicted" imply that the criminal responsibility of the defendant has been established following an assessment of the circumstances and merits of the case. For these purposes, it is necessary that "the authority giving the decision is vested by domestic law with decision-making power enabling it to examine the merits of a case".[812]

Regarding the final character of the decision, the ECtHR has stated that, following the Explanatory Report to Protocol 7, a decision is final when it has acquired the force of *res judicata*.[813] In *Mihalache v. Romania*, the ECtHR recognised that although some previous decisions might give the impression that the final nature of a decision is exclusively governed by domestic law,[814] this is not correct.[815] On the contrary, the concept of "final decision" should be interpreted to some extent autonomously.[816] Otherwise, the application of the *ne bis in idem* would be left to the discretion of the states.[817]

---

[809] ECtHR, Milenković v. Serbia, § 39 [2016].
[810] ECtHR, Milenković v. Serbia, § 40 [2016].
[811] ECtHR, Mihalache v. Romania, § 95 [2019].
[812] ECtHR, Mihalache v. Romania, § 97 [2019].
[813] ECtHR, Korneyeva v. Russia, § 48 [2019]; Ramda v. France, § 82 [2017]; Kapetanios and Others v. Greece, § 63 [2015]; Muslija v. Bosnia and Herzegovina, § 36 [2014]; Tsonyo Tsonev v. Bulgaria, § 53 [2010]; Sergey Zolotukhin v. Russia, § 107 [2009]; Trechsel and Summers, *Human Rights in Criminal Proceedings*, 389; Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*, 160; Carl-Friedrich Stuckenberg, 'Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions', 471.
[814] For instance, Sundqvist v. Finland [2005].
[815] ECtHR, Mihalache v. Romania, § 104 [2019].
[816] ECtHR, Mihalache v. Romania, § 114 [2019].
[817] ECtHR, Mihalache v. Romania, § 116 [2019].

A decision is final when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.[818] On the other hand, extraordinary remedies, such as a request to reopen the case, should not be considered when determining whether the proceeding has concluded.[819]

The principle of legal certainty requires that domestic law clearly circumscribes the temporal scope of a remedy and the procedure for its use. Therefore, a "law conferring an unlimited discretion on one of the parties to make use of a specific remedy or subjecting such a remedy to conditions disclosing a major imbalance between the parties in their ability to avail themselves of it would run counter to the principle of legal certainty". For this principle to be satisfied, a remedy must operate in a manner bringing clarity about the point in time when a decision becomes final.[820] Otherwise, the remedy cannot be considered ordinary.[821]

Based on the requirement of a final decision, the ECtHR has held that the *ne bis in idem* does not prohibit to bring concurrent or parallel proceedings because, in such a situation, there is no final decision. Therefore, the defendant will not have been tried twice for an offence for which he has already been finally acquitted or convicted.[822] However, if one proceeding becomes final, the rest of them should be discontinued. When such discontinuation does not occur, there will be a violation of the *ne bis in idem*.[823]

4.4. The "Duplication of Proceedings" Requirement

The ECtHR has ruled that the *ne bis in idem* does not prohibit the government from criminally prosecuting the same defendant twice for the same offence provided that

[818] ECtHR, Mihalache v. Romania, § 115 [2019]; Šimkus v. Lithuania, § 46 [2017]; Milenković v. Serbia, § 44 [2016]; Glantz v. Finland, § 54 [2014]; Tsonyo Tsonev v. Bulgaria, § 53 [2010]; Sergey Zolotukhin v. Russia, § 107 [2009].
[819] ECtHR, Mihalache v. Romania, § 110 [2019].
[820] ECtHR, Mihalache v. Romania, § 115 [2019].
[821] ECtHR, Mihalache v. Romania, § 115 [2019].
[822] ECtHR, Rinas v. Finland, § 52 [2015]; Nykänen v. Finland, § 49 [2014]; Glantz v. Finland, § 59 [2014]; Muslija v. Bosnia and Herzegovina, § 37 [2014]; Van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance', 331; Fabio Salvatore Cassibba, 'I limiti oggettivi del ne bis in idem in Italia tra fonti nazionali ed europee', *Revista Brasileira de Direito Processual Penal* 4, no. 3 (2018): 979.
[823] ECtHR, Korneyeva v. Russia, § 51 [2019]; Boman v. Finland, § 41 [2015]; Kiiveri v. Finland, § 43 [2015]; Tomasovic v. Croatia, § 31 [2011].

the different proceedings are sufficiently connected in substance and time. If so, there will be no duplication of proceedings, but a combination of procedures compatible with the *ne bis in idem*.[824]

4.4.1. The Case Law before *A and B v. Norway*.

The first case in which the ECtHR held that there had been no duplication of proceedings, but a combination of proceedings was *R. T. v. Switzerland*. In March 1993, the defendant was driving his car when he was stopped by the police. His blood alcohol level was checked, disclosing a concentration of 1,5 %. In May 1993, the Road Traffic Office withdrew the applicant's driving licence for a period of four months. In June 1993, the District Office convicted the defendant of driving under the influence of alcohol, imposing on him a prison sentence of two weeks suspended on probation for a period of two years as well as a fine of 1,100 Swiss francs.[825] The ECtHR considered that the two different Swiss authorities "were merely determining the three different sanctions envisaged by law for such an offence, namely a prison sentence, a fine and the withdrawal of the driving licence".[826] Therefore, the ECtHR held that the defendant had not been tried twice for the same offence.

The second decision was *Nilsson v. Sweden*. In June 1999, the Mora District Court convicted the applicant of aggravated drunken driving and unlawful driving and sentenced him to a suspended sentence of 50 hours' community service. In July of the same year, the County Administrative Board withdrew the defendant's driving licence for eighteen months. The ECtHR held that the decision to withdraw the applicant's driving licence did not amount to a new criminal proceeding because there had been a sufficiently close connection in substance and time between the different proceedings. This connection made it possible to consider the withdrawal of a driving licence as part of an integrated sanctioning scheme under Swedish law for the offences of aggravated drunken driving and illegal driving.[827]

The following decision was *Maszni v. Romania*. In August 1998, the applicant was convicted of using a forged document and driving while his driving licence was

[824] ECtHR, Korneyeva v. Russia, § 56 [2019]; Mihalache v. Romania, § 83 [2019].
[825] ECtHR, R. T. v. Switzerland, § 3 [2000].
[826] ECtHR, R. T. v. Switzerland, § 3 [2000].
[827] ECtHR, Nilsson v. Sweden [2005].

suspended. In September 1999, the police authority withdrew the driving licence of the applicant, based on his prior criminal conviction. Regarding the duplication of proceedings, the ECtHR noted that the withdrawal of the driving licence was a direct and foreseeable consequence of the criminal conviction and that the police authority had intervened without opening a new procedure.[828] Consequently, the ECtHR concluded that there had been a close connection between the two proceedings and that both sanctions were part of an integrated sanctioning scheme.[829]

After *Maszni v. Romania*, the ECtHR decided four cases in which the applicants questioned the lawfulness of the Finnish and Swedish multiple sanctioning systems for tax offences under the *ne bis in idem*: *Nykänen v. Finland* and *Glantz v. Finland*, both decided on 20 May 2014, *Lucky Dev v. Sweden*, decided on 27 November 2014 and *Kiiveri v. Finland*, decided on 10 February 2015. In these four cases, the defendants were sanctioned for tax offences, firstly by the tax authority and later by the criminal court.[830] Even though it was clear that both proceedings were part of the Finnish and Swedish sanctioning systems, the ECtHR observed that the different proceedings had not been connected in any way since each of them followed its own separate course and became final independently from the other one. Moreover, the Court noted that the tax sanction had been imposed after a separate examination of the conduct of the applicant and his liability.[831] Therefore, the ECtHR concluded that there had been no sufficiently close connection in substance and time between the two sanctioning proceedings,[832] finding a violation of the *ne bis in idem*.[833]

The next case in which the application of the sufficiently close connection was discussed was *Boman v. Finland*. In April 2010, the defendant was convicted of causing a serious traffic hazard and operating a vehicle without a licence and sentenced to 75 day-fines, amounting to €450. A driving ban was also imposed until 4 September 2010.[834] In May 2010, the police imposed a new driving ban on the applicant

---

[828] ECtHR, Maszni v. Romania, § 68 [2006].
[829] ECtHR, Maszni v. Romania, § 69-70 [2006].
[830] ECtHR, Kiiveri v. Finland, § 6-16 [2015]; Lucky Dev v. Sweden, § 6-12 [2014]; Glantz v. Finland, § 6-19 [2014]; Nykänen v. Finland, § 6-19 [2014].
[831] ECtHR, Kiiveri v. Finland, § 45 [2015]; Lucky Dev v. Sweden, § 62 [2014]; Glantz v. Finland, § 61 [2014]; Nykänen v. Finland, § 51 [2014].
[832] ECtHR, Kiiveri v. Finland, § 45 [2015]; Lucky Dev v. Sweden, § 62 [2014]; Glantz v. Finland, § 61 [2014]; Nykänen v. Finland, § 51 [2014].
[833] ECtHR, Kiiveri v. Finland, § 49 [2015]; Lucky Dev v. Sweden, § 64 [2014]; Glantz v. Finland, § 64 [2014]; Nykänen v. Finland, § 54 [2014].
[834] ECtHR, Boman v. Finland, § 7 [2015].

from 5 September to 4 November 2010. The police based its decision on the prior criminal conviction of the applicant.[835] After examining the case, the ECtHR held that there had been a sufficiently close connection between the two proceedings to consider that the measures had taken place within a single set of proceedings. The Court noted that the decision of the police had been directly based on the previous conviction of the applicant, and that it had not contained a separate examination of his conduct or liability.[836]

In *Rivard v. Switzerland,* the ECtHR recognised once again the exception to the sufficiently close connection in substance and time. In July 2010, the Geneva Contraventions Department fined the defendant 600 Swiss francs for driving over the speed limit.[837] In September 2010, the Vaud Traffic Department ordered the withdrawal of the driving licence of the defendant for one month.[838] Regarding the question of whether the applicant had been prosecuted twice, the ECtHR observed that the Geneva Contraventions Department had no jurisdiction to impose civil sanctions and that the Vaud Traffic Department had no jurisdiction to impose criminal sanctions. Therefore, each authority had imposed different sanctions, which did not overlap.[839] Besides, the administrative authority could deviate from the criminal judgment only under certain conditions, for example, if it finds facts unknown to the criminal judge.[840] The ECtHR also noted that the driving licence of the applicant had been withdrawn very soon after his criminal conviction.[841] Consequently, the Court held that the two sanctioning proceedings had been sufficiently closely connected to be considered as two aspects of a single system, finding no violation of the *ne bis in idem*.[842]

4.4.2. The Development of the "Sufficiently Close Connection in Substance and Time Exception": *A and B v. Norway*.

In *A and B v. Norway*, decided in 2016 by the Grand Chamber, the Court tried to develop in more details the elements of the sufficiently close connection in substance

---

835 ECtHR, Boman v. Finland, § 9 [2015].
836 ECtHR, Boman v. Finland, § 43-44 [2015].
837 ECtHR, Rivard v. Switzerland, § 7 [2016].
838 ECtHR, Rivard v. Switzerland, § 9 [2016].
839 ECtHR, Rivard v. Switzerland, § 31 [2016].
840 ECtHR, Rivard v. Switzerland, § 31 [2016].
841 ECtHR, Rivard v. Switzerland, § 32 [2016].
842 ECtHR, Rivard v. Switzerland, § 33-34 [2016].

and time exception.[843] In this case, the ECtHR examined the Norwegian system of dual criminal and civil sanctioning proceedings regarding incorrect information submitted in tax declarations.

The ECtHR held that dual criminal and civil sanctioning systems are not contrary to the *ne bis in idem,* as long as there is a sufficiently close connection in substance and time between the different proceedings. If so, there will be no duplication of proceedings, but a combination of procedures compatible with the *ne bis in idem*.[844] In order to determine whether there is a sufficiently close connection in substance, it must be considered (i) whether the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved; (ii) whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice; (iii) whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set; and (iv) whether the sanction imposed in the proceeding which concluded first was considered in that which ended later, so as to prevent that the individual concerned bears an excessive burden. This latter risk is least likely to be present where there is an offsetting mechanism designed to assure that the overall amount of any penalties imposed is proportionate.[845] Furthermore, the extent to which the civil proceedings bear the hallmarks of ordinary criminal proceedings, including its stigmatising features, is an important factor.[846]

Besides the connection in substance, the proceedings should be connected in time too, in order to protect the defendant from being subjected to uncertainty and delay and from proceedings becoming protracted over time. This does not mean, however, that the proceedings must be performed simultaneously from beginning to end.[847]

---

[843] Ruggero Rudoni, 'Sul Ne Bis in Idem Convenzionale: Le Irriducibili Aporie Di Una Giurisprudenza Casistica', *Quaderni Costituzionali* 37, no. 4 (2017): 831.
[844] ECtHR, A and B v. Norway, § 130 [2016].
[845] ECtHR, A and B v. Norway, § 132 [2016]; Cassibba, 'I limiti oggettivi del ne bis in idem in Italia tra fonti nazionali ed europee', 981; Sofia Mirandola and Giulia Lasagni, 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law', *Eucrim*, no. 2 (2019): 128.
[846] ECtHR, A and B v. Norway, § 133 [2016].
[847] ECtHR, A and B v. Norway, § 134 [2016].

Applying those criteria to the case in question, the ECtHR held that there had been a sufficiently close connection in substance and time between the criminal and civil sanctioning proceeding, which allowed considering them as forming part of an integral scheme of sanctions under Norwegian law.[848] Therefore, the ECtHR found no violation of the *ne bis in idem*.[849]

The ECtHR recognised that the ruling in *A and B v. Norway* was partially inspired by the interpretation developed in *Jussila v. Finland*, decided in 2006.[850] In this case, the tax authority sanctioned the applicant for book-keeping errors with a surcharge of 10% of the value-added tax, amounting to €309.[851] The applicant appealed the decision, requesting an oral hearing at which he could call the tax inspector and an expert chosen by him. The court invited the tax inspector and the expert chosen by the applicant to submit written observations. After the observations had been submitted, the court held that it was not necessary to hold an oral hearing because the parties had submitted all the information in writing, upholding the decision of the tax authority.[852]

After characterising the civil sanction as criminal in nature under the Engel criteria, the ECtHR addressed the question of whether the tax proceeding had complied with the criminal due process standard of Article 6 of the Convention.[853] In the first place, the ECtHR recognised that an oral and public hearing constitutes a fundamental principle, particularly in criminal proceedings.[854] However, the obligation to hold a hearing is not absolute because there may be proceedings in which an oral hearing may not be required. For example, where there are no issues of credibility or contested facts and the courts may fairly and reasonably decide the case on the basis of written materials.[855] The ECtHR has clarified that refusing to hold an oral hearing may be justified not only in exceptional cases because even in criminal proceedings the nature of the issues may not require an oral hearing.[856] Regardless of the criminal

---

848 ECtHR, A and B v. Norway, § 147 [2016]; Ľubica Masárová and Michal Maslen, 'Ne Bis in Idem Principle, Double Jeopardy Guarantee and Their Application in the Fields of Punishment and Sanctioning: Differences, Merits and Demerits', *Societas et Iusrisprudentias* 5, no. 3 (2017): 76.
849 ECtHR, A and B v. Norway, § 154 [2016].
850 ECtHR, A and B v. Norway, § 133 [2016].
851 ECtHR, Jussila v. Finland, § 10 [2006].
852 ECtHR, Jussila v. Finland, § 11-12 [2006].
853 ECtHR, Jussila v. Finland, § 38-39 [2006].
854 ECtHR, Jussila v. Finland, § 40 [2006].
855 ECtHR, Jussila v. Finland, § 41 [2006], citing Döry v. Sweden, § 37 [2002] and Pursiheimo v. Finland [2003]. See also Tommaso v. Italy, § 163 [2017].
856 ECtHR, Jussila v. Finland, § 42 [2006].

nature of the tax proceeding, the ECtHR affirmed that it is evident that there are criminal cases which do not carry a significant degree of stigma. In other words, there are criminal charges of different weight.[857] The Court recognised that the application of the Engel criteria has caused a broadening of the criminal sphere to cases that do not strictly belong to the traditional categories of criminal law. In those cases that do not belong to the core of criminal law, the guarantees do not apply with their full stringency.[858]

Regarding the present case, the ECtHR noted that the applicant had had ample opportunity to put forward his case in writing and to comment on the submissions of the tax authorities. Therefore, the ECtHR concluded that the requirements of fairness had been complied with, and an oral hearing had not been necessary in the particular case, finding no violation of Article 6 of the Convention.[859] The ECtHR has clarified that the approach adopted in the *Jussila* is not limited to the issue of the lack of an oral hearing but may be extended to other procedural issues covered by Article 6.[860]

The ECtHR supported its ruling in *A and B v. Norway* with the reasoning in *Jussila*,[861] underlining that there are criminal cases of differing weight, which do not carry any significant degree of stigma and where the guarantees do not apply with their full stringency.[862]

A and B v. Norway constituted a turning point in the development of the case law of the ECtHR regarding the lawfulness of multiple sanctioning systems under the *ne bis in idem*, shifting the central issue away from whether the proceedings were criminal in nature or concerned the same offence towards the question of whether there was a

[857] ECtHR, Jussila v. Finland, § 43 [2006]; Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', 142; Masera, *La Nozione Costituzionale Di Materia Penale*, 51.
[858] ECtHR, Jussila v. Finland, § 43 [2006]. See also Chap Ltd. v. Armenia, § 41-43 [2017]; Sancakli v. Turkey, § 44 [2018]; Hans Lidgard, 'Due Process in European Competition Procedure: A Fundamental Concept or a Mere Formality?', in *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, ed. Pascal Cardonnel, Allan Rosas, and Nils Wahl (Hart Publishing, 2012), 411; Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', 143; Masera, *La Nozione Costituzionale Di Materia Penale*, 51.
[859] ECtHR, Jussila v. Finland, § 48-49 [2006].
[860] ECtHR, Kammerer v. Austria, § 27 [2010].
[861] Agnė Andrijauskaitė, 'Exploring the Penumbra of Punishment under the ECHR', *New Journal of European Criminal Law* 10, no. 4 (2019): 370.
[862] ECtHR, A and B v. Norway, § 133 [2016]. The ECtHR has reaffirmed that civil sanctions do not belong to the traditional categories of criminal law in Suhadolc v. Slovenia [2011]; Marčan v. Croatia, § 37 [2014]; Sancakli v. Turkey, § 47 [2018].

sufficiently close connection in substance and time between the proceedings so as to regard them as one proceeding.[863]

4.4.3. The Case Law after *A and B v. Norway*.

After *A and B v. Norway*, the ECtHR has continued addressing the sufficiently close connection in substance and time exception.

In *Jóhannesson and Others v. Iceland*, decided in 2017, the applicants were sanctioned for several tax offences, firstly by the tax authority[864] and later by the criminal court.[865] After citing *A and B v. Norway*, the ECtHR examined whether there had been a sufficiently close connection in substance and time between the two sanctioning proceedings. Concerning the connection in substance, the ECtHR accepted that the proceedings pursued complementary purposes and that the consequences of the conduct of the applicants were foreseeable. Regarding the connection in time, the ECtHR noted that the overall length of the two proceedings had been more than nine years, that the proceedings had been performed in parallel just for one year, and that the criminal prosecution had continued several years after the end of the tax proceeding.[866] This was in contrast to the case of *A and B v. Norway*, "where the total length of the proceedings against the two applicants amounted to approximately five years and the criminal proceedings continued for less than two years after the tax decisions had acquired legal force".[867] Therefore, the ECtHR concluded that there had been no sufficiently close connection in time between the two sanctioning proceedings, thereby finding a violation of the *ne bis in idem*.[868]

One year later, the Court handed down its decision in *Matthildur Ingvarsdottir v. Iceland*. In March 2009, the tax authority requested from the applicant information regarding her income and the usage of a foreign credit card.[869] In 2011 the tax authority

---

[863] Piet Hein Van Kempen and Joeri Bemelmans, 'EU Protection of the Substantive Criminal Law Principles of Guilt and Ne Bis in Idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework', *New Journal of European Criminal Law* 9, no. 2 (2018): 260.
[864] ECtHR, Jóhannesson and Others v. Iceland, § 10-14 [2017].
[865] ECtHR, Jóhannesson and Others v. Iceland, § 15-20 [2017].
[866] ECtHR, Jóhannesson and Others v. Iceland, § 54 [2017].
[867] ECtHR, Jóhannesson and Others v. Iceland, § 54 [2017]; Francis Desterbeck, 'Ne Bis in Idem and Tax Offences: How Belgium Adapted Its Legislation to the Recent Case Law of the ECtHR and the CJEU', *Eucrim*, no. 2 (2019): 137.
[868] ECtHR, Jóhannesson and Others v. Iceland, § 56 [2017].
[869] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 4-7 [2018].

found that the applicant had failed to declare significant sums she had received from 2005 to 2008. The authority reassessed the taxes of the applicant and imposed a 25% surcharge. The applicant appealed the decision of the tax authority, but it was upheld, acquiring legal force in April 2013.[870] In the same month, the defendant was tried and convicted for aggravated tax offences and sentenced her to four months' imprisonment, suspended for two years, and a fine of 8,800,000 Icelandic krónur. The appeal of the defendant was rejected by the Supreme Court in January 2014.[871] Regarding the question of whether there had been a close connection in substance between the two proceedings, the ECtHR accepted that both proceedings had pursued complementary purposes in addressing the issue of a taxpayers' failure to file tax returns and that the consequences of the applicant's conduct were foreseeable. The ECtHR also noted that the tax authorities and the police had shared all the information collected during the investigations and, furthermore, that there had been permanent coordination between the two authorities.[872] Turning to the connection in time, the ECtHR noted that the overall length of proceedings had been almost four years and ten months and that the proceedings had been performed in parallel for almost four years.[873] For all these reasons, the ECtHR held that there had been a sufficiently close connection in substance and time between the two proceedings.[874]

In *Bjarni Ármannsson v. Iceland*, the tax authority initiated an audit of the applicant's tax returns in July 2009.[875] In May 2012, the tax authority reassessed the applicant's taxes for the tax years from 2007 to 2009 and imposed a 25% surcharge on him.[876] The defendant was indicted in December 2012 and convicted in June 2013 for aggravated tax offences. The decision upheld by the Supreme Court in May 2014.[877] Regarding the question of whether there had been a sufficiently close connection in substance between the tax and criminal proceeding, the ECtHR accepted once again that they had pursued complementary purposes and that they were foreseeable under national law.[878] However, the ECtHR found that the police and the tax authority had

[870] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 13-18 [2018].
[871] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 23-32 [2018].
[872] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 58-59 [2018].
[873] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 62 [2018].
[874] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 65 [2018].
[875] ECtHR, Bjarni Ármannsson v. Iceland, § 5 [2019].
[876] ECtHR, Bjarni Ármannsson v. Iceland, § 10 [2019].
[877] ECtHR, Bjarni Ármannsson v. Iceland, § 18-20 [2019].
[878] ECtHR, Bjarni Ármannsson v. Iceland, § 53 [2019].

conducted their own independent investigations, examining the conduct of the defendant and his liability separately.[879] Concerning the connection in time, the ECtHR noted that the overall length of the proceedings had been about four years and ten months.[880] During this period, the proceedings had been conducted in parallel for five months. Moreover, the defendant had been indicted in December 2012, seven months after the final decision of the tax authority.[881] Considering the above, especially the lack of overlap in time and the independent collection and assessment of evidence, the ECtHR concluded that there had been no sufficiently close connection in substance and time between both proceedings, thereby finding a violation of the *ne bis in idem*.[882]

In *Nodet v. France*, the financial markets regulator, in December 2007, sanctioned the applicant for market manipulation and fined him €250,000. The decision was upheld by the Supreme Court in November 2009.[883] In April 2010, the criminal court convicted the defendant of obstructing the proper operation of the stock market. The decision was upheld by the Supreme Court in January 2014.[884] On the question of whether there had been a sufficiently close connection in substance between the two sanctioning proceedings, the ECtHR held that they had not pursued complementary purposes nor addressed different aspects of the misconduct involved.[885] The ECtHR noted that the two legal provisions protected the same legal interest and defined the relevant conduct in the same manner.[886] Furthermore, the Court observed that there had been a repetition in the gathering of evidence because there had been two different investigations.[887] Concerning the connection in time, the ECtHR noted that the overall length of the proceedings had been seven and a half years. After the end of the administrative proceeding, the criminal proceeding had lasted for another four years.[888] Therefore, the Court concluded that there had been no sufficiently close connection in substance and time between both proceedings, finding a violation of the *ne bis in idem*.[889]

[879] ECtHR, Bjarni Ármannsson v. Iceland, § 55 [2019].
[880] ECtHR, Bjarni Ármannsson v. Iceland, § 56 [2019].
[881] ECtHR, Bjarni Ármannsson v. Iceland, § 56 [2019].
[882] ECtHR, Bjarni Ármannsson v. Iceland, § 58 [2019].
[883] ECtHR, Nodet v. France, § 16-18 [2019].
[884] ECtHR, Nodet v. France, § 22-25 [2019].
[885] ECtHR, Nodet v. France, § 48 [2019].
[886] ECtHR, Nodet v. France, § 48 [2019].
[887] ECtHR, Nodet v. France, § 49 [2019].
[888] ECtHR, Nodet v. France, § 52 [2019].
[889] ECtHR, Nodet v. France, § 53-54 [2019].

In *Mihalache v. Romania*, decided in July 2019, the applicant was sanctioned for a traffic offence in two separate proceedings.[890] Regarding the question of whether there had been a sufficiently close connection between the sanctioning proceedings, the ECtHR stated that even though both proceedings had been conducted by the same authority and the evidence had been the same, the two proceedings were not conducted simultaneously at any time, taking place one after the other. Besides, the two sanctions imposed on the applicant had not been combined.[891] Therefore, the ECtHR held that there had been no sufficiently close connection in substance and time between the two proceedings.[892]

In July 2020, the ECtHR delivered its decision in *Velkov v. Bulgaria*. On 17 May 2008, the applicant and other people arrived at the municipal stadium where a football match was being played, tried to enter it, threw objects towards people and the police officers, and broke several windows. On 29 May 2008, the administrative authority found the applicant guilty of breaching the peace during the football match, ordering his imprisonment for 15 days and banning him from attending sporting events for two years.[893] In July 2008, the defendant was indicted for insulting and throwing stones at the police officers and other people, disobeying and offering resistance to the police during the football match. In January 2009, the criminal court found the applicant guilty on all charges and sentenced him to two years' imprisonment. The conviction was upheld by the Supreme Court in October 2010.[894] Regarding the sufficiently close connection in time, the ECtHR noted that the two proceedings had started at the same time and had been conducted in parallel. Moreover, the criminal proceeding had concluded only two years and four months after the administrative one. In view of this, the Court concluded that there had been a sufficiently close connection in time between the two proceedings.[895] Concerning the connection in substance, the ECtHR noted that both proceedings had not pursued complementary purposes, but the same: sanctioning the breach of the peace during the football match. Secondly, the facts determined in the administrative proceeding had not been considered by the criminal court. Finally, the criminal court had not taken into account the administrative sanction.

---

[890] ECtHR, Mihalache v. Romania, § 9-26 [2019].
[891] ECtHR, Mihalache v. Romania, § 84 [2019].
[892] ECtHR, Mihalache v. Romania, § 85 [2019].
[893] ECtHR, Velkov v. Bulgaria, § 4-10 [2020].
[894] ECtHR, Velkov v. Bulgaria, § 11-23 [2020].
[895] ECtHR, Velkov v. Bulgaria, § 77 [2020].

For these reasons, the ECtHR held that there had been no sufficiently close connection in substance between the two sanctioning proceedings.[896]

Finally, in October 2020 the ECtHR handed down its decision in *Bajčić v. Croatia*. In 2004 the defendant caused a road accident in which a person died. In July 2006, an administrative court fined the defendant 4,100 Croatian kunas for three traffic offences. The defendant did not appeal, and the decision became final the same month. In 2005 the defendant was indicted for causing a fatal road accident. In March 2011, the Municipal Court found the applicant guilty as charged and sentenced him to one year and six months' imprisonment.[897] On the question of whether there had been a sufficiently close connection in substance between the two proceedings, the ECtHR stated that they were foreseeable under national law and that they had pursued complementary purposes: while the first proceeding had addressed the applicant's failure to comply with traffic regulations, the criminal proceeding had addressed the consequence of his failure to comply with those rules, that is, the death of a pedestrian. Regarding the manner of conducting the proceedings, the ECtHR held that the interaction between the two courts had been adequate because the criminal court had inspected the case file from the minor offence proceeding in its entirety, using certain evidence.[898] Concerning the sufficiently close connection in time, the ECtHR noted that the two proceedings initiated at practically the same time and that they were conducted in parallel for almost fourteen months. The Court observed that the criminal proceeding had lasted for six years and ten months after the end of the first proceeding. However, the additional time could not be considered disproportionate because, while the first proceeding was a minor offence procedure, the second was a more complex proceeding, a criminal one, which took place before different court instances. Therefore, the Court held that the two proceedings had been sufficiently closely connected in substance and time, finding no violation of the *ne bis in idem*.[899]

4.5. The Exception of the Second Paragraph of Article 4 of Protocol 7

[896] ECtHR, Velkov v. Bulgaria, § 78-80 [2020].
[897] ECtHR, Bajčić v. Croatia, § 4-9 [2020].
[898] ECtHR, Bajčić v. Croatia, § 41-43 [2020].
[899] ECtHR, Bajčić v. Croatia, § 45-47 [2020].

The second paragraph of Article 4 of Protocol 7 allows reopening a case in accordance with domestic law if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceeding which could affect the outcome of the case.[900] It is important to highlight that the ECtHR has recognised that the reopening of a criminal proceeding may be either in favour or against the defendant. Consequently, a court can quash a final decision that either convicted or acquitted the defendant.[901]

In *Nikitin v. Russia*, decided in 2004, the defendant was charged with treason through espionage and aggravated disclosure of an official secret. In 1999 the criminal court acquitted the applicant on all the charges. The Supreme Court upheld the acquittal, which became final in April 2000.[902] One month later, the government requested the Supreme Court to reopen the case. The Supreme Court rejected the request, noting that the government had had the opportunity during the proceeding to resolve the shortcomings described.[903]

Before the ECtHR, the defendant contended that the supervisory proceeding which took place after his final acquittal had violated the *ne bis in idem* because the request for supervisory review had created the potential for a new prosecution.[904] The ECtHR rejected the argument of the applicant, holding that Article 4 of Protocol 7 allows reopening a criminal proceeding following the emergence of new evidence or the discovery of a fundamental defect in the previous proceeding, even if the defendant was acquitted in such a proceeding.[905]

However, the ECtHR has pointed out that, in certain circumstances, the reopening of a case may impair the essence of a fair trial.[906] In particular, it should be determined whether the authority to review a case "was exercised by the authorities so as to strike, to the maximum extent possible, a fair balance between the interests

---

[900] ECtHR, Sabalić v. Croatia, § 99 [2021]; Mihalache v. Romania, § 130 [2019]; Kadusic v. Switzerland, § 84 [2018]; Nikolay Stepanovich and Ivan Stepanovich Goncharovy v. Russia [2008]; Xheraj v. Albania, § 53 [2008]; Radchikov v. Russia, § 42-43 [2007]; Bratyakin v. Russia [2006]; Harris et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, 973; Vladimiro Zagrebelsky, Roberto Chenal, and Laura Tomasi, *Manuale Dei Diritti Fondamentali in Europa* (Il Mulino, 2016), 225; Viganò and Mancuso, 'Art. 4 Prot. N. 7', 378; Van Bockel, 'Right Not to Be Tried or Punished Twice', 988.

[901] ECtHR, Sabalić v. Croatia, § 99 [2021]; Mihalache v. Romania, § 130-138 [2019]; Fadin v. Russia, § 30-37 [2006]; Nikitin v. Russia, § 46-49 [2004].

[902] ECtHR, Nikitin v. Russia, § 9-16 [2004].

[903] ECtHR, Nikitin v. Russia, § 17-18 [2004].

[904] ECtHR, Nikitin v. Russia, § 31 [2004].

[905] ECtHR, Nikitin v. Russia, § 39-49 [2004].

[906] ECtHR, Xheraj v. Albania, § 53 [2008].

of the individual and the need to ensure the effectiveness of the system of criminal justice".[907] National authorities must respect the binding nature of final decisions and allow the resumption of criminal proceedings only when serious considerations outweigh the principle of legal certainty.[908] Regarding this latter determination, some relevant factors to consider are the effect of the reopening of the case on the situation of the defendant; the grounds on which the authorities revoked the final judgment; the compliance of the proceeding with domestic law; and the existence of procedural safeguards capable of preventing eventual abuses.[909]

4.6. Summary of the Case Law of the European Court of Human Rights

According to the ECtHR, the *ne bis in idem*, recognised by Article 4 of Protocol 7 to the European Convention on Human Rights, aims to prohibit the repetition of criminal proceedings against the same person for the same offence.

Criminal proceedings are those that concern a criminal offence. However, the ECtHR has held that the characterisation of the proceeding under national law cannot be the only criterion to decide its nature. Otherwise, the application of the guarantees would be left to the discretion of the national legislature. For this reason, the ECtHR has developed an autonomous concept of criminal offence. To ascertain the nature of the proceeding, the ECtHR applies three criteria: (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the severity of the penalty that the person concerned risks incurring. Applying these criteria, the ECtHR has increasingly extended the notion of criminal proceeding, characterising as criminal, for instance, the withdrawal of the driving license for eighteen months, a 10% tax surcharge, a fine of 720 Finnish marks and a fine of 60 Deutsche marks.

Concerning the "same offence" requirement, the ECtHR has adopted a purely factual approach, ruling that the *ne bis in idem* must be understood as prohibiting the prosecution of an individual for a second offence in so far as it arose from identical facts or facts which were substantially the same as those underlying the first offence.

[907] ECtHR, Kiselev v. Russia, § 26 [2009]; Xheraj v. Albania, § 53 [2008]; Radchikov v. Russia, § 45 [2007].
[908] ECtHR, Kiselev v. Russia, § 26 [2009]; Bratyakin v. Russia [2006].
[909] ECtHR, Xheraj v. Albania, § 54 [2008].

The broad definition of “criminal proceeding” and the purely factual concept of “same offence” had led to a continuous expansion of the scope of application of the *ne bis in idem*. The ECtHR interpreted the protection against multiple prosecutions as a right to a single trial, stating that once a defendant has been finally convicted or acquitted in a criminal proceeding, the government cannot bring a second criminal proceeding against the same defendant for the same facts. As a consequence, multiple sanctioning systems have usually been found contrary to the *ne bis in idem*.

The ECtHR slightly modified the above interpretation in *A and B v. Norway*. In this case, the ECtHR held that the *ne bis in idem* does not prevent the state from introducing a multiple sanctioning system, as long as there is a sufficiently close connection in substance and time between the different sanctioning proceedings. If so, there will be no duplication of proceedings, but a combination of procedures compatible with the *ne bis in idem*. In order to determine whether there is a sufficiently close connection in substance, it must be considered (i) whether the different proceedings pursue complementary purposes and thus address, not only in abstracto but also in concreto, different aspects of the social misconduct involved; (ii) whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice; (iii) whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set; and (iv) whether the sanction imposed in the proceeding which concluded first was considered in that which ended later, so as to prevent that the individual concerned bears an excessive burden. Besides the connection in substance, the proceedings should be connected in time too. This does not mean, however, that the proceedings must be performed simultaneously from beginning to end.

5. Case Law of the Court of Justice of the European Union

The CJEU has as its aim, among other things, ensuring that European Union law is interpreted and applied the same way in every Member State. In this context, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaties. Thus, when a party raises a question regarding the EU Charter before a national court of a Member State, that tribunal may request the CJEU to give a ruling on that question.[910]

The *ne bis in idem* is recognised in several European instruments, such as the European Convention on Extradition,[911] the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States,[912] the Convention Implementing the Schengen Agreement (CISA)[913] and the EU Charter of Fundamentals Rights.[914] As one scholar has affirmed, the *ne bis in idem* is everywhere in EU law.[915] The *ne bis in idem*, which has been characterised as a fundamental principle of EU law,[916] has performed a central role in the integration process of the EU, especially concerning judicial cooperation.[917]

The CJEU has mainly developed its case law on the *ne bis in idem* in the context of the application of Article 54 of the CISA and Article 50 of the EU Charter of Fundamentals Rights.

Article 54 of the CISA states:

> "A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if

---

910 Article 267, Treaty on the Functioning of the European Union.
911 Article 9.
912 Article 3.
913 Article 54.
914 Article 50.
915 Daniel Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice', in *Ne Bis in Idem in EU Law*, ed. Bas Van Bockel (Cambridge University Press, 2016), 103.
916 CJEU, Slovak Telekom A. S. § 40 [2021]; Van Esbroeck, § 40 [2006]; Daniel Sarmiento, 'El Principio Ne Bis In Idem En La Jurisprudencia Del Tribunal de Justicia de La Comunidad Europea', in *El Principio de Ne Bis in Idem En El Derecho Penal Europeo e Internacional*, ed. Luis Arroyo Zapatero and Nieto Martín, Adán (Ediciones de la Universidad de Castilla-La Mancha, 2007), 37–38; Michele Messina, 'The Operation of Ne Bis in Idem in the Application of European Union Competition Law Rules across the European Union: Recent Developments in the Light of the Toshiba Case', *ERA Forum* 13, no. 2 (2012): 164; Tobias Lock, 'Articles 48-50', in *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, ed. Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (Oxford University Press, 2019), 2236.
917 CJEU, Gözütok and Brügge, § 37 [2003].

a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party".

Since the provisions of the CISA were integrated into the EU law,[918] all EU Member States are bound by Article 54.[919]

Article 50 of the EU Charter of Fundamental Rights states:

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

It should be underlined that, according to Article 51 of the EU Charter, its provisions are aimed at the institutions of the EU and at its Member States only when they are implementing Union law.[920]

Article 54 of the CISA[921] and Article 50 of the EU Charter provide for transnational application of the *ne bis in idem*, applying when a person has been finally acquitted or convicted for the same offence in any Member State of the EU.[922]

According to the CJEU, the *ne bis in idem* prohibits a duplication of criminal sanctions and proceedings against the same person for the same offence.[923] Regarding the unity of offender, the Court has stated that there is no violation of the *ne bis in idem* where the proceedings concern natural or legal persons who are legally distinct.[924]

---

918 Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?', 109.

919 Juliette Lelieur, 'Transnationalising Ne Bis in Idem: How the Rule of Ne Is Idem Reveals the Principle of Personal Legal Certainty', *Utrecht Law Review* 9, no. 4 (2013): 198–99.

920 CJEU, Åklagaren v. Hans Åkerberg Fransson, § 16-31 [2013]; Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*, 161; Floinn, 'The Concept of Idem in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law', 81.

921 Luca Luparia, *La Litispendenza Internazionale. Tra Ne Bis in Idem Europeo e Processo Penale Italiano* (Giuffrè, 2012), 62–63; André Klip, 'Jurisdiction and Transnational Ne Bis in Idem in Prosecution of Transnational Crimes', in *The Oxford Handbook of Criminal Process*, ed. Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser (Oxford University Press, 2019), 495.

922 Valsamis Mitsilegas and Fabio Giuffrida, 'Ne Bis in Idem', in *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, ed. Rosaria Sicurella et al. (Giuffrè, 2017), 209–10; Alejandro Hernández, 'Granting Due Process of Law to Suspected and Accused Persons Involved in Parallel Criminal Proceedings in the EU', *Diritto Penale Contemporaneo Rivista Trimestrale*, no. 1–16 (2019): 4.

923 CJEU, Menci, § 25 [2018]; Åklagaren v. Hans Åkerberg Fransson, § 34 [2013].

924 CJEU, Orsi, § 21-23 [2017]; Paulesu, 'Ne Bis in Idem and Conflicts of Jurisdiction', 405.

According to the CJEU, to determine whether there has been a violation of the *ne bis in idem* the judge must analyse (i) whether the penalties and proceedings are criminal in nature; (ii) whether the proceedings concern the same offence; (iii) whether the first decision was final; and (iv) whether the duplication of proceedings is a justified limitation under Article 52 of the EU Charter.

5.1. Criminal Nature of the Proceedings

The CJEU has held that the *ne bis in idem* only applies to penalties and proceedings that are criminal in nature.[925] Consequently, the CJEU has recognised that the states are free to choose the applicable penalties to each offence[926] and that these penalties may take the form of civil penalties, criminal penalties or a combination of the two.[927] Accordingly, the *ne bis in idem* does not prevent the person from being tried for the same offence in a second proceeding of civil nature.[928] However, if the civil sanction is criminal in nature and has become final, the *ne bis in idem* will preclude a successive criminal proceeding for the same offence.[929]

In *Åklagaren v. Hans Åkerberg Fransson*, decided in 2013, the CJEU held that the *ne bis in idem* "laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value-added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine".[930]

In order to determine the nature of the penalty and proceeding, the CJEU has adopted the Engel criteria from the case law of the ECtHR: (i) the legal classification

---

925 CJEU, TN v. ENISA, § 103 [2019]; Menci, § 25 [2018]; Garlsson Real Estate and Others, § 27 [2018]; Spasic, § 53 [2014]; Beneo-Orafti, § 74 [2011]; Wouter P. J. Wils, 'The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis', *World Competition* 26, no. 2 (2003): 133; Mitsilegas and Giuffrida, 'Ne Bis in Idem', 221–22; Lock, 'Articles 48-50', 2237.
926 CJEU, Åklagaren v. Hans Åkerberg Fransson, § 34 [2013]; de Andrade, § 19 [2000].
927 CJEU, M. A. S. and M. B, § 33 [2017]; Åklagaren v. Hans Åkerberg Fransson, § 34 [2013].
928 CJEU, Åklagaren v. Hans Åkerberg Fransson, § 34 [2013].
929 CJEU, Åklagaren v. Hans Åkerberg Fransson, § 34 [2013]; Darius-Dennis Patraus, 'The Non Bis in Idem Principle in The Case Law of the Court of Justice of the European Union- Consistency or Inconsistency', *AGORA International Journal of Juridical Sciences*, no. 1 (2018): 29.
930 CJEU, Åklagaren v. Hans Åkerberg Fransson, § 50 [2013].

of the offence under national law; (ii) the very nature of the offence; and (iii) the nature and degree of severity of the penalty that the person concerned is liable to incur.[931]

The Court has underlined that the application of the *ne bis in idem* is not limited to proceedings and penalties which are classified as criminal under national law, but rather it extends to proceedings and penalties which must be considered criminal in nature on the basis of the two other criteria.[932]

Concerning the second criterion, the relevant question is whether the purpose of the sanction is punitive.[933] Indeed, a sanction with a punitive purpose should be considered criminal, regardless of whether it also has a deterrence purpose.[934] By contrast, a measure that merely repairs the damage caused by the offence committed by the defendant is not criminal in nature.[935]

In *Menci* and *Garlsson Real Estate,* the CJEU characterised administrative sanctions as criminal in nature.[936]

In *Menci*, the tax authority found that the defendant had failed to pay the value-added tax resulting from the annual tax return for the tax year 2011, amounting to €282,495. The tax authority fined the defendant €84,748, representing 30% of the tax debt.[937] Regarding the purpose of the sanction, the CJEU held that it sought to punish the late payment of the value-added tax.[938] Finally, with reference to the third criterion,

---

[931] CJEU, Åklagaren v. Hans Åkerberg Fransson, § 35 [2013]; Bonda, § 37 [2012]; Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen (CBFA), § 42 [2009]; Hüls AG v. Commission, § 150 [1999]; Jonathan Tomkin, 'Article 50', in *The EU Charter of Fundamental Rights: A Commentary*, ed. Steve Peers et al. (Hart Publishing, 2014), 1388; Wong, 'Criminal Sanctions and Administrative Penalties: The Quid of the Ne Bis in Idem Principle and Some Original Sins', 241; Chiara Amalfitano and Raffaele D'Ambrosio, 'Diritto di non essere giudicato o punito per due volte per lo stesso reato', in *Carta dei diritti fondamentali dell'Unione Europea*, ed. R. Mastroianni et al. (Giuffrè, 2017), 1031; Maugeri, 'The Concept of Criminal Matter in the European Courts Case Law', 283; Helmut Satzger, *International and European Criminal Law*, 3 edizione (C. H. Beck – Hart – Nomos, 2018), 156; Gianni Lo Schiavo, 'The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions: ECJ 20 March 2018, Case C-524/15, Luca Menci ECJ 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v Commissione Nazionale per Le Società e La Borsa (Consob) ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v Consob and Consob v Antonio Zecca', *European Constitutional Law Review* 14, no. 3 (2018): 651–52.

[932] CJEU, Menci, § 30 [2018]; Garlsson Real Estate and Others, § 32 [2018].

[933] CJEU, Menci, § 31 [2018]; Garlsson Real Estate and Others, § 33 [2018]; Bonda, § 39 [2012].

[934] CJEU, Menci, § 31 [2018]; Garlsson Real Estate and Others, § 33 [2018].

[935] CJEU, Menci, § 31 [2018]; Garlsson Real Estate and Others, § 33 [2018].

[936] Lo Schiavo, 'The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions: ECJ 20 March 2018, Case C-524/15, Luca Menci ECJ 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v Commissione Nazionale per Le Società e La Borsa (Consob) ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v Consob and Consob v Antonio Zecca', 652–53.

[937] CJEU, Menci, § 11-12 [2018].

[938] CJEU, Menci, § 32 [2018].

the CJEU observed that the administrative sanction had a high degree of severity because it consisted of a fine of 30% of the value-added tax due.[939]

In *Garlsson Real Estate*, the securities exchange authority imposed a fine amounting to €10.2 million on the defendants for having manipulated the price of some securities with a view to personal gain. The Court of Appeal upheld the decision but reduced the fine to €5 million.[940] Concerning the second Engel criterion, the CJEU noted that the sanction provided by law for market abuse was a fine of between €20,000 and €5,000,000, which could be increased up to an amount ten times the profit obtained from the offence. The CJEU then held that the sanction had a punitive purpose because it was not only intended to repair the harm caused by the offence.[941] The CJEU finally observed that a fine which can be of an amount up to 10 times greater than the profit obtained from the offence has evidently a high degree of severity.[942]

5.2. The "Same Offence" Requirement

Regarding the "same offence" requirement, in *Van Esbroeck*, decided in 2006, the CJEU adopted a purely factual approach.[943]

In this case, the defendant was sentenced in Norway to five years' imprisonment for illegally importing into Norway narcotic drugs from Belgium. After having served part of his sentence, the defendant was released.[944] Afterwards, a prosecution was brought against the defendant in Belgium, as a result of which he was sentenced to one year's imprisonment for illegally exporting narcotic drugs from Belgium.[945] The defendant filed an appeal arguing a violation of the *ne bis in idem*, enshrined in Article 54 of the CISA.[946] The national court asked the CJEU for a preliminary ruling regarding the "same offence" requirement.[947]

---

[939] CJEU, Menci, § 33 [2018].
[940] CJEU, Garlsson Real Estate and Others, § 11-13 [2018].
[941] CJEU, Garlsson Real Estate and Others, § 34 [2018].
[942] CJEU, Garlsson Real Estate and Others, § 35 [2018].
[943] Lock, 'Articles 48-50', 2238.
[944] CJEU, Van Esbroeck, § 14 [2006].
[945] CJEU, Van Esbroeck, § 15 [2006].
[946] CJEU, Van Esbroeck, § 16 [2006].
[947] CJEU, Van Esbroeck, § 17 [2006]; Bas Van Bockel, 'Case C-436/04, Criminal Proceedings against Léopold Henri Van Esbroeck, Case C-150/05, Jean Leon Van Straaten v. Netherlands and Italy, Case C-467/04, Criminal Proceedings against G. Francesco Gasparini, José Ma L.A. Gasparini, G. Costa Bozzo, Juan de Lucchi Calcagno, Francesco Mario Gasparini, José A. Hormiga Marrero, Sindicatura Quiebra, Judgment of the Court of Justice of 28 September 2006, First Chamber [2006] ECR I9199.', *Common Market Law Review* 45, no. 1 (2008): 225.

The CJEU observed that, unlike other international instruments, Article 54 of the CISA does not refer to the same offence, but rather to the same acts.[948] Moreover, since Article 54 provides transnational application of the *ne bis in idem*, the CJEU held that legal differences could not be an obstacle to the application of the *ne bis in idem*,[949] especially because national criminal law has not been harmonised in the EU.[950]

Based on these considerations, the CJEU held that the only relevant criterion for the application of the *ne bis in idem* is the identity of the facts, understood as the same set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter.[951] Therefore, the legal classification given to those facts or the protected legal interest are not relevant.[952]

The reasoning developed by the CJEU is similar to that of the Inter-American Court of Human Rights (IACHR), which, already in 1997, adopted a purely factual approach. In *Loayza Tamayo v. Peru*, the IACHR held that the *ne bis in idem* protects the defendants from being tried twice for the same facts.[953]

The purely factual approach is the current interpretation of the CJEU,[954] except for competition law cases, where the CJEU has held that to apply the *ne bis in idem*, a threefold condition of identity is necessary: (i) identity of facts; (ii) identity of the

---

948 CJEU, Van Esbroeck, § 27 [2006].
949 CJEU, Van Esbroeck, § 31-32 [2006].
950 CJEU, Van Esbroeck, § 35 [2006].
951 CJEU, Van Esbroeck, § 36-38 [2006]; Van Bockel, 'Case C-436/04, Criminal Proceedings against Léopold Henri Van Esbroeck, Case C-150/05, Jean Leon Van Straaten v. Netherlands and Italy, Case C-467/04, Criminal Proceedings against G. Francesco Gasparini, José Ma L.A. Gasparini, G. Costa Bozzo, Juan de Lucchi Calcagno, Francesco Mario Gasparini, José A. Hormiga Marrero, Sindicatura Quiebra, Judgment of the Court of Justice of 28 September 2006, First Chamber [2006] ECR I9199.', 228; Alfredo Gaito, 'La Progresiva Transfiguración de «ne Bis in Idem»', in *Investigación y Prueba En Los Procesos Penales de España e Italia*, ed. José Caro Catalán and Isabel Villar Fuentes (Aranzadi, 2019), 59.
952 CJEU, Van Esbroeck, § 42 [2006]; Martin Wasmeier, 'The Principle of Ne Bis in Idem', *Revue Internationale de Droit Penal* 77, no. 1 (2006): 127; Lelieur, 'Transnationalising Ne Bis in Idem', 205; Tomkin, 'Article 50', 1402; André Klip, *European Criminal Law: An Integrative Approach*, 3 edition (Intersentia, 2016), 294; Alessandro Rosano, 'Ne Bis Interpretatio in Idem: The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice', *German Law Journal* 18, no. 1 (2017): 42; Amalfitano and D'Ambrosio, 'Diritto di non essere giudicato o punito per due volte per lo stesso reato', 1019; Mitsilegas and Giuffrida, 'Ne Bis in Idem', 217; Paulesu, 'Ne Bis in Idem and Conflicts of Jurisdiction', 405; Satzger, *International and European Criminal Law*, 158; Błachnio-Parzych, 'Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle', 380.
953 IACHR, Loayza Tamayo v. Peru, § 66 [1997]; Juana María Ibáñez, 'Artículo 8. Garantías Judiciales', in *Convención Americana Sobre Derechos Humanos*, ed. Christian Steiner and Patricia Uribe (Temis, 2014), 247; Daniela Fanciullo et al., 'Diritto Ad Un Processo Equo', in *Commentario Alla Prima Parte Della Convenzione Americana Dei Diritti Dell'uomo*, ed. Laura Cappuccio and Palmina Tanzarella (Editoriale Scientifica, 2017), 296–97. The reasoning has been subsequently confirmed in J. v. Peru, § 259 [2013]; Mohamed v. Argentina, § 121 [2012].
954 CJEU, Menci, § 25 [2018]; Garlsson Real Estate and Others, § 27 [2018].

offender; and (iii) unity of the protected legal interest.[955] Consequently, differently from other areas of EU law, in competition law cases the same defendant can be sanctioned more than once for the same facts if the offences in question are designed to protect a different legal interest.[956] Even though the standpoint of the CJEU has been criticised, it has not been receptive to the critiques. On the contrary, the CJEU has reaffirmed the threefold condition of identity in recent cases.[957]

5.3. The "Final Decision" Requirement

Regarding the "final decision" requirement, the CJEU has mainly addressed its meaning in the context of Article 54 of the CISA.

In *Gözütok and Brügge*, decided in 2003, the CJEU adopted a broad notion of final decision, also including cases in which the proceeding ended as a result of an agreement between the parties.[958]

In *Miraglia*, decided in 2005, the CJEU held that a decision of the Public Prosecutor to discontinue the prosecution without any determination whatsoever as to the merits of the case does not constitute a final decision.[959] The Court stated that what matters to recognise the existence of a final decision is that the authority has assessed the merits of the case. [960]

However, in *Gasparini*, decided one year later, the CJEU held that an acquittal because the offence was time-barred constitutes a final decision for the purposes of

---

[955] CJEU, Slovak Telekom A. S. § 43 [2021]; Islamic Republic of Iran Shipping Lines and Others, § 197 [2017]; Toshiba v. Commission, § 97 [2012]; Bavaria v. Commission, § 186 [2011]; Hoechst v. Commission, § 149 [2009]; Roquette Frères v. Commission, § 278 [2006]; Groupe Danone v. Commission, § 185 [2005]; Aalborg Portland and Others v. Commission, § 338 [2004]; Di Federico, 'EU Competition Law and the Principle of *Ne Bis in Idem*', 245; Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice', 124; Rosano, 'Ne Bis Interpretatio in Idem: The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice', 45.

[956] Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice', 124.

[957] CJEU, Islamic Republic of Iran Shipping Lines and Others, § 197 [2017]; Toshiba v. Commission, § 97 [2012]; Renato Nazzini, 'Parallel Proceedings in EU Competition Law', in *Ne Bis in Idem in EU Law*, ed. Bas Van Bockel (Cambridge University Press, 2016), 141; Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice', 126.

[958] CJEU, Gözütok and Brügge, § 42 [2003]; Sarmiento, 'El Principio Ne Bis In Idem En La Jurisprudencia Del Tribunal de Justicia de La Comunidad Europea', 43.

[959] CJEU, Miraglia, § 35 [2005]; Mitsilegas and Giuffrida, 'Ne Bis in Idem', 213.

[960] The CJEU upheld this interpretation in Van Straaten, § 60 [2006].

the *ne bis in idem*.[961] The decision in *Gasparini* seemed to suggest that to assess the final nature of a decision it was crucial to consider its regulation under national law.[962]

The CJEU clarified its interpretation in Turanský, decided in 2008. After examining the merits of the case, the police decided to suspend the criminal proceeding against the defendant. Under Slovak legislation, this decision did not bar a second prosecution for the same facts. The CJEU pointed out that the concept of final decision refers to those cases where further prosecution is definitely barred.[963] Because of this, the Court held that the decision of the police to suspend the proceeding could not constitute a final decision since it did not preclude a second prosecution.[964]

Finally, in Kossowski, decided in 2016, the CJEU held that to resolve whether a decision is final the judge should determine whether the decision definitely bars any further prosecution under national law[965] and whether the decision was given after a determination of the merits of the case.[966]

5.4. Duplication of Proceedings as a Legitimate Restriction of the *Ne Bis in Idem*

After the decision of the ECtHR in *A and B v. Norway*, there was great curiosity about whether the CJEU would adopt the reasoning suggested in that decision or, conversely, would maintain its case law.[967] On March 2018, the CJEU handed down its decision in *Menci* and *Garlsson Real Estate*, developing a similar interpretation to that of the ECtHR.[968]

In these two cases, the CJEU held that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the *ne bis in idem* because

---

[961] CJEU, Gasparini and Others, § 58 [2006]; .Mezei, '"Not Twice for the Same": Double Jeopardy Protections Against Multiple Punishments', 208.
[962] Mitsilegas and Giuffrida, 'Ne Bis in Idem', 213.
[963] CJEU, Turanský, § 32 [2008]. The Court reaffirmed this interpretation in M, § 30-31 [2014] and Stavytskyi, § 127 [2019].
[964] CJEU, Turanský, § 32 [2008].
[965] CJEU, Kossowski, § 34-35 [2016].
[966] CJEU, Kossowski, § 42 [2016]; Mitsilegas and Giuffrida, 'Ne Bis in Idem', 218; Satzger, *International and European Criminal Law*, 157; Paulesu, 'Ne Bis in Idem and Conflicts of Jurisdiction', 407.
[967] Valentina Felisatti, 'Il Ne Bis in Idem Domestico. Tra Coordinazione Procedimentale e Proporzionalità Della Sanzione', *Diritto Penale Contemporaneo Rivista Trimestrale*, no. 3 (2018): 121.
[968] J. Baron and E. Poelmann, 'The Principle of *Ne Bis in Idem*: On the Ropes, but Definitely Not Defeated', *Intertax* 46, no. 10 (2018): 805.

it can be a legitimate limitation of this right in conformity with the restriction clause of Article 52 of the EU Charter.[969] Under Article 52, the states may restrict by law the fundamental rights protected by the Charter, as long as they respect the essence of the right and the principle of proportionality. Moreover, the restrictions must be necessary and either have an objective of general interest recognised by the EU or aim to protect the rights and freedoms of people.[970]

In *Menci*, the Italian tax authority found that the defendant had failed to pay the value-added tax resulting from the annual tax return for the tax year 2011, amounting to €282,495. The tax authority fined the defendant €84,748, representing 30% of the tax debt. That decision became final. After the administrative proceeding had ended, the government initiated a criminal proceeding for the same facts against the defendant for tax offences. The trial court decided to stay proceedings and to request the CJEU for a preliminary ruling on the question of whether the criminal proceeding was contrary to the *ne bis in idem*.[971]

In *Garlsson Real Estate*, the Italian securities exchange authority fined the defendants €10.2 million for having manipulated the price of some securities with a view to personal gain. The Court of Appeal upheld the decision but reduced the fine to €5 million. All the parties to the dispute appealed against that judgment before the Italian Supreme Court. In parallel, the government initiated a criminal proceeding for the same facts against the defendants for market abuse. Through a negotiated procedure, one of the defendants was convicted and sentenced to a term of imprisonment of four years and six months. That sentence was subsequently reduced to three years and then extinguished as a result of a pardon. The decision became final. Considering the criminal conviction of one of the defendants, the Supreme Court

---

[969] CJEU, Menci, § 39 [2018]; Garlsson Real Estate and Others, § 41 [2018]. See also Di Puma, § 40-41 [2018]; Lock, 'Articles 48-50', 2239–40; Giulia Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, Comparative, European and International Criminal Justice (Springer, 2019), 58. The CJEU had already accepted the possibility to limit the ne bis in idem in the context of the application of Article 54 of the CISA in Spasic. See CJEU, Spasic, § 55 [2014]; John A. E. Vervaele, 'Schengen and Charter-Related Ne Bis in Idem Protection in the Area of Freedom, Security and Justice: M and and Zoran Spasic', *Common Market Law Review* 52, no. 5 (2015): 1347–78; Mirandola and Lasagni, 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law', 129.

[970] CJEU, Menci, § 41 [2018]; Garlsson Real Estate and Others, § 43 [2018]; Błachnio-Parzych, 'Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle', 381; Baron and Poelmann, 'The Principle of *Ne Bis in Idem*: On the Ropes, but Definitely Not Defeated', 806.

[971] CJEU, Menci, § 11-16 [2018].

asked the CJEU for a preliminary ruling on the question of whether continuing with the administrative procedure concerning that defendant was contrary to *ne bis in idem*.[972]

After affirming in both cases that the administrative sanctions were criminal in nature[973] and that the procedures had concerned the same offence,[974] the CJEU addressed the question of whether the accumulation of sanctions and proceedings met the requirements of Article 52.

Firstly, the CJEU held that, since the accumulation of sanctions and proceedings was only allowed under the conditions defined by law, the essence of the *ne bis in idem* had been respected.[975] National legislation must allow individuals to predict when an accumulation of sanctions and proceedings is permitted.[976]

Secondly, the CJEU held that in both *Menci* and *Garlsson Real Estate* the accumulation of sanctions and proceedings pursued an objective of general interest. While in *Menci* the legislation sought to ensure the collection of taxes and to punish tax offences,[977] in *Garlsson Real Estate* the aim was to protect the integrity of financial markets and public confidence in financial instruments and to punish market abuse offences.[978]

Thirdly, regarding the principle of proportionality, the CJEU stated that the national legislation must ensure that the disadvantages for the person concerned resulting from an accumulation of sanctions and proceedings are limited to what is strictly necessary to achieve the objectives of general interest.[979] The above implies the existence of legal provisions that regulate the coordination between the different authorities.[980] It is also necessary to guarantee that the severity of the sum of all the sanctions imposed does not exceed the seriousness of the offence concerned.[981] The CJEU held that it is for the referring court to assess the principle of proportionality, by balancing the seriousness of the offence and the actual disadvantage resulting for the defendant from the accumulation of sanctions and proceedings.[982]

---

[972] CJEU, Garlsson Real Estate and Others, § 11-20 [2018].
[973] CJEU, Menci, § 32-33 [2018]; Garlsson Real Estate and Others, § 34-35 [2018].
[974] CJEU, Menci, § 38 [2018]; Garlsson Real Estate and Others, § 40 [2018].
[975] CJEU, Menci, § 43 [2018]; Garlsson Real Estate and Others, § 45 [2018]; Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, 58.
[976] CJEU, Menci, § 49 [2018]; Garlsson Real Estate and Others, § 51 [2018].
[977] CJEU, Menci, § 44 [2018].
[978] CJEU, Garlsson Real Estate and Others, § 46-47 [2018]; Di Puma, § 43 [2018].
[979] CJEU, Menci, § 52 [2018]; Garlsson Real Estate and Others, § 54 [2018].
[980] CJEU, Menci, § 53 [2018]; Garlsson Real Estate and Others, § 55 [2018].
[981] CJEU, Menci, § 55 [2018]; Garlsson Real Estate and Others, § 57 [2018].
[982] CJEU, Menci, § 59 [2018]; Garlsson Real Estate and Others, § 61 [2018].

5.5. Summary of the Case Law of the Court of Justice of the European Union

According to the CJEU, the *ne bis in idem* prohibits the accumulation of sanctions and proceedings of criminal nature against the same person for an offence for which the defendant has been finally acquitted or convicted within the Union.

To determine the nature of the sanction and proceeding, the CJEU has adopted the Engel criteria from the case law of the ECtHR: (i) the legal classification of the offence under national law; (ii) the very nature of the offence; and (iii) the nature and degree of severity of the penalty that the person concerned is liable to incur. By applying the Engel criteria, the CJEU has characterised as criminal in nature sanctions imposed by administrative agencies.

Based on the above considerations, the CJEU held that the only relevant criterion for the application of the *ne bis in idem* is the identity of the facts, understood as the same set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter. Therefore, the legal classification given to those facts or the protected legal interest are not relevant.

The broad definition of criminal offence and proceeding and the purely factual approach regarding the idem requirement have caused an expansion of the scope of application of the *ne bis in idem*.

Nevertheless, in *Menci* and *Garlsson Real Estate* the CJEU held that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the *ne bis in idem* because it can be a legitimate limitation of this right in conformity with the restriction clause of Article 52 of the EU Charter. Under Article 52, the states may restrict by law the fundamental rights protected by the Charter provided that they respect the essence of the right and the principle of proportionality. Moreover, the restrictions must be necessary and either have an objective of general interest recognised by the EU or aim to protect the rights and freedoms of people.

SECOND PART

--

CRITICAL ANALYSIS OF THE CASE LAW OF THE ECTHR AND THE CJEU REGARDING THE LAWFULNESS OF MULTIPLE SANCTIONING SYSTEMS UNDER THE *NE BIS IN IDEM*

1. Lawfulness of Multiple Sanctioning Systems under the *Ne Bis in Idem*: Five Different Approaches to Resolve the Same Problem

The comparative case law on the lawfulness of multiple sanctioning systems under the *ne bis in idem* is characterised by three elements. First, a unanimous recognition of the problem; second, the existence of five different approaches to resolve the problem; and third, a lack of dialogue between the different courts.

There is a unanimous recognition of the problem because despite their differences the five jurisprudences analysed in the First Part recognise that multiple sanctioning systems may violate the rights of the defendants, especially the *ne bis in idem*. The courts accept that multiple sanctioning systems may be contrary to both the prohibition of multiple punishments and the prohibition of multiple prosecutions.

Unfortunately, the comparative situation is characterised by an insufficiency of dialogue between the different courts because each of the five courts has developed its own approach to deciding whether multiple sanctioning systems are contrary to the *ne bis in idem*, without drawing any support from comparative law. This is problematic because the different courts have developed their respective case law successively, having a real opportunity to consider the distinct experiences before deciding the cases. For example, while the United States Supreme Court has faced the problem of the lawfulness of multiple sanctioning systems under the *ne bis in idem* since the 19th century, both the ECtHR and the CJEU have addressed it only in the last few decades.

This Second Part aims to identify and critically analyse three problems with the case law of the ECtHR and the CJEU.

The first problem is the lack of clarity regarding the rationale of the protection against multiple prosecutions. The ECtHR and the CJEU, unlike the United States Supreme Court and the Spanish Constitutional Court, have not addressed the rationale of the protection against multiple prosecutions in any of their judgments. The European courts have only repeated, again and again, that the protection against multiple prosecutions aims to prohibit the repetition of criminal proceedings against the same person based on the same facts. However, it is clear that barring the repetition of criminal proceedings is neither the rationale nor the aim of the protection against multiple prosecutions, but rather the consequence of its application.

The second problem is the uncertainty caused by the application of the autonomous concept of “criminal offence” developed by the ECtHR and the CJEU. As stated above, both European courts have held that the *ne bis in idem* only applies to criminal offences and proceedings, as opposed to those that are civil in nature. However, since the characterisation of the offence under national law cannot be the sole criterion to determine its nature, both European courts have developed an autonomous notion of "criminal offence". In my opinion, the approach of the ECtHR and the CJEU has not produced entirely consistent results.

Finally, the third problem to address is the incorporation of criteria unrelated to the protection against multiple prosecutions for the purpose of determining whether it has been violated. In their latest decisions, both European courts have held that the protection against multiple prosecutions does not necessarily preclude the legislature from criminally prosecuting the same defendant twice for the same offence. In particular, the ECtHR has held that the duplication of criminal sanctioning proceedings is not contrary to the *ne bis in idem* if the proceedings are sufficiently connected in substance and time. The CJEU has affirmed that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the *ne bis in idem* because the accumulation can be a legitimate limitation of this right in conformity with Article 52 of the EU Charter. In their new approaches, both European courts have included unrelated to the prohibition of multiple prosecutions for the purpose of determining whether it has been violated. The inclusion of such criteria is problematic because they are unrelated to the rationale of the guarantee in question. Moreover, the CJEU does not longer consider the prohibition of multiple prosecutions as an absolute bar to the state, but now deems it a protection capable of being balanced with other public interests. Three problems with the new approaches of the ECtHR and the CJEU will be reviewed: first, the vagueness of the factors listed by the ECtHR and the CJEU; second, the problematic criterion of avoiding as far as possible any duplication in the collection and the assessment of the evidence; and third, the overlap between the prohibition of multiple prosecutions and the ban of disproportionate sanctions.

The critical analysis that will be developed on those three problems will demonstrate that neither the ECtHR nor the CJEU have developed a coherent standpoint on the lawfulness of multiple sanctioning systems under the *ne bis in idem*. Therefore, an alternative interpretation of the *ne bis in idem* under Protocol 7 to the

European Convention and Article 50 of the EU Charter is needed. This task will be carried out in the Third Part.

2. First Problem: Lack of Clarity Regarding the Rationale of the *Ne Bis in Idem*

Interpreting fundamental rights has always been challenging. While narrow interpretations could leave citizens unprotected from certain abuses from the authority, broad interpretations could excessively limit national legislature, preventing it from achieving their public interest aims. Consequently, the rationale of every fundamental right must be a primary basis for the interpretation process. Why did the Constitution recognise the fundamental right? What was the legal problem that the Constitution aimed to resolve? What was the possible abuse that the recognition of the fundamental right intends to prevent?

The first problem with the case law of the ECtHR and the CJEU is the lack of clarity regarding the rationale of the protection against multiple prosecutions.

The ECtHR and the CJEU have recognised and applied only the protection against multiple prosecutions.[983] The interpretation of most European commentators is similar to that of both courts. For instance, some commentators recognise only the prohibition of multiple prosecutions.[984] Other commentators hold that the *ne bis in idem* solely prevents multiple punishments when they are the result of a violation of the prohibition of multiple prosecutions. In this context, the prohibition of multiple punishments would be a mere consequence of the procedural protection.[985]

The issue of the rationale of the *ne bis in idem* has been a topic that the jurisprudences studied in the First Part have faced very differently. While the United States Supreme Court and the Spanish Constitutional Court have addressed the matter and developed an interpretation on it, trying to apply the *ne bis in idem* in accordance with its rationale, the ECtHR and the CJEU have not addressed the issue in question in any of their decisions.

The United States Supreme Court, in *Green v. United States*, held that the rationale of the double jeopardy clause is that the State with all its resources and power

---

[983] Chiara Silva, *Sistema Punitivo e Concorso Apparante de Illeciti* (Giappichelli, 2018), 208.
[984] For instance, Michele N. Morosin, 'Double Jeopardy and International Law: Obstacles to Formulating a General Principle', *Nordic Journal of International Law* 64, no. 2 (1995): 261; Wasmeier, 'The Principle of Ne Bis in Idem', 121; Rosano, 'Ne Bis Interpretatio in Idem: The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice', 40.
[985] Benlloch, 'El Principio de Non Bis in Idem En Las Relaciones Entre El Derecho Penal y El Derecho Disciplinario', 307; Błachnio-Parzych, 'Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle', 380–81.

should not make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[986] Afterwards, however, the Supreme Court formulated a different rationale regarding the protection against multiple punishments in the same prosecution. In this context, the prohibition aims to assure that the courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislature.[987]

The Spanish Constitutional Court has held that the prohibition of multiple punishments aims to prevent the imposition of disproportionate sanctions.[988] Regarding the rationale of the prohibition of multiple prosecutions, it is related to *res judicata* because once a court has finally decided a matter, it is not possible to discuss it again. Initiating a new proceeding on the same matter would diminish the protection granted by the prior judgment.[989]

As stated, the situation of the ECtHR and the CJEU is different from that of the United States Supreme Court and the Spanish Constitutional Court because both European courts have not addressed the issue of the rationale of the protection against multiple prosecutions in any of their decisions. The ECtHR and the CJEU have only held, over and over, that the protection against multiple prosecutions aims to prohibit the repetition of criminal proceedings against the same person for the same facts. However, it is clear that prohibiting the repetition of criminal proceedings is neither the rationale nor the aim of the protection against multiple prosecutions, but rather the consequence of its application.

Although the ECtHR and the CJEU have not addressed the issue of the rationale of the protection against multiple prosecutions, it seems that the idea underlying their judgments is that the proceeding itself is a punishment for the defendant. In other words, the sole fact of bringing two sanctioning proceedings based on the same facts against the same defendant would be unfair. For instance, in *Bajčić v. Croatia,* the ECtHR held that the "object of Article 4 of Protocol No. 7 is to prevent the injustice of a person's being prosecuted or punished twice for the same criminalised conduct".[990]

---

[986] First Part, 1.2.
[987] First Part, 1.6.1.
[988] First Part, 3.1.
[989] First Part, 3.2.
[990] ECtHR, Bajčić v. Croatia, § 26 [2020].

From my perspective, the notion of the proceeding as punishment as the rationale of the protection against multiple prosecutions should be rejected because it is not compatible with the regulation of Article 4 of Protocol 7 and Article 50 of the EU Charter for two reasons.

Firstly, in both Protocol 7 and the EU Charter, the existence of a final decision is an essential requirement of the protection against multiple prosecutions. Without a final decision, it is simply not possible to find a violation of the protection against multiple prosecutions. Two main consequences follow from this requirement. First, the protection against multiple prosecutions does not preclude several concurrent sets of proceedings because, in such a situation, there is no final decision. Only when one of those proceedings becomes final, the others must be discontinued. Consequently, the existence of, for example, five parallel sanctioning proceedings against the same defendant for the same facts would not violate the protection against multiple prosecutions, provided that no final decision has been reached. Second, the protection against multiple prosecutions neither prohibits resuming a prosecution that has concluded without a final decision nor bringing a second prosecution when the first one has finished without such a decision. These two consequences which follow from the requirement of a final decision, are hardly compatible with the argument that the rationale of the protection against multiple prosecutions is the idea of the proceeding itself as punishment for the defendant. Indeed, considering that the prohibition of multiple prosecutions neither prohibits bringing several parallel sanctioning proceedings nor resuming a prosecution that has concluded without a final decision, it seems unconvincing to argue that the rationale of the protection is to prevent "the injustice of a person's being prosecuted or punished twice for the same criminalised conduct". If so, the prohibition of multiple prosecutions should forbid bringing two parallel sanctioning proceedings for the same facts or to reopen a case that was preliminarily closed due to lack of evidence. However, the prohibition of multiple persecutions does not prohibit either of these actions.

The second argument for rejecting the idea of the proceeding as punishment as the rationale of the protection against multiple prosecutions is the exception provided for in the second paragraph of Article 4 of Protocol 7. As explained, the second paragraph of Article 4 of Protocol 7 allows reopening a case in accordance with domestic law if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceeding which could affect the outcome of the

case. The reopening may be either in favour or against the defendant. Consequently, a higher court can quash a final decision that either convicted or acquitted the defendant.[991] Although some legal systems have authorised the government to retry a person previously acquitted, such as England and Wales,[992] it is a very exceptional regulation. For instance, the International Covenant on Civil and Political Rights, the EU Charter and the American Convention on Human Rights do not recognise such a possibility. The exception provided for in the second paragraph of Article 4 of Protocol 7 is difficult to reconcile with the argument that the rationale of the protection against multiple prosecutions is the idea of the proceeding itself as punishment for the defendant. If this were the case, resuming a proceeding that has concluded with an acquittal should be definitely prohibited since it would constitute a severe limitation to the rationale of the protection against multiple prosecutions and its scope of application. However, this is not the case.

Even though the approaches of the United States Supreme Court and of the Spanish Constitutional Court regarding the rationale of the protection against multiple prosecutions can surely be criticised, at least both courts have developed an interpretation on the issue in question and apply the protection following its rationale.

The situation is different in the case of the ECtHR and the CJEU. Both European courts have not addressed the rationale of the protection against multiple prosecutions. This lack of clarity is not harmless. If the rationale of a fundamental right is not properly addressed, developing a coherent interpretation regarding that fundamental right is all but impossible. Why was the *ne bis in idem* recognised? What was the legal problem that the recognition of the fundamental right aimed to resolve? The ECtHR and the CJEU have left these questions unanswered.

---

[991] First Part, 4.5.

[992] Part 10 of the Criminal Justice Act 2003 allows the government to retry a person previously acquitted of a qualifying offence. The offences characterised as qualifying offences are listed in Schedule 5 to the Act, and they include murder; manslaughter; rape; unlawful importation, exportation, or production of a Class A drug; arson endangering life; directing a terrorist organization; and conspiracy to commit any of the aforementioned crimes, among others. After a court acquits a person of a serious offence, the prosecutor may apply to the Court of Appeal for an order "quashing a person's acquittal" and "ordering him to be retried for the qualifying offence". A prosecutor may make this application only with the written consent of the Director of Public Prosecutions, who may give his consent only if "new and compelling evidence" exists and it is in "the public interest for the application to proceed." A prosecutor may only make one application for retrial after an acquittal. See Taylor, 'England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes', 190–91; David Rudstein, 'Retrying the Acquitted in England, Part I: The Exception to the Rule against Double Jeopardy for New and Compelling Evidence', *San Diego International Law Journal* 8, no. 2 (2007): 392–97.

3. Second Problem: The Dead End of the Thesis of the Criminal Nature

The second problem with the case law of the ECtHR and the CJEU concerns the uncertainty caused by the application of the autonomous concept of “criminal offence” developed by the ECtHR and the CJEU.

The criminal-civil distinction is an organising principle in every modern legal system.[993] However, the distinction is not absolute, especially in the context of law enforcement systems, where the number of statutes that sanction the same conduct with both criminal and civil sanctions has notoriously grown in the last decades.[994]

According to the ECtHR and the CJEU, the guarantees that refer to criminal offences and proceedings apply only to offences and proceedings that are criminal in nature, as opposed to those that are civil in nature. For instance, the ECtHR has held that all the guarantees provided by the second and third paragraphs of Article 6 of the European Convention apply only to cases where people are charged with a criminal offence.[995] A similar interpretation is held by the Supreme Court of Canada, which has stated that all the protections provided by Section 11 of the Canadian Charter of Rights and Freedoms apply only to cases where people are subject to criminal proceedings or may be subject to penal consequences.[996] Thus, the scope of application of the criminal protections is dependent on the actual nature of the offence or proceeding in question. This idea will be referred to as the “thesis of the criminal nature”.

However, since national law cannot be the sole criterion to determine its nature, both European courts have developed an autonomous and unitary concept of criminal offence, applicable to all the criminal guarantees. By resorting to this notion, which is based on the Engel criteria, in several cases the ECtHR and the CJEU have characterised as criminal in nature offences and proceedings that national law labelled

---

[993] Paul H. Robinson, ‘The Criminal-Civil Distinction and the Utility of Desert Symposium’, *Boston University Law Review* 76, no. 1–2 (1996): 201–2.
[994] Debra Marie Ingraham, ‘Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject Healy Note’, *Washington and Lee Law Review* 54, no. 3 (1997): 1188; Anthony O’Rourke, ‘Parallel Enforcement and Agency Interdependence’, *Maryland Law Review* 77, no. 4 (2018): 985–86; Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, 24; Nancy J. King, ‘Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties’, *University of Pennsylvania Law Review* 144, no. 1 (1995): 103.
[995] ECtHR, Engel and Others v. Netherlands, § 87 [1976].
[996] Supreme Court of Canada, Guindon v. Canada, 30, § 44 [2015]; R. v. Rodgers, 596, § 58 [2006]; R. v. Wigglesworth, 559 [1987].

as civil, thereby extending the application of the criminal guarantees to those offences and proceedings.[997]

One of the criminal guarantees is, of course, the *ne bis in idem*. According to the ECtHR and the CJEU, the *ne bis in idem* only applies to criminal offences and proceedings. Therefore, the *ne bis in idem* neither prohibits bringing multiple civil sanctioning proceedings for the same offence nor a criminal and a civil proceeding for the same offence, as long as the civil proceedings are not characterised as criminal by applying the Engel criteria.

This reasoning is not unique to the European case law. For instance, the United States Supreme Court has held that the double jeopardy clause only applies to cases where the government seeks to impose a second criminal punishment on the defendant.[998] Similarly, the Canadian Supreme Court has stated that the double jeopardy clause only applies when the defendant is subject to proceedings that are criminal in nature, or when the defendant could be subject to penal consequences.[999]

There are two problems with the current approach of the criminal nature thesis. The first problem is that its results are often neither predictable nor coherent. The second problem is the "all-or-nothing" reasoning. Since the European courts have developed a single concept of criminal offence, all the substantive and procedural criminal guarantees apply only to offences and proceedings that fall within that concept. These two problems will be analysed in the following.

3.1. Has the Current Approach Produced Coherent Results?

The first problem with the current approach of the criminal nature thesis is that its results are often neither predictable nor coherent.

Since the current approach makes the application of the criminal safeguards dependent on the nature of the specific offence faced by the defendant in the particular proceeding, the application of the thesis has not produced consistent results.[1000]

[997] Ligeti, 'Fundamental Rights Protection Between Strasbourg and Luxembourg', 165.
[998] First Part, 1.
[999] First Part, 2.1.
[1000] Similarly, Lorena Bachmaier, 'New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property', in *Prevention, Investigation, and Sanctioning of Economic Crime. Alternative Control Regimes and Human Rights Limitations*, ed. Ulrich Sieber (Maklu, 2019), 307.

Indeed, from the case law of the ECtHR and the CJEU, it is not possible to identify the division between criminal and civil offences.[1001]

Consider the case *Müller-Hartburg v. Austria*. An Austrian bank and the applicant, who worked as a lawyer, entered into a trusteeship agreement in connection with real estate transactions. One of the tasks of the defendant was to transfer 20,000,000 Austrian schillings (ATS, approximately €1,450,000), which he held as a trustee, to company "X" in exchange for a loan guarantee. In May 1996, the bank complained to the Vienna Bar Association that the applicant had transferred ATS 20,000,000 to company "X", but had not handed over the guarantee, as was stipulated in the agreement. In July 2000, the applicant was charged with fraudulent conversion for the transfer of ATS 20,000,000. The applicant was convicted of fraudulent conversion and sentenced to three years' imprisonment.[1002] In parallel, the Disciplinary Council of the Vienna Bar Association initiated a sanctioning proceeding. In February 2005, the Disciplinary Council found that the applicant had breached his professional duties and had infringed the honour and reputation of the profession and ordered that he be struck off the register.[1003]

The applicant complained that he had been tried twice for the same offence, first in the criminal proceeding and then in the disciplinary proceeding. To determine whether the disciplinary proceeding was criminal in nature, the ECtHR applied the Engel criteria. In the first place, the ECtHR noted that, under national law, the offence of professional misconduct belonged to the sphere of disciplinary law. Regarding the second Engel criterion, the Court observed that the offence in question was directed at the members of a professional group possessing a special status and that the offence was only related to the professional misconduct of the defendant. Turning to the third Engel criterion, the ECtHR noted that the maximum potential sanction was a fine of up to ATS 500,000 (approximately €36,000). However, the Court observed that, in contrast to criminal fines, the fine in question did not attract a prison term in the event of default. Because of the above, the ECtHR concluded that the disciplinary proceeding

[1001] Katja Šugman, 'An Increasingly Blurred Division between Criminal and Administrative Law', in *Visions of Justice. Liber Amicorum Mirjan Damaška*, ed. Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić (Duncker & Humblot, 2016), 351–52.
[1002] ECtHR, Müller-Hartburg v. Austria, § 6-14 [2013].
[1003] ECtHR, Müller-Hartburg v. Austria, § 16-24 [2013].

was not criminal in nature, thereby rejecting the application of the criminal guarantees, including the protection against multiple prosecutions.[1004]

Is the argument of the ECtHR convincing? In my view, the following examples show that it is not. In *Jussila,* the ECtHR characterised as criminal in nature a tax surcharge of 10% of the value-added tax, amounting to €309.[1005] In *Öztürk*, the ECtHR characterised as criminal a fine of 60 Deutsche marks imposed on the defendant for having driven his car into another car which was parked, causing damage to both vehicles.[1006] Neither in *Jussila* nor in *Öztürk* the domestic law provided for a prison term in the case of non-payment of the surcharge or the fine. What if the defendant in *Müller-Hartburg* had been fined €35,000? Furthermore, is it rational to grant the defendants in *Öztürk* and *Jussila* all the criminal guarantees while the defendant in *Müller-Hartburg* did not have right to any of them?

The case law of the ECtHR regarding driving bans is useful to further exemplify some of the practical difficulties with the current approach of the criminal nature thesis.

In *Escoubet v. Belgium* and *Mulot v. France*, both decided in 1999, the ECtHR characterised as a preventive measure, and civil in nature, the withdrawal of the driving licence before the commencement of any proceedings, on account of a suspected offence of driving under the influence of alcohol offence. The withdrawal of the driving licence lasted for up to fifteen days in *Escoubet* and for six months in *Mulot*.[1007]

In *Hangl v. Austria*, decided in 2001, the defendant exceeded a speed limit of 50 km/h by more than 40 km/h. In November 1995, the Federal Police Authority sanctioned the applicant for exceeding the speed limit and sentenced him to a fine of 3000 Austrian schillings. The applicant did not appeal and paid the fine. In December 1995, the Federal Police Authority ordered the withdrawal of the driving licence of the defendant for two weeks. The applicant argued that he had been tried twice for the same offence. Regarding the withdrawal of the driving licence, the ECtHR noted that the police had considered the dangerous circumstances of the case and the degree of recklessness of the offender. For this reason, the ECtHR found that the withdrawal of the driving licence was a preventive measure and civil in nature.[1008]

[1004] ECtHR, Müller-Hartburg v. Austria, § 42-49 [2013].
[1005] First Part, 4.4.2.
[1006] ECtHR, Öztürk v. Germany, § 50-54 [1984].
[1007] ECtHR, Escoubet v. Belgium, § 32-39 [1999]; Mulot v. France [1999].
[1008] ECtHR, Hangl v. Austria [2001].

The decision was different in *Nilsson v. Sweden*, decided in 2005. In this case, the defendant was convicted of drunken driving and unlawful driving and sentenced to 50 hours' community service. Afterwards, the government withdrew the driving licence of the defendant for eighteen months. The applicant complained that he had been tried twice for the same offence, first in the criminal proceeding and then in the administrative proceeding. The ECtHR noted that, although the offences of drunken driving and unlawful driving had occurred in November 1998, it was not until August 1999 that the government withdrew the driving licence of the applicant. Therefore, "prevention and deterrence for the protection of the safety of road users could not have been the only purposes of the measure; retribution must also have been a major consideration". For this reason, the ECtHR characterised the withdrawal of the driving licence as criminal in nature.[1009]

The last case was *Boman v. Finland*, decided in 2015. In March 2010, the applicant was charged with causing a serious traffic hazard and operating a vehicle without a licence, both acts having been committed on 5 February 2010. In April 2010, the District Court convicted the applicant as charged and sentenced him to 75 day-fines, amounting to €450. A driving ban was also imposed until 4 September 2010. In May 2010, the police authority imposed a new driving ban on the applicant from 5 September to 4 November 2010. The police based their decision on the applicant's criminal conviction. Regarding the nature of the second driving ban, the ECtHR noted that it had been imposed for reasons of road safety after the criminal proceeding against the applicant had become final. Therefore, following *Nilsson*, the Court considered the second driving ban to be criminal in nature.[1010]

It seems challenging to identify the general criteria on which the ECtHR bases the division between civil and criminal offences. If the authority imposes the driving ban immediately and before the commencement of any proceedings, the ECtHR will likely characterise the measure in question as civil in nature. On the contrary, if the authority imposes the driving ban after the defendant has been convicted, the ECtHR will probably consider the ban as criminal in nature. However, the decision in *Hangl* was different because, although the authority imposed the driving ban after the defendant had been convicted, the ECtHR characterised it as civil in nature anyway.

[1009] ECtHR, Nilsson v. Sweden [2005].
[1010] ECtHR, Boman v. Finland, § 32 [2015].

In my view, an interpretation which leads the legislator to provide for an immediate ban on driving without any procedure is unreasonable. Such an interpretation could even violate other fundamental rights of the accused, such as the right to an oral and public hearing or the right to call witnesses, among others.

If the case law of the ECtHR is compared to that of the United States Supreme Court and the Canadian Supreme Court, the uncertainty increases. For instance, in *Guindon v. Canada*, the Supreme Court held that a civil sanction of $546,747 was not a criminal consequence. The Supreme Court argued that although the magnitude of the sanction is not a decisive factor, monetary sanctions should not be considered just another cost of doing business. The Court observed that the sanction had considered the magnitude of the tax involved and the personal gain of the defendant, without regard to other general criminal sentencing principles and no stigma comparable to that attached to a criminal conviction flowed from the imposition of the sanction.[1011] Similarly, in *Hudson v. United States*, the Supreme Court held that a penalty of $100,000 was civil in nature. The Court noted that the sanction imposed neither involved an affirmative restraint nor had historically been considered as punishment.[1012]

Considering the decisions of the ECtHR in *Jussila* and *Öztürk*, where the Court characterised as criminal in nature a tax surcharge of 10% of the value-added tax, amounting to €309, and a fine of 60 Deutsche marks, respectively, it is not difficult to imagine that, if the ECtHR had addressed *Guindon* and *Hudson,* it would have characterised as criminal in nature the sanctions imposed in those two cases.

How can the different characterisations of the sanctions between the diverse jurisprudences be explained? It is challenging to identify the general criteria on which the different courts decide the criminal-civil distinction cases. For instance, while the withdrawal of the driving license for two months has been characterised as criminal by the ECtHR,[1013] driving prohibitions for impaired driving have been qualified as civil by the Supreme Court of Canada.[1014]

[1011] First Part, 2.1.2.
[1012] First Part, 1.6.2.8.
[1013] ECtHR, Boman v. Finland, § 32 [2015].
[1014] Supreme Court of Canada, Goodwin v. British Columbia, 274-275, § 43 [2015].

The division between civil and criminal offences is an issue that has never been adequately resolved, neither in theory nor in practice.[1015] Although scholars and courts have made countless efforts to distinguish criminal from civil offences, they have failed to develop a coherent and applicable distinction.[1016] As George Fletcher once stated, we may share an intuitive sense that tort damages, deportation and impeachment are not cases of criminal punishment, but it is difficult to explain why.[1017] The division between criminal and civil offences has become more complicated in the last decades because it has been blurred in many areas.[1018] For example, new types of sanctions have emerged, which do not correspond to the classical forms of either criminal or administrative sanctions.[1019] Moreover, retribution and deterrence are no longer an exclusive feature of criminal law, but now they also play a role in modern civil law.[1020] Therefore, the factor that has historically been considered most relevant to differentiate criminal from civil offences does not longer offer enough guidance.

In my view, it can be concluded that, nowadays, the characterisation of the offence either as criminal or civil is left to the determination of every single court, which must determine the nature of the offence utilising a vague method and list of factors with no hierarchy between them.[1021]

Even if it were possible to draw a clear line between criminal and civil offences, this would not solve the problem in the case law of the ECtHR, as it would still be necessary to decide whether the case under discussion belongs to the core of criminal

---

[1015] Mary Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction', *Hastings Law Journal* 42, no. 5 (1991): 1349–58; J. C. Smith and Brian Hogan, *Criminal Law* (Butterworths, 1992), 15; Aaron Xavier Fellmeth, 'Civil and Criminal Sanctions in the Constitution and Courts', *Georgetown Law Journal* 94, no. 1 (2005): 8; Katja Šugman and Matjaž Jager, 'The Organization of Administrative and Criminal Law in National Legal Systems: Exclusion, Organized or Non-Organized Co-Existence', in *Do Labels Still Matter?: Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, ed. Francesca Galli and Anne Weyembergh (Université de Bruxelles, 2014), 155.

[1016] Šugman and Jager, 'The Organization of Administrative and Criminal Law in National Legal Systems: Exclusion, Organized or Non-Organized Co-Existence', 155.

[1017] George P. Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000), 412.

[1018] Bachmaier, 'New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property', 299; Šugman, 'An Increasingly Blurred Division between Criminal and Administrative Law', 366; Issachar Rosen-Zvi and Talia Fisher, 'Overcoming Procedural Boundaries', *Virginia Law Review* 94, no. 1 (2008): 121.

[1019] Helmut Satzger, 'Application Problems Relating to "Ne Bis in Idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR', *Eucrim*, no. 3 (2020): 214.

[1020] Levin, 'OSHA and the Sixth Amendment', 1021–22; Rosen-Zvi and Fisher, 'Overcoming Procedural Boundaries', 122–23. Similarly, Supreme Court of the United States, Hudson v. United States, 101-102 [1997].

[1021] Puerta, 'La Prohibición de Bis in Idem En La Legislación de Tráfico', 236; Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', 143.

law.[1022] As the ECtHR held in *Jussila*, in those cases that do not belong to the core of criminal law, the guarantees do not necessarily apply with their full stringency.[1023] Nevertheless, the ECtHR has not provided general guidelines to identify this core.[1024] Once again, the issue is left to the determination of every single court.[1025]

3.2. The "All-or-Nothing" Reasoning of the Current Approach

The second problem with the current approach of the thesis of the criminal nature is the "all-or-nothing" reasoning. Since both European courts have developed a unitary concept of criminal offence, applicable to all the substantive and procedural criminal guarantees, all such protections apply only to offences and proceedings that fall within that concept. Outside of this concept, thus, the criminal safeguards do not apply.

The "all-or-nothing" reasoning is problematic because it means that all the criminal guarantees, such as the principle of legality, or the presumption of innocence, or the right not to be tried twice for the same offence, are not applicable to offences and proceedings that the courts characterise as civil in nature. Consequently, when the courts characterise a proceeding as civil in nature, the *ne bis in idem* does not preclude the government from bringing a second time or third time the same proceeding against the same person for the same offence.

The ECtHR has characterised as civil in nature offences and proceedings concerning the dissolution of political parties,[1026] temporary suspension of practicing as an accountant,[1027] dismissal of a police officer and forfeiture of his pension,[1028] disciplinary proceedings against lawyers,[1029] impeachment against the President of the Republic for gross violations of the Constitution,[1030] disciplinary proceedings against

[1022] Bailleux, 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"', 150–51.
[1023] First Part, 4.4.2.
[1024] Weyembergh and Joncheray, 'Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed', 206–8; Šugman, 'An Increasingly Blurred Division between Criminal and Administrative Law', 365; Masera, *La Nozione Costituzionale Di Materia Penale*, 233.
[1025] Alan Brudner has underlined that none of the approaches developed to distinguish between cases that belong to the core of criminal law and the rest of it has succeeded in keeping the categories differentiated. See Alan Brudner, *Punishment and Freedom* (Oxford University Press, 2009), 171–73.
[1026] ECtHR, Refah Partisi (the Welfare Party) and Others v. Turkey, § [2000].
[1027] ECtHR, Luksch v. Austria [2000].
[1028] ECtHR, Banfield v. The United Kingdom [2005].
[1029] ECtHR, Klein v. Austria [2006]; Müller-Hartburg v. Austria, § 42-49 [2013].
[1030] ECtHR, Paksas v. Lithuania, § 64-69 [2011].

employees of a public company for non-compliance with safety regulations,[1031] and deprivation of the nationality of the applicants,[1032] among others.

Under the current approach of the criminal nature thesis, none of the criminal guarantees would apply to these proceedings. Accordingly, if the defendant is prosecuted a second time for the same offence in any of those proceedings, there will be no violation of *ne bis in idem*.

The "all-or-nothing" reasoning also produces results that might be considered incoherent. For instance, while a person who causes damage to a parked car and is sanctioned with a fine of €30 is entitled to all the criminal safeguards because such an offence is considered criminal in nature, a person whose total assets are frozen or even confiscated is granted substantially less vigorous guarantees because such measures are characterised as preventive civil measures.[1033]

Consider now *Berland v. France,* where the ECtHR characterised as civil in nature the long-term compulsory hospitalisation of the defendant who lacked criminal liability because of a mental disease,[1034] or *Ghoumid and Others v. France*, where the ECtHR characterised as civil in nature the deprivation of the nationality of the applicants because they had been convicted of conspiracy to commit an act of terrorism, an offence which the Court considered particularly serious which undermines the basis of the democracy itself.[1035] While the defendant in *Öztürk*, fined 60 Deutsche marks, is entitled to all the protections provided by Article 6.3 of the European Convention on Human Rights, the defendants in *Berland* and *Ghoumid* are not entitled to any of those guarantees. Thus, the applicants in *Berland* and *Ghoumid* do not have a right, for example, to free legal assistance nor to the free assistance of an interpreter.

Based on what has been stated above, it can be concluded that the approach of labelling an offence or proceeding entirely as criminal or entirely as civil for the purpose of determining the applicable substantive and procedural safeguards is misguided.[1036] The approach of the European courts, which has been developed on the basis of a

---

[1031] ECtHR, Kurdov and Ivanov v. Bulgaria, § 38-46 [2011]
[1032] ECtHR, Ghoumid and Others v. France, § 67-73 [2020].
[1033] Bachmaier, 'New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property', 307.
[1034] ECtHR, Berland v. France, § 44-47 [2015].
[1035] ECtHR, Ghoumid and Others v. France, § 67-73 [2020].
[1036] Susan R. Klein, 'Redrawing the Criminal-Civil Boundary', *Buffalo Criminal Law Review* 2, no. 2 (1999): 687.

unitary concept of criminal offence, forces courts to choose to apply either all or none of the criminal safeguards. Thus, the current approach prevents the courts from distinguishing the protections applicable to a particular case on the basis of the rationale of the relevant criminal guarantee whose application is under discussion.

4. Third Problem: Incorporation of Criteria Unrelated to the Protection against Multiple Persecution

The last problem to be addressed in the case law of the ECtHR and the CJEU is the incorporation of criteria unrelated to the protection against multiple prosecutions for the purpose of determining whether it has been violated.

In their latest decisions, both the ECtHR and the CJEU have held that the protection against multiple prosecutions does not necessarily preclude criminally prosecuting the same defendant twice for the same offence.

In *A and B v. Norway*, the ECtHR held that the *ne bis in idem* does not prevent the state from introducing a multiple sanctioning system, as long as there is a sufficiently close connection in substance and time between the different sanctioning proceedings. If so, there will be no duplication of proceedings, but a combination of procedures compatible with the prohibition of multiple prosecutions.[1037]

In *Menci* and *Garlsson Real Estate,* the CJEU held that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the protection against multiple prosecutions because the accumulation can be a legitimate limitation of this right in conformity with the restriction clause of Article 52 of the EU Charter.[1038]

There is a relevant difference between the approaches of the ECtHR and that of the CJEU. In the case of the ECtHR, when there is a sufficiently close connection in substance and time between the different proceedings, there will be no duplication of proceedings for the purposes of the ne bis in idem. On the contrary, the CJEU recognises that in those cases there is a duplication of proceedings. However, this duplication can be a legitimate limitation of the *ne bis in idem* under Article 52 of the Charter.

Presumably, the new approaches of the ECtHR and the CJEU were due to the fact that the courts realised that an absolute prohibition on multiple sanctioning systems was not plausible. For instance, one of the arguments that the ECtHR took into account in *A and B v. Norway* was that multiple sanctioning systems were a

[1037] First Part, 4.4.2.
[1038] First Part, 5.4.

widespread practice in the EU Member States, especially in fields such as taxation, environment and public safety.

In their new approaches, both European courts have included criteria unrelated to the protection against multiple prosecutions for the purpose of determining whether it has been violated. Some of these criteria are the purposes pursued by the different proceedings; the foreseeability of the proceedings, both in law and in practice; the proportionality of the sanctions imposed by the different authorities; and the overall length of the proceedings, among others.[1039] The inclusion of such criteria is problematic because they are unrelated to the rationale of the guarantee in question. Furthermore, the CJEU does not longer consider the prohibition of multiple prosecutions as an absolute bar to the state, but now deems it a protection capable of being balanced with other public interests. Indeed, the CJEU has allowed limiting limit the protection against multiple prosecutions by applying the general limitation clause of Article 54 of the EU Charter. The protection against multiple prosecutions would not be different, in this context, from the right to privacy.

Three problems with these new approaches of the ECtHR and the CJEU will be reviewed: first, the vagueness of the factors listed by the ECtHR and the CJEU; second, the problematic criterion of avoiding as far as possible any duplication in the collection and the assessment of the evidence; and third, the overlap between the prohibition of multiple prosecutions and the ban of disproportionate sanctions.

4.1. Vagueness of the Factors Listed by the ECtHR and the CJEU

The first problem with the approaches of the ECtHR and the CJEU is their vagueness.[1040] Even though the ECtHR and the CJEU have attempted to reduce the uncertainty by listing factors to determine the application of their approaches, they are not sufficiently clear. For instance, what does it mean that the different sanctioning proceedings should pursue complementary purposes? What is the degree of coordination needed with which the various authorities should act? When does the accumulation of sanctions and proceedings of criminal nature respect the essential

---

[1039] First Part, 4.4.2 and 5.4.

[1040] Giorgio Marinucci and Emilio Dolcini, *Manuale Di Diritto Penale. Parte Generale*, 6 edizione (Giuffrè, 2017), 193; Felisatti, 'Il Ne Bis in Idem Domestico. Tra Coordinazione Procedimentale e Proporzionalità Della Sanzione', 136; Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, 46.

content of the protection against multiple prosecutions? The criteria indicated by both European courts are imprecise, which has caused the decisions of the courts on this matter to be unpredictable.[1041]

For example, regarding the question of whether the different sanctioning proceedings pursued complementary purposes, the analysis of the ECtHR has been performed in a perfunctory manner.[1042] In *Jóhannesson and Others v. Iceland*, the ECtHR accepted without any analysis whatsoever that the tax and criminal proceeding pursued complementary purposes. The Court merely stated that "at the outset the Court accepts that they pursued complementary purposes in addressing the issue of taxpayers' failure to comply with the legal requirements relating to the filing of tax returns".[1043] Exactly the same paragraph can be found in *Matthildur Ingvarsdottir v. Iceland* and *Bjarni Ármannsson v. Iceland*, two cases of parallel tax and criminal proceedings for the same offence.[1044]

The decision was different in *Nodet v. France*. In this case, the financial markets regulator convicted the applicant of market manipulation and fined him €250,000. Afterwards, the criminal court convicted the defendant of obstructing the proper operation of the stock market.[1045] This time, the ECtHR held that the two proceedings had not pursued complementary purposes nor addressed different aspects of misconduct involved. The ECtHR noted that the two legal provisions protected the same legal interest and defined the relevant conduct in the same manner.[1046]

The ECtHR also rejected the existence of complementary purposes i*n Velkov v. Bulgaria.* In this case, the administrative authority found the applicant guilty of breaching the peace during a football match, ordering his imprisonment for 15 days and banning him from attending sporting events for two years. Afterwards, the criminal court convicted the defendant of insulting and throwing stones at the police officers and other people, disobeying and offering resistance to the police during the football match, sentencing him to two years' imprisonment. Regarding the question of whether the two proceedings had pursued complementary purposes, the ECtHR just held that

---

[1041] Francesco Mazzacuva, *Le Pene Nascoste. Topografia Delle Sanzioni Punitive e Modulazione Dello Statuto Garantistico* (Giappichelli, 2017), 336; Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, 48.
[1042] Mirandola and Lasagni, 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law', 128.
[1043] ECtHR, Jóhannesson and Others v. Iceland, § 51 [2017].
[1044] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 58 [2018]; Bjarni Ármannsson v. Iceland, § 53 [2019].
[1045] ECtHR, Nodet v. France, § 16-25 [2019].
[1046] ECtHR, Nodet v. France, § 48 [2019].

they had not because the purpose in both proceedings was the same: sanctioning the breach of the peace during the football match.[1047]

The problem with the decisions in *Jóhannesson, Matthildur Ingvarsdottir, Bjarni Ármannsson*, *Nodet* and *Velkov* is the same: the ECtHR neither explained nor justified its reasoning. Indeed, the only substantial difference between all those cases is the Section of the European Court of Human Rights that ruled on them: *Jóhannesson* was decided by the First Section*, Matthildur Ingvarsdottir* and *Bjarni Ármannsson* by the Second Section, *Velkov* by the Fourth Section*,* and *Nodet* by the Fifth Section.

The vagueness of the approach of the ECtHR is even greater. Besides requiring a sufficiently close connection in substance between the different proceedings, it also requires a sufficiently close connection in time. The case law of the ECtHR differs from that of the CJEU since it does not require any temporal connection between the different proceedings.

Regarding the sufficiently close connection in time, ECtHR has not indicated guidelines to assess it, which has caused more uncertainty.

How long should the proceedings be conducted in parallel to avoid a violation of the protection against multiple prosecutions? Even though the ECtHR held in *A and B v. Norway* that proceedings need not be conducted in parallel, the ECtHR has generally criticised the government when proceedings have been conducted in parallel for only a short period. For instance, in *Jóhannesson* and Bjarni *Ármannsson*, the ECtHR criticised that the proceedings had been performed in parallel just for one year[1048] and five months,[1049] respectively.

Moreover, what should be the acceptable overall length of the proceedings? For example, even though the overall length was about four years and ten months in both *Matthildur Ingvarsdottir*[1050] and *Bjarni Ármannsson*,[1051] in the former case the ECtHR recognised a sufficiently close connection in time, while in the latter case the ECtHR rejected it. Furthermore, even though in *Bajčić v. Croatia*, the overall length of the proceedings was about eight years and four months, the ECtHR recognised a sufficiently close connection in time.[1052]

[1047] ECtHR, Velkov v. Bulgaria, § 78 [2020].
[1048] ECtHR, Jóhannesson and Others v. Iceland, § 54 [2017].
[1049] ECtHR, Bjarni Ármannsson v. Iceland, § 56 [2019].
[1050] ECtHR, Matthildur Ingvarsdottir v. Iceland, § 62 [2018].
[1051] ECtHR, Bjarni Ármannsson v. Iceland, § 56 [2019].
[1052] ECtHR, Bajčić v. Croatia, § 45 [2020].

Based on what has been stated, in my view, it is possible to conclude that the assessment of the sufficiently close connection in time by the ECtHR does not provide enough certainty and sometimes seems to be arbitrary.[1053]

4.2. Duplications in the Collection and the Assessment of the Evidence

The specific factors listed by the ECtHR to determine whether there is a sufficiently close connection in substance between the different proceedings are also questionable.

One of those factors is that any duplication in the collection and the assessment of the evidence should be avoided as far as possible, and that the facts established in one proceeding should also be used in a concurrent one. This factor is particularly worrying for three reasons.

Firstly, because such a criterion forces the government to collect and assess the evidence either only in the criminal or the civil proceeding.[1054] For instance, in *Bjarni Ármannsson,* the ECtHR rejected the existence of a sufficiently close connection in substance between the different proceedings because the police and the tax authority had conducted their own independent investigations, examining the conduct of the defendant and his liability separately.[1055] According to the ECtHR, those two circumstances proved that there had been a "largely independent collection and assessment of evidence".[1056] Similarly, in *Velkov v. Bulgaria*, one of the reasons why the ECtHR rejected the existence of a sufficiently close connection in substance was because the criminal court had not taken into account the facts determined in the administrative proceeding.[1057] On the other hand, in *Bajčić v. Croatia*, the ECtHR held that the interaction between the two authorities had been adequate because the criminal court had inspected the case file from the minor offence proceeding in its entirety, even using some evidence.[1058]

[1053] Mirandola and Lasagni, 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law', 128.
[1054] Lasagni, *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*, 49.
[1055] ECtHR, Bjarni Ármannsson v. Iceland, § 55 [2019].
[1056] ECtHR, Bjarni Ármannsson v. Iceland, § 57 [2019].
[1057] ECtHR, Velkov v. Bulgaria, § 78 [2020].
[1058] ECtHR, Bajčić v. Croatia, § 43 [2020].

Secondly, the criterion in question is problematic because it does not take into account that civil proceedings are usually faster than the criminal ones. Consequently, in most cases, the evidence will be first gathered within the civil proceeding and will later be transferred to the criminal prosecution. The above is a problem because the safeguards that apply to criminal investigations are generally stronger than those that apply to civil investigations. For this reason, it will not always be in the interest of the defendant to authorise the transfer of the evidence gathered in the civil proceeding to the criminal prosecution. It is even possible that the defendant opposes the automatic transfer of the evidence from the civil to the criminal proceeding.

Thirdly, the criterion of the ECtHR is worrying because it does not consider that since the civil authority will typically assess the evidence before the criminal court, in most cases the criminal court will be restricted by the assessment of the evidence made by the civil authority. Such a situation is problematic because there are relevant differences regarding the assessment of the evidence between civil and criminal proceedings, such as different rules of evidence and a different burden or standard of proof. All those differences may justify a duplication in the assessment of the evidence, especially because the conclusions of the civil and criminal factfinder may be different.

It must be underlined that, on this matter, the CJEU has been noticeably less demanding. While the ECtHR requires to avoid as far as possible any duplication in the collection and assessment of the evidence, the CJEU requires to ensure that the disadvantages resulting for the defendant from the duplication of proceedings are limited to what is strictly necessary to achieve the objectives of general interest pursued by the national legislation. Therefore, the CJEU does not require to avoid any duplication in the collection and the assessment of the evidence.

4.3. Overlap between the Protection against Multiple Prosecutions and the Prohibition of Disproportionate Sanctions

The third problem with the European case law is the overlap that has occurred between the protection against multiple prosecutions and the prohibition of disproportionate sanctions.

Both the ECtHR and the CJEU have included arguments of proportionality when determining whether a multiple sanctioning system is contrary to the prohibition of multiple prosecutions.

One of the factors listed by the ECtHR to determine whether there is a sufficiently close connection in substance between the different proceedings is assuring that the sanction imposed in the proceeding which concluded first is considered in the one which ended later, so as to prevent that the defendant bears an excessive burden.[1059] The CJEU has held that, when limiting the protection against multiple punishments under Article 52 of the EU Charter, the principle of proportionality must be respected, which means, firstly, that the national legislation must ensure that the disadvantages resulting from an accumulation of sanctions and proceedings are limited to what is strictly necessary to achieve the objectives of general interest, and secondly, that the severity of the sum of all the sanctions imposed does not exceed the seriousness of the offence concerned.[1060]

However, including a proportionality analysis to determine whether there is a violation of the protection against multiple prosecutions is improper for at least two reasons.

First, the incorporation of arguments of proportionality is a problem because they are is incompatible with the operating structure of the prohibition of multiple prosecutions, which must be capable of ascertaining whether the protection has been infringed when the second prosecution starts. If the sanction actually imposed in the second proceeding is one of the factors to consider in order to determine whether the prohibition of multiple prosecutions has been violated, the court would not be able to resolve this issue until the second proceeding has concluded. The idea that to resolve a motion based on double jeopardy grounds the defendant must wait until the second proceeding runs its full course contradicts the core notion of the protection against multiple prosecutions, which prohibits the government from prosecuting the defendant a second time for the same offence. The United States Supreme Court suggested the same argument in *Hudson*. On that occasion, the Supreme Court argued that, if to determine whether the double jeopardy is implicated a court must look at the sanction imposed, it will not be possible to determine whether the double jeopardy clause is violated until the defendant has endured a trial until the judgment.[1061] The ECtHR also disregards that the second proceeding can end without the imposition of a sanction, in

[1059] First Part, 4.4.2.
[1060] First Part, 5.4.
[1061] Supreme Court of the United States, Hudson v. United States, 102 [1997].

which case the inquiry on whether the sanction imposed in the second proceeding respected the principle of proportionality would lack sense.

Second, the inclusion of proportionality arguments is problematic because it has overlapped the protection against multiple prosecutions and the prohibition of disproportionate sanctions, which have both theoretical and practical differences. At a theoretical level, while the prohibition of multiple prosecutions addresses the question of whether a second prosecution is barred, the ban of disproportionate sanctions addresses the question of whether a given sanction is disproportionate. At a practical level, the two fundamental rights have dissimilarities too. Firstly, imposing a disproportionate sanction is always contrary to the ban of disproportionate sanctions, regardless of whether the sanction was imposed in one or several proceedings. Secondly, the prohibition of multiple prosecutions can also be breached in cases where no sanction has been imposed on the defendant, for example, when the defendant has been acquitted twice.

In conclusion, including arguments of proportionality to determine whether there is a violation of the protection against multiple prosecutions is inappropriate. The inclusion of those arguments is a problem because they are incompatible with the operating structure of the prohibition of multiple prosecutions, which must be capable of ascertaining whether the protection has been infringed when the second prosecution starts. Moreover, the inclusion of arguments of proportionality has overlapped the protection against multiple prosecutions and the prohibition of disproportionate sanctions, which have both theoretical and practical differences. The question of whether a disproportionate sanction has been imposed on the defendant is independent of the question of whether the government has prosecuted the same defendant twice for the same offence.

THIRD PART

--

RECONSTRUCTING THE PROHIBITION OF MULTIPLE PUNISHMENTS AND THE PROHIBITION OF MULTIPLE PROSECUTIONS

1. Understanding Multiple Sanctioning Systems: Models of Organisation

The critical analysis developed in the Second Part regarding the three problems with the case law of the ECtHR and the CJEU supports the argument that neither of the two European courts has accomplished the task of developing a satisfactory interpretation on the lawfulness of multiple sanctioning systems under the *ne bis in idem*. There is thus a need to propose a general reconstruction on the *ne bis in idem* under Protocol 7 to the European Convention of Human Rights and EU Charter.

However, before proposing an alternative approach regarding the lawfulness of multiple sanctioning systems under the *ne bis in idem*, it is indispensable to address a subject that has been excluded from the discussion: the rationale of multiple sanctioning systems. Indeed, the case law on *ne bis in idem* of both the ECtHR and the CJEU seems to be based on the assumption that there is no reason to provide for a multiple sanctioning system. However, this assumption is probably flawed. There are certainly cases where such a system is fully justified.[1062] For instance, multiple sanctioning systems may be supported by considerations of efficiency and specialisation of administrative agencies. In some particularly complex sectors, such as tax law, securities market or antitrust law, the investigation of offences and the imposition of certain sanctions often requires specialised competencies.[1063] In other words, experts need to be in place to analyse financial trends and detect whether an offence has taken place.[1064] . However, it is possible that, given the seriousness of the facts, they should also be punished with criminal sanctions, in addition to administrative sanctions, because of the greater deterrent effect and the stigma attached to the criminal justice system. In these cases, therefore, providing for both a civil and a criminal offence is justified. Preventing the legislature from providing both types of sanctions would mean that the legislature is forced to choose either to provide a more

[1062] Héctor Hernández, 'Actividad Administrativa, Procedimiento Sancionatorio-Administrativo y Proceso Penal: Algunas Necesidades de Coordinación Legal', in *Sanciones Administrativas. X Jornadas de Derecho Administrativo*, ed. Jaime Arancibia Mattar and Pablo Alarcón Jaña (Thomson Reuters, 2014), 568.

[1063] Ulrich Sieber, 'Administrative Sanction Law in Germany', in *The Limits of Criminal Law. Anglo-German Concepts and Principles*, ed. Matthew Dyson and Benjamin Vogel (Intersentia, 2018), 304.

[1064] Nikolaos Theodorakis, 'The Role of Administrative Sanctions in Criminal Law. From Minor Offences to Corporate Misconduct', in *The Limits of Criminal Law. Anglo-German Concepts and Principles*, ed. Matthew Dyson and Benjamin Vogel (Intersentia, 2018), 283.

efficient but less deterrent administrative sanction or to provide a less efficient but more deterrent criminal sanction. These two options are sub-optimal.

The need for specialised administrative agencies may also be due to the convenience of specialised supervision of the execution of the sanctions imposed on the defendant. The criminal courts may lack the appropriate systems or information to supervise the execution of a particular sanction imposed on the defendant, or it can be too expensive for them to be involved in the supervision. Moreover, the administrative agencies can be more efficient in controlling the execution of that measure. For instance, when a defendant is convicted of market abuse and sentenced to ten years debarment, a specialised administrative agency is in a better position than the criminal court to oversee the execution of that sanction. In this case, it would be advisable that the criminal court supervises the execution of the imprisonment sentence and the specialised administrative agency supervises the execution of the debarment sanction.

In short, to provide for different sanctioning proceedings for the same facts is not an irrational public policy decision. Regarding the models of organisation under which multiple sanctioning systems may be designed, there are two: the subsidiary model and the complementary model. The two different models will be analysed in the following.

1.1. Subsidiary Model

First, the legislature can design multiple sanctioning systems following a subsidiary logic. In this model, although there are both a civil and a criminal offence for the same facts, the civil offence is provided as a “backup” in case it has not been possible to convict the defendant in the criminal proceeding. Therefore, if the criminal prosecution fails because of the more demanding substantive and procedural requirements for the imposition of criminal sanctions, the government will be able to initiate the civil sanctioning proceeding.[1065] On the contrary, if the defendant is convicted in the criminal proceeding, initiating the civil sanctioning proceeding will be prohibited.

[1065] Šugman and Jager, ‘The Organization of Administrative and Criminal Law in National Legal Systems: Exclusion, Organized or Non-Organized Co-Existence’, 160; Hernández, ‘Actividad Administrativa, Procedimiento Sancionatorio-Administrativo y Proceso Penal: Algunas Necesidades de Coordinación Legal’, 568.

Those more demanding substantive and procedural requirements can be of the most diverse nature. For example, the criminal offence can require a subjective element that the administrative offence does not. For instance, in some cases, negligence is not enough to convict the defendant for the criminal offence, but it is sufficient to convict him for the civil offence.[1066] In these cases, an acquittal of the defendant in the criminal proceeding will not bar, in principle, the possibility to sanction him in a following non-criminal proceeding.

Another example is the case in which the defendant is acquitted in the criminal trial because the government could not meet the standard of proof applicable in those proceedings. Since the standard of proof in criminal proceedings is more demanding than the one applicable in other sanctioning proceedings, a defendant could be acquitted in a criminal trial but sanctioned in a subsequent civil proceeding.

An additional example is the case in which the defendant is acquitted in a criminal trial because some evidence was declared inadmissible based on the rules of evidence applicable to criminal proceedings. In this case, if the evidence excluded were admissible under the rules of evidence applicable to civil sanctioning proceedings, the defendant could be sanctioned in a subsequent civil proceeding.

The legislature usually provides for subsidiary multiple sanctioning systems when it considers that, even though it was not possible to sanction the defendant in the criminal proceeding, the conduct performed by the defendant nevertheless deserves to be sanctioned in a civil process. However, in subsidiary multiple sanctioning systems, if the defendant is convicted in the criminal proceeding, the government will not be able to initiate a subsequent civil sanctioning proceeding for the same facts.

1.2. Complementary Model

Alternatively, the legislator can design multiple sanction systems following a complementary logic. In this model, none of the offences is provided as a "backup" in case it has not been possible to convict the accused in one of the proceedings. Rather, in complementary multiple sanctioning systems, all the sanctioning proceedings, whether criminal or civil, are designed to be brought by the government against the

---

[1066] Hernández, 'Actividad Administrativa, Procedimiento Sancionatorio-Administrativo y Proceso Penal: Algunas Necesidades de Coordinación Legal', 568.

defendant. Therefore, the same facts are addressed by different authorities in different sanctioning proceedings, each following its own rules.

The main characteristic of these multiple sanctioning system is that the legislature has organised the sanctioning response in two or more proceedings such that each sanction is only a part of the full sanctioning response, appropriate with regard to the seriousness of the defendant's conduct. Thus, only the sum of all sanctions forms the real (or complete) sanctioning response of the legislature. For example, if, with regard to the seriousness of the conduct, the full appropriate sanction would be "X", the legislator could provide for a criminal sanction of "Y" (with Y<X) and a civil sanction of "X-Y", or two civil sanctions of "X/2".

The legislature generally provides for complementary multiple sanctioning systems in those economic sectors characterised with two circumstances. Firstly, the existence of abundant and complex regulation, which often makes it difficult to distinguish between prohibited and permitted conduct. Secondly, the fact that economic actors decide their strategies taking into account the behaviour of other economic actors. Nowadays, the majority of economic criminal offences are accompanied by administrative sanctions, such as tax offences, stock market offences, offences against consumers, and antitrust offences. In all these cases, the situation is the same: a sort of continuous line that goes from administrative to criminal offences.[1067]

The two above characteristics create the risk that, when an economic actor commits an offence, the rest of them could imitate the illicit behaviour. In order to forestall this risk, the legislature needs to immediately either confirm or reject the lawfulness of the conduct undertaken by the defendant. Since criminal proceedings are not in a position to do that, the legislature prefers to entrust this task to an administrative proceeding, which is faster and less complex than a criminal one. However, it may happen that, given the seriousness of the conduct of the defendant, it should also be punished with criminal sanctions, in addition to administrative sanctions, because of the greater deterrent effect of criminal penalties and the stigma attached to a criminal conviction. Therefore, there are valid reasons in these cases to provide for a complementary multiple sanctioning system. Consequently, besides initiating a criminal prosecution, the government will also bring a parallel administrative

[1067] Norberto De la Mata et al., *Derecho Penal Económico y de La Empresa* (Dykinson, 2018), 53.

proceeding, whose aim will be to rapidly address and resolve the issue of the lawfulness of the facts in question, at least from the perspective of administrative law. In this way, if the defendant is sanctioned in administrative proceeding, for instance by the Securities and Exchange Commission, the other actors in the stock market will not imitate such a conduct, as they will know that it is unlawful.

Complementary multiple sanctioning systems also allow the legislature to address the same factual event from different specialised perspectives. For example, a case of water pollution can lead to the initiation of two different sanctioning proceedings. While the environmental protection agency could be in charge of addressing the environmental damage, the public health protection agency could address the damage that the pollution caused to people. Each of these administrative agencies will perform its own investigation and impose different sanctions.

In *United States v. Halper*, the Supreme Court suggested that the government might join the civil penalty action with the criminal prosecution,[1068] thereby avoiding bringing a second trial against the same defendant. However, the suggestion of a hybrid procedure is difficult to imagine because its practical application would be fraught with problems. For instance, what would the standard of proof be in a combined civil sanction-criminal prosecution? Would it be preponderance of the evidence for the civil sanction and beyond a reasonable doubt for the crime? Should the verdict be unanimous? These problems demonstrate how difficult it would be to combine civil and criminal proceedings.[1069]

In conclusion, it is not correct to consider that multiple sanctioning proceedings are irrational or represent an abuse by the legislature. On the contrary, there are cases in which providing for this type of law enforcement system is a reasonable public policy decision.

[1068] The Supreme Court stated that its decision did not “prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding”. Supreme Court of the United States, United States v. Halper, 450 [1989].
[1069] Eads, ‘Separating Crime from Punishment’, 978–82.

2. Overcoming the Dead End of the Thesis of the Criminal Nature

One of the problems with the case law of the ECtHR and the CJEU addressed in the Second Part was the dead end of the criminal nature thesis. As stated, there are two problems with the current approach of the European courts.

Firstly, since the current approach makes the application of the criminal safeguards dependent on the nature of the specific offence faced by the defendant in the particular proceeding, the application of the thesis has not produced consistent results. The characterisation of the offence either as criminal or civil is left to the determination of every single court, which must determine the nature of offence utilising a vague method and list of factors with no hierarchy between them.

The second problem with the approach of the ECtHR and the CJEU is the "all-or-nothing" reasoning. Since both European courts have developed a unitary concept of criminal offence, applicable to all the substantive and procedural criminal guarantees, all such protections apply only to offences and proceedings that fall within that concept. Outside of this concept, thus, the criminal safeguards do not apply.

Those two problems show the need for a new approach to resolving the issue of the application of criminal guarantees to civil offences and proceedings. The new approach should be capable of expanding the scope of application of the criminal protections and overcoming the two shortcomings explained above.

This alternative approach can only be developed based on a differentiated concept of "criminal offence". As stated above,[1070] interpreting fundamental rights is a complex process. While narrow interpretations could leave citizens unprotected, broad interpretations could excessively limit national legislature. Consequently, the rationale of every fundamental right must be a primary basis for the interpretation process. Thus, it is not possible to develop a single concept of criminal offence which delimits the scope of application of all the criminal guarantees at once. Only by considering the rationale of the guarantee whose application is under discussion and the civil offence and proceeding in question, a court can decide whether that protection should apply to that case.[1071]

[1070] Second Part, 2.
[1071] Masera, *La Nozione Costituzionale Di Materia Penale*, 207.

If two criminal guarantees have a different rationale, there is no obstacle to hold that they may have a different scope of application too. Consequently, it should be admitted that an offence may be characterised as criminal for the purposes of one guarantee and not the other.[1072]

The idea of a differentiated approach depending on the specific protection whose application is under discussion is not unprecedented. Indeed, such a differentiated approach has been proposed in the United States. For example, the Supreme Court adopted a differentiated approach in *Ursery*, when it held that civil forfeiture constitutes punishment for the purposes of the excessive fines clause but not for the double jeopardy clause.[1073]

Similarly, the courts have adopted a differentiated approach regarding the Securities and Exchange Commission's disgorgement imposed as a sanction for violating federal securities law. Even though the Supreme Court ruled in *Kokesh v. Securities and Exchange Commission* that disgorgement constitutes a "penalty" for purposes of the five-year statute of limitations in 28 U.S.C. § 2462, and therefore any claim for disgorgement in a SEC enforcement action must be commenced within five years of the date the claim accrued,[1074] lower courts have held that disgorgement does not constitute punishment for purposes of the double jeopardy clause. For example, the Court of Appeal for the Sixth Circuit held, in *United States v. Dyer*, that even though the Supreme Court had held in *Kokesh* that SEC disgorgement is a penalty subject to the five-year statute of limitations in 28 U.S.C. § 2462, it had not said that disgorgement constitutes punishment for the purposes of the double jeopardy clause.[1075] The Court of Appeal for the Fourth Circuit held the same conclusion in *United States v. Bank*.[1076]

The differentiated approach proposed above shifts the centre of attention. While the current approach of the European courts exclusively concentrates on the offence and measure faced by the defendant in the particular proceeding, this alternative approach focuses on the relevant guarantee under discussion and its rationale. By changing the focus of the relevant question, this new approach allows overcoming the

---

[1072] Masera, 207.
[1073] Criticising the differentiated concept of punishment depending on the specific guarantee adopted by the Supreme Court of the United States, Susan R. Klein, 'Civil in Rem Forfeiture and Double Jeopardy', *Iowa Law Review* 82, no. 1 (1996): 239–40.
[1074] Supreme Court of the United States, Kokesh v. Securities and Exchange Commission, 11 [2017].
[1075] Court of Appeal for the Sixth Circuit, United States v. Dyer [2018].
[1076] Court of Appeal for the Fourth Circuit, United States v. Bank [2020].

"all-or-nothing" reasoning of the current approach and the uncertainty caused by its application.

This alternative approach overcomes the "all-or-nothing" reasoning because a given offence may be qualified as criminal for the purposes of one criminal guarantee and not for the others. For each criminal safeguard, it will be necessary to determine, in the light of its rationale, its scope of application, thus identifying the civil offences and procedures to which each protection applies. Only after determining the scope of application of the criminal guarantee whose application is under discussion, it is possible to resolve whether an offence falls within that scope. Since every protection must be separately analysed to determine its scope of application, it is no longer necessary to develop a unitary concept of criminal offence applicable to all the criminal guarantees.

The alternative approach also allows overcoming the uncertainty caused by the current interpretation. Since the focus shifts from the particular offence or measure faced by the defendant to the guarantee whose application is under discussion, the courts will have a more stable ground to resolve the relevant question. Since it is no longer necessary to develop a single concept of criminal offence which delimits the scope of all the criminal guarantees at once, the courts will be able to extend or reduce the scope of one criminal protection without affecting the others. Consequently, it will be possible for the courts to delimit more precisely the scope of application of each criminal guarantees.

In conclusion, the purpose of developing a unitary concept of criminal offence which delimits the scope of application of all criminal guarantees at once must be abandoned. Instead, it is necessary to develop a differentiated notion of criminal offence, determining for each criminal safeguard, in the light of its rationale, its scope of application, identifying the civil offences and procedures to which those protections apply. Consequently, an offence may be characterised as criminal for the purposes of one guarantee and not the other. Therefore, for example, a civil offence may fall within the scope of the principle of legality and, at the same time, be outside the scope of *ne bis in idem*. For the same reason, it is possible to imagine that some criminal guarantees apply to the entire sanctioning system, such as the ban of disproportionate sanctions, notwithstanding the fact that Article 49 of the European Union Charter of Fundamental Rights refers to criminal offences and penalties.

3. Remodelling the *Ne Bis in Idem*

3.1. Two Competing *Ne Bis in Idem* Models

In general terms, at a comparative level it is possible to identify two competing n*e bis in idem* models: (i) a substantive model and (ii) a partly substantive model.

3.1.1. First Model: Substantive *Ne bis in idem*.

This first model interprets the *ne bis in idem* as a substantive restriction on the competence of the legislature to define offences and fix punishments. According to this model, the legislature is free to define offences and authorise punishments, as long as the result does not constitute an inadmissible case of multiple punishments. This model assumes that there is a substantive criterion capable of determining when multiple punishments authorised by the legislature are impermissible under the *ne bis in idem*.[1077]

This first model has been followed by the Spanish Constitutional Court. Initially, the Court had stated that the prohibition of multiple punishments only precluded the actual accumulation of punishments in the case of unity of offender, identity of facts and unity of legal basis.[1078] However, in judgment 48-2003 the Court extended the prohibition to the legislature, ruling that a legal provision that obliges to accumulate punishments in the case of unity of offender, identity of facts and unity of legal basis violates the prohibition.

The problem is that the *ne bis in idem* gives no guidance to determine when different punishments authorised by the legislature are impermissible. For instance, if for a conduct of tax fraud the legislature provides for a criminal offence, authorising the imposition of both a fine and a jail term for that offence, do these sanctions amount to impermissible multiple punishments for the same offence? The answer is clearly negative because society expects the legislature to define crimes and fix penalties, as well as it expects courts to impose those penalties provided by the legislature. There is nothing in the *ne bis in idem* that prevents the legislature from providing for more

[1077] Thomas III, *Double Jeopardy*, 8.
[1078] First Part, 3.1.

than one sanction for a particular offence. After all, "punishment" is the total package of sanctions authorised by the legislature for a single offence, whether it be ten years in jail, a fine, community service, or any combination thereof.[1079]

Now imagine that, instead of providing for a criminal offence and authorising the imposition of a jail term and a fine, the legislature provides for one criminal offence and a civil offence, authorising a jail term for the first offence and a fine for the second one. If a defendant, based on the same conduct of tax fraud, is convicted for the two offences and sentenced to a jail term and a fine, would it be a case of impermissible multiple punishments? Again, the answer should be no. Indeed, there is no relevant difference between this case and the previous one.

3.1.2. Second Model: Procedural *Ne bis in idem*.

According to this second model, although the *ne bis in idem* does not limit the competence of the legislature to define offences and fix punishments in a single trial, it does limit the legislature in the context of multiple prosecutions, prohibiting successive prosecutions for the same facts.[1080]

This second model has been followed by the ECtHR and the CJEU. As noted in the First Part, both courts have stated that the *ne bis in idem* aims to prohibit the repetition of criminal proceedings against the same person for the same offence. Regarding the "same offence" requirement, both European courts have adopted a purely factual approach.[1081] Therefore, even though the *ne bis in idem* does not limit the power of the legislature to impose multiple punishments for the same facts in a single trial, it does limit the power of the legislature to impose multiple punishments for the same facts in separate proceedings.

3.2. Analysis of the Protection against Multiple Punishments and the Protection against Multiple Prosecutions

The problem with the two models described above, as well as with the five case law systems studied in the First Part, is that they do not distinguish the protection against

[1079] Susan R. Klein, 'Double Jeopardy's Demise', *California Law Review* 88, no. 3 (2000): 1006.
[1080] Thomas III, *Double Jeopardy*, 12.
[1081] First Part, 4.2 and 5.2.

multiple prosecutions from the protection against multiple punishments, overlapping both safeguards and depriving the differentiation of any practical consequence.

The interpretation that will be proposed in the following sections assumes that the protection against multiple prosecutions for the same offence and the protection against multiple punishments for the same offence are indeed different safeguards. These two protections have a different rationale, scope of application and different requirements. Therefore, it is indispensable to differentiate one protection from the other.[1082]

3.2.1. Protection against Multiple Punishments.

3.2.1.1. Rationale of the Prohibition of Multiple Punishments.

The protection against multiple punishments aims to assure that the authorities, either courts or administrative agencies, do not impose on the defendant, by convicting him twice for the same offence, a disproportionate punishment according to the standard of the legislature. The protection is based on a worry about proportionality,[1083] ensuring that the punishment imposed on the defendant is not disproportionate in terms of "legislative sanctioning redundancy".[1084]

It is important to explain, however, that the protection against multiple punishments works differently from the ban of disproportionate sanctions. Firstly, the former does not address the question of whether a penalty is excessive from an ordinal or cardinal perspective.[1085] Indeed, the prohibition of multiple punishments aims to assure that the authorities do not impose on the defendant, by convicting him twice for the same offence, a disproportionate punishment according to the standard of the

[1082] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 175.
[1083] Michael Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law* (Oxford University Press, 1993), 309.
[1084] Juan Pablo Mañalich, *Estudios Sobre La Fundamentación y La Determinación de La Pena* (Thomson Reuters, 2018), 71.
[1085] The differentiation between ordinal and cardinal magnitudes was proposed by von Hirsch. On the one hand, the issue of ordinal magnitudes "concerns how a crime should be punished compared to similar criminal acts and compared to other crimes of a more or less serious nature". On the other hand, the issue of cardinal magnitudes addresses tries to fix absolute severity levels that the penalty scale should respect. See Andrew von Hirsch, *Past or Future Crimes* (Rutgers University Press, 1985), 40–43.

legislature, “not by some court imposed idea of proportionality”.[1086] Secondly, the prohibition of multiple penalties only applies when the defendant has been convicted twice for the same offence. On the contrary, the prohibition of disproportionate sanctions does not include this requirement as it also applies to cases where the defendant has been convicted only for one offence.

The application of the prohibition of multiple punishments is related to what in civil law systems is referred to as “apparent concurrence of offences”.[1087] An apparent concurrence of offences occurs when, even though the conduct of the defendant falls within the scope of two or more statutory provisions, the application of one of those legal provisions, the “prevailing offence”, displaces the application of the others.[1088] The non-application of these rules is not because the requirements to apply such offences to the specific case are not met, but rather because their application has been displaced by the application of the prevailing offence. Thus, if for any reason it is not possible to apply the prevailing offence, it will still be possible to apply the other offences.[1089]

In civil law systems, there are two main criteria to resolve cases of apparent concurrence by identifying the prevailing offence: the principle of speciality and the principle of consumption. The principle of speciality, which is equivalent to the Blockburger test, states that if a conduct violates two legal provisions, it constitutes two different offences only when each provision requires proof of an extra element that the other does not. If this rule is not satisfied, and one offence falls entirely within the scope of another, then the special offence should prevail over the general one.[1090] For

---

[1086] Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law*, 310; Pérez Manzano, *La prohibición constitucional de incurrir en ‘bis in idem’*, 74.
[1087] García, *Non Bis in Idem Material y Concurso de Leyes Penales*, 31; Pérez Manzano, *La prohibición constitucional de incurrir en ‘bis in idem’*, 59; Alarcón Sotomayor, *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*, 54.
[1088] Günther Stratenwerth, *Derecho Penal. Parte General I*, 4 edition (Thomson-Civitas, 2005), 453; Claus Roxin, *Derecho Penal. Parte General. Especiales Formas de Aparición Del Delito*, vol. II (Thomson Reuters-Civitas, 2014), 997.
[1089] Enrique Peñaranda Ramos, *Concurso de Leyes, Error y Participación En El Delito* (Civitas, 1991), 181–83; Günther Jakobs, *Derecho Penal. Parte General. Fundamentos y Teoría de La Imputación* (Marcial Pons, 1995), 1067–68; Stratenwerth, *Derecho Penal. Parte General I*, 458; Roxin, *Derecho Penal. Parte General. Especiales Formas de Aparición Del Delito*, II:1017; Francisco Maldonado Fuentes, ‘Delito Continuado y Concurso de Delitos’, *Revista de Derecho (Valdivia)* 28, no. 2 (2015): 207–8.
[1090] Hans-Heinrich Jescheck, *Tratado de Derecho Penal: Parte General*, 4 edition (Editorial Comares, 1993), 672; Santiago Mir Puig, *Derecho Penal. Parte General*, 7 edition (Editorial Reppertor, 2005), 648; Daryl Mundis, *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford University Press, 2009), 257; L. J. van den Herik, *Contribution of the Rwanda Tribunal to the*

instance, the offences of robbery and bank robbery are in a relation of speciality. Thus, a criminal court cannot convict a person who robs a bank for both offences. If that were the case, that person would be convicted twice for the same crime. According to the principle of consumption, when a greater offence includes the blameworthiness of a lesser offence, the conviction for the former displaces the application of the latter because, in that case, the conviction exhausts the total blameworthiness of the defendant's conduct. Contrary to the principle of speciality, for the purposes of the principle of consumption, it is not necessary that the distinct offences have the same legal elements.[1091]

Since the protection against multiple punishments aims to prevent the imposition of disproportionate punishments according to the standard of the legislature, the prohibition is not a limit for the legislature. The prohibition neither prevents the legislature from defining offences and fix punishments[1092] nor from incriminating the same conduct more than once. Rather, the prohibition of multiple punishments operates as a form of sentencing control, preventing judges and administrative agencies from imposing multiple punishments when it appears that the legislature did not intend it.[1093] The same interpretation has been adopted by the Canadian Supreme Court, which has held that the double jeopardy clause only applies to proceedings and not to legal enactments, not preventing Parliament from creating offences that may overlap.[1094] Accepting that the prohibition of multiple punishments is a limit for the legislature would mean that the prohibition precludes providing multiple sanctioning systems, whether subsidiary or complementary. This does not seem reasonable because, as explained above, there are cases in which providing for this type of law enforcement system is a reasonable public policy decision.[1095]

Is the prohibition of multiple punishments part of the double jeopardy clause? This question has been a permanent matter of discussion in the United States. In his

Development of International Law (Martinus Nijhoff Publishers, 2005), 251; Lorena Bachmaier Winter and Antonio del Moral García, *Criminal Law in Spain*, 3rd ed. (Wolters Kluwer, 2020), 202.

[1091] Jescheck, *Tratado de Derecho Penal: Parte General*, 674; Mir Puig, *Derecho Penal. Parte General*, 650; Fulvio Maria Palombino, 'Cumulation of Offences and Purposes of Sentencing in International Criminal Law: A Troublesome Inheritance of the Second World War', *International Comparative Jurisprudence* 2, no. 2 (2016): 91.

[1092] Mañalich, *Estudios Sobre La Fundamentación y La Determinación de La Pena*, 71.

[1093] Sigler, 'Federal Double Jeopardy Policy', 377; Cano, 'Non Bis in Idem, Prevalencia de La Vía Penal y Teoría de Los Concursos En El Derecho Administrativo Sancionador', 194.

[1094] Supreme Court of Canada, R. v. Nova Scotia Pharmaceutical Society, 645 [1992].

[1095] Third Part, 1.

dissenting opinion in *Kurth Ranch*, Justice Scalia discussed the convenience of recognising the prohibition of multiple punishments as part of the double jeopardy clause. After arguing that “to be put in jeopardy” does not mean “to be punished”, Justice Scalia concluded that, by its terms, the double jeopardy clause only prohibits multiple prosecutions for the same offence.[1096] In his opinion, the prohibition of multiple punishments should be considered an element of the due process clause.[1097] Following the reasoning of Scalia, commentators have argued that the history of the double jeopardy clause proves that it was meant to limit only prosecutors, not the legislature.[1098] In this way, the double jeopardy clause would only prohibit multiple prosecutions, not multiple punishments.[1099] Multiple punishments cases should be resolved on the basis of the due process clause.[1100]

In my view, Justice Scalia was right when he argued that the prohibition of multiple punishments is not part of the double jeopardy clause. Since the prohibition of multiple punishments aims to assure that the authorities do not impose on the defendant a disproportionate punishment according to the standard of the legislature, the prohibition does not limit the competence of the legislature to define offences and fix punishments. In other words, the prohibition of multiple punishments does not limit the power of the legislature to provide for multiple punishments for the same offence. Rather, the prohibition operates as a form of sentencing control, preventing judges and administrative agencies from imposing multiple punishments when it appears that the legislature did not intend it. Therefore, the prohibition of multiple punishments is not part of the *ne bis in idem*, but it is a general principle of law, which is immanent to the sanctioning system.

Since the prohibition of multiple punishments is a general principle of law, it is not necessary for the legislature to explicitly provide for the criteria to resolve cases of apparent concurrence by identifying the prevailing offence. On the contrary, considering the difficulties to foresee all the situations of apparent concurrence of offences, it seems even advisable for the legislature not to provide for general norms,

[1096] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 798 (Scalia, J., dissenting) [1994].
[1097] Supreme Court of the United States, Department of Revenue of Montana v. Kurth Ranch, 801 (Scalia, J., dissenting) [1994].
[1098] Mack, ‘Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate’, 251–52; Summers, ‘Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition’, 1609.
[1099] Summers, ‘Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition’, 1617.
[1100] Summers, 1611.

thereby allowing courts and scholars developing the criteria to identify the proportionality standard of the legislature.[1101]

Because of the above, the prohibition of multiple punishments is not part of Article 4 of Protocol 7 to the European Convention nor Article 50 of the EU Charter, both of which recognise only the prohibition of multiple prosecutions. From my perspective, the sentence "no one shall be liable to be tried or punished twice for the same offence" is nothing more than a hendiadys, that is, the expression of a single idea, in this case the prohibition of multiple prosecutions, by two different terms separated by a conjunction.[1102]

3.2.1.2. Interpreting the "Same Offence" Requirement.

From my perspective, the concept of "same offence" must be constructed based on the rationale of the relevant protection, whether it be the prohibition of multiple punishments or the prohibition of multiple prosecutions.[1103]

Since the prohibition of multiple punishments aims to ensure that the authorities do not impose on the defendant a disproportionate punishment according to the standard of the legislature, the concept of "same offence" in this context can only be a legal one. This does not mean, however, that "same offence" means "same legal offence", as some commentators have suggested. For instance, due to all the practical problems that the "same offence" requirement has caused, Akhil Amar has proposed a "same is same" approach, suggesting that "murder means murder, not attempted murder".[1104] Even though Amar complements his double jeopardy approach with the doctrines of implied acquittal and issue preclusion, as well as proposing a mandatory joinder in certain cases, his "same is same" approach offers almost no protection against double jeopardy.

How should the concept of "same offence" be interpreted? Following the case law of the Supreme Court of Canada,[1105] for the purposes of the prohibition of multiple

---

[1101] Jescheck, *Tratado de Derecho Penal: Parte General*, 671; Roxin, *Derecho Penal. Parte General. Especiales Formas de Aparición Del Delito*, II:997–98; Jean Pierre Matus, 'El Concurso (Aparente) de Leyes En La Reforma Penal Latinoamericana', *Revista Chilena de Derecho* 24, no. 3 (1997): 442.

[1102] Regarding the concept of "hendiadys", see Samuel L. Bray, '"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution', *Virginia Law Review* 102, no. 3 (2016): 695.

[1103] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 58; Mañalich, *Estudios Sobre La Fundamentación y La Determinación de La Pena*, 78.

[1104] Akhil Amar, 'Double Jeopardy Law Made Simple Essay', *Yale Law Journal* 106, no. 6 (1997): 1809.

[1105] First Part, 2.2.

punishments, two offences should be considered to be the same offence if they arise out the same facts[1106] and constitute a single wrong. Two offences constitute a single wrong if the protected legal interest, as well as the way in which it has been affected, are the same.[1107] The required analysis does not only consider the legal provisions in the abstract, but the opposite. The relevant issue is to analyse the legal interest that the legal provisions seek to protect in the specific case, considering the type of attack and the particular harm experienced by that legal interest. For this reason, the Blockburger test cannot be the only test to resolve whether two offences are the same because it is excessively narrow.[1108] The mere existence of different legal provisions is not sufficient to conclude that the protected legal interest is different.

The "same offence" requirement works as a rebuttable presumption against cumulative punishments.[1109] As stated above, the protection against multiple punishments aims to ensure that the sanction imposed on the defendant is not disproportionate according to the standard of the legislature. Therefore, where the legislature has provided for both a civil and a criminal offence in respect of the same facts, and those offences are the same for the purposes of the prohibition of multiple punishments, the presumption is that cumulative punishments are not authorised.[1110] Nevertheless, this presumption can be rebutted by a clear indication of contrary legislative intent. The proposed approach has two levels: firstly, the court should determine whether the defendant has been convicted twice for the same offence. If that is not the case, cumulative punishments are allowed. Conversely, where the court concludes that the defendant has been convicted twice for the same offence, the second step of the inquiry is to ascertain whether there is a clear legislative indication allowing cumulative punishments. If there is no such indication, cumulative punishments are forbidden. On the contrary, if such indication exists, cumulative punishments are admissible because, in that case, such conviction will not be disproportionate according to the standard of the legislature.

[1106] Therefore, the prohibition of multiple punishments does not bar cumulative sentences if they are based on different factual incidents.
[1107] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 119–21.
[1108] Thomas III, *Double Jeopardy*, 199.
[1109] Similarly, Peter Westen and Richard Drubel, 'Toward a General Theory of Double Jeopardy', *Supreme Court Review* 1978, no. 1 (1978): 116–22; Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law*, 309.
[1110] Hernández, 'Actividad Administrativa, Procedimiento Sancionatorio-Administrativo y Proceso Penal: Algunas Necesidades de Coordinación Legal', 573.

The same interpretation has been adopted by the Canadian Supreme Court, which has held that unless there is a clear indication that multiple punishments are envisaged, the Kienapple rule should be followed.[1111] In other words, when two offences are the same under the Kienapple rule, cumulative punishments are forbidden, except if this is expressly or implicitly authorised by a legal provision.[1112]

The approach proposed here is also similar to that of the United States Supreme Court. In *Missouri v. Hunter*, the Supreme Court held that two convictions and two sentences in a single trial, one for robbery and the other for armed criminal action, were admissible despite the fact that both offences were the same under the Blockburger test because the legislature had specifically authorised cumulative punishments under the two relevant statutes.[1113] The Supreme Court held that since in a single trial the double jeopardy clause only prevents the court from prescribing greater punishment than the legislature intended, no combination of clearly authorised penalties imposed in a single proceeding is contrary to the double jeopardy clause. [1114]

3.2.1.3. Scope of Application of the Prohibition of Multiple Punishments.

According to what has been proposed,[1115] the question of whether a criminal guarantee applies to civil offences or proceedings depends on its rationale. Regarding the prohibition of multiple punishments, since it aims to prevent that the overall punishment imposed on the defendant is not disproportionate according to the standard of the legislature, it seems clear that the prohibition is a general safeguard, applicable to the entire sanctioning system, whether it be civil or criminal. Moreover, as a form of sentencing control, the prohibition of multiple punishments applies uniformly whether sanctions are imposed in a single trial or multiple trials.[1116]

How does the prohibition of multiple punishments operate in the context of multiple sanctioning systems? As stated, the legislature may provide for multiple sanctioning systems under either a subsidiary or a complementary model. In a

[1111] Supreme Court of Canada, Kienapple v. R., 753 [1975].
[1112] Supreme Court of Canada, R. v. Prince, 498 [1986].
[1113] Supreme Court of the United States, Missouri v. Hunter, 368-369 [1983].
[1114] Supreme Court of the United States, Missouri v. Hunter, 366 [1983]; Ohio v. Johnson, 499 [1984]; John F. Stinneford, 'Dividing Crime, Multiplying Punishments', *U.C. Davis Law Review* 48, no. 5 (2015): 1970.
[1115] Third Part, 2.
[1116] Thomas III, *Double Jeopardy*, 15.

subsidiary model, the civil offence is provided as a backup in case it has not been possible to convict the defendant in the criminal proceeding. On the contrary, in a complementary model, none of the offences is provided as a "backup" in case it has not been possible to convict the accused in one of the proceedings. In this model, all the sanctioning proceedings, whether criminal or civil, should be brought against the defendant.[1117]

Now, since the prohibition of multiple punishments aims to assure that the overall punishment imposed by the different authorities is not disproportionate according to the standard of the legislature, in the context of multiple sanctioning systems the protection against multiple punishments prohibits considering as complementary a sanctioning system that the legislature has actually designed following a subsidiary logic. In simple terms, the prohibition of multiple punishments prohibits, in the context of a subsidiary multiple sanctioning system, sanctioning the defendant for both the civil and the criminal offence. The question of whether a given multiple sanctioning system is designed following a subsidiary or a complementary logic is a matter of legal interpretation.

What are the consequences of a violation of the prohibition of multiple punishments? Considering its rationale, where the prohibition of multiple punishments has been violated, the legal remedy is the invalidation of the excess of punishment imposed on the defendant. For example, if a defendant is convicted and sentenced in the same trial of bank robbery and robbery, the legal remedy is the voiding of the conviction and sentence for the less serious offence, which in this case is robbery.

The same solution applies in the context of multiple sanctioning systems. Since in subsidiary multiple sanctioning systems the civil offence is provided as a “backup” in case it has not been possible to convict the defendant in the criminal proceeding, if the defendant is sanctioned in this system for both the civil and the criminal offence, the legal remedy is the invalidation of the conviction for the civil offence. The solution proposed here is similar to that suggested by the Constitutional Court of Spain. In judgment 2-2003, the Constitutional Court held that the accumulation of punishments in the case of threefold identity does not violate the prohibition of multiple punishments if the first sanction was discounted from the second sanction by the authority since, in that case, the sanction imposed on the defendant will not be disproportionate.[1118]

[1117] Third Part, 1.
[1118] Constitutional Court of Spain, judgment 2-2003, FJ 6.

3.2.2. Protection against Multiple Prosecutions.

3.2.2.1. Rationale of the Prohibition of Multiple Prosecutions.

Traditionally, it has been stated that the cardinal purpose of the protection against multiple prosecutions is to prevent the unwarranted procedural harassment of the defendant through endless prosecutions.[1119] The idea behind the prohibition is to prevent an overbearing government from harassing a person by subjecting him to interminable prosecutions.[1120]

The Supreme Court of the United recognised the antiharassment policy in *Green v. United States*, where it stated that the underlying idea is that the government should not make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.[1121] The CJEU has also recognised the antiharassment policy. In *Powszechny Zakład Ubezpieczeń na Życie*, the CJEU held that the *ne bis in idem* aims to ensure legal certainty and fairness, guaranteeing that, after the defendant has been finally convicted or acquitted, he can have certainty that he will not be tried again for the same offence.[1122]

The antiharassment policy has been criticised because it would exclusively centre on the harm of forcing a defendant to endure a second prosecution.[1123] It has been argued that talking about harassment caused by a second trial would be meaningless since a trial is always unwanted and burdensome. The time, expense, and embarrassment of a criminal trial are harms to every criminal defendant, but they are inevitable harms. “It is only where these harms are inflicted on a defendant for no good reason that a prosecutor is harassing a defendant (…). If a defendant has truly done more than one wrong, he deserves more than one punishment. Hence, conviction for an earlier wrong should not bar a second prosecution for the second wrong”.[1124]

[1119] Cranman, ‘The Dual Sovereignty Exception to Double Jeopardy’, 1652; Friedland, *Double Jeopardy*, 3–4; Westen and Drubel, ‘Toward a General Theory of Double Jeopardy’, 84.
[1120] D. Scott Broyles, *Criminal Law in the U.S.A.*, 2nd ed. (Wolters Kluwer, 2011), 142; Mazzacuva, *Le Pene Nascoste. Topografia Delle Sanzioni Punitive e Modulazione Dello Statuto Garantistico*, 294.
[1121] First Part, 1.2.
[1122] CJEU, Powszechny Zakład Ubezpieczeń na Życie, § 33 [2019].
[1123] Thomas III, *Double Jeopardy*, 50–52.
[1124] Moore, *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law*, 353.

From my perspective, the protection against multiple prosecutions is indeed intended to prevent the unwarranted procedural harassment of the defendant through limitless prosecutions, thereby working as a mechanism of procedural closure. However, the harm that the prohibition of multiple prosecutions intends to prevent does not occur by the mere fact of initiating a second sanctioning proceeding against the defendant.[1125] Rather, the harm that the prohibition intends to prevent occurs when the government tries to relitigate a matter that a final decision has already decided.[1126] Once a final decision has been rendered, the legal system grants the defendant the expectation that the matter in question has been irrevocably determined by that decision. Therefore, when the government tries to relitigate a matter that has been determined by a final decision, that expectation of finality is disappointed. In other words, once a defendant has been finally acquitted or convicted for an offence, that defendant should be able to consider the matter closed and plan his life ahead without the permanent threat of facing once again the same prosecution.[1127]

It is important to underline that this is an objective expectation of finality, not a merely subjective one. When a matter has been determined by a final decision, fulfilling the legal requirements, it is the legal system that grants the defendant the expectation of finality. Therefore, if the legal requirements to consider the matter closed are not met, there will be no expectation of finality, no matter if the defendant believes that the matter is closed.

The above reasoning allows explaining the argument of the IACHR regarding the "fraudulent *res judicata*". In *Almonacid-Arellano et al. v. Chile*, the IACHR held that the protection against multiple prosecutions is not an absolute right because it does not apply in the following three cases: i) when the intervention of the court that acquitted the person responsible for violating human rights or international law was intended to shield the defendant from criminal responsibility; ii) when the proceedings were not conducted independently or impartially in accordance with the requirements of due

[1125] The idea of the sanctioning proceeding itself as punishment was already criticised and rejected in the Second Part, 2.
[1126] Ferrando Mantovani, *Concorso e Conflitto Di Norme Nel DIritto Penale* (Nicola Zanichelli Editore, 1966), 400.
[1127] Sigler, 'Federal Double Jeopardy Policy', 376; Rudstein, 'Retrying the Acquitted in England, Part I', 416; Anielak, 'Double Jeopardy', 182.

process;[1128] and iii) when there was no real intent to bring those responsible to justice.[1129]

In my opinion, the IACHR is correct when it states that the protection against multiple prosecutions does not apply in those three cases. However, this is not because those cases are exceptions to the protection, but rather because there is no real *res judicata*.[1130] When a proceeding has been fraudulent, the legal system does not grant the defendant any expectation of finality. Therefore, the fundamental requirement to apply the protection against multiple prosecutions is not met.

The rationale of the prohibition of multiple prosecutions proposed above also allows justifying the regulation of the protection in Article 20 (3) of the Statute of the International Criminal Court (ICC).[1131]

Article 20 contains three paragraphs, each of which provides for a different prohibition: firstly, no person shall be tried before the ICC with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the ICC; secondly, no person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the ICC; and thirdly, no person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the ICC with respect to the same conduct unless the proceedings in the other court were for the purpose of shielding the person

[1128] IACHR, Nadege Dorzema et al. v. Dominican Republic, § 195 [2012]; Lori Berenson-Mejía v. Peru, § 206 [2004]; Cantoral-Benavides v. Peru, § 114-115 [2000].
[1129] IACHR, Almonacid-Arellano et al. v. Chile, § 154 [2006]; Fanciullo et al., 'Diritto Ad Un Processo Equo', 296; Cecilia Medina, *The American Convention on Human Rights: Crucial Rights and Their Theory and Practice*, 2nd ed. (Intersentia, 2016), 321; Ibáñez, 'Artículo 8. Garantías Judiciales', 247; Amaya Úbeda, 'The Right to Due Process', in *The Inter-American Court of Human Rights: Case-Law and Commentary*, ed. Laurence Burgorgue-Larsen and Amaya Ubeda de Torres (Oxford University Press, 2011), 663. The expression had previously been used in Gutiérrez-Soler v. Colombia, § 98 [2005]; Carpio-Nicolle et al. v. Guatemala, § 131 [2004].
[1130] Medina, *The American Convention on Human Rights: Crucial Rights and Their Theory and Practice*, 321.
[1131] "Article 20. Ne bis in idem.
1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice".

concerned from criminal responsibility for crimes within the jurisdiction of the ICC, or were not conducted in accordance with the norms of due process recognised by international law and were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice.

Article 20 (3) addresses the question of whether national decisions may prevent the ICC from trying a person for the same conduct. As a matter of principle, Article 20 (3) affirms that no person who has been tried by another court for conduct also proscribed under Articles 6, 7, or 8 of the Statute shall be retried by the ICC with respect to the same conduct.[1132] However, Article 20 (3) contains two subparagraphs that provide for situations in which the rule does not apply. These situations refer to "sham proceedings", which are characterized by the absence of a genuine intent of punishing the person accused: the proceedings were for the purpose of shielding the person concerned from criminal responsibility within the jurisdiction of the ICC or were conducted in a manner which was inconsistent with an intent to bring the person concerned to justice.[1133] To counter impunity for serious human rights violations, in these cases the ICC may disregard the proceedings conducted at the national level and retry the persons concerned.[1134]

In the cases described in the two subparagraphs of Article 20 (3) the prohibition of multiple prosecutions does not apply because in these cases there is no real *res judicata*. As stated regarding the case law of the IACHR, when there has been a sham proceeding, the legal system does not grant the defendant any expectation of finality. Indeed, when the proceedings were for the purpose of shielding the defendant from criminal responsibility within the jurisdiction of the ICC or were conducted without a genuine intent to bring the defendant to justice, it is not possible to affirm that the legal system has granted the defendant an expectation of finality. Nobody would reasonably consider in such cases that the issue has been irrevocably determined and closed. Therefore, the fundamental requirement to apply the prohibition of multiple

---

[1132] Christine Van Den Wyngaert and Tom Ongena, 'Ne Bis in Idem Principle, Including the Issue of Amnesty', in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, vol. I B (Oxford University Press, 2002), 724.

[1133] William A. Schabas, *An Introduction to the International Criminal Court*, 6th ed. (Cambridge University Press, 2020), 199–202; Tallgren and Reisinger Coracini, 'Article 20. Ne Bis in Idem', 925–27; Mohamed El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', *Michigan Journal of International Law* 23, no. 4 (1 January 2002): 931.

[1134] Evode Kayitana, 'Complementarity and Completed Trials: Reforming the Ne Bis in Idem Clause of Article 20(3) of the Rome Statute', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 9, no. 2 (2018): 32; Van Den Wyngaert and Ongena, 'Ne Bis in Idem Principle, Including the Issue of Amnesty', 724–25.

prosecutions is not met, and for this reason Article 20 (3) allows the ICC to try the defendant.

The rationale of the prohibition of multiple prosecutions proposed here is consistent with the fundamental importance of the final decision requirement in the regulation of both Protocol 7 and the EU Charter.

Following the case law of the ECtHR,[1135] a decision is final when it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them. Therefore, extraordinary remedies should not be considered to determine whether there is a final decision. Moreover, the decision must be a determination on the liability of the defendant, considering the merits of the case. Consequently, the protection against multiple prosecutions neither prohibits initiating parallel sanctioning proceedings nor resuming a proceeding that has concluded without a final decision.[1136]

The antiharassment policy justifies these two consequences. Since the protection against multiple prosecutions works as a mechanism of procedural closure, preventing the government from harassing the defendant by relitigating a matter that has already been decided by a final decision, it is clear that the harm the protection aims to prevent does not occur without a final decision. Before a proceeding has concluded with a final decision, the defendant does not have, and cannot have, the expectation that the matter in question has been decided irrevocably.

These two consequences are explained by the antiharassment policy: since the protection against multiple prosecutions works as a mechanism of procedural closure, preventing the government from harassing the defendant by relitigating a matter that has already been decided by a final decision, it is clear that the harm the protection aims to prevent does not occur without a final decision. Before it, the defendant does not have, and cannot have, the expectation that the matter in question has been decided irrevocably.

Under the approach proposed above, it is also possible to explain the exceptional possibility, provided for in Article 4 of Protocol 7, to open a proceeding that has concluded with a final decision if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceeding which could affect

[1135] First Part, 4.3.
[1136] First Part, 4.3 and 5.3.

the outcome of the case.[1137] As affirmed above, when a matter has been determined by a final decision, fulfilling the legal requirements, the legal system grants the defendant the expectation that that decision has irrevocably determined the matter in question. In my opinion, if all the legal requirements of Article 4 of Protocol 7 are met, the reopening of the case will not infringe upon the expectation of finality because the possibility to reopen the case was part of the expectation itself as the reopening of the case must have been previously established by law, and only allowed in the two specific cases indicated in Article 4.

3.2.2.2. Interpreting the "Same Offence" Requirement.

As previously stated, the concept of "same offence" depends on the specific protection under consideration. Nevertheless, the courts have unified the prohibition of multiple punishments and the prohibition of multiple prosecutions under a single concept of "same offence",[1138] applying the same concept in both contexts.

For instance, the United States Supreme Court has held that the Blockburger test is the only test for ascertaining whether two offences are the same.[1139] In the same way, the Canadian Supreme Court only applies the Kienapple rule to ascertain whether two offences are the same.[1140]

The utilisation of a single concept of "same offence" has overlapped the scope of application of both prohibitions, blurring the differentiation between the two protections and intermingling the cases.[1141] It has even been stated that much of the confusion on the application of the different protections is because the courts apply the same concept of "same offence" in both contexts.[1142] If the prohibition of multiple punishments and the prohibition of multiple prosecutions are actually different protections, with a

[1137] First Part, 4.5.
[1138] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 55.
[1139] First Part, 1.3.3.3.
[1140] First Part, 2.2.
[1141] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 57; Friedland, *Double Jeopardy*, 199.
[1142] Scott Storper, 'Double Jeopardy's Door Revolves Again in United States v. Dixon: The Untimely Death of the "Same Conduct" Standard', *University of Miami Law Review* 49, no. 3 (1995): 881; Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 58.

different rationale and scope of application, the concept of “same offence” must be different too.[1143]

How should the concept of “same offence” be interpreted? As stated above, the procedural harassment that the prohibition aims to prevent occurs when the government tries to relitigate a matter that had been determined by a final decision. In that case, the government is disappointing the expectation of finality that the legal system has granted the defendant.

Consequently, the concept of “same offence” in this context must be interpreted from a procedural perspective: for the purposes of the prohibition of multiple prosecutions, “same offence” means “same subject of adjudication”. As result, the protection against multiple prosecutions covers as much as the subject of adjudication.[1144]

The subject of adjudication is the historical event[1145] over which the authority had jurisdiction.[1146] If the authority that rendered the decision had no jurisdiction, that decision is void.[1147] This procedural concept of “same offence” is different from the legal concept utilised in the context of the prohibition of multiple punishments.[1148]

In sanctioning proceedings, the accusation delimits the subject of adjudication.[1149] Therefore, to determine the subject of adjudication it is necessary to identify the historical event described in the accusation.

Regarding the concept of “historical event”, it should not be interpreted in purely factual terms, like it is done by the ECtHR and the CJEU. On the contrary, legal aspects

---

[1143] In United States v. Dixon, the Supreme Court of the United States rejected the idea of a differentiated concept of “same offence”. On that occasion, the Supreme Court held: “The centerpiece of Justice Souter’s analysis is an appealing theory of a “successive prosecution” strand of the Double Jeopardy Clause that has a different meaning from its supposed “successive punishment” strand. We have often noted that the Clause serves the function of preventing both successive punishment and successive prosecution, see, e. g., North Carolina v. Pearce, 395 U. S. 711 (1969), but there is no authority, except Grady, for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term “same offence” (the words of the Fifth Amendment at issue here) has two different meanings—that what is the same offense is yet not the same offense”. Supreme Court of the United States, United States v. Dixon, 704 [1993].

[1144] Juan Luis Gómez Colomer, *El Proceso Penal Alemán. Introducción y Normas Básicas* (Bosch, 1985), 182; Claus Roxin, *Derecho Procesal Penal* (Editores del Puerto, 2000), 437.

[1145] Beling defined the “subject of adjudication” as that fact of life discussed in the proceeding. See Ernst Beling, *Derecho Procesal Penal* (Editorial Labor S. A., 1943), 79.

[1146] Roxin, *Derecho Procesal Penal*, 437.

[1147] Bernard Gavit, ‘Jurisdiction of the Subject Matter and Res Judicata’, *University of Pennsylvania Law Review* 80, no. 3 (1932): 386.

[1148] Emilio Gómez Orbaneja, *Comentarios a La Ley de Enjuiciamiento Criminal*, vol. II (Bosch, 1951), 291; Pérez Manzano, *La prohibición constitucional de incurrir en ‘bis in idem’*, 92; Roxin, *Derecho Procesal Penal*, 160.

[1149] Beling, *Derecho Procesal Penal*, 84.

should be considered too.[1150] This does not mean, of course, that a different legal qualification of the same facts is enough to change the subject of adjudication.[1151] Rather, the need to consider both factual and normative aspects means that the subject of adjudication should only consider those factual elements that are relevant from a legal point a view.[1152]

3.2.2.3. Scope of Application of the Prohibition of Multiple Prosecutions.

Once again, according to the alternative approach proposed here, the application of a criminal guarantee to civil offences and proceedings depends on the rationale of the relevant guarantee. Given that the prohibition of multiple prosecutions aims to prevent the unwarranted procedural harassment of the defendant through limitless prosecutions, it seems clear that the prohibition is a general safeguard, applicable to all the authorities with sanctioning power. Therefore, once a sanctioning proceeding, whether it be civil or criminal, has been closed by a final decision, the prohibition of multiple prosecutions prevents the government from relitigating the same matter before the same competent authority.

How does the prohibition of multiple prosecutions work in the context of multiple sanctioning systems? As stated above, in multiple sanctioning systems the same facts constitute two or more offences, which fall in the competence of different authorities, which can be government agencies, criminal or civil courts. The harm that the prohibition of multiple prosecutions intends to prevent occurs when the government seeks to relitigate a matter that has previously been decided by a final decision. In that case, the government disappoints the expectation of finality that the legal system has granted the defendant.

If the antiharassment policy is coherently interpreted, the protection against multiple prosecutions does not prohibits the functioning of multiple sanctioning systems. Since in this type of law enforcement system the different sanctioning proceedings have been previously provided by law, the initiation of both cannot constitute procedural harassment for the defendant. If at the time of performing a

[1150] Kai Ambos, *European Criminal Law* (Cambridge University Press, 2018), 155.
[1151] Julio Maier, *Derecho Procesal Penal*, 2 edition, vol. I (Editores del Puerto, 2004), 610.
[1152] Umberto Lucarelli, *L'istituto Del Giudicato. Il Giudicato Penale e i Suoi Effetti Civili* (Utet Giuridica, 2006), 119.

conduct the person knows that the government will bring against him both a civil and a criminal sanctioning proceeding, the initiation of the second proceeding does not disappoint an expectation of finality the defendant. Indeed, when the first sanctioning proceeding ends with a final decision, the legal system does not grant the defendant an expectation of finality regarding the other sanctioning proceedings provided in the context of the multiple sanctioning system, but only regarding the proceeding that ended with that final decision. In other words, after the first proceeding has concluded with a final decision, the legal system only grants the defendant the expectation that the first proceeding is closed and the government will not try to relitigate it, but not the expectation that the government will not bring the other proceeding against him.

For instance, consider that the legislature has provided for a civil-criminal complementary multiple sanctioning system for cases of environmental contamination. In this context, after a person pollutes the local river, the government brings both the civil and the criminal proceeding against him. The Environmental Protection Agency, which is in charge of the civil proceeding, renders its final decision and fines the defendant €5.000. It is certainly true that the legal system has granted the defendant an expectation of finality regarding the civil proceeding, which prevents the government from relitigating the subject of adjudication. However, such a finality expectation does not cover the criminal proceeding, which is being conducted by the Public Prosecutor. When the Environmental Protection Agency ends the civil proceeding, the prohibition of multiple prosecutions does not require the government to stop and drop the criminal proceeding. The defendant cannot even reasonably expect it because, in complementary multiple sanctioning system, the different sanctioning proceedings are designed to be brought against the defendant. The previous reasoning is implicit in the case law of the United States Supreme Court, which, in the context of multiple sanctioning systems, does not apply the protection against multiple prosecutions, but the prohibition of multiple punishments.[1153]

In short, when the government, in the context of multiple sanctioning systems, brings both a civil and a criminal proceeding against the defendant for the same historical event, the prohibition of multiple prosecutions is not called in question. The same happens if, instead of a civil and a criminal proceeding, the legislature has provided for two civil sanctioning proceedings, which are being conducted by different

[1153] First Part, 1.6.2.

authorities, for example the public health agency and the environmental protection agency.

What are the consequences of a violation of the prohibition of multiple prosecutions? Where the prohibition of multiple prosecutions has been breached, the legal remedy is the preclusion of the second prosecution. This is regardless of whether the defendant was convicted or acquitted in the first proceeding, the severity of the sanction imposed or the length of the proceedings. All these considerations are not pertinent for resolving the question of whether the expectation of finality of the defendant has been violated because the government has sought to relitigate a matter that had previously been decided by a final decision.

In other words, for the protection against multiple prosecutions, the question of whether there was a sufficiently close connection in substance and time between the different proceedings, which has become the central issue in the case law of the ECtHR after *A & B v. Norway*, is irrelevant.[1154]

In conclusion, while the prohibition of multiple punishments does not arise until multiple sanctions are actually imposed, regardless of whether this occurs in one or several trials, the prohibition of multiple prosecutions arises when the government tries to initiate a second proceeding for the same subject of adjudication.[1155]

3.3. Summary of the Proposed Alternative Interpretation

The interpretation proposed here assumes that the protection against multiple prosecutions for the same offence and the protection against multiple punishments for the same offence are different safeguards. These two protections have a different rationale, scope of application and different requirements. Therefore, it is indispensable to differentiate one protection from the other.

The protection against multiple punishments aims to assure that the authorities do not impose on the defendant, by convicting him twice for the same offence, a disproportionate punishment according to the standard of the legislature. Consequently, the prohibition does not limit the competence of the legislature to define offences and fix punishments, not preventing the legislature from providing for multiple punishments for the same offence. Because of the above, the prohibition of multiple

[1154] First Part, 4.4.2.

[1155] Pérez Manzano, *La prohibición constitucional de incurrir en 'bis in idem'*, 58.

punishments is not part of the *ne bis in idem*, but it is a general principle of law. This principle, which is immanent to the sanctioning system, operates as a form of sentencing control, preventing judges and administrative agencies from imposing multiple punishments when it appears that the legislature did not intend it.

The protection against multiple prosecutions aims to prevent the unwarranted procedural harassment of the defendant through limitless prosecutions, thereby working as a mechanism of procedural closure. The harm that the prohibition of multiple prosecutions intends to prevent does not occur by the mere fact of initiating a second sanctioning proceeding against the defendant. Rather, the harm that the prohibition intends to prevent occurs when the government tries to relitigate a matter that a final decision has already decided. Once a final decision has been rendered, the legal system grants the defendant the expectation that the matter in question has been irrevocably determined by that decision. Therefore, when the government tries to relitigate the same matter, that expectation of finality is disappointed.

The concept of "same offence" depends on the specific protection under consideration, whether it be the prohibition of multiple punishments or the prohibition of multiple prosecutions.

For the prohibition of multiple punishments, two offences should be considered to be the same offence if they arise out the same facts and constitute a single wrong. Two offences constitute a single wrong if the legal interest protected by the different legal provisions, as well as how that legal interest has been affected, are the same. Since the protection against multiple punishments aims to prevent the imposition of a disproportionate sanction according to the standard of the legislature, the "same offence" requirement works as a rebuttable presumption against cumulative punishments. Therefore, when two offences are the same, the general presumption is that cumulative punishments are not authorised. Nevertheless, this presumption can be rebutted by a clear indication of contrary legislative intent.

For the purposes of the prohibition of multiple prosecutions, "same offence" means "same subject of adjudication". The subject of adjudication, which in sanctioning proceedings is delimited by the accusation, is the historical event over which the authority has jurisdiction. The concept of "historical event" only considers those factual elements that are relevant from a legal point a view.

Considering the rationale of the two different prohibitions, it seems clears that they apply to the entire sanctioning system, both in its civil and its criminal

manifestation. In the specific context of multiple sanctioning systems, the protection against multiple punishments prohibits considering as complementary a sanctioning system that the legislature has actually designed following a subsidiary logic. Regarding the question of whether the protection against multiple prosecutions prohibits the functioning of multiple sanctioning systems, the answer depends on the rationale of the protection. The harm that the protection aims to prevent occurs when the government tries to relitigate a matter that has previously been decided by a final decision. In that case, the government is disappointing the expectation of finality granted the defendant by the legal system. Now, based on the antiharassment policy, it can be concluded that the prohibition of multiple prosecutions does not proscribe the functioning of multiple sanctioning systems. Since in this context the different sanctioning proceedings have been previously established by law, the initiation of both cannot constitute procedural harassment for the defendant. When the first sanctioning proceeding ends with a final decision, the legal system does not grant the defendant an expectation of finality regarding the other sanctioning proceedings provided in the context of the multiple sanctioning system, but only regarding the proceeding that ended with that final decision.

Finally, the violation of the different protections also produces different consequences. Where the prohibition of multiple punishments has been violated, the legal remedy is the invalidation of the excess of punishment imposed on the defendant. For instance, since in subsidiary multiple sanctioning systems the civil offence is provided as a "backup" in case it has not been possible to convict the defendant in the criminal proceeding, if the defendant is sanctioned in this system for both the civil and the criminal offence, the legal remedy is to void the conviction for the civil offence. In the case of a violation of the prohibition of multiple prosecutions, the legal remedy is the preclusion of the second prosecution, regardless of any further consideration.

FOURTH PART

--

LOOKING BEYOND THE *NE BIS IN IDEM*: RECALLING THE PROHIBITION OF DISPROPORTIONATE SANCTIONS AND THE RIGHT TO BE TRIED WITHIN A REASONABLE TIME

1. Looking Beyond the *Ne Bis in Idem*

Some might think that, under the approach proposed here, multiple sanctioning systems are virtually limitless. In my opinion, the problem with most of the criticisms of multiple sanctioning systems is that they exclusively focus on those protections. The courts have tried to solve all the problems regarding multiple sanctioning systems by applying the protections against multiple prosecutions and multiple punishments, overlooking other constitutional safeguards. In the case of the ECtHR and the CJEU, the situation is even more problematic because they have solely applied the procedural protection. The concern about eventual abuses under multiple sanctioning systems is legitimate. However, the courts should not engage in troublesome analysis of the *ne bis in idem* to try to prevent such abuses.[1156] This is not the right path. Rather, they should start to consider other safeguards and develop guidelines regarding them.

For instance, in *Hudson v. United States,* the Supreme Court stated that some of the ills at which *Halper* was directed are addressed by other constitutional provisions, like the due process clause and the prohibition of cruel and unusual punishments.[1157] In a similar vein, Amar has underlined that the double jeopardy clause is not the only safeguard against multiple prosecutions and multiple punishments cases. Rather, the double jeopardy clause must be supplemented by the due process clause and other rules rooted in the Sixth Amendment.[1158] Similarly, Stuckenberg has noted that while English law favours a narrow concept of "same offence", it has also accepted a protection against multiple prosecutions based on the same facts. Nowadays, this protection forms part of a broad doctrine of abuse of process, which covers a variety of situations and is understood as the discretionary power of the courts to stay proceedings if this is necessary to protect the integrity of the criminal justice system.[1159]

The following sections aim to address, of course only in general terms, two other safeguards that may prevent eventual abuses under multiple sanctioning systems: the prohibition of disproportionate sanctions and the right to be tried within a reasonable time.

[1156] Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 252.
[1157] Supreme Court of the United States, Hudson v. United States, 102-103 [1997].
[1158] Amar, 'Double Jeopardy Law Made Simple Essay', 1809.
[1159] Carl-Friedrich Stuckenberg, 'Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions', 475.

2. Recalling the Prohibition of Disproportionate Sanctions and the Right to Be Tried Within a Reasonable Time

2.1. The Prohibition of Disproportionate Sanctions

The threat of excessive punishments from multiple penalties is more appropriately controlled by the prohibition of disproportionate sanctions, not by the double jeopardy clause.[1160]

As a limit to the sanctioning system, the ban of disproportionate sanctions prevents the legislature from providing for punishments that are unreasonably harsh in relation to a given offence.[1161]

In Canada, the prohibition of disproportionate sanctions is recognised in Section 12 of the Canadian Charter of Rights and Freedoms, which states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment". For Section 12 to be engaged, the impugned treatment or punishment must involve the state and be grossly disproportionate.[1162] To determine whether a criminal sentence is cruel and unusual, the Supreme Court has pointed out that the core question is whether the sentence is "grossly disproportionate to the sentence that is appropriate, having regard to the nature of the offence and the circumstances of the offender".[1163]

The Canadian Supreme Court has addressed minimum sentencing provisions with particular attention mandatory because, as the Court has stated, they have the potential to depart from the ban of disproportionate sanctions.[1164] In applying the prohibition of disproportionate sanctions, the Court has declared contrary to Section 12, for instance, a mandatory minimum of seven years' imprisonment for importing any quantity and any type of illegal narcotic;[1165] a mandatory minimum of three years' imprisonment for a first offence, and five years' imprisonment for a second or subsequent offence, of possessing loaded prohibited firearms;[1166] and a mandatory

[1160] King, 'Portioning Punishment', 193.
[1161] Randy Clapp, 'Eighth Amendment Proportionality', *American Journal of Criminal Law* 7, no. 2 (1979): 260; Stinneford, 'Dividing Crime, Multiplying Punishments', 1986.
[1162] Supreme Court of Canada, R. v. Smith, 1072 [1987]; R. v. Morrisey, 108, § 26 [2000].
[1163] Supreme Court of Canada, R. v. Nur, 798, § 39 [2015].
[1164] Supreme Court of Canada, R. v. Nur, 800, § 44 [2015].
[1165] Supreme Court of Canada, R. v. Smith, 1045-1050 [1987]; Roozbeh B. Baker, 'Proportionality in the Criminal Law: The Differing American versus Canadian Approaches to Punishment', *The University of Miami Inter-American Law Review* 39, no. 3 (2008): 490.
[1166] Supreme Court of Canada, R. v. Nur, 775-777 [2015].

minimum of one year imprisonment for possessing controlled substances for the purpose of trafficking.[1167]

In Europe, the prohibition of disproportionate sanctions is expressly recognised in Article 49.3 of the European Union Charter of Fundamental Rights, which states that the "severity of penalties must not be disproportionate to the criminal offence". The CJEU has held in several cases that penalties must not go beyond what is strictly necessary, as well as they must not be so disproportionate that they become an obstacle for personal freedoms.[1168] Regarding the European Convention on Human Rights, although it does not expressly recognise a prohibition of disproportionate sanctions, the ECtHR has stated that grossly disproportionate sentences would amount to inhuman punishments, contrary to Article 3. However, the Court has underlined that this would be the case only in rare and unique occasions.[1169]

In the United States, the prohibition of disproportionate sanctions is recognised in the Eighth Amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".[1170] The Eighth Amendment incorporates three different prohibitions: a prohibition of excessive bail, a prohibition of cruel and unusual punishments, which is concerned with matters such as the duration or conditions of confinement, and a prohibition of excessive fines, which limits the power of the government to extract payments as punishment for an offence.[1171] The history of the Amendment indicates that it was intended to limit the power of the government to punish.[1172] In *Ewing v. California*, decided in 2003, the Supreme Court held that the Eighth Amendment prohibits sentences that are "grossly disproportionate" to the offence.[1173]

[1167] Supreme Court of Canada, R. v. Lloyd, 131-134 [2016].
[1168] CJEU, Commission v Germany, § 14 [1998]; Skanavi and Chryssanthakopoulos, § 36 [1996]; Casati, § 27 [1981]; Watson and Belmann, § 21 [1976].
[1169] ECtHR, Vinter and Others v. United Kingdom, § 83 [2013]; Willcox and Hurford v. United Kingdom, § 74 [2013]; Harkins and Edwards v. United Kingdom, § 133 [2012]; Anabela Miranda, 'Fundamental Rights and Punishment: Is There an EU Perspective?', *New Journal of European Criminal Law* 10, no. 1 (2019): 19.
[1170] Supreme Court of the United States, Solem v. Helm, 284 [1983]; Ewing v. California, 20 [2003].
[1171] Supreme Court of the United States, Alexander v. United States, 558 [1993]; Browning-Ferris Industries v. Kelco Disposal, 265 [1989]; Austin v. United States, 609-610 [1993]; United States v. Bajakajian, 328 [1998]; Ingraham v. Wright, 667 [1977].
[1172] Reinhart, 'Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality', 252; Javier Escobar Veas, 'The Constitutionality of Parallel Civil Forfeiture Proceedings and Criminal Prosecutions under the Double Jeopardy Clause in the United States', *Revista Brasileira de Direito Processual Penal* 6, no. 2 (2020): 719–20.
[1173] Supreme Court of the United States, Ewing v. California, 20 [2003]. See also Lockyer v. Andrade, 72 [2003].

In applying the prohibition of disproportionate sanctions, the Supreme Court has declared unconstitutional, for instance, a punishment called "cadena temporal", which was a form of imprisonment that included hard labour in chains and permanent civil disabilities;[1174] the sanction of denaturalization for the offence of wartime desertion;[1175] a ninety day prison sentence for the crime of being addicted to narcotics;[1176] a death sentence for the crime of rape of an adult woman;[1177] a life sentence without possibility of parole under a recidivist statute for a person convicted of seven nonviolent felonies;[1178] life sentence without parole for nonhomicide crimes for juvenile offenders;[1179] the execution of juvenile offenders;[1180] the execution of mentally retarded people.[1181]

In *United States v. Bajakajian*, decided in 1998, the Supreme Court addressed the question of whether a forfeiture of $357,144 for an offence of failure to report was contrary to the Eighth Amendment.[1182] In this case, the defendant and his family were waiting at the airport to board a flight abroad. A customs inspector told the defendant that they were required to report all money in excess of $10,000. He said that he had $8,000 and his wife another $7,000. A search of their belongings revealed a total of $357,144. The defendant was indicted for failing to report that he was transporting more than $10,000 outside the United States. The government also sought forfeiture of the $357,144. The defendant pleaded guilty of the criminal offence but elected to have a bench trial on the forfeiture. The trial court found that the forfeiture sought by the government would be grossly disproportionate to the offence committed, thereby violating the Eighth Amendment. The instead ordered forfeiture of $15,000, in addition

[1174] Supreme Court of the United States, Weems v. United States, 377 [1910].
[1175] Supreme Court of the United States, Trop v. Dulles, 101 [1958].
[1176] Supreme Court of the United States, Robinson v. California, 667 [1962].
[1177] Supreme Court of the United States, Coker v. Georgia, 592 [1977].
[1178] Supreme Court of the United States, Solem v. Helm, 279-290 [1983].
[1179] Supreme Court of the United States, Graham v. Florida, 82 [2010].
[1180] The Court firstly held, in Thompson v. Oklahoma, 838 [1988], that executing offenders who committed crimes while under the age of sixteen was unconstitutional. In Roper v. Simmons, 578-579 [2005], the Court extended the prohibition to offenders who committed crimes while under the age of eighteen. Roper v. Simmons overruled Stanford v. Kentucky, 380 [1989], a decision in which the Court concluded that the "Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18".
[1181] Supreme Court of the United States, Atkins v. Virginia, 321 [2002]. Before Atkins v. Virginia, the Court had ruled that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded defendants. See Penry v. Lynaugh, 340 [1989].
[1182] For an analysis of the decision in Bajakajian, see Escobar Veas, 'The Constitutionality of Parallel Civil Forfeiture Proceedings and Criminal Prosecutions under the Double Jeopardy Clause in the United States', 721–27.

to three years' probation and the maximum fine of $5,000 under the Sentencing Guidelines. The government appealed.[1183]

The Supreme Court stated that the Eighth Amendment prohibits forfeitures grossly disproportionate to the gravity of the offence committed by the defendant.[1184] After considering that the offence in question was a failure to report the removal of currency from the United States, that the violation was unrelated to any other illegal activity, and that the harm caused was minimal because there had been no fraud and the failure to report affected only the government, the Supreme Court concluded that the forfeiture of $357,144 would be grossly disproportionate to the gravity of the offence committed by the defendant, upholding the forfeiture of $15,000.[1185]

How should the prohibition of disproportionate sanctions apply in the context of multiple sanctioning systems? The prohibition of disproportionate sanctions prevents the legislature from providing for disproportionate sanctions in relation to the seriousness of the offence. To determine whether the punishment is disproportionate, it is necessary to consider the severity of all the sanctions combined, and not one at a time, thereby ensuring that the overall sanction does not exceed the seriousness of the offence. The relevant issue, therefore, is to assure that the overall sanctioning response is not disproportionate. Consider a person that, based on the same facts, is criminally convicted of market abuse and sentenced to ten years' imprisonment, and later is fined €500.000 in a civil sanctioning proceeding. In this case, the question to resolve will be whether an overall sanction of ten years' imprisonment and a fine of €500.000 is disproportionate in relation to the facts. The task of the courts, therefore, is to develop proportionality guidelines under the prohibition of disproportionate sanctions, preventing in this way government overreaching.[1186]

In my opinion, the decision in *United States v. Halper* clearly shows the difference between the way in which the courts have traditionally resolved proportionality issues and the one proposed here. In *Halper*, the defendant caused the government to unnecessarily pay out $585 in disbursements. The defendant was criminally convicted and sentenced to two years' imprisonment and fined $5,000. After the criminal trial, a civil proceeding was brought against the defendant based on the same facts. The

---

[1183] Supreme Court of the United States, United States v. Bajakajian, 324-327 [1998].
[1184] Supreme Court of the United States, United States v. Bajakajian, 337 [1998].
[1185] Supreme Court of the United States, United States v. Bajakajian, 337-340 [1998].
[1186] Mack, 'Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate', 252.

District Court found the defendant civilly liable and, under the formula provided by law, imposed on him a total fine of $130,000. The Supreme Court stated that the sole question to determine was whether the fine of $130,000 for false claims amounting to $585 constituted a second punishment for the purposes of double jeopardy.[1187]

Instead of posing a question of double jeopardy, *United States v. Halper* raised a question of proportionality. The question the Supreme Court had to address was not whether the fine of $130,000 for false claims amounting to $585 constituted a second punishment for the purposes of double jeopardy. On the contrary, the relevant question was whether an overall sanction of two years' imprisonment, a criminal fine of $5,000 and a civil fine of $130,000 was disproportionate for the offence committed by the defendant. In my view, the defendant should have filed a motion based on the prohibition of disproportionate sanctions, which would have had a reasonable basis to be granted.

2.2. The Right to Be Tried within a Reasonable Time

The right to be tried within a reasonable time is widely recognised by both national and international instruments. One of its first articulations in modern law can be found in the Magna Carta: "We will sell to no man, we will not deny or defer to any man either justice or right".[1188]

In Canada, Section 11 (b) of the of the Canadian Charter of Rights and Freedoms states that any person charged with an offence has the right "to be tried within a reasonable time". In the United States, the right to a speedy trial, which has been defined as "one of the most basic rights",[1189] is recognised in the Sixth Amendment to the United States Constitution, which reads in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial".

The safeguard in question has also been recognised by international human rights instruments. Article 14.3 (c) of the International Covenant on Civil and Political Rights states that any person has the right "to be tried without undue delay". Similarly,

---

[1187] First Part, 1.6.2.5.

[1188] Supreme Court of the United States, Klopfer v. North Carolina, 223 [1967]; Monika Milošević and Ana Knežević Bojović, 'Trial within Reasonable Time in EU Acquis and Serbian Law', *EU and Comparative Law Issues and Challenges Series (ECLIC)* 1 (2017): 448.

[1189] Supreme Court of the United States, Klopfer v. North Carolina, 226 [1967]; Marc Steinberg, 'Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974', *Journal of Criminal Law and Criminology* 66, no. 3 (1976): 229.

Article 47 of the EU Charter of Fundamental Rights and Article 6.1 of the European Convention on Human Rights recognise the right of every person to a fair and public hearing "within a reasonable time".

The right to be tried within a reasonable time serves three purposes. First, it enhances the fact-finding process by making it more probable that evidence and witnesses will remain available. Second, it minimises the infliction of anxiety and concern accompanying sanctioning proceedings. Finally, the guarantee protects against oppressive behaviour by public officials who might intentionally withhold a sanctioning proceeding.[1190] The ECtHR has highlighted the second of these purposes, stating that the right "is based on the need to ensure that accused persons do not have to remain too long in a state of uncertainty as to the outcome of the criminal accusations against them".[1191]

As regards the period to which the right to be tried within a reasonable trial is applicable, this period covers the whole of the proceeding in question, including appeal proceedings, and ends with the judgment that determines the charge.[1192] Regarding the beginning of the period, it begins to run as soon as the person is charged. For the purposes of Article 6.1 of the European Convention on Human Rights, "charge" has been defined by the ECtHR as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that corresponds to the question of whether the situation of the suspect has been substantially affected.[1193] In *Eckle v. Germany*, the ECtHR held that the relevant moment may be "the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened".[1194] Based on this standard, the ECtHR has found that the reasonable time

---

[1190] Supreme Court of the United States, United States v. Ewell, 120 [1966]; Strunk v. United States, 439 [1973]; Steinberg, 229.
[1191] ECtHR, Kart v. Turkey § 68 [2009]; Wemhoff v. Germany, § 18 [1968].
[1192] ECtHR, König v. Germany, § 98 [1978]; Neumeister v. Austria, § 19 [1968]; Joanna Mierzwińska-Lorencka and Celina Nowak, 'Fair Trial (Judicial Authority) and Effective Remedy', in *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, ed. Rosaria Sicurella et al. (Giuffrè, 2017), 184.
[1193] ECtHR, Eckle v. Germany, § 73 [1982]. See also Yaikov v. Russia, § 72 [2015]; McFarlane v. Ireland, § 143 [2010]; Kangasluoma v. Finland, § 26 [2004]; Deweer v. Belgium, § 46 [1980]; Neumeister v. Austria, § 18 [1968]; Trechsel and Summers, *Human Rights in Criminal Proceedings*, 138.
[1194] ECtHR, Eckle v. Germany, § 73 [1982].

begins when the applicant is questioned as suspect of commission of an offence[1195] or a search and seizure is carried out.[1196]

In my view, it should not be required, to consider that the reasonable period has begun, that the situation of the suspect has been substantially affected. The reason is that this requirement is not essential for two of the three purposes of the right to be tried within a reasonable time: enhancing the fact-finding process and protecting against oppressive behaviour by public officials who might intentionally withhold a sanctioning proceeding. It is possible to imagine cases in which the risks behind these two purposes exist and, nevertheless, the situation of the suspect has not been substantially affected. From my perspective, the courts should consider that the reasonable period has begun when the authorities direct their investigation against the defendant.

In relation to the assessment of the reasonableness of the period, the United States Supreme Court has stated that speedy trial cases should necessarily be resolved on an ad hoc basis. The Court has identified four factors to be assessed in determining whether a particular defendant has been deprived of his right to a speedy trial: "the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". None of these four factors is an either necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.[1197]

Similarly, the ECtHR has held that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case, which call for an overall assessment, and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute.[1198]

1195 ECtHR, Kalēja v. Latvia, § 38-40 [2017].

1196 ECtHR, Diamantides v. Greece, § 21 [2003].

1197 Supreme Court of the United States, Barker v. Wingo, 530-533 [1972]. Steinberg, 'Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974', 230–31.

1198 ECtHR, Johanna Fröhlich v. Germany, § 38 [2019]; Dobbertin v. France, § 38 [1993]; Baggetta v. Italy, § 21 [1987]; Eckle v. Germany, § 80 [1982]; König v. Germany, § 99 [1978]; Mierzwińska-Lorencka and Nowak, 'Fair Trial (Judicial Authority) and Effective Remedy', 184; Bettina Weisser, 'The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe', in *The Oxford Handbook of Criminal Process*, ed. Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser (Oxford University Press, 2019), 102.

What is the legal remedy in the case of a violation of the right to be tried within a reasonable time? In this regard, there are different approaches. The United States Supreme Court has held that the sole constitutional remedy for a denial of the right to a speedy trial is the dismissal of the charges.[1199] In the same way, the Canadian Supreme Court has affirmed that a stay of proceedings is the minimum remedy for a breach of this right because the court has lost jurisdiction to proceed.[1200] The Court has explained its standpoint in the following terms: “If an accused has the constitutional right to be tried within a reasonable time, he has the right not to be tried beyond that point in time, and no court has jurisdiction to try him or order that he be tried in violation of that right. After the passage of an unreasonable period, no trial, not even the fairest possible trial, is permissible”.[1201] A stay of proceedings is the price that society pays for not having been sufficiently diligent in preventing undue delays.[1202]

On the contrary, the ECtHR has adopted a “compensation approach”. In cases where the Court has found a violation of the right to be tried within a reasonable time, financial compensation is generally awarded under Article 41.[1203] The financial compensation approach of the ECtHR has been criticised because it “can hardly be praised for its success in speeding up proceedings”.[1204] Indeed, even though the Court has sanctioned the Member States with several million euros, European justice systems have not sufficiently improved the length of proceedings.[1205]

The approach of the United States Supreme Court and the Canadian Supreme Court, therefore, should be preferred.[1206] Consequently, if the proceeding has not ended yet, the legal remedy is a stay of proceedings. On the contrary, if the proceeding has already ended, the legal remedy will be the voiding of the decision that the authority rendered because it was delivered after the reasonable time had expired. In addition, the court can always grant the defendant financial compensation.

1199 Supreme Court of the United States, Strunk v. United States, 439-440 [1973].
1200 Supreme Court of Canada, R. v. Jordan, 680, § 114 [2016]; R. v. Rahey, 614 [1987]; Mills v. The Queen, 947 [1986]; Steve Coughlan, ‘Making Trial Within a Reasonable Time a Right Once More’, *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 81, no. 1 (2017): 228.
1201 Supreme Court of Canada, R. v. Rahey, 614 [1987].
1202 Coughlan, ‘Making Trial Within a Reasonable Time a Right Once More’, 228.
1203 ECtHR, Rouille v. France, § 33-37 [2004]; B. v. Austria, § 57-61 [1990]; Milasi v. Italy, § 23-24 [1987]; Baggetta v. Italy, § 29-30 [1987].
1204 Trechsel and Summers, *Human Rights in Criminal Proceedings*, 149.
1205 Trechsel and Summers, 149.
1206 Daniel Pastor, ‘Acerca Del Derecho Fundamental al Plazo Razonable de Duración Del Proceso Penal’, *Revista de Estudios de La Justicia* 4 (2004): 75–76.

How should the right to be tried within a reasonable time apply in multiple sanctioning systems? From my perspective, since in this context the legislature has provided for more than one sanctioning proceeding in respect of the same facts, the period to consider in order to determine whether the right in question has been violated should be the overall length of the different proceedings. Therefore, when the authorities, in one of the proceedings, direct their investigation against the suspect, the reasonable period begins not only for that procedure but also for the rest of them.

In this way, the right to be tried within a reasonable time protects the defendant from being in a state of uncertainty for too long because of the functioning of multiple sanctioning systems.

FINAL REMARKS

Even though the *ne bis in idem* is extensively proclaimed by national legal systems and international human rights instruments, several difficulties arise when the protection is applied to concrete cases, especially in the context of multiple sanctioning systems.

This work has aimed to resolve the question of whether multiple sanctioning systems are contrary to the *ne bis in idem* under the regulation provided by Protocol 7 to the European Convention on Human Rights and the European Union Charter of Fundamental Rights.

The evolution of the case law of the ECtHR and CJEU on *ne bis in idem* and multiple sanctioning systems can be divided into two phases. The first phase is characterised by the continuous expansion of the scope of the guarantee. Due to an autonomous concept of criminal offence, developed on the basis of the Engel criteria, and the adoption of a purely factual concept of "same offence", during this time both European courts interpreted the prohibition of multiple prosecution as a "right to a single trial": once a defendant had been finally convicted or acquitted in a criminal proceeding, the government could not initiate any other criminal proceeding based on substantially the same facts. During this first stage, multiple sanctioning systems were considered in clear contrast with the prohibition of multiple prosecutions.

The second phase of this evolution commenced with the decisions in *A and B v. Norway*, of the ECtHR, and *Menci* and *Garlsson Real Estate*, of the CJEU. In *A and B*, the ECtHR held that the *ne bis in idem* does not prevent the state from introducing a multiple sanctioning system, as long as there is a sufficiently close connection in substance and time between the different sanctioning proceedings. If so, there will be no duplication of proceedings, but a combination of procedures compatible with the prohibition of multiple prosecutions. In *Menci* and *Garlsson Real Estate,* the CJEU held that the accumulation of sanctions and proceedings of criminal nature does not necessarily violate the protection against multiple prosecutions because the accumulation can be a legitimate limitation of this right in conformity with the restriction clause of Article 52 of the EU Charter.

Presumably, the new approaches of the ECtHR and the CJEU were due to the fact that the courts realised that an absolute prohibition on multiple sanctioning

systems was not plausible. For instance, one of the arguments that the ECtHR considered in *A and B v. Norway* was that multiple sanctioning systems were a widespread practice in the EU Member States, especially in fields such as taxation, environment and public safety.

The European case law was analysed from a comparative perspective. For these purposes, the case law of the United States Supreme Court, the Canadian Supreme Court and the Spanish Constitutional Court were reviewed. Unfortunately, the comparative situation is characterised by an insufficient dialogue between the different courts because each of the courts has developed its own approach to addressing the problem in question, without drawing any support from comparative law. The above has resulted in the existence of significant differences between the diverse approaches.

The analysis of the comparative case law has also shown that a coherent solution to the problem has not yet been developed. For instance, while the Canadian Supreme Court has held that the double jeopardy clause includes a prohibition of multiple punishments, the ECtHR and the CJEU have not recognised such a protection. Whilst the Spanish Constitutional Court and the United States Supreme Court have addressed the rationale of the *ne bis in idem*, the European courts have not addressed the matter in any of their decisions. Finally, the ECtHR and the CJEU have adopted a broad concept of criminal offence, including offences that national law labelled as civil, whereas the Canadian Supreme Court and the United States Supreme Court have maintained a narrow concept of criminal offence.

Are multiple sanctioning systems contrary to the *ne bis in idem*? This question is the title of this work, and now it is time to answer it. The thesis proposed in the Third Part assumes that the protection against multiple prosecutions for the same offence and the protection against multiple punishments for the same offence are indeed different safeguards. These two protections have a different rationale, scope of application and requirements.

The protection against multiple punishments aims to assure that the authorities do not impose on the defendant, by convicting him twice for the same offence, a disproportionate punishment according to the standard of the legislature. Since the protection aims to prevent the imposition of disproportionate punishments according to the standard of the legislature, the prohibition of multiple punishments does not limit the competence of the legislature to define offences and fix punishments, not

preventing the legislature from providing for multiple punishments for the same offence. Because of the above, the prohibition of multiple punishments is not part of the *ne bis in idem*, but it is a general principle of law. This principle, which is immanent to the sanctioning system, operates as a form of sentencing control, preventing judges and administrative agencies from imposing multiple punishments when it appears that the legislature did not intend it.

The protection against multiple prosecutions aims to prevent the unwarranted procedural harassment of the defendant through limitless prosecutions, thereby working as a mechanism of procedural closure. However, the harm that the prohibition of multiple prosecutions intends to prevent does not occur by the mere fact of initiating a second sanctioning proceeding against the defendant. Rather, the harm that the prohibition intends to prevent occurs when the government tries to relitigate a matter that a final decision has already decided. Once a final decision has been rendered, the legal system grants the defendant the expectation that the matter in question has been irrevocably determined by that decision. Therefore, when the government tries to relitigate the same matter, that expectation of finality is disappointed.

The concept of “same offence” depends on the specific protection under consideration, whether it be the prohibition of multiple punishments or the prohibition of multiple prosecutions.

For the prohibition of multiple punishments, two offences should be considered to be the same offence if they arise out the same facts and constitute a single wrong. Two offences constitute a single wrong if the legal interest protected by the different legal provisions, as well as how that legal interest has been affected, are the same. The “same offence” requirement works as a rebuttable presumption against cumulative punishments. Thus, when two offences are the same, the general presumption is that cumulative punishments are not authorised. Nevertheless, this presumption can be rebutted by a clear indication of contrary legislative intent. For the purposes of the prohibition of multiple prosecutions, “same offence” means “same subject of adjudication”. The subject of adjudication is the historical event over which the authority has jurisdiction. The concept of “historical event” only considers those factual elements that are relevant from a legal point a view.

Considering the rationale of the two different prohibitions, it seems clears that they are applicable to the entire sanctioning system, both in its civil and its criminal manifestation.

In the specific context of multiple sanctioning systems, the protection against multiple punishments prohibits considering as complementary a sanctioning system that the legislature has actually designed following a subsidiary logic. Therefore, when the legislature has provided for a subsidiary multiple sanctioning system, the protection against multiple punishments prohibits sanctioning the defendant for both the civil and the criminal offence. The question of whether a given multiple sanctioning system is designed following a subsidiary or a complementary logic is a matter of legal interpretation.

In relation to the protection against multiple prosecutions, since the harm that the protection aims to prevent occurs when the government tries to relitigate a matter that has previously been decided by a final decision, thereby disappointing the expectation of finality granted the defendant by the legal system, it can be concluded that the prohibition of multiple prosecutions does not proscribe the functioning of multiple sanctioning systems. Since in this context the different sanctioning proceedings have been previously established by law, the initiation of both cannot constitute procedural harassment for the defendant. When the first sanctioning proceeding ends with a final decision, the legal system does not grant the defendant an expectation of finality regarding the other sanctioning proceedings provided in the context of the multiple sanctioning system, but only regarding the proceeding that ended with that final decision.

The clear differentiation between the protection against multiple punishment and the protection against multiple prosecution allows a consistent and reasonable application of both protections, which, taking into account the situation of the comparative case law, must be considered a virtue.

Some might think that, under the approach proposed here, multiple sanctioning systems are virtually limitless. The problem with the criticisms against multiple sanctioning systems is that they only focus on the protection against multiple punishments and the protection against multiple prosecutions. Indeed, the courts have tried to solve all the problems regarding multiple sanctioning systems by applying those two protections, overlooking other safeguards. The situation is even more troublesome in the case of the ECtHR and the CJEU because they have solely applied the procedural protection. Concerns about eventual abuses under multiple sanctioning systems are legitimate. However, to prevent such abuses it is not necessary for courts to elaborate tortured, convoluted and ultimately impractical analysis of the *ne bis in*

idem. Rather, they should start to consider other safeguards and develop guidelines on them.

Two possible safeguards are the prohibition of disproportionate sanctions and the right to be tried within a reasonable time. How should these protections apply in the context of multiple sanctioning systems?

The ban of disproportionate sanctions prohibits imposing a punishment disproportionate in relation to the seriousness of the conduct committed by the defendant. To determine whether the punishment imposed is disproportionate, the courts must take into account the severity of all the sanctions combined, and not one at a time, thereby ensuring that the overall sanction does not exceed the seriousness of the conduct. Therefore, if a person that is criminally convicted and sentenced to ten years' imprisonment, and later is fined €500.000 in a civil proceeding, the question to resolve will be whether an overall sanction of ten years' imprisonment and a fine of €500.000 is disproportionate in relation to the facts.

Regarding the right to be tried within a reasonable time, since in the context of multiple sanctioning systems the legislature has provided for more than one sanctioning proceeding in respect of the same facts, the period to consider in order to determine whether the right in question has been violated should be the overall length of the different proceedings. In the case of a violation of the right in question, if the proceeding has not ended yet, the legal remedy is a stay of proceedings. On the contrary, if the proceeding has already concluded, the legal remedy will be the voiding of the decision that the authority rendered. Besides, the court can always grant the defendant financial compensation.

In the context of multiple sanctioning systems, it is time to set aside the exclusive focus on the protection against multiple prosecutions and the protection against multiple punishments and start to develop guidelines regarding other safeguards that, until now, have been overlooked.

BIBLIOGRAPHY

Abbott, Nelson T. ‘United States v. Halper: Making Double Jeopardy Available in Civil Actions’. *BYU Journal of Public Law* 6, no. 3 (1992): 551–74.

Adler, Adam J. ‘Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem’. *Yale Law Journal* 124, no. 2 (2014): 448–83.

Alarcón Sotomayor, Lucía. *La Garantía Non Bis in Idem y El Procedimiento Administrativo Sancionador*. Iustel, 2008.

Alastuey, M. Carmen, and Estrella Escuchuri. ‘Ilícito penal e ilícito administrativo en materia de tráfico y seguridad vial’. *Estudios penales y criminológicos*, no. 31 (2011): 7–86.

Albin, Laurel. ‘Notes: Constitutional Limitations of Civil in Rem Forfeiture and the Double Jeopardy Dilemma: Civil in Rem Forfeiture Constitutes Punishment and Is Subject to Excessive Fines Analysis. Aravanis v. Somerset County, 339 Md. 644, 664 A.2d 888 (1995), Cert. Denied, 116 S. Ct. 916 (1996)’. *University of Baltimore Law Review* 26, no. 1 (1996): 155–99.

Alcácer, Rafael. ‘El Derecho a No Ser Sometido a Doble Procesamiento: Discrepancias Sobre El “Bis in Idem” En El Tribunal Europeo de Derecho Humanos y En El Tribunal Constitucional’. *Justicia Administrativa: Revista de Derecho Administrativo*, no. 61 (2013): 25–52.

Alexander, Rose, Ofie Rubin, Anita Vaughn, and Carol Wingo. ‘Collateral Estoppel’. *University of Richmond Law Review* 16, no. 2 (1982): 341–90.

Allegrezza. ‘Art. 4 Prot. 7’. In *Commentario Breve Alla Convenzione Europea Dei Diritti Dell’uomo e Delle Libertà Fondamentali*, edited by Sergio Bartole, Pasquale De Sena, and Vladimiro Zagrebelsky, 894–905. Cedam, 2012.

Allen, Ronald, and John Ratnaswamy. ‘Heath v. Alabama: A Case Study of Doctrine and Rationality in the Supreme Court’. *Journal of Criminal Law and Criminology* 76, no. 4 (1986): 801–31.

Alogna, Forrest G. ‘Double Jeopardy, Acquittal Appeals, and the Law-Fact Distinction’. *Cornell Law Review* 86, no. 5 (2001): 1131–64.

Amalfitano, Chiara, and Raffaele D’Ambrosio. ‘Diritto di non essere giudicato o punito per due volte per lo stesso reato’. In *Carta dei diritti fondamentali dell’Unione*

Europea, edited by R. Mastroianni, S. Allegrezza, O. Razzolini, O. Pollicino, and F. Pappalardo, 1015–41. Giuffrè, 2017.

Amar, Akhil. 'Double Jeopardy Law Made Simple Essay'. *Yale Law Journal* 106, no. 6 (1997): 1807–48.

Amar, Akhil, and Jonathan L. Marcus. 'Double Jeopardy Law after Rodney King'. *Columbia Law Review* 95, no. 1 (1995): 1–59.

Ambos, Kai. *European Criminal Law*. Cambridge University Press, 2018.

Andrijauskaitė, Agnė. 'Exploring the Penumbra of Punishment under the ECHR'. *New Journal of European Criminal Law* 10, no. 4 (2019): 363–75.

Anielak, Eric Michael. 'Double Jeopardy: Protection against Multiple Punishments'. *Missouri Law Review* 61, no. 1 (1996): 169–84.

Apisson, Elizabeth M. 'Double Jeopardy and the Civil Monetary Penalties Dilemma: Is Hudson the Cure for Health Care Fraud and Abuse?' *Administrative Law Review* 51, no. 1 (1999): 283–300.

Arroyo Zapatero, Luis. 'Principio de legalidad y reserva de ley en materia penal'. *Revista española de derecho constitucional* 3, no. 8 (1983): 9–46.

Arslan, Mehmet. *Procedural Guarantees for Criminal and Administrative Criminal Sanctions: A Study of the European Convention on Human Rights*. Max-Planck-Institut für ausländisches und internationales Strafrecht, 2019.

Bachmaier, Lorena. 'New Crime Control Scenarios and the Guarantees in Non-Criminal Sanctions: Presumption of Innocence, Fair Trial Rights, and the Protection of Property'. In *Prevention, Investigation, and Sanctioning of Economic Crime. Alternative Control Regimes and Human Rights Limitations*, edited by Ulrich Sieber, 299–334. Maklu, 2019.

Bailleux, Antoine. 'The Fiftieth Shade of Grey. Competition Law, "Criministrative Law" and "Fairly Fair Trials"'. In *Do Labels Still Matter?: Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, edited by Francesca Galli and Anne Weyembergh, 137–52. Université de Bruxelles, 2014.

Baker, Roozbeh B. 'Proportionality in the Criminal Law: The Differing American versus Canadian Approaches to Punishment'. *The University of Miami Inter-American Law Review* 39, no. 3 (2008): 483–502.

Baron, J., and E. Poelmann. 'Tax Penalties: Minor Criminal Charges?' *Intertax* 45, no. 12 (2017): 816–21.

———. ‘The Principle of *Ne Bis in Idem*: On the Ropes, but Definitely Not Defeated’. *Intertax* 46, no. 10 (2018): 805–9.

Bassiouni, M. Cherif. ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’. *Duke Journal of Comparative & International Law* 3, no. 2 (1993): 235–98.

Beling, Ernst. *Derecho Procesal Penal*. Editorial Labor S. A., 1943.

Benlloch, Guillermo. ‘El Principio de Non Bis in Idem En Las Relaciones Entre El Derecho Penal y El Derecho Disciplinario’. *Revista Del Poder Judicial*, no. 51 (1998): 303–76.

Błachnio-Parzych, Anna. ‘Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle’. *New Journal of European Criminal Law* 9, no. 3 (2018): 366–85.

Blackstone, William. *Commentaries on the Laws of England*. Vol. 4. J. B. Lippincott & Co., 1893.

Blumberg, Jonathan. ‘Implications of the 1984 Insider Trading Sanction Act: Collateral Estoppel and Double Jeopardy’. *North Carolina Law Review* 64, no. 1 (1985): 117–57.

Boix, Javier. ‘La Jurisprudencia Constitucional Sobre El Principio Non Bis in Idem’. In *Responsabilidad Penal Por Defectos En Productos Destinados a Los Consumidores*, edited by Javier Boix and Alessandro Bernardi, 65–100. Iustel, 2005.

Boto, Alejandra. ‘Sobre el principio non bis in idem y la importancia de la técnica legislativa (al hilo de la STC 188/2005, de 7 de julio)’. *Revista española de derecho constitucional* 26, no. 76 (2006): 273–94.

Braun, Daniel A. ‘Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism’. *American Journal of Criminal Law* 20, no. 1 (1992): 1–78.

Bray, Samuel L. ‘“Necessary and Proper” and “Cruel and Unusual”: Hendiadys in the Constitution’. *Virginia Law Review* 102, no. 3 (2016): 687–764.

Brickman, Jay. ‘The Dual Sovereignty Doctrine and Successive State Prosecutions: Health v. Alabama’. *Chicago-Kent Law Review* 63, no. 1 (1987): 175–88.

Brodin, Mark. 'Case Note: Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts'. *Columbia Law Review* 71, no. 2 (1971): 321–35.

Broyles, D. Scott. *Criminal Law in the U.S.A.* 2nd ed. Wolters Kluwer, 2011.

Brudner, Alan. *Punishment and Freedom*. Oxford University Press, 2009.

Buric, Zoran. 'Ne Bis in Idem in European Criminal Law: Moving in Circles Topic 4: Criminal Law and Procedure'. *EU and Comparative Law Issues and Challenges Series* 3 (2019): 507–20.

Bustos, Juan. *Manual de Derecho Penal. Parte General*. 4th ed. PPU, 1994.

Byassee, William Sam. 'Collateral Estoppel without Mutuality: Accepting the Bernhard Doctrine'. *Vanderbilt Law Review* 35, no. 6 (1982): 1423–52.

Campbell, Colin. 'Application of the Charter to Civil Penalties in the Income Tax Act'. *Canadian Tax Journal* 50, no. 1 (2002): 1–27.

Cancio Meliá, Manuel, and Mercedes Pérez Manzano. 'Principios Del Derecho Penal (II)'. In *Manual de Introducción al Derecho Penal*, edited by Juan Antonio Lascuraín Sánchez, 69–90. Agencia Estatal Boletín Oficial del Estado, 2019.

Cano, Tomás. 'Non Bis in Idem, Prevalencia de La Vía Penal y Teoría de Los Concursos En El Derecho Administrativo Sancionador'. *Revista de Administración Pública*, no. 156 (2001): 191–250.

———. *Sanciones Administrativas*. Francis Lefebvre, 2018.

Caprioli, Francesco. 'Editoriale Del Dossier "Giudicato Penale, Principio Di Legalità, Principio Di Colpevolezza"'. *Revista Brasileira de Direito Processual Penal* 4, no. 3 (2018): 933–52.

Carl-Friedrich Stuckenberg. 'Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions'. In *The Oxford Handbook of Criminal Process*, edited by Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser, 457–75. Oxford University Press, 2019.

Carlton, Christopher W. 'Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause: Whalen v. United States'. *Cornell Law Review* 66, no. 4 (1981): 819–41.

Carpio, David. 'Europeización y Reconstitución Del Non Bis in Idem. Efectos En España de La STEDH Sergey Zolotukhin v. Rusia de 10 de Febrero de 2009'. In *Constitución y Sistema Penal*, edited by Santiago Mir Puig and Mirentxu Corcoy, 223–42. Marcial Pons, 2012.

Cassibba, Fabio Salvatore. ‘I limiti oggettivi del ne bis in idem in Italia tra fonti nazionali ed europee’. *Revista Brasileira de Direito Processual Penal* 4, no. 3 (2018): 953–1002.

Cheh, Mary. ‘Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction’. *Hastings Law Journal* 42, no. 5 (1991): 1325–1413.

Chemerinsky, Erwin, and Laurie L. Levenson. *Criminal Procedure: Adjudication*. 3rd ed. Wolters Kluwer, 2018.

Choo, Andrew. *Abuse of Process and Judicial Stays of Criminal Proceedings*. Oxford University Press, 2008.

Cid Moliné, José. ‘Garantías y Sanciones (Argumentos Contra La Tesis de La Identidad de Garantías Entre Las Sanciones Punitivas)’. *Revista de Administración Pública*, no. 140 (1996): 131–74.

Clapp, Lauren. ‘United States v. Halper: Remedial Justice and Double Jeopardy’. *North Carolina Law Review* 68, no. 5 (1990): 979–94.

Clapp, Randy. ‘Eighth Amendment Proportionality’. *American Journal of Criminal Law* 7, no. 2 (1979): 253–76.

Clermont, Kevin M. ‘Procedure’s Magical Number Three Psychological Bases for Standards of Decision’. *Cornell Law Review* 72, no. 6 (1987): 1115–56.

———. ‘Res Judicata as Requisite for Justice’. *Rutgers University Law Review* 68, no. 3 (2016): 1067–1142.

Cobo del Rosal, Manuel, and Tomás Salvador [et al Vives Antón. *Derecho Penal: Parte General*. 5th ed. Tirant Lo Blanch, 1999.

Coffey, Gerard. ‘Raising the Pleas in Bar against a Retrial for the Same Criminal Offence’. *The Irish Judicial Studies Journal* 5, no. 2 (2005): 124–65.

Colangelo, Anthony J. ‘Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory’. *Washington University Law Review* 86, no. 4 (2009): 769–857.

Colgan, Beth A. ‘The Excessive Fines Clause: Challenging the Modern Debtors’ Prison’. *UCLA Law Review* 65, no. 1 (2018): 2–77.

Colussi, Joseph A. ‘An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions’. *Indiana Law Journal* 55, no. 4 (1980): 667–94.

Conway, Gerard. ‘Ne Bis in Idem and the International Criminal Tribunals’. *Criminal Law Forum* 14, no. 4 (2003): 351–83.

———. ‘Ne Bis in Idem in International Law’. *International Criminal Law Review* 3, no. 3 (2003): 217–44.

Corwin, Melissa. ‘Defining Proof Beyond a Reasonable Doubt for the Criminal Jury: The Third Circuit Accepts an Invitation to Tolerate Constitutionally Inadequate Phraseology’. *Villanova Law Review* 46, no. 4 (2001): 829–53.

Coughlan, Steve. ‘Making Trial Within a Reasonable Time a Right Once More’. *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 81, no. 1 (2017): 213–31.

Cox, Stanley E. ‘Halper’s Continuing Double Jeopardy Implications: A Thorn by Any Other Name Would Prick as Deep’. *Saint Louis University Law Journal* 39, no. 4 (1995): 1235–1308.

Cranman, Erin M. ‘The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right’. *Emory International Law Review* 14, no. 3 (2000): 1641–80.

Cryer, Robert, Hakan Friman, Darryl Robinson, and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure*. Cambridge University Press, 2010.

Csúri, András, and Michiel Luchtman. ‘Procedural Safeguards for Heads of Business in Light of the ECrHR and CJEU Case Law’. In *Punitive Liability of Heads of Business in the Eu: A Comparative Study*, edited by Katalin Ligeti and Marletta Angelo, 273–304. Cedam, 2018.

Cubero Marcos, José Ignacio. ‘Las Aporías Del Principio “Non Bis in Ídem” En El Derecho Administrativo Sancionador’. *Revista de Administración Pública*, no. 207 (2018): 253–88.

Cunningham, Gary R. ‘Collateral Estoppel: The Changing Role of the Rule of Mutuality’. *Missouri Law Review* 41, no. 4 (1976): 521–45.

Davis, Frederick T. *American Criminal Justice: An Introduction*. Cambridge University Press, 2019.

Dawson, Michael A. ‘Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine’. *Yale Law Journal* 102, no. 1 (1992): 281–304.

De la Mata, Norberto, Jacobo Dopico, Juan Antonio Lascuraín, and Adán Nieto. *Derecho Penal Económico y de La Empresa*. Dykinson, 2018.

De Vero, Giancarlo, and Giuseppina Panebianco. *Delitti e Pene Nella Giurisprudenza Delle Corti Europee*. Giappichelli, 2007.

DeMott, Joseph J. ‘Rethinking Ashe v. Swenson from an Originalist Perspective’. *Stanford Law Review* 71, no. 2 (2019): 411–60.

Desterbeck, Francis. ‘Ne Bis in Idem and Tax Offences: How Belgium Adapted Its Legislation to the Recent Case Law of the ECtHR and the CJEU’. *Eucrim*, no. 2 (2019): 135–41.

Di Federico, Giacomo. ‘EU Competition Law and the Principle of *Ne Bis in Idem*’. *European Public Law* 17, no. 2 (2011): 241–60.

Díaz y García, Miguel. ‘Ne bis in idem material y procesal’. *Revista de Derecho*, no. 9 (2004): 9–28.

Donofrio, Anthony J. ‘Double Jeopardy Clause of the Fifth Amendment--The Supreme Court’s Cursory Treatment of Underlying Conduct in Successive Prosecutions Supreme Court Review’. *Journal of Criminal Law and Criminology* 83, no. 4 (1993): 773–803.

Downey, Bruce J. ‘Criminal Procedure -- Application of the Doctrine of Collateral Estoppel to State Criminal Prosecutions’. *North Carolina Law Review* 49, no. 2 (1971): 351–58.

Dressler, Joshua, and George C. Thomas III. *Criminal Procedure: Principles, Policies and Perspectives*. 6th ed. West Academic Publishing, 2017.

Eads, Linda S. ‘Separating Crime from Punishment: The Constitutional Implications of United States v. Halper’. *Washington University Law Quarterly* 68, no. 4 (1990): 929–94.

Edmiston, Robert Ruyle. ‘Ashe v. Swenson: A New Look at Double Jeopardy’. *Tulsa Law Journal* 7, no. 1 (1971): 68–73.

El Zeidy, Mohamed. ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’. *Michigan Journal of International Law* 23, no. 4 (1 January 2002): 869–975.

Escobar Veas, Javier. ‘Double Jeopardy and Dual Sovereignty Doctrine: Gamble v. United States’. *Revista de Derecho* 20, no. 2 (2019): 225–42.

———. ‘The Constitutionality of Parallel Civil Forfeiture Proceedings and Criminal Prosecutions under the Double Jeopardy Clause in the United States’. *Revista Brasileira de Direito Processual Penal* 6, no. 2 (2020): 701–33.

Evans, Merry. ‘Collateral Estoppel and the Administrative Process’. *Missouri Law Review* 53, no. 4 (1988): 779–94.

Fanciullo, Daniela, Anna Iermano, Angela Martone, and Rossana Palladino. 'Diritto Ad Un Processo Equo'. In *Commentario Alla Prima Parte Della Convenzione Americana Dei Diritti Dell'uomo*, edited by Laura Cappuccio and Palmina Tanzarella, 256–302. Editoriale Scientifica, 2017.

Fedorova, Masha, and Goran Sluiter. 'Human Rights as Minimum Standards in International Criminal Proceedings'. *Human Rights & International Legal Discourse* 3, no. 1 (2009): 9–56.

Felisatti, Valentina. 'Il Ne Bis in Idem Domestico. Tra Coordinazione Procedimentale e Proporzionalità Della Sanzione'. *Diritto Penale Contemporaneo Rivista Trimestrale*, no. 3 (2018): 119–47.

Fellmeth, Aaron Xavier. 'Civil and Criminal Sanctions in the Constitution and Courts'. *Georgetown Law Journal* 94, no. 1 (2005): 1–66.

Fisher, Walter T. 'Double Jeopardy, Two Sovereignties and the Intruding Constitution'. *University of Chicago Law Review* 28, no. 4 (1961): 591–613.

Fletcher, George P. *Rethinking Criminal Law*. Oxford University Press, 2000.

Floinn, Mícheál. 'The Concept of Idem in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law'. *Columbia Journal of European Law* 24, no. 1 (2017): 75–109.

Fox, Jere Lamont. 'Breed v. Jones: Double Jeopardy and the Juvenile'. *Pepperdine Law Review* 3, no. 2 (1976): 407–26.

Friedland, Martin L. *Double Jeopardy*. Oxford University Press, 1969.

Gaito, Alfredo. 'La Progresiva Transfiguración de «ne Bis in Idem»'. In *Investigación y Prueba En Los Procesos Penales de España e Italia*, edited by José Caro Catalán and Isabel Villar Fuentes, 51–70. Aranzadi, 2019.

Gallardo, María Jesús. 'La Concurrencia de Sanciones Penales y Administrativas: Una Prohibición En Desuso'. *Administración de Andalucía: Revista Andaluza de Administración Pública*, no. 61 (2006): 55–88.

———. *Los Principios de La Potestad Sancionadora. Teoría y Práctica*. Iustel, 2008.

Garberí, José. 'Principio "Non Bis in Ídem" y Cuestiones de Perjudicialidad'. *Cuadernos de Derecho Judicial*, no. 11 (1997): 79–122.

García. *Non Bis in Idem Material y Concurso de Leyes Penales*. Cedecs, 1995.

Garcia, Alfredo. *The Fifth Amendment: A Comprehensive Approach*. Praeger, 2002.

García, Jesús. 'Consideraciones sobre el principio "ne bis in idem" en la doctrina constitucional'. *Revista del Ministerio Fiscal*, no. 1 (1995): 59–88.

Garcia-Rivera, Luis. ‘Dodging Double Jeopardy: Combined Civil and Criminal Trials’. *Stetson Law Review* 26, no. 1 (1996): 373–406.

Garcías, Gabriel. ‘Consecuencias del principio “non bis in idem” en Derecho penal’. *Anuario de derecho penal y ciencias penales* 42, no. 1 (1989): 109–24.

Gavit, Bernard. ‘Jurisdiction of the Subject Matter and Res Judicata’. *University of Pennsylvania Law Review* 80, no. 3 (1932): 386–96.

George, W. David. ‘Finally, an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States’. *Baylor Law Review* 46, no. 2 (1994): 509–24.

Gimeno, Vicente. *Derecho Procesal Penal*. 2nd ed. Colex, 2007.

Glickman, Andrew Z. ‘Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings after United States v. Halper’. *Virginia Law Review* 76, no. 6 (1990): 1251–86.

Gómez Colomer, Juan Luis. *El Proceso Penal Alemán. Introducción y Normas Básicas*. Bosch, 1985.

Gómez, Manuel. ‘Non bis in idem en los casos de dualidad de procedimientos penal y administrativo. Especial consideración de la jurisprudencia del TEDH’. *Indret: Revista para el Análisis del Derecho*, no. 2 (2020): 421–56.

Gómez Orbaneja, Emilio. *Comentarios a La Ley de Enjuiciamiento Criminal*. Vol. II. Bosch, 1951.

Gómez-Jara, Carlos, and Luis Chiesa. ‘Spain’. In *The Handbook of Comparative Criminal Law*, edited by Kevin Jon Heller and Markus Dubber, 488–530. Stanford University Press, 2011.

Gordon, James. ‘Double Jeopardy and Appeal of Dismissals: A Before-and-After Approach’. *California Law Review* 69, no. 3 (1981): 863–84.

Górriz, Elena. ‘Sentido y Alcance Del “Ne Bis in Idem” Respecto a La Preferencia de La Jurisdicción Penal, En La Jurisprudencia Constitucional (De La STC 2/1981, 30 de Enero a La STC 2/2003, 16 de Enero)’. *Estudios Penales y Criminológicos*, no. 24 (2002): 188–271.

Green, Phillip. ‘Constitutional Law - Goodbye Grady - Blockburger Wins the Double Jeopardy Rematch’. *University of Arkansas at Little Rock Law Journal* 17, no. 2 (1995): 369–86.

Griffin, Lissa. ‘Untangling Double Jeopardy in Mixed-Verdict Cases’. *SMU Law Review* 63, no. 3 (2010): 1033–68.

Groussot, Xavier, and Angelica Ericsson. ‘Ne Bis in Idem in the EU and ECHR Legal Orders. A Matter of Uniform Interpretation?’ In *Ne Bis in Idem in EU Law*, edited by Bas Van Bockel, 53–102. Cambridge University Press, 2016.

Gunn, Douglas J. ‘The Offensive Use of Collateral Estoppel in Mass Tort Cases’. *Mississippi Law Journal* 52, no. 4 (1982): 765–802.

Hall, Lynn. ‘Crossing the Line Between Rough Remedial Justice and Prohibited Punishment: Civil Penalty Violates the Double Jeopardy Clause—United States v. Halper, 109 S. Ct. 1892 (1989)’. *Washington Law Review* 65, no. 2 (1990): 437–56.

Harris, David, Michael O’Boyle, Ed Bates, and Carla Buckley. *Harris, O’Boyle, and Warbrick: Law of the European Convention on Human Rights*. 3rd ed. Oxford University Press, 2014.

Hendricks, Charles William. ‘100 Years of Double Jeopardy Erosion: Criminal Collateral Estoppel Made Extinct’. *Drake Law Review* 48, no. 2 (2000): 379–402.

Henning, Peter J. ‘Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy’. *American Criminal Law Review* 31, no. 1 (1993): 1–72.

Herik, L. J. van den. *Contribution of the Rwanda Tribunal to the Development of International Law*. Martinus Nijhoff Publishers, 2005.

Hernández, Alejandro. ‘Granting Due Process of Law to Suspected and Accused Persons Involved in Parallel Criminal Proceedings in the EU’. *Diritto Penale Contemporaneo Rivista Trimestrale*, no. 1–16 (2019).

Hernández, Héctor. ‘Actividad Administrativa, Procedimiento Sancionatorio-Administrativo y Proceso Penal: Algunas Necesidades de Coordinación Legal’. In *Sanciones Administrativas. X Jornadas de Derecho Administrativo*, edited by Jaime Arancibia Mattar and Pablo Alarcón Jaña. Thomson Reuters, 2014.

Hessick, Carissa Byrne, and F. Andrew Hessick. ‘Double Jeopardy as a Limit on Punishment’. *Cornell Law Review* 97, no. 1 (2011): 45–86.

Hildy, John. ‘Fifth Amendment--Double Jeopardy and the Dangerous Drug Tax’. *Journal of Criminal Law and Criminology* 85, no. 4 (1995): 936–61.

Hirsch, Andrew von. *Past or Future Crimes*. Rutgers University Press, 1985.

Ibáñez, Juana María. ‘Artículo 8. Garantías Judiciales’. In *Convención Americana Sobre Derechos Humanos*, edited by Christian Steiner and Patricia Uribe, 207–54. Temis, 2014.

Ilić, Goran P. 'Observations on the Ne Bis in Idem Principle in Light of the European Court of Human Rights' Judgment: Milenkovic v. Serbia'. *Journal of Eastern-European Criminal Law*, no. 1 (2017): 217–30.

Ingraham, Debra Marie. 'Civil Money Sanctions Barred by Double Jeopardy: Should the Supreme Court Reject Healy Note'. *Washington and Lee Law Review* 54, no. 3 (1997): 1183–1226.

Izquierdo, Cristina. 'Preferencia Aplicativa y Diálogo Judicial'. *Indret: Revista Para El Análisis Del Derecho*, no. 1 (2019): 1–32.

Jahncke, Elizabeth S. 'United States v. Halper, Punitive Civil Fines, and the Double Jeopardy and Excessive Fines Clauses'. *New York University Law Review* 66, no. 1 (1991): 112–47.

Jakobs, Günther. *Derecho Penal. Parte General. Fundamentos y Teoría de La Imputación*. Marcial Pons, 1995.

James, Fleming. 'Burdens of Proof'. *Virginia Law Review* 47, no. 1 (1961): 51–70.

Jescheck, Hans-Heinrich. *Tratado de Derecho Penal: Parte General*. 4 edition. Editorial Comares, 1993.

Johnson, Barry L. 'Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture after United States v. Bajakajian'. *University of Illinois Law Review*, no. 2 (2000): 461–516.

Jordan, James C. 'Application and Limitations of the Rule Prohibiting Multiple Convictions: Kienapple v. the Queen to R. V. Prince'. *Manitoba Law Journal* 14, no. 3 (1985): 341–78.

Joseph, Sarah, and Melissa Castan. *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*. 3rd ed. Oxford University Press, 2014.

Kanovitz, Jacqueline R., Jefferson L. Ingram, and Christopher J. Devine. *Constitutional Law for Criminal Justice*. 15th ed. Routledge, 2018.

Kapiloff, Arnold. 'Collateral Estoppel and the Civil Fraud Penalty'. *Bulletin of the Section of Taxation, American Bar Association* 20, no. 2 (1967): 137–49.

Kayitana, Evode. 'Complementarity and Completed Trials: Reforming the Ne Bis in Idem Clause of Article 20(3) of the Rome Statute'. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 9, no. 2 (2018): 31–45.

Kennelly Jr., Richard B. ‘Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases’. *Virginia Law Review* 80, no. 6 (1994): 1379–1427. https://doi.org/10.2307/1073610.

Khinda, Philip S. ‘Undesired Results under Halper and Grady: Double Jeopardy Bars on Criminal RICO Actions against Civilly-Sanctioned Defendants’. *Columbia Journal of Law and Social Problems* 25, no. 1 (1991): 117–56.

Kidd, C. J. F. ‘Disciplinary Proceedings and the Right to a Fair Criminal Trial under the European Convention on Human Rights’. *International and Comparative Law Quarterly* 36, no. 4 (1987): 856–72.

Kidron, Eithan Y. ‘Understanding Administrative Sanctioning as Corrective Justice’. *University of Michigan Journal of Law Reform* 51, no. 2 (2018): 313–55.

King, James E. ‘The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution’. *Stanford Law Review* 31, no. 3 (1979): 477–504.

King, Nancy J. ‘Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties’. *University of Pennsylvania Law Review* 144, no. 1 (1995): 101–96.

Klein, Susan R. ‘Civil in Rem Forfeiture and Double Jeopardy’. *Iowa Law Review* 82, no. 1 (1996): 183–274.

———. ‘Double Jeopardy’s Demise’. *California Law Review* 88, no. 3 (2000): 1001–50.

———. ‘Redrawing the Criminal-Civil Boundary’. *Buffalo Criminal Law Review* 2, no. 2 (1999): 681–723.

Klip, André. *European Criminal Law: An Integrative Approach*. 3 edition. Intersentia, 2016.

———. ‘Jurisdiction and Transnational Ne Bis in Idem in Prosecution of Transnational Crimes’. In *The Oxford Handbook of Criminal Process*, edited by Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser, 477–98. Oxford University Press, 2019.

Knoll, Patrick J. *Criminal Law Defences*. 2nd ed. Carswell Legal Publishing, 1994.

Koklys, Andrea. ‘Second Chance for Justice: Reevaluation of the United States Double Jeopardy Standard’. *John Marshall Law Review* 40, no. 1 (2006): 371–94.

Lasagni, Giulia. *Banking Supervision and Criminal Investigation: Comparing the EU and US Experiences*. Comparative, European and International Criminal Justice. Springer, 2019.

Laudan, Larry. *Truth, Error, and Criminal Law*. Cambridge University Press, 2006.

Lee, Cynthia, L. Song Richardson, and Tamara Lawson. *Criminal Procedure. Cases and Materials*. West Academic Publishing, 2016.

Lelieur, Juliette. 'Transnationalising Ne Bis in Idem: How the Rule of Ne Is Idem Reveals the Principle of Personal Legal Certainty'. *Utrecht Law Review* 9, no. 4 (2013): 198–210.

León, Francisco de. *Acumulación de Sanciones Penales y Administrativas : Sentido y Alcance Del Principio 'Ne Bis in Idem'*. Bosch, 1998.

———. 'Sobre el sentido del axioma ne bis in idem'. In *El principio de ne bis in idem en el derecho penal europeo e internacional*, edited by Luis Arroyo Zapatero and Nieto Martín, Adán, 17–36. Ediciones de la Universidad de Castilla-La Mancha, 2007.

Levin, Michael H. 'OSHA and the Sixth Amendment: When Is a Civil Penalty Criminal in Effect'. *Hastings Constitutional Law Quarterly* 5, no. 4 (1978): 1013–70.

Lidgard, Hans. 'Due Process in European Competition Procedure: A Fundamental Concept or a Mere Formality?' In *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, edited by Pascal Cardonnel, Allan Rosas, and Nils Wahl, 403–21. Hart Publishing, 2012.

Ligeti, Katalin. 'Fundamental Rights Protection Between Strasbourg and Luxembourg'. In *Preventing and Resolving Conflicts of Jurisdiction in EU Criminal Law*, edited by Katalin Ligeti and Gavin Robinson, 160–81. Oxford University Press, 2018.

Limbaugh, Stephen. 'The Case of Ex Parte Lange (Or How the Double Jeopardy Clause Lost Its Life or Limb)'. *American Criminal Law Review* 36, no. 1 (1999): 53–86.

Lo Schiavo, Gianni. 'The Principle of Ne Bis in Idem and the Application of Criminal Sanctions: Of Scope and Restrictions: ECJ 20 March 2018, Case C-524/15, Luca Menci ECJ 20 March 2018, Case C-537/16, Garlsson Real Estate SA and Others v Commissione Nazionale per Le Società e La Borsa (Consob) ECJ 20 March 2018, Joined Cases C-596/16 and C-597/16, Enzo Di Puma v Consob and Consob v Antonio Zecca'. *European Constitutional Law Review* 14, no. 3 (2018): 644–63.

Lock, Tobias. ‘Articles 48-50’. In *The EU Treaties and the Charter of Fundamental Rights. A Commentary*, edited by Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin, 2235–40. Oxford University Press, 2019.

Lopez, Dax Eric. ‘Not Twice for the Same: How the Dual Sovereignty Doctrine Is Used to Circumvent Non Bis in Idem’. *Vanderbilt Journal of Transnational Law* 33, no. 5 (1 November 2000): 1263.

Lucarelli, Umberto. *L’istituto Del Giudicato. Il Giudicato Penale e i Suoi Effetti Civili*. Utet Giuridica, 2006.

Luparia, Luca. *La Litispendenza Internazionale. Tra Ne Bis in Idem Europeo e Processo Penale Italiano*. Giuffrè, 2012.

MacDougal, Douglas W. ‘Collateral Estoppel: Its Application and Misapplication’. *Washington and Lee Law Review* 29, no. 1 (1972): 110–18.

Mack, Barbara A. ‘Double Jeopardy - Civil Forfeitures and Criminal Punishment: Who Determines What Punishments Fit the Crime Double Jeopardy: The Civil Forfeiture Debate’. *Seattle University Law Review* 19, no. 2 (1996): 217–52.

Maier, Julio. *Derecho Procesal Penal*. 2 edition. Vol. I. Editores del Puerto, 2004.

Maldonado Fuentes, Francisco. ‘Delito Continuado y Concurso de Delitos’. *Revista de Derecho (Valdivia)* 28, no. 2 (2015): 193–226.

Mañalich, Juan Pablo. ‘El Concurso de Delitos: Bases Para Su Reconstrucccion En El Derecho Penal de Puerto Rico’. *Revista Juridica Universidad de Puerto Rico* 74, no. 4 (2005): 1021–1212.

———. *Estudios Sobre La Fundamentación y La Determinación de La Pena*. Thomson Reuters, 2018.

Mantovani, Ferrando. *Concorso e Conflitto Di Norme Nel DIritto Penale*. Nicola Zanichelli Editore, 1966.

Marina, Belén. ‘La Problemática Solución de La Concurrencia de Sanciones Administrativas y Penales: Nueva Doctrina Constitucional Sobre El Principio Non Bis in Idem’. *Revista de Administración Pública*, no. 162 (2003): 175–88.

Marinucci, Giorgio, and Emilio Dolcini. *Manuale Di Diritto Penale. Parte Generale*. 6 edizione. Giuffrè, 2017.

Martin, Janeice T. ‘Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game’. *Florida Law Review* 46, no. 4 (1994): 661–86.

Martin, Marc. ‘Health v. Alabama: Contravention of Double Jeopardy and Full Faith and Credit Principles’. *Loyola University of Chicago Law Journal* 17, no. 4 (1986): 721–58.

Masárová, Ľubica, and Michal Maslen. ‘Ne Bis in Idem Principle, Double Jeopardy Guarantee and Their Application in the Fields of Punishment and Sanctioning: Differences, Merits and Demerits’. *Societas et Iusrisprudentias* 5, no. 3 (2017): 60–81.

Masera, Luca. *La Nozione Costituzionale Di Materia Penale*. Giappichelli, 2018.

Matus, Jean Pierre. ‘El Concurso (Aparente) de Leyes En La Reforma Penal Latinoamericana’. *Revista Chilena de Derecho* 24, no. 3 (1997): 423–46.

Maugeri, Ana Maria. ‘The Concept of Criminal Matter in the European Courts Case Law’. In *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, edited by Rosaria Sicurella, Valsamis Mitsilegas, Raphaele Parizot, and Annalisa Lucifora, 275–93. Giuffrè, 2017.

Mayers, Daniel K., and Fletcher L. Yarbrough. ‘Bis Vexari: New Trials and Successive Prosecutions’. *Harvard Law Review* 74, no. 1 (1960): 1–43.

Mazzacuva, Francesco. *Le Pene Nascoste. Topografia Delle Sanzioni Punitive e Modulazione Dello Statuto Garantistico*. Giappichelli, 2017.

McAninch, William S. ‘Unfolding the Law of Double Jeopardy’. *South Carolina Law Review* 44, no. 3 (1993): 411–506.

McDermott, Paul A. *Res Judicata and Double Jeopardy*. Bloomsbury Professional, 1999.

McGee, Ramona Lennea. ‘Criminal Rico and Double Jeopardy Analysis in the Wake of Grady v. Corbin: Is This Rico’s Achilles’ Heel’. *Cornell Law Review* 77, no. 3 (1992): 687–722.

McKay, Monroe G. ‘Double Jeopardy: Are the Pieces the Puzzle’. *Washburn Law Journal* 23, no. 1 (1983): 1–23.

Medina, Cecilia. *The American Convention on Human Rights: Crucial Rights and Their Theory and Practice*. 2nd ed. Intersentia, 2016.

Melenyzer, Lisa. ‘Double Jeopardy Protection from Civil Sanctions after Hudson v. United States’. *Journal of Criminal Law and Criminology* 89, no. 3 (1999): 1007–46.

Merkl, Taryn A. ‘The Federalization of Criminal Law and Double Jeopardy’. *Columbia Human Rights Law Review* 31, no. 1 (1999): 175–208.

Merrills, J. G., and A. H. Robertson. *Human Rights in Europe*. 4th ed. Juris Publishing, 2001.

Messina, Michele. 'The Operation of Ne Bis in Idem in the Application of European Union Competition Law Rules across the European Union: Recent Developments in the Light of the Toshiba Case'. *ERA Forum* 13, no. 2 (2012): 325–47.

Meyers, Alaya. 'Rejecting the Clear and Convincing Evidence Standard for Proof of Incompetence'. *Journal of Criminal Law and Criminology* 87, no. 3 (1997): 1016–39.

Mezei, Péter. '"Not Twice for the Same": Double Jeopardy Protections Against Multiple Punishments'. In *Fair Trial and Judicial Independence: Hungarian Perspectives*, edited by Attila Badó, 197–219. Springer, 2014.

Mierzwińska-Lorencka, Joanna, and Celina Nowak. 'Fair Trial (Judicial Authority) and Effective Remedy'. In *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, edited by Rosaria Sicurella, Valsamis Mitsilegas, Raphaele Parizot, and Annalisa Lucifora, 177–207. Giuffrè, 2017.

Miller, Leonard G. *Double Jeopardy and the Federal System*. Chicago University Press, 1968.

Milošević, Monika, and Ana Knežević Bojović. 'Trial within Reasonable Time in EU Acquis and Serbian Law'. *EU and Comparative Law Issues and Challenges Series (ECLIC)* 1 (2017): 447–70.

Mir Puig, Santiago. *Derecho Penal. Parte General*. 7 edition. Editorial Reppertor, 2005.

Miranda, Anabela. 'Fundamental Rights and Punishment: Is There an EU Perspective?' *New Journal of European Criminal Law* 10, no. 1 (2019): 17–27.

Mirandola, Sofia, and Giulia Lasagni. 'The European Ne Bis in Idem at the Crossroads of Administrative and Criminal Law'. *Eucrim*, no. 2 (2019): 126–35.

Mitsilegas, Valsamis, and Fabio Giuffrida. 'Ne Bis in Idem'. In *General Principles for a Common Criminal Law Framework in the EU. A Guide for Legal Practitioners*, edited by Rosaria Sicurella, Valsamis Mitsilegas, Raphaele Parizot, and Annalisa Lucifora, 209–42. Giuffrè, 2017.

Moore, Michael. *Act and Crime: The Philosophy of Action and Its Implications for Criminal Law*. Oxford University Press, 1993.

Morosin, Michele N. 'Double Jeopardy and International Law: Obstacles to Formulating a General Principle'. *Nordic Journal of International Law* 64, no. 2 (1995): 261–74.

Mulrine, Thomas. 'Reasonable Doubt: How in the World Is It Defined?' *American University International Law Review* 12, no. 1 (1997): 195–225.

Mundis, Daryl. *The Oxford Companion to International Criminal Justice*. Edited by Antonio Cassese. Oxford University Press, 2009.

Murray, Christopher. 'Collateral Estoppel in Criminal Prosecutions: Time to Abandon the Identity of Parties Rule'. *Southern California Law Review* 46, no. 3 (1973): 922–64.

Navas-Parejo, Marta. 'La Aplicación Del Principio "Non Bis in Idem" En El Ámbito Del Derecho Del Trabajo y de La Seguridad Social'. *Temas Laborales: Revista Andaluza de Trabajo y Bienestar Social*, no. 124 (2014): 63–119.

Nazzini, Renato. 'Parallel Proceedings in EU Competition Law'. In *Ne Bis in Idem in EU Law*, edited by Bas Van Bockel, 131–66. Cambridge University Press, 2016.

Neafsey, Ed, and Edward R. Bonanno. 'Parallel Proceedings and the Fifth Amendment's Double Jeopardy Clause Symposium'. *Fordham Environmental Law Journal* 7, no. 3 (1996): 719–36.

Neagu, Norel. 'The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation'. *Leiden Journal of International Law* 25, no. 4 (2012): 955–77.

Nelson, Caleb. 'The Constitutionality of Civil Forfeiture'. *Yale Law Journal* 125, no. 8 (2016): 2446–2518.

Nolan, Patrick S. 'Double Jeopardy's Multipunishment Protection and Regulation of Civil Sanctions after United States v. Ursery'. *Marquette Law Review* 80, no. 4 (1997): 1081–1116.

Öberg, Jacob. 'The Definition of Criminal Sanctions in the EU'. *European Criminal Law Review* 3, no. 3 (2014): 273–99.

O'Rourke, Anthony. 'Parallel Enforcement and Agency Interdependence'. *Maryland Law Review* 77, no. 4 (2018): 985–1061.

Owsley, David Bryan. 'Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study'. *Washington University Law Quarterly* 81, no. 3 (2003): 765–800.

Pace, Kirstin. ‘Fifth Amendment--The Adoption of the Same Elements Test: The Supreme Court’s Failure to Adequately Protect Defendants from Double Jeopardy’. *Journal of Criminal Law and Criminology* 84, no. 4 (1994): 769–804.

Padover, Jordan. ‘State Constitutional Law - Criminal Procedure - The Constitutional Guarantee of Protection against Double Jeopardy Is Not Violated When a Defendant Is Convicted Of, and Punished for, Separate Offenses That Contain Different Elements’. *Rutgers Law Journal* 40, no. 4 (2009): 969–94.

Palombino, Fulvio Maria. ‘Cumulation of Offences and Purposes of Sentencing in International Criminal Law: A Troublesome Inheritance of the Second World War’. *International Comparative Jurisprudence* 2, no. 2 (2016): 89–92.

Pastor, Daniel. ‘Acerca Del Derecho Fundamental al Plazo Razonable de Duración Del Proceso Penal’. *Revista de Estudios de La Justicia* 4 (2004): 51–76.

Patraus, Darius-Dennis. ‘The Non Bis in Idem Principle in The Case Law of the Court of Justice of the European Union- Consistency or Inconsistency’. *AGORA International Journal of Juridical Sciences*, no. 1 (2018): 25–34.

Paulesu, Pier Paolo. ‘Ne Bis in Idem and Conflicts of Jurisdiction’. In *Handbook of European Criminal Procedure*, edited by Roberto E. Kostoris, 393–421. Springer, 2018.

Peñaranda Ramos, Enrique. *Concurso de Leyes, Error y Participación En El Delito*. Civitas, 1991.

Pérez Manzano, Mercedes. *La prohibición constitucional de incurrir en ‘bis in idem’*. Tirant Lo Blanch, 2002.

———. ‘Ne Bis in Idem in Spain and in Europe. Internal Effects of an Inverse and Partial Convergence of Case-Law (from Luxembourg to Strasbourg)’. In *Multilevel Protection of the Principle of Legality in Criminal Law*, edited by Mercedes Pérez Manzano, Juan Antonio Lascuraín Lascuraín, and Marina Mínguez Rosique, 75–95. Springer, 2018.

Perkins, Rollin M. ‘Collateral Estoppel in Criminal Cases Current Problems in Criminal Law (I)’. *University of Illinois Law Forum*, no. 4 (1960): 533–73.

Perschbacher, Rex R. ‘Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings’. *University of Florida Law Review* 35, no. 3 (1983): 422–63.

Podgor, Ellen S. ‘Department of Justice Guidelines: Balancing Discretionary Justice’. *Cornell Journal of Law and Public Policy* 13, no. 2 (2004): 167–202.

Poulin, Anne Bowen. ‘Collateral Estoppel in Criminal Cases: Reuse of Evidence after Acquittal’. *University of Cincinnati Law Review* 58, no. 1 (1989): 1–58.

Principato, Daniel A. ‘Defining the Sovereign in Dual Sovereignty: Does the Protection against Double Jeopardy Bar Successive Prosecutions in National and International Courts’. *Cornell International Law Journal* 47, no. 3 (2014): 767–90.

Puerta, Francisco. ‘La Prohibición de Bis in Idem En La Legislación de Tráfico’. *Documentación Administrativa*, no. 284 (2009): 219–51. https://doi.org/10.24965/da.v0i284-285.9657.

Quigley, Tim. *Procedure in Canadian Criminal Law*. 2nd ed. Thomson Carswell, 2005.

Ramírez, María Lourdes. ‘El Criterio de Interpretación Del Principio Non Bis in Ídem Previsto En El Artículo 45.3 de La Constitución Española’. *Revista Ius et Praxis* 16, no. 1 (2010): 287–302.

Randall, Cynthia L. ‘Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence’. *University of Pennsylvania Law Review* 141, no. 1 (1992): 283–326.

Rebollo, Manuel, and Manuel Izquierdo. ‘El Régimen de Infracciones y Sanciones’. In *Comentario a La Ley General de Subvenciones*, edited by Germán Fernández, 597–702. Civitas, 2005.

Rebollo, Manuel, Manuel Izquierdo, Lucía Alarcón, and Antonio Bueno. *Derecho Administrativo sancionador*. Lex Nova, 2010.

———. ‘Panorama Del Derecho Administrativo Sancionador En España’. *Revista Estudios Socio-Jurídicos* 7, no. 1 (2005): 23–74.

Redmayne, Mike. ‘Standards of Proof in Civil Litigation’. *The Modern Law Review* 62, no. 2 (1999): 167–95.

Reinhart, Douglas. ‘Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States: Excessiveness and Proportionality’. *William & Mary Law Review* 36, no. 1 (1994): 235–68.

Resch, Diane M. ‘High Comedy But Inferior Justice: The Aftermath of Grady v. Corbin’. *Marquette Law Review* 75, no. 1 (1991): 265–82.

Richardson, Eli. ‘Eliminating Double Talk from the Law of Double Jeopardy’. *Florida State University Law Review* 22, no. 1 (1994): 119–69.

Richardson, Eli J. ‘Matching Tests for Double Jeopardy Violations with Constitutional Interests Recent Developments’. *Vanderbilt Law Review* 45, no. 1 (1992): 273–312.

Robinson, Paul H. ‘The Criminal-Civil Distinction and the Utility of Desert Symposium’. *Boston University Law Review* 76, no. 1–2 (1996): 201–14.

Rosano, Alessandro. ‘Ne Bis Interpretatio in Idem: The Two Faces of the Ne Bis in Idem Principle in the Case Law of the European Court of Justice’. *German Law Journal* 18, no. 1 (2017): 39–58.

Rosen-Zvi, Issachar, and Talia Fisher. ‘Overcoming Procedural Boundaries’. *Virginia Law Review* 94, no. 1 (2008): 79–156.

Roxin, Claus. *Derecho Penal. Parte General. Especiales Formas de Aparición Del Delito*. Vol. II. Thomson Reuters-Civitas, 2014.

———. *Derecho Procesal Penal*. Editores del Puerto, 2000.

Rudoni, Ruggero. ‘Sul Ne Bis in Idem Convenzionale: Le Irriducibili Aporie Di Una Giurisprudenza Casistica’. *Quaderni Costituzionali* 37, no. 4 (2017): 825–49.

Rudstein, David. ‘A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy’. *William & Mary Bill of Rights Journal* 14, no. 1 (2005): 193–242.

———. *Double Jeopardy: A Reference Guide to the United States Constitution*. Praeger, 2004.

———. ‘Double Jeopardy and the Fraudulently-Obtained Acquittal’. *Missouri Law Review* 60, no. 3 (1995): 607–51.

———. ‘Retrying the Acquitted in England, Part I: The Exception to the Rule against Double Jeopardy for New and Compelling Evidence’. *San Diego International Law Journal* 8, no. 2 (2007): 387.

———. ‘Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges’ Rulings of “No Case to Answer”’. *San Diego International Law Journal* 13, no. 1 (2011): 5.

Rudstein, David S. ‘Double Jeopardy in Juvenile Proceedings’. *William and Mary Law Review* 14, no. 2 (1972): 266–311.

Sackett, Robin M. ‘The Impact of Austin v. United States: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings’. *Golden Gate University Law Review* 24, no. 2 (1994): 495–522.

Saltzburg, Stephen, and Daniel Capra. *American Criminal Procedure: Cases and Commentary*. 4 edition. West Academic Publishing, 1992.

Sardegna, Robin. ‘No Longer in Jeopardy: The Impact of Hudson v. United States on the Constitutional Validity of Civil Monetary Penalties for Violations of Securities Laws Under the Double Jeopardy Clause’. *Valparaiso University Law Review* 33, no. 1 (2011): 115–80.

Sarmiento, Daniel. ‘El Principio Ne Bis In Idem En La Jurisprudencia Del Tribunal de Justicia de La Comunidad Europea’. In *El Principio de Ne Bis in Idem En El Derecho Penal Europeo e Internacional*, edited by Luis Arroyo Zapatero and Nieto Martín, Adán, 37–64. Ediciones de la Universidad de Castilla-La Mancha, 2007.

———. ‘Ne Bis in Idem in the Case Law of the European Court of Justice’. In *Ne Bis in Idem in EU Law*, edited by Bas Van Bockel, 103–30. Cambridge University Press, 2016.

Satzger, Helmut. ‘Application Problems Relating to “Ne Bis in Idem” as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR’. *Eucrim*, no. 3 (2020): 213–17.

———. *International and European Criminal Law*. 3 edizione. C. H. Beck – Hart – Nomos, 2018.

Schabas, William A. *An Introduction to the International Criminal Court*. 6th ed. Cambridge University Press, 2020.

Schaefer, Walter V. ‘Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe’. *California Law Review* 58, no. 2 (1970): 391–404.

Schmitt, Deborah L. ‘Fifth Amendment--Double Jeopardy: Legislative Intent Controls in Crimes and Punishments Supreme Court Review’. *Journal of Criminal Law and Criminology* 74, no. 4 (1983): 1300–1314.

Schomburg, Wolfgang. ‘Criminal Matters: Transnational Ne Bis in Idem in Europe—Conflict of Jurisdictions—Transfer of Proceedings’. *ERA Forum* 13, no. 3 (2012): 311–24.

Schoone, Adrian P. ‘Collateral Estoppel in Negligence Actions’. *Marquette Law Review* 41, no. 4 (1958): 456–73.

Schwartz, David L., and Christopher B. Seaman. ‘Standards of Proof in Civil Litigation: An Experiment from Patent Law’. *Harvard Journal of Law & Technology* 26, no. 2 (2013): 429–80.

Scott, Austin Wakeman. ‘Collateral Estoppel by Judgment’. *Harvard Law Review* 56, no. 1 (1942): 1–29.

Sharpe, Robert J., and Kent Roach. *The Charter of Rights and Freedoms*. 6 edition. Irwin Law, 2017.

Shreve, Nina. 'Expanded Application of Collateral Estoppel Defense in Criminal Prosecutions (United States Ex Rel. Rogers v. LaVallee)'. *St. John's Law Review* 50, no. 2 (1975): 339–47.

Sieber, Ulrich. 'Administrative Sanction Law in Germany'. In *The Limits of Criminal Law. Anglo-German Concepts and Principles*, edited by Matthew Dyson and Benjamin Vogel, 301–31. Intersentia, 2018.

Siegler, Adam. 'Alternative Grounds in Collateral Estoppel'. *Loyola of Los Angeles Law Review* 17, no. 4 (1984): 1085–1124.

Sigler, Jay A. 'A History of Double Jeopardy'. *American Journal of Legal History* 7, no. 4 (1963): 285–311.

———. 'Federal Double Jeopardy Policy'. *Vanderbilt Law Review* 19, no. 2 (1966): 375–405.

Silva, Chiara. *Sistema Punitivo e Concorso Apparante de Illeciti*. Giappichelli, 2018.

Simon, Michelle S. 'Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back'. *University of Memphis Law Review* 34, no. 4 (2004): 753–88.

Smith, J. C., and Brian Hogan. *Criminal Law*. Butterworths, 1992.

Soldo, Linda J. 'Parklane Hoisery: Offensive Use of Nonmutual Collateral Estoppel in Federal Courts'. *Catholic University Law Review* 29, no. 2 (1980): 509–28.

Solomon, Matthew C. 'The Perils of Minimalism: United States v. Bajakajian in the Wake of the Supreme Court's Civil Double Jeopardy Excursion Note'. *Georgetown Law Journal* 87, no. 3 (1999): 849–86.

Sousa Mendes, Paulo de. 'El Estándar de Prueba y Las Probabilidades: Una Propuesta de Interpretación Inspirada En El Derecho Comparado'. In *Fundamentos de Derecho Probatorio En Materia Penal*, edited by Kai Ambos and Ezequiel Malarino, 127–55. Tirant lo Blanch, 2019.

Steinberg, Marc. 'Right to Speedy Trial: The Constitutional Right and Its Applicability to the Speedy Trial Act of 1974'. *Journal of Criminal Law and Criminology* 66, no. 3 (1976): 229.

Stinneford, John F. 'Dividing Crime, Multiplying Punishments'. *U.C. Davis Law Review* 48, no. 5 (2015): 1955–2034.

Storper, Scott. ‘Double Jeopardy’s Door Revolves Again in United States v. Dixon: The Untimely Death of the “Same Conduct” Standard’. *University of Miami Law Review* 49, no. 3 (1995).

Stratenwerth, Günther. *Derecho Penal. Parte General I*. 4 edition. Thomson-Civitas, 2005.

Subin, Andrew L. ‘The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation’. *Seattle University Law Review* 19, no. 2 (1996): 253–88.

Šugman, Katja. ‘An Increasingly Blurred Division between Criminal and Administrative Law’. In *Visions of Justice. Liber Amicorum Mirjan Damaška*, edited by Bruce Ackerman, Kai Ambos, and Hrvoje Sikirić, 351–70. Duncker & Humblot, 2016.

Šugman, Katja, and Matjaž Jager. ‘The Organization of Administrative and Criminal Law in National Legal Systems: Exclusion, Organized or Non-Organized Co-Existence’. In *Do Labels Still Matter?: Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU*, edited by Francesca Galli and Anne Weyembergh, 155–68. Université de Bruxelles, 2014.

Summers, Brian L. ‘Double Jeopardy: Rethinking the Parameters of the Multiplicity Prohibition’. *Ohio State Law Journal* 56, no. 5 (1995): 1595–1618.

Tallgren, Immi, and Astrid Reisinger Coracini. ‘Article 20. Ne Bis in Idem’. In *The Rome Statute of the International Criminal Court. A Commentary*, edited by Otto Triffterer and Kai Ambos, 3rd ed. C. H. Beck – Hart – Nomos, 2016.

Talmadge, Philip A. ‘Preface: Double Jeopardy in Washington and Beyond Double Jeopardy: The Civil Forfeiture Debate’. *Seattle University Law Review* 19, no. 2 (1996): 209–16.

Taylor, Nyssa. ‘England and Australia Relax the Double Jeopardy Privilege for Those Convicted of Serious Crimes’. *Temple International and Comparative Law Journal* 19, no. 1 (2005): 189–218.

Theis, William H. ‘The Double Jeopardy Defense and Multiple Prosecutions for Conspiracy’. *SMU Law Review* 49, no. 2 (1996): 269–308.

Theodorakis, Nikolaos. ‘The Role of Administrative Sanctions in Criminal Law. From Minor Offences to Corporate Misconduct’. In *The Limits of Criminal Law. Anglo-German Concepts and Principles*, edited by Matthew Dyson and Benjamin Vogel, 273–300. Intersentia, 2018.

Thomas III, George C. *Double Jeopardy: The History, The Law*. New York University Press, 1998.

———. ‘Multiple Punishments for the Same Offense: The Analysis After Missouri v. Hunter or Don Quixote, the Sargasso Sea, and the Gordian Knot’. *Washington University Law Review* 62, no. 1 (1984): 79–124.

Tomkin, Jonathan. ‘Article 50’. In *The EU Charter of Fundamental Rights: A Commentary*, edited by Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward, 1373–1412. Hart Publishing, 2014.

Trechsel, Stefan, and Sarah Summers. *Human Rights in Criminal Proceedings*. Oxford University Press, 2005.

Úbeda, Amaya. ‘The Right to Due Process’. In *The Inter-American Court of Human Rights: Case-Law and Commentary*, edited by Laurence Burgorgue-Larsen and Amaya Ubeda de Torres, 641–72. Oxford University Press, 2011.

United States Department of Justice. ‘Justice Manual. Title 9-2.031 - Dual and Successive Prosecution Policy (“Petite Policy”)’. Accessed 22 June 2020. https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals.

Van Bockel, Bas. ‘Case C-436/04, Criminal Proceedings against Léopold Henri Van Esbroeck, Case C-150/05, Jean Leon Van Straaten v. Netherlands and Italy, Case C-467/04, Criminal Proceedings against G. Francesco Gasparini, José Ma L.A. Gasparini, G. Costa Bozzo, Juan de Lucchi Calcagno, Francesco Mario Gasparini, José A. Hormiga Marrero, Sindicatura Quiebra, Judgment of the Court of Justice of 28 September 2006, First Chamber [2006] ECR I9199.’ *Common Market Law Review* 45, no. 1 (2008): 223–44.

———. ‘Right Not to Be Tried or Punished Twice’. In *Theory and Practice of the European Convention on Human Rights*, edited by Pieter Van Dijk, Fried Van Hoof, Arjen Van Rijn, and Leo Zwaak, 5th ed., 981–90. Intersentia, 2018.

———. ‘The European Ne Bis in Idem Principle. Substance, Sources and Scope’. In *Ne Bis in Idem in EU Law*, edited by Bas Van Bockel, 13–52. Cambridge University Press, 2016.

———. ‘The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance’. *ERA Forum* 13, no. 3 (2012): 325–47.

Van Den Wyngaert, Christine, and Tom Ongena. ‘Ne Bis in Idem Principle, Including the Issue of Amnesty’. In *The Rome Statute of the International Criminal Court:*

A Commentary, edited by Antonio Cassese, Paola Gaeta, and John R. W. D. Jones, Vol. I B. Oxford University Press, 2002.

Van Kempen, Piet Hein, and Joeri Bemelmans. 'EU Protection of the Substantive Criminal Law Principles of Guilt and Ne Bis in Idem under the Charter of Fundamental Rights: Underdevelopment and Overdevelopment in an Incomplete Criminal Justice Framework'. *New Journal of European Criminal Law* 9, no. 2 (2018): 247–64.

Vars, Fredrick E. 'Toward a General Theory of Standards of Proof'. *Catholic University Law Review* 60, no. 1 (2011): 1–46.

Ventoruzzo, Marco. 'When Market Abuse Rules Violate Human Rights: Grande Stevens v. Italy and the Different Approaches to Double Jeopardy in Europe and the US'. *European Business Organization Law Review* 16, no. 1 (2015): 145–65.

Vervaele, John. 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?' *Utrecht Law Review* 9, no. 4 (2013): 211–29.

Vervaele, John A. E. 'Schengen and Charter-Related Ne Bis in Idem Protection in the Area of Freedom, Security and Justice: M and and Zoran Spasic'. *Common Market Law Review* 52, no. 5 (2015): 1339–59.

———. 'The Transnational e Bis in Idem Principle in the EU. Mutual Recognition and Equivalent Protection of Human Rights'. *Utrecht Law Review* 1, no. 2 (2005): 100–118.

Vestal, Allan D. 'Preclusion/Res Judicata Variables: Nature of the Controversy'. *Washington University Law Quarterly*, no. 2 (1965): 158–94.

Viganò, Francesco, and Enrico Maria Mancuso. 'Art. 4 Prot. N. 7'. In *Corte Di Strasburgo e Giustizia Penale*, edited by Giulio Ubertis and Francesco Viganò, 374–85. Giappichelli, 2016.

Vines, J. Andrew. 'United States v. Ursery: The Supreme Court Refuses to Extend Double Jeopardy Protection to Civil in Rem Forfeiture'. *Arkansas Law Review* 50, no. 4 (1997): 797–840.

Waggoner, Michael J. 'Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not'. *Review of Litigation* 12, no. 2 (1993): 391–440.

Wagner, Robert E. 'Corporate Criminal Prosecutions and Double Jeopardy'. *Berkeley Business Law Journal* 16, no. 1 (2019): 205–48.

Wasmeier, Martin. ‘The Principle of Ne Bis in Idem’. *Revue Internationale de Droit Penal* 77, no. 1 (2006): 121–30.

Watkins, Amy E. ‘Double Jeopardy Clause - Government May Bring Parallel Criminal Prosecution and In Rem Forfeiture Actions without Violating the Double Jeopardy Clause Survey: Fifth Amendment’. *Seton Hall Constitutional Law Journal* 7, no. 1 (1996): 287–92.

Wattel, Peter. ‘Ne Bis in Idem and Tax Offences in EU Law and ECHR Law’. In *Ne Bis in Idem in EU Law*, edited by Bas Van Bockel, 167–216. Cambridge University Press, 2016.

Weaver, Russell, Leslie Abramson, John Burkoff, and Catherine Hancock. *Principles of Criminal Procedure*. 4th ed. West Academic Publishing, 2012.

Weisser, Bettina. ‘The European Convention on Human Rights and the European Court of Human Rights as Guardians of Fair Criminal Proceedings in Europe’. In *The Oxford Handbook of Criminal Process*, edited by Darryl K. Brown, Jenia Iontcheva Turner, and Bettina Weisser, 89–114. Oxford University Press, 2019.

Wells, Adam C. ‘Multiple-Punishment and the Double Jeopardy Clause: The United States v. Ursery Decision’. *St. John’s Law Review* 71, no. 1 (1997): 153–72.

Westen, Peter, and Richard Drubel. ‘Toward a General Theory of Double Jeopardy’. *Supreme Court Review* 1978, no. 1 (1978): 81–169.

Weyembergh, Anne, and Nicolas Joncheray. ‘Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture That Needs to Be Addressed’. *New Journal of European Criminal Law* 7, no. 2 (2016): 366–85.

Whelan, Peter. *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges*. Oxford University Press, 2014.

Wilmoth, David. ‘Civil Procedure: Collateral Estoppel: Collateral Estoppel Applied Offensively Where Plaintiffs Were Not Parties or Privies in Prior Action. (Parklane Hosiery Co. v. Shore).’ *Marquette Law Review* 63, no. 1 (1979): 114–31.

Wils, Wouter P. J. ‘The Principle of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis’. *World Competition* 26, no. 2 (2003): 131–48.

Winter, Lorena Bachmaier, and Antonio del Moral García. *Criminal Law in Spain*. 3rd ed. Wolters Kluwer, 2020.

Wong, Christoffer. ‘Criminal Sanctions and Administrative Penalties: The Quid of the Ne Bis in Idem Principle and Some Original Sins’. In *Do Labels Still Matter?:*

Blurring Boundaries between Administrative and Criminal Law. The Influence of the EU, edited by Francesca Galli and Anne Weyembergh, 219–46. Université de Bruxelles, 2014.

Wood, Cynthia Sherrill. 'Asset, Forfeiture and the Excessive Fines Clause: An Epilogue to Austin v. United States'. *Wake Forest Law Review* 29, no. 4 (1994): 1357–1404.

Woods, Christina Galye. 'The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole'. *University of Baltimore Law Review* 24, no. 1 (1994): 177–210.

Zagrebelsky, Vladimiro, Roberto Chenal, and Laura Tomasi. *Manuale Dei Diritti Fondamentali in Europa*. Il Mulino, 2016.

TABLE OF CASES

1. The United States

1.1. Supreme Court.

Fox v. The State of Ohio, 46 U.S. 410 (1847).

United States v. Marigold, 50 U.S. 560 (1850).

Moore v. Illinois, 55 U.S. 13 (1852).

Ex parte Lange, 85 U.S. 163 (1873).

Cromwell v. County of Sac, 94 U.S. 351 (1877).

Coffey v. United States, 116 U.S. 427 (1886).

In re Nielsen, 131 U. S. 176 (1889).

United States v. Ball, 163 U.S. 662 (1896).

Stone v. United States, 167 U.S. 178 (1897).

Southern Pacific R. Co. v. United States, 168 U.S. 1 (1897).

Grafton v. United States, 206 U.S. 333 (1907).

Weems v. United States, 217 U. S. 349 (1910).

Gavieres v. United States, 220 U.S. 338 (1911).

Lewis v. Frick, 233 U.S. 291 (1914).

Frank v. Mangum, 237 U.S. 309 (1915).

Morgan v. Devine, 237 U.S. 632 (1915).

United States v. Oppenheimer, 242 U.S. 85 (1916).

Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917).

Oklahoma v. Texas, 256 U.S. 70 (1921).

Lipke v. Lederer, 259 U.S. 557 (1922).

United States v. Lanza, 260 U.S. 377 (1922).

Hebert v. Louisiana, 272 U.S. 312 (1926).

Murphy v. United States, 272 U.S. 630 (1926).

Albrecht v. United States, 273 U.S. 1 (1927).

Westfall v. United States, 274 U.S. 256 (1927).

United States v. Adams, 281 U.S. 202 (1930).

United States v. Benz, 282 U.S. 304 (1931).

United States v. La Franca, 282 U.S. 568 (1931).

Various Items of Personal Property et al. v. United States, 282 U.S. 577 (1931).
Blockburger v. United States, 284 U.S. 299 (1932).
A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).
United States v. Constantine, 296 U.S. 287 (1935).
Puerto Rico v. Shell Co., 302 U.S. 253 (1937).
Palko v. Connecticut, 302 U.S. 319 (1937).
Helvering v. Mitchell, 303 U.S. 391 (1938).
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).
In re William v. Bradley, 318 U.S. 50 (1943).
Jerome v. United States, 318 U.S. 101 (1943).
Screws v. United States, 325 U.S. 91 (1945).
American Tobacco Co. v. U.S., 328 U.S. 781 (1946).
United States v. Bayer, 331 U.S. 532 (1947).
Sealfon v. United States, 332 U.S. 575 (1948).
Wade v. Hunter, 336 U.S. 684 (1949).
Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).
Rex Trailer Co., Inc. v. United States, 350 U.S. 148 (1956).
Green v. United States, 355 U.S. 184 (1957).
Trop v. Dulles, 356 U.S. 86 (1958).
Hoag v. New Jersey, 356 U.S. 464 (1958).
Gore v. United States, 357 U.S. 386 (1958).
Bartkus v. Illinois, 359 U.S. 121 (1959).
Abbate v. United States, 359 U.S. 187 (1959).
Petite v. United States, 361 U. S. 529 (1960).
Flemming v. Nestor, 363 U.S. 603 (1960).
Chaunt v. United States, 364 U.S. 350 (1960).
Fong Foo v. United States, 369 U.S. 141 (1962).
Robinson v. California, 370 U.S. 660 (1962).
Marakar v. United States, 370 U. S. 723 (1962).
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
Reynolds v. Sims, 377 U.S. 533 (1964).
United States v. Ewell, 383 U.S. 116 (1966).
United States v. Utah Construction Co., 384 U.S. 394 (1966).
Woodby v. Immigration Service, 385 U.S. 276 (1966).

Klopfer v. North Carolina, 386 U.S. 213 (1967).
North Carolina v. Pearce, 395 U.S. 711 (1969).
Benton v. Maryland, 395 U.S. 784 (1969).
In re Winship, 397 U.S. 358 (1970).
Waller v. Florida, 397 U.S. 387 (1970).
Ashe v. Swenson, 397 U.S. 436 (1970).
Price v. Georgia, 398 U.S. 323 (1970).
United States v. Jorn, 400 U.S. 470 (1971).
Simpson v. Florida, 403 U.S. 384 (1971).
Blonder Tongue v. University of Illinois Foundation, 402 U.S. 313 (1971).
Harris v. Washington, 404 U.S. 55 (1971).
Turner v. Arkansas, 407 U.S. 366 (1972).
Barker v. Wingo, 407 U.S. 514 (1972).
One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972).
Robinson v. Neil, 409 U.S. 505 (1973).
Illinois v. Somerville, 410 U.S. 458 (1973).
Strunk v. United States, 412 U.S. 434 (1973).
United States v. Wilson, 420 U.S. 332 (1975).
United States v. Jenkins, 420 U.S. 358 (1975).
Serfass v. United States, 420 U.S. 377 (1975).
Iannelli v. United States, 420 U.S. 770 (1975).
Breed v. Jones, 421 U.S. 519 (1975).
United States v. Dinitz, 424 U.S. 600 (1976).
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).
Ingraham v. Wright, 430 U.S. 651 (1977).
Jeffers v. United States, 432 U.S. 137 (1977).
Brown v. Ohio, 432 U.S. 161 (1977).
Coker v. Georgia, 433 U.S. 584 (1977).
Harris v. Oklahoma, 433 U. S. 682 (1977).
Arizona v. Washington, 434 U.S. 497 (1978).
United States v. Ceccolini, 435 U.S. 268 (1978).
United States v. Wheeler, 435 U.S. 313 (1978).
Burks v. United States, 437 U.S. 1 (1978).
Crist v. Bretz, 437 U.S. 28 (1978).

Sanabria v. United States, 437 U.S. 54 (1978).
United States v. Scott, 437 U.S. 82 (1978).
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).
Montana v. United States, 440 U.S. 147 (1979).
Addington v. Texas, 441 U. S. 418 (1979).
Thompson v. United States, 444 U.S. 248 (1980).
Vance v. Terrazas, 444 U.S. 252 (1980).
Whalen v. United States, 445 U.S. 684 (1980).
Standefer v. United States, 447 U.S. 10 (1980).
Illinois v. Vitale, 447 U.S. 410 (1980).
United States v. Ward, 448 U.S. 242 (1980).
Allen v. McCurry, 449 U.S. 90 (1980).
United States v. Di Francesco, 449 U.S. 117 (1980).
Steadman v. SEC, 450 U.S. 91 (1981).
Albernaz v. United States, 450 U.S. 333 (1981).
Bullington v. Missouri, 451 U.S. 430 (1981).
Tibbs v. Florida, 457 U.S. 31, (1982).
Missouri v. Hunter, 459 U.S. 359 (1983).
Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).
Haring v. Prosise, 462 U.S. 306 (1983).
Solem v. Helm, 463 U.S. 277 (1983).
United States v. Mendoza, 464 U.S. 154 (1984).
United States v. Stauffer Chemical Co., 464 U.S. 165 (1984).
United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984).
Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984).
Colorado v. New Mexico, 467 U.S. 310 (1984).
Ohio v. Johnson, 467 U.S. 493 (1984).
Richardson v. United States, 468 U.S. 317 (1984).
Garrett v. United States, 471 U.S. 773 (1985).
Heath v. Alabama, 474 U.S. 82 (1985).
Morris v. Mathews, 475 U.S. 237 (1986).
Allen v. Illinois, 478 U.S. 364 (1986).
United States v. Salerno, 481 U. S. 739 (1987).
Ricketts v. Adamson, 483 U.S. 1 (1987).

Thompson v. Oklahoma, 487 U.S. 815 (1988).
United States v. Halper, 490 U.S. 435 (1989).
Jones v. Thomas, 491 U.S. 376 (1989).
Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257 (1989).
Penry v. Lynaugh, 492 U.S. 302 (1989).
Stanford v. Kentucky, 492 U.S. 361 (1989).
Dowling v. United States, 493 U.S. 342 (1990).
Grady v. Corbin, 495 U.S. 508 (1990).
Grogan v. Garner, 498 U.S. 279 (1991).
United States v. Felix, 503 U.S. 378 (1992).
Medina v. California, 505 U.S. 437 (1992).
Alexander v. United States, 509 U.S. 544 (1993).
Austin v. United States, 509 U.S. 602 (1993).
United States v. Dixon, 509 U.S. 688 (1993).
Schiro v. Farley, 510 U.S. 222 (1994).
Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1994).
Rutledge v. United States, 517 U.S. 292 (1996).
Cooper v. Oklahoma, 517 U.S. 348 (1996).
United States v. Ursery, 518 U.S. 267 (1996).
Kansas v. Hendricks, 521 U.S. 346 (1997).
Hudson v. United States, 522 U.S. 93 (1997).
Lewis v. United States, 523 U.S. 155 (1998).
United States v. Bajakajian, 524 U.S. 321 (1998).
Monge v. California, 524 U.S. 721 (1998).
New Hampshire v. Maine, 532 U.S. 742 (2001).
Atkins v. Virginia, 536 U.S. 304 (2002).
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003).
Ewing v. California, 538 U.S. 11 (2003).
Lockyer v. Andrade, 538 U.S. 63 (2003).
United States v. Lara, 541 U.S. 193 (2004).
Roper v. Simmons, 543 U.S. 551 (2005).
Yeager v. United States, 557 U.S. 110 (2009).
Graham v. Florida, 560 U.S. 48 (2010).
Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. 91 (2011).

Blueford v. Arkansas, 566 U.S. 599 (2012).
Bravo-Fernandez v. United States, 580 U.S. __ (2016).
Kokesh v. Securities and Exchange Commission, 581 U.S. ___ (2017).
Currier v. Virginia, 585 U.S. __ (2018).
Gamble v. United States, 587 U.S. __ (2019).

1.2. Court of Appeal for the Fourth Circuit.
United States v. Bank, No. 19-4356 (2020).

1.3. Court of Appeal for the Sixth Circuit.
United States v. Dyer, No. 17-6174 (2018).

2. Canada

2.1. Supreme Court of Canada.
Kienapple v. R., [1975] 1 SCR 729.
R. v. Loyer et al., [1978] 2 SCR 631.
Sheppe v. The Queen, [1980] 2 SCR 22.
McKinney v. The Queen, [1980] 1 SCR 401.
Krug v. The Queen, [1985] 2 SCR 255.
Mills v. The Queen, [1986] 1 SCR 863.
R. v. Prince, [1986] 2 SCR 480.
R. v. Wigman, [1987] 1 SCR 246.
Canada v. Schmidt, [1987] 1 SCR 500.
Argentina v. Mellino, [1987] 1 SCR 536.
R. v. Smith, [1987] 1 SCR 1045.
R. v. Wigglesworth, [1987] 2 SCR 541.
Burnham v. Metropolitan Toronto Police, [1987] 2 SCR 572.
Trumbley and Pugh v. Metropolitan Toronto Police, [1987] 2 SCR 577.
Trimm v. Durham Regional Police, [1987] 2 SCR 582.
R. v. Rahey, [1987] 1 SCR 588.
R. v. Morgentaler, [1988] 1 SCR 30.
Professionnelle des Médecins v. Thibault, [1988] 1 SCR 1033.
R. v. Shubley, [1990] 1 SCR 3.

R. v. Van Rassel, [1990] 1 SCR 225.
Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 SCR 869.
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606.
R. v. Potvin, [1993] 2 SCR 880.
R. v. Richard, [1996] 3 SCR 525.
R. v. MacDougall, [1998] 3 SCR 45.
R. v. Morrisey, [2000] 2 SCR 90.
Cartaway Resources Corp. (Re), [2004] 1 SCR 672
Martineau v. M.N.R., [2004] 3 SCR 737.
R. v. G.R., [2005] 2 SCR 371.
R. v. Rodgers, [2006] 1 SCR 554.
Canada v. Whaling, [2014] 1 SCR. 392.
R. v. Nur, [2015] 1 SCR 773.
Guindon v. Canada, [2015] 3 SCR. 3.
Goodwin v. British Columbia, [2015] 3 SCR 250.
R. v. Lloyd [2016] 1 SCR 130.
R. v. Jordan, [2016] 1 SCR 631.
R. v. K. R. J., [2016] 1 SCR 906.

2.2. Federal Court of Appeal.

United States Steel Corporation v. Canada, [2011] FCA 176.

2.3. Ontario Superior Court of Justice.

Canada (Competition Bureau) v. Chatr Wireless Inc., [2013] ONSC 5315.

2.4. Court of Appeal for Ontario.

R. v. Gushue, [1976] ONCA 52.
R. v. Marleau, [2005] ONCA 8667.
R. v. Kinnear, [2005] ONCA 21092.
Rowan v. Ontario Securities Commission, [2012] ONCA 208.

2.5. Court of Appeal of Alberta.

Alberta Securities Commission v. Brost, [2008] ABCA 326.
Lavallee v. Alberta (Securities Commission), [2010] ABCA 48.

R. v. Peers, [2015] ABCA 407.

2.6. Manitoba Court of Appeal.

R. v. McKinney, [1979] 2 W.W.R. 545, 46 C.C. (2d) 566.

2.7. British Columbia Court of Appeal.

R. v. Deslisle, [2003] BCCA 196.

Michaels v. British Columbia Securities Commission, [2016] BCCA 144.

R. v. Samji, [2017] BCCA 415.

2.8. Court of Queen's Bench for Saskatchewan.

R. v. Boychuk, [1995] SKQB 5979.

3. Constitutional Court of Spain

Judgment 2-1981, 30 January 1981.

Judgment 77-1983, 3 October 1983.

Judgment 159-1985, 17 November 1985.

Judgment 23-1986, 14 February 1986.

Judgment 66-1986, 23 May 1986.

Judgment 94-1986 8 July 1986.

Judgment 159-1987, 26 October 1987.

Judgment 239-1988, 14 December 1988.

Judgment 98-1989, 1 June 1989.

Judgment 107-1989, 8 June 1989.

Judgment 22-1990, 15 February 1990.

Judgment 154-1990, 15 October 1990.

Judgment 119-1991, 3 June 1991.

Judgment 234-1991, 10 December 1991.

Judgment 270-1994, 17 October 1994.

Judgment 164-1995, 13 December 1995.

Judgment 204-1996, 16 December 1996.

Judgment 222-1997, 4 December 1997.

Judgment 177-1999, 11 October 1999.

Judgment 276-2000, 16 November 2000.
Judgment 47-2001, 15 February 2001.
Judgment 132-2001, 8 June 2001.
Judgment 152-2001, 2 July 2001.
Judgment 2-2003, 16 January 2003.
Judgment 48-2003, 12 March 2003.
Judgment 100-2003, 2 June 2003.
Judgment 229-2003, 18 December 2003.
Judgment 180-2004, 2 November 2004.
Judgment 246-2004, 20 December 2004.
Judgment 26-2005, 14 February 2005.
Judgment 188-2005, 7 July 2005.
Judgment 334-2005, 20 December 2005.
Judgment 98-2006, 27 March 2006.
Judgment 331-2006, 20 November 2006.
Judgment 48-2007, 12 March 2007.
Judgment 60-2008, 26 May 2008.
Judgment 91-2008, 21 July 2008.
Judgment 1-2009, 12 January 2009.
Judgment 91-2009, 20 April 2009.
Judgment 77-2010, 19 October 2010.
Judgment 126-2011, 18 July 2011.
Judgment 70-2012, 16 April 2012.
Judgment 189-2013, 7 November 2013.
Judgment 86-2017, 4 July 2017.
Judgment 3-2019, 14 January 2019.
Judgment 1-2020, 14 January 2020.

4. European Court of Human Rights

Wemhoff v. Germany, no 2122/64, 27 June 1968.
Neumeister v. Austria, no 1936/63, 27 June 1968.
Engel and Others v. The Netherlands, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976.

König v. Germany, no. 6232/73, 28 June 1978.
Deweer v. Belgium, no. 6903/75, 27 February 1980.
Eckle v. Germany, no. 8130/78, 15 July 1982.
Öztürk v. Germany, no. 8544/79, 21 February 1984.
Campbell and Fell v. The United Kingdom, no. 7819/77; 7878/77, 28 June 1984.
Baggetta v. Italy, no. 10256/83, 25 June 1987.
Milasi v. Italy, no. 10527/83, 25 June 1987.
B. v. Austria, no. 11968/86, 28 March 1990.
Weber v. Switzerland, no. 11034/84, 22 May 1990.
Dobbertin v. France, no. 13089/87, 25 February 1993.
Bendenoun v. France, no. 12547/86, 24 February 1994.
Welch v. The United Kingdom, no. 17440/90, 9 February 1995.
Gradinger v. Austria, no. 15963/90, 23 October 1995.
Benham v. The United Kingdom, no. 19380/92, 10 June 1996.
Pierre-Bloch v. France, no. 120/1996/732/938, 21 October 1997.
Oliveira v. Switzerland, no. 84/1997/868/1080, 30 July 1998.
Adamson v. The United Kingdom, no. 42293/98, 26 January 1999.
Ponsetti and Chesnel v. France, nos. 36855/97 and 41731/98, 14 September 1999.
Escoubet v. Belgium, no. 26780/95, 28 October 1999.
Mulot v. France, no. 37211/97, 14 December 1999.
R. T. v. Switzerland, no. 31982/96, 30 May 2000.
Refah Partisi (the Welfare Party) and Others v. Turkey, nos. 41340/98, 41342/98, 41343/98, 41344/98, 3 October 2000.
Luksch v. Austria, no. 37075/97, 21 November 2000.
Hangl v. Austria, no. 38716/97, 20 March 2001.
Franz Fischer v. Austria, no. 37950/97, 29 May 2001.
W. F. v. Austria, no. 38275/97, 30 May 2002.
Göktan v. France, no. 33402/96, 2 July 2002.
Sailer v. Austria, no. 38237/97, 6 September 2002.
Smirnova and Smirnova v. Russia, nos. 46133/99 and 48183/99, 3 October 2002.
Döry v. Sweden, no. 28394/95, 12 November 2002.
Manasson v. Sweden, no. 41265/98, 8 April 2003.
Ezeh and Connors v. The United Kingdom, nos. 39665/98 and 40086/98, 9 October 2003.

Diamantides v. Greece, no 60821/00, 23 October 2003.
Pursiheimo v. Finland, no. 57795/00, 25 November 2003.
Rouille v. France, no 50268/99, 6 January 2004.
Kangasluoma v. Finland, no. 48339/99, 20 January 2004.
Nikitin v. Russia, no. 50178/99, 20 July 2004.
Banfield v. The United Kingdom, no. 6223/04, 18 October 2005.
Sundqvist v. Finland, no. 75602/01, 22 November 2005.
Nilsson v. Sweden, no. 73661/01, 13 December 2005.
Bratyakin v. Russia, no. 72776/01, 9 March 2006.
Klein v. Austria, no. 57028/00, 4 May 2006.
Fadin v. Russia, no. 58079/00, 27 July 2006.
Maszni v. Romania, no 59892/00, 21 September 2006.
Jussila v. Finland, no. 73053/01, 23 November 2006.
Grecu v. Romania, no. 75101/01, 30 November 2006.
Hauser-Sporn v. Austria, no. 37301/03, 7 December 2006.
Storbråten v. Norway, no. 12277/04, 1 February 2007.
Mjelde v. Norway, no. 11143/04, 1 February 2007.
Radchikov v. Russia, no. 65582/01, 24 May 2007.
Schutte v. Austria, no. 18015/03, 26 July 2007.
Haarvig v. Norway, no. 11187/05, 11 December 2007.
Garretta v. France, no 2529/04, 4 March 2008.
Xheraj v. Albania, no. 37959/02, 29 July 2008.
Nikolay Stepanovich and Ivan Stepanovich Goncharovy v. Russia, no. 77989/01, 27 November 2008.
Carlberg v. Sweden, no. 9631/04, 27 January 2009.
Kiselev v. Russia, no. 75469/01, 29 January 2009.
Sergey Zolotukhin v. Russia, no. 14939/03, 10 February 2009.
Ruotsalainen v. Finland, no. 13079/03, 16 June 2009.
Maresti v. Croatia, no. 55759/07, 25 June 2009.
Kart v. Turkey, no. 8917/05, 3 December 2009.
Gardel v. France, no. 16428/05, 17 December 2009.
Tsonyo Tsonev v. Bulgaria, no. 2376/03, 14 January 2010.
Kammerer v. Austria, no. 32435/06, 12 May 2010.
McFarlane v. Ireland, no. 31333/06, 10 September 2010.

Paksas v. Lithuania, no. 34932/04, 6 January 2011.

Vernes v. France, no. 30183/06, 20 January 2011.

Suhadolc v. Slovenia, no. 57655/08, 17 May 2011.

Kurdov and Ivanov v. Bulgaria, no 16137/04, 31 May 2011.

A. Menarini Diagnostics Srl v. Italy, no. 43509/08, 27 September 2011.

Tomasovic v. Croatia, no 53785/09, 18 October 2011.

Harkins and Edwards v. The United Kingdom, nos. 9146/07 and 32650/07, 17 January 2012.

Toth v. Croatia, no. 49635/10, 6 November 2012.

Willcox and Hurford v. The United Kingdom, nos. 43759/10 and 43771/12, 8 January 2013.

Müller-Hartburg v. Austria, no. 47195/06, 19 February 2013.

Vinter and Others v. United Kingdom, nos. 66069/09, 130/10 and 3896/10, 9 July 2013.

Pirttimäki v. Finland, no. 35232/11, 20 May 2014.

Muslija v. Bosnia and Herzegovina, no. 32042/11, 14 January 2014.

Grande Stevens and Others v. Italy, nos. 18640/10 and 4 others, 4 March 2014.

Nykänen v. Finland, no. 11828/11, 20 May 2014.

Glantz v. Finland, no. 37394/11, 20 May 2014.

Marguš v. Croatia, no. 4455/10, 27 May 2014.

Marčan v. Croatia, no. 40820/12, 10 July 2014.

Lucky Dev v. Sweden, no. 7356/10, 27 November 2014.

Rinas v. Finland, no. 17039/13, 27 January 2015.

Kiiveri v. Finland, no. 53753/12, 10 February 2015.

Boman v. Finland, no. 41604/11, 17 February 2015.

Kapetanios and Others v. Greece, nos. 3453/12, 42941/12 and 9028/13, 30 April 2015.

Yaikov v. Russia, no. 39317/05, 18 June 2015.

Berland v. France, no. 42875/10, 3 September 2015.

Milenković v. Serbia, no. 50124/13, 1 March 2016.

Palmén v. Sweden, no. 38292/15, 20 March 2016.

Dungveckis v. Lithuania, no. 32106/08, 12 April 2016.

Žaja v. Croatia, no. 37462/09, 4 October 2016.

Rivard v. Switzerland, no. 21563/12, 4 October 2016.

A and B v. Norway, nos. 24130/11 and 29758/11, 15 November 2016.

Tommaso v. Italy, no. 43395/09, 23 February 2017.

Chap Ltd. v. Armenia, no. 15485/09, 4 May 2017.
Jóhannesson and Others v. Iceland, no. 22007/11, 18 May 2017.
Šimkus v. Lithuania, no. 41788/11, 13 June 2017.
Kalēja v. Latvia, no. 22059/08, 5 October 2017.
Ramda v. France, no. 78477/11, 19 December 2017.
Kadusic v. Switzerland, no 43977/13, 9 January 2018.
Sancakli v. Turkey, no. 1385/07, 15 May 2018.
Serazin v. Croatia, no. 19120/15, 9 October 2018.
Navalnyy v. Russia, nos. 29580/12, 36847/12, 11252/13, 12317/13 and 43746/14, 15 November 2018.
Matthildur Ingvarsdottir v. Iceland, no. 22779/14, 4 December 2018.
Johanna Fröhlich v. Germany, no. 16741/16, 24 January 2019.
Orlen Lietuva Ltd. v. Lithuania, no. 45849/13, 29 January 2019.
Bjarni Ármannsson v. Iceland, no. 72098/14, 16 April 2019.
Nodet v. France, no. 47342/14, 6 June 2019.
Mihalache v. Romania, no. 54012/10, 8 July 2019.
Korneyeva v. Russia, no. 72051/17, 8 October 2019.
Khodorkovskiy and Lebedev v. Russia (no. 2), nos. 51111/07 and 42757/07, 14 January 2020.
Ghoumid and Others v. France, nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, 25 June 2020.
Velkov v. Bulgaria, no 34503/10, 21 July 2020.
Prina v. Romania, no. 37697/13, 8 September 2020.
Bajčić v. Croatia, no. 67334/13, 8 October 2020.
Sabalić v. Croatia, no. 50231/13, 14 January 2021.
Timofeyev and Postupkin v. Russia, nos. 45431/14 Et 22769/15, 19 January 2021.

5. Court of Justice of the European Union

C-118/75 - Watson and Belmann, 7 July 1976.
C-203/80 – Casati, 11 November 1981.
C-193/94 - Skanavi and Chryssanthakopoulos, 29 February 1996.
C-24/97 - Commission v Germany, 30 April 1998.
C-199/92 - Hüls AG v. Commission, 8 July 1999.

C-213/99 - de Andrade, 7 December 2000.
C-187/01 - Gözütok and Brügge, 11 February 2003.
C-204/00 - Aalborg Portland and Others v. Commission, 7 January 2004.
C-469/03 - Miraglia, 10 March 2005.
T-38/02 - Groupe Danone v. Commission, 25 October 2005.
C-436/04 - Van Esbroeck, 9 March 2006.
T-322/01 - Roquette Frères v. Commission, 27 September 2006.
C-150/05 - Van Straaten, 28 September 2006.
C-467/04 - Gasparini and Others, 28 September 2006.
C-367/05 - Kraaijenbrink, 18 July 2007.
C-288/05 - Kretzinger, 18 July 2007.
C-491/07 - Turanský, 22 December 2008.
T-161/05 - Hoechst v. Commission, 30 September 2009.
C-45/08 - Spector Photo Group NV and Chris Van Raemdonck v. Commissie voor het Bank, Financie en Assurantiewezen (CBFA), 23 December 2009.
C-261/09 - Mantello, 16 November 2010.
T-235/07 - Bavaria v. Commission, 16 June 2011.
C-150/10 - Beneo-Orafti, 21 July 2011.
C-489/10 - Bonda, 5 June 2012.
C-617/10 - Åklagaren v. Hans Åkerberg Fransson, 26 February 2013.
C-129/14 - Spasic, 27 May 2014.
C-398/12 - M, 5 June 2014.
C-486/14 - Kossowski, 29 June 2016.
T-14/14 - Islamic Republic of Iran Shipping Lines and Others v. Council, 17 February 2017.
C-217/15 - Orsi, 5 April 2017.
C-42/17 - M. A. S. and M. B, 5 December 2017.
C-524/15 - Menci, 20 March 2018.
C-537/16 - Garlsson Real Estate and Others, 20 March 2018.
C-596/16 - Di Puma, 20 March 2018.
T-290/17 - Stavytskyi, 30 January 2019.
T-461/17 - TN v. ENISA, 6 February 2019.
C-617/17 - Powszechny Zakład Ubezpieczeń na Życie, 3 April 2019.
C-857/19 - Slovak Telekom A. S., 25 February 2021.

6. United Nations Human Rights Committee

Communication no. 1001/2001, Gerardus Strik v. The Netherlands, 1 November 2002.
General Comment no. 32, 23 August 2007.
Communication no. 2631/2015, J. G. v. New Zealand, 2 November 2015.

7. Inter-American Court of Human Rights

Loayza Tamayo v. Peru, 17 September 1997 (Merits).
Cantoral-Benavides v. Peru, 18 August 2000 (Merits).
Carpio-Nicolle et al. v. Guatemala, 22 November 2004 (Merits, Reparations and Costs).
Lori Berenson-Mejía v. Peru, 25 November 2004 (Merits, Reparations and Costs).
Gutiérrez-Soler v. Colombia, 12 September 2005 (Merits, Reparations and Costs).
Almonacid-Arellano et al. v. Chile, 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs).
Nadege Dorzema et al. v. Dominican Republic, 24 October 2012 (Merits, Reparations and Costs).
Mohamed v. Argentina, 23 November 2012 (Preliminary Objection, Merits, Reparations and Costs).
J. v. Peru, 27 November 2013 (Preliminary Objection, Merits, Reparations and Costs).