A CRITICAL ANALYSIS ON ISSUANCE OF FALSE CHEQUES IN THE BANKING INDUSTRY AND THE LAW IN UGANDA, A CASE STUDY OF KAMPALA DISTRICT

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DECLARATION

I declare that this dissertation is the work of KIILU JOSHUA MUNYAE alone, except where due acknowledgement is made in the text. It does not include materials for which any other University degree or diploma has been awarded.

Signature:.....

Date:05/08/2015

APPROVAL

I certify that I have supervised and read this study and that in my opinion; it conforms to the acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Laws of Kampala International University,

Name of Supervisor: Her Worship BASAJABALABA JALIA.

Signature: .....

This 5th **Day of** August **2015**

DEDICATION

This Research paper is dedicated to my parents: my Dad, Mr. Kiilu Ronald Muithya, my Mum, Mrs. Esther Kiilu, my brother Mumo Nathan, my sisters Mrs Hellen John, Lillian Mumbua Kiilu, my uncles; Mr. Muthenya Geofrey, Mr. Munyae Wilfred and Aunties; Mrs Sarah Muthenya, Mrs Mutetu who believe in my ability to change the world amidst the challenge of material inadequacies.

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LIST OF ACRONYMS

BOU:	Bank of Uganda
Cap:	Chapter
EAC:	East African Community
EADB:	East African Development Bank
EIU:	Economic Intelligence Unit
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the Former Yugoslavia
MICR:	Magnetic Ink Character Recognition,
UDB:	Uganda Development Bank
UNIC:	United Nations International Covenant
US:	United States
WTO:	World Trade Organization

LIST OF CASES

Angelina Zabala Alonto, (Petitioner) Vs People of The Phillippines (Respondents) First division (G.R.No.1400078, December 9th, 2004)

Kolla Veera Vs Gorantia Rao and another on 1st Feb., 2011

Sangueetaben Vs State Of Gujarat and another 23rd April 20124.

Avi Enterprises Ltd V Orient Bank Ltd & Anor Hccs No 147 Of 2012

Sambasivam V. Public Prosecutor, Federation of Malaya [1950] A.C. 458, 479

Muchumbi V Uganda Constitutional Reference No. 17 Of 2011

LIST OF STATUTES

Constitution of the Republic of Uganda 1995

Financial Institutions Act 2004

Foreign Exchange Act, 2004

Geneva Convention 1949

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Micro Finance Deposit-Taking Institutions Act, 2003

Penal Code Act Cap 120

Rome Statute

United Nations Covenant on Civil and Political Rights

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ABSTRACT

This Article offers a coherent way of thinking about double jeopardy rules among sovereigns. Its theory has strong explanatory power for current double jeopardy law and practice in both U.S. federal and international legal systems, recommends adjustments to double jeopardy doctrine in both systems, and sharpens normative assessment of that doctrine. The Article develops a jurisdictional theory of double jeopardy under which sovereignty signifies independent jurisdiction to make and apply law. Using this theory, the Article recasts the history of the U.S. Supreme Court's "dual sovereignty" doctrine entirely in terms of jurisdiction, penetrating the opacity of the term sovereign as it is often deployed by the Court and supplying a useful analytical predictor for future extension of the doctrine. The Article then applies the theory to the international legal system to explain the confused and seemingly dissonant body of modern international law and practice on double jeopardy, including the international law of human rights and extradition, international criminal tribunal statutes, and the exercise of universal jurisdiction. The Article next explores the theory's implications for U.S and international law in light of two main double jeopardy concerns: the individual right to be free from multiple prosecutions and the sovereign ability to enforce law. It argues that since the U.S. dual sovereignty doctrine originally derived and continues to derive justification from the sovereign's jurisdiction over the defendant, the Court's present analysis is incomplete and betrays the doctrine's own foundations by ignoring a basic, and necessary, constitutional inquiry: whether a successively prosecuting sovereign's exercise of jurisdiction satisfies due process. This inquiry would enrich present doctrine by incorporating individual rights concerns that now are completely absent from dual sovereignty analysis and holds the potential to alter outcomes, especially in cases of successive prosecutions between U.S. states and by the federal government when it exercises jurisdiction extraterritorially.

The theory similarly enriches international doctrine through a reasonableness evaluation of a successively prosecuting nation-state's jurisdiction that resembles U.S. due process tests. Finally, the Article suggests that where multiple sovereigns legitimately may exercise jurisdiction it does not mean that they will; institutionalized comity mechanisms between enforcement authorities of different sovereigns can accommodate both the sovereign interest to enforce law and the individual interest to be free from multiple prosecutions by encouraging the representation of multiple sovereigns' interests in a single prosecution in a single forum

CHAPTER ONE

THE PROBLEM AND ITS SCOPE

1.1 Introduction.

This chapter entailed the background of the study, in regard to issuance of false cheques in Uganda as far as the independence times. It also provided for the objectives of the study, statement of the problem, research questions, scope of the study, significance of the study, synopsis of the study and what should be provided in the subsequent chapters. This chapter also provided for research methodology, and literature review.

1.2 Background of the study.

Prior to Uganda's independence in 1962, government-owned institutions dominated most banking in Uganda. In 1966 the Bank of Uganda, which controlled the issue of currency and managed foreign exchange reserves, became the central bank. Uganda Commercial Bank, which had fifty branches throughout the country, dominated commercial banking and was wholly owned by the government. The Uganda Development Bank was a state-owned development finance institution, which channeled loans from international sources into Ugandan enterprises and administered most of the development loans made to Uganda.

The East African Development Bank, established in 1967 was jointly owned by Uganda, Kenya, and Tanzania. It was also concerned with development finance. It survived the breakup of the East African Community in 1977 and received a new charter in 1980.

In the 1960s, other commercial banks included local operations of Bank of Baroda, Barclays Bank, Bank of India, Grindlays Bank, Standard Chartered Bank and Uganda Cooperative Bank.

During the 1970s and early 1980s, the number of commercial bank branches and services contracted significantly. Whereas Uganda had 290 commercial bank branches in 1970, by 1987 there were only 84, of which 58 branches were operated by government-owned

banks. This number began to increase slowly the following year, and in 1989 the gradual increase in banking activity signaled growing confidence in Uganda's economic recovery.[1]

In the late 1990s and early 2000s, the Ugandan banking industry underwent significant restructuring. Several indigenous commercial banks were declared insolvent, taken over by the central bank and eventually sold or liquidated. These included *Uganda Cooperative Bank*, *Greenland Bank*, *International Credit Bank*, *Teefe Bank* and *Gold Trust Bank*, which were closed or sold. Uganda Commercial Bank was initially privatized through a sale of its majority shares to a purported company from Malaysia. However it later came to light that the actual buyer was a partnership between *Greenland Bank*, which was insolvent at the time, and some politically connected individuals. A second privatization sale was conducted, with the Standard Bank of South Africa emerging as the winner.

The privatized Uganda Commercial Bank was merged with the former Grindlays Bank which Standard Bank of South Africa already owned and had renamed Stanbic Bank. The combined new bank is now known as Stanbic Bank (Uganda) Limited. As of 2008, Stanbic Uganda was the dominant commercial bank in Uganda, with about 27% of all bank assets and about 20% of all bank branches.[2] Nile Bank Limited, an indigenous institution, was acquired by the British conglomerate, Barclays Plc., in January 2007 and merged with its existing Ugandan operations to form the current Barclays Bank (Uganda). Originally the customer of a bank wrote out his order or note as it used to be called and there was no settled form of a cheque. From the middle years of the nineteenth century, the use of cheques increased rapidly.

The Cheque system originated with the Gold smiths. For various reasons, merchants began to leave their money in the hands of gold smiths and to receive interests upon those sums. They appeared to have started this practice shortly before the outbreak of civil war of the year, 1642-9. They looked to gold smiths to assist them in making payments to third parties. And this was the origin of cheques. The gold smith honored written chits by

[1] http://en.wikipedia.org/wiki/banking-in-uganda#cite-note-1

the depositors addressed to him. The depositor would address to the goldsmith a short letter authorizing the Goldsmith to pay his creditor the sum due. The creditor would then take this authority to the gold smith's shop and receive the sum in specie. (As per MW Downey)

Before long, the debtor drew his bill or note" in favor of his creditor or "order" or in favor of the bearer" and the goldsmith duly honored it upon presentation, even though it was not presented by the original payee. (i.e. if the bill is negotiated by endorsement to another person). This became the practice and the cheque system was established. (as per M.W Downey)

The goldsmith therefore operated accounts for each merchant depositor for his transactions. The accounts of those merchants, which would be called Current Accounts, were known as "Running Cashes" and they became popular. (as per M.W. Downey)

By 1677, there were 58 goldsmiths in London who kept on running the Cashes. There is clear evidence that the goldsmiths in their endeavors to run banking business employed the funds left with them by making loans to other merchants who were in need of financial support for their business. Thus, they made loans to Cormwell and also the merchants who were in need of money. This shows that the gold smiths performed the basic functions of the modern bankers, for instance by accepting sums of money or gold values at interests, by making loans, and by providing their customers with facilities for making payments to third parties[i].

One of the earliest of these instruments (bills or notes- supra) still in existence, today is in the collection of the institute of bankers, and it was dated on 14th August, 1675 (photograph published in the journal of institute of bankers Vol. LIX (1938).

The instrument was addressed to a gold smith named Thomas Fowls and it reads thus:

Mr. Thomas Foweles

I desire you to pay into Mr. Samuel Howard or order upon receipt here of the sum of Nine pounds thirteen shillings and six pence and place it to the account of:

Yr. Servant

Edmond Warcupp

For: Thomas Foweles Goldsmith at his shop between the two temple gate Fflee street"[ii].

You will note that; the form of the instrument is very similar to that of a modem cheque, even though the language employed is somewhat different.

The word "cheque" or rather check as it was spelt it did not come into use until the 18th century, and adopted by J.W GILBART in his book, practical treatise on banking in the 19th century. He indicated that; he adopted the modern spelling" cheque" because it was free from ambiguity and it was analogous to EX- CHEQUER, the royal treasury[2]. .

At the present time, payment by cheque has become the method of discharging debts and other monetary obligations. It has continued to form an important part of mercantile currency of the country and the bank money.

Today, there are several ways in which debts can be settled. These include; - Telegraphic Transfers, Postal orders, Bank drafts, Coupons and standing orders. But most important and major concern here, is the use of Cheques, such as Bankers' Cheques, customer's Cheques, Traveler's Cheques. The cheques are convenient and safe way of settling debts. They can be sent by ordinary mail, they provide a record and proof of payment, and the cheque book is easier and safer to carry around.

[2] Banking and commerce Dec. 2008, vo. 13, No. 3, pg 31

1.3. Statement of the problem

Cheque Frauds and transactions constitute the largest form of settlement in the banking sector and the recent past reveals that cheque fraud is the fastest growing financial crime. Whilst cheque fraud statistics are scanty, the loss of funds as a result of well-organized fraud through the financial sector has been enormous. Global technological advancements has made it increasingly possible and easy for criminals to skim or clone realistic counterfeit and fictitious cheques, plastic cards as well as identification that can be used to defraud banks and bank customers.

The researcher was concerned with the imposition of **double jeopardy** whenever a criminal is apprehended and produced before courts of law for trial. The issue that boiled the researcher's mind was "why should the law impose two distinct penalties on the same criminal found guilty of fraud". The Constitution of the Republic of Uganda 1995 under Art. 28(9) and (10) condemns such penalties and it's to this respect that the researcher intended to address his mind on the legal problem eating up the Justice sector in Uganda. When one was found guilty, such a person was held liable for civil and criminal charges and this led to double jeopardy.

1.4 Objectives of the study

1.4.1. General objectives

The study generally examined the effectiveness of the legal framework in regard to issuance of false cheques and protecting the financial sector in Uganda.

1.4.2 Specific objectives

1. To investigate the emergence of banking transactions and examine the current legal and institutional framework supporting the use of cheques in Uganda..
2. To investigate the causes, shortcomings and challenges in the legal frame work governing the issuance of false cheques in relation to double jeopardy in Uganda's banking transaction..
3. To draw appropriate conclusions and recommendations regarding the issuance of false checks in Uganda

1.5 Research questions

1. What was the current legal and institutional frame work supporting the use of cheques in Uganda's banking transaction and the imposition of double jeopardy?
2. Whether there were any shortcomings and challenges in the legal frame work governing the issuance of false cheques in relation to double jeopardy in Uganda's banking transaction?
3. What were the major causes of bouncing cheques in Uganda's banking transactions and whether the imposition of double jeopardy is appropriate?
4. Whether there were any appropriate conclusions and recommendations regarding the law on issuance of cheques and legal justice on imposition of double jeopardy in Uganda?

1.6. Scope of the study

1.6.1 Content scope

The study was specifically focused on the role played by the legal frame work on issuance of false cheques and imposition of double jeopardy by the legal justice system in Uganda as a tool for the prevention of issuance of false cheques and the effectiveness and implementation of these laws without compromising on its failures and how the government can possibly improve on mechanisms through which these laws are implemented.

1.6.2 Time scope.

The research work took an approximate period of three months from May 2015 to July 2015, within which all research analysis was done and a study tour to different law libraries, internet sources, law journals, interviews, and related materials were reached to compile this report.

1.6.3 Geographical scope

The research entailed movement from place to place, office to office and other authorities, all conducted within Kampala district and other parts of the country mostly affected by this vice.

1.7 Significance of the study

The study is very important to developing countries especially Uganda whose banking industry is under high rate of degradation due to swift and notorious vice of issuance of false cheques leading to fraudulence and criminal actions.
In order to put the policy goals and objectives into practice, and to provide a legal framework for implementing the policy, regulation of issuance of cheques has been incorporated in various statutes including the Penal Code Act Cap 120, the policy will be strengthened by supplementary laws specifically addressing issue of issuance of false cheques in the affecting the banking sector /industry in Uganda

The study will further help policy makers, legislators and relevant institutions in their decision making process when it comes to issuance of false cheques in the banking industry in Uganda. This will help such authorities observe the recommended principles in implementing the legal framework in curbing the issuance of false cheques in the banking industry in Uganda.

The study also put onus on individual citizens of Uganda in particular those within the banking industry and the law enforcing bodies to ensure that our banking industry was protected from issuance of false cheques and also protect our citizens who may fall prey to this vice in the best way possible.

The study also boosted the literature of Kampala International University Library (The Basajjabalaba Memorial Library) and be a good source of reference to potential future researchers in similar field of research.

1.8 Research Methodology

This included the methodology of the study. It entailed design, geographical location,/area and population sampling, data collection methods and instruments, data analysis and processing and limitations of the study.

1.8.1 Data collection methods and instruments

The researcher collected data from both primary and secondary sources.

1.8.1.1 Primary sources:

This was sourced by physically visiting the selected areas and perusing files and records in respective offices and authorities at the border customs as mentioned above.

1.8.1.2 Secondary sources:

This was sourced by viewing of documents/literature such as news papers, law journals, trade and investment reports, presentations of different scholars and authors, magazines, banking records and online publications (websites) as well as visiting Kampala International University Library, Law Development Centre, and the Uganda National Library

1.8.2 Research Design

This research was based on descriptive and analytical research designs. This was because it allowed the researcher get accurate and correct information and was an effective way of research presentations. It was survey based on quantitative and qualitative data analysis because it offered lively dialogue among the participants which also activates memories, feeling and experience sharing. This in the end resulted into more accurate and analyzed information got on the ground/field.

1.8.3 Area and geographical scope of the study.

The research was conducted in the districts of Kampala, and other parts of the country mostly affected by this vice.

The respondents consisted of local population especially banking institutions, business adult persons, legal bodies and opinion leaders. The area was specifically chosen because the researcher is a Kenyan student but pursuing a bachelor's degree in laws in Ugandan jurisdiction, well versed with the laws of this country, Uganda.

1.9. Literature Review

J MILNESHOLDEN – in his boo,[3] has dealt so much with the manner in which cheques should be drawn, issued and negotiated. And also dealt with the law and practice relating to the collection and payment of cheques.

This book deliberated on the defenses available to a claim on a cheque which include, absence or future of consideration, failure to present a cheque in proper time, notice of dishonour,

The text contractual incapacity, cheque delivered upon a condition, cheque incomplete when Signed forged signatures, material alteratio; frauds, duress, undue influence, illegal consideration cheque overdue and cheque previously dishonoured.

The text also discusses the liabilities of parties to a cheque, for instance liabilities of the drawer, endorser and Quasi — Endorser. Unfortunately, the text did not talk of the liability of the Bank. And neither did it discuss the criminal liabilities under the cheque system. It only considered liability of the drawer under Bills of Exchange Act; which advocates for compensation of a holder of a cheque, if the cheque is dishonored. Here the possible legal action is civil litigation

LORD CHORLEY, LAW OF BANKING:[4] provides general introduction to the law of banking exerting the background of the law of bills of exchange and promisory notes. It

[3] *The Law And Practice Of Banking:*[3] Page 27
[4] Law of Banking, page 44

also gives a detailed description and analysis of the law of cheques. For instance it defines a cheque and its role in the banker customer relationship, and describes mandate by which the dealing between banker and customer can be effective; where a third party is involved or repayment to self (customer). It also discusses the duties owed to one another as banker and customer established by their relationship. It however does not establish duties as between the banker and third party, the customer and third party.

This text however discussed why for practical purposes cheques used as currency could later turn being oppressive in cases of endorsement, and could perpetuate forgery. And it suggests that there is a growing need for introducing a new type of instrument to replace the cheque.

The book also attempted drawing the marginal difference between a cheque issued to a third party and an assignment of money to a third party through a bank but does not critically bring out the issue of double jeopardy as the researcher intends to address the public.

In a story [5]***Bounced Cheque Related Crime on the Increase, by Mohammed Atepo,*** a Regional Criminal Investigations Officer

Police in Kampala are concerned about the increasing cases of bounced cheque in the city.[6] More than 890 cases of bounced cheques worth 3.4 billion shillings were recorded by police between January and December 2006.
The Regional Criminal Investigations Officer, Mohammed Atepo, however said that out of the cases recorded only 46 were taken to court and two people convicted for the crime.

Atepo attributed the increase, to the laxity in the law. Whereas in the past a person found guilty of issuing a bounced cheque was on conviction ordered to pay ten times the value of the money written on the cheque, today the culprits are ordered to pay only two times the value.

[5] Dated 22 Feb 2007 in the New Vision.
[6] http://ugandaradionetwork.com/a/story/php

Early this year[7], Bank of Uganda set 20 million shillings as the threshold beyond which commercial banks should not honor cheques. The Payments and Settlements department director at Bank of Uganda, Elliot Mwebya, says by limiting the amount of money written on cheques, the central bank is trying to improve the payment system which is free of fraud.

Mwebya said effective July 2007, bank customers will pay their suppliers through either the electronic money transfer (EMT) or the real time gross settlement (RTGS) system.

This article is relevant to this research in that it brings out the aspect of regulation and prevention of issuance of false cheques in the banking industry in Uganda. However, the researcher's main concern on double jeopardy is not handled to satisfaction. This research work aims at addressing the issue of double jeopardy

Commercial court: MP sued over Shs156m bank loan[8]

In this report, the commercial court summoned Busiro South MP Joseph Balikudembe Mutebi to defend himself on allegations that he failed to pay a Shs156 million loan he acquired from Housing Finance Bank.

According to the court documents signed by the court Registrar, Balikudembe has been given 10 days within which to defend himself on the allegations. The said money arose from the personal loan he got from Housing Bank but failed to pay since May 2011.

The bank said Mr. Balikudembe applied for a swift loan of Shs 100 Million payable in 6 months installments but he only made a few deposits leaving a balance of Shs 156 million. In September 2014, Mr Balikudembe was arrested on the orders of Buganda Road Court for allegedly issuing false cheques to a businessman, Mr. Emmanuel Masesane. He was arrested for allegedly defying court summons to answer criminal charges of bouncing cheques.

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[7] http://ugandaradionetwork.com/a/story/php

[8] By Monitor Reporter Posted Thursday, February 12 2015 at 10:54

Jailed Chinese To Pay Shs1.8b Debt As Newspaper Is Sued[9]

Yuping Zhang and Jingyue Duan both directors of Kangda Uganda Limited are reported to have acquired Usd$330,000 from Guangzhou Lakelight Company Limited,shs78,668,633 from Kenya Commercial Bank and USD 291,296 from Ms Fang Min of Fang Fang Restaurant and Hotels which they never paid back.

"The two ladies approached me in May 2010 seeking for a loan of USD150, 000 and later borrowed an extra USD365, 000 in July at an interest rate of 15% per annum," Min said.

Ms Min told us that after Kangda Company had failed to pay back the loan, she sought legal advice against Yuping and Duan respectively. Zhang appeared before Buganda road court grade one magistrate Matengo Dawa to answer cases of issuing false cheques.

1.10 Synopsis of the study

This explained clearly what the individual chapters in the research focused on through-out the research period as discussed below.

Chapter One

This among others introduced the research topic together with the objectives of the study, the research questions, scope of the study, plus the review of the relevant literature that touched on the research topic.

Chapter Two

This tackled the in-depth analysis of the regional and international laws that have captioned on the research topic.

Chapter Three

This chapter discussed the shortcomings and challenges faced by the legal institutions in combating issuance of false cheques and imposition of double jeopardy, mechanism available in the enforcement of the legal framework/laws on issuance of false cheques in the banking industry in Uganda; a comparison of enforcement mechanisms of legal

[9] The New Vision Nov 17, 2011.

framework on issuance of false cheques in other jurisdictions, challenges to the enforcement agencies and stakeholders and the effects of non enforcement of these laws in respect to the banking industry, and economy of Uganda.

Chapter Four

This chapter discussed the analysis of data and findings on the subject matter herein referred to as double jeopardy.

Chapter Five

This gave the conclusions to the research findings, and recommendations necessary in the realization of the role of the legal institutions responsible for the protection and regulation of cheques and combating the imposition of double jeopardy in the banking industry of Uganda.

CHAPTER TWO

NATIONAL, REGIONAL AND INTERNATIONAL LEGAL FRAMEWORK ON DOUBLE JEOPARDY IN RELATION TO ISSUANCE OF FALSE CHEQUES IN UGANDA

2.0. Introduction:

This Part adapts to the international legal system the argument that sovereignty in the double jeopardy context really means independent jurisdiction to prescribe law. I discern two kinds of prescriptive jurisdiction in international law. One kind I label "national jurisdiction"; the other I label "international jurisdiction." National jurisdiction derives from what we typically think of as sovereignty in international law and relations. It springs from independent entitlements of each individual state vis-à-vis other states in the international system to make and apply its own law principally, from entitlements over national territory and persons. We might think of national courts exercising national jurisdiction and applying national law in the [10]

International system as roughly analogous to U.S. state courts applying their own state's law in the U.S. federal system. What I will refer to as international jurisdiction, on the other hand, derives from a state's shared entitlement along with all other states as members of the international system to enforce international law. At the risk of stretching an analogy beyond its natural breaking point, we might think of national courts exercising international jurisdiction, and thus applying and enforcing international law, as roughly analogous to U.S. federal courts geographically sitting in different U.S. states but applying and enforcing the same federal law. [11]

In short, two different kinds of entitlements authorize two different kinds of jurisdiction, and ultimately come to represent two different kinds of lawgivers or "sovereigns" for double jeopardy purposes: one national and the other international. This analysis

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[10] Double Jeopardy: William Bernhardt 1996

[11] *https://en.wikipedia.org/wiki/Double_Jeopardy*

produces three basic double jeopardy rules for the international legal system that will be illustrated below.

2.1. National Jurisdiction

If sovereignty really means jurisdiction within the meaning of the dual sovereignty doctrine, translating the doctrine to the international realm creates an instant linguistic circularity. The reason is that the term sovereignty is often invoked to imply that which authorizes a nation-state's jurisdiction in the first place, to wit: State A has jurisdiction over State a territory because State A is "sovereign" over its territory. Hence the regularly invoked combination: "sovereign jurisdiction." And hence the circularity: sovereign jurisdiction sovereign again within the meaning of the dual sovereignty doctrine. [12]

Our first step is to unpack this circularity. We can begin by breaking out what we mean by the first "sovereign" in the equation; that is, by considering what authorizes an individual state's jurisdiction under international law. Here the first "sovereign" is shorthand, again containing no real independent analytic force,

109for an established list of state entitlements110 recognized by international law that, taken together, essentially define the state as a "state."[13] For example, principal among these entitlements is power over a certain piece of geographic territory. To avoid too much confusion, instead of calling these entitlements "sovereign" entitlements we can call them "national" entitlements. Thus State

A has jurisdiction over State A territory because of State A's national entitlement, as recognized by international law, over its territory. And instead of calling this State A's "sovereign jurisdiction" we can call it State A's "national jurisdiction." Accordingly, national entitlement national jurisdiction sovereign within the meaning of the dual sovereignty doctrine. [14]

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[12] ***https://en.wikipedia.org/wiki/Double_jeopardy***

[13] http://conventions.coe.int/Treaty/en/Reports/Html/117.htm;

[14] *www.researchgate.net/.../228149576_Double_Jeopardy*

The list of entitlements recognized by international law authorizing a state's national jurisdiction is fairly intuitive. As already mentioned, a state legitimately may claim jurisdiction over activity that occurs, even in part, within its territory.

This is called subjective territoriality. A state also may claim jurisdiction over activity that does not occur but that has an effect within its territory, or what is called objective territoriality.

Furthermore, a state may claim jurisdiction over activity that involves its nationals.

Where the acts in question are committed by a state's nationals, the state may claim active personality jurisdiction. And where the acts victimize a state's nationals, the state may claim passive personality jurisdiction.

Additionally, under the protective principle a state may claim jurisdiction over activity that is directed against the state's security and/or its ability to carry out official state functions, such as its exclusive right to print state currency.

All of these entitlements relate distinctly back to the particular state claiming jurisdiction whether to its territory, to punishing or protecting its nationals, or to affirming its very statehood.

And because international law recognizes multiple national entitlements, there may well be multiple states with national jurisdiction over a given activity. Thus Germany may claim jurisdiction over acts committed by a German national in the United States, but clearly so too may the United States. In such cases there are overlapping or concurrent national jurisdictions. Yet the list of national entitlements also circumscribes the jurisdiction of states. While the entitlements authorize the projection of one state's laws to activity taking place in other states, for example where activity abroad affects the first state's territory or involves its nationals, such extraterritorial prescriptive jurisdiction still requires some measurable and objective nexus to the first state's national entitlements.[15]

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For instance, absent some nexus, Germany may not apply its racial hate speech laws to speech by U.S. nationals, speaking only in the United States and having no connection to Germany. [16]

Finally, within the parameters of its national jurisdiction a state enjoys a relatively free hand under international law to exercise its lawgiving power however it chooses. With the notable exception that it may not prescribe laws contrary to international law124(for example, a state may not, under international law, legislatively endorse or permit genocide), international law leaves states at great liberty to regulate whatever conduct they deem deserving of regulation in essentially whatever regulatory terms they like.[17]

Thus the United States claims jurisdiction over acts that occur in the United States or involve U.S. nationals and Germany claims jurisdiction over acts that occur in Germany or involve German nationals. And both the United States and Germany may pass whatever laws they like in pretty much whatever terms they like criminalizing pretty much whatever activity they like where that activity takes place within their geographic borders or involves their nationals. To sum up then, international law contains multiple bases of national jurisdiction. These bases of jurisdiction, or sources of lawgiving power, derive from a state's independent national entitlements as recognized by international law; namely, the state's entitlement over its territory, its entitlement to punish and protect its nationals, and its entitlement to secure itself as a state. Moreover, when states seek to regulate activity falling within the compass of their national jurisdiction, they largely are free to employ their domestic law giving apparatus however they see fit by defining offenses according to their own individual and independent lawgiving prerogatives. It follows that when a state prescribes an offense against its laws and exercises its adjudicative and enforcement jurisdiction by prosecuting the perpetrator of that offense, the state is exercising its own national entitlements.

Or, we might say to borrow the Supreme Court's phrase it "is exercising its own sovereignty, not that of ... other sovereigns."[18]

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[16] *eulawanalysis.blogspot.com/.../**double-jeopardy-and-eu-law-court.html***

[17] Principles of international law by Godefridus J. H. Hoof 1983

[18] , North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20).

2.1.1 The 1995 Constitution of the Republic Of Uganda.

The 1995 constitution of the Republic of Uganda clearly stipulates under Chapter IV the fundamental rights and freedoms of the people of Uganda. *Article 28 (1)* provides for the right to fair hearing. And states that

"in determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal; established by law"

1. Art. 28 (9). person who shows that he/she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he/she could have been upon the order of a superior court in thr course of appeal or review proceedings to the conviction or acquittal.
2. Art 28 (10), No person shall be tried for a criminal offence if that person shows that he/she has been pardoned in respect of that offence.

These provisions are important in the sense that the constitution is the grand norm upon which all other laws are supposed to base their operations and authority, short of that, the provisions of other laws remain null and void to the extent of their inconsistency. This helps the researcher to clearly bring out the research problem enshrined in Section 385 of the Penal Code Act[19]

2.1.2. The Penal Code Act Cap 120

The penal code Act[20], laws of Uganda provides for the offence of issuance of false cheques and punishment for it prescribed and states as follows;

Section 385 :- any person including a public officer in relation to public funds who:-

a) Without reasonable excuse proof of which shall be upon him, issues any cheque drawn on any bank where there is no account against which the cheque is drawn; or

[19] Cap 120, laws of Uganda
[20] Cap 120, laws of Uganda

b) Issues any cheque in respect of any account with any bank, when he/she has no reasonable ground or proof of which shall be on him/her, to believe that there's a fund in the account to pay the amount of money specified on the cheque within the normal course of the banking business or

c) With intent to defraud, stops the payment of or countermands any cheque, commits an offence and is liable on conviction to a fine not exceeding double the amount represented on the cheque or to imprisonment not exceeding 5 years or both. This in essence has been of importance to my research because it brings out the loophole that is the source and gist of this research.

This is due to the fact that it creates a legal problem of double jeopardy in relation to the issuance of false cheques when the penalty sentence is passed in courts. The researcher therefore tries to discuss this whole chapter and provision in the penal code Act.

2.1.3. The Anti Corruption Act[21]

Provides for

31. Illicit enrichment.

(1) The Inspector General of Government or the Director of Public Prosecutions or an authorized officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—

(a) maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets; or

(b) is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.

(2) A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.

(3) Where a court is satisfied in any proceedings for an offence under subsection (2) that having regard to the closeness of his or her relationship to the accused and to other

[21] Anti Corruption Act No. 6 of 2009

relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as gift or loan without adequate consideration, from the accused, those resources or property shall, until the contrary is proved, be deemed to have been under the control or in possession of the accused.

(4) In any prosecution for corruption or proceedings under this

Act, a certificate of a Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as to the value of the asset or benefit or source of income or benefit is admissible and is proof of the value, unless the contrary is proved.

The Act allows authorized officers, including the IGG, to investigate persons believed to possess *"property disproportionate to his or her current or past known sources of income or assets."* This is unconstitutional since it brings out the issue of double jeopardy.

2.1.4. Case Law

Muchumbi v Uganda[22]

This is a Constitutional Reference arising out of Anti-Corruption Criminal Case 183 of 2010 made by His Worship Baguma, Principal Magistrate Grade I to this Court under *Article 137(5) (b)* of the Constitution of Uganda.

Mr. Gasasira ("the Applicant") was formerly the Principal Accountant in the Public Service in the Ministry of Health. On 5th December 2005 an investigation originated where the then Deputy DPP wrote to the Applicant requesting him to explain the source of his assets listed in the Declarations of Wealth, a required document for public officials, filed with the Inspector General of Government ("IGG") in 2002 and 2005. The Applicant made a response to the inquiry on January 19, 2006, but further investigation by the IGG led to the issuing of a report by the IGG on October 12, 2009.

[22] Constitutional Reference No. 17 Of 2011

The 2009 IGG Report included information from independent valuations reports from 2006, and determined that the Applicant had misstated the value of various assets and withheld the disclosure of others. The IGG's report came with recommendation to have the Applicant's properties confiscated because they were alleged to be inconsistent with his income. The report further recommended the Applicant's removal from public office and that he be prevented from being allowed to hold public office for 5 years, under the provisions of the Leadership Code Act.

The Applicant made a special civil appeal against the Report and the decisions of the IGG to the High Court acting as a special appellate tribunal under jurisdiction granted by the Leadership Code Act. The Learned trial Judge, **Bamwine J** (as he then was), allowed the appeal and quashed the IGG's report findings and recommendations, primarily because of the IGG's failure to adhere to the rules of natural justice by not granting the Applicant a fair hearing. The IGG then appealed the above decision of the High Court to the Court of Appeal[23] which appeal is still pending.

After the determination of the appeal by the High Court, the Applicant was arrested on the 29th October 2010 and charged with two counts of Illicit Enrichment under Sections 31 (1) (b) and 31 (2) of the ("the Act")[24]. The Act allows authorized officers, including the IGG, to investigate persons believed to possess *"property disproportionate to his or her current or past known sources of income or assets."* The two counts of Illicit Enrichment related to eight apartments worth Ushs. 548,205,844/= and a residential house valued at Ushs. 330,262,946/=.

The Applicant was held in jail over a weekend, and, when he was produced before the Principal Grade 1 Court the following Monday, his Counsel made an application for a Constitutional Reference to this Court which was granted. The three questions which were framed for consideration by this Court are as follows:

1. **Whether Section 31 of the Anti-Corruption Act No. 6 of 2009, under which the accused is charged with as an offence of being in possession of**

[23] in C.A. No. 98 of 2010,
[24] Anti-Corruption Act of 2009

illicit enrichment is not in contravention of Article 28 (7) and (8) of the Constitution, in view of the valuer's report attached to the IGG's report of 12th October, 2009.

2. Whether [the Magistrate's Court] has jurisdiction to entertain a charge which arises from the investigations, proceedings and a report of the IGG that has been quashed and set aside by the High Court and is subject of Appeal proceedings in the Court of Appeal.

3. Whether the property of the accused person can be subjected to forfeiture to the State on more than one occasion, in view of the Double Jeopardy rule and Article 28 (9) of the Constitution.

This reference was presented before a new panel of Justices and it was agreed by the parties and the Court that the Court decides the matter on the basis of submissions already on file.[25]

The applicants were contending that the provisions of the Act[26] amount to double jeopardy hence the legal problem the researcher aims to analyze.

2.2. International Jurisdiction

While each base of national jurisdiction just described relies upon some nexus to a national entitlement of the state claiming jurisdiction, which authorizes and circumscribes the reach of that state's national law giving authority in relation to other states, there is another base of jurisdiction in international law that requires no nexus at all. That base is universal jurisdiction. According to this doctrine, the very commission of certain crimes denominated universal under international law engenders jurisdiction for all states irrespective of where the crimes occur or which state's nationals are involved.
The category of universal crime began long ago with piracy, expanded in the wake of World War II, and is now generally considered to include serious international human

[25] *www.ulii.org/ug/judgment/constitutional-court/2014/19*
[26] Anti-Corruption Act No. 6 of 2009

rights and humanitarian law violations like genocide, crimes against humanity, war crimes, torture and, most recently, certain crimes of terrorism.[27]

Instead of deriving from a state's independent national entitlements, universal jurisdiction derives from the commission of the crime itself under international law. It is the international nature of the crime its very substance and definition under international law that gives rise to jurisdiction for all states. Thus while a state may not, without a nexus to its national entitlements, extend its national prescriptive reach into the territories of other states, international law extends everywhere and without limitation the international prohibition on universal crimes. Universal jurisdiction consequently has nothing to do with any particular state's independent national jurisdiction; rather it is a base of international jurisdiction: it authorizes states not to enforce any distinctly national entitlement, but to enforce a shared international entitlement to suppress universal crimes as prescribed by international law. [28]

For instance, justifying Israel's jurisdiction in the famous Eichmann case over war crimes and crimes against humanity committed before the state of Israel even existed, the Israeli Supreme Court explained: "international law [enforces itself] by authorizing the countries of the world to mete out punishment for the violation of its provisions, which is effected by putting these provisions into operation either directly or by virtue of municipal legislation which has adopted and integrated them." More recently, Spain's Constitutional Court made the point emphatically when it upheld universal jurisdiction over crimes committed in Guatemala by Guatemalans against Guatemalans, and having no link to Spain: "The international ... prosecution which the principle of universal justice seeks to impose is based exclusively on the specific characteristics of the crimes which are subject to it, where the damage (as in the case of genocide) transcends the specific victims and affects the International Community as a whole." The Court emphasized that "the prosecution and punishment of [universal crimes] constitute not just a shared commitment but also a shared interest of all States, and the legitimacy of this [jurisdiction], as a consequence, does not depend on particular interests of each of the

[27] *https://en.wikipedia.org/wiki/Double_jeopardy*
[28] Principles of international law by Godefridus J. H. Hoof 1983 at page 109-116

[jurisdiction], as a consequence, does not depend on particular interests of each of the States ... [and] is not configured around links of connection founded on particular state interests."[29]The upshot is that while states collectively through their common and coordinated practice contribute to international lawmaking, including the law of universal jurisdiction, a single state cannot unilaterally and subjectively determine what crimes are within its universal jurisdiction that is a matter of international, not national, law.[30]

For example Germany cannot just decide on its own that racial hate speech is now a universal crime over which it might assert jurisdiction around the world, including racial hate speech in the United States involving U.S. nationals and having no connection to Germany. Of course states control whether and to what degree their courts may enforce universal jurisdiction. Depending on how their domestic laws view international law, states often must legislatively implement or "transform" this international legal power of universal jurisdiction into their national laws so that they might exercise it in domestic courts.136 But what is important is that Germany, or any other state, cannot unilaterally define its universal jurisdiction in relation to other states, that is to say, the crimes giving rise to such jurisdiction again, that is exclusively a matter of international law.

Because the crime itself generates jurisdiction, courts must use the definition of that crime, as prescribed by international law, when prosecuting on universal jurisdiction grounds; otherwise there is no jurisdiction. Thus the exercise of universal adjudicative jurisdiction by states (through their courts) depends fundamentally on the application of the substantive law of universal prescriptive jurisdiction. And this substantive law, or the definitions of universal crimes, is a matter of international law. Where courts invent or exaggerate the definition of the crime on which they claim universal jurisdiction, their jurisdiction conflicts with the very international law upon which it purports to rely.137 Although universal jurisdiction is a customary international law, the most accurate and readily available definitions of universal crimes appear in treaties which largely embody the customary definitions.

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[29] U.N. GAOR, 45th Sess., 68th plen. mtg., U.N. Doc.
[30] *www.ulii.org/ug/judgment/supreme-court/2009/2*

The takeaway for the present thesis is that universal jurisdiction is foundationally different from national jurisdiction. Its jurisdictional anchor for states, or source of lawgiving powers, is distinctly international i.e. the international legal system's interest in suppressing certain international crimes no matter where they occur and whom they involve. Furthermore, when individual states wish to implement their universal jurisdiction through domestic legislation and enforce it in domestic courts, they are constrained to determine the crimes they adjudicate as the crimes are determined under international law. A state may not—as it may when exercising its national jurisdiction criminalize essentially any activity it likes in any terms it likes according to its own independent lawgiving prerogative. The primary lawgiver rather is the international legal system, and individual states exercising universal jurisdiction merely act as decentralized enforcement vehicles for that lawgiver.

2.2.1. Three Rules of International Double Jeopardy[31]

Based on the foregoing analysis of the international law of jurisdiction I want to lay down three basic rules of international double jeopardy:

Rule (i): a national prosecution applying and enforcing a national law does not erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question; similarly,

Rule (ii): a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime does not erect a bar to successive prosecutions by other states with national jurisdiction over the crime in question; however,

Rule (iii): a national prosecution applying and enforcing a national law that incorporates an international legal prohibition on a universal crime does erect a bar to successive prosecutions that rely only upon international, i.e. universal, jurisdiction that is, to successive prosecutions that lack a recognized national basis for jurisdiction or nexus to the crime and would be prohibited in the absence of universal jurisdiction. To illustrate, suppose a U.S. national is alleged to have committed torture in Egypt. Clearly Egypt may

[31] *https://en.wikipedia.org/wiki/Double_jeopardy*

exercise prescriptive jurisdiction, and may apply Egyptian law proscribing torture to activity committed in its territory.[32]

Under international law the United States also may exercise prescriptive jurisdiction, and may apply U.S. law proscribing torture to activity committed by its national. Thus we easily have two states that potentially may claim jurisdiction under international law. But that is not all. For Spain, among other states, has a universal jurisdiction law that allows Spanish courts to prosecute for torture, wherever it occurs and whomever it involves. So it too conceivably could exercise jurisdiction on these facts. Now suppose the United States prosecutes this particular individual for torture using the federal code provision implementing the international Convention against Torture (which code provision explicitly provides for jurisdiction over torture committed outside the United States where, inter alia, "the alleged offender is a national of the United States").[33]

Is there a double jeopardy bar to a successive prosecution by Egypt for the same torture? How about to a successive prosecution by Spain? How about by any other state in the world with a universal jurisdiction law prohibiting torture?

According to a jurisdictional theory of double jeopardy, if the United States prosecutes under a U.S. law that incorporates the international prohibition on torture, Egypt still may prosecute for the same act of torture on an Egyptian law that also incorporates the international prohibition on torture.

The reason, as we know, is that Egypt is an independent lawgiver with an independent national jurisdiction to apply its laws to acts taking place within its territory. Hence we have (1) an application of U.S. law prohibiting torture, and (2) an application of Egyptian law prohibiting torture. No problem; that's what dual sovereignty is all about. What about Spain? Unlike Egypt, it has no national jurisdiction on these facts. If the crime were instead an "ordinary" crime, say a robbery in an Egyptian marketplace by a U.S. national, Spain could not apply and enforce Spanish national law over that crime. Rather for Spain

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[32] International Covenant on Civil and Political Rights

[33] 693 & n.332 (4th ed. 2004); van den Wyngaert & Stessens

to prosecute, it must rely uniquely upon its international jurisdiction over the universal crime of torture. And that is indeed what states claim to do when they exercise universal jurisdiction. The Spanish national law used to prosecute is therefore really just a shell, with no self-supporting national jurisdictional basis, through which Spain applies and enforces international law. My contention is that because Spain has no independent national jurisdiction to apply its own national law, but must rely uniquely on a shared international jurisdiction to apply international law, Spain would be blocked from prosecuting by the prior U.S. prosecution on a jurisdictional theory of double jeopardy. Thus as long ago as 1820 the Supreme Court articulated a theory of international double jeopardy moored in doctrines of jurisdiction and the autonomous lawgiving power of the sovereign. Under this theory to continue the Court's hypothetical where the United States and Great Britain had independent bases of national jurisdiction over a particular act, multiple prosecutions were permissible. But where no distinctly national jurisdiction authorized prosecution, where the United States sought to prosecute upon its universal jurisdiction to enforce the international law against piracy, a double jeopardy plea would have been available in the courts of another state exercising that same, shared universal jurisdiction to enforce that same international prohibition.185 In the next Part I show that this theory continues to explain modern international law and practice. [34]

2.2.2. International Law and Practice[35]

This Part uses the jurisdictional theory to explain the existence and contours of double jeopardy protections in various areas of international law and practice.

It evaluates double jeopardy protections in the international law of human rights and humanitarian law, extradition and cooperation, the statutes of international criminal tribunals, and the practice of universal jurisdiction by states. The discussion will show that the three rules of international double jeopardy articulated above persuasively explain modern international law and practice relating to double jeopardy.

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[34] U.N. Model Treaty on Extradition, G.A. Res. 45/116

[35] by Gary B. Born. Publication Date. 2012..

2.2.3. Human Rights and Humanitarian Law

A main justification if not the main justification for double jeopardy protection is to guarantee the rights of individuals to be free from successive prosecutions for the same crime. It is not surprising therefore that international human rights law contains double jeopardy protections, as does the related field of international humanitarian law which protects the rights of individuals in situations of armed conflict. However, double jeopardy protection in these areas has a notably limited scope: it attaches only to multiple prosecutions or punishments within a single state. In other words, the relevant international human rights and humanitarian law instruments permit a state to prosecute an individual for a crime for which that individual already has been prosecuted and punished in another state.

The jurisdictional theory explains this lack of international double jeopardy protection among different states since, under the theory, each state as an independent lawgiver may exercise its national jurisdiction to apply and enforce its own laws.

2.2.4. Universal Human Rights Instruments

Article 14(7)[36] guarantees that: "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."As the language of the provision seems to suggest, the prohibition on double jeopardy applies only within "each" state's judicial system.[37] The drafting history of the provision explicitly supports this interpretation, and the quasi-judicial Human Rights[38]
Committee, whose job it is to interpret and implement the Convention, has made clear that the scope of *Article 14(7)'s* double jeopardy protection is limited to multiple

[36] United Nations International Covenant on Civil and Political Rights
[37] Geneva Convention Relative to the Treatment of Prisoners of War,

[38] Geetika, Nandan Tanuj, Upadhyay Ashwani , "Internet Banking in India: Issues and Prospects", The ICFAI University Journal of Bank Management, Volume-VII Issue 2 (May 2008) Pages: 47-61

prosecutions by one state. The leading Committee ruling on the issue involved a complaint by an Italian citizen who had been convicted in Switzerland of money laundering and was then prosecuted for the same offense in Italy. The complaint alleged that the successive Italian prosecution violated *Article 14(7)'s* double jeopardy bar. The Italian government rejected this idea of "international non bis in idem" and argued that[39] instead "must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States."

The Committee agreed, and in language mirroring that used to articulate the jurisdictional theory presented above, explained that "article 14, paragraph 7, of the Covenant[40] ... does not guarantee non bis in indem with regard to the national jurisdictions of two or more states.... This provision prohibits double jeopardy only with regard to an offence adjudicated in a given State." Subsequent Human Rights Committee decisions have affirmed this interpretation, and it has been adopted as well by cases in national courts interpreting the Covenant.[41]

2.2.5. Regional Human Rights Instruments

Regional human rights instruments[42] containing a bar on double jeopardy likewise limit its application to multiple prosecutions by a single state. *Article 4* of Protocol 7 to the European Convention for the Protection of Human Rights and Freedoms, for example, restricts double jeopardy protection as follows: "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." And if the language itself were not adequately clear that double jeopardy protection does not extend to prosecutions by multiple national jurisdictions, the Council of Europe's Explanatory Report erases all doubt: "The words 'under the jurisdiction of the same State' limit the application of the article to the national

[39] Article 14(7)
[40] United Nations International Covenant on Civil and Political Rights
[41] See Duarte-Acero, 208 F.3d at 1286-1289; United States v. Benitez, 28 F. Supp. 2d 1361, 1363-1364 (S.D.Fla. 1998).
[42] *https://en.wikipedia.org/.../International_human_rights_instruments*

level."[43] Again, it is the concept of jurisdiction that demarcates double jeopardy protection: where there are multiple national jurisdictions, there may be multiple prosecutions.[44]

3. Humanitarian Law Instruments International humanitarian law also contains rules limiting double jeopardy. *Article 86* to the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War directs that "No prisoner of war may be punished more than once for the same act or on the same charge."[45] Although the article was approved "unanimously without comment,"[46] its language suffers from a number of lacunae. Does it protect only against multiple punishments and not trials? And more importantly for this Article, does it apply only to multiple punishments doled out by one state party or does it attach across multiple states?

The drafting history suggests that the provision applies only to multiple punishments by one state, explaining that it was included "to prevent any recurrence of certain abuses committed during the Second World War in penal matters."[47]The "abuses" are referenced in an additional paragraph proposed by the Sub-Committee on Penal and Disciplinary Sanctions, elaborating that "The punishment inflicted at the first trial shall not be increased as the result of an appeal or a similar procedure."[48]

Thus it appears that *Article 86* was intended to protect against additional punishment being heaped on as a result of exercising one's right to "appeal or petition from any sentence," a right which is guaranteed by *Article 106.*

Consequently, the provision relates only to multiple punishments exacted by one state party. Subsequent international instruments more directly spell out the scope of double

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[43] Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, art. 4, Europ. T.S. 117, (entered into force 1 Nov. 1988) (emphasis added).

[44] Council of Europe, Explanatory Report to Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

[45] Geneva Convention Relative to the Treatment of Prisonersof War, art. 86, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[46] Commentary to Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, available at http://www.icrc.org/ihl.nsf/COM/375-590105?OpenDocument.

[47] Id

[48] Thus it appears that Article 86 was intended to protect against additional punishment being heaped on as a result of exercising one's right to "appealor petition from any sentence," a right which is guaranteed by Article 106

jeopardy protection in modern humanitarian law and expressly cabin it to multiple prosecutions by the same state party[49]. Additional Protocol I to the Geneva Conventions guarantees that "no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure." The narrowness of this protection is consistent with that afforded[50]. Indeed, according to the Additional Protocol's Official Rapporteur, "The provision on ne bis in idem [in Protocol I] is drawn from the United Nations Covenant on Civil and Political Rights." Thus, while human rights and humanitarian law instruments create rights against double jeopardy, the instruments self-consciously limit the scope of that right to prohibit only multiple prosecutions by a single state. The jurisdictional theory explains why.

International Cooperation

One area of international law in which individuals clearly are protected from successive prosecutions by different states, at least in some circumstances, is the law of extradition and cooperation in criminal matters. If the legal instruments in this area reflect a general prohibition on international double jeopardy they would cut against a jurisdictional theory of double jeopardy whereby states with independent jurisdiction to prescribe law always retain the independent ability to enforce that law through a separate prosecution in their courts.

2.2.6. Extradition Treaties

Extradition treaties uniformly contain mandatory grounds for refusal of extradition where the requested individual already has been convicted or acquitted of the offense that serves as the basis of the extradition request in the state to which the request is directed. For example, the European Convention on Extradition states that "Extradition shall not be granted if final judgment has been passed by the competent authorities of the requested Party upon the person claimed in respect of the offence or offences for which extradition is requested."[51]

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[49] Article 75(4)(h) to the 1977

[50] by Article 14(7) of the ICCPR

[51] European Convention on Extradition art. 9, Dec. 13, 1957, 359 U.N.T.S. 274.

The United Nations Model Treaty on Extradition similarly provides that extradition "shall not be granted .... If there has been a final judgment rendered against the person in the requested State in respect of the offence for which the person's extradition is requested." In fact, "with two exceptions, all United States extradition treaties negotiated since World War II contain provisions prohibiting the extradition of persons convicted, acquitted, or being tried in the requested country for the same acts or offenses for which their extradition is requested." The consistency of these provisions throughout the majority of modern extradition treaties brings the international lawyer to a bit of a dilemma. The dilemma centers on the role of treaties in the international legal schema. On the one hand, treaties may be either generative or declarative of an underlying international law; while on the other hand, they may carve out an exception to that law for the particular states parties to the treaty. For instance, the Genocide Convention establishes the international law against genocide a law that applies generally to all states[52]; while a treaty setting up a trade regime like the WTO creates rights and obligations only for those specific states parties to the treaty against the background of a far more relaxed or even disinterested general international law that by and large permits states to trade how they see fit.

The question we must answer is whether the double jeopardy provisions in extradition treaties are generative of an international law prohibiting double jeopardy across the board i.e. across state borders, or whether these treaties merely carve out an exception for states parties to the treaties against an otherwise permissive international law that allows multiple prosecutions by different states. Two possible arguments, only one of which withstands scrutiny, tend to support the answer that the protection contained in the treaties is the exception, not the rule. The first argument, and the one that in my view ultimately must fail, takes extradition treaties as a class and contends that because they inherently are designed to create exceptions, the rules they contain are also exceptional.

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[52] , North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 41 (Feb. 20).

Extradition treaties depart from the general international rule that states have no obligation to extradite[53].

The domestic laws of many states, including the United States, in fact prohibit extradition in the absence of an extradition treaty.

Thus the entire purpose of an extradition treaty is to hew an exception; to create obligations and rights for states parties that they otherwise would not have under international law. One could argue that the exceptional character of the treaty's overall object and purpose might make awkward the conclusion that a specific provision incidental to that object and purpose such as a provision relating to double jeopardy somehow extends to non-party states as a general rule of international law. If the overall obligation to extradite is non-generalizable, neither are its incidentals. But this type of interpolation from the overall character of extradition treaties runs into a strong human rights objection. The reason for the double jeopardy bar ostensibly would be to protect the individual from states contracting away her rights through the treaty; "from combining to do together what each could not ... do on its own." Thus if extradition is the exception to the general rule, human rights are the exception to the exception: states may create whatever rules they like amongst themselves, except rules that violate fundamental human rights. Hence the Torture Convention's firm commands:

"No State Party shall ... extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

2.2.7. German Jurisdiction

The German Constitutional Court[54] addressed precisely these points when a fugitive in Germany challenged his pending extradition to Turkey on the grounds that he had already been convicted, and had served his time, for the offense in question in Greece.[55] Surveying the relevant international instruments and evaluating state practice on the point, the Court concluded categorically:

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[53] U.N. Model Treaty on Extradition, G.A. Res. 45/116, U.N. GAOR, 45th Sess., 68th plen. mtg., U.N. Doc. A/RES/45/116 (1991), art. 3(d); European Convention on Extradition, art. 9.

[54] *https://en.wikipedia.org/wiki/Double_jeopardy*

[55] decision of the German Federal Constitutional Court, supra

There is presently no general rule of public international law that states that a person who has been sentenced and that has also served this sentence is unable to be retried or reconvicted for the same offence in another state. ... Similarly, there is presently no general rule of public international law opposing the permissibility of extradition when the person sought has already been imprisoned for the same offence in a third state and this time is not accounted for or taken into consideration by the state seeking extradition[56]

2.2.8. Other Cooperation Conventions

The survey of law in this area would not be complete without discussing a few attempts among European states to set up regimes of mutual respect of criminal judgments and coordination in criminal matters. Each of the agreements behind these regimes contains some form of double jeopardy protection.

But these too recognize that the (limited) protection they afford is the exception and not the rule.[57] The Explanatory Report to the Judgments Convention observes that the protection afforded is and was intended to be an exception to the general permissibility of international double jeopardy. It notes that while national systems generally prohibit double jeopardy, "[a]t the international level, on the other hand, the principle of ne bis in idemis not generally recognized."[58] Moreover, the Council of Europe deliberately included the international double jeopardy clause in a convention dealing with cooperation between states parties as opposed to incorporating it by protocol into the European Convention for the Protection of Human Rights and Fundamental Freedoms out of concern that placing it in the latter would signal, wrongly, a wider application to non-party states unsupported by international law.[59] And even this watered down double

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[56] *jfhcrime.co.uk/extradition-success-in-double-jeopardy-*

[57] The Council of Europe's 1970 Convention on the International Validity of Criminal Judgments 223 and 1972 Convention on the Transfer of Proceedings in Criminal Matters 224 provide a double jeopardy protection based on a final judgment in another member state's courts.

[58] Council of Europe, Explanatory Report on the Convention on the International Validity of Criminal Judgments 49, available athttp://conventions.coe.int/Treaty/en/Reports/Html/070.htm.

[59] Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders 30 I.L.M. 84 (1991).

jeopardy protection failed to take hold because most Council of Europe members did not ratify the conventions. [60]More recently (and more successfully), the European Union put into effect the 1990 Schengen Convention229 in anticipation of lifting the internal border controls in 1993.

But like the two Council of Europe conventions above, the Schengen Convention is an instrument of cooperation intended to carve out an exception to the general rule.

2.2.9. General Principles of International Law

Even where states have not affirmatively undertaken to establish a double jeopardy protection at the international level through treaty law, their domestic practices may, to borrow a phrase from the Statute of the International Court of Justice, give rise to "a general principle of law recognized by civilized nations."

General principles constitute "supplementary rules of international law."

While international courts and tribunals have on numerous occasions looked to general principles to "fill in the gaps" left by the primary source law like treaties and custom, the proper formulation and application of these principles is much contested.[61]

We need not wade too far into the complexity of exactly when and how a principle common among domestic legal systems may be recruited into a general principle of international law in order to conclude that no such generally accepted principle exists with respect to double jeopardy among states.

The Hierarchy of Sources Hurdle

Before we get to the domestic practice, any general principle in this area faces a preliminary stumbling block. Their main role as gap fillers in the international jurisprudence could suggest that general principles cannot supplant an inconsistent rule e established by primary international law sources like treaties. Primary sources

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[60] van den Wyngaert & Stessens, supra

[61] Convention of 19 June 1990, applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders 30 I.L.M. 84 (1991)

represent the affirmative and deliberate consent of states to a rule that binds them on the international plane.

By contrast, a general principle taken from the domestic practices of states has no such international imprimatur. As a matter of the hierarchy of sources, the fact that the relevant primary source instruments purposefully limit their provisions so as

not to create a generally applicable double jeopardy rule among states at the international level tends to undermine the proposition of this same rule arising (and overriding the primary source rule) through a supplemental rule of international law, and one that derives from the practices of states in their domestic spheres to boot. One might think of the treaties as having "occupied the field"[62] here in a way that cabins quite conspicuously the rule so as not to prohibit international double jeopardy. Indeed, apart from stating flatly "There is no general protection from double jeopardy among different states "which the drafting history and decisional law actually do it is not clear what else the treaties themselves might have done to limit the scope of double jeopardy protection to successive prosecutions by a single state. International Double Jeopardy

Protections in National Law Without doubt, most states' domestic laws contain some type of double jeopardy protection whether through constitutional guarantee or by statutory or common law rule. Our question is whether the protection attaches in light of prior prosecutions by foreign courts[63].

(a) Common Law Countries

Practice in common law countries is sharply divided. U.S. law on the point is clear: the double jeopardy clause of the Fifth Amendment covers only multiple prosecutions by the same sovereign; and thus different prosecutions by different Sovereigns, including foreign states, are permissible. As one court succinctly put it, "The Constitution of the United States has not adopted the doctrine of international double jeopardy."

On the other hand, common law countries like Canada and England offer a more comprehensive protection that shields defendants from international double jeopardy in

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[62] , Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[63] On the civil side, the doctrine of res judicata appears to have been accepted for some time as a general principle of international law. See Chorzow Factory Case (Ger. v. Pol.), 1929 P.C.I.J. (ser. A) No. 19 at 27 (July 26) (Judge Anzilotti) (cited in CHENG, supra

most cases249 where judgment already has been handed down by a foreign "Court of competent jurisdiction."[64]

(b) Civil Law Countries

The practice of civil law countries runs the gamut between these two poles of total international double jeopardy protection or none at all. Some states like Germany and Italy 252 appear to fall into the U.S. camp and provide no international double jeopardy protection, while Dutch law operates similarly to that of England and Canada in that a valid foreign judgment broadly shields the accused from a successive Dutch prosecution for the same offense. The rest of civil law practice is somewhere in between. Apart from the Netherlands, no civil law country appears to permit a double jeopardy claim where the offense takes place within its territory. Thus, as with the double jeopardy provisions in the cooperation conventions discussed above, if John commits X on State A's territory, he will always be subject to prosecution in State A, even if he already has been convicted or acquitted of X in the courts of State B. Again, this practice should not be all that surprising. A state's entitlement to exercise jurisdiction over its territory is one of the most important and jealously-guarded in the package of entitlements that make the state a state D. International Criminal Tribunal Statutes.

Double jeopardy provisions also appear in the statutes of international criminal tribunals. To take some well-known examples, the statutes creating the ICTY and ICTR as well as the Rome Statute for the ICC all provide for what could be viewed as double jeopardy protection at the international level. That is, they all offer some type of shield from successive prosecutions as between international tribunals and national courts. The double jeopardy protections contained in the statutes are complicated and varied, but their very existence appears to generate discord for double jeopardy rules in international law: no general double jeopardy protection among states, but double jeopardy protection between states and international tribunals. [65]

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[64] See Opinion of Advocate General Mayras, Case 45/69, Boehringer v. Commission [1972] ECR 1281, at 1293-1295.

[65] In reality this protection is not so easily assured since the concept of territoriality has enlarged to include a broad range of activity including offenses exhibiting only a tangential relation to the forum state. SeeColangelo, supra, at 128-129. Prosecutors often take

2.2.10 The Rome Statute

The Rome Statute[66] provides: "No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 [articles which lay out conduct constituting crimes within the ICC's subject matter jurisdiction] shall be tried by the Court with respect to the same conduct" unless the other court's proceedings were designed to shield the individual or were otherwise flawed so as not to achieve justice. Since the ICC has only complementary jurisdiction, once a state properly exercises national jurisdiction over the conduct in question the ICC has no jurisdiction left upon which to prosecute.

The result is double jeopardy protection from a successive ICC prosecution for that conduct. Reversing the double jeopardy shield to address the situation of a prior ICC prosecution and a successive national court prosecution, *Article 20* provides: "No person shall be tried by another court for a crime referred to in article 5 [the article setting forth crimes within the ICC's jurisdiction] for which that person has already been convicted or acquitted by the Court." Notice here use of the term "crime," instead of "acts" or "conduct."[67] The use is deliberate on the face of the statute since, as quoted above, Article 20 frames the double jeopardy protection flowing from national courts to the ICC as a protection from prosecution for the "same conduct." Moreover, the Article 20 protection prohibiting a successive prosecution in national courts for the same "crime" already adjudicated in the ICC references *Article 5* of the Rome Statute, which sets forth the "Crimes within the jurisdiction of the Court."

By contrast, the *Article 20* protection prohibiting a successive ICC prosecution for "conduct" already adjudicated in national courts references *Articles 6, 7 and 8*—articles which lay out conduct that forms the basis of the crimes listed in *Article 5*.

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advantage of this to "convince[e] courts to localize offences on the territory of their own State," van den Wyngaert & Stessens, supra, at 784.

[66] Article 20

[67] The ICTY Appeals Chamber acknowledged that Article 2 of the U.N. Charter

The scope of the double jeopardy protections in the Rome Statute is therefore opposite that contained in the ICTY and ICTR statutes. While the ICTY and ICTR have primacy over acts constituting serious violations of international law and can extinguish national court jurisdiction over those acts when they prosecute, national courts have primacy over conduct constituting the crimes enumerated in the Rome Statute and can extinguish ICC jurisdiction over that conduct when they prosecute.

Further, just as the ICTY and ICTR might vindicate international law by prosecuting an individual for acts constituting international crimes even though national courts already have prosecuted the same individual for those same acts as "ordinary" crimes under national law, the Rome Statute leaves open the possibility that a national court might vindicate national law by prosecuting an individual for conduct constituting an ordinary crime even though the ICC already has prosecuted the same individual for that same conduct, but as an international crime. The national court just cannot successively prosecute for the same "crime" as the ICC, i.e. an international crime. Thus if Jane is prosecuted for the international crime of genocide by the ICC, a national court may not prosecute her again for genocide, but may prosecute her for the ordinary crime of homicide. And this all makes sense under the jurisdictional theory since the national court would be enforcing a different law national law than that enforced by the ICC.

This section has shown how the complex of double jeopardy provisions contained in international tribunal statutes becomes explicable through concepts of jurisdiction. An exercise of jurisdiction by a tribunal usually extinguishes an exercise of that same jurisdiction by states, and vice versa. The result is double jeopardy protection. Where the statutes allow a successive prosecution, they do so by reserving a portion of either national or international jurisdiction to the state or tribunal respectively. In sum, the provisions make perfect sense under a jurisdictional theory of double jeopardy. [68]

[68] *https://en.wikipedia.org/.../**Rome_Statute_of_the_International_Crimina*** court

2.2.11. The Spanish Jurisdiction

To take one high profile example, Spain's universal jurisdiction law contains an express double jeopardy bar to this effect. Codified,[69] it limits the exercise of universal jurisdiction to situations where "the accused has not been absolved, pardoned, or sentenced in another country, or in the last case, that the sentence has not been completed." Spanish courts have elaborated the jurisdictional rationale of this double jeopardy limitation. The Spanish Supreme Court observed in the Peruvian Genocide case involving universal jurisdiction claims over former Peruvian Prime Minister Alberto Fujimori that "the necessity of judicial intervention pursuant to the principle of universal jurisdiction remains excluded when the territorial jurisdiction is effectively prosecuting the crime of universal character in its own country."

In keeping with this Article's theory, the Court explained that this principle of jurisdictional exclusion "is derived from the very nature of universal jurisdiction."[70] Because Peru, the national jurisdiction state, had initiated its own prosecution against the accused, Spanish jurisdiction was "excluded" and the case dismissed.
More recently, in the Guatemala Genocide Case the Constitutional Court called upon Article 23.4's double jeopardy limitation to respond to concerns about competition among jurisdictions resulting from universal jurisdiction.

The Court explained that since a prosecution by a state with national jurisdiction precludes universal jurisdiction by Spain, no competition would result.
What is perhaps even more interesting is that Spain seems to have a relatively permissive law as compared to other countries with universal jurisdiction laws on the books. While explicitly referencing Article 23.4's double jeopardy bar as a limitation on the exercise of universal jurisdiction in the Guatemala Genocide Case, the Constitutional Court refused to apply a principle of subsidiary jurisdiction. Under the particular subsidiary principle at issue in the case the party bringing the universal jurisdiction action would have needed

[69] at Article 23.4 of the Organic Law of the Judicial Branch

[70] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, at art. 10, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the

affirmatively to show inaction on the part of the state with national jurisdiction in order for Spanish courts to exercise jurisdiction. The Court felt that this was too high a burden to place on plaintiffs.

Its discussion raises the far more common reason why any instances of successful successive prosecution based solely on universal jurisdiction are so hard to find

2.2.12. Implications for U.S. Constitutional and International Law

So far I have argued that a jurisdictional theory of double jeopardy supplies a useful analytical vehicle for understanding the corpus of Supreme Court dual sovereignty jurisprudence and also brings coherence to what otherwise looks like an unintelligible grab bag of international rules and practice. In this respect, my arguments until now have been largely descriptive.[71] While the theory's explanatory force may be able to stand on its own as a helpful contribution, it also recommends important doctrinal developments for double jeopardy law and practice in both the U.S. and international systems. In this Part I explore some of the more significant implications of the theory in this regard.

To frame the discussion I begin by flagging an inherent normative tension between state sovereignty and individual rights in double jeopardy rules among sovereigns. In light of this tension, I argue that a jurisdictional theory can enrich both U.S constitutional and international legal evaluation of double jeopardy by importing more nuanced analysis into conventional doctrine to better accommodate the competing interests at stake—particularly, individual rights interests; and therefore, the theory promises a sounder doctrine of double jeopardy in both systems. Specifically, the theory can enrich U.S doctrine by calling for a due process analysis of a successively prosecuting sovereign's jurisdiction an analysis that holds the potential to change outcomes in cases of either U.S. state or federal extraterritorial jurisdiction. The theory similarly can enrich international doctrine through a reasonableness analysis of a successively prosecuting sovereign's jurisdiction—an analysis that reflects the doctrinal and normative correctness of the double jeopardy rules articulated in Part III. Last I engage the situation where multiple

[71] U.N. Convention against Transnational Organized Crime, art. 15(5), G.A. Res. 55/25, Annex II, U.N. Doc. A/Res/55/25 (Nov. 15, 2000).

sovereigns legitimately have jurisdiction to pursue multiple prosecutions even under the revised constitutional and international tests proposed below. I suggest that this does not mean that these sovereigns necessarily will exercise that power to vindicate their interests. In fact, Comity mechanisms already built into both the U.S. and international systems aim to facilitate a single prosecution in a single forum so as to satisfy the interests of multiple sovereigns, thus increasing efficiency and reducing friction for the system while simultaneously advancing the individual's interest not to be prosecuted multiple times for the same crime[72].

Normative Stakes

The central normative tension in double jeopardy rules among sovereigns is between the ability of sovereigns to protect their interests through the enforcement of their criminal laws and the rights of individuals to be free from multiple prosecutions for the same criminal activity. The former ability self-evidently motivates the U.S. dual sovereignty doctrine as well as current international rules allowing states with independent jurisdiction successively to prosecute for acts that harm important entitlements over national territory and persons.

The "underlying idea" of double jeopardy protection from the individual rights perspective, on the other hand, "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Angelina Zabala Alonto (Petitioner) Vs People Of The Philippines, (Respondents)[73]

This is a position for review on certiorari of the decision of the court of appeals, dated March 11 1999, which affirmed in toto the consolidated decision of October 2, 1994,

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[72] See Duarte-Acero, 208 F.3d at 1286-1289; United States v. Benitez, 28 F. Supp. 2d 1361, 1363-1364 (S.D.Fla. 1998).

[73] First division (G.R.No. 140078, December 9th 2004)

finding petitioner Angelina Zabala Alonto guilty of three counts of Violation of the bouncing checks law, and its resolution, dated September 9, 1999, denying petitioners motion for reconsideration. The trial court sentenced petitioner to suffer the three courts or the equivalent of the three years imprisonment, to identify the private complainant, violeta E, Tizon, in the total amount of £75000 and to pay the fine of £25000. Petitioner was charged with three counts of violation of the bouncing checks law in three separate information all dated February 22, 1993, to wit;

In criminal case NO,Q-93-41749, the information alleged that on or about the 5th day of January, 1992, in Quezon city , Philippines they said accused did then and there willfully, unlawfully and feloniously make or draw and issue to VIOLENT E TIZON to apply on account or for £2500000 Philippines currency, said accused well knowing that at the time of issue he/she/ they did not have sufficient finds in or credit with the drawee bank for payment of such check in full upon its presentment, which check when presented for payment was subsequently dishonored by the drawee bank for insufficiency of the funds/ account closed and despite received of notice of such dishonor, said the accused failed to pay said check or to make arrangement for full payment of the same within five banking days after receiving the said notice

The decision and resolution of the court of appeals were affirmed

Sanqueetaben Vs state of Gujaral[74]

A cheque issued for the repayment of a loan was dishonored by the bank. The payee filed a complainant under section 138 of negotiable instrument Act. He went ahead and filed complaints of breach of the Indian penal code Act[75]. The drawer of the cheque was convicted under the bank law. Then he moved the high court for quashing the criminal complainants under the penal code since he has already been prosecuted under the bank law.

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[74] 23rd April 2012

[75] **The Indian Penal Code, 1860 Act No. 45 Of 1860**

This raises the question of double jeopardy. It is an age old principal recognized in ancient Greek and roman jurisprudence. In India, *Article 20 (2)*[76] of the constitution says no person shall be prosecuted and punished for the same offence more than once. At least three major statues incorporate the doctrine. There are strong reasons for providing this protection to people. It prevents the government from exercising its power to wear down and convict innocent people.

Citizens are protected from the financial, emotional and social consequences of successive prosecutions. The principle also gives finality to criminal proceedings.
In case of cheque bouncing there seems to be a thin line hardly visible to lay eyes which separates a valid prosecution of the accused person and the illegal course of double jeopardy. It is the issue of the cheque that is the main cause of action.
However, behind it there might be cheating the breach of trust. The aggrieved payee is likely to take all coercive measures against the drawer, not only to get back his money but also to punish him.

In this case, the Supreme Court mentioned that both proceedings can go on simultaneously. This is because the bank law and the code operate in different fields, for instance, there is no need to prove the guilty mind of the accused person in the case of a dishonored cheque. But in cheating and breach of trust, it is essential for offences under the code are severe. In the cheque case, a fine may be imposed to meet the liability. The cheque complainer is initiated by an aggrieved person, whereas in other instances, it is the state that takes action.

However, there are judgments of the Supreme Court itself that take a liberal, contrary view. In 2011 in the case of ***Kolla Veera Vs Gorantia Roa,***[77] the court qashed the second wave of charges after the accused person was convicted for a bad cheque. He argued

[76] The constitution of the Republic of India
[77] on 1st Feb., 2011

that we had already been convicted under the bank law and hence, could not be tried again on the same facts for cheating or other provisions of penal code.[78]

2.3. Conclusion.

Double jeopardy rules among sovereigns throw into sharp relief fundamental tensions between some of our most basic legal intuitions concerning individual rights and the very idea of sovereignty. And they do so against a back drop loaded with questions about the proper distribution of power in two of the world's major legal systems. Resolution of these tensions in a coherent and practical fashion poses a central challenge for both U.S. and international law. This Article has attempted to meet that challenge head on. It offers a theory that not only explains an otherwise opaque domestic doctrine and seemingly incoherent mix of international rules and practice, but also recommends adjustments to each body of law that better accommodate the competing interests at stake including those of multiple sovereigns, the systems they comprise, and those of individual defendants.

[78] *www.supremecourtcases.com/index2.php?option=com...do...*

CHAPTER THREE

SHORTCOMINGS AND CHALLENGES FACED BY THE LEGAL INSTITUTIONS IN COMBATING ISSUANCE OF FALSE CHEQUES AND IMPOSITION OF DOUBLE JEOPARDY

3.0 Introduction

Cheque Frauds Cheques transactions constitute the largest form of settlement in the banking sector and the recent past reveals that cheque fraud is the fastest growing financial crime. Whilst cheque fraud statistics
are scanty, the loss of funds as a result of well-organized fraud
through the financial sector has been enormous. Global technological advancements has made it increasingly possible and easy for criminals to skim or clone realistic counterfeit and fictitious cheques, plastic cards as well as identification that can be used to defraud banks and bank customers.
Common types of cheque frauds Cheque frauds worldwide take the form of;
•Counterfeit
•Forged
•Altered
•Drawn on closed account Counterfeit - cheque not written or authorized by legitimate account holder.

Normally this occurs when a false cheque is drawn on a valid account or presented based on fraudulent identification. A criminal may open a current account and cash the false cheque using the fraudulent identification
documents. Criminals use information from personal and / or corporate trash to produce the identification with computer technology. In other instances a valid cheque drawn on a busy account may be stolen, counterfeited and the counterfeit is then cashed using a fictitious account. To protect against such frauds, customers should ensure that their

personal information, including account records is highly secured at all times. Forged Instruments.[79]

These are usually stolen cheques not signed by the account holder. The fraudster, upon getting hold of a blank cheque, which is either stolen or lost, will fill in the details and forge the account holder's signature. Another way is to forge an endorsement. Customers should ensure that their cheques are securely kept and should promptly report any stolen or lost cheques to their bankers. Alterations on Instruments -information on the legitimate cheque such as payee, account number, amount is changed to benefit the fraudster (Bichupuli). This occurs after a bonafide drawer creates a valid cheque to settle an obligation; a criminal then intercepts this good cheque and uses chemicals or other means to erase the amount or the payee so that new information can be entered. New information is then introduced on the cheque.[80]

The valid cheque then becomes a fraudulent cheque, which the criminal cashes using false identification. To protect against such frauds, customers are encouraged to exercise care and safety precautions in keeping their cheque books and in issuing cheques. Due care must be taken in transmission of cheques from drawer to payee by use of reliable and secure couriers. The recipients of cheques must also exercise adequate security for cheques received before being banked to avoid these cheques falling into the hands of fraudsters who may later cause the alterations. If lost, the drawer should be requested to issue a 'stop payment' order to the bank and the loss reported immediately to the appropriate authorities. Drawn on closed accounts - Closed accounts frauds are based on cheques being written against closed accounts. Such frauds occur when a fraudster banks a cheque drawn on a closed account. The cheque is then deposited into a new account in another bank. [81]

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[79] *www.hrw.org/reports/2008/rwanda0708/9.htm*

[80] *www.qebholliswhiteman.co.uk/.../parallel-criminal...*

[81] Parallel criminal and civil proceedings - QEB Hollis Whitema

The criminal can withdraw funds from the new account if the cheque is intercepted or lost during the clearing process. Closed account fraud can be successful when customers do not return unused leaves after closing accounts or do not inform their bankers the proper status of their accounts. To mitigate such frauds, customers should keep their bankers informed of the status and return unused cheque leaves to the banks whenever an account is closed or destroy unused cheque leaves. Sources of cheque frauds There are many sources of cheque frauds but the following are the most common in our sector.
Fraudulently opened bank accounts.

Thieves/robbers who break into homes/offices or cars;

Waste cheques from bank archives by bank insiders;

Intercepted Government / Parastatals or company cheques payable to genuine suppliers/service providers

Intercepted cheques written using acronyms e.g. URA, CAA, URC, KCC etc.

Counterfeit cheques – with advancement in color copying and desktop publishing, this is a growing source of fraudulent cheques.[82]

Dollar cheques / Travelers cheques – "Bichupuli" – these are mainly obtained from outside the country but may also be intercepted from International Mail locally.

One of the economic crimes that have adversely affected the level of economic development in Uganda today is money laundering and fraud in the banking sector including issuance of false cheques[83]. Money laundering and issuance of false cheques has the notorious tendency to discourage or frustrate legitimate business enterprise, corrupt the financial system and ultimately, the socio-political system. Modern financial systems, in addition to facilitating legitimate commerce, permit criminals to order the transfer of millions of shillings instantly. Criminals have always endeavored to conceal the origin of illegally generated funds in order to erase all trace of their wrongdoings.[84]

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[82] *www.tsc.state.tn.us › Courts › Supreme Court*
[83] *www.ulii.org/ug/judgment/high-court/2013/61-0*

[84] Avi Enterprises Ltd v Orient Bank Ltd & Anor HCCS NO 147 OF 2012

This study sought to establish the challenges faced by the Central Bank of Uganda in combating issuance of false cheques alongside the imposition of double punishment, amounting to double jeopardy in the country and determine how the bank is dealing with these challenges. The significance of the study will help the bank as the regulator in financial industry realize the areas of attention and where it needs to improve in order succeed on its objective in combating the vice here in Uganda.

The researcher carried out a case study of Central Bank of Uganda to find out the challenges it faces in combating issuance of false cheques the respondents were senior bank managers and officers of Bank Supervision Department and Bank Fraud Investigation Unit who were required to respond to questions in an interview guide. Each section of the interview guide was aimed at answering each of the 2 objectives of the study. The Financial Institutions Act empowers the Financial Reporting Centre to ensure compliance. The study identified the cheque fraud challenges as; lack of adequate laws, delay in implementation of the recently enacted these Laws.

3.1 Findings and analysis

The study further found out that the big challenge for reporting institutions is to strike a proper balance between implementing the Act and maintaining client confidentiality for the case of the commercial banks and this will affect how BOU can effectively monitor and supervise them in combating the vice. The study concludes that that cheque fraud is a threat to both the integrity and stability of the banking sector.

The issue of double jeopardy is incumbent upon the Human Rights Forums to protect the rights of accused persons and to promote the constitutional demands of the 1995 constitution of Uganda.

The emergency of the provisions of the penal code Act has also weakened the thrill by the Human Rights Activists to curb the imposition of double punishment on the bank fraud criminals. The Penal Code Act was adopted from India and as a result, this law just like any other laws received under the reception clause has become hard for the legislators to amend these provisions however much they infringe on the rights of citizens

accused, charged, convicted and sentenced to double punishment as indicated under the A cap 120.

The courts are custodians of the constitution and any infringements on the rights of individuals guaranteed under the constitution are to be safeguarded by the courts. Any person who feels infringed by any act upon which an injury is caused curtailing the enjoyment of his/her rights may invoke Article 50 of the constitution for remedy in a court of competent jurisdiction. However, courts have also failed to notice that the imposition of double punishment against the accused is an indicator of double jeopardy.

The survey was conducted with Ugandan-based banking institutions having over $4BN in assets. Of note is that 30% of the respondents had international operations outside of Uganda. The respondents included VPs of Compliance and Risk Management, directors of banks, Risk Applications/Fraud Control and managers of Fraud Investigation, Security, and Loss Prevention.[85]

The results of the survey are currently being compiled for general release, but it was extremely interesting to learn that the key challenges of fraud investigations include:

1. the inability to access data due to privacy concerns
2. a lack of real-time high performance data searching engine
3. and an inability to cross-reference and discover relationships between suspicious entities in different databases.

For regular readers of this blog, it comes as no surprise that identity resolution and entity analytics technology provides a solution to those challenges.[86] An identity resolution engine glides across the different data within (or perhaps even external to) a bank's infrastructure, delivering a view of possible identity matches and non-obvious[87] relationships or hidden links between those identities... despite variations in attributes and/or deliberate attempts to deceive.

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[85] *https://dpss.lacounty.gov/dpss/**fraud/***

[86] *Fraud Prevention* and *Investigation* (WFP&I) ... A *unit* of WFP&I find at *https://dpss.lacounty.gov/dpss/**fraud/***

[87] Parsons, D., Gotlieb, C.C. and Denny, M. (1993) "Productivity and Computers in Canadian Banking", Z. Griliches and J.Mairesse (Eds.), Productivity Issues in Services at the Micro Level, Kluwer, Boston

Large banks need to know who's who... and who's working with who. A true identity resolution engine is the right way for them to find out.

One of the economic crimes that have adversely affected the level of economic development in Uganda today is money laundering and fraud in the banking sector including issuance of false cheques. Money laundering and issuance of false cheques has the notorious tendency to discourage or frustrate legitimate business enterprise, corrupt the financial system and ultimately, the socio-political system. Modern financial systems, in addition to facilitating legitimate commerce, permit criminals to order the transfer of millions of shillings instantly. Criminals have always endeavored to conceal the origin of illegally generated funds in order to erase all trace of their wrongdoings.

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The study further found out that the big challenge for reporting institutions is to strike a proper balance between implementing the Act and maintaining client confidentiality for the case of the commercial banks and this will affect how BOU can effectively monitor and supervise them in combating the vice. The study concludes that that cheque fraud is a threat to both the integrity and stability of the banking sector.

3.2. Conclusion

The research conducted out was successful and different findings were observed by the researcher which has become a focal point for the entire research. The institutions the researcher visited were welcoming such as the Stanbic bank of Uganda, Wandegeya branch, Ndeeba branch and some other institutions around town. The findings are as discussed above and it is to the best of the researcher's knowledge that these findings will help readers to achieve common cause, to help iron out the legal problem this research intends to address.

CHAPTER FOUR

DATA ANALYSIS AND FINDINGS ON DOUBLE JEOPARDY IN RELATION TO ISSUANCE OF FALSE CHEQUES (CHEQUE FRAUD)

4.0. Introduction.

Cheque fraud[88] is one of the largest challenges facing businesses and financial institutions today. With the advancement of computer technology it's increasingly easy for criminals, either independently or in organized gangs, to manipulate cheques in such a way as to deceive innocent victims expecting value in exchange for their money.

A significant amount of cheque fraud is due to counterfeiting through desktop publishing and copying to create or duplicate an actual financial document, as well as chemical alteration, which consists of removing some or all of the information and manipulating it to the benefit of the criminal. Victims include financial institutions, businesses who accept and issue checks, and the consumer. In most cases, these crimes begin with the theft of a financial document. It can be perpetrated as easily as someone stealing a blank check from your home or vehicle during a burglary, searching for a canceled or old check in the garbage, or removing a check you have mailed to pay a bill from the mailbox.

The analysis of the data the researcher did was majorly concerned with the issuance of false cheques and the imposition of double jeopardy. In this respect, the researcher based his findings on the constitutional provisions relating to the rights of the accused persons and the how the Human rights bodies and custodians of the constitution have stood to protect these rights, the case in point is the freedom from double jeopardy, under Article 28 (9) & (10)[89].

The penal code provisions relating to issuance of false cheques are biased, inconsistent with the provisions of the constitution and are injurious on the fundamental freedoms and rights of an accused person. It is upon this legal problem that the researcher was

[88] *www.actionfraud.police.uk/fraud-az-cheque-fraud*
[89] Of the 1995 constitution of the Republic of Uganda

concerned and wanted to raise an alarm to the public, and the world at large to observe this issue with due diligence.

Types of Check Fraud

Forgery

For a business, forgery typically takes place when an employee issues a check without proper authorization. Criminals will also steal a check, endorse it and present for payment at a retail location or at the bank teller window, probably using bogus personal identification.[90]

Counterfeiting and Alteration

Counterfeiting can either mean wholly fabricating a cheque --using readily available desktop publishing equipment consisting of a personal computer, scanner, sophisticated software and high-grade laser printer -- or simply duplicating a check with advanced color photocopiers.

Alteration primarily refers to using chemicals and solvents such as acetone, brake fluid and bleach to remove or modify handwriting and information on the cheque. When performed on specific locations on the cheque such as the payee's name or amount, it is called-spot alteration; When an attempt to erase information from the entire cheque is made, it is called-check washing.

Paperhanging

This problem primarily has to do with people purposely writing cheques on closed accounts (their own or others), as well as reordering checks on closed accounts (their own or others).

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90 Principles of Fraud Examination–2010 by Joseph T. Wells

Cheque Kiting

Cheque Kiting is opening accounts at two or more institutions and using "the float time" of available funds to create fraudulent balances. This fraud has become easier in recent years due to new regulations requiring banks to make funds available sooner, combined with increasingly competitive banking practices.

It has been estimated that the annual losses due to check fraud are in the billions of dollars and continue to grow steadily as criminals continue to seek ways to earn a living by defrauding others. For the consumer, the amount of inconvenience and anxiety caused by resolving problems with the account, local merchants, as well as possible repercussions with credit bureaus can be considerable.

Signs for bad cheques:[91]

The researcher interviewed one of the tellers in Stanbic Bank Wandegeya branch who did not want his name to be disclosed and discussed the following tips for signs of a bad cheque.

Below are several signs which may indicate a bad check. While one sign on its own does not guarantee a check to be counterfeit, the greater the number of signs, the greater the possibility that the cheque is bad.

The cheque lacks perforations.

The cheque number is either missing or does not change.

The cheque number is low (like 101 up to 400) on personal checks or (like 1001 up to 1500) on business checks. (90% of bad checks are written on accounts less than one year old.)

The type of font used to print the customer's name looks visibly different from the font used to print the address.

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[91] *www.credit.com › Personal Finance Articles*

Additions to the check (i.e. phone numbers) have been written by hand.

The customer's address is missing.

The address of the bank is missing.

There are stains or discolorations on the check possibly caused by erasures or alterations.

The numbers printed along the bottoms of the check (called Magnetic Ink Character Recognition, or MICR, coding)[92] is shiny. Real magnetic ink is dull and non glossy in appearance.

The MICR encoding at the bottom of the check does not match the check number.

The MICR numbers are missing.

The MICR coding does not match the bank district and the routing symbol in the upper right-hand corner of the check.

The name of the payee appears to have been printed by a typewriter. Most payroll, expenses, and dividend checks are printed via computer.

The word VOID appears across the check.

Notations appear in the memo section listing "load," "payroll," or "dividends." Most legitimate companies have separate accounts for these functions, eliminating a need for such notations.

The cheque lacks an authorized signature.

Fraud professionals have become increasingly skilled and sophisticated, thanks to advances in readily available technology such as personal computers, scanners and color photocopiers. Criminals today can defraud you and your financial institution quite easily with a blank check taken from your check book, a canceled check found in your garbage,

[92] *https://en.wikipedia.org/.../Magnetic_ink_character_recognition*

or a check you mailed to pay a bill. Therefore, it is important to follow a common-sense, logical approach with the way you use and store your cheques.

Make sure your checks are endorsed by your financial institution and incorporate security features that help combat counterfeiting and alteration.

Store your checks, deposit slips, bank statements and canceled checks in a secure and locked location. Never leave your checkbook in your vehicle or in the open.

Reconcile your bank statement within 30 days of receipt in order to detect any irregularities. Otherwise, you may become liable for any losses due to check fraud.

Never give your account number to people you do not know, especially over the telephone. Be particularly aware of unsolicited phone sales. Fraud artists can use your account without your authorization and you may end up being responsible.

Unless needed for tax purpose, destroy old canceled checks, account statements, deposit tickets, ATM receipts (they also frequently have your account number and worse yet, your account balance). The personal information on it may help someone impersonate you and take money from your account.

When you receive your check order, make sure all of the checks are there, and that none are missing. Report missing checks to your bank at once. Should you fail to receive your order by mail, alert your bank. Checks could have been stolen from mail box or lost in transient.[93]

If your home is burglarized, check your supply of checks to determine if any have been stolen. Look closely, because thieves will sometimes take only one or two checks from the middle or back of the book. The longer it takes to detect any of

[93] *https://www.bou.or.ug/bou/bou.../fraud_challenge*

your checks have been taken, the more time the criminal has to use them successfully.[94]

If someone pays you with a cashier's check, have them accompany you to the bank to cash it. If at all possible, only accept a check during normal business hours so you can verify whether it is legitimate. Make sure you obtain identification information from the individual

Do not mail bills from your mailbox at night. It is a favorite location from which a criminal can gain possession of your check with the intent to defraud you. Criminals will remove a check from your mailbox and either endorse it using bogus identification, photocopy and cash it repeatedly, scan and alter the check, or chemically alter it. The Post Office is the best location from which to send your bill payment.

Limit the amount of personal information on your check. For example, do not include your Social Security, driver's license or telephone numbers on your check. A criminal can use this information to literally steal your identity by applying for a credit card or loan in your name, or even open a new checking account.

Don't leave blank spaces on the payee and amount lines.

The type of pen you use makes a difference. Most ballpoint and marker inks are dye based, meaning that the pigments are dissolved in the ink. But, based on ink security studies, gel pens, like the Uniball 207 uses gel ink that contains tiny particles of color that are trapped into the paper, making check washing a lot more difficult.

1. Don't write your credit card number on the check.
2. Use your own pre-printed deposit slips, and make sure the account number on your slip is correct. Thieves occasionally alter deposit slips in the hope you won't notice and the money goes into their account.

[94] *independent.co.ug/business/.../9463-bank-fraud-risk*

Don't make a check payable to cash. If lost or stolen, the check can be cashed by anyone.

Never endorse a check until you are ready to cash or deposit it. The information can be altered if it is lost or stolen.

It is widely believed that businesses are the primary targets of check fraud professionals - especially by organized rings of criminals. As far as counterfeiting and alteration, payroll checks appear to be a favorite although all forms of business checks are targets from time to time and all forms of fraud techniques are practiced as well. [95]

Uniform Commercial Code - Who is responsible?

It is clear now that businesses must play a role in ensuring their checks are secure. Recently revised UCC regulations add the onus of shared responsibility for check fraud on the business. For example, if a bank offers their customer check stock that containins security features that could have prevented a specific case of fraud, the bank can claim that the customer was negligent and therefore at least partially liable for the fraud loss.

A combination of precautions that a business might undertake could greatly reduce the likelihood of check fraud a legal analyst at DTB, Kireka branch. Poor internal controls may lead to collusion between employees or third parties who copy, steal, alter and forge checks. [96]

Order checks and deposit slips wisely

Use an established, respectable source, especially those recommended by your bank, to ensure your checks will process easily through the bank's clearing system.

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[95] *www.imf.org/external/np/rosc/uga/*

[96] IMF Report on Observance of Standards and Codes: Uganda

Make sure that your checks include Security Features that will help combat counterfeiting and alteration.[97]

Make sure you notify your check supplier (and financial institution, if necessary) if a new check order has not been received within a reasonable amount of time after you ordered them.

Maintain adequate physical security of your checks, deposit slips, etc.

Secure all reserve supplies of checks, deposit slips and other banking documents in a locked facility. Keep blank checks locked up at all times and limit the number of people with access to your checks. If your checks fall into the possession of unscrupulous employees, you could be liable for substantial losses.

Change the locks on your facility when an employee leaves your employ

Never leave checks or bank records unattended in order to assist customers

Issuing and reconciling checks

Assign accounts payable functions to more than one person and make each one responsible for different payment areas. This division of responsibility makes it more difficult for employees to tamper with checks and payments.

Limit the number of official signers. The fewer check signers you have, the lower your chances are of being defrauded.

Require more than one signature on large dollar check amounts. In this way, any losses you may incur will be low denominations only.

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[97] Security features of cheque (RBI Notice) - Citibank India *www.online.citibank.co.in/.../security-features-of-cheque-r*

Immediately notify the bank of any change to your accounts payable process and personnel. You don't want former employees who may have secreted some checks from your business to retain authorization to sign them after they have left your employ.[98]

Separate the check writing and account reconcilement functions. Try not to have the same person who balanced the bank statement issue checks. This provides greater safeguards against an employee writing fraudulent checks and covering it up. The reconciler would be able to prevent the crime unless the employees are in collusion.

Reconcile your account promptly and regularly -- quick fraud detection increases the likelihood of recovery. Businesses and personal consumers who do not balance their accounts monthly and don't find the discrepancies until months have passed, can become liable for losses.

Fraud Prevention Services (provided by the bank)

Use maximum dollar amounts on accounts to limit large denomination losses by authorized or unauthorized persons.

Set up a separate account of large dollar payments to keep fraud losses at low denomination levels.

Request detail reports for large dollar items to stay better informed. Increase fraud detection opportunities to find out whether you have a corrupt employee.

Use Positive Pay. This type of payment system records pertinent information about each check such as the amount, the check number, bank information and date, and then transmits it to the bank to be verified, before the check can be paid.

[98] Radhakrishna Gita and Pointon Leo, "Fraud in Internet Banking: A Malaysian Legal Perspective", ICFAI University Journal of Bank Management, Vol. VI, issue 1 (Feb. 2007), pages 47-62 87

Employee relations policies

Make sure you know who you are hiring to handle your money. Diligent reference and background investigations on all prospective employees are important so you know that you are not hiring someone with a past record of financial abuse.

Conduct random audits and enforce vacation policies.

Have your employees bonded.

Detecting Counterfeit Checks:

1. Color - By fanning through a group of returned checks, a counterfeit may stand out as having a slightly different color than the rest of the checks in the batch.
2. Perforation - Most checks produced by a legitimate printer are perforated and have at least one rough edge. However, many companies are now using in-house laser printers with MICR[99] capabilities to generate their own checks from blank stock. These checks may have a micro-perforated edge that is difficult to detect.
3. Micr Line Ink - Most, but not all, forgers lack the ability to encode with magnetic ink the bank and customer account information on the bottom of a check. They will often substitute regular toner or ink for magnetic ink, which is dull and non-reflective. Real magnetic ink applied by laser printers is the exception and may have a shine or gloss.

   If a counterfeits MICR line is printed or altered with non-magnetic ink, the banks sorting equipment will be unable to read the MICR line, thus causing a reject item. Unfortunately, the bank will normally apply a new magnetic strip and process the check. This works to the forgers advantage because it takes additional time to process the fraudulent check, reducing the time the bank has to return the item. But banks cannot treat every non-MICR check as a fraudulent item because millions of legitimate checks are rejected each day due to unreadable MICR lines.

[99] *https://en.wikipedia.org/.../Magnetic_ink_character_recognition*

4. Routing Numbers - The nine-digit number between the colon brackets on the bottom of a check is the routing number of the bank on which the check is drawn. The first two digits indicate in which of the 12 Federal Reserve Districts the bank is located. It is important that these digits be compared to the location of the bank because a forger will sometimes change the routing number on the check to an incorrect Federal Reserve Bank to buy more time.[100]

4.1 Prevention of Fraud

How to Prevent Cheque Fraud.

While in the field, the researcher established several ways through which bank fraud is prevented especially with regard to issuance of false cheques. An interview was conducted and the interviewee in the name of Mr. wakaya Eric, assistant legal adviser at DTB branch in Kireka, under the Legal Department and the following tips were discussed.

> Never accept a cheque, or banker's draft from someone, unless you know and trust them. Be especially wary when accepting a high–value cheque; for instance if you are selling a car.
> Always complete cheques using a ballpoint pen, or pen with indelible ink.
> Draw a line through all unused spaces, including after the payee name.
> Following the introduction of the 2-4-6 rules you can be sure that at the end of the 6th day after you have paid the cheque in to your account, the money is yours and there is no risk that the money could be reclaimed IF the cheque turns out to be stolen, fraudulently altered or counterfeit.
> It is safer to ask for payment for high–value items to be made by other means (an internet or phone banking payment or a CHAPS payment). There is a charge for a CHAPS payment but it is a guaranteed same–day value payment. If the "buyer" is unwilling to pay the relatively small cost involved – or to split it with you – then you really do need to be on your guard.

[100] *www.aarp.org › Money › Consumer Protection Centre*

Be aware that a banker's draft or building society cheque is not necessarily safe from fraud. They can be stolen or altered like any other cheque, and if altered, stolen or counterfeit they will not be honoured. If you receive a banker's draft in payment for goods, you should wait until the end of the 6th working day after you've paid the draft in to your account before releasing the goods.

Keep your chequebook in a safe place, report any missing cheques to your bank immediately and always check your bank statement thoroughly.

If you are making a cheque payable to a bank or credit card company to pay off your credit card bill, you must ensure that you provide sufficient details about the payee and enter the full details for the account holder in the payee line.

Banks consider all incidents of cheque fraud on an a case-by-case basis and take reasonable steps to ensure that cheques are genuine before they are paid, but, generally speaking, if you are an innocent victim of cheque fraud who has had a cheque or cheque book stolen and used fraudulently you will be refunded. However, if you are the victim of a scam because you have accepted a cheque or banker's draft that turns out to be fraudulent, and you have parted with either goods or services or, in the case of receiving a cheque or banker's draft for an inflated amount, you have paid cash back to the buyer, you are unlikely to be refunded. The consequence of such action is criminal and civil but the imposition of such amounts to double jeopardy.

In *Sambasivam v. Public Prosecutor, Federation of Malaya*[101] that the effect of a double imposition of penalty pronounced by a competent court after a lawful trial is not restricted to the fact that the person cannot be tried again for the same offence but the issue is on the civil as well as criminal consequences upon which the accused is subjected to. He said that it is binding and conclusive in all subsequent proceedings between the parties to the adjudication. But I agree with my noble and learned friend Lord Hutton that the observation which is contained in the second of these two statements is in need of qualification in order to confine its application to its proper context. The principle which underlies both statements is that of double jeopardy. It is obvious that this principle is infringed if the accused is put on trial again for the offence of which he has been

[101] [1950] A.C. 458, 479

acquitted. It is also infringed if any other steps are taken by the prosecutor which may result in the punishment of the accused on some other ground for the same offence. But it is not infringed if what the prosecutor seeks to do is to lead evidence which was led at the previous trial, not for the purpose of punishing the accused in any way for the offence of which he has been acquitted, but in order to prove that the defendant is guilty of a subsequent offence which was not before the court in the previous trial.

4.2 Conclusion

It was concluded that: (1) there was a definite need for further research on the situation of the banking industry and more emphasis be put on the imposition of double jeopardy, based on the diversity of findings regarding regarding issuance of false cheques, (2) that the concept of double jeopardy has merit as a general concept, and (3) that although the concept of double jeopardy is probably appropriate in certain situations, it may well not be with respect to fraud in the banking industry. In the second stage of the analysis, subjective factors associated with

That the effect of a double imposition of penalty pronounced by a competent court after a lawful trial is not restricted to the fact that the person cannot be tried again for the same offence but the issue is on the civil as well as criminal consequences upon which the accused is subjected to. I also deduce that it is infringing and inconsistent with the 1995 Constitution as a grand norm of uganda in all subsequent proceedings between the parties to the adjudication

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions.

Bank of Uganda Initiatives in its resolve to maintain a safe and sound financial sector, the Bank of Uganda has strengthened the regulatory framework and strengthened the supervision of financial institutions. New laws have been enacted to strengthen the legal framework. The Micro Finance Deposit-Taking Institutions Act, 2003 (MDI), The Financial Institutions Act, 2004 (FIA) and the Foreign Exchange Act, 2004 (FEA) have all been enacted recently to ensure that financial institutions are managed within an appropriate and up to date legal environment. The MDI regulates micro finance institutions which take deposits from the public and Bank of Uganda has so far licensed three micro finance deposit-taking institutions. The implementation of the law is expected to increase outreach of financial services especially in the rural areas. The FIA reflects best practices, standards and principles in supervision of financial institutions. It addresses among others aspects of licensing, corporate governance and prompt corrective actions against problems in licensed institutions. There are currently fifteen commercial banks and seven credit institutions licensed and supervised under this Act. Implementing regulations have been gazzetted under these Acts and supervision of the institutions has been strengthened through capacity building, and more frequent examination of institutions through on-site and off-site methodologies including risk-based supervision.
The FEA consolidates the law relating to foreign exchange in Uganda; to provide for the exchange of foreign currencies in Uganda and the making of international payments and transfer of foreign exchange. Foreign Exchange Bureaux are licensed under this Act. The Anti-Money Laundering Bill has been drafted and is due for debate by the legislature. The enactment of this law will curtail the misuse of Uganda's financial system for money laundering activities, hence protecting the financial sector against the effect of money laundering. Bank of Uganda regularly meets with the Uganda Bankers' Association to discuss the frauds and forgeries taking place in the financial sector.

An Economic Intelligence Unit (EIU) has been established in the Bank of Uganda to handle the problems of fraud and forgeries taking place in financial institutions. The payments system has been extensively modernized by the Central Bank in collaboration with the financial institutions. Improvements have introduced initiatives, which will reduce on incidences of especially cheque fraud.

Implementation of a national cheque standard has ensured high quality cheques with reasonable security features. The use of risk-prone cheques will be reduced further with the introduction of electronic funds transfer systems (EFT), real time gross settlement system (RTGS), credit cards and electronic funds transfer at point of sale (EFTPOS). The use of these settlement methodologies to effect both large volume payments (RTGS) and low value payments (EFTS) eliminate the use of cheques, and hence the incidence of cheque fraud. Customer Due Diligence Bank customers should also be vigilant in our joint fight to stamp out or reduce bank frauds. They should exercise caution and be security conscious in the handling of bank instruments. Cheques should be written in a way that deters fraudulent alterations; use of strong, bold and consistent font is advisable and no large gaps should be left in the completion of the payee name, amount in words and amount in figures. If the cheque is completed in ink, indelible ballpoint or permanent ink preferably black should be used. Cheques should never be signed when they are blank. They should only be signed after all details have been completed. Cheques with preprinted signatures must be more closely controlled and regularly audited. The business organizations should also limit the number of authorized signatories and regularly audit the business signing authority registered at the bank.

In relation to imposition of double punishment, a main justification if not the main justification for double jeopardy protection is to guarantee the rights of individuals to be free from successive prosecutions for the same crime. It is not surprising therefore that international human rights law contains double jeopardy protections, as does the related field of international humanitarian law which protects the rights of individuals in situations of armed conflict. However, double jeopardy protection in these areas has a notably limited scope: it attaches only to multiple prosecutions or punishments within a single state. In other words, the relevant international human rights and humanitarian law

instruments permit a state to prosecute an individual for a crime for which that individual already has been prosecuted criminally. Civil action is also considered at the same time in a state where an accused is compelled by courts to pay as twice the amount of money indicated on the cheque.

5.2. Recommendations

Quick fraud detection increases the likelihood of loss prevention and probably recovery. Therefore, bank customers should reconcile their chequing accounts promptly and regularly. If cheques are issued falsely, the bank should be requested to record a "Stop Payment". In case of businesses, independent oversight at an appropriate level of

management should be instituted. The company could consider having a separate account specifically for higher value cheques. This would help the company to monitor more easily large disbursements.

Financial institutions should therefore have measures in place to identify and verify the identity of their clients (legal and natural) before opening a bank account. These measures or guidelines / policies stated or implied must require customers to provide certain information before opening an account. Banks should at the minimum check for the applicant's address, occupation, telephone numbers and credit records. Additional information could be a letter from the Local council (LC) or a recommendation from the employer or former financial institution affiliation. KYC rules promote high ethical standards in the financial sector and prevent the institution from being used intentionally or unintentionally by criminal elements.

The teller should get an address. First have the customer sign the cheque in your presence and make sure that the customer's phone number and address appear somewhere on the cheque. If the customer has an address that does not appear permanent or that would make it difficult to trace her later on, think carefully before accepting the cheque.

Avoid post-dated cheques. Examine the cheque carefully before accepting it. Be ware of cheques with crossed out or re written marks. Check the date to see if it is accurate. Also

be extra careful about accepting post dated cheques (cheques that cannot be deposited immediately) in some states, the writer of a post-dated cheque cannot be held liable for writing such cheques.

Confirm identity: collect identification, for example, driver's license, when taking cheques. You may wish to write down the customer's driver license number on the cheque. Remember that you do not have to accept cheques and that you may also require customers to pay in cash. To avoid a discrimination claim, you must apply a cheque policy constantly to all customers.

The bank may correct a bad cheque. The bank may first call the customer and ask that he/she either write a new cheque for the amount awed or send you a cash payment. This is why it is helpful to collect a customer's phone number and other contact information in advance.

The recipient of the cheque should call the customer's bank and if the customer's bank is still active, wait a few days and then call the bank to determine if there are sufficient funds. Explain that you have a cheque for a certain amount and ask if there are enough funds in the account t to cover it; normally, banks are able to provide you with this information. If there are sufficient funds to cover the amount, take the returned cheque to the bank and draw the cash.

On the other hand, you can also ask the customer's bank for enforced collection. If the bank offers the service, the bank will ensure that the next deposit in the customer's account is transferred to you. The procedure and cost of using such services vary, obtain details from the bank directly.

Intentionally, writing a bad cheque is a crime. Note, however, that many states require you to send a written notice to the debtor before he/she may be prosecuted. Police department or district attorney should be able to tell whether written notice is required and what information the written notice should contain.

The writer of the cheque should balance his cheque book. It sounds elementary but balancing your cheque book can be the best preventive measure. Begin by writing down every withdrawal and deposit. If you withdraw 20 dollars from and ATM, note it down, if you deposit 100 dollars cheque from someone, write it down. A well kept cheque book makes it easier to avoid mistakes when you compare it to your monthly bank statements.

Recording all ATM/Deposit transactions. Most institutions charge non customers a fee for using their ATMs. Debt cards, on the other hand do not carry sur charges. They work just like a cheque. Money is siphoned from your account when the card is used. Keep in mind that debt cards offer less leverages than a credit card when returning a purchased item. So cheque the cards return policy. ATM and debt transactions need to be recorded immediately to keep from losing track of your balance.

Using overdraft protection. You can forever avoid the rubber cheque blues by signing your overdraft protection. When you write a cheque for more than the balance in your account money can be automatically withdrawn from your savings or money market account to cover the amount. Some financial institutions charge a fee to transfer funds from one account to another.

Reporting a lost or stolen cheque book immediately. Failing to notify the bank immediately that your cheque book or debt card was lost or stolen can result in losing all your money. Issue a stop payment on cheques numbered after the last cheque you wrote. Some financial institutions limit your liability at 50 dollars for a lost debt card that limit, though, could increase the longer you wait to report the loss. The best preventive measure to take is keeping fastidious records of all your financial transactions.

When people discuss banking and finance, they often underestimate the specialized skills required to process the millions of banking transactions that occur every day. The vital role of the bank tellers who handle these day-to-day transactions is often overlooked. In this lesson, we will explore how bank tellers could make or break the banking process!

Tellers should be charged with new responsibilities in the bank. Tellers should be required by law to ask more questions, record much more information from customer,

and be on the lookout for suspicious activity. They also have expanded responsibilities beyond completing transactions, like dispersing financial information or even selling other financial products and services that the bank offers.

Identity theft, which includes bank fraud, it is the fastest growing crime in thenation, so it is becoming an even bigger concern to tellers and bankers. Banks should tighten rules and ask their tellers to do more to prevent fraud. Additionally, technology for copying and counterfeiting has become more sophisticated, making fraud harder to detect. In that case, technology should work.

Advanced technology. To stop fraud, bank tellers are using more advanced technology, like fingerprint scanners to help identify customers. Banks are also encouraging tellers to get to know customers and their banking habits, and to be on their toes at all times. Banks should devise sofiscated system of detecting bank cheques and check whether the cheques drawn are valid.

Tellers should also cheque accounts of clients who intend to draw a cheque or cheques against their accounts to establish whether the amount they tend to draw actually exists. This will scare away people who would want to draw cheques that are false. Tellers should be equipped with skills to handle clients and ensure that some of them are not genuine but with evil intentions. Since a teller is the face of the bank, a teller must have very good "people skills" and be able to communicate well with customers. A teller should also be skillful using technology, and be knowledgeable about laws and regulations that apply to banking. A teller must also have skills beyond basic math skills, and be able to help customers with their other financial needs.

Maintain adequate physical security of your checks, deposit slips, etc.

Secure all reserve supplies of checks, deposit slips and other banking documents in a locked facility. Keep blank checks locked up at all times and limit the number of people with access to your checks. If your checks fall into the possession of unscrupulous employees, you could be liable for substantial losses.

Change the locks on your facility when an employee leaves your employ

Never leave checks or bank records unattended in order to assist customers

Issuing and reconciling checks

Assign accounts payable functions to more than one person and make each one responsible for different payment areas. This division of responsibility makes it more difficult for employees to tamper with checks and payments.

Limit the number of official signers. The fewer check signers you have, the lower your chances are of being defrauded.

Require more than one signature on large dollar check amounts. In this way, any losses you may incur will be low denominations only.

Immediately notify the bank of any change to your accounts payable process and personnel. You don't want former employees who may have secreted some checks from your business to retain authorization to sign them after they have left your employ.

Separate the check writing and account reconcilement functions. Try not to have the same person who balanced the bank statement issue checks. This provides greater safeguards against an employee writing fraudulent checks and covering it up. The reconciler would be able to prevent the crime unless the employees are in collusion.

Reconcile your account promptly and regularly -- quick fraud detection increases the likelihood of recovery. Businesses and personal consumers who do not balance their accounts monthly and don't find the discrepancies until months have passed, can become liable for losses.

Double jeopardy

The idea of double jeopardy is quiet challenging to the legal/judicial institution in Uganda. The conviction and sentencing of the criminal lies in the hands of the court in what we call the discretion of court as seen in different cases discussed in the previous chapters. Many criminals have been punished twice and yet this is not an appropriate action courts should take when considering the provisions of the 1995 Constitution of the Republic of Uganda.

The doctrine of double jeopardy can be prevented in the following respects:

Courts should ensure that the provisions of the constitution are fully considered and observed. Any infringement makes courts a bad custodian of the constitution in Uganda. To keep a clean reputation and image, courts should strictly adhere to the constitutional rights of an accused before passing any sentence.

Relatedly, courts should only sentence a criminal to one punishment. If the money was not drawn, why should the criminal pay what he/she has not stolen? Serving a sentence in prison is appropriate for him/her and the government should not make such a criminal pay double the amount.

There are instances where the drawer is not certain of the balance on his account but mistakenly issues a false cheque without intention to defraud. In such circumstances, there is need for courts to give a lenient punishment but not paying double the amount on the cheque. The drawer may be released freely if it so happens that he/she did not intend to defraud. The issue of double jeopardy should be observed as it infringes on the constitutional rights of an accused person.

REFERENCES

Dos Santos, B.L., Peffers, K.G. and Mauer, D.C. (1993) "The Impact of Information Technology Investment Announcements on the Market Value of the Firm", Information Systems Research, Vol.4, p.1-23.

Brynjolfsson Erik (1993) "The Productivity Paradox of Information Technology", Communication of ACM, Vol. 36(12),p.67-77.

Brynjolfsson, Erik, Hitt, Lorin (1996) "Paradox lost? Firm-level Evidence on the Returns to Information Systems Spending", Management Science, April, Vol.42 No.4, p.541-558.

Parsons, D., Gotlieb, C.C. and Denny, M. (1993) "Productivity and Computers in Canadian Banking", Z. Griliches and J.Mairesse (Eds.), Productivity Issues in Services at the Micro Level, Kluwer, Boston.

Reserve Bank of India. (1984). Report of the Committee on Mechanisation in Banking Industry.

RBI (1989) Report of the committee on computerisation in banks (The Rangarajan committee) Mumbai: Reserve Bank of India

www.rbi.com & www.Banknetindia.com

RBI (1998) Report of the committee on Banking sector reforms (The Narasimhan committee) Mumbai : reserve bank of India

Balasubramanya S. "IT wave breaks over banking", THE CITY, Aug – Sept 2002(http://www.rbi.org.in/scripts/aboutusdisplay.aspx?pg=depts.htm#DBOD(FILE:)

Reserve bank of India R&D_DEPT)

Rajashekhara K. S., "Application of IT in Banking", Yojana, July 04

Vij Madhu, "The New World of Banking: A Paradigm shift", Journal of Management Research, Vol.3, December 2003.

Gulati V. P.," Information Technology Application in Indian Banking: Better Late than Never!", "NewsLetter", Volume 6, No. 3, July 1996.

G Ananthakrishnan," Customer Service in Banks", Vinimaya, Vol. XXV, No.3, (2004-05) 86

Rao Akula Rajagopal, "Sprightliness of Urban Cooperative Banks : A Study" Uppal R. K., "Customer Perception of E-Banking Services of Indian Banks: Some Survey Evidence", The ICFAI University Journal of Bank Management, Volume-VII Issue-1 (Feb. 2008) Pages 63-78

Kamakodi N., M Basheer Ahmed Khan, "Customer Expectations and Service Level in E-Banking Era: An Empirical Study", The ICFAI University Journal of Bank Management, Volume VII Issue4 (Nov. 2008), Pages:50-70

S. Venkata Seshaiah & VunyaleNarender, "Factors Affecting Customers' Choice of Retail Banking", ICFAI University Journal of Bank Management, Vol. VI, issue 1 (March 2007), pages 34-46

Morrison, C.J. and Berndt, E.R. (1990) "Assessing the Productivity of Information Technology Equipment in the U.S Manufacturing Industries", National Bureau of Economic Research Working Paper #3582, January.

Loveman G.W. (1994) "An Assessment of the Productivity Impact of Information Technologies", T.J. Allen and M.S. Scott Morton (Eds.), Information Technology and the Corporation of the 1990s: Research Studies, MIT Press, Cambridge MA.

Kamath K V, Kohli S S, Shenoy P S, Ranjana Kumar, Nayak R M, and Kuppuswamy PT, N Ravichandran, "Indian Banking Sector: Challenges and Opportunities", Vikalpa, Vol. 28, No.3, Jul-Sept. 2003.

Balasubramanya S., "IT wave breaks over banking", THE CITY, Aug – Sept 2002

Kunkalienkar Manoj,"IT in Banking 2003 (Special) Perspectives of CEO's: Banking Software Companies" (http://www.banknetindia.com/special/itb8b.htm).

Mittal R. K. and Dhingra Sanjay, "Technology in Banking Sector: Issues and Challenges", Vinimay, Vol.XXVII, No.4, 2006-07.

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