

# Thy Cause shall not be heard Twice: Exploring the Doctrines of Res Judicata and Double Jeopardy, the Counterparts in Civil and Criminal Laws in India

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## Abstract

*The doctrine of res judicata, striving to uphold the conclusive and inviolate nature of a judicial pronouncement, has since long back, stood as an integral part of civil law. The objective of this doctrine is to prevent a deluge of superfluous litigation that can collectively undermine the finality and sacred nature of a judgement passed by the courts. In course of the present article, the authors have traced the origin of this doctrine to its early Roman law counterpart and have also laid bare the conditional precedents for successful application of the doctrine in the modern scenario. The individual components of the doctrine have been analyzed, with the conclusions reached there from drawing their support from numerous judicial precedents. The authors have then examined in brief the exceptions that operate against the said doctrine. In course of such efforts, attention has also been paid to the exclusive nature of Section 11 of the Code of Civil Procedure, 1908 that embodies res judicata and the relative position of the doctrine vis-a-vis other established legal principles such as res sub judice and estoppel. After having traced the manner of evolution of the scope of res judicata with tie, the authors have then turned their thoughts to the principle of double jeopardy, which can at best be described as the counterpart of res judicata in the context of criminal law. While doing so, the authors have at first looked back at the historical source of double jeopardy, the constitutional validity of the said principle being the next in the list of matters discussed. This has been followed by an examination of the legislative provisions pertaining to double jeopardy, especially those of the Code of Criminal Procedure. The authors have then ventured into a comparative analysis of the status of double jeopardy under the criminal law regimes across the globe. Finally, the article concludes with highlighting the role played by res judicata in matters pertaining to public policy and the curious tendency of the mass to prefer the constitutional rather than the legislative path while pleading double jeopardy in a court of law.*

## Introduction

The doctrine of *res judicata*, also known as the rule of conclusiveness of a judgment, regarding the point decided either of fact, or of law, or both, in every subsequent suit between the same

parties, is the crux of the contents of Section 11 of the Code of Civil Procedure (CPC), 1908. According to this section, once a court of competent jurisdiction reaches a decision with respect to a particular subject matter, no party can be given permission to reopen the same in a subsequent litigation. The rationale behind this rule of imposing an embargo on a judicial proceeding is the desire to prevent a deluge of unnecessary litigation that can only result in trouble, harassment and unwelcome expenses for the parties involved and the subsequent social unrest. Dating as far back as the early Roman jurisprudence, where a defendant could successfully contest a suit filed by a plaintiff on the plea of "*ex captio res judicata*", this doctrine has been described by Spencer Bower as "*a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto.*"<sup>1</sup> The object of this rule can be succinctly described through the combined effect of three maxims –

- (a) *nemo debet lis vexari pro una et eadem causa* (no man should be vexed twice for the same cause);
- (b) *interest publicae ut sit finis litium* (it is in the interest of the State that there should be an end to a litigation); and
- (c) *res judicata pro veritate occipitur* (a judicial decision must be accepted as correct).

In order to decide whether a subsequent proceeding is barred by *res judicata* or not, the question ought to be examined with reference to:

- (i) The form or competence of the court;
- (ii) The party and the respective representatives;
- (iii) Matters in issue;
- (iv) Matters which ought to have been made ground for defence or attack in the former suit; and
- (v) The final decision.

For a defence of *res judicata* to succeed, the defendant has to prove not only that the cause of action was the same but also that the plaintiff had a previous opportunity to get the relief which he is seeking at present. For this purpose, it is necessary to examine whether the claim in the subsequent suit is actually founded upon the same cause of action upon which the former suit was based. However, not every matter decided in a former suit can be pleaded as *res judicata* in a subsequent suit. For that the following conditions must be satisfied:

1. The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either *actually* (as per Explanation III to S. 11) or *constructively* (as per Explanation IV) in the former suit.

2. As per Explanation VI, the former suit must have been either *between the same parties* or *between parties under whom they or any of them claim*, i.e. whom they represent legally.
3. The aforementioned parties must have *litigated under an identical title* in the former suit.
4. The former suit must have been tried by a court of competent jurisdiction to try the subsequent suit. Explanation II relates to this condition.
5. Finally, the matter directly and substantially in issue in the subsequent suit must have been heard and conclusively decided by the court in the former suit, according to the provisions of Explanation V.

Thus one can see that although this doctrine rests on the foundation of quite a simple principle, still it has many facets of its own that are both complex as well as fascinating in nature.

### **Analysis of the Components of Res Judicata**

Res judicata includes two related concepts: claim preclusion, and issue preclusion (also called collateral estoppel), though a narrower interpretation of the doctrine includes only claim preclusion. Claim preclusion focuses on barring a suit from being brought again on a legal cause of action that has already been finally decided between the parties. Issue preclusion, on the other hand, seeks to prevent the re-litigation of factual issues that have already been necessarily determined by a judge or jury as part of an earlier claim. It is often difficult to determine which, if either, of these apply to later lawsuits that are seemingly related, because many causes of action can apply to the same factual situation and vice versa. The scope of an earlier judgment is probably the most difficult question that judges must resolve in applying res judicata. Sometimes merely part of a subsequent lawsuit will be affected, such as a single claim being struck from a plaint, or a single factual issue being removed from reconsideration in the new trial. Res judicata does not restrict the process of appeal, simply for the reason that an appeal is considered a linear extension of the same lawsuit, an appropriate manner by which a judgment should be challenged. Once the process of appeal is exhausted or waived, res judicata will apply even to a judgment that is otherwise contrary to law.

The terms and conditions mentioned for operation of res judicata may bear certain elucidations. As for example, the term 'matter in issue', as explained in *Mathura Prasad v Dossiba*<sup>2</sup>, means the rights litigated between the parties, i.e. the facts on which the right is claimed and the law

applicable to the determination of that issue. Such issue can be of fact, of law, or a mix of both and its manner of appearance in the proceedings may be direct and substantial or collateral and incidental, depending on the facts and circumstances of each case. Mention must also be made of the rule of constructive res judicata, which is artificial form of res judicata, providing that if a plea could have been taken by a party in a proceeding between him and the opposite party, then he shouldn't be permitted to take that plea against the same party in a subsequent proceeding.<sup>3</sup> In *Greenhalgh v Mallard*<sup>4</sup>, Somervell, L.J. had rightly observed, "*I think that...it would be accurate to say that res judicata...is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and could clearly have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*"<sup>5</sup> As a matter may be res judicata between a plaintiff and a defendant, similarly, it may be so between co-defendants and co-plaintiffs. Such a test had in fact been laid down in a Common Law decision of *Cottingham v Earl of Shrewsbury*<sup>6</sup> – "*If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide the case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains.*"<sup>7</sup> Another condition of res judicata is that the parties to the subsequent suit must have litigated under the same title as in the former suit. Here title refers to the capacity or interest of a party – whether he sues in his own interest or for himself as representing the interest of another. The demand should be of the same quality in the subsequent suit as it was in the former. The term 'title' thus has no relation with the particular cause of action on which a party had sued or been sued.<sup>8</sup> A plea of res judicata can successfully be taken in respect of judgments of courts of competent jurisdiction, whether that jurisdiction be exclusive (like Revenue Courts, Land Acquisition Courts, Administration Courts etc.), limited (like courts of limited pecuniary jurisdiction<sup>9</sup>) or concurrent (concurrency as regards the pecuniary limit as well as subject matter of the suit<sup>10</sup>). Finally, the matter directly and substantially in issue in the subsequent suit has to have been heard and finally decided by a court in the former suit, i.e. in other words, it must be a matter on which the court has exercised its judicial mind and after arguments and consideration, has come to a decision on a contested matter.<sup>11</sup> One must not forget to mention that the onus of proving all these conditions to the satisfaction of the court lies on the party relying on the theory of res judicata.

## Exceptions to Res Judicata

Other than appeals, there are a few limited exceptions to res judicata that allow a party to attack the validity of the original judgment. Popularly known as collateral attacks, these exceptions are typically based on procedural or jurisdictional issues, having as their foundational base not the wisdom of the earlier court's decision but its authority or competence to issue it. A collateral attack is more likely to be available in judicial systems with multiple jurisdictions, such as under federal governments, or when a domestic court is asked to enforce or recognize the judgment of a foreign court. Moreover, it may so happen that under certain circumstances, a subsequent court may fail to apply res judicata and render a contradictory verdict on the same claim or issue. In that situation, if a third court is faced with the same case, it is likely to give effect only to the later judgment, even though the result came out differently the second time. This situation is not unheard of, as it is typically the responsibility of the parties to the suit to bring the earlier case to the judge's attention, and the judge must decide how broadly to apply it, or whether to recognize it in the first place.

The provisions of section 11 of CPC are not directory but mandatory in nature. The judgment in a former suit can be avoided only by taking recourse to section 44 of the Indian Evidence Act on the ground of fraud or collusion. Nevertheless, in a suit the collusion of only one of the several defendants present is alone not enough to avoid the operation of rule of res judicata. In this context, gross negligence should be differentiated from fraud and collusion. It is not for the court to treat negligence or gross negligence as fraud or collusion unless fraud or collusion is the proper inference from facts. Other factors in exception to section 11 being present is that the plaintiff must be litigating bona fide and the fulfillment of this is necessary for the applicability of the section. The above ratio decidendi was laid down in *Jallur Venkata Seshayya v. Thadviconda Koteswara Rao and Others*<sup>12</sup>. This representative suit was brought by some persons on behalf of public interest for declaring certain temples public temples and for setting aside alienation of endowed property by the manager thereof. A similar suit was brought some years ago by two persons and the suit was dismissed on the grounds that the temples were private temples and the property endowed to the temple being private endowment, the alienation thereof were valid. The plaintiffs admitted that they could be deemed to be persons claiming under the plaintiffs in prior suit and the issue in both the suits was same. However, they contended that finding in the prior suit could not be res judicata as against them in as much as there was gross negligence on the part of the plaintiffs in that suit in not producing the documents necessary for the decision of

the suit in their favour and in not placing their evidence before the Court. Subsequently Privy Council held that no case of fraud apart from collusion being suggested, the plaintiffs were bound to establish either that the decree in prior suit was obtained by collusion between the parties or that the litigation by the plaintiffs in prior suit was not bona fide. The plaintiffs based their case entirely on inferences to be drawn from alleged gross negligence on the part of the plaintiffs in the prior suit. The finding of gross negligence by the Trial Court was, however, far from a finding of intentional suppression of the documents, something that would have amounted to want of bona fide or collusion on the part of the plaintiffs in prior suit. The suit was subsequently barred on ground of *res judicata*.

In *Beliram & Brothers and Others v. Chaudari Mohammed Afzal and Others*<sup>13</sup> it was held that where it is established that a minor's suit was not brought by the guardian of the minor bona fide but was brought in collusion with the defendants and the suit was a fictitious suit, a decree obtained therein is one obtained by fraud and collusion within the meaning of section 44 of the Indian Evidence Act, and does not operate *res judicata*. The principle of *res judicata* in section 11 CPC is thus modified by section 44 of the Indian Evidence Act, and the doctrine won't apply if any of the grounds mentioned in Section 44 exists.

### **Exclusive Nature of Section 11 of CPC and General Principles**

General principles cannot and should not be applied in a way that would result in making section 11 nugatory. In *Sarla Bala Devi v. Shyam Prasad Chatterjee*<sup>14</sup>, the Division Bench of Calcutta High Court held: "*It is undoubtedly true that the principles of res judicata apply to proceedings other than suits including proceedings in execution. It must be taken as held by the Supreme Court that the principles of constructive res judicata are also applicable to execution proceedings. But the conditions of applicability of the principles of res judicata actual or constructive contained in section 11 CPC must be complied within such cases as far as possible. It is not the law that when a court applies the principles analogous to res judicata that court can override the conditions specified in section 11 CPC.*"<sup>15</sup> The Calcutta High Court had in fact followed an earlier decision of the same court to conclude that section 11 does not codify or crystallize the entire law regarding the doctrine of *res judicata*. It deals with some of the circumstances under which a previous decision will operate as *res judicata* but not with all. Where circumstances other than those provided for in section 11 exists, the general principle underlying the rule of *res judicata* may be invoked in proper cases without recourse to the provision to the provisions of that section. But obviously it does not follow that the provision of section 11 may be flouted or

overridden or that the prohibitions or reservation express or implied in that section may be ignored by reference to general principles of res judicata in a case to which section 11 applies. Moreover, it is also apparent that the general principles of res judicata cannot be invoked in a case when the court which tried the first suit had no jurisdiction to try the subsequent suit in as much as section 11 is explicit on this point and hence a former decision by court of small causes will not operate as res judicata. Thus the decision on an issue by a court of inferior jurisdiction does not operate as a bar to the trial of the issue by a court of superior jurisdiction in a subsequent suit, although in view of the Amending Act of 1976, there seems to be a scope of doubt regarding this conclusion.

Supreme Court has hastened to clarify time and again that the provisions of Section 11 of CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent suit and on general principles of res judicata, any previous decision on a matter of controversy decided after full contest or after affording fair opportunity to the parties to prove their case by a court competent to decide it will operate as res judicata in a subsequent regular suit. There is little doubt that the rule of res judicata as contained in Section 11 has some technical aspects like the rule of constructive res judicata, but the basis on which the said rule rests is founded on consideration of public policy. The doctrine of res judicata is a doctrine of wide import and Section 11 of CPC is not exhaustive of it and there is high authority for the view that the principle may apply apart from the limited provisions of CPC. In this context, recourse may properly be had to the decisions of the English Courts for the purpose of ascertaining the general principles governing the application of the doctrine. A decision in order to constitute res judicata need not necessarily have been given in a prior suit. The principle preventing the same cause being twice litigated is of general application and is not limited by the specific words of Section 11. The general provisions of res judicata are wider than the provisions of Section 11 and also apply to cases outside the ambit of the section but if the case falls within the terms of the section, then in that case, conditions of the section must be strictly complied with. The general principles of res judicata are applicable where a plea of res judicata is raised in a subsequent civil suit although the previous decision has not been given in a civil suit. Where both the proceedings are civil in nature, however, the general principles have no application and the case must be confined within S. 11. The principle of conclusiveness of judgment is much wider and is a part of the general principles of res judicata and those principles have been held by authorities to be good principles apart from the provisions of CPC. In this respect, mention can be made of *Sarangapani Ayyangar vs. Venkata Narsimha Acharyulu*<sup>16</sup>, where although a proceeding for scaling down a debt under the Madras

Agriculturists Relief Act was considered an original proceeding and not a suit, the decision of the Court scaling down the decree as regards the amount payable under it was held to be res judicata between the parties in subsequent proceedings.

The principle of Res judicata has been held to be of wider application on the basis of the wider principle of the finality of decision by Courts of law. As for instance, a decision under Section 12 of the U.P. Agriculturists Relief Act of 1934 was held to operate as Res judicata. Section 11 is not exhaustive statement of doctrine of res judicata and the principle has a wider application than is warranted by the strict language of the section. The Division Bench of the Madras High Court in *Arikapudi Balakotayya v. Yadlapalli Nagayyaheld*<sup>17</sup> as follows: "*It is undoubtedly the law that the Doctrine of Res Judicata is not confined to decisions in a suit and that the doctrine applies even to decisions rendered in proceedings which are not suits but how far the decision which is rendered in an original proceedings will bind the parties depends upon the considerations. A decision given in a proceeding other than a suit may still operate as Res Judicata substantial rights of the parties are determined. But if the decision is given in a summary proceeding it does not operate as Res Judicata. Proceedings under section 84(2) Madras Hindu Religious Endowments Act, cannot be said to be summary proceedings even though there may be no right of appeal. The question of res judicata does not depend on the applicability of the decision, which is put forward as constituting res judicata. That question comes in incidentally to see if proceedings under section 84(2) are of a summary nature.*"<sup>18</sup>

The decision of the District Judge can therefore successfully operate as res judicata in a subsequent proceeding between the same parties. On the other hand, the binding force of a judgment in probate proceedings depends not upon S. 11 but upon the general principles of law. Therefore one can only reach the inevitable conclusion that the application of the rule of res judicata by the Courts in India should be qualified by no technical consideration of form but by matter of substance within the limit allowed by law.

### **Res Judicata vis-à-vis Res Sub Judice**

The Doctrine of *res sub judice*, as enumerated in S. 10 of CPC, deals with the stay of civil suits, providing that no court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties and that the court in which the previous suit is pending is competent to grant the relief claimed. The rationale behind both the doctrines of *res judicata* and *res sub judice* is essentially similar in nature. The former aims to curtail endless litigations and the convenience caused to the parties thereby, whereas the latter is engaged in an effort to protect a person from multiplicity of proceedings and to avoid a conflict of decisions by confining a plaintiff to one litigation and obviating the

possibility of two contradictory verdicts by one and the same court in respect of the same relief.<sup>19</sup> However, there are two main grounds on the basis of which, *res judicata* and *res sub judice* can be properly distinguished from each other, viz.

- (1) The former applies to a matter adjudicated upon (*res judicatum*), while the latter involves a matter pending trial (*sub judice*); and
- (2) The restrictions imposed by the two also differ from each other in that *res judicata* restricts the trial of a suit or an issue which has been decided in a former suit and *res sub judice* bars the trial of a suit which is pending decision in a previously instituted suit.<sup>20</sup>

### **Res Judicata vis-à-vis Estoppel**

The doctrine of estoppel and *res judicata* are principles that are often placed on the same plane of generality. Nevertheless, there exist certain fundamental differences between them. Estoppel is actually a part of the law of evidence. Simply speaking, it prevents a person from saying something at one time and the opposite thing at another time. *Res judicata*, on the other hand, precludes a person from avowing the same thing in successive litigations. No estoppel can be applied to a pure question of law and the very focal point of the operative sphere of the doctrine of *res judicata* is the transformation of a question of fact into a question of law. The distinguishing features of these two doctrines had best been explained in *Sita Ram v Amir Begam*<sup>21</sup>, where Mahmud J. proceeded to say, "*Perhaps the shortest way to describe the difference between the plea of res judicata and estoppel, is to say that while the former prohibits the court from entering into an enquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declaration or acts to the prejudice of another party has altered his position. In other words, res judicata prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence.*"<sup>22</sup> As far as the points of similarity between the two are concerned, a popular viewpoint exists comparing the doctrine of *res judicata* as mentioned in S. 11 of CPC favorably with what is known in English Common Law as estoppel by judgment. It is more a rule of convenience than one of absolute justice, the very existence of which rests upon a foundation of public interest. To serve the same interest, sometimes the rule of *res judicata* has to be overlooked. Such a situation had occurred in *Delhi Golf Club Ltd. v NDMC*<sup>23</sup>, when the court held that the civil court judgment restraining recovery of tax, in a suit based on a cause of action arising out of assessment for a particular year and holding the plaintiff as not liable to payment of tax, doesn't constitute *res judicata* for liability to

pay tax or assessment of tax for subsequent years. However, despite such similarities, there are some essential particulars separating the two principles of estoppel and res judicata, viz.

- (a) Res judicata arises from a judicial decision, whereas estoppel is caused by the act of the parties concerned.
- (b) Res judicata seeks to prevent multiplicity of suits, where the object of estoppel is to bar multiplicity of representations.
- (c) Estoppel serves to prevent a party from making certain statements, whereas res judicata precludes an inquiry at the threshold by ousting the court's jurisdiction to try the case.
- (d) Finally, while res judicata binds both the parties concerned to a litigation by making a conclusive presumption with regard to truth of the decision in the former suit, estoppel only binds the party who had made the previous statement or committed the previous action.<sup>24</sup>

### **Enhancement of the Scope of Res Judicata**

Perhaps the earliest use to which the doctrine of res judicata was put to was in the *Duchess of Kingstone case*<sup>25</sup>, where the Duchess pleaded res judicata in the face of an allegation of bigamy. In that case, Sir William de Grey observed, "*From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first the judgment of a Court of concurrent jurisdiction, directly upon the points, is as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*"<sup>26</sup>

In CORPUS JURIS (vol. 34, p. 743), it has been stated: "*Res Judicata is a rule of universal law pervading every well regulated system of jurisprudence and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation; the other, the hardship to the individual that he should not be vexed twice for the same cause.*"<sup>27</sup>

The scope of this doctrine was further enhanced in the historic case of *Daryao v State of U.P.*<sup>28</sup>, where the petitioners, after witnessing the dismissal of their writ petitions in the Allahabad High Court filed under A. 226 of the Constitution, had filed substantive petitions in the Supreme

Court under Art. 32 of the Constitution seeking the same relief with the same cause of action. The Supreme Court accepted an objection raised by the respondents regarding maintainability of the petition, on the ground that the High Court decision should operate as res judicata to create an obstruction to the same. In doing so, Gajendragadkar J. further maintained, "***The binding character of judgments produced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis.***"<sup>29</sup>

### **Double Jeopardy: The Counterpart of Res Judicata in Criminal Law<sup>30</sup>**

*"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."*<sup>31</sup>

The origin of the doctrine of Double Jeopardy can be traced to the Latin maxim '*Nemo debet bis vexari*', which means that a man should not be put in peril twice for the same offence. The Indian Constitution has elevated this doctrine to the status of a fundamental right under Article 20(2), which proclaims, "*No person shall be prosecuted and punished for the same offence more than once*". However, the right of not punished more than once for the same offence has been a part of the Indian jurisprudence even before, albeit in a statutory form, in Sec. 26 of the General Clauses Act and Sec.403 (1) of the Code of Criminal Procedure (CRPC), 1898 and echoes of the same can still be found in the words of Sec. 300 of the Cr PC, 1973.

Perusal of historical records reveals the birth of the doctrine in the contours of the controversy between Henry II and Archbishop Thomas A. Becket that clerks convicted in the ecclesiastical courts ought to be exempted from further punishment in the King's courts, to effectuate the maxim *nemo bis in idipsum* (no man ought to be punished twice for the same offence).<sup>32</sup> The rule later found expression in the common pleas '*autrefois convict*'<sup>33</sup> and '*autrefois acquit*'<sup>34</sup>. While such pleas were adequate for a scenario with relatively few criminal offences and limited opportunities for a given fact situation to give rise to multiple offences,<sup>35</sup> the years since then have seen the proliferation of criminal law, the modernization of criminal procedure, and the development of modern criminal process and institutions<sup>36</sup>, all collectively contributing to the development of a

more extensive double jeopardy rule. The earliest judicial pronouncement of a coherent general principle regarding this rule came in *Connelly v Director of Public Prosecutions (UK)*<sup>37</sup>: "*For the doctrine of autrefois to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that which he is then charged. The word 'offence' embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.*"<sup>38</sup>

No attempt to capture the spirit of the essential arguments for maintaining the double jeopardy rule can hope to achieve a better result than the statement, "*The underlying idea ... is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence [sic], 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.*"<sup>39</sup> The necessity for such a rule is the need to protect against wrongful convictions, such risk being enhanced by repeated exposure to the (fallible) trial process.<sup>40</sup>

### **The Constitutional Premise of Double Jeopardy**

The presence of the doctrine of double jeopardy in the Indian Constitution not only provides a defensive right to a person against whom a criminal proceeding is being repeated, but also seeks to reinforce the trust of the people in the decisions of a competent judiciary. Article 20(2) of the Constitution echoes this principle, proclaiming that "*No person shall be prosecuted for the same offence more than once*". The ambit of this provision is, however, narrower than the English or the American rule against Double Jeopardy, with the Indian counterpart enunciating only the principle of *autrefois convict* and not the principle of *autrefois acquit*. This basically means that Art. 20 (2) can be invoked only when there has been prosecution and punishment in the first instance. However, as the authors have indicated later on, one comes across the principle of *autrefois acquit* having been embedded in Sec. 300 of CrPC.

The term 'prosecution', as used in Art. 20 (2), embodies the following essentials:

- There must be a person accused of an offence, with the meaning of offence being the same as in the General Clauses Act, 1897, i.e. "*an act or omission made punishable by any law for the time being in force*".<sup>41</sup>

- The prosecution should have taken place before a 'court' or 'judicial tribunal', not including revenue authorities like the sea-custom authorities<sup>42</sup>, or a tribunal entertaining departmental/administrative enquiries.<sup>43</sup>

A range of judicial pronouncements have delineated the ambit of Art. 20 (2) as far as Indian jurisprudence is concerned. As for example, if a person has been prosecuted for an offence but acquitted, then he can be prosecuted for the same offence again and punished, as has been held in *Kalawati v. State of Himachal Pradesh*<sup>44</sup>. Then again, the same set of facts can, in some cases, constitute offences under the two different laws. In the case of *State of Bihar v. Murad Ali Khan*<sup>45</sup> the Supreme Court held that in order for the prohibition to apply under Article 20(2), the same act must constitute an offence under more than one Act. If there are two distinct separate offences with ingredients under two different enactments, a double punishment is not barred.

In the case of *State of Bombay v. S.L. Apte*<sup>46</sup>, the Supreme Court expounded the legal position as follows:

*"To operate as a bar the second prosecution and the consequential punishment there under, must be for the 'same offence'. The crucial requirement therefore, for attracting the Article is that the offences are the same, i.e., they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out."*

A careful reading of Article 20(2) should reveal a sort of in-built restriction in that the former 'prosecution'(which indicates that the proceedings are of a criminal nature) must be before a court of law, or a judicial tribunal required by law to decide matters in controversy judicially on evidence and on oath which it must be authorized by law to administer, and not before a tribunal which entertains a departmental or administrative enquiry, even though set up by a statute, but not required to proceed on legal evidence given on oath.<sup>47</sup> Such was the situation in *Maqbool Hussain v. State of Bombay*<sup>48</sup>, wherein a person coming to India from abroad was found in illegal possession of gold and action was taken against him by the customs authorities and the gold was confiscated. Later he was prosecuted before a criminal court under the Foreign Exchange Regulation Act. The question was whether the plea of autrefois acquit could be raised under Art. 20(2). The Supreme Court came to the conclusion that the proceedings before the customs authorities did not constitute 'prosecution' of the appellant, and the penalty imposed on him did not constitute 'punishment' by a judicial tribunal. Under such circumstances, the trial of the petitioner before the criminal court was not barred. It was further observed:

*"It is clear that in order that the protection of Art. 20 (2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on oath which it must be authorized by law to administer and not before a tribunal which entertains a department or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Art 20 and the words used therein would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulated the procedure."<sup>49</sup>*

Furthermore, it has been ruled by the apex court of the land that the sea customs authorities are not a judicial tribunal and adjudging by it of the confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting the plea of double jeopardy.<sup>50</sup> Hence one can safely conclude that action taken by a *quasi-judicial body does not bar a later prosecution before a court*. Thus, immunity against a second prosecution has become confined to a situation when the first proceeding has been before a court of law. The same will be the position when after 'prosecution and punishment' for an offence, further action is taken by a quasi-judicial body.<sup>51</sup>

## **Double Jeopardy in the Code of Criminal Procedure**

As has been mentioned earlier, under the present CrPC, the provision to prevent punishment for the same offence twice can be found under Sec. 300<sup>52</sup>, the said section acknowledging the validity of the pleas of *autrefois acquit* and *autrefois convict*. The essential ingredients of Section 300(1) are:

- a) If a person is convicted or acquitted by a court of competent jurisdiction, he cannot be tried for the same offence.
- b) If charge has been made against a person under Section 221(1) and the facts are the same and he has been charged under Section 221(2), then he cannot be tried on the same facts. Of course this holds true only till the conviction or acquittal remains in force.

For the purpose of Sec. 300, the term 'acquittal' has been explained in negative terms by saying that the dismissal of a complaint or the discharge of the accused is not acquittal.<sup>53</sup> The said explanation has been repeatedly used by the judiciary in matters such as *Ramasharama v. Pinki Sharma*<sup>54</sup> and *E.K. Thankappan v. Union of India*.<sup>55</sup> In *Krishna Sen Gupta v. Manjula Mukherjee*,<sup>56</sup> the Calcutta High Court held that a subsequent complaint by the complainant for the same offence

is not barred by the principle of double jeopardy. The reason for having such an explanation is that the dismissal of a complaint or the discharge of the accused is not considered as final decision regarding the innocence of the accused person.<sup>57</sup> However, if a court applies a wrong provision of law erroneously, it would be deemed that the order in effect, was one under the provisions of law applicable to the facts of the case. Where in a summons case, the Magistrate passed an order of discharge under Sec. 245 (2) owing to the absence of the complaint, the order of discharge under Sec. 245 (2) must be read as an order of acquittal passed under Sec. 256.<sup>58</sup>

Furthermore, the term 'tried' in Sec. 300(1) does not imply tried on merit, as had been decided in *Kashigar Ratangar v. State of Gujarat*,<sup>59</sup> wherein withdrawal from the prosecution by the public prosecutor under Sec. 321 CrPC had resulted in an acquittal of the accused despite the latter having not been tried on merit. Such an acquittal would bar the trial of the accused on the same facts on a subsequent complaint.<sup>60</sup> One There are two views regarding the word "tried". One view states that the accused must be present in court on being summoned, before it can be said that the trial has commenced. The other view is that once the court has taken cognizance of a complaint or a criminal case and has ordered issue of process for the accused to appear, it has taken steps towards the trial and what it has done is proceedings in the nature of a trial. Just as it is necessary under Art 20 (2) to establish the competence of the court which tried the earlier case, in order to get benefit of the rule contained in Sec. 300 Cr PC it is imperative that the accused establishes that he has been tried by a competent court.

Another significant expression is 'competent court', a term that ought not to be narrowly interpreted as to involve merely the consideration of the status or the character of the court. On the contrary, while determining competence, it must also be considered whether the court, though otherwise qualified to try the case, could not have done so because certain conditions precedent for the exercise of the jurisdiction had not been fulfilled.<sup>61</sup>

Re-punishment for the same/identical offence is considered to be another crucial element of Section 300. It is therefore necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.<sup>62</sup>

Section 300 bars the trial for same offences and not different offences which may result from the commission or omission of the same set of acts. Where the legislature provides that on the same facts proceedings could be taken under two different sections and the penalties provided under those sections are also different, it is obviously intended to treat the two sections as distinct. In such a case, it is not possible to successfully apply the said section.

Where a person has been acquitted or convicted of any offence and a separate charge for another offence could have been made but was not made against him in the former trial, he should not

be liable to be again prosecuted for the other offence as a matter of course because this might lend itself to abuse. To provide a check against such abuse, Section 300 (2) imposes an obligation to obtain the State Government's consent before launching a new prosecution against any person for any distinct offence, for which a separate charge might have been made against him at the formal trial under Sec. 220 (1).<sup>63</sup> The said provision, however, allows a trial for a distinct offence.<sup>64</sup>

Section 300(3), considered carefully, can be judged applicable only in cases of conviction and not acquittal. This section is best explained by its illustration: "*A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide*".<sup>65</sup> Thus, this provision allows the re-trial of an accused for acts which did not come to light in front of the court of prior conviction. Nonetheless, a conviction simply in itself is not an adequate prohibition to re-trial of the accused for similar offences, which were not brought to the notice of the courts –the facts/circumstances must be such as to indicate a different kind of offence of which there could be no conviction at the first trial.<sup>66</sup>

The gist of section 300(4) is essentially that if any court lacks competence to try an accused of any offence, which is the consequence of an offence for which the latter has already been convicted/acquitted, such prior acquittal/ conviction would not act as a bar to the proceedings for the consequential offence as the court could not have possibly tried the accused of that offence. An illustration given with this sub section explains the fact further thus: "*A is charged by a magistrate of the second class with, and convicted by him of, theft of property from person B. A may subsequently be charged with, and tried for, robbery on the same facts*".<sup>67</sup>

In a summons case instituted otherwise than upon a complaint, the judiciary is authorised under Section 258 of CrPC to halt the proceedings at any stage without pronouncing the judgment. If such action is taken before the evidence of the principal witness has been recorded, then it causes discharge of the accused. However, as per provisions of Section 300(5), such accused cannot be tried again for the same offence without the consent of the concerned court, the rationale being that this provision will provide a safeguard against the abuse of power of fresh prosecution in such cases.<sup>68</sup>

Finally, Section 300(6) refers to Section 26<sup>69</sup> of the General Clauses Act, 1897 and Section 188 of the CrPC. Though said Section 26 refers to "*acts and omissions constituting an offence under two or more enactments*", the emphasis is not on the facts alleged in the two complaints, but rather on the ingredients which constitute the two offences with which a person is charged. Such a conclusion can safely be drawn from the reference to "*shall not be liable to be punished twice for the same offence*".

However, it must be noted that in case of distinct offences are not the same but are distinct, the ban imposed by Section 26 cannot be effected<sup>70</sup>.

The basic point that comes across from analyzing the entire section is that only sub-section (1) deals with the exact provision relating to Double Jeopardy. The other sections are merely supplementing the main sub-section as to the various contingencies which may arise in the actual implementation of the doctrine of Double Jeopardy.

### **Double Jeopardy from a Multinational Perspective**

Australia shares a common jurisprudence regarding this doctrine with other common law countries. While there appears to be no constitutional protection against re-trials following acquittal, statutory exceptions have been known to exist. For example, in all state jurisdictions prosecutors can appeal against the sentence handed down by the trial judge and in South Australia and Tasmania the prosecution can appeal against an error of law made by the trial judge in certain situations. However the acquittal will still stand valid and the purpose of the appeal is merely to clarify the relevant laws.

It is worth noting that contrary to other common law jurisdictions, *Australian double jeopardy law extends to prevent prosecution for perjury following a previous acquittal where a finding of perjury would controvert the previous acquittal*. The decision in *Queen v Carroll*<sup>71</sup> confirms this deviation, wherein the police had found new evidence convincingly disproving Carroll's sworn alibi two decades after he had been acquitted of the murder of a young girl and successfully prosecuted him for perjury.

The authors have next sought to consider the Canadian scenario, wherein Section 11(h) of the Canadian Charter of Rights and Freedom<sup>72</sup> reflects the double jeopardy doctrine, although said prohibition mostly applies only after conclusion of the trial, contrary to the U.S. law, with the prosecution being allowed to appeal from an acquittal. If the acquittal is dismissed, the new trial is not considered to be eligible for the doctrine, since the first trial and its judgment would have been annulled. On very few occasions, a court of appeal may also substitute a conviction for an acquittal, but that is not considered to be double jeopardy either, with the appeal and subsequent conviction being deemed to be a mere continuation of the original trial.

In Europe, all members of the Council of Europe are signatories to the European Convention of Human Rights<sup>73</sup>, which protects against double jeopardy through Article 4 of the 7<sup>th</sup> Protocol that proclaims, *"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.*<sup>74</sup> All EU states other than Belgium, Germany, Netherlands, Portugal, Spain and the United Kingdom have ratified this specific optional protocol. In many European countries the prosecution may appeal an acquittal to a higher court (similar to the provisions of Canadian law)-unfortunately, this situation cannot be deemed either as one where the doctrine can be applied with success, being considered another mere continuation of the same trial.

Next comes the turn of France, where Article 6 of the Code of Penal Procedure provides that once all appeals have been exhausted on a case, the judgment is final and the action of the prosecution is closed, except if the final ruling had been forged. Prosecution for an already judged crime is impossible even though new incriminating evidence has been found. However, a person who has been convicted may request another trial on grounds of new exculpatory evidence.

As far as the United Kingdom is concerned, subsequent to the enactment of the Criminal Justice Act, 2003 by the English Parliament, the previous stringent form of prohibition of double jeopardy has been abolished, and *retrials are now allowed if there is 'new and compelling evidence'*, although prior approval of the Director of Public Prosecutions is required, along with the Court of Appeal having agreed to set aside the original acquittal.<sup>75</sup>

The term 'double jeopardy' originally stems from the Fifth Amendment to the U.S. Constitution: "*nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*", the said clause being intended to restrict governmental abuse in repeated prosecution for the same offense, as a means of harassment or oppression. As far as the U.S. position is concerned, there exist three protections provided for by the double jeopardy doctrine, viz. *protection from being retried for the same crime after an acquittal; protection from retrial after a conviction; and protection from being punished multiple times for the same offense*. Having said that, the doctrine has sometimes been critically termed a mere legal technicality, owing to its permitting defendants a defence that fails to address whether the crime had actually been committed.<sup>76</sup> While the applicability of the Fifth Amendment is restricted only to the federal government, the double jeopardy clause in particular can be applied to the states as well, owing to incorporation of the said clause in the Fourteenth Amendment. With regard to procedural details, jeopardy attaches in a jury trial once the jury panel has been constituted and the swearing in has been complete, while in case of a non-jury trial, jeopardy attaches once the first evidence is put on, which occurs when the first witness is sworn.

## **Conclusion**

Having thus analysed the constitutional as well as statutory provisions reflecting the doctrine of double jeopardy, the authors feel that the resemblance between the said doctrine and the common law principle of *res judicata* becomes rather obvious, despite their fields of applicability varying from criminal law to the civil matters. It may also be concluded that the doctrine of Double Jeopardy has attained a wider range of shades while being elaborated in the CrPC, as compared to the constitutional enunciation thereof. Nonetheless, throughout the jurisprudential history of the land, it has been observed that the mass usually prefer to take the constitutional recourse while pleading the defence of double jeopardy, rather than alluding to the provisions of the CrPC.

As Sir Lawrence Jenkins had observed once, "*The rule of res judicata, while founded on account of precedent, is dictated by a wisdom is for all times.*"<sup>77</sup> Thus, *res judicata* is a fundamental concept based on public policy and private interest. It is conceived in the larger public interest, which requires that every litigation must come to an end. It therefore, applies to civil suits, execution proceedings, arbitration proceedings, taxation matters, writ petitions, administrative orders, interim orders, criminal proceedings, etc. Although the doctrine is frequently invoked, yet difficulties continue to be encountered in its application, particularly where either court or counsel fails to realize that, of the two principles which it comprehends (*interest reipublicae ut sit finis litium* and *nemo debet lis vexari pro una et eadem causa*), the protection from the annoyance of repeated litigation, which the individual suitor is afforded, is, after all, only an incident of the first principle, that the best interests of society demand that litigation be concluded. As far as the question is concerned regarding whether *res judicata* at times pose hindrance to the rules of natural justice, the words of Edward W. Cleary seems apt in that context, to the effect that if the plaintiff, through negligence in not properly presenting his claim in the first instance, has lost his right to remedy, it is a hardship but one from which the courts can't relieve if the general and well-established rule against the splitting of a single cause of action is to be allowed for the benefit of all.<sup>78</sup>

## References

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<sup>1</sup> Takwani (Thakker), C.K. J., *Civil Procedure*, 5<sup>th</sup> Edition, 2004 Reprint, p. 53.

<sup>2</sup> AIR 1971 SC 2355

<sup>3</sup> Explanation IV, S. 11, The Code of Civil Procedure, 1908

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- <sup>4</sup> (1947) 2 All ER 255
- <sup>5</sup> Bower, George Spencer, Turner and K.R. Handley, J., *The Doctrine of Res Judicata*, 1996, p. 246
- <sup>6</sup> (1843) 3 Hare 627
- <sup>7</sup> Currie, David P., *Res Judicata: The Neglected Defense*, from *Civil Procedure Anthology*, Ed. David I. Levine, Donald L. Doernberg and Mellisa L. Nelken, 1998, p. 89
- <sup>8</sup> *Ram Gobinda v Bhakta Bala*, (1971) 1 SCC 387
- <sup>9</sup> *Devoki Amma v Kunhi Raman*, AIR 1980 Ker 230
- <sup>10</sup> *Maqbul v Amir Hassan*, AIR 1916 PC 136
- <sup>11</sup> *Pandurang v Shantibai*, AIR 1989 SC 2240
- <sup>12</sup> AIR 1937 PC 1
- <sup>13</sup> AIR 1948 PC 168
- <sup>14</sup> AIR 1981 SC 104
- <sup>15</sup> *Ibid*; vide p. 109
- <sup>16</sup> AIR 1952 Mad 384
- <sup>17</sup> AIR 1946 Mad. 509
- <sup>18</sup> *Ibid*; vide p. 514
- <sup>19</sup> *Shetty v Giridhar*, AIR 1982 SC 83
- <sup>20</sup> Nandi, A.K. and B. Paul, *Nandi's Civil Ready Referencer*, Vol. I, 6<sup>th</sup> Edition, 2002, p. 217
- <sup>21</sup> (1886) ILR 8 All 324
- <sup>22</sup> *Ibid*; vide p. 332
- <sup>23</sup> AIR 1997 Del 347
- <sup>24</sup> Mallick, M.R., *Mitra's Civil Reference*, 4<sup>th</sup> Edition, 2001, p. 174
- <sup>25</sup> *Smith's Leading Cases*, 13<sup>th</sup> Edn., p. 644
- <sup>26</sup> Paul, Solil and Anupam Srivastava, *Mulla: The Code of Civil Procedure*, Vol. 1, 16<sup>th</sup> Edition, 2001, p. 160
- <sup>27</sup> Thakker (Takwani) C.K., J., *Civil Procedure*, 5<sup>th</sup> Ed., 2004 Rep, p. 55
- <sup>28</sup> AIR 1961 SC 1457
- <sup>29</sup> *Ibid*; vide p. 1462
- <sup>30</sup> This chapter of the article is inspired by a working paper Tirthankar Das, *A Discussion on Law of Double Jeopardy in India*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1303324](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1303324) (Last visited on January 26, 2015)
- <sup>31</sup> *Green v. United States*, 355 U.S. 184, 187-88 (1957); this passage has often been approvingly quoted by the judiciary in cases like *Crist v. Bretz*, 437 U.S. 28, 35 (1978), *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980) etc.
- <sup>32</sup> This maxim stemmed from St Jerome's commentary in AD 391 on the prophet Nahum: "*For God judges not twice for the same offence*"; see Friedland M. L., *Double Jeopardy* (1969) Clarendon Press, Oxford at 5.
- <sup>33</sup> Based on the concept of mergers, this was a plea that the prisoner had already been tried for and convicted of the same offence; the objective was to avoid curial imposition of a sentence in punishment of conduct which had previously been the subject of curial imposition of a sentence in punishment; see generally *Laws of Australia*, Chapter 9, at 293.

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<sup>34</sup> Based on estoppel, this was a plea that the prisoner had already been tried for and acquitted of the same offence; *ibid.*

<sup>35</sup> *Supra* note 31, at 14.

<sup>36</sup> *Supra* note 32.

<sup>37</sup> [1964] AC 1254.

<sup>38</sup> *Ibid.*, at 1339.

<sup>39</sup> *Green v United States* (1957) 355 US 185 at 187-88

<sup>40</sup> Roberts P, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, in *Modern Law Review* (2002) 65 (3) 393 at 397.

<sup>41</sup> *S. A. Venkataraman v. Union of India*, AIR 1954 SC 375; see V. N. Shukla, *Constitution of India*, 10th ed., Rep. 2004, p. 156.

<sup>42</sup> *Maqbool Hussain v. State of Bombay*, AIR 1952 SC 325

<sup>43</sup> *Ibid.*, p. 325; This is because, the prosecution should take place in reference to the law that has created the offence concerned. Hence, where an enquiry is held before a statutory authority against a government servant, not for the purpose of punishing for the offence of cheating and corruption, but to advise the government as to disciplinary action to be taken against him, it cannot be said that the person has been prosecuted; see *Thomas Dane v. State of Punjab*, AIR 1959 SC 375. Furthermore, it would make no difference even if the authority making the enquiry is required to act judicially; see *Leo Roy Frey v. Supdt., Distt. Jail*, AIR 1958 SC 119; V. N. Shukla, *Constitution of India*, 10th ed., 2001, rep. 2004, p. 157.

<sup>44</sup> AIR 1953 SC 546; M.P. Jain, "Indian Constitutional Law", 2003, 5th ed., p. 1239

<sup>45</sup> AIR 1989 SC 1; M.P. Jain, "Indian Constitutional Law", 2003, 5th ed., p. 1239

<sup>46</sup> AIR 1961 SC 578; M.P. Jain, "Indian Constitutional Law", 2003, 5th ed., p. 1239

<sup>47</sup> *Ibid.* p. 1241

<sup>48</sup> AIR 1953 SC 325

<sup>49</sup> *Ibid.*, at p. 327

<sup>50</sup> *Thomas Dane v. State of Punjab*, AIR 1959 SC 375

<sup>51</sup> *Joginder Singh v. Bar Council of India*, AIR 1975 Del. 192; see M.P. Jain, *Indian Constitutional Law*, 2003, 5th ed., p. 1243 and V. N. Shukla, *Constitution of India*, 10th ed., Rep. 2004, pp. 158 – 159.

<sup>52</sup> Section 300 CrPC states:

*(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.*

*(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub-section (1) of section 220.*

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(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897 or of section 188 of this Code.

*Explanation* – The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section.

<sup>53</sup> Explanation to S. 300 Cr PC

<sup>54</sup> 1989 Cr LJ 2153 (Pat.); Ratanlal & Dhirajlal, *The Code of Criminal Procedure*, 16th ed., Rep. 2003, p. 887.

<sup>55</sup> 1989 (3) Crimes 656, 663 (Ker.); Ratanlal & Dhirajlal, supra note 53.

<sup>56</sup> 1997 (1) Crimes 48 (Cal); Ratanlal & Dhirajlal, supra note 53.

<sup>57</sup> R. V. Kelkar, *Criminal Procedure*, Rev. Dr. K. N. Chandrasekharan Pillai, 4th ed., 2001, p. 479.

<sup>58</sup> *Rabindra Dhal v. Jairam Sethi*, 1982 Cri LJ 2144, 2146 (OriHC); R. V. Kelkar, supra note 56.

<sup>59</sup> 1975 Cri LJ 963

<sup>60</sup> *Shankar Dattatraya Vaze v. Dattatray Sadashiv Tendulkar*, AIR 1929 Bom. 408, 409

<sup>61</sup> *State v. Birda*, (1966) 1 Cr LJ 166, 168; see R. V. Kelkar, supra note 56, at p. 480.

<sup>62</sup> *State of Bombay v. S. L. Apte*, AIR 1961 SC 578

<sup>63</sup> R. V. Kelkar, supra note 56, at p. 481

<sup>64</sup> *Kunjilal v. State of M.P.*, AIR 1955 SC 280; Ratanlal & Dhirajlal, supra note 53, at p. 890.

<sup>65</sup> Illustration (b) to S. 300 CrPC.

<sup>66</sup> Ratanlal & Dhirajlal, supra note 53, p. 572-573

<sup>67</sup> Illustration (e) to S. 300 Cr PC

<sup>68</sup> Ratanlal & Dhirajlal, supra note 53, p. 573.

<sup>69</sup> As per this section, “Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

<sup>70</sup> R. V. Kelkar, supra note 56, p. 484

<sup>71</sup> *R v Carroll* (2002) 213 CLR 635.

<sup>72</sup> The Canadian Charter of Rights and Freedoms is a bill of rights entrenched in the Constitution of Canada.

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<sup>73</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), was adopted under the auspices of the Council of Europe[1] in 1950 to protect human rights and fundamental freedoms

<sup>74</sup> See [http://en.wikipedia.org/wiki/Double\\_jeopardy#External\\_links](http://en.wikipedia.org/wiki/Double_jeopardy#External_links), last visited January 15, 2015.

<sup>75</sup> See [http://www.cps.gov.uk/legal/section19/chapter\\_j.html](http://www.cps.gov.uk/legal/section19/chapter_j.html), last visited January 15, 2015.

<sup>76</sup> As for example, even if police manages to uncover new evidence conclusively proving the guilt of someone previously acquitted, there is little to be done because the defendant may not be tried again (at least, not on the same or substantially similar charge); see *Fong Foo v. United States*, 369 U.S. 141 (1962).

<sup>77</sup> Currie, David P., *Res Judicata: The Neglected Defense*, from *Civil Procedure Anthology*, Ed. David I. Levine, Donald L. Doernberg and Mellisa L. Nelken, 1998, p. 87

<sup>78</sup> Cleary, Edward W., *Res Judicata Reexamined*, Yale Law Journal, Vol. 57, No. 3, January, 1948.