Protection Against Double Jeopardy in India – A Critical Analysis

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I. Introduction

The principle of double jeopardy is very old common phenomenon where a person cannot be punished for the same offence more than once. This principle of double jeopardy can be traced to the maxim "*nemo debet bis vexari pro una et eadem causa*" which means a man should not be put in peril twice for the same offence. The core rule is barring the repeated criminal prosecution for the same offence – namely '*autrefois acquit*' and '*autrefois convict*.' Actually this principle is very essential for criminal justice administration of every country. It is aimed to protect the offenders from the harassment and trauma of re-litigation. Almost all countries in the world incorporate this protection in their laws. While some countries have found it necessary to be included in their constitution, others have incorporated it in their statutes. This principle actually developed in the English common law of the late eighteenth century. While its origin is thus common, it is found that its reception and implementation have been different.

II. Meaning of double jeopardy

Double jeopardy is the subjecting of a person to a second trial or punishment for the same offence for which the person has already been tried or punished. It is a procedural defence that prevents an offender from being tried over again on similar charges followed by a legitimate acquittal or conviction. This means that if a person is prosecuted or convicted once cannot be punished again for that criminal act. According to Black's Law Dictionary double jeopardy means "the fact of being prosecuted or sentenced twice for substantially the same offence."[2] The concept has been dealt with by the Article 20(2) of the Indian Constitution as well as Section 300 of the Criminal Procedure Code, 1973 and also Section 26 of the General Clauses Act, 1897. In U.S. law, double jeopardy is prohibited by the 5th Amendment to the Constitution of the United States, which states that no person shall "be

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[2] Garner, B. A. (2008). *Black's Law Dictionary.* 8th Ed. p. 528

subject for the same offense to be twice put in jeopardy of life and limb." The clause bars second prosecutions after acquittal or conviction and prohibits multiple convictions for the same offence.

III. History of double jeopardy

This rule had its origin in 12th Century, when controversy was raised between Henry II and Archbishop Thomas Becket. At that time two courts of law were there – the royal and the ecclesiastical. The king wanted the clergy subject to be punished in the royal court even after the ecclesiastical court punished him. Becket relied on St. Jerome's interpretation of Nahum and declared that the ancient text prohibited "two judgments". He had viewed that the repeated punishments would violate the maxim *nimo bis in idipsum* that means no man ought to be punished twice for the same offence. Followed by the dispute, King's knights murdered Becket in 1170, and despite of this King Henry exempted the accused from further punishment in 1176. This concession given by King Henry is considered as responsible for the introduction of the principle in English common law. In the twelfth century, the *res judicata* doctrine had been introduced in English civil as well as criminal law due to the influence of teachings of Roman law in England. During the thirteenth and part of the fourteenth centuries, a judgment of acquittal or conviction in a suit brought by an appellant or King barred a future suit. During the fifteenth century, an acquittal or conviction on an appeal after a trial by jury was a bar to a prosecution for the same offence. The sixteenth century witnessed significant lapses in the rational development of the rule partly due to the statute of Henry VII, by totally disregarding the principle. The last half of the seventeenth century was the period of enlightenment regarding the significance of the rule against double jeopardy. Lord Coke's writings contributed to it partly and of course, the rest was due to the public dissatisfaction against the lawlessness in the first half of the century. It is only by seventeenth the century, the principle of double jeopardy seems to have developed into a settled principle of the common law. During the eighteenth century, the extreme procedure was generally followed. Until the nineteenth century, the accused was provided with virtually no protection against a retrial when he or she was discharged due to a defect in the indictment or a variation between what was alleged and proved.[3]

It must be noted that Continental law recognized the principle of double jeopardy. Article 360 of the Napoleonic *"code d'instruction criminelle"* (French Civil Code established under Napoleon I in 1804) provided that, "No person legally acquitted can be a second time arrested or

[3] Friedland, M. L. (1969). *Double Jeopardy* (p. 3). Oxford: Oxford University Press.

accused by reason of the same act." In Spanish law also, there were references to double jeopardy in the thirtieth century. It is noteworthy that both the Continental as well as the Common law has adopted the doctrine from the common source of Canon law. The origin of the maxim that, "not even God judges twice for the same act" was present in church canons as early as 847 A.D. The protection under the rule was also available in Roman law. In fact, there are primitive notions of double jeopardy appearing in the Bible. The first known codified reference to double jeopardy was set forth in the Digest of Justinian (collection of fundamental works in jurisprudence, issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor). As per the Justinian Code, "He who has been accused of a crime cannot be complained of for the same offence by another person."

The concept continued to change and improve through many kings and queens in England. Thereafter, the writings of Lord Coke and William Blackstone were commingled to provide us with the modern day concept of double jeopardy. In modern times, double jeopardy is not limited only to crimes affecting "life or limb" but, rather, applies to all criminal prosecutions and punishments in which an individual is at risk of multiple attacks on his or her liberty. Colonial Massachusetts gave birth to the modern American approach to double jeopardy in its Body of Liberties published in 1641. Similar to prior pronouncements, the Body of Liberties provided that ''no man shall be twice sentenced by civil justice for one and the same crime, offense, or trespass.'' Over one hundred years later, in 1784, New Hampshire became the first state to protect against double jeopardy in its Bill of Rights, proclaiming that ''no subject shall be liable to be tried, after an acquittal, for the same crime or offense.'' Yet, it was not until 1790 in the Pennsylvania Declaration of Rights that a phrase resembling our modern phraseology appeared. The Pennsylvania Declaration of Rights succinctly stated that ''no person shall, for the same offense, be twice put in jeopardy of life or limb.'' In modern times, remnants of double jeopardy exist in many countries, including Australia, Canada, the United Kingdom, parts of Asia, and the United States.

The decision in *Connelly v. Director of Public Prosecutions (UK)*[4] provided the first judicial statement of coherent general principle on the rule. It was held that 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.

[4] [1964] AC 1254

The American Supreme Court in *Green v. United States*[5] held that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The principle was inexistence in India even prior to the commencement of the Constitution,[6] but the same has now been given the status of constitutional, rather than a mere statutory, guarantee. Double Jeopardy is recognized in different countries like U.S., U.K., Canada, Germany, France, Japan etc. Further, double jeopardy is discussed in accordance with Constitutions of different countries.

There are significant differences, however, between the English and American perspective of precisely when ''jeopardy'' attaches. The English rule, which retains the common-law approach, limits application of double jeopardy to instances in which a defendant has been acquitted or convicted. In other words, the English rule requires a full, completed trial. In contrast, the American rule attaches jeopardy as soon as the jury is sworn, in a jury trial, or when the prosecution offers its first piece of evidence in a trial before the court. Thus, the concept of jeopardy attaches much earlier in the American legal system than in its English counterpart. Despite the apparent staying power of the general double jeopardy concept, England recently diluted its double jeopardy protection with parliamentary passage of the Criminal Justice Act 2003. England's departure from the stricter version existing in the United States permits a subsequent prosecution following acquittal for certain offenses, such as murder, rape, kidnapping and manslaughter, when new and compelling evidence arises. Additionally, individuals acquitted prior to 2003 may nonetheless be subject to prosecution retroactively under the act. The revised English approach was motivated by notorious trials in which individuals adjudged not guilty later confessed to committing the crimes for which they were accused. Societal tolerance for such perceived travesties of justice waned and the English legislators responded to victims' rights groups in altering their previously steadfast approach to double jeopardy.

In India, The Fundamental Rights have their origins in many sources, including England's Bill of Rights, the United States Bill of Rights and France's Declaration of the Rights of Man.

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5 355 US 184 (187-188)

6 Sec. 26 of General Clauses Act and S. 403(1) of the Criminal Procedure Code, 1898; S. 300, Criminal Procedure Code, 1973

IV. Indian laws on Double Jeopardy

Article 20(2) of the Constitution is based upon the principle of the "double jeopardy" clause and lays down that no person should be put in jeopardy of his life or liberty more than once. The intention of the founding fathers appears to have been not to disturb the existing law which is to be found in Section 403 of the Code of Criminal Procedure (Old) relating to the extent of protection against "double jeopardy" in the criminal law of this country. Article 20(2) does nothing more than reproduce in effect the provisions of Section 300 (403 old) of the Code of Criminal Procedure. It is clear that under the Code a discharged person can be put for retrial. Article 20(2) clearly uses the word "and" in a conjunctive sense and it is only where the accused has been both prosecuted and punished for the same offence that a second trial is barred. The person in order to get benefit must have been prosecuted and punished for the same offence. Section 403(1) is more comprehensive in its scope than Article 20(2). Article 20(2) bars retrial of a person for the same offence when he has been convicted and sentenced for the same offence whereas Section 403(1) specially incorporates the principle which gives effect to the pleas (*autrefois acquit* as well as *autrefois convict*).

The principle which is sought to be incorporated into Section 300 of the Code of Criminal Procedure is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. Though Article 20(2) of the Constitution of India embodies a protection against second trial after a conviction of the same offence, the ambit of the sub-Article is narrower than the protection afforded by Section 300 of the Procedure Code. Section 220(1) of Code of Criminal Procedure provides that if in one transaction many offences are committed by the same person, he may be charged with (separately) and tried at one trial for very such offence. Section 300(2) of the Code allows a subsequent trial of a person on the same facts for a distinct offence for which a separate charge might have been made against him at the former trial under Section 220(1) of the Code. Reading the sections together the conclusion would be that if a person commits two distinct offences in the same transaction he can be charged with them (though separately) and tried at the same trial; but if he is tried, at one trial for one of the distinct offences and acquitted or convicted the subsequent trial for a distinct offence committed in the same transaction is not barred.

Section 300(1) of the Code makes it abundantly clear that a person who once has been tried by a Court of competent jurisdiction and has been convicted or acquitted shall not be liable to be tried again for the same offence till conviction or acquittal remains in force. As far as the trial for another offence on the same facts is concerned, it depends as to whether a charge about subsequent offence would have been made under Section 221(1) or sentence might have been passed under Section 221(2) of the Code. If offence sought to be charged subsequently is of such nature that a

charge for it should have been framed under sub-section (1) of Section 221 or conviction might have been passed under sub-section (2) of Section 221 of the second trial would be barred on the same facts.

Section 236 of the Code provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences. Section 236, therefore, refers to the case of an offence or offences which are so connected that the same facts may fall within the ambit either of one offence or another, the shades of distinction between them being so fine as to make it doubtful which of the offence or offences really are made out by the facts alleged on behalf of the prosecution.

In order to get the benefit of Section 403(1) of the Code or Article 20(2) of the Constitution it is necessary for an accused to establish that he had been tried by a Court of competent jurisdiction for an offence and he had been convicted or acquitted was still in force. If that much is established, he is not 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 Section 236 or for which he might have been convicted under Section 273 of the Code. Sub-section (4) of Section 300 of the Code, provides that 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.

In order to enable a citizen to invoke the protection of Clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The word “prosecuted and punished” are to be taken not distributively so as to mean “prosecuted or punished.” Both the factors must co-exist in order that the operation of the clause may be attracted. The position is also different under the American Constitution. It may be pointed out that the words “prosecuted” and punishment” have not fixed connotation and they are susceptible of both a wider and a narrower meaning, but in Article 20(2) both these words have been used with reference to an “offence” and the word “offence” has to be taken in the sense in which it is used in the General Clauses Act as meaning “an act or omission made punishable by any law for the time being in force.” The provisions of Section 26 of General Clauses Act, on construction, resemble those of Article 20(2) of the Constitution and notwithstanding the fact that the section permits a second trial after a previous one and acquittal,

the provisions are (not) unconstitutional. But under those provisions of the General Clauses Act and Article 20(2) of the Constitution, double punishment would be permissible would be void being repugnant to Article 20(2) of the Constitution.

V. Double jeopardy and Issue estoppels

In fact, the principle of issue estoppel is not a sufficient ground which can bar a subsequent trial under Section 300 Criminal Procedure Code, 1973. It was in the case of *Pritam Singh v. State of Punjab*[7], that certain observations were made by the Supreme Court relying upon the Privy Council's decision in *Sambashivam v. Public Prosecutor Federation of Malaya*[8], wherein Lord Dermot had observed that the maxim *res judicata pro veritate accipitur* is no less applicable to criminal proceedings than to civil proceedings. The facts of *Pritam Singh's* case, illustrate the application of the role of issue estoppel vis-a-vis Section 300, Cr.P.C.

The principle of issue-estoppel subsequently found support in a number of decisions of the Supreme Court. The rule may be reproduced as follows –

> *"Where an issue has been tried by a competent Court on a former occasion and the finding of fact has been reached in favour of the accused, such finding would constitute an estoppel or res judicata against the prosecution; not as a bar to the trial and conviction of the accused for different or distinct offences but as precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence which might be permitted by law."*

It must, however, be stated that in order to invoke the rule of issue-estoppel it is necessary that the parties in the two trials must be the same and fact-in-issue proved or not in the earlier trial must also be identical with the one which is raised and agitated in the subsequent trial.

The principle of "double jeopardy" may be distinguished from the rule of "issue estoppel." The principle of issue estoppel is a different principle, viz., where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppels or res-judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to

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7 AIR 1956 SC 415

8 [1950] AC 458

disturb that finding of fact when the accused is tried subsequently even for a different offence.[9]

The rule of issue estoppels prevents re-litigation of the issue which has been determined in a criminal trial between the state and the accused. If in respect of an offence arising out of a transaction of a trial has taken place and the accused has been acquitted, another trial is respect of the offence alleged to arise out of that transaction or of a related transaction which requires the court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppels.[10]

The rule is not the same as the plea of double jeopardy, because, firstly, the rule does not introduce any variation in the Code of Criminal Procedure, either in investigation, enquiry a trial and secondly it does not prevent the trial of any offence as does the rule of double jeopardy, but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier trial before a competent court. The rule, thus relates only to the admissibility. The rule depends upon well known doctrines which control the re-litigation of issues which are settled by prior litigation.[11]

While dealing with the case of *Lalta v. State of U.P*[12], the Apex Court has drawn distinction between "Issue Estoppel" and "*autrefois acquit.*" After referring and relying on the decisions of the Apex Court in the case of *Pritam Singh v. State of Punjab*[13], and in the case of *Manipur Administration v. Thokehom Bira Singh*[14] and in the case of *Sambasivam v. Public Prosecutor*[15] the Apex Court has held that –

> *"Where an issue of fact has been tried by a competent Court on a former occasion and finding of fact has been reached in favour of the accused, such a finding would constitute an estoppels or res-judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2) of the Code, Section*

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9 *Piara Singh v. The State of Punjab*, AIR 1969 SC 961

10 *The State of Andhra Pradeh v. Kokkiligada Meeraiah & Another*, AIR 1970 SC 771

11 Singh, Mahendra P, Eastern Book Company, Lucknow, 2006, pp. 158-159

12 AIR 1970 SC 1381

13 AIR 1956 SC 415

14 AIR 1965 SC 87

15 (1950) AC 458

403 does not preclude the applicability of this rule of "Issue estoppels."

The rule of issue estoppels is not the result of any enactment. It has been borrowed from English decision. The maxim "*res judicata pro vertitate accipitur*" is no less applicable to criminal than to civil proceedings.[16]

VI. Double Jeopardy in other Countries: A Comparative analysis

Numerous countries maintain variations of double jeopardy. Provisions of double jeopardy of some of those countries are discussed below.

VI.I. United States of America

The phrase "double jeopardy" 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." This clause is intended to limit prosecutorial abuse by the government in repeated prosecution for the same offense, as a means of harassment or oppression. It is also in harmony with the common law concept of *res judicata*, which prevents courts from relegating issues and claims that have already been the subject of a final judgment.

While numerous countries maintain variations of double jeopardy, the American approach remains one of the more potent provisions. The American interpretation, however, has not always provided criminal defendants a formidable defense. For nearly two hundred years, the Fifth Amendment's double jeopardy protection was limited solely to actions by the federal government and its subdivisions. Not until the Supreme Court's 1969 decision in *Benton v. Maryland*,[17] did the Double Jeopardy Clause extend equally to state governments. Benton considered the Fifth Amendment promise against multiple prosecutions and multiple punishments to ''represent a fundamental ideal in our constitutional heritage'' and, accordingly, held double jeopardy to be applicable to the states through incorporation of the Fourteenth Amendment. Having so found, the Supreme Court decision in Benton mandates that double jeopardy determinations now be governed by federal standards rather than state nuances. Nonetheless, states retain certain flexibility under double jeopardy due to the dual sovereignty doctrine. In 1922, the Supreme Court explicitly recognized the power of distinct sovereigns to prosecute an individual for criminal conduct falling within the jurisdiction of both in *United States v.*

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[16] *Ibid.*

[17] 395 U.S. 784 (1969)

Lanza.[18] Thereafter, in 1985, the Court further expanded the dual sovereignty doctrine to permit separate prosecutions by distinct state sovereigns in *Heath v. Alabama*.[19]

By holding that each state has independent power to determine an individual's guilt or innocence under the state's criminal code for all conduct occurring within that state, the Supreme Court permitted a subsequent prosecution of Heath for murder, which resulted in a much harsher sentence than had been received in the other state prosecution. The Supreme Court held that separate, independent sovereigns possess the right to try a criminal defendant for conduct occurring within their separate borders. The conduct, constituting independent criminal acts in each state, is not protected by double jeopardy because the conduct offends both sovereigns equally. The dual sovereignty doctrine was extended recently to embrace dual prosecution by the federal government and tribal courts on Indian reservations in *United States v. Lara*.[20]

Thus, although the Fifth Amendment protects against multiple prosecutions by the same sovereign or subdivisions thereof—double jeopardy poses no bar to separate prosecutions by independent sovereigns. Two of the more renowned instances of separate prosecutions by independent sovereigns include the Rodney King case defendants' subsequent federal trials following state acquittals and Terry Nichols's subsequent state capital trial following a federal trial resulting in a life sentence. Finally, double jeopardy does not affect the ability of a private individual to sue civilly for conduct that may be prohibited by criminal and civil law. The paradigm example continues to be the O. J. Simpson case, in which Simpson was subsequently sued civilly for wrongful death following his acquittal for murder.

Though the Fifth Amendment applies only to the federal government, the Supreme Court has ruled that the double jeopardy clause applies to the states as well, through incorporation by the Fourteenth Amendment.

VI.II. United Kingdom

The doctrines of autrefois acquit and autrefois convict persisted as part of the common law from the time of the Norman Conquest; they were regarded as essential elements of protection of the liberty of the subject and respect for due process of law in that there should be finality of proceedings.

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[18] 260 U.S. 377 (1922)
[19] 474 U.S. 82 (1985)
[20] 541 U.S. 193 (2004)

The Parliament of the United Kingdom passed legislation in the Criminal Justice Act 2003 introduced by then Home Secretary David Blunkett to abolish the previously strict form of prohibition of double jeopardy in England. Retrials are now allowed if there is 'new and compelling evidence'. All cases must be approved by the Director of Public Prosecutions and the Court of Appeal must agree to quash the original acquittal.[21]

VI.III. Australia

Australian double jeopardy jurisprudence is *very similar to other common law countries*. While there is no constitutional protection against re-trials following acquittal, there have been few examples of statutory exceptions. 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.

In contrast to other common law jurisdictions, Australian double jeopardy law has been held to extend to prevent prosecution for perjury following a previous acquittal where a finding of perjury would controvert the previous acquittal. This was confirmed in the case of the *Queen v Carroll*[22], where the police found new evidence convincingly disproving *Caroll's* sworn alibi two decades after he had been acquitted of the murder of a young girl and successfully prosecuted him for perjury. Public outcry following the overturning of his conviction by the High Court has led to widespread calls for reform of the law along the lines of the UK legislation.

VI.IV. Canada

In Canada the concept of double jeopardy is contained in section 11(h) of the Canadian Charter of Rights and Freedoms.[23] However, this prohibition applies only after an accused person has been "finally" convicted or acquitted. In contrast to the laws of the United States, Canadian law allows the prosecution to appeal from an acquittal. If the acquittal is thrown out, the new trial is not considered to be double jeopardy because the first trial and its judgment would have been annulled. In rare circumstances, a court of appeal might also substitute a conviction for an acquittal. This is not considered to be double jeopardy either - in this case the appeal and

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[21] Retrieved on 17.01.2015 from http://www.cps.gov.uk/legal/section19/chapter_j.html

[22] The Queen v. Raymond John Carroll , (2002) 213 CLR 635; [2002] HCA 55

[23] Retrieved on 18.01.2015 from http://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf

subsequent conviction are deemed to be a continuation of the original trial. For an appeal from an acquittal to be successful, the Supreme Court of Canada requires that the Crown show an error in law was made during the trial and that the error contributed to the verdict.

VI.V. Germany

The Basic Law for the Federal Republic of Germany (*Grundgesetz*) does provide protection against double jeopardy, if a final verdict is pronounced. A verdict is final, if nobody appeals against it. Article 103 (3) of the Basic Law provides[24] –

> *"Nobody shall be punished multiple times for the same crime on the base of general criminal law."*

The German Code of Criminal Procedure (*Strafprozessordnung*) permits a retrial if it is in favor of the defendant or if following events had happened[25] –

if a document produced as genuine, for his benefit, at the main hearing was false or forged;

if a witness or expert, when giving testimony or an opinion for the defendant's benefit, was guilty of willful or negligent violation of the duty imposed by the oath, or of willfully making a false, unsworn statement;

if a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case;

if the person acquitted makes a credible confession, in or outside the court, that he committed the criminal offence.

In the case of an order of summary punishment, which can be issued by the court without a trial for lesser misdemeanours, there is a further exception. The Code accordingly provides[26] –

> *"Reopening of proceedings concluded by a final penal order to the convicted person's detriment shall also be admissible if new facts or evidence have been produced which, either alone or in conjunction with earlier evidence, tend to substantiate conviction for a felony."*

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[24] Retrieved on 19.01.2015 from http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf

[25] Section 362, retrieved on 20.01.2015 from http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p2094

[26] Ibid, Section 373a

VII. International instruments on double jeopardy

There are a number of international instruments and legal regimes which provide for restrictions on successive criminal proceedings. There are provisions that have transnational effect; that is, provisions which address the question of how one state should act in relation to criminal proceedings which have been concluded, or are to be brought, in another state. It is technically called "inter-state" provisions. There are two principal contexts in which the recognition of foreign criminal judgments might be an issue. The first arises where a person who is present in State A is charged with an offence by the authorities of State A, and claims that his trial should be barred on the basis that he has already been tried and convicted or acquitted in relation to the same matter in State B. Here, the question is whether the criminal judgments of State B will be recognized by State A's rule against double jeopardy. The second context is that of extradition: if State B requests the extradition of a person from State A, should State A refuse the extradition request on the basis that that person has already been tried and convicted or acquitted in relation to the same matter in State A (or perhaps even in State C)? The only international instrument which recognizes the foreign judgments for the purposes of double jeopardy is the Schengen Convention, 1990.[27] Article 54 of the Convention provides –

> *"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*

The International Covenant on civil and Political Rights, 1966 also contain the provisions of double jeopardy. Article 14(7) of the Convention provides[28] –

> *"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."*

The European Convention on Human Rights (ECHR), as ratified by the United Kingdom in 1953, made no provision in relation to double jeopardy. Such provision is now made by Protocol 7 to the Convention,

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[27] Retrieved on 12.01.2015 from http://ials.sas.ac.uk/postgrad/AGIS-035/Materials/Vervaele/10.pdf

[28] Retrieved on 16.01.2015 from https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

which was done at Strasbourg in 1984. Article 4 of this Protocol provides that[29] –

> *"1. No-one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*
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> *The provisions of the proceeding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."*

Article 50 of the Charter of Fundamental Rights of the European Union, 2000 also deals with double jeopardy. It provides[30] –

> *"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."*

VIII. Analytical discussion on double jeopardy in India with decided cases

As discussed earlier, the protection against the double jeopardy is a constitutional as well as a statutory guarantee in India. The principle has also been recognized under the provision of General Clauses Act. The Constitution of India recognize only *autrefois convict* whereas the Code of Criminal Procedure, 1973 incorporates *autrefois acquit* as well. The rule against double jeopardy has been recognized as a fundamental right in the Constitution of India. The most important thing to be noted is that, sub-clause (2) of Article 20 has no application unless there is no punishment for the offence in pursuance of a prosecution.

Double Jeopardy clause under article 20(2) of Indian Constitution is closely similar to 5th amendment of United States. In US, the procedure relating to double jeopardy was first evolved as element test in the case of *Blockburger v. United States.*[31] In *Blockburger*, the Court said that "where

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[29] Retrieved on 14.01.2015 from http://www.echr.coe.int/Documents/Convention_ENG.pdf

[30] Retrieved on 15.01.2015 from http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[31] 284 U.S. 299 (1932)

the same transaction or act constitutes a abuse of two separate statutory provisions, the test to be applied to establish whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."' This test has long been employed both to measure the correctness of successive prosecutions and to address multiple punishment issues by determining presumptive legislative intent, and is now the exclusive test for defining "same offense."

Under the provisions of the Indian Constitution, the conditions that have to be satisfied for raising the plea of *autrefois convict* are firstly; there must be a person accused of an offence; secondly; the proceeding or the prosecution should have taken place before a 'court' or 'judicial tribunal' in reference to the law which creates offences and thirdly; he accused should be convicted in the earlier proceedings. The requirement of all these conditions have been discussed and explained in the landmark decision, *Maqbool Hussain v. State of Bombay*.[32] In this case, the appellant, an Indian citizen, was arrested in the airport for the illegal possession of gold under the provisions of the Sea Customs Ac, 1878. Thereupon, an action was taken under section 167(8) of the Act, and the gold was confiscated. Sometimes afterwards, he was charge sheeted before the court of the Chief Presidency Magistrate under section 8 of the Foreign Exchange Regulation Act, 1947. At trial, the appellant raised the plea of *autrefois convict*, since it violates his fundamental right guaranteed under article 20(2) of the constitution. He sought the constitutional protection mainly on the ground that he had already been prosecuted and punished inasmuch as his gold has been confiscated by the customs authorities. By rejecting his plea, the court held that the proceedings of the Sea Customs Authorities cannot be considered as a judicial proceedings because it is not a court or judicial tribunal and the adjudgment of confiscation or the increased rate of duty or penalty under the provisions of the Sea Customs Act does not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy. The court also held that the proceedings conducted before the sea customs authorities were, therefore, not 'prosecution' and the confiscation of gold is not punishment inflicted by a 'court' or 'judicial tribunal'. The appellant, therefore, cannot be said to have been prosecuted and punished for the same offence with which he was charged before the Chief Presidency Magistrate Court.

In *Thomas Dane v. State of Punjab*,[33] a case similar to the case of *Maqbool Hussain*, the appellant sought to take out some foreign exchange from India which was confiscated by the customs authorities after following due process under the Sea Customs Act. Later he was prosecuted before a

[32] AIR 1953 SC 325
[33] AIR 1959 SC 375

criminal court under the Foreign Exchange Regulation Act and the Sea Customs Act and he was duly convicted for the offence. The High Court of Punjab dismissed his appeal. The appellant preferred filed a writ petition in the Supreme Court on the ground that Art 20 (2) barred his prosecution. The Supreme Court dismissed the petition on the ground that in imposing confiscation and penalty under the Sea Customs Act and the FERA, the concerned authorities acted judicially but did not constitute a court.

In *Rao Shiv Bahadur singh v. State of V.P.*[34] Supreme court held that what is forbidden under article 20 is only conviction or sentence under an *ex post facto law* and not the trial thereof. It cannot be reasonably urged that the prohibition of double jeopardy applies only when both the instances therefore arise after the Constitution. Article 20 does not have retrospective effects but the laws passed which have retrospective effect should be confined to article 20. Laws passed even when the constitution was not in existence, does not make the constitutional sovereignty ineffective. The court further held that the whole idea of article 20 would be defeated in its implication even to ex post facto laws passed after the Constitution. Every such ex post facto law can be made retrospective, as it should be, if it is to regulate acts committed before the actual passing of the Act, and it can well be urged that by such retrospective operation it becomes the law in force at the time of the commencement of the Act. It is obvious that such a construction which nullifies Art. 20 cannot possibly be adopted.

In *Venkataraman v. Union of India*,[35] an enquiry was made before the enquiry commissioner on the appellant under the Public Service Enquiry Act, 1960 & as a result, he was dismissed from the service. He was later on, charged for committed the offence under Indian Penal Code & the Prevention of Corruption Act. The court held that the proceeding held by the enquiry commissioner was only a mere enquiry & did not amount to a prosecution for an offence. Hence, the second prosecution did not attract the doctrine of Double Jeopardy or protection guaranteed under Fundamental Right Article 20 (2).

It is to be noted that Article 20 (2) will applicable only where punishment is for the same offence, In *Leo Roy v. Superintendent District Jail,*[36] the Court held that if the offences are distinct the rule of Double Jeopardy will not apply. Thus, where a person was prosecuted and punished under sea customs act, and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

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[34] AIR 1953 SC 394
[35] AIR 1954 SC 375
[36] AIR 1958 SC 119

It was held by the Supreme Court in *Manipur Administration v. Thokehom Bira Singh*[37] that if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application. While the sub-Article embodies the principle of *autrefois convict*, Section 300 the Code of Criminal Procedure combines both *autrefois convict* and *autrefois acquit*. Section 300 has further widened the protective wings by debarring a second trial against the same accused on the same facts even for a different offence if a different charge against him for such offence could have been made under Section 221(1) of the Code, or he could have been convicted for such other offence under Section 221(2) of the Code. Article 20(2) of our Constitution, it is to be noted, does not contain the principle of "*autrefois acquit*" at all.

The court in *Manipur Administration v. Nila Chandra Singh,*[38] held that to operate as a bar under Article 20(2), the second prosecution and the consequential punishment must be for the same offence, i.e., an offence whose ingredients are the same. The court further held that one of the important conditions to attract the provision under clause (2) of article is that, the trial must be conducted by a court of competent jurisdiction. If the court before which the trial had been conducted does not have jurisdiction to hear the matter, the whole trial is null and void and it cannot be said that there has been prosecution and punishment for the same offence.[39] While protecting under Article 20(2) the court in *Raja Narayanlal Bansilal v. M.P. Mistry,*[40] held that the constitutional right guaranteed by Article 20(2) against double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued before a court of law or a tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

However, the Code of Criminal procedure recognize both the pleas of *autrefois acquit* as well as *autrefois convict*. The conditions which should be satisfied for raising either of the plea under the Code are: firstly; that there should be previous conviction or acquittal, secondly; the conviction or acquittal must be by be a court of competent jurisdiction, and thirdly; the subsequent proceeding must be for the same offence. The expression "same offence" shows that the offence for which the accused shall be tried and the offence for which he is again being tried must be identical, and based on the same set of facts.[41]

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[37] AIR 1965 SC 87
[38] AIR 1964 SC 1533
[39] *Bai Nath Prasad Tripathi v. State,* AIR 1967 SC 494
[40] AIR 1961 SC 29
[41] State of Rajasthan v. Hat Singh, AIR 2003 SC 791

In *State of Bombay v. S.L. Apte*,[42] the question that fell for consideration was whether in view of an earlier conviction and sentence under Section 409 IPC, a subsequent prosecution for an offence under Section 105 of Insurance Act, 1935, was barred by Section 26 of the General Clauses Act and Article 20(2) of the Constitution. The Court held that 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. The Court further held that though Section 26 in its opening words refers to 'the act or omission 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. This is made clear by the concluding portion of the section which refers to 'shall not be liable to be punished twice for the same offence'. If the offences are not the same but are distinct, the ban imposed by this provision also cannot be invoked.

An employee of the Boarder Road Organization was court-martialled and found to be guilty of some of the charges framed against him and was sentenced to rigorous imprisonment for one year. Thereafter he was dismissed from service under the relevant Service Rules. The Supreme Court ruled in *Union of India v. Sunil Kumar Sarkar*[43] that it did not amount to double jeopardy under Article 20(2). The two proceedings operated in two different fields even though the crime or the misconduct might arise out of the same act. The two proceedings did not overlap - court-martial proceedings dealt with penal aspect of the misconduct while the proceedings under the Service Rules dealt with the disciplinary aspect of the misconduct.

The Supreme Court of India in *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao & Others*[44] has affirmed that Section 300(1) Cr.P.C is wider in its scope than Article 20(2) of the Constitution. While Article 20(2) of the Constitution only says that "no person shall be prosecuted and punished for the same offence more than once", Section 300(1) Cr.P.C states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. Thus, it can be seen that Section 300(1) of Cr.P.C. is wider than Article 20(2) of the Constitution. While,

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[42] AIR 1961 SC 578
[43] AIR 2001 SC 1092
[44] AIR 2011 SC 641

Article 20(2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once', Section 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts. In the present case although the offences are different but the facts are the same.

The Supreme Court in *The Institute of Chartered Accountants of India v. Vimal Kumar Surana*[45] has declared that the provisions of the Chartered Accountants Act, 1949 do not act as a bar against the prosecution of a person who is charged with the allegations which constitute an offence or offences under other laws including the Indian Penal Code (IPC). In holding so the Supreme Court declared that punishment of a person for a same act did not foul of the constitutional safeguard against double-jeopardy when the same act constituted offence under different statutes and therefore the accused could legally be punished under the statutes differently.

IX. Conclusion

In every legal system there is provision for “double jeopardy” as no person should be punished twice for the same offence. Doctrine of double jeopardy is a right given to the accused to save him from being punished twice for the same offence and he can take plea of it. In different, cases it is interpreted in different manner due to the circumstances of the cases. Our Constitution also provides such right guaranteed under Fundamental Rights to safeguard the interest of the accused person. The rule against double jeopardy is a universally accepted principle for the protection of certain values within the criminal justice system. It serves many purposes such as preventing the arbitrary actions of the state against its subject, ensures finality in litigations etc., which are of great importance for the protection of human rights of the accused persons. It is a centuries old principle, which survived not by chance, but for many good reasons.

Thus we can conclude by saying that in general, in the countries observing the rule of Double Jeopardy, a person cannot be convicted twice for the same crime based on the same conduct. The defence of Double Jeopardy also prevents the State from retrying a person for the same crime after he has been acquitted. However, acquittal in one state or nation does not, always bar trial in another.

[45] (2011) 1 SCC 534