



## DOUBLE JEOPARDY

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### Introduction:

Fundamental Rights which is guaranteed under Article 20(2) of Constitution of India incorporates the principles of “autrefois convict” or Double Jeopardy which means that person must not be punished twice for the offence. Doctrine against Double Jeopardy embodies in English common law’s maxim ‘*nemo debet bis vexari, si constat curie quod sit pro una iti eadem causa*’ (no man shall be punished twice, if it appears to the court that it is for one and the same cause). It also follows the “*audi alterum partem* rule” which means that no person can be punished for the same offence more than ones. And if a person is punished twice for the same offence it is termed Double Jeopardy. At Common Law a defendant may plead *autrefois*, *acquit* and *autrefois convict* (peremptory plea), meaning the defendant has been acquitted or convicted of the same offence. If this issue is raised, evidence will be placed before the court, which will normally rule as the preliminary matter whether the plea is sustained, and if it so finds, the projected trial will be prevented from proceeding.

The principle was inexistence in India even prior to the commencement of the Constitution- Section 26 of the General clause Act 1897 says: *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*

Article 20 of the Constitution of India provides protection against double jeopardy. It has been enshrined as a part of the Fundamental Right by the fathers of our Constitution. The Indian Constitution, which has been beautifully written as poetry-in-prose, guarantees to the people certain basic human rights and freedoms, *inter alia* freedom against double jeopardy. Accordingly, no person can be prosecuted and punished for the same offence more than once. The provision apotheosizes the principle that a person cannot be tried twice for the same offence by an equally competent court.

When a person has been convicted for an offence by a competent court, the conviction serves a bar to any further criminal proceedings against him for the same offence. The idea is that no one ought to be punished twice for one and the same offence.

As per Indian Constitutions Article 20 “Protection in respect of conviction for offences” in the Constitution of India 1949 says,

1. No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
2. No person shall be prosecuted and punished for the same offence more than once
3. No person accused of any offence shall be compelled to be a witness against himself



Meaning of Jeopardy

The word Jeopardy refers to the “danger” of conviction that an accused person is subjected to when one trial for an criminal offence<sup>1</sup>.

Meaning of Double Jeopardy

Double jeopardy is a criminal procedural defense that prevents a criminal defendant from being tried for the same criminal act twice after an acquittal or conviction or in other words The act of putting a person through a second trail of an offence for which he or she has already been prosecuted or convicted<sup>2</sup>.

History and origin of this principle

Judicial and academic statements on the principle that a person should be protected against double jeopardy tend to either assume or imply unquestioningly the belief that the rule is one with a long historical background and sound doctrinal foundations.<sup>3</sup>

The principle of double jeopardy was not entirely unknown to the Greeks and Romans, although the legal environment was quite different.<sup>4</sup> This principle found final expression in the Digest of Justinian as the precept that “the governor should not permit the same person to be again accused of a crime of which he had been acquitted.”<sup>5</sup> No statement of the double jeopardy clause

appears in Magna Charta, nor can it be discovered by implication.

Both the continental and the English systems drew the doctrine of double jeopardy from the common source of Canon law.<sup>6</sup> 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.<sup>7</sup>

Purpose

The double jeopardy protection exists for several reasons. First, it prevents the government from using their seemingly unlimited resources to attempt to bring to court innocent individuals multiple times until the government gets a conviction. An example of this could be a man who is accused of punching his wife who is found not guilty after a jury trial. This would prevent the prosecutor from charging the defendant over and over until he is finally found guilty.



Secondly, it protects people from the social and financial costs of multiple proceedings. A court process is expensive: the costs of hiring a lawyer, the emotional costs on the defendant and that person's family and the funds that have to be paid to the court can all add up. The double jeopardy defense protects the person from these emotional and financial costs.

Lastly, it minimizes judges being able to punish defendants multiple times for the

<sup>1</sup>Find Legal law dictionary

<sup>2</sup>The American Heritage law dictionary

<sup>3</sup> Jill Hunter, *The Development of Rule Against Double Jeopardy*.

<sup>4</sup> Jay A. Sigler, *A History of Double Jeopardy*, The American Journal of Legal History, Vol. 7, No. 4 (Oct., 1963), p. 283

<sup>5</sup> Digest of Justinian, Book 48, Title XVII, as translated in Scott, *The Civil Law* (1932)

<sup>6</sup> Radin, *Anglo- American Legal History* 228 (1936)

<sup>7</sup> Brooke, *The English Church and the Papacy* 205 (1952)



same crimes. For example, if a judge sentenced a man who was accused of punching his wife, this would prevent the same judge from sentencing him twice for the same action.

#### Defense

If a defendant claims double jeopardy in court, the attorney will put evidence in front of the court to review if the claim is accurate. The court will consider documents and facts from both proceedings in making the determination. Some of the documents the court may review would be police reports from the act, doctor evaluations and paperwork from prior court proceedings.

#### Indian law and Double Jeopardy

The Double Jeopardy principle was existed in the India prior to the enforcement of the Constitution of India. It was enacted under in section 26<sup>8</sup>section 26 states that “provision as to offences punishable under two or more enactments,- where an act or omission) constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

And section 403(1) of (the old) CrPC<sup>9</sup>, 1898 (Section 300 of the amended Criminal Procedure Code, 1973), which states, 300(1) a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of offence shall, while such conviction or acquittal remains in force,

not to 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 under sub-section (1) of the section 221 or for sub-section (2) there of. It is to be noted that, the Code of Criminal procedure recognize both the pleas of *autrefois acquit* as well as *autrefois convict*. The condition 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.<sup>10</sup>

Section 71 of IPC<sup>11</sup> runs as- limits of punishment of offence made up of several offence where anything which is an offence is made up of parts is itself an offence, the offender shall not be punished of more than one of such his offences, unless it be so expressly provided.

The ambit of Article 20(3) is narrower than the English or the American rule against double jeopardy. The Indian provision enunciates only the principle of *autrefois acquit*. In Britain and in U.S.A., both these rules operate and a second trial is barred even when the accused has been acquitted at the first trial for that offence. In India, however, Article 20(2) may be invoked only if when there has been a prosecution and punishment in the first instance.<sup>12</sup>

<sup>8</sup> Section 26 of General Clauses Act, 1897

<sup>9</sup> Criminal Procedure Code, 1897

<sup>10</sup> State of Rajasthan v Hat Singh, (2003) 2 SCC, 152

<sup>11</sup> Section 71 of Indian Penal Code, 1860

<sup>12</sup> *Kalawati v State of Himachal Pradesh*, AIR 1953 SC 131



### Constitutional Implication

In constitution of India, Double Jeopardy is incorporated under Article 20(2) and it is one of the fundamental rights of the Indian Constitution. And the features of fundamental rights have been borrowed from U.S. Constitution and the concept of Double Jeopardy is also one of them. Principle of Double Jeopardy is incorporated into the U.S. Constitution in the Fifth Amendment, which says that “no person shall be twice put in Jeopardy of life or limb”.

Article 20 of the Indian Constitution provides protection in respect of conviction for offences, and article 20(2) contains the rule against double jeopardy which says that “no person shall be prosecuted or punished for the same offence more than once.” The protection under clause (2) of Article 20 of Constitution of the Indian is narrower than the American and British laws against Double Jeopardy.

Under the American and British Constitution the protection against Double Jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against double punishment is given only when the accused has not only been ‘prosecuted’ but also ‘punished’, and is sought to be prosecuted second time for the same offence. The use of the word ‘prosecution’ thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause

(2) of the article 20 has no application and an appeal against acquittal, if provided by the procedure is in the substance a continuance of the prosecution.<sup>13</sup>

In the case of *Kalawati v State of Himachal Pradesh*<sup>14</sup>, a person accused of committing murder was tried and acquitted. The State preferred an appeal against the acquittal. The accused could not plead Article 20(2) against the State preferring an appeal against the acquittal. Article 20(2) would not apply as there was no punishment for the offence at the earlier prosecution: and an appeal against an acquittal was in substance a continuation of the prosecution.

Where there are two distinct offences made up of different ingredients, embargo under Article 20(2) or Section 26 General Clauses Act 1897 has no application, though the offences may have some overlapping features. The doctrine of double jeopardy protects a person from being tried and punished twice for the same offence but not from different offences arising out of violation of different laws by the same set of facts. The Supreme Court in the recent case of *Monica Bedi v State of Andhra Pradesh*<sup>15</sup> has ruled that a passport on fictitious name amounted to a double jeopardy for her as a Portuguese court too had earlier convicted her for owning forged passport.

Doctrine against Double Jeopardy in Constitution of India, Article 20(2) says that ‘no person shall be prosecuted and punished for the same offence more than once.’ But it

<sup>13</sup> Smt. Kalawati v State of H.P , AIR 1953 SC 131 at p. 152

<sup>14</sup> *Kalawati v State of Himachal Pradesh* , AIR 1953 SC 131

<sup>15</sup> *Monica Bedi v State of Andhra Pradesh* , 2011 1 SCC 284



is subjected to certain restriction. And it is to be noted that Article 20(2) of constitution of India does not apply to a continuing offence. There is also the concept of 'continuing offence' which means that where an act or commission constituting the offence is continued from day to day, a fresh offence is committed every day and each offence can be punished separately.<sup>16</sup>

Enhancement of punishment by the revising authority does not amount to second punishment<sup>17</sup> Preventive Detention is not 'prosecution and punishment' and, therefore, it does not bar prosecution of the person concerned.<sup>18</sup> In the case of *State of Bombay v S.L. Apte*<sup>19</sup>, the Supreme Court explained the legal position as follows:

"The crucial requirement for attracting Article 20(2) is that the offences are the same, i.e., they should be identical. It is therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see, whether their identity is made out..."

For instance, the offence under Section 161 I.P.C., is different from the offence of criminal misconduct punishable under Section 5(2) of the Prevention of Corruption Act, though some of the ingredients of the two offences may be common.<sup>20</sup> When a person was convicted in U.S.A. under its drug laws and on the same set of facts tried in India under the Narcotics Drugs and Psychotropic Substances Act, 1985, it was

held that the application of the principle of double jeopardy was not available since the offences in USA and India are distinct and separate.<sup>21</sup>

There are some examples of cited cases mentioned below which throw light on the above question:

In *venkataraman v Union of India*,<sup>22</sup> an enquiry was made before the enquiry commissioner on the appellant under the Public Service Enquiry Act, 1960 and as a result, he was dismissed from the service. He was later on, charged for committed the offence under Indian Penal Code and the Prevention of Corruption Act. The court held that proceeding held by the enquiry commissioner was only a mere enquiry and 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 be applicable only where punishment is for the same offence, in *Leo Roy v Superintendent District Jail*<sup>23</sup>, The Court held: 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.

<sup>16</sup> *Mohd. Ali v Sri Ram Swarup*, AIR 1965 All 161

<sup>17</sup> *D.A. Kelshikar v State of Bombay*, AIR 1960 Bom 225

<sup>18</sup> *Ghulam Ahmad v State of Jammu and Kashmir*, AIR 1954 J&K 59

<sup>19</sup> *State of Bombay v S.L. Apte* AIR 1961 SC 578

<sup>20</sup> *Kunji Lal v State of Madhya Pradesh*, AIR 1955 SC 280

<sup>21</sup> *Jitendra Panchal v Narcotics Control Bureau*, (2009) 3 SCC 57

<sup>22</sup> AIR 1954 SC 375

<sup>23</sup> AIR 1958 SC 119



In *Roshan Lal and ors v State of Punjab*,<sup>24</sup> the accused had disappeared the evidence of two separate offences under section 330 and section 348 Indian Penal Code. So, it was held by the court that the accused was liable to be convicted for two separate sentences.

In this case,<sup>25</sup> the appellants were charged under section 409 IPC and Section 5 of the prevention of Corruption Act, 1947 for making false panchnama in which they have shown recovery of 90 gold biscuits while according to the prosecution case, they had again tried for the offence under section 120-B of Indian Penal Code, Section 135 and 136 of the Customs Act, Section 85 of Gold (control) Act and Section 23(1-A) of FERA and Section 5 of Import Export (control) Act, 1947. The validity of the subsequent prosecution was challenged by the appellant by the appellant on the ground that it contravened the constitutional guaranteed embodied in Article 20(2). The court held: "After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offences for which the appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact- situation and the enquiry for finding out constituting offences under the Customs Act and Gold (control) Act in the second trial is of a different nature. Not only the ingredients of the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial is also not indented (sic). Accordingly, the second trial

was not barred under Section 403 CrPC of 1898 as alleged by the appellants."

In *Union of India and Anr v P.D. Yadav*,<sup>26</sup> In this case, the pension of the officer, who was convicted by a Court-Martial, had been forfeited. The court held: "this principle is embodied in the well-known maxim *nemo debet bis vexari si constat curiae quod sit pro una et eadem causa*, meaning no one ought to be vexed twice if it appears to the court that it is for one and the same cause. Doctrine of Double Jeopardy is a protection against prosecution twice for the same offence. Under Article 20-22 of the Indian Constitution, provisions are made relating to personal liberty of citizens and others offences such as criminal breach of trust, misappropriation, cheating, defamation etc., may give rise to prosecution on criminal side and also for action in civil court/ other forum for recovery of money by way of damages etc., unless there is a bar created by law. In the proceedings before General Court Martial, a person is tried for an offence of misconduct and whereas in passing order under Regulation 16(a) for forfeiting pension, a person is not tried for the same offence of misconduct after the punishment is imposed for a proven misconduct by the General Court Martial resulting in cashiering, dismissing or removing from service. Only further action is taken under Regulation 16(a) are entirely different. Hence, there is no question of applying principle of Double Jeopardy to the present cases.

Double Jeopardy and Res Judicata/ Issue Estoppel

<sup>24</sup>AIR 1965 SC 1413

<sup>25</sup>A.A. Mulla and Ors v State of Maharashtra and ans., AIR 1997 SC 1441

<sup>26</sup> (2002) 1SSC 405



In essence, the policy of protection against double jeopardy expounds that a matter, once put to an end, may not be reopened or relitigated. The finality principle found expression in the Roman-law doctrine of *res judicata*. The basic tenet of the doctrine is that a matter or question raised by one's adversary who has already been the subject of adjudication in previous legal proceedings, cannot be raised once again. Roman texts on the principle of *res judicata* reveal a concern that a community ought to be protected against what may be regarded as oppressive multiplication of suits.<sup>27</sup> Our Supreme Court has held that the application of the above rule of *res judicata* in India is not excluded by the fact that the rule against double jeopardy has been codified in s. 300 of the Cr. P.C., and also guaranteed by Article 20(2) of the Constitution<sup>28</sup> because the scope of the two principles is not identical. For, the rule of *res judicata* rests on the principle where an issue of fact has been tried by a competent court on a former occasion and the finding of that court has been in favour of the accused, such finding would constitute an estoppel against the prosecution- not as a bar to the trial but as a precluding the reception of evidence to disturb the finding of fact when the accused is tried subsequently even for a different offence. Since the doctrine of *res judicata* rests on the identity of the issues at the two trials, it is also known as the doctrine of 'issue estoppel'. The basic difference between the principle of double jeopardy and *res judicata* is that while the rule of double jeopardy is not applicable unless the

offence involved in the subsequent proceeding is not the same as in the former proceeding, the rule of *res judicata* applies even though the offence for which the subsequent proceeding has been brought is a different one.<sup>29</sup>

In India, the starting point of issue estoppels was the Privy Council decision in *Sambasivam v Public Prosecutor, Federation of Malay*<sup>30</sup>. Lord MacDermott in this judgement said that:

“The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all the subsequent proceedings between the parties to the adjudication. The maxim, ‘Res judicata pro veritate accipitur’ is no less applicable to criminal as to civil proceedings.”

Hedge J. in *Assistant Collector, Customs v Malwani*<sup>31</sup> has also observed that the issue estoppel rule was but a facet of the doctrine of *autrefois acquit*. And that it was based on the principle of *res judicata*. The subsequent position of Law.

The Supreme Court in *Venkataraman v Union of India*<sup>32</sup>, laid down that Art.20(3) refers to judicial punishment and gives immunity to a person from being prosecuted and punished for the same offence more than once. In other words, if a person has been

<sup>27</sup> 32 Comp. & Int'l L.J. S. Afr. 1 (1999) Appeal by the Prosecution and the Right of the Accused to be Protected against Double Jeopardy: A Comparative Perspective; Jordaan, Louise

<sup>28</sup> *Manipur Administration v Thokchom Bira Singh*, AIR 1965 SC 87(90)

<sup>29</sup> *Ibid.*

<sup>30</sup> *Sambasivam v Public Prosecutor, Federation of Malaya*, (1950) A.C. 458

<sup>31</sup> *Assistant Collector, Customs v Malwani*, (1969) 2 SCR 438

<sup>32</sup> *Venkataraman v Union of India*, (1954) SCR 1150



prosecuted and punished in a previous proceeding of an offence, he cannot be prosecuted and punished for the same offence again in subsequent proceedings. If any law provides for such double punishment, such law would be void. The Article however does not give immunity from proceedings other than proceedings before a Court of law or a judicial tribunal. Hence a government servant who has been punished for an offence in a Court of law may be subjected to departmental proceedings for the same offence or conversely. In *O.P. Dahiya V Union of India*<sup>33</sup>, it was held that if the accused was neither convicted nor acquitted of the charges against him in the first trial his retrial would not amount to double jeopardy and in *State of Rajasthan V Hat Singh*<sup>34</sup>, it was said that prosecution and other punishment under two sections of an Act, the offences under the two Sections being distinct from each other, does not amount to double jeopardy.

The Supreme Court in a recent decision, of *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*<sup>35</sup>, explaining this proposition of law *inter alia* observed that a person cannot be convicted even for a different offence under a different statute if the facts leading to the conviction under both the statutes are the same. This decision does not discuss aspect of double jeopardy and is in considerable contrast from the earlier enunciation of law and it has been criticized.

Comparison with other countries

It is a fundamental principle of the common law that a person cannot be put in jeopardy twice for the same offence. Almost all common law countries incorporate this protection in their laws. While some countries have found it necessary to be included in their constitutions, others have incorporated it in their statutes. All agree that the protection has its origin in the English common law of the eighteenth century. Though its origin is thus common, it is found that its reception and implementation have been different. The purpose for which the protection has been accepted, the problems arising out of the implementation of these purposes and the resolution of these problems etc., are dealt with differently.

RE  
[C] Germany

In Germany, also principle of double jeopardy is stated in Article 103(3) of the Germany's Constitution:

UP  
AM  
"No one may be punished for the same act more than once in pursuance of general legislation."<sup>36</sup>

U.S.A.

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 defence.

The Fifth Amendment to the United States Constitution provides:

<sup>33</sup> *O.P. Dahiya V Union of India*, (2003)1 SCC 122)

<sup>34</sup> *State of Rajasthan V Hat Singh*, AIR 2003 SC 791

<sup>35</sup> *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao*, AIR 2011 SC 641

<sup>36</sup> M.V. PYLEE, *Select Constitutions of the World*, 2<sup>nd</sup> Edition, p. 232



*“Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”*

The Double Jeopardy Clause encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment. Jeopardy “attaches” when the jury is empanelled, the first witness is sworn, or a plea is accepted.

The protection has been held to be not only from punishment but also from a second trial, which commences when a man is charged before a competent tribunal. But, a retrial does not come within the rule nor does the doctrine extend to the execution of the sentence.

The Double Jeopardy clause prevents the State from ‘punishing’ twice or attempting a second time to ‘punish’ criminally for the same offence.

#### *Japan*

The Constitution of Japan states in Article 39 that

*“No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.”*

However, if someone is acquitted in a lower District Court, then the prosecutor can appeal to the High Court, and then to the Supreme Court. Only the acquittal in the Supreme Court is the final acquittal which prevents any further retrial.

#### *England*

The above provision of the American Constitution is indeed founded on the English Common Law rule ‘*nemo debet bis vexari*’.

It enabled an accused to raise a plea not only for *autrefois convict* but also of *autrefois acquit* before the implementation of the Criminal Justice Act, 2003.

Following the murder of Stephen Lawrence, the Macpherson Report recommended that the double jeopardy rule should be abrogated in murder cases, and that it should be possible to subject an acquitted murder suspect to a second trial if “fresh and viable” new evidence later came to light. The Law Commission later added its support to this in its report “Double Jeopardy and Prosecution Appeals” (2001).

These recommendations were implemented—not uncontroversial at the time—within the Criminal Justice Act 2003 and this provision came into force in April 2005. It opened certain serious crimes (including murder, manslaughter, kidnapping, rape, armed robbery, and serious drug crimes) to a retrial, regardless of when committed. Under the new system, a suspect can be tried again for the same offence if there is “new, compelling, reliable and substantial evidence”, which had not been previously available.

#### **Conclusion**

There are two pillars found in every legal system. One is legal certainty and the other is equity. When the offender is prosecuted



and punished, he must know that, by paying the punishment, he has expiated his guilt and need not fear further sanction. If he is acquitted, he must have the certainty that he will not be prosecuted again in further proceedings. A sentence, whether absolvitor or condemnatory, is a complete bar, not only to any subsequent trial for the same offence, but for any other crime involving the same *species facti*, whether at the instance of the public or private property. 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/she can take plea of it. Different cases present different circumstantial situations. Therefore, the rule of double jeopardy cannot be made a strait-jacket rule and is hence interpreted differently for different cases. While interpreting the provision judges always keep a watch that innocent does not gets punished. The principle of double jeopardy has been a part of the legal system since man can remember and is an honest endeavour to protect the non-guilty ones. It can therefore be considered a positive and just doctrine based on equity, justice and good conscience.

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