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The Judicial Perspective of Double Jeopardy in India

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ABSTRACT

This paper revolves around the legal maxim "nemo debet bis vexari pro unoet eadem causa" which means that no person shall be vexed twice for the same cause. Double Jeopardy is a legal term and many people are familiar to this term & its definition that a person cannot punished for the same offence more than once. But this paper aims to highlights those questions, which may arise in the mind of the readers, when they are discussing about Double Jeopardy. Because these questions clicked to my mind too and I thought that, is there more to know about Double Jeopardy than not to punish for the same offence more than once? What are the exceptions of the rule of Double Jeopardy? And also, can an accused be actually punished twice for the same offence in India.

The term "double jeopardy" in simple words can be summed up as the idea of a person being put in peril of conviction more than once for the same offence. Further this paper is set to explore the various existent laws regarding the concept in India. Analysing the provisions provided for both in the Indian Constitution as well as the Criminal Procedure Code, 1973. The author sheds light on the previously existent laws like Section 403 of the CrPC as well as the laws amended in current practice. One of the most prominent aspect that the paper aims to establish is highlighting the various case laws of the above concept to truly highlight the judicial perspective. This is followed by a brief comparison of laws relating to double jeopardy of India with other countries namely US, Germany, England and Japan.

Keywords: *Double Jeopardy, Judicial Perspective, Comparisons, Criminal Procedural Code.*

I. INTRODUCTION TO THE CONCEPT

In this chapter the researcher expands upon the ***Interpretation of Concepts – Definition of Jeopardy & Double Jeopardy(1.1.)***. This is followed by establishing the ***Scope & Application(1.2.)*** Furthermore, the researcher shall also establish the ***Conditions for Applicability(1.3.)***. Lastly, the ***History & Origin(1.4.)*** of the concept in hand has also been

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established.

(A) Interpretation of Concepts – Definition of Jeopardy & Double Jeopardy

What is Jeopardy?

The word Jeopardy refers to the "danger" of conviction that an accused person is subjected to when one trial for a criminal offence.

What is Double Jeopardy?

The doctrine of Double jeopardy has been conceptualized in the Constitution of India under Article 20(2) which provides that no person shall be prosecuted and punished for the same offence more than once. It has been enshrined as a part of the Fundamental Right by the fathers of our Constitution under Part III.

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. No one ought to be punished twice for one and the similar offence.

(B) Scope & Application

To understand the scope of application of the concept of double jeopardy, consider the following statement, that was held in the case of **Yusofalli Noorbhoy**;

"*The whole basis of Section 300 is that the first trial should have been before a court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the court was not so competent it is irrelevant that it would have been competent to try other cases of the same class or indeed the case against the particular accused in different circumstances, for example, if a sanction had been obtained*"[2]

Additionally, in the case of **E.K. Thankappan v. Union of India** it has also been stated that; "*When an accused was discharged for want of sanction, second trial is permissible.*"[3]

The provisions of the Civil Procedural Code upon the question of the previous acquittals are different from the principles underlying the English "*doctrine of auterfois acquit*" in this that the code makes a clear distinction between "discharge" and "acquittal". The rule of English law, requiring the accused to have been tried as well as acquitted in order to bar further proceedings and embodied in this section, is inapplicable to statutory acquittals under Section 321, 256 and 320.

In the case of **State of M.P. v. Veereshswar Rao**; "*Section 300 has no application to the*

[2] Yusofalli Noorbhoy v. The King, (1950) 52 BOMLR 1.
[3] K. Thankappan v. Union of India, 1989 CrLJ 2374 (Ker).

case where there was only one trial for several offences, of some of which the accused person was acquitted while being convicted for one. Thus, where the accused is tried for offences under section 5(2), Prevention of Corruption Act, 1947, and under section 409 I.P.C., but is acquitted under section5(2) of the Corruption Act, he can be convicted under Section 409 I.P.C."[4]

Furthermore, in the case of **Kalawati v. State of Himachal Pradesh** it was explicitly stated that; "*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.*"[5]

Lastly, in the case of **State of Haryana v. Bhagwant Singh**, Court held that the prohibition under Article 20 is not applicable to departmental proceeding.

Therefore, the scope and applicability of the concept of double jeopardy is narrow in nature as it is governed by the condition of previous acquittal.

(C) Conditions for Applicability

As mentioned above the scope and applicability of the concept of double jeopardy is narrow in nature due to the conditions governing the concept, the conditions are as discussed below. These provisions are based upon the general principle of autrefois acquit as stated earlier, recognized by the English Courts. The principle on which the right to plead autrefois acquit depends is that a man may not be put twice in jeopardy for the same offence. 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**.[6]

The same principle has now been incorporated under Article 20 of the Indian Constitution. "*What can be successfully pleaded as a bar to a subsequent trial for the same offence or for an offence based on the same facts is that the accused has been;*

[4] State of M.P. v. Veereshswar Rao, AIR 1957 SC 592.
[5] Kalawati v. State of Himachal Pradesh, AIR 1953 SC 131.
[6] Maqbool Hussain v. State of Bombay, A.I.R. 1953 S.C. 325.

i. *Tried by a court*

ii. *Of competent jurisdiction*

iii. *Acquitted of offence alleged to have been committed by him or an offence with which he might have been charged under Section 221(1) or for which he might have been convicted under Section 221(1).*"

The above was held in the case of **Mohammad Safi v. State of WB**.[7] Furthermore, In the case of **K.V. Chacko v. State of Kerala** it has been stated that; "*where the fact in issue in the earlier case was totally different, principle of estoppel does not apply.*"[8]

Hence, the three conditions for the application of this clause on the basis of the author's interpretation are:

i. The person should be "prosecuted and punished".

ii. It should be for the "same offence".

iii. The offence should be committed "more than once".

Lastly, in the case of **Monica Bedi v. State of Andhra Pradesh**, the Apex Court ruled that; "*a passport enrolled on fictitious name amounted to a double jeopardy as a Portuguese court too had earlier convicted her for owning forged passport.*"[9] This instance clearly classifies as double jeopardy as all of the above provided conditions of applications, provided by the researcher, have been duly satisfied.

(D) History & Origin

The principle of double jeopardy was bit known to the Greeks and Romans, and thus this principle was finally recognized 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 earlier. In Magna Charta, the clauses related to double jeopardy have not been discussed nor by implication it can be interpreted.

The doctrine of double jeopardy has been derived from the common source of Canon law by continental and the English systems. In the Roman law under Justinian Code this doctrine has been adopted. Both the continental and the English systems drew the doctrine of double jeopardy from the common source of Canon law.[10] The origin of the maxim that, "not even

[7] Mohammad Safi v. State of WB, AIR 1966 SC 69.
[8] K.V. Chacko v. State of Kerala, 2001 CrLJ 1179 (Ker – DB
[9] Monica Bedi v State of Andhra Pradesh, 2011 1 SCC 284.
[10] 21 Max Radin, Anglo- American Legal History 228 (Marquette Law Review 1937).

God judges twice for the same act" was present in church canons as early as 847 A.D.[11]

The concept of double jeopardy was prevalent in the Roman law in the Justinian Code. The classical argument for the need of maintaining the rule is apparent in the observation of the court in **Green v. United States**, whereby the Court observed that; "*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, 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*."[12]

It exists as a constitutional right is many countries such as United States, Canada, Mexico and India and on the international platform also, it has been recognized through various international documents, for instance; Article 14(7) of the International Covenant on Civil and Political Rights, Article 4(1), Protocol 7 to the European Convention of Human Rights and Article 50 of the Charter of Fundamental Rights of the European Union and the party states are bounded with the relevant provisions of the conventions.

II. INDIAN LEGISLATION AND DOUBLE JEOPARDY

In this chapter the researcher expands upon the ***Interpretation of Concepts – Definition of Jeopardy & Double Jeopardy(1.1.)***. This is followed by establishing the ***Scope & Application(1.2.)*** Furthermore, the researcher shall also establish the ***Conditions for Applicability(1.3.)***. Lastly, the ***History & Origin(1.4.)*** of the concept in hand has also been established.

(A) Prevailing Laws

The following are the prevalent laws that govern the concept of double jeopardy in India;

i. Article 20 of the Indian Constitution.

ii. Section 221 of the Criminal Procedural Code, 1973.

iii. Section 300 of the Criminal Procedural Code, 1973.

iv. Section 320 of the Criminal Procedural Code, 1973.

(B) Constitutional Implication – Article 20

In Constitution of India, Double Jeopardy is incorporated under Article 20(2) and it is one of fundamental right of the Indian Constitution. And the features of fundamental rights have

[11] Z. N. Brooke, The English Church and the Papacy 205 (Cambridge University Press 1989).
[12] Green v. United States, (1957) 355 US 185.

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 India 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. 12

In the case of **Smt. Kalawati v. State of H.P**, it was stated that; "*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 substance a continuance of the prosecution.*"[13]

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 applicable as there was no punishment for the offence at the earlier prosecution. The same was the position in the case of **Kalawati v. State of Himachal Pradesh**.[14]

In the case of **State of Bombay v. S.L Apte**, the Supreme Court explained the legal position and stated that for applicability of Article 20(2) the requisites must be that the offences are identical and analysis of ingredients of the two offences must be done, not the allegations in the two complaints.[15]

Lastly, in the case of **Bhagwant Swarup v. State of Maharashtra**, Court held that; "*the second prosecution, as well as punishment, should be regarding the same offense for which the person has been prosecuted and punished before and Article 20(2) is applicable. The same offence here means that the ingredients of the offense are same. It does not apply to*

[13] Smt. Kalawati v. State of H.P., AIR 1953 SC 131.
[14] Kalawati v. State of Himachal Pradesh, AIR 1953 SC 131.
[15] State of Bombay v. S.L. Apte AIR 1961 SC 578.

different offences committed by the same act of that person."[16]

(C) Criminal Implication - Section 221, 300.

Section 221 (2) - If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub- section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Tried does not mean tried on merit. It just has to be an acquittal of the accused. The basic rule is that the offence should be same i.e., identical. It is therefore necessary to analyses and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. 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 fact's 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.

Section 300 - Person once convicted or acquitted not to be tried for same offence.

(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 subsection (1) of section 221, or for which he might have been convicted under sub-section (2) thereof.

In the case of **Maidhan Gupta v. State U.P**, it has been held that; "*an offence under Section 409 I.P.C., and Section 14 of the Employees Provident Funds Act, cannot be deemed to be same offence within the meaning of this section.*"[17]

Also, in the case of **State of Madhya Pradesh vs Veereshwar Rao** it was held that; "*the offences under Section 409 I.P.C., and Section 5(2) of the Prevention of Corruption Act, 1947, have been held not the same/identical offence.*"[18]

Furthermore, in the case of **Natarajan v. State**, the accused had been tried in the earlier case for the offence under Section 457 and Section 380, I.P.C., and he had been acquitted thereof. The verdict of acquittal so rendered was not at all further agitated and still remains in force.

[16] Bhagwant Swarup v. State of Maharashtra, AIR 1979 SC 1120.
[17] Maidhan Gupta v. State U.P., 1976 CrLJ 868 (All).
[18] Supra.

In such state of affairs, on the same set of facts, he cannot be charged for the offences under Section 404 and 408, I.P.C.[19]

Lastly, in the case of **Prempratap Singh Sisodiya v. A.C. Patel** it was stated that; an accused has been tried and acquitted by a competent court and as the acquittal was in force, subsequent trial for the same offence was borne by Section 300 of CrPC.[20]

III. COMPARATIVE ANALYSIS

In this chapter the researcher conducts comparative analysis on the concept in hand of India with ***England (A)***, ***Japan(B)***, ***United States of America(C)*** and ***Germany(D)***.

(A) 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.

(B) Japan

Article 39 of the Constitution of Japan states 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, the Supreme Court decided on September 27, 1950 that trials in district court, high court and the Supreme Court for the same offence constitute a single jeopardy. Thus, there

[19] Natarajan v. State, 1991 CrLJ 2329.
[20] Prempratap Singh Sisodiya v. A.C. Patel, (2002) 2 Guj LR 1411.

exists no double jeopardy where the prosecutor appeals the acquittal at the district court. There have been many cases where this case law was challenged, but the Court has constantly upheld the decision. It was not even considered as an issue in the recent reform efforts.

The Supreme Court held that it was within the discretion of the prosecution as to whether to charge the defendant with a single of offense of habitual larceny, or to charge multiple counts of trespass and simple larceny. In either case, there would not be a violation of double jeopardy.

It is clear that the concept of double jeopardy in Japan is quite different for that of other countries. Prosecutors are given broad powers of discretion, and the ability to appeal cases to higher courts when they do not get the desired result from a lower court. No change is expected by the courts at any time soon regarding this deeply rooted notion of prosecutorial authority and the power to fill the facts of any given case in such a fashion as to achieve the most severe punishment possible.

(C) United States of America

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:

"*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 17 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

Although the text of the Fifth Amendment refers to being placed twice in jeopardy of "life or limb," the Supreme Court has said that protections against re-prosecution for the same crime extend to all felonies, misdemeanours and juvenile delinquency adjudications, regardless of the potential punishment.

Nonetheless, there are some things to keep in mind. First, if a defendant was never previously in legal "jeopardy," then subsequent prosecution is not prohibited. For instance, if prosecutors take certain actions before jeopardy begins, or attaches, such as dismissing the indictment, nothing will prevent them from later trying the same person for the same offense.

Once an individual has been placed in legal jeopardy and the jeopardy has ended, the government cannot continue to pursue a prosecution against the person for the same crime, because this would violate the rule against double jeopardy. Jeopardy will always end after a jury's verdict of acquittal, and sometimes it also ends after certain other events, such as the trial judge's declaration of a mistrial.

Finally, the double jeopardy rule applies to re-prosecution for the same offense, but what constitutes the same offense? State and federal courts apply a multitude of tests to determine whether the same facts have already been litigated, whether the "actual evidence" has already been presented in court, whether all the alleged criminal acts were part of the "same transaction," or whether the defendant is being prosecuted a second time for the "same conduct."

(D) Germany

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

"*No one may be punished for the same act more than once in pursuance of general legislation.*"[21]

Although German law protects the accused from being repeatedly prosecuted or subjected to double jeopardy, the prosecution as well as the defense may appeal a court judgment, and such an appeal by the prosecution is not considered double jeopardy. Notification for appeal must be submitted within one week after the oral announcement of the court's judgment. A brief supporting the appeal must be submitted within 30 days.

SOFA and German Protections Against Double Jeopardy. The SOFA has a double jeopardy provision that states:

"*Where an accused has been tried in accordance with the provisions of [Article VII] by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party.*

[21] M.V. Pylee, Select Constitutions of the World 232 (4 ed. Universal Law Publishing 2016).

However, nothing in this paragraph shall prevent the military authorities of the State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party."[22]

The import of the first sentence of this provision seeks to prevent an American serviceperson from being prosecuted first by the military, and subsequently by Germany. The first part of the provision is therefore a clear protection against double jeopardy. The second sentence has been read to mean offenses that are resolved using punishments imposed by a commanding officer such as proceedings under Article 15, UCMJ, including reprimands and admonitions, are not prohibited before or after a trial by another Contracting Party. This is because these proceedings do not constitute a "trial" which would be prohibited by the rules against double jeopardy and the first sentence.73 The second sentence, therefore, seems to preserve military jurisdiction for the purposes of imposing minor disciplinary actions.

IV. CONCLUSION

The Supreme Court in **Venkataraman v Union of India**, 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 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.[23]

In **O.P.Dahiya v. Union of India**[24], 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**, 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.[25]

The Supreme Court in a recent decision of **Kolla Veera Raghav Rao v. Gorantla Venkateshwara Rao**, explaining this proposition of law inter alia observed that a person

[22] NATO SOFA Article VII, § 8.
[23] Venkataraman v. Union of India, (1954) SCR1150.
[24] O.P. Dahiya v. Union of India, (2003)1 SCC 122).
[25] State of Rajasthan v. Hat Singh, AIR 2003 SC 791.

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.[26]

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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[26] Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao, AIR 2011 SC 641.