



Protection from ‘Double Jeopardy’: A Constitutional Imperative

Dr. Manoj Kumar Sadual

Lecture-in-Law, University Law College, Utkal University, Bhubaneswar, Odisha, India

Abstract

Double Jeopardy is a legal term which simply means that a person cannot be punished for the same offence more than once. The double jeopardy rule, known in law as *autrefois acquit*, developed over centuries as a protection against oppressive prosecution. The principle of Double Jeopardy plays an important role for the protection of integrity of the criminal justice system including precious fundamental rights of the accused persons. The paper makes an attempt to analyse the concept of double jeopardy under Indian law with special reference to the Constitution of India and examines how it protects the fundamental rights of the persons accused of crime. It also makes an in-depth analysis of judicial pronouncements on the limits and boundaries of doctrine of double jeopardy.

Key Words: Double Jeopardy, *autrefois convict*, Fundamental Rights, Criminal Justice System, Constitution of India.

Introduction: Every civilized society maintains a criminal justice system in order to control crime and impose penalties on those who violate laws. Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, or sanctioning those who violate laws with criminal penalties and rehabilitation efforts¹. But any criminal justice system to be valid must be in conformity with the constitutional requirements. The criminal justice system operates on the basis of certain values within which it admits no compromise. The ‘double jeopardy’ principle is one such value protected by the system. It is a procedural safeguard, which bars a second trial then an accused person is either convicted or acquitted after a full-fledged trial by a court of competent jurisdiction². The basic idea behind double jeopardy is deceptively simple: prosecutors should only get one chance to convict someone for a crime. The rule against double jeopardy originally flows from the maxim “*nemo debet bis vexari pro uno et eadem causa*” which means that no person shall be vexed twice for the same cause. The term “*double jeopardy*” expresses the idea of a person being put in peril of conviction more than once for the same offence³. The core rule includes the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*⁴. These two doctrines are aimed to protect criminal defendants from the tedium and trauma of relitigation⁵. When a criminal charge has been adjudicated by a competent court, that is

¹Available at http://en.wikipedia.org/wiki/Criminal_justice.

² Lawrence Newman, “Double Jeopardy and the Problem of Successive Prosecutions”, 34 S.Cal.R [1960], p.252.

³Ian Dennis, “Rethinking Double Jeopardy: Justice and Finality in Criminal Process”, [2000] Crim. L.R. 993. For the applicability of the principle, the conviction must be for the same offence:

“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 with 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.” See, Lord Devlin in *Connelly v. Public Prosecutions*, [1964] A.C 1254.

⁴*Autrefois acquit* is a defense plea available to the accused in a criminal case, that he has been acquitted previously for the same offence and thus entitling a discharge. Likewise, *Autrefois convict* discharges an accused, as he has been convicted previously for the same offence.

⁵Daniel K. Mayers and Fletcher L.Yarbrough, “Bisvexari: New Trials and Successive Prosecutions”, [1960] Harv. L. Rev.74.

final irrespective of the matter whether it takes the form of an acquittal or a conviction, and it may be pleaded in bar of a further prosecution when it is for the same offence⁶.

'Double Jeopardy': Conceptual Analysis: The word Jeopardy refers to the "danger" of conviction that an accused person is subjected to when one trial for a criminal offence. Thus 'Double jeopardy' simply refers to the act of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted⁷. A second prosecution for the same offence after acquittal or conviction or multiple punishments for same offence. The evil sought to be avoided by prohibiting double jeopardy is double trial and double conviction, not necessarily double punishment. This means that if a person is prosecuted or convicted once cannot be punished again for that criminal act. And if a person is indicated again for the same offence in the court then he has the plea of Double Jeopardy as a valid defence. Five policy considerations underpin the double jeopardy doctrine⁸:

1. preventing the government from employing its superior resources to wear down and erroneously convict innocent persons;
2. protecting individuals from the financial, emotional, and social consequences of successive prosecutions;
3. preserving the finality and integrity of criminal proceedings, which would be compromised were the state allowed to arbitrarily ignore unsatisfactory outcomes;
4. restricting prosecutorial discretion over the charging process; and
5. eliminating judicial discretion to impose cumulative punishments that the legislature has not authorized.

'Double Jeopardy': Historical Background: There is no unanimity of opinions regarding the origin of double jeopardy principle as it is one of the oldest legal concepts. It has been rightly observed that the history of double jeopardy is the history of criminal procedure⁹. The rule is considered to have its origin in the controversy between Henry II and Archbishop Thomas Becket in 12th century¹⁰. At that time two courts of law have existed, 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"¹¹. 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*¹² 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. Further, it was during that period the famous *Vaux's* case was decided to the effect that a new charge could be brought even after a meritorious acquittal on a defective indictment. The last half of the

⁶*R V. Miles, 24 Q.B. 423, at p.431*, as cited in *Broom's Legal Maxims*, R.H.Kersley (Ed), Herbert Broom, Pakistan Law House, Karachi (10thed), 1998.

⁷ The American heritage dictionary.

⁸ Available at <http://legal-dictionary.thefreedictionary.com/double+jeopardy>.

⁹ Martin L.Friedland, "Double Jeopardy", (1969) Oxford University Press,p.3.

¹⁰ Excerpt by Justice Roslyn Atkinson at Australian Law Student's Association (ALSA) Double Jeopardy Forum, 9 July 2003, Brisbane, available at <http://archive.sclqld.org.au/judgepub/2003/atkin090703.pd>.

¹¹ Nyssa Taylor, "England and Australia relax the double jeopardy privilege for those Convicted of Serious Crimes", [2005] 19 Temp. Int'l & Comp. L. J., p.195.

¹² *Res judicata* or *res iudicata*, also known as **claim preclusion**, is the Latin term for "a matter [already] judged", and may refer to two concepts: in both civil law and common law legal systems, a case in which there has been a final judgment and is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) continued litigation of a case on same issues between the same parties. In this latter usage, the term is synonymous with "preclusion".

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 century, the principle of double jeopardy seems to have developed into a settled principle of the common law¹³.

During the eighteenth century, the extreme procedure was generally followed. It should be noted that, in eighteenth century, Blackstone stated thus:

"First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life for more than once for the same offence and hence it is allowed as a consequence that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence he may plead such acquittal in bar of any subsequent accusation for the same crime¹⁴."

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 proved¹⁵.

The protection given under this rule has gained international recognition also through various international documents¹⁶. Today, almost all civilized nations incorporate protection against double jeopardy in their municipal laws. While some of these countries have provided the protection through their constitution and others have incorporated it into their statute law¹⁷.

'Double Jeopardy': Protection under Indian Law: In India the Double Jeopardy principle was existed prior to the commencement of the Constitution of India. The principle was already recognized under the provision of General Clauses Act¹⁸. And Section 403(1) of (the old) CrPC,1898¹⁹ (Section 300 of the amended Criminal Procedure Code,1973²⁰) provided that 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) thereof.

Further Section 71 of the Indian Penal Code²¹ which deals with 'limits of punishment of offence made up of several offences' made it clear that 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.

In Constitution of India, Article 20 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." Thus the Constitution of India recognizes only *autrefois convict* whereas the Code of Criminal Procedure, 1973 incorporates *autrefois acquit* as well.

¹³Charles Parkinson, "Double Jeopardy Reform: The New Evidence Exception for the Acquittals", (2003) UNSW Law Journal,p.,605.

¹⁴Blackstone, Commentaries, 335, (1889), excerpt by Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions", 34 S.Cal.R [1960], p.252.

¹⁵*Supra note* 9, p.3.

¹⁶The states are bound to cope with the relevant provisions of the conventions to which they are parties. 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; Article 50 of the Charter of Fundamental Rights of the European Union.

¹⁷For instance, in countries such as U.S.A and India, it is accepted as a constitutional right. In particular, Fifth Amendment to Constitution of USA and Article 20(2) of the Constitution of India. Conversely, in England and Canada, it is the part of Common Law and Statute Law.

¹⁸Section 26 of the General Clauses Act, 1897 provides:

" 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."

¹⁹ Act No. 5 of 1898.

²⁰ Act No.2 of 1974.

²¹ Act No. 45 of 1860.

Further 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. 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 prosecution²². Thus 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.

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 the 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*²³. 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 Act, 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.

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 same²⁴. 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 offence²⁵. Gajendragadkar, J. has stated the protection under Article 20(2) as follows:

"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 procedure²⁶."

²² *Smt. Kalawati v. state of H.P.*, AIR 1953 SC 131.

²³ AIR 1953 SC 325.

²⁴ *Manipur Administration v. Nila Chandra Singh*, AIR 1964 SC 1533.

²⁵ *Bai Nath Prasad Tripathi v. Statel*, A.I.R. 1967 S.C. 494.

²⁶ *Raja Narayanlal Bansilal v. M.P. Mistry*, AIR 1961 SC 29.

In the above context, it is to be noted that the Code of Criminal Procedure recognizes both the pleas of *autrefois acquit* as well as *autrefois convict*. The conditions which should be satisfied for raising either of the pleas under the Code are:

- Firstly, that there should be previous conviction or acquittal,
- Secondly, the conviction or acquittal must be by 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 facts²⁷.

'Double Jeopardy': Role of Indian Judiciary: Some of the landmark judgements delivered by the Supreme Court of our country are cited below to throw light on the response of the Indian Judiciary with respect to the protection of Double Jeopardy as enshrined in the Constitution of India.

In *Venkataraman v. Union of India*²⁸, 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 be applicable only where punishment is for the same offence, In *Leo Roy v. Superintendent District Jail*²⁹, 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.

In *Roshan Lal & ors v. State of Punjab*³⁰, the accused had disappeared the evidence of two separate offences under section 330 & 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 *A.A.Mulla v. State of Maharashtra*³¹, the appellants were charged under section 409 IPC & 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 recovered 99 gold biscuits. The appellants were tried for the same & acquitted. The appellants were again tried for the offence under Section 120-B of Indian Penal Code, Sections 135 & 136 of the Customs Act, Section 85 of the Gold (Control) Act & 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 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 the 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 the Gold (Control) Act in the second trial is of a different nature. Not only the ingredients of offences in the previous and the second trial are different, the factual foundation of the first trial and such foundation for the second trial are also not indented. Accordingly, the second trial was not barred under Section 403 CrPC of 1898 as alleged by the appellants."

In *Union of India v. P.D. Yadav*³², 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

²⁷ *State of Rajasthan v. Hat Singh*, AIR 2003 SC 791.

²⁸ AIR 1954 SC 375.

²⁹ AIR 1958 SC 119.

³⁰ AIR 1965 SC 1413.

³¹ AIR 1997 SC 1441.

³² (2002)1SSC 405.

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.”

In *Jitendra Panchal v. Intelligence Officer, N.C.B.*³³, 17th October, 2002, officers of the US Drug Enforcement Agency, along with officers of the Narcotics Bureau, India, seized a consignment of 1243 pounds equivalent to 565.2 Kgs. of Hashish in Newark, USA. During the investigation, it appears to have transpired that one Niranjana Shah and the appellant were engaged in trafficking Hashish out of India into the USA and Europe and that the seized contraband had been smuggled out of India by the appellant and the said Niranjana Shah along with one Kishore. The appellant was arrested in Vienna in Austria by officers of the Drug Enforcement Agency, USA on 5th December, 2002 and was extradited to the USA. Soon, thereafter, on 25th March, 2003, the Deputy Director General of the Narcotics Control Bureau, hereinafter referred as 'the NCB', visited the USA and recorded the appellant's statement. Subsequently, on 9th April, 2003, officers of the NCB arrested Niranjana Shah, Kishore Joshi and Irfan Gazali in India and prosecution was launched against them in India. On 5th September, 2003, a complaint was filed by the NCB before the learned Special Judge, Mumbai, against Niranjana Shah, Kishore Joshi and two others under Sections 29/20/23/27A/24 read with Section 8(c)/12 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as 'the NDPS Act', in connection with the above-mentioned incident. While the said Niranjana Shah and others were being proceeded with before the learned Special Judge in Mumbai, the appellant, who had been extradited to the USA, was tried before the District Court at Michigan, USA³⁴. On pleading guilty of the charge of conspiracy to possess with intention to distribute controlled substances, which is an offence under USC Controlled Substances Act³⁵, the appellant was sentenced to imprisonment on 27th June, 2006, for a total term of 54 months. After serving out the aforesaid sentence, the appellant was deported to India on 5th April, 2007, and on his arrival at New Delhi, he was arrested by officers of the NCB and was taken to Mumbai and on 10th April, 2007, he was produced before the learned Chief Metropolitan Magistrate and was remanded to judicial custody. At this juncture, it may be indicated that although the appellant could have been prosecuted for other offences under Title 21 USC, the other charges against the appellant were dropped as he had pleaded guilty to the offence of conspiring to possess controlled substances. On 25th April, 2007, on the appellant's application that the proceedings against the appellant in India would amount to double jeopardy, the learned Special Judge, Mumbai, rejected the appellant's contention upon holding that the charges which had been dropped against the appellant in the proceedings in the USA had not been dealt with while imposing sentence against him in the District Court of Michigan, USA. The Special Judge extended the judicial custody of the appellant and subsequently rejected his prayer for bail on 17th May, 2007.

Conclusion: The “underlying idea” of double jeopardy includes the desire to protect an individual from repeat prosecutions that would subject him to live in a continuing state of anxiety and insecurity. A critical analysis of the Indian law relating to the protection of double jeopardy as enunciated in Section 300 of the Code of Criminal Procedure and Article 20(2) of the Constitution of India, it is revealed that a partial protection against double jeopardy is a Fundamental Right guaranteed under Article 20 (2) of the Constitution of India. This provision enshrines the concept of *autrefois convict*, that no one convicted of an offence can be tried or punished a second time. However it does not extend to *autrefois acquit*, and so if a person is acquitted of a crime, he can be retried. In India, protection against *autrefois acquit* is a statutory right, not a fundamental one. Such protection is

³³ AIR 2009 SC 1938.

³⁴ Case No.04 CR 80571-1.

³⁵ Section 846 of Title 21, United States Code Controlled Substances Act.

provided by provisions of the Code of Criminal Procedure rather than by the Constitution. Recently the Supreme Court of India in *Kolla Veera Raghav Rao case*³⁶ has also affirmed that Section 300(1) Cr. PC is wider in its scope than Article 20(2)³⁷ 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. PC states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts.

Double Jeopardy law in India essentially protects a person from multiple punishments or successive prosecution based on same facts of a case where the elements of multiple prosecutions are similar to those for which the accused has already been prosecuted or has been acquitted by the court. Going by the basic principle of law, a new charge cannot be framed against a person under Section 300 of Cr. PC based on same facts. It is essentially the duty of police who files the charge sheet to ensure that all the charges are framed against an accused properly; also it is the responsibility of the magistrate to ensure that the charge sheet has been filed without an error. So it creates extra burden on both i.e., *accused and the state machinery* if the charges are not framed cautiously, as it sometimes leads to the double victimization of an accused and on the other side, it also creates problem for state to prosecute a person as it should be.

³⁶ (2011) 2 SCC 703.

³⁷ Available at [ndiankanoon.org](http://indiankanoon.org), Article 20(2) in The Constitution of India 1949, <http://indiankanoon.org/doc/17858>.
