

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 5**

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**2021**

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# Doctrine of Double Jeopardy

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## ABSTRACT

*In this article the author has tried to explain various concepts of doctrine of double jeopardy. The concepts are explained in the simple and easy language. For the better understanding of the author has used case laws, illustrations, and examples. The conclusion given by author is his own opinion which may vary person to person.*

## I. INTRODUCTION

This article emphasizes on various aspects of the doctrine of double jeopardy. In this article we will be able to find out evolution of doctrine of double jeopardy. This article is also inclusive of explanation, relevance and case laws related to doctrine of double jeopardy. Before going into the depth of this particular doctrine i.e. doctrine of double jeopardy, let's know what is meaning of doctrine? Are these doctrines conferred by constitution? If yes then which part of constitution speaks about these provisions and if no then from where these doctrines got introduced? No, these doctrines are not written in constitution of India. Legal doctrine is the **currency of the law**.<sup>2</sup> In many respects, doctrine is the law, at least as it comes from courts.<sup>3</sup> Judicial opinions create the rules or standards that comprise legal doctrine.<sup>4</sup> In simple words we can say that doctrines are not written in constitution of India but are stated by precedent. Now let's look into DOCTRINE OF DOUBLE JEOPARDY, which is soul of this article.

## II. EXPLANATION

The meaning of double jeopardy is "two adjudications for one offense."<sup>5</sup> Which means a person is prosecuted twice in court of law for same and single offence committed by him. So, the doctrine of double jeopardy says that no person shall be prosecuted and punished twice for same and single offence committed by that person. This doctrine operates on the principle of a well known maxim '*nemo debet bis vexari, si constat curice quod sit pro una iti eadem causa*' which means no person should be vexed twice if it so appears to the court that it is for the one

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<sup>1</sup> Author is a student, India.

<sup>2</sup> Tiller, E., 2021. *What is Legal Doctrine? | Request PDF*. [online] ResearchGate. Available at: <[https://www.researchgate.net/publication/228187193\\_What\\_is\\_Legal\\_Doctrine](https://www.researchgate.net/publication/228187193_What_is_Legal_Doctrine)> [Accessed 6 October 2021].

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> 2021. *double jeopardy*. [online] Available at: <<https://www.merriam-webster.com/dictionary/double%20jeopardy>> [Accessed 6 October 2021].

and same cause.

Let's take a hypothetical situation. Suppose a person X is accused of murder of Z and put on the trial of court. Then during trial it is observed that X is guilty, hence was punished accordingly. But due to his good behavior he's released from jail after few years of imprisonment. Now if the relatives of the deceased [Z] sue X again for same offence i.e. committing murder of Z. Then, X will now have a defense under doctrine of double jeopardy which says, a person cannot be prosecuted and punished more than once for the single and same offence in the court of law. Hence X will be acquitted.

**(A) Essential elements applicable to doctrine of double jeopardy:**

- a. The person must be accused of an offence<sup>6</sup>.
- b. There is judicial proceeding against that person in the court of law
- c. The person had been prosecuted and punished in the earlier proceeding
- d. The person should be sued again, provided that the offence must be same for which the person was prosecuted and punished earlier.

### **III. GENESIS OF DOCTRINE OF DOUBLE JEOPARDY**

If we trace the history we learn that the principle of double jeopardy was not entirely unknown to the Greeks and Romans<sup>7</sup>. The criminal procedures of that time were different to what we have today with the defendant being liable to prosecution by the prosecutor within 30 days of the acquittal. 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>8</sup>

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*

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<sup>6</sup> 'Offense' as defined in general clauses Act means 'any act or omission made punishable by law for the time being in force.

<sup>7</sup> Jay A. Sigler, A History of Double Jeopardy, The American Journal of Legal History, Vol. 7, No. 4 (Oct., 1963), p. 283[<https://www.lawctopus.com/academike/double-jeopardy/>]

<sup>8</sup> Digest of Justinian, Book 48, Title XVII, as translated in Scott, The Civil Law (1932) [<https://www.lawctopus.com/academike/double-jeopardy/>]

*accusation for the same crime.*<sup>9</sup>”

Both the continental and the English systems drew the doctrine of double jeopardy from the common source of Canon law<sup>10</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>11</sup>. The classical argument for the need of maintaining the rule is apparent in the observation of the court in *Green v. United States*<sup>12</sup>. The Court observed thus:

*“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.”*

The protection is also given under this rule has gained international recognition also 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. The states are bound to cope with the relevant provisions of the conventions to which they are parties.<sup>13</sup>

If we throw some light on origin of this doctrine in India, it was observed that this concept of double jeopardy existed prior to enactment of constitution of India. As Section 26 of the General Clauses Act of 1897 states *“Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence”*<sup>14</sup>. This same concept of this doctrine is also seen in section 71 of Indian Penal Code of 1860 which states: *Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.*<sup>15</sup>

Article 20 of constitution of India also emphasizes on this doctrine and constitution declared it as one of the fundamental right. It is also said that as India has borrowed the fundamental rights

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<sup>9</sup> Blackstone, Commentaries, 335, (1889), excerpt by Lawrence Newman, “Double Jeopardy and the Problem of Successive Prosecutions”, 34 S.Cal.R [1960], p.252. [<https://www.lawctopus.com/academike/double-jeopardy/>]

<sup>10</sup> Radin, Anglo- American Legal History 228 (1936) [<https://www.lawctopus.com/academike/double-jeopardy/>]

<sup>11</sup> Brooke, The English Church and the Papacy 205 (1952) [<https://www.lawctopus.com/academike/double-jeopardy/>]

<sup>12</sup> (1957) 355 US 185 [<https://www.lawctopus.com/academike/double-jeopardy/>]

<sup>13</sup> sharma, K. and prakash, r., 2021. *Guarantee Against Double Jeopardy - Academike*. [online] Academike. Available at: <<https://www.lawctopus.com/academike/double-jeopardy/>> [Accessed 6 October 2021].

<sup>14</sup> THE GENERAL CLAUSES ACT, 1897

<sup>15</sup> Ibid.

from America, hence this doctrine got introduced in India from America. On the contrary part it is said that this concept existed in India before enactment of constitution, in other acts. Hence it got introduced in India from common law of English system. The concept of doctrine of double jeopardy was also stated by court in the case Union of India Vs. P.D. Yadav.

#### IV. RELEVANCE OF DOCTRINE OF DOUBLE JEOPARDY

In India, article 20(2) of constitution of India articulates that “No person shall be prosecuted and punished for the same offence more than once”<sup>16</sup> which means constitution of India gives protection against the double jeopardy. This principle has also been recognized under section 26 of General Clauses Act of 1897. The constitution of India under article 20(2) has recognized only the defendant’s plea stating that he/she has already been tried for and convicted of the same offence. Whereas Code of Criminal Procedure of 1973 has recognized another side of same coin i.e. the defendant’s plea stating that he/she has already been tried for and acquitted of the same offence. The rule against double jeopardy is recognized as fundamental right in the constitution of India. Which means the person can claim his right against the state too. Moreover, the 44<sup>th</sup> amendment of constitution of India has strengthened this doctrine of double jeopardy a lot, by giving special provision to these article during state under emergency i.e. article 20 and 21 will not be suspended during emergency. Hence, the person can approach the court during the state under emergency, if his rights are infringed.

#### V. CASE LAWS

##### (A) Union of India & Anr. v. P.D. Yadav,<sup>17</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

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<sup>16</sup> INDIA CONST.

<sup>17</sup> India, 1., 2021. *Double Jeopardy in India*. [online] Legalservicesindia.com. Available at: <<http://www.legalservicesindia.com/article/1633/Double-Jeopardy-in-India.html>> [Accessed 6 October 2021].

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.”

**(B) Kalawati v State of Himachal Pradesh<sup>18</sup>**

In this case 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 be applicable as there was no punishment for the offence at the earlier prosecution.

**(C) Monica Bedi v State of Andhra Pradesh<sup>19</sup>**

In this case the Apex Court ruled that a passport enrolled on a fictitious name amounted to a double jeopardy as a Portuguese court too had earlier convicted her for owning a forged passport.

**(D) State of Bombay v S.L. Apte<sup>20</sup>**

In this case, 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.

**(E) O. P. Dahiya vs. Union of India<sup>21</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 constitute double jeopardy and in *State of Rajasthan V Hat Singh<sup>22</sup>*, it was said that prosecution and other punishment under two sections of an Act, the offences under the two Sections being different from each other, does not amount to double jeopardy.

**(F) Mohammad Ali vs. Sri Ram Swaroop**

In this case the Court held that in cases of continuing offence, each day is counted as a fresh offence and each can be punished separately so double jeopardy doctrine is not permissible in continuing offences.

**(G) Bhagwant Swarup vs. State of Maharashtra**

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<sup>18</sup> Kalawati v State of Himachal Pradesh, AIR 1953 SC 131

<sup>19</sup> Monica Bedi v State of Andhra Pradesh, 2011 1 SCC 284

<sup>20</sup> State of Bombay v S.L. Apte AIR 1961 SC 578

<sup>21</sup> O.P. Dahiya v Union of India, (2003) 1 SCC 122

<sup>22</sup> State of Rajasthan v Hat Singh, AIR 2003 SC 791

In this case, 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 different offences committed by the same act of that person.

## **VI. WHY ARTICLE 20 OF THE CONSTITUTION OF INDIA IS NOT SUSPENDED DURING EMERGENCY?**

In the case of *ADM Jabalpur v. S. Shukla*<sup>23</sup> majority, the Supreme Court bench decided one cannot move to court for violation of the right to life. The judgment was perceived to be anti-people as in this judgment the Supreme Court shut its door to anyone who is deprived of their most fundamental right to life or personal liberty. To prevent something like this to repeat, the 44<sup>th</sup> Amendment Act made it sure that Article 20 and Article 21 shall not be violated in most extreme situations. Even if a person is deprived of his right to life or personal liberty, he is entitled to approach the court of law for the enforcement of his rights. In other words, the court will have the power to declare any law or executive action to be void if it is violative of Article 20 or Article 21. As these rights are most fundamental for existence of any of the person, therefore Article 20 and 21 of constitution of India are not suspended during emergency.

## **VII. CONCLUSION/ OPINION**

This doctrine of double jeopardy has played the major role in uplifting the spirit of justice in Indian judiciary. According to me this doctrine has an edge in reducing the risk of wrongful conviction. Where the same person is not wrongfully convicted and his rights are protected. This doctrine has also minimised the distress among the wrongfully convicted person. If we see psychological aspect of this doctrine then it has helped in reducing mental trauma of an individual during trial process. Absence of this doctrine would have created many loop holes, where the person would be brutally harassed and the judiciary would have been left with no option. Another point is absence of this doctrine would have created more pendency of cases in the court of law. Due to which the trust of people on judiciary would have hampered badly. Finally I would conclude that this doctrine is one of the strongest and most important pillars in our judiciary system. This doctrine has also contributed in smooth functioning of judiciary. Moreover, we can trace its importance by looking at its impact on constitution of India after 44<sup>th</sup> amendment, which recognized this doctrine as most fundamental right. And this right

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<sup>23</sup> iPleaders. 2021. *State emergencies and the fundamental rights* - iPleaders. [online] Available at: <<https://blog.iplayers.in/state-emergencies-fundamental-rights/>> [Accessed 6 October 2021].

cannot be suspended during the state under the emergency.

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