# COMPARATIVE ANALYSIS OF THE LAW ON SEARCH AND SEIZURE IN INDIA AND THE USA

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**ABSTRACT**

The principles of search and seizure of India and the USA are mostly similar. Both states follow constitutional forms of governments. India has a common procedure and developed constitutional principles regarding search and seizure. The USA also has robust constitutional principles on search and seizure. The scope of the paper is to explore those principles in both countries. The paper concludes with a finding that judiciaries in both the counties have struck a balance between facilitation for criminal investigation and the liberty of a citizen.

**KEYWORDS**

Seizure. Frisk. Attachment of Property. Freezing. Contemporaneous Search. Probable Cause. Reasonable Suspicion. Chimel vs. California. Terry vs. Ohio. Tapas D. Neogy.

## INTRODUCTION

Search and seizure are considered important steps of an investigation. The meanings of both these terms differ substantially. "Search means to look somewhere carefully in order to find something".[i] It is to "try to find something by looking or otherwise seeking carefully or thoroughly. Also, examine (a place, vehicle or a person) thoroughly in order to find something or someone".[ii] But both are sequential events and are an integral part of an investigation. At times, those are also considered an integral part of the arrest of an accused person. Search and seizure offer real evidence. They furnish tangible evidence to produce before the court for their inspections. There are different dimensions of search and seizure. The treatments of laws for these concepts even if are different in details but are the same in essential characteristics in different countries. The concepts in the context of the USA and India are similar due to their common-law backgrounds and being the constitutional forms of governments.

### Comparative Analysis of Law on Search and Seizure

The power of search and seizure in case of India is spread over various penal procedural legislations. The primary legislation is the Code of Criminal Procedure, 1973. Section 47, Section 100, Section 102, Section 51, Section 52, Section 91 and Section 92 are some of the sections for the search and seizure of the properties.

The area liable under search and the procedure of search are reflected u/s 100 of Code, 1973. This section is used for search, with or without a warrant. In Section 100, the place which is "open" leaves no doubt for the search to carry out, and the preparatory words, "any place" followed by another word, "closed" makes clear the gamut of search. That means, with a reasonable procedure that is reflected in the section itself, the close compound even if it is occupied by anyone can be liable to search. And the liability is cast on the occupant to allow free ingress and egress to the police officer.

The "search and seizure" in the USA related to various other concepts associated with it. Arrest, stop and frisk are different dimensions of these. The concept of arrest draws its constitutional protection from 4th [iii] and 14th [iv] Amendment from these words. In factual circumstances, these concepts overlap. The reason for Search and Seizure, Arrest and, Stop and Frisk is different from one another. The principle of Due process, placed under 5th and 14th Amendments put a constitutional limitation on the Arrest, Search, Seizure, Stop and Frisk. The 14th amendment's due process clause explicitly applies to all the states. The Supreme Court of the USA infused the same meaning of the due-process in both 5th and 14th Amendments. In Malinski v. NY, 324 U.S. 401(1945), the

Supreme Court stated that "To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.[v]" Within the bounds of the due process clause, the action of each of the states is judged. Even in India, the 'procedure established by law' under article 21 of the Constitution restricts the legislature to pass unjust laws which may hamper the 'personal liberty' of a person. It is also considered as the 'due process clause' of India and antithetical to unjust and unfair laws or procedures that curtail fundamental freedom and the fundamental rights of a person. Indian due process clause is India both substantive and procedural. In addition to constitutional mandates, India has a union law for the investigation of a crime and is applicable in all the state governments.

In the USA the landmark case of seizure is Chimel vs. California[vi]. It lays down the principles of seizure as an integral part of arrest without warrant, requiring 'probable cause', failing which it shall violate 4th and 14th Amendment of the Constitution.

In this case, police arrived at the house of Chimel searching for him in connection with an offence of burglary. Police introduced themselves to his wife. His wife was present in the house but he was absent. On his arrival, he was put under arrest. Police requested Chimel to search his house. Chimel refused. The police stated that a lawful search and seizure can be conducted 'on the basis of the lawful arrest'. Then, police searched the 3-bedroom house, attic, garage, workshop, sewing room, drawer etc and an exclusive search was conducted of the master bedroom. The scope of search integral to arrest was stated as to when an arrest is made, it was reasonable for the arresting officer to search the person arrested to remove any weapons that the latter might seek to use to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself be frustrated. Besides, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person to prevent its concealment or destruction. And the area into which an arrestee might reach to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of an arrestee can be as dangerous to the arresting officer as one concealed in his clothing. There was ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—means, the area under his command where he might gain possession of a weapon or destructible evidence.

The court decided that the incidents of searches must be confined to the location within the prompt control of the arrestee, giving him oppertunity to immediately bring the weapon to use against the investigating officer. The area with his *immediate control* also gives him the oppetunity to cause the disappearance of evidence. If we apply the above facts, we can reasonably sum up that, the entire areas of three bed-rooms were not in the prompt control. This power of search-integral-to-arrest is given to the police officer for his safety while dealing with criminals in everyday works of professional life. *So, a proper search is contemporaneous to the time and place of arrest.* It should not be remote. In case of India, while exercising the power u/s 100 of the Code, 1973, if the police officer is obstructed, the Section 47 of Code, 1973, comes into operation and the police officer is having the power to break open the door or window or any access point for ingress and egress. And the search in that compound is *not confined to that very place only*. If any person is found there, who cause raise to suspicion of a crime, committed or about to commit, he is also liable to search. And if the person is a female, the search is carried out strictly by female police. For that reason, in India, the police always carry a lady officer or personnel, for the investigation and general police patrolling, as a routine practice.

Apart from the above, section 51 and section 52 of the Code, 1973, also provide for the search and seizure. Section 51 and section 52 are an integral part of Arrest and the later is an integral part of an investigation of a cognizable case by the police officer u/s 156 Act, 1973. Section 51 and section 52 can be used by the police without a warrant from a court of law. Section 52 can be compared with the *frisking* of a person under the American jurisprudence.

In America, the frisking is an integral part of search action. It is another facet of search. Frisking is associated with the Stop. The stop and frisking are simultaneously used. And the stop is considered as detention that falls short of arrest. So, the yardstick for validity is different from that of the arrest. A frisking is effected for the safety of the police officer**.** A stop is effected by the investigating officer if he observes peculiar and unusual conduct leading to a credible suspicion. The credible suspicion must be entertained by a reasonable mind that a crime is about to or has taken place. When conducting a legal stop, if further, the police-officer becomes concerned about his safety, he may "pat-down" the outer clothing of the arrestee and can confiscate weapon, if he finds. A valid stop does not lead to validate an invalid frisking. Frisking for any other purpose than the safety of the police officer is invalid.

In Terry vs. Ohio[vii], the principles of the frisking aspect of search from the arrest were enunciated. In this case, a police officer of named Martin McFadden relied on his experience for the validation of his frisking. One day when the police officer was patrolling in the downtown of Cleveland he saw two persons named John Terry and Richard Chilton standing on one corner of Huron Road and Euclid Avenue roads. The police officer had been patrolling this area for long 30 years out of his 39 years of experience. He saw one man going southwestward of Huron Road and passed some stores. He saw the man stopped for some time and looked into a window of a shop. Then he walked a few steps then turned around and walked back towards the corner, and peeped into the widow of the shop again. After that, he met his companion again at the corner to confabulate. This activity was also similarly done by his companion. This going, peeping and turning activities were repeatedly done by these two fellows for multiple times and subsequently, they met the third person and indulged in conversation. Then this third man left and went west on Euclid Avenue. Then again the last two fellows engaged in the earlier peeing-and-analysing-window-activities for twelve to thirteen times and finally moved to towards the place, the third man had gone. The police officer began to suspect the conduct of three fellows and thus approached them and after giving his police credential asked their names. They mumbled something. Then the police officer held and spun around Terry and patted outside overcoat, felt a pistol, and swiftly seized it. Then he ordered them to turn around and face the wall with raised hands showing the seized pistol. Thereafter, he patted down Chilton's overcoat and also found a weapon. Then he arrested them and took to the police station.

Here, at first, the lower court reasoned that the police officer had 'no probable cause' to arrest these fellows before patting them down. The pleading of the prosecution was that the police officer had seized the guns during a search incidental or integral to the arrest. The court here made a distinction between a frisking-search and investigatory-stop of the arrestee. However, the court here also noted that the police officer had a 'reasonable cause' to suspect the conduct of the accused persons.

The issue before the Supreme Court of the USA was whether "this police practice of stopping and frisking suspects 'without probable cause' constitutional". Here the Supreme Court of America held that sustaining a valid pat-down or frisking, police should have more than a hunch, but a "reasonable suspicion" must exist. There is a difference between 'probable cause' and 'reasonable suspicion'. Probable cause is roughly a fifty, fifty chance and comparably a higher standard to 'reasonable suspicion". The purpose of the 'frisking-on reasonable-suspicion' is restricted to a situation where the police smell a crime and want to discharge his duty without endangering his life. In this case, the Supreme Court of America tried to strike a balance between the individual liberty and need of the law enforcement agency. Now a days, the application of the principle is made in a host of situations ranging from finding a suspect in a prolific crime area to his attempt to escape.

While the intent of *frisking* in American jurisprudence is to expel the possibility of commission of an offence on the police officer, in Indian jurisprudence u/s 52 of Code of Criminal Procedure, 1973 uses '*weapon* found on the body of the person searched' to offer the same meaning in essence.

In India, the police are having the power u/s 102 of the Code of Criminal Procedure, 1973 to seize *any property* during an investigation which under the circumstances *creates suspicion* of commission of the crime. Of course, the suspicion is read into it, as in India, property right is a constitutional right amenable to a writ of the High Court and the Supreme Court. 'Any property' means any kind of movable property including the assets lying with any bank. The seizure of the asset in the bank is popularly known as *freezing*, which is having the effect of attachment of the property. Under the Procedure, 1973 the attachment of the property can only be made when a person is declared absconder following an arrest warrant. In India the court is only empowered to declare a person an absconder on the prayer made by the police u/s 82 and naturally, the attachment is also made by the court order u/s 83. In the State of Maharastra vs. Tapas D. Neogy[viii], the Supreme Court of India validates a seizure of bank account by police exercising the power u/s 102. Police requests with an application in writing to the Bank Manager, under the strength of section102 to freeze the account, which otherwise can be possible through the rigorous route of section 84, fraught with '*judicial application of the mind'*. In a way, the ratio of the case is a big relief to the police during the investigation. However, in India, an illegal search violates Art 21, of the constitution. And an illegal seizure violates constitutional right under article 301A, enforceable through writ jurisdictions.

In India, it is also necessary that when the search is made, the inventory of the search articles i.e, the seizure list, is prepared. Here the police are required to attest the fact with two or more independent and respectable witness of that locality. However, in most of the cases it is found, the lower rank police personnel, like Habildar and constables, even not the strictly called police personnel, but personnel associated with the police department,

become the witness to the search and seizure. This is because the general public seldom comes forward to become a witness for the fact of search and seizure. And at the core remains stake of their 'independent-abilities'. Again this inventory is signed by the person from whom the things are seized after the search. Further, to prevent the manipulation on the record the police officers gives a copy of the seizure list. This apart, there are decisions of the various courts making police to *allow (himself to) the person to be searched to make a prior search* of the police officer who is searching him. This reasonable procedure is the outcome of judicial precedents. If in a case this procedure is not followed the defence counsel asks police on the dock whether this procedure is followed. And if at all, Investigating Officer (I.O) tries to lie on the dock, the further question is put, whether the same is reflected in the Case Diary of the I.O or not. So, various checks and balance are inbuilt to safeguard the interest of an accused person in India.

**Conclusion:** In both the countries there is a balance struck by the Apex Courts between the facilitation of investigation of a crime and the liberty of a citizen. While important evidence should come before the court of law to enforce accused person's attendance and to try him, it is also the interest of the court of justice to jealously guard fundamental liberty of a citizen least he is victimised. In these aspects, the Apex Courts of both countries hold similar views.

**Acknowledgement**

None

**References**

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[i]https://dictionary.cambridge.org/dictionary/english/search (last visited 19.25 dt. 17.july. 2020)
[ii] https://www.lexico.com/definition/search (last visited 19.28 dt. 17.july. 2020)

[iii] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

[iv] 14th amendment to the constitution of the USA u/s 1 "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". https://constitution.congress.gov/browse/amendment-14/

[v]https://www.law.cornell.edu/wex/fourteenth_amendment_0

[vi] Carmen Rolando V. Del and Craig Hemmens, Criminal Procedure and the Supreme Court, at 91 ( Rowman & Liittlefield 20 July 2010 )

[vii] Ibid at 57

[viii] State of Maharastra vs. Tapas D. Neogy on 16 September, 1999 https://indiankanoon.org/doc/491816/