

EX POST FACTO LAWS: ISSUES AND CHALLENGES

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ABSTRACT

Laws ought to apply tentatively and not reflectively. Retrospective enactment demolishes the assurance of law, is discretionary and is malicious. Retrospective laws are ones that try to change the law identifying with the past. Retrospective enactment is for the most part considered as undesirable as it disintegrates the unwavering quality of the law according to the native. This article researches the hypothesis and extent of the protected rule against retrospective inconvenience. Assurance against ex post facto laws has been perceived in different nations independent of the type of government and it assumes an imperative part in the general public's improvement with the expect to give equity against self-assertive laws. The paper addresses the avoidance of civil law from the enclosure of security against retrospective laws and tries to locate the conceivable purpose for it. It examines the laws in regards to retrospectivity in diverse countries with their pertinence in civil cases. History behind retrospective laws is likewise an essential viewpoint to be managed. The motivation behind retrospective laws is to avert human respect and individual awareness. Retrospective laws make it incomprehensible for people to arrange their existence with sensible sureness of the future outcomes.

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INTRODUCTION

The idea of retroactive illegality makes any sense only if legality is understood as a provisional condition dependent on the future will of a legislative authority. If this is the case, the law's primary function of providing guidance to conduct is severely weakened. Individuals who cannot predict the legal consequences of their actions cannot coordinate their behaviour in relation to each other. Therefore substantial restraint on the imposition of harm for past innocent acts is a necessary condition of social life.² Certain activities are thought to be lawful at one point of time and unlawful at another. An act that was thought innocent at the time of its commission is no longer innocent today but is illegal. These changing circumstances may prompt wrongful discipline of numerous blameless people.

Ex post facto law is law that retroactively makes act that was not an offence or against the law while the act was performed thereby increases the penalisation for offence that has been already committed, or changes the principles of procedure effective at the time once the offence was committed. Thence it will increase the penalisation for the offence committed and thereby the wrongdoer is in disadvantageous position. The motivation behind this restriction is to guarantee that people have reasonable cautioning of authoritative acts that could work to their impediment.

.A retroactive law is one that takes away or impairs unconditional rights beneath existing laws, creates a new obligation, imposes new duties, or attaches a replacement and completely different legal impact to issues already past. A retroactive statute works forward in time, beginning from a point further back in time than the date of its authorization; so it changes the lawful results of past occasions as though the law had been unique in relation to it truly was at the time those occasions happened.³

If a person has been punished for an act that has been done in 2014 and a law has been passed in 2015 which penalizes the act or enhances the punishment for the same offence. The law passed in 2015 cannot be applied to punish the person because it violates the principle of protection against ex-post facto laws.

² Suri Ratnapala, 'Reason and Reach of the Objection to Ex Post Facto Law', (2007) 1:1 *The Indian Journal of Constitutional Law*, 140-168.

³ *Hornby Island Trust Committee v. Stormwell*, 1988 3143 (BC CA).

A form of ex post facto law commonly known as an *amnesty law* may decriminalize certain acts or alleviate possible punishments (for example by replacing the death sentence with life-long imprisonment) retrospectively.⁴

Most common law jurisdiction do not permit retrospective legislation, though some have suggested that judge-made law is retrospective as a new precedent applies to events that occurred prior to the judicial decision.

HISTORICAL PERSPECTIVE AND LEGAL MAXIMS

On looking at the historical perspective, ex-post facto laws is the principle that law should not apply to the events which occurred before their passage date at least from Roman times.⁵ *Verres* had been berated by *Cicero* for making the provision of *Lex Voconia* retroactive and on the other hand *Justinian Code* repeated the retroaction as a settled law.

The concept of Ex-Post Facto law is an aspect of the fundamental maxim, *nulla poena sine lege*: there can be no punishment without law—in this case, without preexisting law. As said by Thomas Jefferson that "Every man should be protected in his lawful acts, and be certain that no ex post facto law shall punish or endamage him for them."⁶ These kinds of law that penalizes for the act committed in past are against the notion of morality and the justice and that is why many countries have provided safeguards against such acts. The maxim which advocates the concept of Ex-Post Facto laws is *nulla poena sine lege*, it means that there can be no punishment without law. The principle has been rooted in Roman law.

These kinds of laws are against the principle of human rights because it takes the individual liberty of the person and ultimately it will create havoc in the society. Ex-Post Facto law has been recognized in different form in the laws of the various countries but the essence is same *id est* protection of individual liberty, freedom and rights. Another maxim that advocates Ex-Post Facto laws is *Nullum crimen, nulla poena sine praevia lege poenali* which means that "there exists no crime and no punishment without a pre-existing penal law". Some other aspects that can be deduced from the maxims that advocate ex-post facto laws include that there cannot be any penalty without any written laws or the law whose meaning is not definite.

⁴ James Kent (1860), Commentaries on American Law, (Little, Brown and Company).

⁵ Seligmen's Encyclopedia of the Social Sciences, ISBN 81-307-0498-6, Pg 355.

⁶ Thomas Jefferson to Isaac McPherson, 1813. ME 13:326.

The principle *nulla poena sine lege* which condemns the retrospective increase in penalties is again a substantive claim of justice. It can also be seen as a logical extension of *nullum crimen sine lege*. A retrospective increase in punishment is an infliction of new pain not prescribed by law. It is not punishment of the offence as the punishment has already been suffered or is being suffered.⁷

IMPLICATION OF EX POST FACTO LAWS IN OTHER COUNTRIES

The position regarding conviction under ex post facto laws and the validity of such laws is different in India and America. Both the countries are against the conviction under the ex post facto laws but America struck down such laws whereas in Indian validity of such laws cannot be challenged.

Articles 281(1) of the *Constitution of Indonesia* protect a person to “*not to be tried under a law with retrospective effect*”. The clause of the Article explicitly says that “Human rights cannot be prohibited under any circumstances”. The Constitution clearly regards Human Rights as an essential ground so that a human cannot be tried against an arbitrary ex-post facto laws.

In the Supreme Court of the United States, in the case of *Calder v Bull*⁸, the concept of Ex-post Facto was discussed for the first time and concluded that it was used in technical sense in order to accept on retroactive criminal or penal laws.

Apart from the striking down of the ex post facto laws for the protection of the human rights, sometimes they are validated in order to develop the society. One current U.S. law that has a retrospective effect is the Adam Walsh Child Protection and Safety Act of 2006. This law imposes new registration requirements on convicted sex offenders and also applies to offenders whose crimes were committed before the law was enacted.⁹ Therefore all the retrospective laws are not struck down. The striking down of the retrospective laws is based upon the human conditions and conditions prevailing in the society.

Australia has no strong constitutional prohibition on ex post facto laws, although narrowly retroactive laws might violate the constitutional separation of powers principle. Australian

⁷ Supra Note 1.

⁸ *Caldero v Bull*,3,U.S.,386 (1798).

⁹ Library of Congress text of H.R.4472.

courts normally interpret statutes with a strong presumption that they do not apply retroactively.

Article 11, paragraph 2 of the *Universal Declaration of Human Rights* provides that no person be held guilty of any criminal law that did not exist at the time of offence nor suffer any penalty heavier than what existed at the time of offence. It does however permit application of either domestic or international law.

The *Constitution of Japan* also prohibits the retroactive application of law. Article 6 of Criminal Code of Japan says that the lightest punishments should be given for the acts committed prior to the enforcement of the Act. The implication of this article is that a person can be tried against an ex post facto law if the later law provides less punishment than the former.

POSITION OF EX POST FACTO LAWS IN INDIA

The Ex-Post Facto law in India is mention in Article 20(1). The Article does not explicitly talks mentions the word “ex post facto” but the essence is same. The Articles is available to all, it is not restricted only to the citizens. Article 20(1) of the Constitution of India, 1950 is as follows:

“No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence “

The first part of the definition deals with Ex-Post Facto laws. The insertion of the word “penalty” direct towards the criminal offences only. Alternatively it does not include civil liabilities. As held in the case of *Hatisingh Mfg. Co. v. Union of India*¹⁰, it was held that the Article 20(1) does not bar civil liability being imposed retrospectively. With the same analogy, the court held that tax can be imposed retrospectively.

The creation of new offences by the new Act or any later Act, enhances the punishment for the offence, then “no person can be convicted under such an ex post facto laws nor can the enhanced punishment prescribed in the later Act apply to any person who had committed the

¹⁰ *Hatisingh Mfg. Co. v. Union of India* 1960 AIR 923.

offence before the enactment of the later law”.¹¹ The common principle behind ex post facto law is individual liberty, individual consciousness, human rights *et cetera*. Through the application of this principle and the second aspect of the judgment *id est*, “nor can the enhanced punishment ...later law”, for the protection of the human rights it can be concluded that if the later law provide less quantum of punishment than the former one, then later Act should be applied.

The same is the situation in India; a punishment of 6 months imprisonment and fine was imposed on a 16 year old boy on 31-5-1962. The Probation of Offenders Act came into force on 1-9-1962. An appeal was filed in Supreme Court contending that the boy should be given benefit of the Act. The court gave judgment in the favour of the boy reasoning that “an ex post facto law which only mollifies the rigours of a criminal act does not fall within the said prohibition”. If a particular law makes provision to that effect though retrospective in operation, it will be valid. The court therefore ruled that the rule of beneficent construction required that even an ex post facto law of the type involved here ought to be applied to reduce the punishment of the young offender.¹²

The Article 20(1) also takes into account that only that penalty can be imposed which is in force at the time of commission of the offence. The higher penalty cannot be imposed by another law after the commission of the offence but the Article gives the way to the laws to be applied retroactively which decreases the rigorousness of the punishment.¹³

In the Indian context an ex-post-facto law which only mollifies the rigors of a criminal law is not within the prohibition of Article 20(1). Therefore, an accused can take the benefit of a retrospective law as observed in *Rattan Lal v. State of Punjab*¹⁴.

A person can be convicted and punished under a “law in force” which means a law “factually” in existence at the time the offence was committed. A law not factually in existence at the time, enacted subsequently, but by a legislative declaration “deemed” to have become operative from an earlier date (by a fiction of law), cannot be considered to be a law “factually” in force earlier than the date of its enactment and the infirmity applying to an ex-post-facto law applies to it, the reason is that if such a fiction were accepted, and a law passed

¹¹ *T. Barai v. Henry Ah Hoe*, AIR 1983 SC 150 : (1983) 1 SCC 177.

¹² *Rattan Lal v. State of Punjab*, 1965 AIR 444, 1964 SCR (7) 676.

¹³ *Sawant Singh v. State of Punjab*, 1960 AIR 266.

¹⁴ *Supra* note 11.

later were to be treated as a law in existence earlier, then the whole purpose of the protection against an ex-post-facto law would be frustrated, for a legislature could then give a retrospective operation to any law.¹⁵

Articles 20, 21 and 22 of the Constitution of India ensure right to life and individual freedom. These procurements guarantee security to subjects from self-assertive activities of the State. It has likewise been given that State ought to make moves to guarantee that subjects ought to have the capacity to lead a significant life.¹⁶

The essence of protection against ex post facto laws is that an offence cannot be created and a person can be convicted only if s/he violates law in force. Judiciary cannot create an offence not created by statute. This legal axiom is based on the principle that no criminal law can be made retrospective, that is, for an act to become an offence. The *sine qua non* is that it ought to associate offence lawfully within the law books at the time of committing it.¹⁷

On the close analysis of Article 20(1), it talks about the right not to be “*convicted of any offence except for violation of a law in force at the time of the commission*”. Since conviction cannot but be by a judicial authority, it is clear that the addressee of the right under Art. 20(1) is the judiciary.¹⁸ On the other hand, Article 21 of the Constitution ensures citizen’s right to a life with dignity. It declares that no citizen can be denied his life and liberty except “the procedure established by the law”. It guarantees protection against the executive¹⁹ and legislature actions.²⁰ With this observation it can be concluded that both the Articles, Article 20(1) and Article 21 aims at the protection of human rights but Article 21 leaves wider scope for this purpose as compare to Article 20(1).

The Indian Legal system is very serious for the enforcement of Article 20 because even during the period of emergency, the Constitution (Forty Forth Amendment) Act, 1978 makes the enforcement of the Article possible. The Amendment Act amended Article 359 of the Constitution of India, 1950. Previously, a presidential order under Article 359(1) could suspend the enforcement of any of the Fundamental Rights mentioned in Part III of the Constitution. The 44th Amendment Act had made it impermissible to suspend the

¹⁵ *Kanaiyalal v. Indumati*, AIR 1958 SC 444: 1958 SCR 1394.

¹⁶ http://www.legalpoint.in/right_to_life_and_personal_liberty.php.

¹⁷ Supra note 14.

¹⁸ <https://indconlawphil.wordpress.com/tag/judiciary-as-state/>.

¹⁹ *A K Gopalan v. State of Madras*, 1950 SCR 88.

²⁰ Basu, Durga Das (2003). *Shorter Constitution of India* (13th ed.). Nagpur: Wadhwa & Co, Pg 268.

enforcement of the rights conferred by Article 20 during emergency. Article 20(1) protects the individual against ex post facto laws and double jeopardy. The exemption of Article 20 means that even during operation of proclamation under Article 352, an aggrieved individual have right to move to the Supreme Court or a High Court to challenge a law or a executive order on the ground that Fundamental Rights in Article 20 have been contravened.²¹

CIVIL CASES AND EX POST FACTO LAWS

Most of the legal systems of different countries do not take into account the application ex post facto laws in civil cases. Suppose if two parties enters into the contract with free consent and later a legislature has been passed which abrogates the contract, then ultimately the parties are suffering and hence ex post facto law is coming into the play. Another example is that if two parties enter into a contract according to which the considerations have to be paid in terms of gold. Later a law has been passed which declares that in all the contracts, consideration must be paid in terms of cash. Then it is also affected by ex post facto laws and it is ultimately the parties will have to suffer. If application against ex post facto laws can be applied only in criminal case, not in civil cases, is based upon the intensity of the punishment to the wrongdoer, then in both the cases, it is ultimately the person who have to suffer and the extent or the intensity of suffering might be same. The person committing criminal wrong get imprisonment in most of the cases but during colonial period, incarceration was prevalent as a punishment for civil wrong too.

Every ex post facto law is a retrospective law.²² With this analogy, Article 23 of the *Constitution of New Hampshire* says that:

“[Art.] 23. [Retrospective Laws Prohibited.] Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.”

The Articles clearly shows its intention to safeguard human being against the effects of such kind of law which may affect the human dignity. It also opens the gates for laws in civil cases which are “highly detrimental, draconian and inequitable”.

²¹ Basu, Durga Das (2003). *Shorter Constitution of India* (13th ed.). Nagpur: Wadhwa & Co., Pg 1617-18.

²² A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the States of the American Union, 3rd edition, Pg 256.

In the case of *Calder v. Bull*²³, the Supreme Court of United States created four categories of unconstitutional ex post facto laws which are as follows:

- First, every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- Secondly, every law that aggravates a crime, or makes it greater than it was, when committed.
- Thirdly, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- And fourth, every law that alters the legal rules of evidence, and receives less, or different; testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

There is flaw in the first, second and third category because sometimes the court should also look at the graveness of the offence (or wrong) before adjourning the matter on the ground of ex post facto law as it taking only criminal matters into consideration, not civil matters.

CONCLUSION

Laws cannot be retroactive if they seem to impose any penalty or .punishment. The statement clearly concludes that the ultimate purpose behind the passing of the retroactive legislation is for the protection of human rights. The main purpose of law is to regulate human conduct in the society. In order to meet this goal, laws also say that the acts done which are prohibited by the law are punishable because its purpose of redress the sufferer who had suffered because of violation of his rights. Drawing the same analogy, if the acts committed is wrong but if it's not in mentioned the law, it is not wrong at all. If the person is charged for that wrongs, then Ex-post Facto laws come into play to protect the rights of that person.

The differentiation between the permissible retrospective laws and non-permissible retrospective laws is not advocated by any precedent. Non permissible retrospective laws have considered to arbitrary interferences with the vested rights as “unreasonable” imposition of duties and the obligation on the basis of past events.²⁴

²³ Supra note 7.

²⁴ Segen's Encyclopedia pg 355.

The major provision dealing with the ex post facto laws to safeguard the interest of community is not completely perfect. The provisions dealing with ex post facto laws in many countries have given priority to criminal cases only. But the suffering of the accused in both is more or less, nearly same and thereby it affects individual consciousness. The courts refuse to adjudicate the cases dealing with the ex post facto laws against civil cases.

Law is the expression of the will of the people. Its indirect implementation is that the concrete of the laws is desired by the society. Sometimes even there are some acts, when committed cannot be harshly punished because law does not allow it to be punished harshly. Morally the act is wrong for which harsh punishment should be given because the society says so. Its implication in ex post facto law is that sometimes the law should be applied according to need of the society and the effect of the wrong, *id est* retrospectively even though it may be legally unjust but, not morally. Therefore, provisions dealing with ex post facto needs to be more comprehensive to deal with the different circumstances.

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