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# **“ANALYSING APPLICATION OF LAW- RETROSPECTIVE EFFECTS AND CREATION OF LAW FOR SPECIFIC AREAS.”**

AUTHORED BY - ARINDAM MISHRA

The recent rise in the state machinery's interest in using the law as a tool to steer the society towards a certain ideology and belief has started to trouble the legal scholars and the public at large. While the legislature is free to create and amend provisions of acts they would want to, it is the interpretation and application of the law that is in question. Polemarchus, a roman philosopher describes justice as “The art which gives good to friends and evil to enemies and is nothing else than the interest to the stronger.”<sup>1</sup> And while the great Roman justice system may have ceased to exist, its principles are very much still in use and lay the groundwork for this generation's aspiration as to where the society wishes to progress. The role of the Justice system is to prevent wrongs and uphold certain virtues or ‘rights’ that the society believes is basic or ‘fundamental’ to the functioning of the society. The Courts of the land are expected to be unbiased, yet still be aware of the evolution of the society and thus interpret law keeping in mind the changes.<sup>2</sup> One such aspect of interpreting law coming under fire has been the “Ex post facto law” or Retrospective application of law in the Indian judicial system.

Essentially, retrospective application of law is when a piece of legislation is applied or put into use in a time period of action which is earlier than the date of enforcement of the said legislation.<sup>3</sup> The Indian Constitution under Article 20 states the protection in respect of conviction for offenses and section 1 states, “*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,*”<sup>4</sup> clearly giving protection to people against ‘Ex post facto law’. Thus, making only prospective application of law lawful.

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<sup>1</sup> Plato et al., The republic (2010).

<sup>2</sup> Reeve T Bull, *BUILDING A FRAMEWORK FOR GOVERNANCE: RETROSPECTIVE REVIEW AND RULEMAKING PETITIONS*, 67 ADM. LAW REV. 265–319 (2015), <http://jguelibrary.informaticsglobal.com:2074/stable/24475490>.

<sup>3</sup> Deepa Kansra, *RETROSPECTIVITY OF JUDICIAL INTERPRETATION OF PENAL STATUTES*, 51 Journal of the Indian Law Institute 250–266 (2009).

<sup>4</sup> INDIA CONST. art. 20, cl. 1.

However, the interpretation of the law has been bent by both the state and its subjects in the same way. The state uses it to enforce laws that enable it to prosecute the people either by creating new legislation or issuing fresh FIRs for acts committed earlier. One such example that will be discussed later as well will be that of The Vodafone group being forced to pay retributive taxes. The defendants use Ex post facto law to their advantage to help reduce their prescribed punishment if the said legislation is amended and a lower sentencing is prescribed by the legislation and noted in *T. Baral v Henry*<sup>5</sup>.

Within the civil realm, Retrospective action in terms of Taxation has been met with fierce criticism after the Indian government in 2012, lost a case against the Hague based-Vodafone group in the Supreme Court, they decided to amend the Finance act in 2012, essentially shifting the tax burden back on the Vodafone group. The amendment was criticized for its generalities and the sense of revenge could be felt.<sup>6</sup> The government tried to resolve the issue with the group however adamant on the retrospective taxation, The Netherlands-based company invoked The Bilateral Investment treaty and brought the case to the Permanent Court of Arbitration where India lost the case and is yet to appeal in the case.

Within the criminal realm, the law favours the defendants due to the nature of Article 20. A person is to be convicted for violating a law in force when the act charged is committed, In simpler terms, if an act is not an offense at the date of its commission it cannot be an offense at the time of the trial. This was upheld in *Pralhad Krishna v State of Bombay*.<sup>7</sup> Additionally, the rule of beneficial construction says that the ex post facto law should only be applied to reduce the rigorous sentence of the previous law in the same subject and is based on the legal maxim “*Salus Populi Est Suprema Lex*”<sup>8</sup>, As seen in the *T. Baral v Henry* case where the life Imprisonment was changed to 3 years of Imprisonment by the legislature during the course of trial and the court applied the law retrospectively in the interest of the plaintiff.

While arguments may be made for Retrospective action in the favour of the plaintiff, the law can not be inconsistent with the same piece of legislation, while we give respite to people in criminal matters and happily invoke retrospective action there, we must also maintain this happy nature

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<sup>5</sup> *T. Baral vs Henry Ah Hoe* 1983 AIR 150, 1983 SCR (1) 905

<sup>6</sup> Aashish Aryan, *Retrospective taxation: the Vodafone case, and the Hague court ruling*, THE INDIAN EXPRESS (2020), <https://indianexpress.com/article/explained/retrospective-taxation-the-vodafone-case-and-the-hague-court-ruling-6613799/> (last visited Dec 14, 2020).

<sup>7</sup> *Pralhad Krishna Kurane vs The State Of Bombay*, 1952 A.I.R. Bom 1.

<sup>8</sup> Let the good (or safety) of the people be the supreme (or highest) law.

when we retrospectively apply it in the civil matters or by the government to prosecute old cases under new laws. The inconsistency speaks for the society we all live in. If one is happy to accept the fruits of this metaphorical tree of Retrospective action, why is the society against it when the poisons of the tree are given to the society in the form of new laws being applied on old cases.<sup>9</sup> The answer may lie in the roman principles of natural justice of ‘*Audi Alteram partem*’<sup>10</sup> and the primary responsibility of the justice system is to be fair to all parties involved. Now to define fairness, one would have to look at the stage of society that is to say that fairness may be defined objectively, what maybe fair at one point in time may not be fair in the future, Hence the courts have the ultimate responsibility to uphold Article 14,<sup>11</sup> and maintain equality in all aspects including the application of retrospective laws. The common law system and the importance of setting a precedence by superior courts establishes an extra burden on the weight of the court.<sup>12</sup> It is seen as a general trend that the courts in India have increasing started to tread away from the protection of personal liberty and the same was voiced by retired Justice Madan lokur when he said, “Till a few years ago, the Supreme Court gave considerable importance and significance to social justice, human rights and the dignity of the individual, but I am afraid some of these thoughts are now on the back burner for reasons future historians will identify for us.”<sup>13</sup>

One may argue that the courts have been complicit recently in the erosion of personal liberty for the Indian citizens and allowing the retrospective application of law through subversion of due process and just initiating new FIRs and investigations. It is nothing but only human to be biased towards what they consider as correct, however, and whomever we may pledge our allegiance to, our inherent biases will always subconsciously lead to where we are biased. The Supreme Court Justices may be part of this, the quality of Supreme Court judgements has been trending down, the same can be backed with empirical data, from 2014 onwards there has been a downward trend in the citation of Supreme Court cases at foreign courts.<sup>14</sup>

There have been several laws that have been made recently that seemingly have provisions that try to bring people under new ‘crimes’. These include but are not limited to Unlawful Activities

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<sup>9</sup> A D Wozzley, *What Is Wrong With Retrospective Law?*, 18 PHILOS. Q. 40–53 (1968), <http://jguelibrary.informaticsglobal.com:2074/stable/2218027>.

<sup>10</sup> "Hear the other side". This is a strong principle that no person shall be judged without a fair hearing.

<sup>11</sup> INDIA CONST. art. 14

<sup>12</sup> Uma Narayan, *Sources of Indian Legal Information*, 7 LEGAL INFORMATION MANAGEMENT 133–139 (2007).

<sup>13</sup> Justice Madan B. Lokur (Retd.), “*Judiciary And Social Justice, Dignity And Personal Liberty, Human Rights And Frights*”: Justice Madan Lokur (2020), <https://www.livelaw.in/columns/judiciary-and-social-justice-dignity-and->

<sup>14</sup> *Sharp Fall in Citation of Supreme Court Judgments by Foreign Courts After 2014, Study Finds*, THE WIRE, <https://thewire.in/law/supreme-court-foreign-citations-study> (last visited Dec 14, 2020).

(Prevention) Amendment Act, 2019, NIA Amendment Bill, 2019, Fugitive Economic Offenders Act, 2018, The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020. Prima facie, these all look like legislation brought in by the state for better governance, however nothing could be further than the truth, to discuss one of them, the UAPA was brought as an Anti-terror law and has been applied at every chance for seemingly trivial matters, However the Courts have dismissed more than 66% of these cases filed,<sup>15</sup> The problem remains that these 66% have to remain incarcerated for the duration of the trial, which are often long, point being that the government creates new laws to circumvent the Article 20 and just files a new case. While the process is legal, it is morally incorrect to prosecute a person for acts the person may have done at a time when there were no legal provisions against it. If the Government intends to achieve justice by prosecuting their subjects for their actions it should do so without malice, for if the cases are brought to the courts with a preconceived notion of the person being guilty of the crime that didn't exist at the time of commission of such act, then the government is not looking for justice but revenge. The fine line between the both is often trespassed in the sense that we claim to have justice just because we had the provisions of law to support it, but until when can we hide behind this curtain of law and claim ignorance to the revenge. If the law of the land has assumed that the person standing trial is termed guilty using the provisions of the law, then how can we still claim this as fair, just, and reasonable, The legal maxim '*ei incumbit probatio qui dicit, non qui negat*'<sup>16</sup> mentioning how the burden of proof should, barring some anti-terror law, rest with the prosecution and the fact the person standing trial should not be subject to harsh incarceration only for them to be acquitted by the courts years later is something that is inherently wrong with the justice system of the country.

Justice Pal in his dissenting judgement argued, how it was inherently wrong prosecuting people with laws of which they were never a party to and were following the laws applicable then and thus these could not be applied to events that preceded their formulation. Highlighting the problems of retrospective application of the law. Interpretation of law is evolving towards greater justice, but what is greater justice is driven by the society we live in, and if the society we live in, itself is preconceived on the guilt of people, then the interpretation of law will never truly reflect

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<sup>15</sup> Sanjeev Verma, *UAPA Act: Why UAPA cases fall flat in courts - Times of India*, THE TIMES OF INDIA, <https://timesofindia.indiatimes.com/india/why-uapa-cases-fall-flat-in-courts/articleshow/77191240.cms> (last visited Dec 14, 2020).

<sup>16</sup> "the burden of the proof lies upon him who affirms not he who denies", is the principle that a person is considered innocent unless proven guilty.

what fair, reasonable and just, justice truly is.<sup>17</sup>

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### Constitution and Statutes

1. INDIA CONST. art. 14
2. INDIA CONST. art. 20, cl. 1.

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<sup>17</sup>INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, R PAL & S ARAKI, THE UNITED STATES OF AMERICA AND OTHERS VS. ARAKI SADAQ AND OTHERS: JUDGEMENT OF THE HON’BLE MR. JUSTICE PAL, MEMBER FROM INDIA (1948), <https://books.google.co.in/books?id=brJxQAACAAM>.

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