

*lex retro non agit<sup>1</sup> or is it ? in reference to Domestic Violence Act, 2005<sup>2</sup>*

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Are Laws with penal consequences susceptible to retrospective application ?...the answer is in negative for reasons more than one, the essentiality of a right of protection from laws with retrospective application is accepted without argument, in light of well established judicially professed maxim "*Nullum crimen, nulla poena sine praevia lege poenali*" which when translated means 'No crime, no punishment without a previous penal law" a principle devised & appearing first, way back in 1789 and widely accepted by civilized jurisdictions around the world, recognizing that - making an act, a crime retrospectively after it is done is prime facie of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought... to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law..."<sup>3</sup> and furthermore the history is devoid of any justification for the same, & the same bears testimony to the fact that whenever force has been given to such laws, it has resulted in gross miscarriage of justice.

An ex post facto law or retroactive law, is a law that retroactively changes the legal consequences (or status) of actions committed or relationships that existed prior to the enactment of the law. In reference to criminal law, it may criminalize actions that were legal when committed; or it may aggravate a crime by bringing it into a more severe category than it was in at the time it was committed; or it may change or increase the punishment prescribed for a crime, such as by adding new penalties or extending terms; or it may alter the rules of evidence in order to make conviction for a crime more likely than it would have been at the time of the action for which a defendant is prosecuted.

Nevertheless, there are several examples in international, Australian and British law where the principle has been ignored or at least circumvented. The question of retrospectivity of penal legislations NOW assumes immense importance, in the wake of recent Delhi High Court judgment, purporting to render Domestic Violence Act – ex-post-facto and apply it retrospectively, which has breathed a new lease of life into the dying debate.

Leaders, Human Rights Activists & Legislators over the world have expressed scorn over such laws. *Australian Prime Minister Howard* 'commented condemning retrospective criminal laws. "It's fundamentally wrong to make a criminal law retrospective," he told a television reporter, "We don't support that and won't support that," said the Prime Minister.

The stand of the Prime Minister is to be commended. The Basic edict of the International Bill of Rights i.e The Universal Declaration of Human Rights vide Article 11 provides that a person should be sentenced under the law in force at the time of the crimes he or she committed. To sentence a person under a later regime is to shift the goalposts in a way that contravenes every principle of due process in the criminal justice system.

Sounding fierce dissent over the use of such laws, Thomas Jefferson, in his Letter to Isaac McPherson, way back in August 13, 1813 said "The sentiment that ex post facto laws are against natural right is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. The federal constitution indeed interdicts them in criminal cases only; but they are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing what is wrong. Nor ought it to be presumed that the legislature meant to use a phrase in an unjustifiable sense, if by rules of construction it can be ever strained to what is just."

Now proceeding with the premise of general acceptance over existence of such right against retrospective laws, and abhorrence over such laws, what needs to be seen is weather the right to protection from retroactive criminal law an absolute human right, or should its application be qualified by reference to

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<sup>1</sup> Polish for Law does not operate retrospectively'

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<sup>3</sup> per Willes J in *Phillips v Eyre* (1870) LR 6 QB 1, at 23

the circumstances in each case? Clearly, & in light of examples we have seen in the form of Nuremberg Trials and others, we can say that the right to protection from retroactive criminal law is not an absolute human right.

But if it is a qualified human right, what are the conditions that must be fulfilled before that right will be restricted?. Even if immorality is a necessary condition, it is clearly not sufficient to qualify the right to protection from retroactive criminal law, before pondering over such questions, heres a brief history of retrospectivity of penal legislations.

### **History of Law Against Ex-Post Facto Legislations.**

From the nullum crimen maxim, discussed above jurists have deduced the principle of prohibition of retrospective penal laws. As early as 1651, Hobbes wrote: No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law.<sup>2</sup>

This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it: ... shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.

Article 15 of the International Covenant on Civil and Political Rights states, inter alia:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

In India without using the expression "Ex post facto law" the underlying principle has been adopted in the Article 20 (1) of the Indian Constitution in the following words:

"No person shall be convicted of any offence except for violation of a 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 have been inflicted under the law in force at the time of commission of the offence."

Hence it is quite unanimous that any law that has as any of its consequences, penal repercussions, is to be applied prospectively, departure only to be allowed in rarest of the rare cases, in instances morally repugnant or involving grave moral turpitude.

### **In Reference to the recent pronouncement of the Delhi High Court apropos Domestic Violence Act, 2005**

In light of above well established principles it can be said, that in the context of the criminal law, a person should only be convicted and punished on the basis of law. An individual must know in advance what acts and omissions will make him/her liable to prosecution and the rule is regarded as being of particular importance in the sphere of criminal justice.

Marking a distinct departure from the principle of lex retro non agit<sup>4</sup> & other rulings of district courts in this behalf, which ruled that if the alleged acts of domestic violence have occurred before the act was notified, they would not be entertained by the protection officers, the judgment in question<sup>5</sup> adopts a beneficial construction/interpretation, and held that legislative intent of providing succor to women who are harassed at the hands of their husbands and their in-laws, should be taken into consideration whenever construing/interpreting the act, but the Hon'ble Court failed to recognize that this kind of interpretation runs contrary to all established norms of fairness & no justification/rationale could justify a concept as legally unsound as this.

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<sup>4</sup> 'Polish for Law does not operate retrospectively'

<sup>5</sup> Delivered on 22<sup>nd</sup> March, 2010

The Hon'ble Court in its portentous judgment delivered on 22<sup>nd</sup> March, 2010<sup>6</sup>, while dealing with a complaint filed under the Domestic Violence Act, said the Act was maintainable "even if the domestic violence has been committed prior to coming into force of the Act." The Court based its ratio on the principle of construing the act keeping in view the legislative intent behind it, but it failed to take into consideration that if the legislature indeed desired or in fact intended the act to have a retrospective effect, for that matter, it would have provided so expressly.

While raising assumptions & presumptions the Hon'ble Court further went on to say that "There is no difference between the women who were subjected to domestic violence before 2005 and those who were later, as any differentiation would tantamount to denying the right of equality before law guaranteed to all citizens by the Constitution, "Any discriminatory treatment to women in either category would be violative of their constitutional right guaranteed under Article 14 of the Constitution the court held.

But the Hon'ble Court, while trying to concur its judgment with constitutional right to equality, with due respect perhaps forgot that the very basic premise of this act, so far it addresses domestic violence only if it is perpetuated by a Male Partner, is violative of Article 14 on the very face of it, especially in light of various studies which put it beyond reasonable doubt that even women are capable of inflicting violence in domestic relationships.

The Advocates of this judgment may raise an argument or perhaps the only one, can be that as the act does not primarily envisage criminal prosecution & the remedies are essentially civil in nature, hence is outside the purview of ex-post facto law & resultantly not covered by the principle against retrospective criminal laws, but the said argument is I am afraid to say is a little too farfetched, as S.31 of the said act, clearly provides for penal action in case protection orders are disregarded.

## **Conclusion**

The right to protection from retroactive criminal law is well recognised throughout the international community. Yet there are many examples, in communities which claim to espouse this right as being fundamental, where retroactive criminal laws have been made, the example of application of retrospective laws, though very far & few in between, have met great disapproval & censure from all civilized sections of society.

The Court in the instant judgment has shown a willingness to adopt a retributive approach to punishment and to punish retrospectively, and reflects how a rule as basic as this, relating to retrospectivity can be circumvented in the garb of Protection to Women, and runs contrary to various international instruments to that effect & Article 20(1) of the Constitution of India. Lots of reservations have been & continue to be raised as to the soundness of this Particular Legislation, as to the slackness of the drafting of the said act is concerned, and its misuse thereof; and the present judgment would do nothing but to help & further the misuse of these provisions, which can prove out to be terribly retrogressive, especially when a lot of hue & cry, albeit justified, is being raised by men activists for a gender neutral domestic violence law.

Note: We are a group of law students from universities across India, working to provide free legal assistance to the weaker sections of the society, The related information is now available at : [www.lawstudentscollective.blog.com](http://www.lawstudentscollective.blog.com)

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<sup>6</sup> Mrs.Savita Bhanot v. Lt.Col.V.D.Bhanot – CrI. M.C.No. 3959/2009 & CrI. M.A.13476/2009 – Delhi High Court <http://timesofindia.indiatimes.com/city/delhi/HC-Domestic-Violence-Act-can-be-used-with-retrospective-effect/articleshow/5713590.cms>

