

ABATEMENT OF PUNISHMENT AND PENALTY BEFORE CONVICTION: A CASE OF REVERSE EX POST FACTO LAWS.

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ABSTRACT Legislature can make laws prospectively and retrospectively, but Article 20(1)¹ prohibits legislature from making retrospective criminal laws. Criminal law cannot impose penalties or punishments retrospectively. Any law made after the fact shall be ex post facto law for that fact is concerned i.e. if, on the date of its commission, an act is not an offense, it shall not be offended on a date following the adoption of an Act. Any effective law enforced today cannot be retroactively applied to a crime committed yesterday and by virtue of the second part of 20(1) an accused is not liable to be punished with a greater penalty than what might at the time of the commission of the crime have been subject to. This work is aimed at a thorough introspection of the aspects and probabilities revolving around the concept of ex post facto laws and the constitutions which deal with such provisions contained in them such as:

- 1) Does protection against ex post facto law extend to procedural laws?
- 2) Application of 20(1) with respect to civil and criminal cases.
- 3) Status of an offence with reference to ex post facto taxing statute.
- 4) Provisions for an accused or under trial to take recourse in case of an Act or penal provision being repealed or a reduced penalty.

Individuals who cannot predict the legal consequences of their actions cannot coordinate their behavior in the society. Therefore substantial restraint on the imposition of harm for past innocent acts is a pre requisite for easy social life. 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 send out a chaotic and wrongful inhibitions to individuals.

Key Words: : Constitutional law, Protection, Ex post facto laws, Abatement, Punishment.

INTRODUCTION

Rules of evidence is changed by retroactive application of laws which are Ex post facto in criminal cases, definition of a crime is altered retroactively, punishment for criminal acts are increased retroactively , or conduct which was legal at the time commission be punished. They are prohibited by Article 1, section 10, clause 1, of the U.S. constitution, whereas in U.K. it is possible for an ex post facto law to be operative since they have a parliamentary supremacy and an unwritten constitution but in a country with written constitution like India Ex post facto laws may be prohibited.

An ex-post-facto Law changes the legal implications or status of actions or relations before the law was enacted. Penal law can penalize legal proceedings while committed by making the crime more serious than when committed. It can make criminal acts. It may change the penalty prescribed for the crime by adding new sanctions or extending sentences or it could change the rules of proof to make convictions for the crime more likely than it was when it was committed.

For example, if a law is repealed or otherwise canceled, a law may have a post-facto effect without being technically ex post facto, even if such situations had occurred before the legislation had been canceled. "**Nullumcrimen, nullapoena sine praevalgepoenali,**" which is the principle for prohibiting the continuation of the application of these laws, is the latter, without a prior law, which means that there is no crime, no punishment, (can be executed), especially in European continental systems and legal thinking as part of the Bavarian Code² in 1813.

This basic legal principle has been incorporated into international criminal law which is related to the principle of legality and prohibits the creation of *ex post facto laws*. The principle is enshrined in several

¹ Indian constitution, part-3.

² Paul Johann Anselm Ritter Von Feuerbach, Bavarian Code 1813.

national Constitutions and in a number of international institutions, for example the European Convention on Human Rights (Article 7(1) ; the Rome Statute of the International Criminal Tribunal (Art. 22) and 23) and does not allow retroactive criminal law.

PROCEDURAL LAW AND ART.20 (1)

No change in the courts, responsible in proceeding is claimed to violate Article 20(1), proceedings differed from those held in *Shiv Bahadur v. Vindhya Pradesh* at the time when the offense was commissioned by an offense or a special court established after the offense was commissioned would not violate Article 20 (1); likewise a new rule of evidence may be applied. Except trial, an ex post facto law governs conviction and sentence which is prohibited with Art.20 (1). There is no objection towards changing of the court or the procedure therein. Any trial in a process other than that obtained at the time of the offence's commission or by a court other than those with jurisdiction at the time cannot be held ipso facto unconstitutional. Art. 20 (1) gives away no right, any vested right regarding any procedure, hence any law that retrospectively alter the jurisdiction of trial for any offense from an criminal court to a administrative court shall not be affected this provision.

CIVIL AND CRIMINAL CASES

The US Supreme Court of Justice initially decided that a constitutional ban on ex post facto laws applied only to criminal cases was introduced in *Calder v. Bull*, the Differentiation between the Civil and Criminal Ex Facto Laws. The question was whether it could be described as a law ex post facto for the Connecticut legislative act to set aside a judgment of a probate court. The trial court decided in favor of Bull at a later hearing. Calder argued in his appeal to the Supreme Court in which it states in a portion that the State shall not pass any "ex - post - facto" law, the law issued ex post facto and hence prohibited by Article 1 – Section 10 of the US Constitution.

TAXING STATUTES

In the case of *PareedLubha v. Nilambaram* it has been held that Panchayat Tax was due on the day the defaulters were not liable for non-payment and that non-payment was not an offence when it was due. Clause (1) protection may only be used against conviction and punishment under ex-post facto law in criminal offenses but not against any proceedings. The protection provided under the US constitution is wider than what is provided under the constitution of India as it applies to trial as well in the former.

Even after five decades the interpretation of both the substantive and procedural provisions of legislation remains uncertain. Retrospective amendments made in under the tax law not only upset but creates mockery of business models whose expected concessions and incentives are jeopardized.

Lately, in the case of *ITO New Delhi v. Ekta Promoters Private Ltd*, the Delhi Tribunal Special Bench had to consider if retrospective application to cases would be subject to the interest levy under section 234D of the Act of 1 June 2003.

DOCTRINE OF ABATEMENT

The statutes are a general rule for the future. A legal and legislative concern underlying the rule is the absence of notice, inadequate consideration of past conditions and disruption of the security attached to concluding previous transactions. The rule is based on the American constitution ex post facto clauses of criminal law "forbid the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."³ To mollify criminal sanctions there is no constitutional hindrances on application of retroactive criminal legislations. This focuses on legislative changes which are applied retroactively to redefine criminal conduct or penalty reduction on criminal acts. The problem is the treatment of a person who committed a criminal act before a migratory change preceding apprehension, trial or sentencing. This paper addresses the doctrine of the common law abatement, the surge of general and special statutes for legislative saving and their conflicts between two approaches to solve the problems caused by them.

The amount of legislative changes in criminal law is illustrated in reconsideration by legislations around the globe for laws related to use and possession of marijuana recently. During August, 1971, in three preceding years forty-two states had amended its marijuana related laws. Since then, 27 state legislatures have revised their marijuana legislation. An issue raised by each amendment affects breaches of the previous law. This

³ *Lindsey v. Washington*, 301 U.S 397,401 (1937); The classic definition of an ex post facto law appears in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (179

question is as ancient as the roots of the common law; therefore, the historical development of the common law doctrine of reduction begins to appreciate it.

The unqualified repeal of criminal statutes resulted in prosecutions being abated whose finality had not been reached with common law principles. Hale and Hawkins statements, who have indeed been unbalanced by authorities, can be traced from the origin of the doctrine. Although the doctrine has been criticized as lacking a reasonable foundation and adopted by US courts regardless of or analysis of its social convenience, the two criticisms are controversial. Clear revelations are made when a deep analysis is made amongst the early English as well as the recent American decisions that a rule of lawful construction, based on a reasonable presumption of legislative intent and a guiding principle that lawgivers are permitted to use in designing abolishing acts that are not intended to disturb prosecution for conduct that has previously been prohibited, is provided by a doctrine of abatement. In *Hamm v City, Rock Hill*, Justice Harlan observed the origins of this doctrine: As Justice Harlan observed:

The rule of common law abatement is basically designed by courts to determine whether a legislature has enacted a noncriminal conduct prescribed under an earlier criminal law which also seeks to put an end to non - final convictions in accordance with the former legislation.

Since "abrogation" also includes historically the situation of abolition and re-execution with various punishments, the abatement doctrine was also applied to cases where Parliament reduced the penalty of a particular act. The defendant was accused in *The King v. McKenzie* of feloniously robbing the lace. Before the trial the death penalty statute for this offence was abolished, and in the subsequent recasting life imprisonment was sub-statute. The question of which statute was applied was perturbed to the court. Since its wording was a hint of legislative intent, the abrogation statute could not be supported and the prosecution was unable to apply because of the doctrine of abatement. The defendant would have been sentenced to death upon conviction if the doctrine of abatement was absent. Rather, a lesser penalty common law larceny was convicted of a non - statutory crimes. In *Rex v. Davis*, after the defendant committed the offense but before trial, a statute providing the death penalty for killing a deer was repealed. The court decided that the defendant under the current statute was subject to punishment by the retroactive operation of the legislative intent.

"No law should be given an operation from a time prior to its enactment unless Parliament had expressly provided that it should have such an effect or unless the words of the Act could have no meaning except by application to this past time."

Parliament could therefore easily indicate its intention of punishing offenses committed under abrogated or altered laws and preventing sense less punishment for individuals whose conduct was not considered by the legislature to be unlawful and worthy of conviction. This enabling it to pass retro - active law but which needed to make clear its purpose.

The Supreme Court's doctrine of abatement was first applied in the United States to cases with forfeiture, but its application in the U.S.'s judiciary was far more troubling than the English. The interplay of ex-facto clauses and the doctrine of reduction was one of its difficulties. In situations where the new statute providing for an increase in penalty or the scope of prohibited conduct is widespread, a legislature amended or abolished, either expressly or implicitly, re-enacted an act without a savings clause and no breach of the previous act could be convicted under the statutes. The doctrine of abatement prevented convictions under the former statute. Under the present Statute it was constitutionally impossible to convict, since it was an ex post facto law that would apply to violators under the current Law. The defendant was tried and convicted in *Lindsey v. State* of carrying a covert weapons. A minimal fine of \$25 has been provided in the amended Statute where there is no minimum and the defense of arrest of attack has been eliminated. The court ruled that the conviction had been rejected and the defendant could not be punished with the help of an abatement doctrine and that the prosecution could be constitutionally repugnant on the basis of the amended version.

The Doctrine of Abatement worked like in England when penalties were reduced in America. For example, the defendant was found guilty in *Commonwealth v. Kimball* of the sale of liquor without a license. In view of the passage of a different statute prohibiting the same behavior his appeal had been repealed by implication pending the Statute. Since the previous penalty has been repealed without the saved clause, the court held that the defendant is entitled to freeze his judgment. In cases of express abrogation and prospective repeal of lower penalties, similar results were also discovered. Sentence was detained upon appeal and a convicted accused was released in the *State v Daley* because the legislative body had explicitly revoked and replaced the law of the manslaughter before the trial. This would have allowed the legislature to use a saving clause in the abrogation statute or to apply the new legislation for the remaining violations. If this latter apparatus had been used because punishment had been reduced it would not have violated the ex

post facto clauses. After an 1855 conviction for a murder committed in 1840, the defendant in *Jones v. State* was discharged and the conviction abated due to legislative supervision.

CONCLUSION

This elementary tactic of analysis could be used and should be used in legislation to lessen penalties, reclassify situations of criminal activity and redefine them as per the multiple legislative change in reasoning. Too numerous for comprehensive exploration are the combinations of parameters under four dimensional matrix comprised of the type of change, cause for change and phase of retroactive relief and effects on the criminal justice system. It is not realistic to think that any collection of lawmakers can concur on particular reasons or possible impact. But somehow the delusion that the "collective law - making consciousness," when considering issues raised in the above assessment and successfully applied to certain modifications, will come to an suitable retroactive line is completely reasonable.

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