

RETROSPECTIVITY OF JUDICIAL INTERPRETATION OF PENAL STATUTES

I Introduction

THE TRANSITORY and ever-evolving process of law making plays a role of primal importance in the regulation of human conduct in society. It goes without saying that in this entire process, judges have a predominant participation. The power entrusted by law and the nature of judicial process, make judges the prime mover of the development of law.

It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court. Learned Hand, who was one of the America's best and most famous judges, said he feared a lawsuit more than death.¹ The effect emanating from the decision of a case affects the life of a person in ways that at times have far-reaching and epoch-making impact, especially because as Dworkin says, "law often becomes what judges say it is."² And when the law in question happens to be criminal law, it requires a cautious consideration to see how the interpretative tools used by judges affect the life of a litigant in ways both seen and unseen. A study of judicial decisions under criminal law brings to fore a picture that shows many a grey areas resulting from the adjudicatory function performed by the courts. One of the interesting facets of criminal law is the idea of retrospectivity. An effort is being made in this paper to invigorate the precepts and principles that touch upon the issue of retrospectivity of judicial decisions.

II *Nulla poena sine lege*

Under criminal law, the concept of retrospectivity in terms of *nullum crimen sine lege*, *nulla poena sine lege* (no crime without law, no punishment without law), or the *ex post facto* prohibition means: conduct must be criminalized and penalties fixed in advance of any criminal prosecution. It is a sacred tenet, and also forms an essential attribute of the principle of legality, *a limitation on penalization by the state's officials*,

1. Ronald Dworkin, 1 *Law's Empire* (2002, Indian Reprint).

2. *Id.* at 2.

effected by the prescription and application of specific rules.³ There are two important corollaries that can be subsumed under the above principle: first, penal statutes must be strictly construed, and second, they must not be given retroactive effect.

Traditionally, retrospectivity has been regarded as among the first qualities to be mentioned, in any catalogue of factors, which are antithetical to any civilized concept of law. And, it is one of the propositions that "just and effective law should be focused on the future."⁴ As a corollary, the principle against non-retrospectivity is also used for advocating better codification or interpretation of laws (most often strict in case of penal statutes). The most commonly proposed advantages are that of ensuring that individuals are capable of obtaining notice of prescribed conduct so they can rationally adjust their behavior to avoid sanction (principle of maximum certainty); protecting the citizenry from arbitrary or oppressive state action in the face of ambiguities or gaps in the law; and effectuating the explicit purposes of the law by clearly articulating conduct that is collectively condemned.

However, every attempt to understand 'retrospectivity' leads to one certainty, that there is no agreed definition of retrospectivity. Although authors have found a thin line of distinction between 'retroactive' and 'retrospective' law making, both are used as synonyms herein for a preliminary understanding.

The fundamental concerns of retrospectivity of judicial decisions are:

- I. Law changes in two primary ways: Through legislative and judicial action. In that case, to what extent the process of adjudication under penal law is subject to the tenet of non-retrospectivity?
- II. Since the principle of legality requires judges to take a certain attitude towards penal laws (for instance, strict interpretation), how do the judges reconcile policy and welfare concerns with that of provisions of penal statutes?
- III. Does adherence to the principle of *nulla poena sine lege* amount to mere acceptance of the ancient dogma, which sought to limit the judicial function to a mechanical application of the legislative intention in the statute?

Notably, the controversy in relation to whether the judges 'declare' or 'make' the law is not the theme of the paper primarily because irrespective

3. Jerome Hall, *General Principles of Criminal Law* 28 (1947).

4. David Gwynn Morgan, "The Retrospective Dimension of the 2002-03 Australian Personal Injuries Reforms", 29 *Statute Law Review* 53 (2008).

of the nature of judicial function, the focus is on the new rule, and how it brings about change. The purpose is to look into how judicial decisions operate and affect rights and obligations under criminal law. There is no denial of the fact that "every decision on a debated point adds a little to the law by making that point certain for the future. And, whichever way the case may be decided, it will settle the law upon the precise point involved, and it is this which gives judicial decisions their great importance".⁵

The principle of separation of powers is often advocated to limit the realm of judicial activity, that even if a decision results in morally blameworthy persons going free, the loophole is to be taken care of only by the democratically elected representatives. This proposition is far from the reality, and the concern is to appreciate the well-founded arguments establishing that retrospectivity is not universally bad and perhaps occasionally (especially in case of judicial adjudication) a positive good. It is in fact an essential aspect of any legal system.⁶ In addition, it could be gathered that the definition adopted under various legal systems excludes applicability of non-retrospectivity to judicial decisions or to the process of judicial adjudication.

Traditional theories stipulated the bright line principle that judicial lawmaking is retroactive and legislation is prospective. The principle is ostensibly neutral in application and lends a process - based conception of legitimacy to rules adopted in conformity with it. If the nature of adjudication is backward-looking, then the retroactivity of judicial lawmaking is difficult to attack as unfair or inappropriate. Similarly, if the nature of the legislation is forward-looking, then distinguishing between those affected by the adoption of a new statute and those whose conduct predated the statute's effective date does not seem arbitrary'.⁷ The main concern is to ascertain as to whether in what cases a judicial decision, although retrospective, is still questionable for affecting certain rights and not being in conformity with known principles of penal law.

5. A.T.H. Smith, "Judicial Lawmaking in the Criminal Law", 100 *Law Quart. Rev.* 46 (1984).

6. (a) Andrew Ashworth states: "there is a stock of doctrines, principles, and policies which have acquired some legitimacy in the criminal law through being relied upon from time to time...the idea that criminal law is a set of clearly stated rules which is mechanically applied to citizens must be banished". See Andrew Ashworth, *Principles of Criminal Law* (1992).

(b) H.L. Packer argues that the importance of the principle of legality is a restraint upon the police and the prosecutors and not the courts. See H.L. Packer, *The Limits of the Criminal Sanction* 88 (1961).

7. Jill E. Fisch, "Retroactivity and Legal Change: An Equilibrium Approach", 110 *H L R* 1055 (1997).

An in-depth understanding enables us to accept that reform by way of judicial adjudication in any dynamic society is a result of exercise of power and values implicit in the law of crimes. A realist approach would suggest that protection from retrospective operation of judicial decision on criminal law is not an absolute right, for its application can be qualified by reference to the circumstances in each case. Especially it should be remembered that "*nulla poena* represents the peak of all values expressed in criminal law, indeed, what is done to criminals is an index of the quality of a civilization."⁸

III Historical backdrop

The idea that there is something wrong with punishing people for conduct which they engaged in before its proscription is an ancient one. For instance, Greek philosophy had a perception that frequent or retroactive changes were undesirable, indeed 'changes to the law were essentially undesirable because they were seen as undermining the laws moral authority. "Placing their faith in the educative values of the laws and mores rather than deterrent power, the Greeks were suspicious of changes that diluted the antiquity of laws and hence cast doubt upon wisdom of their ancestors".⁹ In the Roman Empire, jurists propounded the twin maxims *nulla poena sine crimen* (no penalty without crime) and *nulla crimen sine lege* (no crime without a law). Retrospective laws were contrary to the spirit of these ideals. The trend of codification was prevalent, that eventually lead to efficiency and better implementation of the laws. Under the Roman jurisprudence, "there is evidence, that though specified penalties could be mitigated, they could not be increased...this rule also reached its most rigorous statement...insisted that for certain crimes both offence and penalty be exactly described in the statute under which the accusation was brought".¹⁰

The West over the years established a rigid ban on retrospective laws. The French Declaration of the Man and Citizen of 1789 declared (article 8) that "no one shall suffer punishment except...by virtue of law passed and promulgated before the commission of the offence."¹¹

8. *Supra* note 3 at 57.

9. Charles Sampford, *Retrospectivity and the Rule of Law* 10 (2006).

10. Jerome Hall, "Nulla Poena Sine Lege", 47 *The Yale Law Jour.* 166 (1937).

11. The Declaration was said to have a revolutionary spirit of liberty and a direct limitation on the power of the government to make arbitrary laws.

In the twentieth century, human rights charters drafted by international bodies sought to limit the application of retrospective laws.¹² At the domestic level, the constitutional law of many countries incorporated prohibitions on retrospective laws.¹³ The said provisions to a great extent deal specifically only with substantive legislations, and only in a few countries a separate branch of law permits or prohibits retrospectivity in judicial decisions.

Much of the international instruments were formulated in order to eliminate the conditions of injustice and torture associated with world war II. The Nuremberg decisions formed the basis to oppose retrospectivity of law, as being unfair and immoral. For instance, article 7 of the ECHR prohibits retrospective operation of criminal laws. In *R. v. Headley*,¹⁴ the European Court of Human Rights said that if the ambit of this common law offence is to be enlarged it must be done step by step on a case-by-case basis and not by one large leap. The need for caution is underlined by article 7 of the ECHR, which requires any criminal offence to be clearly defined by law. The European Court in *Kokkinaskis v. Greece*¹⁵ observed that article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage and that it also embodies, more generally, the principle that only the law can define crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.

Interestingly, at the time when the United Nations was preparing to work for the UDHR, a major study of the Constitutions of the member

12. For instance, (a) The Universal Declaration of Human Rights (1948) Article 11; (b) The International Covenant on Civil and Political Rights (ICCPR), 1966, Article 15; (c) The European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR)- Article 7; and (d) The Convention on the Rights of the Child – Article 40- which prohibits retroactive crime creation as to all children.

13. (a) The Indonesian Constitution (Article 28(I)): prohibits prosecution under retroactive application of law as this is considered a human right that may not be derogated from in any circumstances. (b) The Indian Constitution (Article 20): protects from conviction for violation of law that as not an offence at the time of the commission of the act and from a penalty greater than that under the law in force at that time. (c) The Japanese Constitution (Article 39): protects persons from being held criminally liable for an act which was lawful at the time it was committed. (d) Constitution of Argentina mandates that punishment without trial based on law enacted before an act was committed is not permitted.

14. [1995] Crim.L.R. 738. Also see Andrew Ashworth and Michelle Strange, "Criminal Law and Human Rights", 2 *Eur. HR Law Rev.* 121 (2004).

15. (1994) 17 EHHR 397.

states was undertaken.¹⁶ The first thing to be noted was, how many nations at the close of world war II had constitutional provisions requiring that crimes and punishment may only be determined by law. However, some of the common law countries had not completely given up the right of the courts to make up new common law crimes retroactively. It shows that development of criminal law by the case law method was not prohibited.

At the time when the International Covenant on Civil and Political Rights (ICCPR) 1966 was debated, it was stated that one could write non-retrospectivity differently, based on its perceptions on what evils are to be protected from. For instance, the United States suggested that legality should protect only against retroactive passages of statutes, not against new judicial interpretations of statutes. Whereas, France argued that legality must protect against retroactivity in law coming from judges, administrators as well as legislators. It is said that the ICCPR text represents the latter view. However, no author can positively conclude that countries with a civil law tradition strictly abide by the maxim, and those not in the category have a different say.

One way or another, it can be gathered that there is a 'presumption against retrospectivity' in most of the Constitutions the world over and consistent internal practice among many nations is seen as creating a general principle of law recognized by the international community. Hence, it can be established that the principles of legality are to be achieved and respected, and as far as judicial retrospectivity is concerned, it has a lot to do with cultural patterns of any society. It is the notion of judicial independence and creative powers of the courts that have come to be respected for a stable legal equilibrium to be maintained.

IV Rule of strict interpretation

As most commonly evident, the rule of strict interpretation curtails the power of interpretation of penal statutes. Very broadly, it does not permit a decision to travel beyond the realm of the written statute. The narrow interpretation of the criminal statute limits the application of the law to the most obvious meaning that almost any reader would derive from a statute. This prevents abuse of power. However, the rigidity of the said rule can be as weak because the rule of statutory interpretation is at times overstated. In the earlier days, as Hall noted:¹⁷

16. Kenneth S. Gallant, "Modern Comparative Law Development: National Provisions Concerning Legality". Available at <http://ssrn.com/abstract=1007013> (visited on November 20, 08)

17. Livingston Hall, "Strict or Liberal Construction of Penal Statutes", 48 *HLR* 748 (1935).

when the law maker acted upon the idea that penal legislation was an important factor in shaping the morals of the people, many acts trivial were declared criminal... The courts, as conservators of natural and inalienable rights of the citizen, found it expedient and just in the administration of the law to strictly construe the penal provisions of statutes, and to resolve every doubtful question of construction in favour of the person charged. However, changing conditions of modern civilization, and the growth of scientific knowledge on criminology, render imperative a new approach to the problems of crime. New categories of crimes and criminals cannot always be accurately defined on the first attempt.

The crux of the matter is to establish as to how a positive relationship exists between judicial retrospectivity (even though it prejudicially affects certain rights), and the legal change the decision brings for the future, simply because in the contemporary conditions there is no reason why any court is not free to decide for itself that changed conditions warrant the abandonment of the old rule of strict interpretation in a particular case.

V Retrospectivity and the process of judicial adjudication

The widespread use of laws prohibiting or limiting the application of retrospective laws, gives an impression that there is a universally accepted definition or understanding of retrospectivity. But before we answer that in the affirmative, we must locate and settle in for a definition of it. A number of terms such as 'retrospectivity' or '*ex post facto*' appear denoting different aspects of retroactivity and are used interchangeably to explain it. Writers who have attempted to make a distinction state that it is easier to use retroactive to refer to retrospective laws whose retrospective effect is formally and explicitly stated by indicating that an enactment is to take effect before its promulgation. Laws so expressed will often, but not necessarily, have more and greater retrospective effects than other retrospective laws.¹⁸ The expression '*Ex post facto* laws' is used in several different senses:

- (a) An act may be called retrospective because it affects existing contracts as from the date of its coming in to operation.
- (b) It may be more properly described as retrospective because it applies to the actual transactions that have been completed or to rights and remedies that have already accrued, or

18. *Supra* note 9 at 17.

- (c) It may apply again to such matters as procedure and evidence and in each of these matters retrospective legislation has a different effect. The term retroactive and retrospective are most commonly employed interchangeably. As far as judicial decisions are concerned, we refer to 'retrospectivity' of judicial decisions, in order to have a different approach to the concept, than that associated with legislative retroactivity. A broader definition of retrospectivity is one suggested by Dennis Pearce, which says:¹⁹ *"A law is retrospective if it impairs an existing right or obligation."*

This definition locates the defining feature of retrospectivity in the fact that rights and obligations which have 'arisen in the past' are 'affected by the new law.'²⁰ Indeed, the common feature of retrospectivity involves a person performing either a completely lawful action or one attracting minor sanctions on one day, and on the next having a sanction (not known or contemplated) as attached to their action, so as to permit the legal consequences of action taken in the past to be determined in the future by legal texts that have been created and were not discoverable at the time the action was taken.

This perhaps is a broader definition that would encompass all laws that alter existing rights and obligations. But this does not tell us as to what laws are those that are not questionable for being retrospective in nature or what is the proposed benchmark of what excludes a law from the class of retrospective laws? If the basis for defining or prohibiting retrospectivity is to protect certain interests, then judicial decisions also can only be questioned if it is a matter that prejudicially affects "interests". The manner in which interests of concerned persons is likely to be affected is as follows:²¹

- a. Individuals commonly act so as to achieve advantageous results.
- b. Retroactive law changes the legal results of acts after these acts have been performed.
- c. Therefore, retroactive laws defeat reasonable expectations...a great deal of activity, which has or may have substantial legal consequences is undertaken regardless of these consequences.

19. *Supra* note 9 at 21.

20. *Id.* at 18.

21. David Slawson, "Constitutional and Legislative Considerations in Retroactive Lawmaking", 48 *Calif. Law Rev.* 216 (1960).

As far as legislative retrospectivity is concerned, the limitations are placed under the Indian Constitution (article 20(1))²² and the American (article 1) Constitution.²³ The mandate under the said provisions is applicable to the substantive penal law, and hence 'the status quo from which a deviation can operate either prospectively or retrospectively does not exist for the judge as it does for the legislator'.²⁴ As regards judicial retrospectivity in the realm of constitutional law, the Supreme Court of India in *Golak Nath v. State of Punjab*²⁵ applied the doctrine of prospective overruling for the first time, in order to avoid chaos that a retrospective judgment would cause. The court summarized the following concerns:²⁶

- a. If the *Golak Nath* judgment were to apply retrospectively, it would introduce chaos.
- b. In the extraordinary situation that was caused by this decision, the court had to evolve the doctrine which had its roots in reason and precedents so that the past may be preserved and the future protected.
- c. The limits of retrospective effect should be left to the courts having regard to the requirements of justice.

The judgment also indicates how this doctrine was borrowed from the United States, wherein it has been referred to as the '*Sunburst Doctrine*,' most widely identified with the works of Cardozo J. According to him, in the vast majority of cases, a judgment would be retrospective. It is only where the hardship is too great that retrospective operation is withheld.²⁷ In essence, with specific reference to the Indian position, the doctrine of prospective overruling has developed in order to avoid the repercussions

22. Art. 20 (1) states: "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 might have been inflicted under the law in force at the time of the commission of the offence."

23. The rationale for incorporation under the American Constitution was stated in the case of *Landgraf v. USI Film Products*, 511US 244, 266-267 (1984). The court said: "The *Ex Post-Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also restricts governmental power by restricting arbitrary and potentially vindictive legislation".

24. *Supra* note 22 at 245.

25. AIR 1967 SC 1643.

26. Arvind P. Datar, "Prospective Overruling: Correct Doctrine, Incorrect Application", (2008) 7 SCC (Jour) 41.

27. *Ibid.*

of a retrospective judgment, under specific conditions.²⁸

To draw a parallel, under penal law retrospective judicial process has its own occurrence and repercussions which must be identified and appropriately opposed or defended in the interests of individual rights. As witnessed in the case of *Rogers v. Tennessee*,²⁹ the accused took up a common law rule as his defence to a homicide charge. The defence did not find any place in the statute law. The court, however, decided that the rule had survived but was outmoded. Therefore, the court abolished the said defense and gave the following reasoning that 'retroactive abolition in this case would not offend due process principles because the year-and-a-day rule was so outmoded that a reasonable person would not expect it to exist under modern law.' However, in the dissenting opinion of the court, the decision of the court to retrospectively remove the said rule was considered to make the conviction invalid.

Interestingly, in England, the term 'intertemporal law' had developed in 1897, specifically 'to address the law relating to the treatment of legal changes over time.' At present the concept is closely related to international law, used to determine whether the legal effects of events are to be judged by the law at the time they happened or by the law at the time when the court has to consider their effects.³⁰ Reflecting on the position, in 1797 David Hume wrote a comment on the Scottish Criminal laws. He says: "Our Scottish Supreme Courts have an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of

28. Even the doctrine of prospective overruling is considered inappropriate at times, because a prospective ruling resembles legislation. For instance, in the Westminster tradition, Parliament makes the law and the judiciary applies it. If a judge decides that a statute should be given one interpretation up until one date and another interpretation after that date, which is the effect of a prospective ruling, then that judge is distorting the will of Parliament. Giving a prospective decision allows the law to be applied wrongly up until a particular date. The essential function of the courts is to decide the legal consequences of past events. A prospective overruling does not decide the case at hand; in fact, it does not decide anything immediately. It is more akin to legislation than to what we commonly mean when we talk about judicial decisions. See Prebble and Catherine Vilder Smith, "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation", 22 *N Z Univ. Law Rev.* (2006).

29. 532 U.S. 451 (2001). The facts of the case were that Rogers stabbed James Bowdery with a butcher knife on May 6, 1994. One of the stab wounds penetrated Bowdery's heart, and during surgery to repair the wound, Bowdery went into cardiac arrest.

30. Alan Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity", 12 *Law Quart. Rev.* 57 (2005).

a criminal nature; though it be such which in time past has never been the subject of prosecution."³¹

VI Retrospective decision making

After a brief understanding of how judicial retrospectivity is defined or placed under various jurisdictions, the foremost attempt is to carve out few broad essentials of any retrospective decision as also laid down in *Calder v. Bull*.³² Indeed, the power of the court many a times is invoked to create a new offence or abrogate an already existing one. It eventually amounts to making an action done before passing of the law, and which was innocent when done, criminal; or altering the original position or charge under the statute. In this context, a few instances may throw some light on the process of retrospective judicial decision making in India.

The common feature in the following cases to be discussed is, that prior to the decision of the court liability is not established under the law, and in the cases it is, there are considerable changes made by the decision of the court once the matter comes before it. The change that the decision brings alters the settled conditions of the law in relation to the issue in hand, so as to disentitle the party of the benefits or the applicability of provisions that would have operated in the absence of such alteration. For instance, in the BMW hit and run cases of *Sanjeev Nanda* (1999) and *Utsav Bhasin* (2008), the court charged both the accused for culpable homicide not amounting to murder instead of punishment under 304 B for rash and negligent driving which carries a maximum punishment for two years. The cases of rash and negligent driving have been covered under section 304 B as per the law, and considering the response of the community and other state agencies with repeated demands for severe criminal response, the offence has been aggravated.³³ The evident feature was, on the day the cause of action occurred punishment was to be meted out for rash and negligent driving and the court proceeded on the charges for culpable homicide not amounting to murder, altering the offence to be applied.

In the landmark judgment of the *Chairman, Railway Board and Ors v. Chandrima Das*,³⁴ the court added new dimensions to the realm of criminal

31. *Ibid.*

32. 3 Dall. 386, 1 L.Ed. 648 (1798). The case makes a reference to a few examples such as creation or abrogation of offences, altering the rules of evidence or enhancing or reducing the prescribed punishment etc.

33. See Staff Reporter, "Verdict Reserved in BMW Case", *The Hindu* (Online Edition) Aug 27, 2008. Available at <http://www.hinduonnet.com/2008/08/27/stories/2008082754270400.htm>.

34. AIR 2000 SC 988.

liability. The government of India was held liable to pay compensation to a woman raped by railway employees. The case is one of plenty of cases that have brought the state to action on its failure to secure the life of the people in its jurisdiction. The very concept of constitutional tort is judiciary created and that places the onus on the state to protect its citizens from crime and violence in the hands of its employees. The said judgment has been path breaking from the traditional norms of criminal liability. It is reflective of the modern compensatory jurisprudence that has crept its way in addition with the traditional modes of punishment. In another path breaking judgment of *Sarla Mudgal v. Union of India*,³⁵ the court gave a serious blow to the emerging trends of conversion to Islam for the purpose of contracting more than one marriage. The court considered it as an offence of bigamy under section 494 of the Indian Penal Code. The decision clearly denied the defense of personal law for violating the norms of morality and declared the act of conversion to be punishable if not undertaken in good faith.

A decision 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 can be retrospective in operation. In *State of Uttar Pradesh v. Ram Sagar*,³⁶ the court advocated for liberalizing the requirement of 'proof beyond reasonable doubt' in cases of police atrocities. As per the facts, a person was brought to the police station and beaten up by the constables for complaining against a fellow constable. In his dying declaration he named only the constables present at the station and not the SHO. The court held the constables as well as the SHO liable for culpable homicide by altering the strict onus of proof as to the involvement of the SHO. In the decision, the court also advocated for a relook at the rules of evidence under the law, since the victims are in a disadvantaged position to prove beyond reasonable doubt, torture within the cell.

It is noteworthy, that intertwined with the legislative or judicial progression towards legal change are the series of events by which citizens carry out the plans that will eventually be affected by the change of legislative or judicial texts- and the degree to which citizens are, or could reasonably be assumed to be aware of the coming change'.³⁷ In several American cases,³⁸ the courts expressly stated that the *ex post facto* clauses

35. AIR 1995 SC 1531.

36. 1986 Cr LJ 836.

37. *Supra* note 4.

38. See *James v. United States*, 366 U.S. 213, 247 n. 3. (1961), *Ross v. Oregon*, 227 U.S. 150,162 (1913) and *Rogers v. Tennessee*, 532 U.S. 451,467 (2001).

did not extend to judicial power at all, upholding that a court's action as the routine exercise of common decision making in which the court brings the law into conformity with reason and common sense at any given point in time.

Similarly stated, in the works of Ronald Dworkin, is the proposition that "law is an interpretive concept",³⁹ and it is significant to evaluate the judicial process and how courts maintain a balance of rights, policies, societal concerns.

VII How is retrospectivity justified?

Many a theorists have used the concept of retrospectivity in judicial decisions to understand legal change. Indeed, it is the aspiration of any legal system, to do away with the undesirable and maintain legality, and the methods employed are: First, utilize existing law so far as possible, and, in addition where it cannot be because no existing law is relevant, defend *ex post facto* decisions on the ground of substantial justice. Also, "if an area of the law is settled, a stable equilibrium, reliance interests are at their peak. Retroactivity thus presents serious fairness and efficiency concerns and should be disfavored. If the regulatory context is in flux, an unstable equilibrium exists, and retroactivity may be more appropriate."⁴⁰ To add on, failure to address demands which require the courts to protect human rights and appropriately direct legal process in spite of legislative presence, have frequently led to criticism that the courts have abandoned their role of protecting rights.

A relatively differing approach suggests that interpretive jurisprudence operates retrospectively. That is the reason in most cases it is certain in advance that particular acts will be declared criminal in accordance with the settled law, but there are the exceptions. "There are behavior and circumstances with regard to which no one can say that they were within prescription; there are cases, landmarks in every modern system of law, where the courts make new law by redefinition of statutes or of jurisprudence."⁴¹ These are the situations wherein the inconvenience caused (to the party concerned) may be overlooked for the cause of justice or legal change.

39. Barbara Levenbook, "The Sustained Dworkin", 53 (3) *The Univ. of Chicago Law Rev.* 1108 (1986).

40. *Supra* note 7.

41. *Supra* note 10 at 171.

VIII The jurisprudence of legal change

Retrospectivity that expressly affects rights involves an assessment of the process of legal change. One view states that legal change can be revolutionary or evolutionary. In the former it implies sudden and substantial alteration of the status quo. Whereas, the latter 'enables one to avoid its more imposing cousin, legal revolution, by presenting legal change as continuous and connected through time'.⁴² In situations wherein a longstanding legal rule that has been in agreement among lawmakers and has been consistently and frequently applied as relatively predictable, it can be reasonably relied on by the people in planning their conduct.⁴³ In all those conditions, wherein disagreement or unstable equilibrium is argued, there is evident a signal of legal change. This signal permits response to the possibility to legal change by various legal mechanisms.

Under conditions that signal for change, the requirement of efficient lawmaking can be achieved and lawmaking can maximize the net benefits of legal change. The new rule could be an improvement, a remedy or a cure to legal rules. Since, the criminal law is constantly being presented with the challenge of new modes of wrongdoing, it is part of the judge's function to make sure that the morally culpable are not benefited for the inadequacies in the law. Most of the times, 'majority of the right thinking members of the community are likely to disapprove the behavior in question, which reduces the impact of the anti-democratic objection to judicial law making.... It is true that the prevention of harm to such interests as life, personal physical integrity and property, the safety of the state and the protection of the process of justice are the classic subject matter of the criminal law...there is no unifying principle – such as the presence of fault- that provides a positive justification for making conduct criminal'.⁴⁴

Many instances indicate that although stability is common, there are times when law is in a flux or defined as unstable. In such cases unstable equilibrium demands retroactivity (as indicative in the *Sarla Mudgal* case). The case would indicate that unstable equilibrium signals legal change. It is the belief that where it is necessary or even desirable for the public good, society at large is entitled to enjoy the benefits of retrospectivity notwithstanding that individual may suffer from it. This principle may be described as the public interest. Practically, at some point in time, there are acts, which are so unspeakably bad that they must be regarded as criminal even if there is no specific text making them so. Similarly, it is often

42. *Supra* note 7 at 1098.

43. *Id.* at 1105.

44. *Supra* note 5 at 57.

argued that when new circumstances give rise to acts, which are worthy of punishment under the criminal law, the public will lose confidence in a system of criminal law if they escape because there is no existing law that deals with them. And on the other hand, a 'rights' based approach would argue for alternative mechanisms to counter emerging evils.

If we go as per the traditional outlook, principle of non-retrospectivity applies to the Parliament and the rule of strict interpretation to the adjudicatory function of the courts. The marked distinction is, retrospective legislations can be checked and repealed as violative of constitutional laws, whereas the rules of interpretations are not constitutional mandates. The opposition to retrospective adjudication is more so for the unjust punishment for the people that ideally should be warned in advance that they will be punished if they do certain acts. Retrospectivity then offends the principles of legality, which protect the individual from the arbitrary power to punish through creation of new offences etc. Perhaps, that is the reason when dealing with matters affecting the liberty of the individual, the judges are expected to be cautious when they mould the criminal law.

It is also a fact to be acknowledged that criminal law is the most coercive force of the state, and ideally it should minimize risking the liberty of the citizens at the hand of judicial officials. The notions of fairness generally oppose retrospective law making as 'notice enables people to predict the consequences of their transactions and increases the influence of legal rules upon primary conduct'.⁴⁵ Perhaps, the respect for the 'principles of legality is a way of respecting human dignity or of making important concessions to liberty – that is, to people's liberty to control important aspects of their own lives in a meaningful way'.⁴⁶ As Daniel Troy says: "If humans were entirely indifferent to the existence of the law and would make the same decisions regardless of the law's content, then there could be little objection to retrospective legislation. However, humans do not operate that way. We factor our knowledge of the law into our decisions. Retrospective laws treat us as if we are indifferent to the law and incapable of making rational choices."⁴⁷

However, in the light of the modern conditions of law and social conduct justice is no longer an abstract virtue to be attained by advocating rights and interests that have been recognized under the law. The essential feature

45. *Supra* note 7 at 1084.

46. Jeremy Waldron, "Positivism and Legality : Hart's Equivocal Response to Fuller," *NY Univ. Law Rev.* 1135 (2008).

47. Prebble and Catherine Vilder Smith, "Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation", *22 NZ Univ. Law Rev.* (2006).

of any decision, whether retrospective or not, must be located in the reasoning of the court. It is more often a matter of choice and time as to when the courts are ready to make alterations to the existing conditions.

IX Conclusion

The rule of law is more often referred to as 'precise legality,' which enhances the protection of the individual, ensures the equality of treatment and certainty of the legal processes.⁴⁸ No doubt, it "is an entitlement of persons to have their behavior governed by rules publicly fixed in advance. And this entitlement frowns on retroactivity."⁴⁹

A realistic analysis suggests, that in today's times, 'rights' are important, and necessarily expectations are high. Each legal system works out its own model to address the new voices for security and dignity. It is best for the community, if scrutiny of emerging concerns is swift in the light of constitutional guarantees. In that case, expectations can possibly be at peak when a case raising pertinent issues arises before the court. Notably, in a country wherein the highest court has authority to secure constitutional values or gives a ruling, which is binding, the judicial process can produce remarkable results.

Even though, ideally, wrongdoing should fairly be proscribed in a criminal code, an excessive judicial conservatism may allow a few serious wrongdoers to escape. Even if limitations on judicial lawmaking are desirable, such limitations do not emanate from the doctrine of non-retrospectivity. Perhaps, greater emphasis on principles of *stare decisis* or legislative intervention can be undertaken.

In one sense, criticizing judicial decisions for being retrospective is almost tantamount to criticizing them for the very fact that judicial decisions exist as part of our legal system. The concern is what decisions would qualify as retrospective. Most judicial decisions simply apply the law as stated by Parliament to individual cases. That is, the judges try to interpret what the law has been all along. However, there are other kinds of judicial decisions that are more open to criticism on grounds of retrospectivity. The reality possibly is, when judges make changes to judge-made law or alter statutory conditions, they are not stating what the law already was; they are changing it. That change will be retrospective as far as it relates to the parties concerned, and also to other potential parties who have acted on the former understanding of a particular law. This kind of decision seems

48. *Supra* note 3 at 4.

49. Stephen R. Munzer, "A Theory of Retroactive Legislation", 61 *Texas Law Rev.* 471 (1982).

vulnerable to attack on much the same grounds as retrospective legislation. But, "legal systems can be judged by reference to a number of different values. The degree to which they conform to the rule of law is but one value. Other values may be the degree to which individual rights are respected, or how effective the legislative system is in ensuring that laws truly reflect the will of the people. Ideally, these values are not mutually exclusive. A good legal system is one that usually scores well no matter which yardstick is used to evaluate it. Nevertheless, in practice there are areas of law where it is impossible to satisfy all the values that we might wish. In some cases, the rule of law must defer to a competing value."⁵⁰

Hence, if we accept that retrospectivity in judicial decisions is vulnerable to the same criticisms as legislation since it is difficult to establish a balanced system. There are number of considerations that soften the retrospective impact of judicial decisions. For instance, while judicial decisions sometimes change the law, it is unusual for those that do so to be totally taken by surprise. A decision that reverses what was thought to be the law on a particular point will often be preceded by a series of warning decisions or will be satisfactorily reasoned to protect the interests of society, thus reducing any injustice. In essence, the process of retrospectivity is a game of *authority* - to alter the law, *opportunity* - to come to face with practical problems, *courage* - to exercise will and reason a way out, and *change* - to satisfy the aspirations and expectations of the people for a better future. The process avoids the conflicts between rule and reason. In the light of the national and international developments, only one idea that gets close is that 'legality is thus a rule that *challenges dogmatic views of jurisprudence* requiring rules to be applied to their fullest logical extent, at the risk of not being considered rules at all'.⁵¹

Deepa Kansra*

50. Joseph Raz, "The Rule of Law and its Virtue", 93 *Law Quart. Rev.* 195 (1977).

51. Kenneth S. Gallant, "The Principle of Legality in International and Comparative Criminal Law", Available at <http://ssrn.com/abstract=997480>.

* LL. B., LL. M., Lecturer, Amity School of Law, Delhi.