

CHANGE IN RULES, AFTER THE GAME HAS BEGUN: VALIDITY OF RETROSPECTIVE AMENDMENTS TO TAXATION STATUTES

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INTRODUCTION

Let us consider a situation wherein, a company from United Kingdom makes an acquisition of an Indian Company through its subsidiary. Under the existing laws it believes that it would not have to pay Capital Gains on the acquisition. However, the Income Tax Department feels differently and an appeal is brought forth the Income Tax tribunal. The Tribunal passes a decision which is in favour of the Company. However, the legislator feels the interpretation is not in accordance with its intent. It passes a retroactive retrospective legislation giving a legislative interpretation and the Company ends up paying Capital Gains tax. How does one tackle the change in rules after the game has begun is what this article seeks to address.

A retrospective statute is one which gives to a pre-enactment conduct a different legal effect from that which it would have without passage of the statute.¹ A statute is retrospective in nature when it takes away or impairs any vested right acquired under the existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or past considerations.² The main group comprises of laws that consists of altering of legal status in the form of attaching new legal rights to the existing or limiting the scope of pre-existing rights by making them unenforceable in the future. For example an assessee could have transferred house property without consideration to his wife without being taxed.³ However, that right may no longer be available by way of subsequent amendments. Another group consists of laws that do

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¹Charles B. Hochman, 'The Supreme Court and the Constitutionality of Retroactive Legislation', (1960).73 HARV L. REV 692 The words retroactive and retrospective would be used interchangeably throughout the article.

²Maxwell, *The Interpretation Of Statutes* (12thed, Lexis Nexis ButterworthsWadhwa Nagpur). See also, *Ashutosh Banik v CIT* 132 ITR 544, *CIT v Mrs.Ayodhyakumari* 154 ITR 604, *Bejgam Veeranna v State of A.P.* AIR 1981 AP 350.

³See, *Ashutosh Banik v CIT* 132 ITR 544.

not alter the pre-enactment status of an action but substantially affect expectations stemming from that action.⁴ For example a tax statute may change the method of depreciation of assets.⁵

It is a principle of English Common Law that generally a statute is not to have a retrospective effect.⁶ Most enactments are presumed not to be intended to have a retrospective operation. The above-said rule recognizes the nature of law⁷. In order to determine whether a law is prospective or retrospective, the nature of law needs to be identified whether it is substantive or procedural, and also if the law affects or impairs existing rights including the rights of action. If a law destroys any existing rights or even places any restriction on it, then no retrospective effect would be given to it unless expressly stated.⁸ In *Jagdamba Prasad Lalla v Anandi Nath Roy*⁹ the court observed that there is no presumption that the statute takes away an existing right. The *prima facie* construction of the Act is that it is not retrospective and if from necessary implication the retrospective operation can be gathered, then the courts will give effect. In case of ambiguity, the construction would be prospective in nature.

A prospective legislation can also have a retrospective effect, as any decision made by an individual on the basis of an existing law can be defeated by a subsequent legislation.¹⁰ A tax law was first enacted in the year say 1973 imposing a tax on capital gains realized in 1965 at a time when such gains were not yet subject to tax. Although, the taxpayer may describe such a statute to be grossly unjust because he enters into a transaction under the then existing law that it would not be subject to tax. However, strictly speaking it cannot be termed as retroactive. It charges tax on something that happened in the past. The legislative enactment requires the taxpayer to pay the tax which operates prospectively. A law may be passed to tax an act which happened yesterday.¹¹

⁴Stephen R Munzer, *Theory of Retroactive Legislation* (1982) 61 TEX. L. REV 425,426.

⁵See, *Escorts Limited v Union of India* 199 ITR 43.

⁶Maxwell, *ibid* 2 at 215. See also, *West v Gwyne* [1911] 2 Ch. 1.

⁷Francis Bennion, '*Understanding Common Law Legislation*' (2004 edn. Oxford University Press).

⁸*Mohd. Bin Salem v Umaji* AIR 1955 Hyd 113.

⁹AIR 1938 Pat 337. This principle has been further on expressed in *Raja Ajai Varmav Assessing Authority* 51 ITR 308, *Mahadeo lal Kanodia v Administrator-General of West Bengal* 3 SCR 578, *C. Mohammed Yunus v Syed Unissa* 1 SCR 67.

¹⁰Debra Lyn Bassett, '*In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*,' 69 U. CIN. L. REV 453 (2000).

¹¹Lon L. Fuller, *The Morality of Law* (4th Indian Reprint Universal Law Publishing Co.,2006)59. See also, *The Growth Leasing and Finance Ltd. v State Of Gujarat* (1992) 85 STC 25. Where it was held that merely because tax was levied on something that happened in the past it cannot be described as being retrospective.

The reason why retrospective legislation is suspected stems from the concern that a person should be able to plan his conduct with reasonable certainty of legal consequences, and prevention from the fluctuating policy of the State.¹² Law has to do with the governance of human conduct by rules. A person properly forms expectations about how a legal system will respond to his actions.¹³ Retrospective laws disrupt these expectations and such disruption is always costly and rarely defensible. Moreover, retrospective law violates rule of law as it undermines human autonomy by hindering the ability of a person to formulate plans and carry them out with regard to the rights of others.¹⁴ And if the principle of rule of law is to help in appraising retroactive legislation then the retrospective statutes must carry some special burden of justification, particularly when liberties are at stake. Therefore, if we are to appraise Retrospective laws intelligently, we must place them in a context of system of rules that are generally prospective.¹⁵

It is when things go wrong that Retrospective statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and pick up the pieces. For example, as Agricultural Income under section 2(1A) Income Tax Act, 1961 is fully exempted from tax; several High Courts held that Capital gain on sale of agricultural land would not be included in capital Gain but rather income from agricultural land. However, the Government was in disagreement with this view and inserted an Explanation to section 2(1A) of the Act with retrospective effect clarifying it would be taxable under capital gains. A second part of retrospective law making relates not so much to any positive contribution it may on occasion make to the internal morality of the law, but rather to the circumstances that it unavoidably attaches in some measure to the office of judge.¹⁶ For example there is a dispute between A and B and the judge weighs their argument carefully. He finds that the case is evenly balanced and the statute gives no clear answer so as to decide the case. Yet the principle lies in the statute. If he fails to render a decision then he is not able settle a dispute from an existing law. If he decides the case he inevitably engages in the act of retrospective legislation. Therefore, the argument for a retrospective legislation is very strong.

1. CONSTITUTIONALITY

Retrospective laws have always been held to be under suspicion as an instrument of

¹²Hochman, *ibid* 1 at 692.

¹³Munzer, *ibid* 4 at 426.

¹⁴*Ibid* at 427.

¹⁵Fuller, *ibid* 11 at 53.

¹⁶*Ibid* at 55.

oppression¹⁷ and unjust.¹⁸ In the absence of any “express” Constitutional limitations eminent jurists such as Justice Story believed that there might be limitations outside the Constitution which the courts would enforce to nullify a legislative act.¹⁹ Reliance would be placed by him on the principles of “free government” or “social compact” and the necessary limitations created thereby. However, whatever be the true story, it is a custom for the courts to stay within the Constitution and, in the absence of an express prohibition of retroactive laws, to apply the Constitutional limitations. The idea of Extra-Constitutional limitations on legislative acts hardly reached the dignity of law.

Judicial history supports that reasonableness, non-arbitrariness and fairness require an inquiry into whether in enacting retrospective law the legislature acted in an arbitrary and irrational way. Since, there are no express provisions in the Constitution which forbid passing of retrospective laws then how can such laws be declared invalid? The only express provision in the Indian Constitution which forbids retrospective laws is ex-post facto law which applies exclusively to criminal or penal laws.²⁰ There is no restriction on legislative power with regard to taxing statutes. In the absence of any Constitutional provision the court should not bring any limitation of its own.²¹ As in the celebrated words of Justice Frankfurter, “*the ultimate touchstone of constitutionality is the Constitution itself*”.²²

The legislature may pass laws with retrospective effect subject to recognized Constitutional limitations.²³ The power of the legislature to amend, delete or obliterate a statute or to enact a statute prospectively or retrospectively cannot be questioned and challenged unless the court is of the view that such exercise is in violation of Article 14²⁴ or Article 19 of the Constitution.²⁵ The immediate severity of the conditions which the legislature seeks to rectify is a criterion for determining the reasonableness and validity of retrospective laws.²⁶ However, when there are no compelling reasons of

¹⁷Bryan Smith, ‘Retroactive laws and Vested Rights’, (1927)5 TEX. L. REV 231,234. See also, *Mithilesh Kumari v Prem Behari Khare* 177 ITR 97.

¹⁸Daniel E. Troy, ‘When Does Retroactivity Cross the Line?:Winstar, Eastern Enterprises and Beyond’, 51 ALA. L. REV 1329,1340.

¹⁹See, *Benson v Mayor of New York*, 10 Barb. 223 (N. Y. 1850).

²⁰The Constitution of India 1950, Article 20 (1).

²¹*Bihar Cotton Mills v Union of India* AIR 1956 Pat 131.

²²*Graves v New York* 306 U.S. 466 (1939).

²³*A.A. Calton v Director of Education* AIR 1983 SC 1143.

²⁴See, *ITO v Lawrence Singh Ingty* 68 ITR 272 where it was held that any provision which is discriminatory in nature and affects fundamental rights will be held to be void even if it relates to tax exemption.

²⁵*State of Tamil Nadu v Arooran Suagrs Ltd.* (1997) 1 SCC 326.

²⁶Hochman, *ibid* 1 at 697.

“public interest”²⁷ the law runs the risk of being declared unconstitutional.²⁸

In *Rai Ramkrishna v State of Bihar*²⁹ it was held that the power to make law carries the power to make retrospective laws. It is well established that Parliament is endowed with plenary powers of legislation³⁰ to pass laws both prospectively and retrospectively.³¹ And for such anterior period as it thinks appropriate.³²

From the above discussion it is clear that the Parliament is competent to enact retrospective laws. However, is it the same with delegated powers?³³ The legislature cannot delegate its power to make a law but it can make a law to delegate powers to determine some facts or state of things upon which the law makes or intends to make its own action depend. In *ITO v. M.C. Ponnose*³⁴ it was held that Parliament can delegate its legislative power within the recognized limits, where it may or may not be possible to give retrospective operation. However, it will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect.

Normally, a retrospective validation of a tax law does not amount to imposing unreasonable restrictions on the rights conferred by Article 19(1) (f) and (g).³⁵ But the possibility of very grave prejudice to the assessee by the withdrawals of relief with retrospective effect in the absence of justifiable grounds and any serious prejudice to the interest of revenue, may establish unreasonableness and arbitrary action. The mere retrospectiveness in imposition of tax or the time period³⁶ of retrospectiveness cannot

²⁷*Ishwari Prosad v N R Sen* AIR 1952 Cal 273 where public interest as a consideration on giving retrospective effect to laws was emphasized.

²⁸*CIT v Hico Products Pvt. Ltd.* 187 ITR 517.

²⁹*Rai Ramkrishna v State of Bihar* 50 ITR 171.

³⁰*Bhubaneshwar Singh v Union of India* JT 1994 (5) SC 83; *Goodricke Group Ltd. v State of West Bengal* JT 1995 Supp (2) SC 187; *Union of India v Madan Gopal Kabra* (1954) SCR 541.

³¹*Krishnamurthi and Co v State of Madras* AIR 1969 Mad 265; *Bihar Cotton Mills v Union of India* AIR 1956 Pat 131; *United Provinces v Mt. Atiqua Begum* AIR 1941 FC 16.

³²*P Kannadasan v State of Tamil Nadu* AIR 1996 SC 2560.

³³See, *J K Jute Mills Co. Ltd. v State of Uttar Pradesh* AIR 1961 SC 1534 where it was held no question of legislative competency of an enactment can arise merely on the ground of its retrospective effect in taxation.

³⁴75 ITR 174. See also, *Modi Food Products Ltd v Commissioner of Sales Tax* 1964 AIR 1594 *India Sugars Refineries Ltd v State of Mysore* AIR 1958 Kant 64 and *S. Shivdev Singh v State of Punjab* 1963 AIR 365.

³⁵H.M. Seervai, *Constitutional Law of India* (4th ed., Universal Law Publishing 1994) Vol.1 p. 844. See also, *Firm Jaimni Dass and Sons v State of UP* 47 STC 437.

³⁶*State of Kerala v Mega Traders* 107 STC 1. See also, *Rai Ramkrishna v State of Bihar* AIR 1963 SC 1667 at

per se render the law unconstitutional on the grounds of its infringing Fundamental Rights or on the ground of unreasonableness.³⁷ However, retrospective laws can be struck down by taking into consideration certain defects such as period of retrospectiveness and extent of any unforeseen or unforeseeable financial burden etc.³⁸ But in order to cure a defect which arose due to a defect in a previous law or ambiguity as a result of court decisions, retrospective laws can be passed.³⁹ These types of amendments have often been referred to as “small repairs”.⁴⁰

In *R R Gavit v Sherbanoo Hasan Daya*⁴¹ the Bombay High Court held that the power to interrogate under oath under section 132(4) of Income Tax Act, 1961 is limited to seeking explanation regarding articles or valuable documents in the person’s possession and not questions in general. The false statement made by accused regarding say, bank lockers was not a statement of oath under section 132(4). By way of Explanation to the said section the decision was upturned where examination included for the purposes enumerated in the Act.⁴² Thus, a repair was made in law to ensure that no false statement is made and the purpose of investigation is not defeated.

In contrast, when a fresh levy is imposed retrospectively by any legislation, the courts have tended to strike down such levy as being an unreasonable restriction on the fundamental rights guaranteed under article 19(1)(f) and (g) of the Constitution.⁴³ In the case of *Shew Bhagwan Goenka v CTO*⁴⁴ under the West Bengal Taxation Laws Act, 1969 retrospective effect was given to the definition of “business”. The purpose was not to cure any defect in law but rather to enlarge the ambit or scope of the term. The effect of retrospectivity was that it imposed an unexpected tax liability on transactions which were not earlier covered by the Act. The Court declared it to be violative of Article 19 (1)(f) and (g).

³⁷See, *Shiv Dutt Rai Fateh Chand v Union of India* 148 ITR 664.

³⁸*Ujagar Prints v Union of India* 179 ITR 317. In this case retrospective amendment given to the term manufacture under the Central excise and Salt and Additional Duties of Excise Act, 1980 was held to be unreasonable restriction under Article 19(1)(g) of the Constitution.

³⁹*Hotel Elite v State of Kerala* 69 STC 119.

⁴⁰See *Rai Ramkrihna v State of Bihar* 50 ITR 171, *Krishnamurthi v State of Madras* 31 STC 190.

⁴¹*ITO v M C Ponnose* 161 ITR 793.

⁴²It came in the statute book on 1st April, 1989 and was given retrospective effect. See also, Rajesh R. Haldipur, ‘Tax Literatures As Jurisprudence in Retrospective Laws-In Retrospect’, 51 *TAXMAN* 22,27.

⁴³*CIT v Hico Products Pvt. Ltd.* 187 ITR 517.

⁴⁴*Shew Bhagwan Goenka v CTO* 32 STC 368.

2. TAX LAW

Section 295 (4) of the Income Tax Act, 1961 explicitly provides for making of retrospective laws which are changed annually through the medium of Finance Bills. The reason why Finance Bills is adopted is that it leaves little time to get noticed under the knowledge of the critics. And in the course of its passage it avoids various ill-conceived tracks.⁴⁵

Retroactive legislation in the tax context may have greater economic advantages to the government than tax legislation with only a prospective effect. A retroactive law helps in the calculation of revenue needed more accurately and fewer projections are required. It also helps in avoiding unintended incentives effect that are usually inevitable with prospective taxes.⁴⁶ It also helps in the protection of the interest of the Income Tax Department.⁴⁷

Tax laws are not just like any other laws. Their principal object is often not merely to raise revenue, but to shape human conduct in ways desirable by the legislator. They coax men into or dissuade them from certain kinds of behaviour.⁴⁸ Section 7 (1) of the Indian Wealth Tax Act, 1957 confer power on the Wealth Tax Officer to determine fair market value of assets. The value would be arrived taking into consideration the market valuation which involved conferment of arbitrary powers to the officer. In order to curb the menace and regulate human conduct Rule 1BB was inserted and methods were listed. The said rule was given retrospective effect.⁴⁹

In *Reid v Reid*⁵⁰ the principle of construction in interpreting retrospective laws the maxim *Omnis nova constitution futuris formam imponere debet non praeteritis* (that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights) should be kept in mind. It is a logical and necessary corollary to the general proposition so as to give not larger retrospective powers. In interpreting retrospective amendments care should be taken that the language is clear and

⁴⁵S. Bhattacharya, 'Retrospective Legislation for Counteracting Court Decisions', 4 *TAXMAN* 147,153.

⁴⁶Harold J. Krent, 'The Puzzling Boundary between Criminal and Civil Retroactive Lawmaking', 84 *GEO. L. J.* 2143,2157 (1996).

⁴⁷'Finance Minister of India justifying tax reforms laws' (*PW India*). <http://www.pwindia.in/News/Finance/10-05-05/Pranab_Mukherjee_justifies_reforms_in_tax_laws.aspx>accessed on 27 January 2011.

⁴⁸Fuller, *ibid* 11 at 60.

⁴⁹*CWT v Man Bahadur Singh* 208 ITR 658. See also, *Manjushree Biswas v CWT* 171 ITR 348, *CWT v O P Tandon* 195 ITR 688 where rule 1BB of Wealth Tax Rules was held to be retrospective in nature.

⁵⁰(1886) L.R. 31 Ch. D. 402.

unambiguous.⁵¹ The “well settled presumption” of law is always prospective in nature⁵² unless so declared in the most unequivocal manner, explicitly or by necessary implications.⁵³ If it is expressed in a language which is fairly capable of either interpretation, it ought to be construed as prospective only.⁵⁴ And equitable interpretation should not find any consideration.⁵⁵ This is true because of the basic belief that legislature does not intend to enact legislation which operates oppressively and unreasonably.

There cannot be any implicit inference of any retrospective operation of law.⁵⁶ In interpreting section 59 of the Estate Duty Act, 1958 where an attempt was made to reopen the estate duty assessment, a question whether it had retrospective effect arose. The court came to the conclusion that there is nothing in the section from which such intent could be inferred or by necessary implications.⁵⁷

The scope or degree of retrospectivity is to be determined from the language of the relevant provision itself.⁵⁸ In *CIT v Biswanath Jhunjhunwalla*⁵⁹ it was held that rule 80 (5)(ii) of the then Bengal Sales Tax Rules, 1941 must be read as being applicable to assessments which were incomplete and also which had reached finality by reason of earlier prescribed periods. Pending assessments and completed assessments are both covered under the ambit of retrospective legislation.⁶⁰ Completed assessments⁶¹ or rectification of assessments⁶² can both take place by way of retrospective law.

However, there might be situation when a retrospective law has been declared invalid by a competent court. Then how should the legislature set out to validate the tax collected under a law which has now been declared illegal. In such situations Amendments are passed which seek to validate the earlier Acts declared illegal and unconstitutional by

⁵¹*Punjab Tin Supply Co. v Central Government* AIR 1984 SC 87.

⁵²*Govinddas v ITO* 136 ITR 123. See also, *ITO v Induprasad Devshanker Bhatt* 72 ITR 595.

⁵³*Mahesh Chand Goyal v State of Rajasthan* 78 STC 51. See also, *P Mahendran v State of Karnataka* (1990) 1 SCC 411. See also, *Dash v Kleech* 7 John. Rep. 506.

⁵⁴*Saharanpur Electric Supply Ltd. v CIT* 194 ITR 294.

⁵⁵*Cape Brandy Syndicate v IRC* 12 TC 358 and *Raja Jagdambika Pratap Narain Singh v CBDT* 100 ITR 698.

⁵⁶*Saurashtra Agencies Pvt. Ltd. v Union of India* 186 ITR 634.

⁵⁷*Controller of Estate-Duty v M A Merchant* 177 ITR 490.

⁵⁸*Union of India v Raghubir Singh* 178 ITR 548. See also, *Lauri v Renaud* [1892] 3 Ch. 402,421.

⁵⁹(1996) 5 SCC 626.

⁶⁰*Chatturam v CIT* 15 ITR 302.

⁶¹*CIT v Bai Nawalbai N Gamadia* 35 ITR 793. Under section 147 of the Income Tax Act, 1961.

⁶²*M K Venkatachalam, ITO v Bombay Dyeing* 34 ITR 143. Under section 154 of the Income Tax Act, 1961.

courts by removing the defect or lacuna which led to the invalidation of the law.⁶³ The method as to how a law can be validated was laid down in *Shri Prithvi Cotton Mills v Broach Borough Municipality*⁶⁴ either by providing for jurisdiction or re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law or by giving a legislative meaning and interpretation of the law under which the tax was collected. The legislature may follow any one of the methods so as to validate a law.

In recent years, retrospective legislation has become a trump card in the unending card-game between the tax evader and the tax gatherer. Retrospectivity is akin to changing the rules of the game after the game has begun; indeed after the game has ended. In *Ishikawajima-Harima Heavy Industries Ltd. v DIT*⁶⁵ it was held that, for an income to be taxable under section 9 of the Income tax Act, 1961 there should be sufficient territorial nexus between such income and territory of India. And in order to establish that territorial nexus, the services have to be rendered and utilized in India. The interpretation spelt out by the court was not in accordance with legislative intent. Therefore, explanation was introduced under Finance Act, 2007. However in *Jindal Thermal Power Co. Ltd. v DCIT*⁶⁶, it was held that *Ishikawajima-Harima Heavy Industries Ltd* case was a good law despite the retrospective amendment. Therefore, a new explanation was further introduced in Finance Act, 2010 wherein income of a non-resident shall be deemed to accrue in India irrespective of the territorial nexus.

CONCLUSION

Sir William Blackstone in his *Commentaries* treats that all laws are to commence in future and operate prospectively.⁶⁷ The principle is that *lex prospicit non respicit* (law looks forward and not back).⁶⁸ Retrospectivity is contrary to the general principle that legislation by which the conduct of mankind is ought to be, when introduced for the first time, 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.⁶⁹ The basis of the principle against retrospectivity is no more than simple fairness, which ought to be the basis of a legal rule.

⁶³*D Cawasji v State of Mysore* 150 ITR 648.

⁶⁴AIR 1970 SC 192.

⁶⁵288 ITR 408.

⁶⁶182 Taxman 252.

⁶⁷See, *Dash v Van Kleeck*, 7 Johns. Rep. 477.

⁶⁸Bennion, *ibid* 7 at 70.

⁶⁹*Phillips v Eyre* (1870) LR 6 QB 1.

Retrospective laws have challenged the presuppositions underlying our democratic systems. When John Locke spoke of a law in a civil society, he referred to “settled standing laws”. On the one hand, retroactive lawmaking conflicts with the rule of law aspirations, on the other hand forbidding retrospective laws denies the legislator the necessary tools to achieve its social and political goals⁷⁰.

The issue that confronts retrospective legislation is not whether the Parliament is competent to legislate on retrospective laws, or whether the law is violative of the Constitutional limitations. Rather it relates to the manner of enactment of retrospective laws? The legislator cannot pass retrospective legislation on its whim and fancies or on ad-hoc basis. The Courts for all these years have tested retrospective laws on the basis of articles 14 and 19 of the Constitution. However, the Constitution does not define retrospective; the parameters of any constitutional limitations are therefore inherently ambiguous. Moreover, because application of a legal rule cannot be constrained within objective categories labelled “retrospective” or “non-retrospective,” constitutional principles cannot definitively answer questions of legitimacy. On the said grounds every law can be tested, there is no judicial creativity involved in testing retrospective laws on these grounds. *Judicial creativity requires, a criteria needs to be laid illustrating the situations when retrospective laws should be passed.* While laying down the criteria certain factors need to be taken into consideration the power of the legislature and the interpretation principles in assessing the extent to which retrospective should be construed as retroactive.

The Supreme Court in *Shew Bhagwan Goenka v CTO*⁷¹ held that “*The test of reasonableness should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases.*” Also, in the case of *Lohia Machine Ltd v Union of India*⁷² the court held that, “*We do not think that a mechanical test can be applied in determining the validity of the retrospective operation of the Act.*”⁷³ Thus, it is not surprising that Supreme Court has had difficulty in formulating a test applying to all scenarios. The court relies more on its own sense of whether a piece of legislation should be applied retrospectively rather than a fully articulated standards.

The judges have always adopted a restrictive approach in describing retrospective laws, by restricting themselves to Constitutional limitations and considering it the

⁷⁰Krent, *ibid* 46 at 2143.

⁷¹32 STC 368.

⁷²152 ITR 308.

⁷³See also, *Rai Ramkrishna.v State of Bihar* 50 ITR 171 where Justice Gajendragadkar held that no mechanical test can be developed.

omnipotence of the legislature.⁷⁴ A recurring problem with the Supreme Court's *retrospectivity analysis* has been the Court's inability to comprehend the nature of retrospective lawmaking. And traditionally characterizing it as a binary construct within which the application of a new rule is either retrospective or prospective. It brings us back to the statement of Justice Story where there might be limitations outside the Constitution which the courts could enforce to nullify a legislative act. In many cases the courts can endorse Natural Rights as a proper basis for invalidating laws. Reference can be drawn from the American Revolution where natural law played a large part leading up to the American Revolution.⁷⁵

If not the principles of Natural Right's then, Sir Edward Coke emphasized on the principles of Common law to strike down a law when it is against common right and reason.⁷⁶ In *Calder v. Bull*,⁷⁷ it was held that, "An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." The purpose for which men enter into society, will determine the nature of terms of the social compact; the nature and ends of legislative power, will limit the exercise of it.⁷⁸ Therefore, the courts should declare retrospective laws void on the principles of natural right or justice, or in conflict with the maxims which were supposed to be embodied in the social contract or compact.

The Constitution clearly spells out the separation of powers among the Legislature, the Executive and the Judiciary. If there were no limitations placed on the powers of the legislative power, the consequence would be that whatever the legislative power chose to enact would be lawfully enacted; and the judiciary power could never pronounce it void.

Whether the judiciary may declare a retrospective law operating on vested rights to be void, is undetermined; that men of profound learning and exalted talents have greatly differed on the subject; and that it is an enquiry beset with difficulty.

⁷⁴See, *Gujarat Ambuja Cements Ltd. v Union of India* 274 ITR 194. See also, *Bull v Calder* 3 Dallas 386 where Justice Iredell expressed that in the absence of Constitutional limitations it is beyond the correction of the judiciary.

⁷⁵Walter F. Dodd, *Extra-Constitutional Limitations Upon Legislative Power*, 40 YALE L. J. 1188,1192 (1931)

⁷⁶*Ibid.* at 1194.

⁷⁷*Calder v Bull* 3 Dall. 386 at p. 388.

⁷⁸*Town of Goshen v Town of Stonington* 4 Conn. 209, 1822 WL 18.

The consequence of not formulating a criteria would be that although the subject would be obeying the law punctually and freely, a time might come when the command of laws were so evil that question of resistance had to be faced. Resistance in the form where investments would stop pouring in, there would be no longer a conducive environment for commerce to flourish. Retrospective legislation is a double yielded sword in the hands of the legislature which needs to be used with abundant caution.