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# Retrospective Laws and Malaysian Parliament: An Analysis

## *Undang-Undang Retrospektif dan Parlimen Malaysia: Satu Analisis*



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**ABSTRACT**

The rule of law demands that laws must not be retrospective, it means that a person cannot be tried for an offence if the conduct was not an offence when the person committed it. Nonetheless, this aspect of the rule of law is being attenuated, with some legislation having retrospective effect. This paper aims to study on retrospective laws in Malaysia; its definition, the drawbacks of such laws, the power to enact such laws and the position of retrospective criminal and procedural law in Malaysia. This paper will also look at the position of retrospective laws in international perspective particularly the law in Australia. The methodology employs qualitative research which encompasses library sources and readings such as books and article journals in acquiring the data and relevant information. This study also employs deductive analysis. The result indicates that Parliament indeed have the power to enact retrospective laws which could adversely affects rights or imposes liability. It is hoped that any proposed law which is intended to have retrospective effect is backed by strong reasoning in order to avoid the law being challenged in court and ultimately to be regarded as a denial of justice to the society as they lose the ability to reasonably rely on the existing law.

**Keywords**: Retrospective Law, Parliament, Criminal Law and Procedural Law

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**ABSTRAK**

Kedaulatan undang-undang menghendaki supaya undang-undang tidak retrospektif, iaitu seseorang tidak dianggap melakukan suatu kesalahan jika perbuatannya itu tidak menjadi satu kesalahan ketika dia melakukan perbuatan tersebut. Walau bagaimanapun, aspek undang-undang ini boleh dilemahkan, dengan beberapa undang-undang yang mempunyai kesan retrospektif. Artikel ini bertujuan mengkaji undang-undang retrospektif di Malaysia; definisinya, kekurangan undang-undang tersebut, kuasa untuk membuat undang-undang tersebut dan kedudukan undang-undang jenayah dan prosedur yang retrospektif di Malaysia. Artikel ini juga akan mengkaji kedudukan undang-undang retrospektif menurut perspektif antarabangsa terutamanya undang-undang di Australia. Metodologi yang digunakan adalah kajian kualitatif dengan menggunakan instrumen keperpustakaan dengan mendapatkan sumber-sumber bacaan seperti buku dan artikel jurnal untuk mendapatkan data dan maklumat yang berkaitan. Kajian ini juga menggunakan analisis secara deduktif. Hasil kajian yang dijalankan menunjukkan bahawa Parlimen memang mempunyai kuasa untuk membuat undang-undang retrospektif yang boleh menjejaskan hak atau mengenakan liabiliti. Menjadi suatu harapan agar mana-mana undang-undang yang hendak dibuat bagi tujuan mendapatkan kesan retrospektif, dapat disokong dengan alasan yang kuat supaya terhindar daripada undang-undang tersebut dicabar di mahkamah dan akhirnya dilihat sebagai satu penafian terhadap keadilan kepada masyarakat kerana mereka hilang kemampuan dengan semunasabahnya untuk percaya pada undang-undang yang sedia ada.

**Kata Kunci**: Undang-undang Retrospektif, Parlimen, Undang-undang Jenayah, dan Undang-undang Prosedural

## INTRODUCTION

*"This Act **<u>is deemed</u>** to have come into operation on 11 February 2010.".*

*"This Act comes into operation **<u>on a date to be appointed by the Minister</u>** by notification in the Gazette and the Minister may appoint different dates for the coming into operation of different parts or different provisions of this Act.".*

*"Sections 17, 18, 20, 21, 22 and 23 **<u>commence on the coming into operation of this Act</u>**.".*

Above are the examples of commencement provisions of laws of Malaysia. The commencement dates of Acts of Parliament are varies. Sometimes, the commencement date is specified in the law itself rather than being left to the Minister to specify it through the commencement order; however it is also possible for the commencement date to be earlier than the making of the Act itself that is to say the law has retrospective commencement. This kind of law is also known as retrospective law.

Retrospective law is generally defined as law which attaches new consequences to an event that occurred prior to its enactment (Driedgar, 1978). Its takes away or impairs any vested right acquired under existing laws or creates a new obligation in respect of transactions or considerations which are already past. Sampford defines retrospective law as law which alters the future legal consequences of past actions and events (2006). The making of retrospective law is very objectionable because it imposes a new complexion on events that have already taken place. As articulated in *Phillips v Eyre*(1870) LR 6 QB, retrospective law is a questionable policy as it changes the character of past transactions which are carried out based on faith in the existing law.

Eventually, retrospective law is an issue which concerns human rights. This issue needs to be addressed carefully because by permitting Parliament or legislative body to make retrospective laws, it is to be seen as allowing Parliament to legally interfere with rights or liabilities of a person on past actions especially in the matter of criminal law, where an offender could be punished with greater punishment for an offence than what was prescribed by law at the time it was committed or one could be considered as criminal for his past action which is not considered as a wrong at that time.

## CRITICISM AGAINST RETROSPECTIVE LAW

According to Palmer and Sampford (1994), among the most common criticisms of retrospective law are this kind of law is undemocratic, unjust, contrary to human rights, incapable of reliance and such kind of law does not comply with the rule of law which undermines its foundation's validity (Sampford, 2006). Of the many criticisms mentioned, one that needs to be examined carefully is the failure of society to rely on existing law; that is to say, society cannot depend on existing laws as their actions may be held to be wrong in the future. This is clearly unfair as citizens should be given the right to rely on existing laws to plan for their lives. The law to be applied to their actions must be the same law that was in force at the time these were performed. Most all laws that operate retrospectively have defeated the subject expectations of those who planned their conduct according to the existing law (Troy, 2000).

Nevertheless, it is pertinent to note that the presence of retrospective law is unavoidable in situations where there is a need to grant retrospective recognition of marriages of the legitimacy of children, or to validate illegal contracts or flawed transactions (The Sunday Star, 30 December 2001). As pointed out by Xantakhi, retrospective law is known as a legalizing provision which is used to cure the defects in earlier law or to validate legal proceedings, instruments, or acts of public and private administrative authorities. Without backdating the law, any action taken by the authority would be declared void.

## POSITION IN MALAYSIA

The making of retrospective law in Malaysia is permitted by virtue of subsection 43(1) of the Interpretation Acts 1948 and 1967 [*Act 388*] provided the intended retrospective effect of such laws are expressly stated within them. This is done through the wording of the law itself which conveys to Parliament that the law is intended to have retrospective effect. An example on commencement provision which has retrospective effect can be seen at the beginning of this paper where the word 'deemed' is used to reflect the intention of the policy maker in making the law to have retrospective commencement. It is significant to note that the making of retrospective subsidiary legislation in Malaysia is also permissible provided the commencement of such subsidiary legislation is not earlier than the commencement of the parent act. This could be found in section 20 of the Interpretation Acts 1948 and 1967.

In construing the intention of laws with retrospective effect, courts have frequently declared in the absence of some clear statement to the contrary a law can be assumed not to have retrospective commencement.[1] A law will not apply to a past, but to a future state or circumstance, unless there are clear words to the contrary in the statute (Greenberg, 2012). A law is prima facie to be construed as having a prospective commencement and not to attach new legal consequences to facts or events which occurred before its commencement.

The intended retrospective effect of the law may be construed by looking at the circumstances of the particular case and the wording of the particular statute.[2] The word 'deemed' used in the commencement provision is a sign that the Act is intended to operate retrospectively. Further, the use of the past tense instead of the present tense is sufficient indication that the law is intended to have retrospective commencement. If there is any ambiguity on construing such intentions, the law will be declared as not having a retrospective commencement. Nevertheless a different approach was taken in *Attorney-General of New South Wales v World Best Holdings* [2005] NSWCA 261 as the court looked into the scope and degree of unfairness or injustice caused by retrospective laws. The greater unfairness or injustice cause by retrospective law, the less likely Parliament intended such law to apply to citizens.

**WHETHER THE POWER TO MAKE RETROSPECTIVE SUBSIDIARY LEGISLATION IS ABSOLUTE?**

As Parliament has been bestowed with power to make laws, thus there is no question as to whether Parliament has the absolute power or not in making any retrospective law. By virtue of Article 74(1) of the Federal Constitution, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule). However, this question is more relevant when discussing whether the power given to the empowered authority to make retrospective subsidiary legislation is absolute or not. This is because the empowered authority may have certain limitations as provided in the parent act to enact any subsidiary legislation. Subsidiary legislation is made by the empowered authority under the powers delegated to them by Parliament in the parent act. It is used to introduce technical or detailed provisions which are necessary for the implementation of parent act. The inclusion of technical and detailed provisions in

[1] Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187; Puncakdana Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors [2003] 4 MLJ 9

[2] Zainal bin Hashim v Government of Malaysia [1979] 2 MLJ 276

subsidiary legislation helps Parliament to focus on the essential points in the parent act and allows the statute law to be updated wherever necessary without having to go through Parliament.

The issue whether the empowered authority has the absolute power in making retrospective subsidiary legislation was discussed in *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2004] 1 CLJ 889. In this case, the court held that the power given to the authority to make retrospective subsidiary legislation was not absolute as such legislation should not touch upon the rights of a person and should only be limited to procedural matters. The court emphasized the fact that a retrospective subsidiary legislation covering procedural matters would be effective on a date appointed but if such procedural matters affected a vested right it would be treated as having prospective operation.

A comparative analysis with Australia shows that the power given to the empowered authority is not absolute too as the retrospective legislative instrument must not deprive a person of rights nor does it imposes liabilities. Reference is made to the Legislative Instruments Act 2003 (Australia), subsection 12(2). As set out in *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, any legislation which changes the statutory right of a person and causes injustice to the parties has no basis in general law.

There is nothing to prevent Parliament from passing retrospective laws if they see fit and the validity of such laws has been tested in many cases. However, the ruling derived by judges which disallows the authority to make retrospective subsidiary legislation that encroaches on the rights of a person is seen as most appropriate. As pointed out in *Starey v Graham* [1899] 1 QB 406, a right acquired means “some specific right which in one way or another has been acquired by an individual, and which some persons have got and others have not got.”. Such vested rights are also protected under common law. These cannot be taken away by laws unless there is a clear indication and good reasons to remove such rights. Without such indications and reasons, Parliament should not alter the legal basis on which people have entered into lawful activities as Parliament is responsible for preserving the rights of people which are acquired or exercised under the existing law.

**PROTECTION AGAINST RETROSPECTIVE CRIMINAL LAW**

The protection against retrospective criminal law in Malaysia has been expressly stated in Article 7(1) of the Federal Constitution which provides safeguards, namely, protection from retrospective criminal law and protection from greater punishment for an offence than what was prescribed by law at the time it was committed. These safeguards were discussed in *PP v Mohamed Ismail* [1984] 1 MLJ 134 where the defendant was charged with drug trafficking which was punishable with life imprisonment or death sentence under the relevant law. While his trial was pending, the law was amended to provide for a mandatory death penalty. The court held that the enhanced penalty could not apply to the defendant’s case as it was enacted after the commission of the offence.

The two safeguards mentioned above flows from the principle that criminal law should be sufficiently precise to enable persons to know in advance whether their conduct might be criminal or not. In *Liyanage v The Queen* [1967] 1 AC 259, the court found that a retrospective criminal law is contrary to fundamental principles if it sought to make persons liable to punishment for new crimes and to higher punishment for old crimes.

As an analogy, a closer look at the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 [*Act 613*] shows that Act 613 is applicable to any serious offence, foreign serious offence or unlawful activity committed before or after the commencement date. Whether this Act has retrospective effect as it applies to any serious offence, foreign serious offence or unlawful activity committed before or after the commencement date of the Act? One may argue that even though this provision seems to have retrospective effect but it does not have any element which is punishing the wrongdoer and therefore this Act is valid and constitutional. However, this provision seems to suggest that a person may be convicted if his action is regarded as an offence under Act 613 even such action is committed before Act 613 comes into operation. Whether this kind of provision is a retrospective legislation? Can we say that Act 613 which applies to any serious offence, foreign serious offence or unlawful activities committed before Act 613 comes into operation is a retrospective legislation and thus has encroached rights of a person hence cause injustice to that person as that person may be relying on the law that already in place at that particular of time. This kind of law is an extremely powerful legislation which clearly cite examples where the expectations of people about the current laws are not met. Nonetheless, as money laundering is a global industry, operating seamlessly across borders, it is understood why this kind of law has been passed by Parliament which confer wide powers on enforcement agencies (such as the police, MACC and Bank Negara Malaysia) to fight money laundering and terrorism financing and also to impose obligations on various industries and professions to monitor the activities of their clients and to report suspicious transactions. Therefore, it is hoped that the policy maker of Act 613 have conducted an in-depth study before enacting this kind of law as it may disrupt Article 7(1) of the Federal Constitution which affects the rights of a person. Balance must be struck down between the need to fight cross-border money laundering as the paramount consideration and the duty to preserve rights of a person as enshrined in the Federal Constitution.

## INTERNATIONAL PERSPECTIVES: AUSTRALIA

The protection against retrospective criminal law has been accepted as one of the fundamental rights by the international community. This can be seen from various declarations of human rights which support this protection; for example Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR) which states that 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. A substantive criminal law must always be prospective in operation as the purpose of criminal law is to punish any conduct which violates the norms and, therefore, such punishment must be anticipated in advance. The law applicable to the charge must be the law existing at the time of the commission or omission of the act and not the law applicable at the time of the trial or verdict. The criminality of an act must be judged by reference to norms at the time of the wrongdoing and not by later developments in the law.

Nevertheless, Article 15(2) of the ICCPR provides an exception to protection against retrospective criminal law. Article 15(2) of the ICCPR provides that nothing in this article shall 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 recognized by the community of nations. Countries like Australia prohibits the creation of retrospective law by virtue of Article 15(1) of the ICCPR. Although retrospective criminal law in Australia is prohibited by virtue of Article 15(1) of the ICCPR, this law was passed to address a gap in existing offences and moral culpability of those involved. Notable examples of retrospective criminal laws in Australia federal law are; a law to criminalize bottom of the harbour tax avoidance in the Crimes (Taxation Offences) Act 1980; a law to criminalize the war crimes offences in the War Crimes Act 1945; and a more recent law to criminalize offences perpetrated against Australians ins foreign countries in the Criminal Code Amendment (Offences Against Australians) Act 2002. The Australian Parliament may make retrospective law to criminalize acts which are a crime according to the general principles of law recognized by the community of nations. This exception was confirmed in *R v Kidman* (1915) 20 CLR 425 where a law which introduced the offence of conspiracy to defraud the Commonwealth into the Crimes Act 1914 was valid even if it had retrospective effect. In *Polyukhovich* (Sampford, 2006), the court confirmed that the Australian Parliament may enact retrospective laws including certain new criminal offences or extending the scope of extraterritoriality for Australian courts to have jurisdiction over offenders.

Both cases mentioned above perhaps fall within the exception in Article 15(2) of ICCPR. This exception will only apply in very limited circumstances where the moral transgression is extremely grave and considered intolerable by any civilized community. It must be a gross violation of human rights, and allowing an offender to get away without being punished is unfair to the victims of war crimes. The consensus decision among Australian courts shows that retrospective criminal law is not unconstitutional provided that it does not also have the characteristics of a Bill of Attainder. It is argued that the punishments imposed by retrospective criminal laws have greater deterrent effect to other potential future offenders than prospective criminal laws. This contention seems right as criminal law is drained of its deterrent content if a person only knows about such punishment after committing the offence.

## RETROSPECTIVE PROCEDURAL LAW IS PERMISSIBLE

It is interesting to note that the protection against retrospective criminal law which is accorded in Article 7(1) of the Federal Constitution and Article 15(1) of the ICCPR only relates to conviction and sentence, but does not extend to procedure for trial. Therefore, the making of retrospective criminal law in procedural matters is permissible in Malaysia and Australia. In *Wright v Hale*158 ER 94, the court defined procedural statutes which regulate practice and procedure. There are occasions where a court has treated statutes as procedural in nature, for instance: an amendment to the rules of procedure after the commission of the alleged crime but before the start of trial; an amendment to reduce the scope of judicial review of a preventive detention order; an amendment to convert a trial by jury to trial by judge alone; an amendment to increase the amount of damages that might be awarded and an amendment to the extradition procedure to facilitate the return of a fugitive to Singapore for an offence committed in the republic before the law is amended.

Any retrospective criminal law which is partly procedural and partly destroys the rights of a person may not have retrospective commencement unless there is a clear indication to the contrary. As outlined in *Dixie v Royal Columbian Hospital* (1941) 2 DLR 138, "(a) a statute divesting vested rights is to be construed as prospective, (b) a statute, merely procedural, is to be construed as retrospective, (c) a statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective.". A court allows procedural changes to be applied in order to avoid complications that would result if different procedural rules were to apply according to when the action accrued. That is to say, a court will apply the procedural changes to the pending case with the assumptions that the rights of parties are not affected by those changes. However, such procedural changes will not be applied to the case if it causes injustice to the parties.

## CONCLUSION

Retrospective law is an issue which concerns human rights across national borders. This issue needs to be addressed carefully because authorizing Parliament to make retrospective laws has been seen as allowing Parliament to legally interfere with rights or liabilities of a person on past transactions.

Some may argue that retrospective law should not be allowed as it fails to provide guidance to the society. Raz (1980) viewed that law is universally regarded as a special method for regulating human behaviour by guiding them in various ways and directions. Thus, the making of retrospective law is unwarranted unless the circumstances are exceptional enough that is to say such retrospective law must not affects the rights of a person. Nevertheless, retrospective law gives an opportunity for the government to retrospectively cure defects in legislation so to enable the purpose of the law is achievable from the very beginning.

Although Parliament have the power to enact retrospective law, it is hoped that any proposed law which is intended to have retrospective effect is backed by strong reasoning in order to avoid the law being challenged in court. A law that has a retrospective commencement which adversely affects rights or imposes liability to be included only in exceptional circumstances and on explicit authority. The failure of legislature to consider those exceptional circumstances in passing retrospective law is a denial of justice to the society as they lose the ability to reasonably rely on the existing law. A good law is a law that is capable of being relied on and supported by the society in which they correspond well to the attitudes prescribed by the legislators. Once the law gets support from the society, the desired or intended result of the law may be easily achieved.

**REFERENCE**

Driedgar, E.A. 1978. Statutes: Retroactive Retrospective Reflections. 56:2 *Canadian Bar Review* 264-78.

Faruqi, S. 2001. *Protection Against Backdated Laws*. The Sunday Star, 30 December 2001.

Greenberg, D. *Stroud's Judicial Dictionary of Words and Phrases.* 2012. (8th ed). United Kingdom: Sweet & Maxwell.

Palmer, A. & Sampford, C. 1994. Retrospective Legilsation in Australia: Looking back at the 1980s. 22(2) *Federal Law Review* 217.

Raz, J. 1980. *The Concept of a Legal System: An Introduction to the Theory of Legal System*. (2nd ed). Oxford: Clarendon Press.

Sampford, C. 2006. *Retrospectivity and the rule of law*. United Kingdom: Oxford University Press.

Troy, D.E. 2000. Toward a Definition and Critique of Retroactivity. *Alabama Law Review* 51: 1329-1353.

Xanthaki, H. Lecture Notes on Time in Legislation 2013-2014. Retrieved from http://studyonline.sas.ac.uk/course/view.php?id=17