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Retroactivity And Justice In Law: Some Reflections On *Ex post facto* Legislation

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A bitter dispute erupted over the House of Lords' veto of the war crimes bill intended to make possible the trial and punishment, in British courts of justice, of former Nazis accused of crimes committed during World War II outside of Great Britain and her empire against persons other than British subjects.

A number of factors may have motivated the peers in their lop-sided rejection of the proposed act. Denigrators of the nobility, of the Tory Party, and of Parliament's ancient second chamber will ascribe it to a gross indifference to the atrocity of the crimes involved. Many for and against the bill have recognized the general concern for European (especially German) feelings, an unwillingness to stir up old hatreds and fears as Germany moves towards unity and the EEC presses forward to increased political, economic, and social integration.

Proponents and opponents of the legislation alike admit that the single most important factor in the defect of the proposed law was the general perception of its retroactive character. Perhaps it has come time to examine the essential question involved in the issue, the relation of justice to retroactivity in law: Can *ex post facto* laws ever be just?

In America, of course, the *Constitution of the United States* forbids both the Federal Government [l,ix,3] and the states [l,x,l] from passing any *ex post facto* laws or bills of attainder, and many state constitutions contain similar restriction upon their legislatures. On account of these clear and total prohibitions, Americans have the tendency to see all *ex post facto* laws as the veritable work of the devil - iniquitous, oppressive, devoid of justice, the plaything of tyrants.

In one aspect, of course, retroactive criminal laws must clearly be unjust: if the law criminalizes acts which are *mala prohibita* - i.e., acts morally neutral in themselves, but wrong because forbidden by just authority - then any degree of retroactivity would, on its very face, necessarily be unjust. If tomorrow the Queen in Parliament should enact a bill which not only raised the minimum legal age for purchasing alcoholic beverages but also went on to impose fines and imprisonment for publicans and youthful imbibers who had violated its provisions during the years prior to its passage into law, people's sense of justice would be outraged.

Intuitively, one recognizes that it is ethically wrong to impose punishment for morally neutral acts before just authority has forbidden them - '*Nulla crimens sine lege*'. as the Romans said. This same intuition may well carry over to acts which inhabit that umbaceous borderland between moral neutrality and moral impermissibility.

Reams of paper have been expended in debates over whether insider-trading on financial markets is morally wrong (*malum in se*) or is wrong only because condemned by just authorities such as legislatures and regulatory agencies (*malum prohibitum*). In cases such as insider- trading, where the independent moral evil of the act is open to serious question, the same intuition seems to apply: It would be ethically indefensible to punish by statute enacted today, insider-trading done in the past in any nation where it had then been legal.

Let us now consider a quite different situation: Imagine a country without the common law, where only statute creates crimes at law and where only statute imposes punishment. Now further imagine that through some inadvertency or through some temporary passion, the parliament of that land were to repeal one of its specific legal provisions against murder. let us say that the section of the law protecting foreigners resident in or travelling through that land were overturned by the national legislature. Within a short time, the law makers either discover their inadvertent error or reconsider the wisdom and justice of their deliberate repeal and correct the deletion, but in the meantime, several foreigners have been killed by criminal elements in the population.

If the legislators chose to include a degree of retroactivity in the new statute so that its prohibitions would extend backwards in time to the original inadvertent or unwise repeal of the old homicide statute protecting aliens, would our ethical intuitions condemn such a procedure?

Clearly we would feel uneasy, for the use of the devices of *ex post facto* law and bills of attainder always carries with it great practical risks. Carelessly or wilfully misused, these devices are a blood-drenched sword in the hand of the despot - whether the despot be Emperor Nero or King Mob.

Strong prudential judgments warn us away from the casual or frivolous use of these terrifying devices, but prudential caveats cannot be translated into absolute moral proscriptions. The American constitutional Framers, despite their ban on retroactivity on both the federal and state level, did not completely foreclose that option, for the amendment process can still enact, or allow to be enacted by lesser bodies, *ex post facto* laws.

Had the Framers so wished, they could have encumbered the amendment power on that issue and precluded the amendment process from touching the restriction upon retroactivity even as they precluded it from interfering with constitutional protections of the slave trade prior to 1808 [V,i,1]. Instead, they trusted to the enormous concurrent legislative majorities required for constitutional amendment in order to insure that retroactivity would not be introduced by amendment or at least would be introduced only under the most extraordinary conditions.

In leaving the amendment power unrestricted in this regard, the Framers' prudential judgment of the practical dangers of retroactivity in criminal law gave way to their prudential judgment of the dangers inherent in attempting to restrain the absolute sovereign.

Still, despite all prudential considerations, it is clear that as a matter of natural justice, our consciences would not be outraged by the punishment of the murderers of the foreigners in our hypothetical case. Although these evil-doers may have acted in the knowledge that the law was repealed - and that need not have been the case - they knew what they did violated one of the most sacred and most universally recognized ethical mandates.

They may claim that they had been led by the revocation of the statute to believe that they would escape punishment, but they cannot plausibly maintain that they did not know that their acts were gravely immoral.

As a rule of thumb, we may say that the graver the moral evil involved, the more appropriate in natural justice that it be punished through the use of retrospective enactments necessary, providing that the evil is one properly to be punished by law and providing also that prudential considerations in the circumstances permit.

Britain has a constitution - partly written, partly embodied in convention and tradition - but her constitution is automatically altered by an appropriate act of Parliament. For this reason, retrospective law is always within the competence of the legal omnipotence of the Queen in Parliament.

In deciding to enact or not to enact *ex post facto* statutes punishing the Nazi war criminals still at large, the Lords and Commons must weigh the various prudential elements that compete in such a policy, but they must not act under the misapprehension that *ex post facto* law is necessarily unjust. In fact, should they finally decide against the anti-war crimes statutes, such an abandonment of the hope of prosecuting these particular criminals might be characterized as the yielding of the demands of natural justice before the demands of prudential wisdom and policy considerations.

Finally, we should remind ourselves, perhaps, that the International War Crimes Trial at Nuremberg in the aftermath of World War II was a primary example of *ex post facto* law used to good effect. It would not seem an exaggeration to insist that prior to the convening of the International War Crimes Tribunal at Nuremberg and the subsequent one convened in occupied Japan, no truly international criminal law existed. It is true, of course, that certain offences were recognized as crimes against the law of

nations, but were only punishable by the domestic courts of particular states and only to the extent that those states saw the law of Nations as integrated by one or another means into their domestic law.

In America, the Constitution gives Congress the power 'to define and punish ... Offences against the laws of Nations' [I,Viii,10] - clearly indicating an element of deliberate legislative incorporation to be necessary for the criminality of international offences in U.S. law. British law is not terribly different in that it requires a parliamentary statute, or an international treaty to which Britain is a party combined with enabling legislation, or an appropriate judicial interpretation of common law to internalise the (offence? ce??) from the international law to the laws of the realm. Piracy, waging war out of uniform, and innumerable other offences known to international law were recognized and punished as part of the domestic law of each and every nation.

With the carnage of the Second World War and its unprecedented violations of the norms of civilized conduct - aggressive war, torture, racial genocide, the deliberate killing of non-combatant civilians, violations of neutrality, massive pillage, slave labour, etc.-- allied statesman recognized that whatever the dangers implicit in creating an international war crimes tribunal and in using retrospective law, the danger of leaving these awesome assaults upon humankind unpunished represented an even more reckless course.

Make no mistake: It was not the creation of an international tribunal which was precedent-breaking. If two or more nations created a special combined judicial panel to try persons who had committed offences against the laws of these states, this would not be unprecedented, nor would it involve a true international criminal law.

The allies probably could have legitimately tried the former Reich leaders on a number of capital offences - including murder - under German law, for the allies had received full powers for the enforcement of German law by virtue of the unconditional surrender of Germany to them. Nevertheless, they chose not to do that, but to prosecute under retrospective international criminal laws.

Of the two most serious charges against the Nazi officials, mass murder and waging aggressive war, neither had any serious basis in pre-1945 international law. The Kellogg-Briand Pact - a nearly universally endorsed agreement repudiating war as an instrument of policy - has occasionally been put forward as a basis for the charge of waging aggressive war, but the Kellogg-Briand Pact contained neither the language of a criminal statute nor did it specify any punishment for infringement of it. In addition, any ratifying state might presumably have repudiated it as a sovereign state may repudiate any other treaty.

Kellogg-Briand was not totally irrelevant, however, because it illustrates the existence of a nearly universal ethical judgment that aggressive war is morally reprehensible.

One of the most serious complaints against *ex post facto* law is that it must necessarily fail to possess one essential element of law - a proper promulgation - since men cannot know the law before it has been made law. In fact, however, when the *ex post facto* codification outlaws and punishes actions long and widely recognized as both grave moral evil and grave moral evil of a public character - murder, pillage, rape, aggression -the element of promulgation is less of an issue, for it is only the aspect of the punishment which has not been proclaimed.

The wrongness of murder and aggression was known by men before it was ever acknowledged in human law codes. That essential wrongness was known even before it was written by the finger of God upon the stone tablets of Sinai, for it was not upon papyrus or stone that law was first inscribed, but upon the hearts of men - as the natural law.

It is perhaps worth remembering that in America, Senator Robert Taft - 'Mr. Repub1ican' - spoke out against the post-war trials as contravening the constitutional prohibitions on *ex post facto* law. Given the passions of the moment, Taft was violently attacked, but because of his principled stand and the degree of vilification he endured, he

was the subject of a laudatory chapter of John F. Kennedy's *Profiles in Courage.*

Despite the unquestionable integrity of his motives and the courage of his stand, Tuft was only partially correct.

Nuremberg was undoubtedly an imposition of *ex post facto* law, but it was not unjust - for the reasons we have explored above. It also did not technically violate U.S. constitutional law, because, despite U.S. participation, the Nuremberg Tribunal was not an American court, did not apply American law, did not try American citizens, and was not located in the U.S.A. The participation of some U.S. personnel as judges, prosecutors, and lesser court officials was not sufficient to transform the tribunal into an American court.

When next the Lords and Commons assemble to take up a re-introduced version of the defeated bill to open the British courts to the prosecution of Nazi war criminals, let them weigh the cause of natural justice with policy matters and with other competing prudential considerations, but let none cast his vote in the mistaken notion that retrospectivity in criminal law is inherently unjust.

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