THE RULE AGAINST EX POST FACTO LAWS AND THE PROSECUTION OF
THE AXIS WAR CRIMINALS

By Hans Kelsen*

I

The original meaning of the term "ex post facto law" as used in the
Constitution of the United States was "retroactive law" and not, as it
is interpreted nowadays, only retroactive criminal law. Blackstone,
speaking of "unreasonable method" of lawmaking, refers to "laws ex post
facto, when after an action (indifferent in itself) is committed, the
legislature then for the first time declares it to have been a crime,
and inflicts a punishment upon the person who has committed it." This
is a retroactive criminal law, but Blackstone refers to it only as an
eexample, for he concludes: "All laws should be, therefore, made to com­
cence in future and be notified before their commencement, which is
implied in the term 'prescribed'."

The opinion that the term ex post facto law as used by the Constitu­
tion of the United States originally referred to all retroactive laws has
been expressed by Colonel Mason2 in the debates on the adoption of the
Federal Constitution in 1787, and with great emphasis by Justice Johnson
of the Supreme Court in the case Satterlee vs. Netherwood.3 There can be
no doubt, however, that the restrictive interpretation of the constitutional

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1Blackstone, Commentaries 46.

2Jonathan Elliot, The Debates, Resolutions, and Other Proceedings in
Convention on the Adoption of the Federal Constitutional, as Recommended by
the General Convention in Philadelphia on the 17th of September 1787,

3Peters 416, and Note 681 ff.
rule against *ex post facto* legislation very soon became predominant and is today generally accepted.

This is quite understandable. For an unrestricted constitutional prohibition of retroactive legislation would lead to unbearable consequences. The rule against retroactive legislation, though a basic principle of jurisprudence, was never recognised without the admission of important exceptions. It is worthy to note that in England the rule on *ex post facto* law, though in principle accepted by the common law, was never interpreted as a limitation of the sovereign legislative power of Parliament. The opinion prevails that Parliament always can pass a retroactive statute.

II

The rule first established by Roman jurisprudence has been taken over by the natural law doctrine. Here it has been deduced from the nature of the law as a rule prescribing future conduct of man, to regulate human conduct which has taken place in the past is impossible. If a retroactive law means a law prescribing a certain conduct of man for the past, the rule against retroactive legislation expresses a logical necessity.

This was probably the idea underlying the natural law doctrine of the inadmissibility of *ex post facto* laws. To understand it, we must take into regard that according to the natural law doctrine the rule of law is a norm prescribing directly the desirable conduct of the subjects, regardless of sanctions attached to the contrary conduct. Sanctions are not essential to the law since its rules are derivable from nature or reason and evident to man as a being endowed with reason. A rule stating that man ought to behave in a certain way is meaningless if it refers to the past and not to the future.

In opposition to the natural law doctrine, legal positivism considers sanctions as an essential element of the law, and consequently formulates the rule of law as a norm by which sanctions are prescribed to be executed by specific organs of the community against subjects whose conduct is undesirable. It is by attaching sanctions to an undesirable conduct that the latter is made illegal. It is by prescribing sanctions to be executed by organs against subjects that the conduct of the subjects is regulated. It is an indirect regulation of the conduct of the subjects. Hence the rule of law as formulated by legal positivism refers to the conduct of, at least, two individuals: the organ authorised to execute a sanction, and the subject against whom, on behalf of his illegal conduct, the sanction is directed. The rule of law as formulated by the natural law doctrine refers only to one individual: the subject whose legal conduct is prescribed by the rule. This rule of law cannot be retroactive; but the rule of law providing sanctions can; not, of
course, with respect to the action of the organ, in execution of the sanction; (this action can be prescribed only for the future) but with respect to the conduct of the subject which is the condition of the sanction. A rule of law can attach a sanction to be executed in the future, (that is to say after the rule has been enacted), to human conduct which has been performed in the past, (that is to say before the rule has been enacted.) Such retroactivity is legally possible but may not be morally or politically desirable. The postulate not to enact retroactive laws cannot be derived from the nature of law in the sense of legal positivism, as it can be derived from the nature of law in the sense of the natural law doctrine. Within the system of legal positivism the rule against retroactive legislation is not an absolute principle as the corresponding rule of the natural law doctrine is, expressing a logical necessity. Its value is highly relative and the sphere of its validity restricted.

III

Retroactive laws are held to be unjust because it hurts our feelings of justice to inflict upon an individual a sanction which he did not foresee, since it was not yet attached to his conduct, and consequently this conduct was not yet illegal, at the moment he committed the action or omission for which he is subjected to the sanction. It is, however, not against our feeling of justice to refrain from applying a law which has been repealed by another law, to a subject who has committed an act to which the repealed law attaches a sanction. If the law by which the previous law is repealed refers to cases which occur prior to the enactment of the repealing law, the latter is retroactive. Since it is advantageous to the subject, it is not considered to be unjust. On the contrary, it is considered to be unjust if such a law is not retroactive. The same is true with respect to a retroactive law by which the sanction provided by a previous law is softened. Hence it is not exactly the retroactivity of the law which is felt objectionable. It is the fact that the individual had no chance to avoid a sanction or a more severe sanction provided by a subsequent law. If he had known that his conduct would entail a sanction, or a more severe sanction than that he had to expect at the moment his conduct took place, he would perhaps have conducted himself in another way; he would perhaps have chosen a conduct by which the sanction was avoided.

The idea underlying this principle of justice is probably the doctrine of contract in a somewhat modified form: the law is binding upon an individual and therefore, applicable to him only if it is recognised, and if not recognised, at least known by him. It is very significant that Blackstone deals with ex post facto laws in connection with the problem of notification of laws. He says: Law is likewise 'a rule prescribed' because a bare resolution confined in the breast of the legislator without manifesting itself by some external sign, can

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never be properly a law. It is requisite that the resolution be noti-

fied to the people who are to observe it. But the manner in which this
notification is made is a matter of very great difference... whatever
way is made use of, it is incumbent on the promulgator to do it in the
most public and propitious manner; not like Caligula, who (according to
Dio Cassius) wrote his laws in a very small character and hung them upon
high pillars, the more effectively to ensnare the people. There follows
the passage concerning ex post facto legislation. The reason why it is
called an "unreasonable method" is: "Here it is impossible that the party
could foresee that the action, innocent when it was done, should be after-
wards converted to guilt by a subsequent law; he had, therefore, no cause
to abstain from it..."

The principle of justice which is the basis of the rule against retro-
active legislation, is: that the law must be known in order to be applicable.
This principle is not without a counter-principle, not less generally re-
cognised than the former; that ignorance of law is no excuse. And it is
significant again that Blackstone refers to this rule immediately after
having expounded the rule against ex post facto laws. He says: "But when this
rule [that is, the law] is in the usual manner notified, or prescribed, it
is then the subject's business to be thoroughly acquainted therewith: for
if ignorance of what he might know were admitted as a legitimate excuse,
the laws would be of no effect, but might always be eluded with impunity."
"Since it is practically impossible to maintain the principle that the law
has to be known by an individual in order to be applicable to him, the
principle must be modified. Not actual knowledge, only the possibility to
be known, is required. Consequently, the law must exist, and if possible
be notified, at the moment the conduct takes place to which the law attaches
a sanction. This is the point where the question of retroactivity comes in.
The rule against retroactive legislation is the result of the necessary
restriction of the rule against the application of laws unknown to the
subject.

IV

If two principles of law are not compatible with each other, the
one must be restricted by the other. The relationship between the rule
against the application of unknown law and the rule that ignorance of the
law is no excuse is typical. The former rule, however, is in conflict
not only with the latter. If it is unjust not to attach to a certain act
a sanction, if, for instance, a legislator has omitted to provide punish-
ment for the theft of electricity because he did not foresee the possibility
of such an act, it is certainly just to enact a law providing such a sanc-
tion, even with retroactive force, especially if the act or its omission
is generally considered as a violation of morality or another higher law,
although not illegal. If a retroactive law, which attaches a sanction to
a conduct generally considered to be immoral or in conflict with another
more superior to the law, is rejected because of its retroactive force,
the rule against the application of unknown law is recognised as more
important than the principle whose violation is made illegal. But there
exists a clear difference between a retroactive law by which an act
"indifferent" in itself or "innocent" when it was done, is connected with
a punishment, and a retroactive law by which an act which was immoral or
otherwise in conflict with a higher law was made illegal.

Even in its restricted form as prohibition of retroactive law, the
rule against the application of unknown law is not without exceptions.
The rule is effective only with respect to legislation, not against the
creation of law by custom or judicial decisions. Any rule of customary
law is retroactive in the first case in which it is applied as a rule of
law. Any rule of law created by a precedent is retroactive in the case
in which it is first applied. The doctrine that custom is not a creation
of law but merely evidence of a pre-existing law is the same fiction as
the doctrine that tries to hide the retroactive character of a precedent
by presenting the judicial decision as an interpretation rather than a
creation of law.

A law may be retroactive not only by providing enactions to be
inflicted upon subjects on behalf of actions performed by them before the
law has been enacted. A law may be retroactive by abolishing or changing
rights and freedoms acquired before the law has been enacted. In this
sense any law is retroactive since it changes a legal situation established
under a previous law. If the concept of retroactive law is taken in its
broad sense, the rule against retroactive law prevents any change of law.
This rule has an extremely conservative character. Without restricting
the scope of this rule, no reform is possible, especially in the field of
civil and administrative law. The protection of vested rights, the ex-
closure of expropriation laws, has frequently been based on the rule ag-
ainst retroactive legislation. A law by which vested rights are abolished
is certainly a retroactive law. But if such law is considered to be unjust,
it is not because of its retroactivity; it is unjust from the point of
view of the natural law doctrine that rights, especially property rights,
are prior to the law of the state, and that the law, by its very nature,
has to protect the rights. It is from the nature of law that the illegality of
a statute is derived that abolishes vested rights. It is, therefore,
quite justifiable to confine the rule against ex post facto laws to
criminal laws which operates to the detriment of the accused person, and to
base the protection of vested rights, if such protection is desired, on
another principle, as stipulated expressly in the Constitution (such as
the contract clause in the Constitution of the United States) or advocated
by the natural law doctrine.

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The result of the preceding analysis is that the rule against ex post facto legislation must be interpreted as restrictively as possible. This we have to bear in mind in the following examination of the role the rule in question may play in the prosecution of Axis war criminals.

The main crimes for which persons belonging to the European Axis powers shall be prosecuted, according to the Agreement signed on August 8, 1945 by the governments of the United Kingdom, the United States of America, the Soviet Union and the French Republic, are:

1. War Crimes in the narrowest sense of the term, that is to say, violations of the rules of warfare.
2. Crimes against peace, that is to say, resort to force (launching of war of aggression) in violation of the Briand-Kellogg Pact or other treaties prohibiting resort to force.
3. Crimes against humanity, that is to say, certain atrocities including persecution on political, racial or religious grounds, which do not constitute violation of International Law but of Municipal Law or morality.

Since individual criminal responsibility for violations of the rules of warfare is established by International Law as well as Municipal Law, no difficulty will probably arise out of the rule against ex post facto legislation in the prosecution of persons who have violated the rules of warfare. The situation is different with respect to illegal resort to force and the atrocities which do not constitute a violation of International Law. In case the trials are to be conducted by an international court established by an international treaty, International law is to be the basis of the prosecution. Illegal resort to force certainly constitutes a violation of International Law. It is usual to characterize an aggressive war that is, a war resorted to in violation of International law, as a "crime". But according to existing International Law, resorting to war in violation of the Briand-Kellogg Pact or another rule prohibiting resort to force is, although illegal, not a "crime" in the true sense of the term, since existing International Law does not establish individual criminal responsibility for illegal resort to force. If by an International Treaty individuals who are morally or politically responsible for the Axis powers starting the second World War are made legally responsible for this violation of International Law and an International Tribunal is authorized, to inflict punishment upon those who have been found guilty, the Treaty undoubtedly establishes a rule with retroactive force.

To conclude treaties establishing rules with retroactive force, is not forbidden by International Law unless the general principles of law
recognized by civilized nations are considered to be parts of International Law and if the rule against retroactive laws is such a general principle of Law. Both presuppositions are doubtful. But even if we assume that the rule in question is part of International Law, it is more than doubtful whether it is applicable to the prosecution of persons for illegal resort to force, that is to say for violations of the Briand-Kellogg Pact or special non-aggression Pacts. One of the essential conditions under which a retroactive criminal law to the detriment of the accused is considered to be objectionable, is the fact that the action to which the subsequent law attaches a punishment was at the time it was performed "indifferent" or "innocent", as Blackstone says. It may be doubtful whether this means morally or legally indifferent or innocent. But even if it only means that the action was not "illegal", the rule against ex post facto laws is not applicable to the prosecution of illegal resort to force. For the action was illegal at the moment it was performed, because it was a violation of International Law. The subsequent Treaty does not make a legal action illegal ex post facto. It only adds to the collective responsibility for an illegal action established by pre-existing International Law, individual responsibility of the perpetrators.

According to Blackstone, it is not only required that the action be legal at the moment of its commission, but also that the punishment subsequently attached to the action could not be foreseen. Only if the action is not illegal when it was done, it cannot be foreseen that its evaluation will change so radically that punishment will be attached to it. But at the time the Briand-Kellogg Pact and certain non-aggression Pacts were violated by the Axis powers, the conviction that an aggressive war is a crime was so generally recognised by the public opinion of the world, that subsequent international agreements providing individual punishment for these violations of International Law were certainly not unforeseeable; and this all the more as the Treaty of Versailles had already established a precedent by authorising an international court to punish William the Second "for a supreme offense against international morality and the sanctity of Treaties".

If it is correct, as it has been shown above, that the interpretation of the rule against ex post facto laws must be as restrictive as possible, its application to the prosecution for illegal resort to force is certainly excluded.

The atrocities for which persons belonging to the Axis powers and especially the Germans shall be prosecuted are almost all ordinary crimes according to the municipal law of the persons to be accused, valid at the moment they were committed. In respect to these crimes the main problem is not the application of the rule against ex post facto laws but the jurisdiction of the International Tribunal. This problem is solved by an international treaty conferring the jurisdiction for the prosecution of these crimes to the International Tribunal. Even if the atrocities are covered by municipal law or have the character of acts of State and hence do not constitute individual criminal responsibility, they are certainly open violations of the principles of morality generally recognised by civilized peoples and hence are, at least, morally not innocent or
indifferent when they were committed. Besides, in all cases where the rule against *ex post facto* laws comes into consideration in the prosecution of war criminals, we must bear in mind that this rule is to be respected as a principle of justice and that, as pointed out, this principle is frequently in competition with another principle of justice, so that the one must be restricted by the other. It stands to reason that the principle which is less important has to give way to the principle which is more important. There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trials, the rule against *ex post facto* law, which has merely a relative value and consequently, was never unrestrictedly recognized.

VIII

The above-mentioned international treaty by which the legal basis for the prosecution of the Axis war criminals is to be established, should be concluded by the States which intend to prosecute the war criminals, with the States whose subjects shall be prosecuted. A treaty concluded only by the victorious United Nations or some of them without the participation of the vanquished Axis powers is not "international", in relation to the latter. The rules established by such a treaty to be applied to the prosecution of subjects of the Axis powers are—in relation to the latter—equivalent to Municipal Law of the former. The Treaty of Versailles which provided for the prosecution of William the II and other German war criminals, was signed and ratified by Germany. However, the actual international situation with respect to Germany is totally different from that which existed after the first World War. Germany's unconditional surrender, together with the abolition of its last national government, have put an end to its existence as a sovereign state. By the Declaration made in Berlin on June 5, 1945, the four occupant powers have established their Joint sovereignty over the German territory and its population. In their capacity as sovereigns over the territory occupied by them they are the legitimate successors of the German state, and the Control Council instituted by the Declaration of Berlin is the legitimate successor of the last German government. For the time being no international treaty can be concluded with Germany as a sovereign state. An international treaty, to which the four occupant Powers in their capacity as the sovereigns over the occupied territory and its population are contracting parties, is equivalent to a treaty concluded with Germany.

To establish the legal basis for the prosecution of the German war criminals, no international treaty is necessary. General International Law obligates the states to punish their own war criminals. Since the four occupant Powers in their capacity as sovereigns over the German territory and its population are legitimate successors of the German state, they have an unlimited legislative, jurisdictional and administrative

4Cf. my article: *The Legal Status of Germany according to the Declaration of Berlin*, American Journal of International Law, Vol.

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jurisdiction over German territory and its population. They are entitled to carry out Germany's obligation with respect to German war criminals. For this purpose they may institute a special court and lay down the principles to be applied in the trials.

In relation to the German war criminals, the agreement for the prosecution and punishment of the major war criminals of the European Axis, signed on August 8, 1945 by the four occupant powers, may also be interpreted as a legislative act of the occupant Powers, issued by them in their capacity as sovereigns over the German territory and its population. If this interpretation is accepted, any objection against the agreement resulting from the fact that Germany is not a contracting party may be refuted. For this purpose it is advisable that the occupant Powers make a declaration to the effect that they consider themselves as exercising joint sovereignty over the German territory and its population on the basis of complete abdication of Germany and that consequently, the military government established by them is to be considered as a legitimate successor to the last German government.

IX

By article 4 of the German Constitution of August 11, 1919, still valid under the Nazi regime, the generally recognized rules of international law are declared to be binding parts of German Federal Law. One of these rules is the one which obligates the states to respect the treaties concluded by them, usually formulated as the rule pacta sunt servanda. Violation of a treaty, especially violation of the Briand-Kellogg Pact to which Germany was a contracting party and one of the non-aggression Pacts, Germany has concluded with other states, may therefore be considered not only as a violation of international law but also of German municipal law. According to Article 59 of the Constitution the Reichstag had the power of impeaching the Reich President, the Reich Chancellor and the Reich Ministers before the Staatsgerichtshof for having violated the law. This provision, however, has ceased to be valid after the Nazi regime has been established. Hence, resort to force in disregard of an international obligation was a violation of German law still under the Nazi regime; but no sanction was provided constituting the individual responsibility of the members of government guilty of such violation. Such individual responsibility may be established by a legislative act of the occupant Powers such as the Agreement of August 9, 1945, providing adequate punishment for violation of that part of municipal law which is formed by the generally recognized rules of international law. Even if the act refers only to treaty violations committed by the Nazi government, it does not fall under the rule against retroactive criminal laws, because it attaches sanctions to acts which were, at the time they were committed, illegal not only under international but also under the municipal law of the accused persons.
The German Criminal Code valid in the moment of the occupation by the four Powers contains the following provision (as a result of an amendment made under the Nazi Regime on June 26, 1935, 1935, RGBl I, 839):

"Anyone shall be punished who commits an act which is declared punishable by statute or which deserves a penalty according to the basic principles of a criminal statute and of the people's sound sense of justice."

By this provision the original Article 2 of the Code has been replaced which runs as follows:

"For no act may punishment be imposed unless such punishment is prescribed by statute before the crime is committed."

This is the rule against ex post facto laws. It has been expressly repealed by the Nazi government.

If the German criminal law would be applied to the German war criminals the rule against ex post facto laws is no obstacle. Against this view it may be objected that the repeal of the rule against ex post facto laws is one of the methods which made the Nazi Regime so hateful in the eyes of the civilized world, and that the powers which waged a war to destroy the Nazi regime must not apply its own detestable principles.

5 Also the Criminal Codes of the Russian Socialist Federative Soviet Republic of 1922 and 1926 do not recognize the rule against ex post facto legislation. Art. 68 (13) of the Code of 1926 expressly provides punishments for "any act or active struggle against the working class or the revolutionary movement of which any person was guilty while in a responsible or secret post (i.e. agent) under the Czarist regime or with any counter-revolutionary government during the period of the civil war," that is to say, for acts which were performed long before the code came into force and were, at that time, no crime at all.
This is a serious objection; and it is certainly not advisable to justify the non-application of the rules against *ex post facto* laws exclusively or in the first place by a principle of the Nazi criminal code. This is not necessary since there are other better arguments to prove that the rule against *ex post facto* laws is not applicable in the prosecution of the German war criminals. But it may be not superfluous to use, as a supplementary argument, the idea that nobody has a right to take advantage of a principle of justice which he himself does not respect. Otherwise, a murderer could object against capital punishment the commandment "you shall not kill". Any sanctions provided by law, be it deprivation of life, freedom, or property, is, by its very nature, the infliction of an evil which, if not carried out as a sanction, that is to say, a reaction against a wrong, is a wrong itself. The non-application of the rule against *ex post facto* laws is a just sanction inflicted upon those who have violated this rule and hence have forfeited the privilege to be protected by it.

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