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The Right to Protection from Retroactive Criminal Law

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Introduction

The essentiality of a right to protection from retroactive criminal law has generally been accepted without argument. Literature on the justification for the principle is scarce. Yet it has become well accepted that individuals have such a right. The principle has been enunciated in various declarations of human rights from 1789 until the present. Nevertheless, there are several examples in international, Australian and British law where the principle has been ignored or (at the very least) circumvented.

Three examples of retrospective law-making are discussed below: the Nuremberg trials of the late 1940s; the decision of the House of Lords in *Shaw v. Director of Public Prosecutions* in 1961; and the Commonwealth's "bottom of the harbour" tax legislation of 1982. In each case, the actions of the defendants were considered so morally repugnant that the principle of non-retroactivity was relaxed so as to allow them to be punished. These examples differ in the extent to which the retrospective aspect of each has been accepted: the Nazis tried at Nuremberg are generally said to have been adjudged fairly; the decision in *Shaw's* case has been criticised widely; and the "bottom of the harbour" tax legislation has attracted both critics and champions.

The fundamental question raised by these three examples is this: is the right to protection from retroactive criminal law an absolute human right, or should its application be qualified by reference to the circumstances in each case? Despite the criticism that these examples provoked, none of them could easily be characterised as a miscarriage of justice. But, in each instance, the defendants were punished for committing acts which were not criminal at the time that they committed those acts: they were found guilty retrospectively. Clearly, then, the right to protection from retroactive criminal law is not an absolute human right.

But if it is a qualified human right, what are the conditions that must be fulfilled before that right will be restricted? It is not enough to say

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that the defendants in the three examples discussed below behaved immorally. Even if immorality is a necessary condition, it is clearly not sufficient to qualify the right to protection from retroactive criminal law. There are numberless examples of immoral acts that are not illegal. And there is no common factor to be found in the extent of the immorality in each of the three examples. The Nazis committed acts of such wickedness that they beggar comparison with Shaw's actions, and make a peccadillo of tax evasion. There is no common condition that links these three examples.

Further, there is the example of judge-made law. There is an oft-cited legal fiction that judges do not make law but merely interpret pre-existing law. In fact, judge-made law is an integral part of the common law system. Yet the making of law by judges is at odds with the principle of non-retroactivity; a person who is found guilty under a newly-enunciated, judge-made law is (necessarily) found guilty retrospectively.

Examples of judge-made law are legion. When this is taken into account, it can be seen that the right to protection from retroactive criminal law is regularly qualified, to such an extent, and in such an indeterminate fashion, that its status as a human right—even as a qualified human right—is dubious.

The History of the Principle of Non-retroactivity

The principle that people should be free from retroactive law has its roots in another principle: that there is no crime or punishment except in accordance with law.

According to Glanville Williams,[1] this principle was first importantly formulated in Article 8 of the French Declaration of the Rights of Man of 1789, which reappeared in the French Constitution of 1791, and remains in the French Code Pénal. It became part of the Bavarian Code in 1813, when Feuerbach formulated the Latin maxim nullum crimen sine lege, nulla poena sine lege. It headed the German Penal Code of 1871 and was guaranteed by the Weimar Constitution. It is clear that the principle had wide acceptance in Europe by the end of the nineteenth century.

From the nullum crimen maxim, jurists have deduced the principle of prohibition of retrospective penal laws. As early as 1651, Hobbes wrote:

> "No law, made after a fact done, can make it a crime . . . For before the law, there is no transgression of the law."[2]

This principle was stated in 1789 in Article 1, section 9(3) of the American Constitution, which prohibited ex post facto laws. Article 7 of the European Convention on Human Rights provides that no one shall be held guilty of a penal offence made so retrospectively. Article 7 includes the important proviso that it:

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1 G. Williams, *Criminal Law, The General Part* (2nd ed., 1961), p. 576.

2 Hobbes, *Leviathan* (1651), Chapters 27-28, quoted in Williams, op. cit., p. 580.

> ". . . shall not 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 recognised by civilized nations."

Article 15 of the International Covenant on Civil and Political Rights states, inter alia:

> "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."

Article 15 includes a proviso identical to that contained in Article 7 of the European Convention on Human Rights, except that the phrase "civilised nations" is replaced by "the community of nations".

In 1985, the unsuccessful Australian Bill of Rights draft Bill included a proposed Article 28 which provided, inter alia:

> "No person shall be convicted of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it occurred."

The proposed article contained no proviso regarding any act or omission which was "criminal according to the general principles of law recognised by the community of nations".

The Arguments in Favour of the Principle of Non-retroactivity

There has been little discussion of the basis for the principle of protection from retroactive criminal law. Proponents of the principle's validity tend to accept it as axiomatic. In the leading Australian case on retroactive legislation, *Yrttiaho v. Public Curator* (*Queensland*),[3] the High Court discussed, at some length, the existence of a presumption against the retrospective operation of a statute. However, at no stage did the Court justify this presumption. The High Court drew a distinction between statutes that divest vested rights and statutes that are merely procedural. In the absence of clear words to the contrary, examples of the former type are to be construed as prospective, but merely procedural statutes are construed as being retrospective ". . . provided, of course, that no injustice is done".[4] This proviso would seem to imply that the presumption against retrospectivity exists (in cases where the statute divests vested rights) to ensure that "justice is done".

Some supporters of the principle claim that prohibiting retrospective law-making contributes to the stability and certainty of the justice system. In the words of Friedrich Carl von Savigny:

> ". . . an immoveable [sic] confidence in the authority of the existing laws is extremely important and desirable. I do not mean confidence

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[3] (1971) 125 C.L.R. 228.

[4] Ibid., at 240, per Gibbs J.

in their permanent endurance . . . But I mean the confidence that their authority and efficacy will be unassailable as long as they subsist."[5]

Another argument against retrospectivity is touched upon by Williams, although not thoroughly investigated. Williams claims that one corollary of the nullum crimen maxim is the principle that penal laws should be accessible and intelligible.[6] This principle is closely linked to the principle that ignorance of the law is no excuse, because that principle relies upon the accessibility of the law for its justification. Retroactive laws are inaccessible in the sense that they are not knowable at the time when the erstwhile legal acts or omissions occur. Clearly, application of the maxim ignorantia juris non excusat to such a situation is unfair as that ignorance is beyond the control of the person in question. Retrospectivity means that even a person well-informed about the law will be ignorant of the illegality of her or his acts because those acts are not deemed illegal until the retroactive law is made. So it can be seen that retroactive laws are at odds with the principle that ignorance of the law is no excuse.

Supporters of the principle of non-retroactivity point to the scope for abuse of individual liberties that exists where retroactive law is allowed. In the words of one commentator:

> ". . . although the advantage of a [retrospective] system of judicial discretion—the protection of society against injuries unforeseen by the law-giver—is recognised . . . the protection of the individual against tyranny is deemed a higher necessity."[7]

The formulation of the principle of non-retroactivity in Article 15 of the International Covenant on Civil and Political Rights has been justified as protecting the rights of the individual. According to one pair of commentators:

> ". . . the main principle of [A]rticle 15(1) . . . is that the criminal law should be applied as it stood when the offence was committed, nulla poena sine lege. The purpose of the main principle is to proscribe, and thus protect individuals against, ex post facto criminal laws operating to their detriment. The exception[8] reasonably departs from this safeguard when its purpose is absent; on the contrary, it not only allows, but prescribes the retroactive operation of the new law when it is to the individual's benefit."[9]

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[5] F. C. von Savigny, *Private International Law, and the Retrospective Operation of Statutes* (1880), p. 344.

[6] G. Williams, op. cit., p. 582.

[7] C. C. Turpin, "Criminal Law—Conspiracy to Corrupt Public Morals" [1961] *Cambridge Law Journal* 144 at 146.

[8] The exception referred to is contained in the last sentence of Article 15(1): "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

[9] T. Opsahl and A. de Zayas, "The Uncertain Scope of Article 15(1) of the International Covenant on Civil and Political Rights" [1983] *Canadian Human Rights Yearbook* 237 at 244-245.

And again, no explanation is advanced as to why the individual must be so protected, beyond the statement that the principle is ". . . based on concern for foreseeability and justice".[10]

Most proponents of the principle couch their arguments in such vague terms as "fairness" and "justice". Typical is the opinion of Sheldon Glueck in 1944:

> "To depart from the rule of nulla poena sine lege would mean to let international law sink to the depth of Nazi jurisprudence, amongst whose minor 'discoveries' is the abandonment of a rule which the rest of the civilised world quite rightly continues to hold in esteem."[11]

So, indirectly, the principle of non-retroactivity is given legitimacy by reference to ex post facto law-making in Nazi Germany (discussed below).

The Arguments Against the Principle of Non-retroactivity

If apologists for the principle of protection from retroactive criminal laws are few, then apologists for retroactivity are fewer still. Savigny makes the point that:

> "A new law is always enacted in the persuasion that it is better than the former one. Its efficacy, therefore, must be extended as far as possible, in order to communicate the expected improvement in the widest sphere."[12]

But he immediately rejects any suggestion that the expected improvement of a law should extend as far as acts which pre-date that law:

> ". . . the natural limits of this authority of a new law are indicated by the principle of non-retroactivity . . ."[13]

Williams points out that the principle of non-retroactivity is associated with the retributive theory of punishment, as opposed to the deterrent theory. If punishment is justified as a deterrent to future wrongdoing, then new laws can only apply prospectively. Unless the previous wrongdoer expected to be punished, the punishment would be useless as a deterrent. Furthermore, announcement of the change in the law should be sufficient deterrent to future wrongdoers; punishing previous wrongdoers would have no deterrent effect upon those future wrongdoers.

However, if punishment is viewed as society's retribution for moral wrongdoing, then retroactivity can be justified. As Williams puts it:

> "Morality can have no special exemption for those who 'commit the oldest sins the newest kind of ways'."[14]

This approach tends to suggest a wide role for retroactivity, a role which draws criticism:

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10 Ibid., at 252.

11 S. Glueck, *War Criminals, Their Prosecution and Punishment* (1944), p. 106.

12 F. C. von Savigny, op. cit., p. 344.

13 Ibid.

14 G. Williams, op. cit., p. 601.

> ". . . the adoption of retroactivity as a general principle is altogether inadmissible . . . it is unjust . . ."[15]

But accepting that retrospectivity has a role in the retributive punishment of wrongdoers does not mean that retrospectivity need be a general principle. Proponents of retrospectivity only argue for the making of retroactive laws in exceptional circumstances: in situations where the wrongdoer's acts or omissions were morally wrong, though legal at the time that they were committed, that is, where the wrongdoer has transgressed the "natural law".[16]

This argument is not much favoured amongst jurists because it smacks of arbitrary, and unpredictable, law-making. Yet the case studies discussed below indicate that law-makers—judges and legislators—have been prepared to take a retributive approach to punishment by ensuring that their decisions or legislation have retrospective effect. In so doing, they have accepted that there is a role for the retrospective operation of criminal law in order to punish wrongdoers whose crimes, even if legal at the time, were always immoral.

The Nuremberg Trials

Thirteen separate trials of war criminals were held in Nuremberg between 1945 and 1947. These trials were presided over by judges from all four major victorious allied powers: America, Britain, France and the Soviet Union. A total of 177 Germans and Austrians were indicted. All but 35 were found guilty: 25 were executed, 20 were sentenced to life imprisonment and 97 were sentenced to shorter prison terms.[17]

These trials represented a large-scale prosecution of Nazis, many of whom pleaded the defence of superior orders. In previous war trials, after previous wars, this defence was generally held to be available to subordinate soldiers. Before World War II, prosecutions for war crimes were limited to heads of State, and to high-ranking military commanders. The defence of superior orders was an accepted general principle of law recognised by the community of nations. In convicting lower-ranking soldiers, the Nuremberg trials were, in a sense, applying international law retrospectively. Before the trials, lower-ranking soldiers could claim that in following orders from their superiors they were not breaking any law. At the trials they were told that their actions were crimes against humanity: that their actions were criminal even though they were not in breach of international law as settled at the time that their acts were committed.

According to Williams, a number of eminent jurists severely criticised the Nuremberg trials for providing for punishment of all crimes against

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[15] F. C. von Savigny, op. cit., p. 345.

[16] This theory of law-making was reified in the much-criticised amendment of the German Criminal Code by the Nazis, discussed below.

[17] A. Palmer, *The Penguin Dictionary of Twentieth Century History* (1979), pp. 285-286.

humanity (whether or not in violation of the domestic law of the country where the acts were committed), and for declaring the waging of a war of aggression to be a crime. Both of these steps were said to go beyond existing international law.[18]

Despite these protestations, most jurists rationalised the behaviour of the Nuremberg court by claiming that the actions of the Nazis were so immoral as to be an exception to the principle of non-retroactivity. Williams claims:

> "No injustice was done at Nuremberg, because all the defendants there found guilty were clearly guilty of war crimes in the traditional sense."[19]

At this point, it is illustrative to quote from the law with which the Nazis altered the German Criminal Code in 1935:

> "Whoever commits an act which . . . deserves punishment according to the principles of criminal law and to the sound feelings of the people, will be punished."[20]

This amendment brought condemnation from jurists around the world. Julius Stone referred, some thirty years later, to "[t]he frightfulness . . . of fascist resorts to punishment of ex post facto 'crimes' . . ."[21]

It is at least arguable that finding Nazis guilty of war crimes "in the traditional sense" is as much the application of an ex post facto law as the punishing of people who deserve punishment according to the "sound feelings of the people". Few would argue that the Nazis found guilty at Nuremberg were treated unfairly or unjustly, and jurists have been loath to admit that they were tried under a retroactive law. Yet it is clear that the principle of non-retroactivity was largely ignored.

Shaw v. Director of Public Prosecutions

In 1961, the House of Lords handed down a decision which caused great consternation amongst lawyers and commentators: *Shaw v. Director of Public Prosecutions.*[22] Shaw had published a booklet called the *Ladies' Directory,* which advertised the names and addresses of prostitutes. The booklet:

> ". . . left no doubt that the advertisers could be got in touch with at the telephone numbers given and were offering their services for sexual intercourse and, in some cases, for the practice of sexual perversions."[23]

Shaw was successfully prosecuted under a number of provisions of the *Sexual Offences Act* 1956 and the *Obscene Publications Act* 1959. He

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18 G. Williams, op. cit., pp. 577-578.

19 Ibid., at p. 578.

20 *Reichsgesetzblatt* (1935) I Art. 1, quoted in S. Glueck, *The Nuremberg Trial and Aggressive War* (1946), p. 73.

21 J. Stone, *Social Dimensions of Law and Justice* (1966), p. 205.

22 [1962] A.C. 220.

23 Ibid., at 220-221.

was also convicted on a charge of "conspiracy to corrupt public morals" on the basis that, when he published the booklet, Shaw was conspiring with the prostitutes ". . . to debauch and corrupt the morals of youth and other subjects of the Queen".[24]

Shaw complained to the House of Lords, inter alia, that the crime of conspiracy to corrupt public morals was hitherto unknown or innominate. All five law lords upheld the conviction. Only Lord Reid maintained that the crime with which Shaw was charged was an existing common law misdemeanour. The other four law lords went further. They held that courts have a residual power to superintend offences which are prejudicial to the public welfare. The majority built their argument upon the notion, put forward by Lord Mansfield almost two hundred years earlier, that the courts are "guardians of public morals" and that they ought to restrain and punish ". . . whatever is contra bonos mores et decorum".[25]

Commentators were quick to criticise this decision, seeing that it had serious consequences:

> "A principle of considerable importance but disquieting possibilities was established by the House of Lords in *Shaw v. Director of Public Prosecutions* . . . It is difficult not to regard the decision . . . as a serious blow to the principle nullum crimen sine lege, 'one of the oldest and most enduring of all the ideas of Western civilisation' . . . Without it we should have what Donnedieu de Vabres calls a 'justice de circonstance, d'occasion, abandonnée à l'influence des passions individuelles'."[26]

In the earlier case of *R. v. Manley*,[27] Manley made false allegations of robbery to the police. Before the Court of Criminal Appeal she was found guilty of "unlawfully effecting a public mischief". This decision was widely attacked as being an example of ex post facto punishment, as no such crime existed before *R. v. Manley*. Courts had avoided following that case until *Shaw v. D.P.P.* provided an implied affirmation (and, in the judgment of Viscount Simonds, an express affirmation) of the decision.

Both Manley and Shaw were found guilty of having committed crimes that were not recognised as such when they committed the acts in question. These two cases have been much criticised, yet they remain as examples of how the principle of non-retroactivity has not been universally applied in British courts. In the words of Stone:

> "The vigour of [the] juristic and professional controversy [after *Shaw's* case and *Manley's* case] is a salutary reminder that ex post facto punishment is still a problem even in the legal order which was the progenitor of 'the rule of law'."[28]

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[24] Ibid., at 221.
[25] J. Stone, op. cit., p. 373.
[26] C. C. Turpin, op. cit., at 144-146.
[27] [1933] 1 K.B. 529.
[28] J. Stone, op. cit., p. 206.

"Bottom of the Harbour" Tax Evasion

In Australia in the 1970s, a complicated method of avoiding company tax became popular. This method involved either stripping a company of its assets before tax became payable, or using another company as the entity which became liable for tax but ensuring that it never had sufficient assets to pay the money owed. These schemes were labelled "bottom of the harbour" schemes because the records of the stripped companies were, figuratively, sent to the bottom of Sydney Harbour once they had served their purpose.

In the late 1970s the legality of these activities was unclear, that is, it was not clear whether these schemes constituted tax avoidance or minimisation (legal) or tax evasion (illegal):

> "It was generally believed by those in government that [this activity was not covered by existing law], although advice had been given by counsel to the Government that criminal laws relating to conspiracy to defraud under the *Crimes Act* 1914 (Cth) would comprehend such cases."[29]

In 1980 the *Crimes (Taxation Offences) Act* (Cth) made it a criminal offence for a natural person to be a party to, or aid and abet, arrangements to make a company or trustee incapable of paying its taxation debts.[30] Penalties for a breach of the Act were originally five years' imprisonment or a $50,000 fine, and in 1986 both penalties were doubled.

This Act drew much criticism. Some argued that tax evasion was not "criminal" in the generally accepted sense; that tax evaders were "white-collar" offenders, and that the harsh penalties under the Act were inappropriate. It is certainly true that tax evasion had been, during the eighteenth and nineteenth centuries, seen as something less than criminal. As the obligation to pay tax was seen as a civil obligation, any legislation which recovered unpaid tax could hardly be seen as criminal legislation. But, despite the criticism, there is no doubt that the 1980 legislation made certain tax evasion schemes criminal.

Jurists have tended to define "crime" fairly broadly:

> "Crime is . . . conduct which is recognised by the law (as made by the courts, and legislatures) as being criminal."[31]

> "It is for the lawmaker (the legislature and the courts) to determine within any given legal system what acts should be classified as criminal."[32]

It is generally accepted that liability to punishment by fine and/or imprisonment indicates that an action is criminal:

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29 A. Freiberg, "Ripples from the Bottom of the Harbour: Some Social Ramifications of Taxation Fraud" (1988) 12 Crim.L.J. 136 at 159.

30 Ibid.

31 P. Gillies, *Criminal Law* (1985), p. 3.

32 C. R. Williams, *Brett and Waller's Criminal Law, Text and Cases* (5th ed., 1983), p. 3.

> "A crime . . . is a legal wrong that can be followed by criminal proceedings which may result in punishment."[33]

The 1980 Act provided for imprisonment and fines for offenders; the intention of the legislature in passing the *Crimes (Taxation Offences) Act* was clear (and evidenced even by its short title): the "bottom of the harbour" tax evasion schemes were criminal.

In 1982 the Commonwealth Parliament passed a number of related Acts, the most important of which was the *Taxation (Unpaid Company Tax) Assessment Act.* This Act aimed to recover tax evaded under the *Crimes (Taxation Offences) Act* 1980. It was significant as it was explicitly retroactive: tax could now be recovered from "bottom of the harbour" schemes which were entered into before the 1980 Act was passed. There was some debate as to whether the 1982 Act was truly retroactive, or whether its effect was merely to recover tax which was always payable, even before 1980. Nevertheless, the legislation is generally said to have been retrospective in its operation.

One opponent of the legislation in the Commonwealth Parliament was Senator Don Chipp. Speaking against the Bill in the Senate, he said:

> "Good heavens; give politicians the chance to legislate retrospectively and we will open a Pandora's box. I find that quite frightening. On this occasion a Pandora's box is opened in the excuse of catching the filthy people who cheat on tax. It is done for a noble purpose, one might say, and I agree. But I have never been one to subscribe to the view that the end justifies the means. That sort of proposition leads one down a track which is fraught with disaster. That is the track that Adolf Hitler went down. It is the track that every tyrant in history has gone down; that is, to make illegal today something which was legal last year."[34]

In his second reading speech on the 1982 Bill, the Federal Treasurer, John Howard, justified the retrospective nature of the legislation as follows:

> "Our normal and general reluctance to introduce legislation having any retrospective element has, on this ocassion [sic], been tempered by the competing consideration of overall perceptions as to the equity and fairness of our taxation system and the distribution of the tax burden."[35]

It is interesting to note how the rhetoric of the proponents of the principle of non-retroactivity ("equity and fairness") was employed to justify a retroactive law.

Judge-made Law

All judge-made law is necessarily retrospective. Whenever a court makes a decision which settles a previously unsettled principle, or which

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[33] G. Williams, *Textbook of Criminal Law* (2nd ed., 1983), p. 27.
[34] Senate, *Debates* 1982, Vol. S96, p. 2594.
[35] House of Representatives, *Debates* 1982, Vol. HR129, p. 1866.

reverses previous cases, the person who is the subject of the case in question is affected by the newly-enunciated law. This is despite the fact that her or his acts or omissions are always committed before the decision is handed down.

In the early years of the development of the common law, courts played a considerable role in making law. Williams gives several interesting examples where English courts created crimes: public nudity (1664), blasphemy (1676), sedition (an eighteenth century extension of the law of libel), and forgery (1727).[36] But the courts' scope for making laws has been reduced in the last two centuries, mainly due to the increased role of Parliament in law-making.

Some judges have claimed that all of their decisions are interpretative: that judges do not make law, but that they extract pre-existing law from the body of the common law. As discussed above, Lord Reid in *Shaw v. D.P.P.* claimed that conspiracy to corrupt public morals was an existing crime. He, alone amongst the law lords in *Shaw's* case, claimed that he was not creating a new offence.

If a previous line of authority is overturned by a court then only one of the following conclusions can be correct: either the court is interpreting the existing law (which means that the cases overturned must have been wrongly decided), or the court is making new law. The first conclusion (from the interpretative argument) is at its most tenuous when the line of authority which is overturned is long and well established.

There is no doubt that courts retain their residual law-making power; courts of appeal would be impotent without it. The existence of this power is accepted, for the most part, without any realisation of the retrospective nature of the justice system.

Conclusion

The right to protection from retroactive criminal law is well recognised throughout the international community. Yet there are many examples, in communities which claim to espouse this right as being fundamental, where retroactive criminal laws have been made. The three examples of retroactive criminal law-making discussed above differ greatly in the extent to which each has been greeted with approval or disapproval.

The Nuremberg trials are generally said to have been fair, despite the demonstrably retrospective nature of the charges laid against the Nazi defendants. This is clearly due to society's abhorrence of the atrocities committed by the Nazis in World War II. Yet, regardless of the repugnant nature of what the Nazis did, it is clear that they were denied protection from retroactive criminal law.

Shaw, too, was convicted of a crime which was not a crime at the time that he published his "immoral" booklet. The denial of Shaw's right to protection from retroactive criminal law has not been embraced as warmly

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[36] G. Williams, *Criminal Law, The General Part* (2nd ed., 1961), p. 593.

as that of the Nazis at Nuremberg. On the contrary, the writings of jurists in the years after *Shaw's* case have tended to criticise that decision of the House of Lords.

The "bottom of the harbour" legislation fits neatly between the two previous examples. Public opinion on the fairness of that legislation would probably be divided between those who believe that the tax evaders should be brought to account, and those who hold the principle of non-retroactivity higher than punishing tax default.

In human rights conventions, the right to protection from retroactive criminal law is typically qualified by the proviso that the protection does not apply to acts or omissions which are criminal according to the general principles of law recognised by the community of nations. Yet that proviso is not applicable to any of the chosen three examples; not even to the trial of the Nazis.[37] These examples are such disparates that it is not possible to extract a common set of circumstances under which a defendant could be said to forfeit the right to protection from retroactive criminal law.

As well as these three specific examples, judges regularly make law which is essentially retrospective. Their power to do so is not questioned. But the extent to which the principle of non-retroactivity is ignored every time a judge makes law must be taken into consideration.

So, it can be seen that, despite the statement that the principle of non-retroactivity is a fundamental human right (in various statements of human rights), retroactive law has been made, and continues to be made, in societies which ostensibly accept that principle as being a right. In Australian Federal politics, the practice of "government by press release"—where legislation comes into force (retrospectively) from the date of the public announcement that the government intends to legislate —has become common.[38] This practice has drawn criticism,[39] but retroactive law-making is usually accepted, often tacitly.

Courts and legislatures have shown a willingness to adopt a retributive approach to punishment and to punish retrospectively. When judge-made law is taken into account, it is at least arguable that the human right to be protected from retroactive criminal law is as much honoured in the breach as in the observance. Its application is limited, and that limitation is unpredictable. Non-retroactivity is an important principle, but it does not deserve the status of a fundamental human right.

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[37] The defence of superior orders was generally recognised by the community of nations prior to the Nuremberg trials. The Nazis were not allowed this defence.

[38] "Opposition Makes Strong Attack on 'Media Release Laws' ", "Breakthrough in 'Legislation by Media Release' Battle", and "Senate Changes Starting Date of Tax on Non-Cash Benefits" (1989) 24(1) *Australian Law News* 9-13.

[39] Much of the criticism of "government by press release" has been directed at the length of time between the public announcement and the passing of the relevant legislation (up to three and a half years), and at differences between the details of the public announcement and the actual legislation. The retrospective nature of the legislation has not usually been attacked.