# General Assembly 4

*Research Report*

*The Question of:*

*The recognition of retroactive state responsibility (with regard to wrongful acts)*

# Introduction

Usually, one would expect the court to reach a verdict of how a prosecuted individual or state for that matter ought to be punished after committing a crime. What is it, however, that we regard as a proper verdict? One would think that the law with all of its rules covers that area. Although true to a certain extent, that is not completely accurate. Laws namely change. What if someone commits an act of which the legal consequence at the time of commitment is the one thing, but the legal consequence for the same action changes because the law has changed as well? The legal consequence can be *retroactively* (after the commitment of the action) changed into another after such a law has been passed. This basically means someone can, for instance, commit an act in 1990, which was legal when committed, but still be criminalised and punished for it in 1995.

# The Committee

General Assembly 4 is quite a plain and ordinary committee, indicating there are not exactly exceptional Rules of Procedure. General Assembly 4's issues mainly revolve around special political situations as well as decolonisation. This implies, for instance, issues about territory.

In general, the General Assembly's member states have equal representation: every single nation has one vote. Matters are decided by a simple majority. Functions and powers of the General Assembly include:

- To discuss any question relating to international peace and security
- To make recommendations for the peaceful settlement of any situation which might harm the friendly relations among nations
- To request studies and make recommendations to promote international cooperation, the development of international law, the protection of human rights, and international collaboration on economic, social, cultural, educational and health issues

Important to note is the fact that during LEMUN, money is no issue. Therefore, a delegate's possible plan proposal should not be refused because of financial reasons, as these ought not to play a role.

A peculiarity that is special for all General Assemblies is our participation in the Plenary Session. This is a session on the last day of the conference where all General Assemblies will assemble in the main hall to discuss one resolution from each General Assembly. We ourselves will also be agreeing upon one passed resolution in General Assembly 4 to have discussed at this Plenary Session.

# Key Terms

- **Retroactive**: if a law or decision, etc. is retroactive, it affects a date from before the law or decision was approved.
- **Ex post facto law**: the official term for a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law.
- **Lex mitior**: the more lenient law has to be applied if the laws relevant to the offence have been amended.
- **Criminal law**: a system of law concerned with the punishment of offenders.
- **Civil law**: the system of law concerned with private relations between members of a community rather than criminal, military or religious affairs.

# General overview

The phenomenon described in the Introduction is officially known as ex post facto law. There are several applications of such a law. The aforementioned application is in criminal law, namely criminalising an act that was legal when committed. Moreover, in criminal law, ex post facto law may retroactively categorise a crime as more severe, thus increasing the severity of the punishment also. Furthermore, such a law may add penalties or extend a sentence. It may also change the rules of evidence, making conviction of a crime likelier. Additionally, ex post facto law may have a similar effect as a pardon in certain cases, decriminalising the acts committed. It could possibly lessen or eliminate punishments also.

There are differences in how countries look upon their retroactive state responsibility concerning judicial cases. In the United States, for instance, ex post facto laws are forbidden by the constitution. This applies, however, to ex post facto laws related to criminal laws and not to ex post facto laws related to civil laws. The latter is in fact permitted. In the United Kingdom, ex post facto laws as a whole are pretty much possible. This is due to the fact that the UK doctrine of parliamentary supremacy allows parliament to pass any law it wishes to pass. In nations with a bill of rights or a constitution, ex post facto legislation may be prohibited. Generally, European countries apply the principle of lex mitior. In the case of lex mitior, ex post facto laws only apply if the new law is a milder one and the new version is more advantageous for the accused.

Ex post facto laws are widely recognised and treated by several organisations and treaties, of which the most noteworthy are mentioned below:

**Universal Declaration of Human Rights and related treaties**

Article 11, paragraph 2 of the UDHR states: *'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed.'*

**International Covenant on Civil and Political Rights**

Article 15, paragraph 1 of the International Covenant on Civil and Political Rights states: *'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.'*

**African Charter on Human and Peoples' Rights**

Article 2, paragraph 7 of the African Charter on Human and Peoples' Rights states: *'[n]o one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed.'*

**American Declaration of the Rights and Duties of Man**

Article 25 of the American Declaration of the Rights and Duties of Man states: *'[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.'*

**Arab Charter on Human Rights**
Article 15 of the Arab Charter on Human Rights states: *'[n]o crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.'*

**European Convention on Human Rights**
Article 7 of the European Convention on Human Rights states: *'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 the criminal offence was committed'* and *'This Article shall not prejudice the trial 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 civilised nations.'*

There are several examples of cases where ex post facto law has been used. Most significant is the example of the Nuremberg trials. After the Second World War, German individuals were put on trial for committing crimes against peace, crimes against humanity and war crimes. However, the soldiers claimed to be committing all those crimes while working under the order of a superior. This claim should have made the soldiers be found not guilty, for the law backed them at the time. Everyone wanted the soldiers to be punished for their crimes, however. The judges made use of ex post facto law and punished the soldiers still. This has raised many questions since. Although many were happy with the decision made, can we say the Nuremberg trials were fair? By punishing soldiers for committing immoral yet legal acts, haven't we undermined the very fundament of our judicial system? Then again, should we have let the soldiers walk away after all of their actions during the Second World War? Ex post facto law is generally prohibited, or otherwise seldom used. The Nuremberg trials are an example where the prohibition of retroactive law has been circumvented.

Opponents of ex post facto law say that prohibiting retroactive law-making contributes to the stability and certainty of the justice system. Who is to, in for instance the case of the Nuremberg trials, determine if ex post facto law is applicable or not? Another argument against ex post facto law is the fact that even people well informed about the laws at the time cannot know they are doing something illegal for the act is not deemed illegal until the retroactive law has been made. The main arguments of ex post facto law opponents come down to fairness and justice.

*An extreme example of an ex post facto law that underpins the ex post facto law opponents' opinion*

Proponents of ex post facto law argue that new laws are passed for being better than former ones. In order to reach its full potential, therefore, it must be extended as far as possible. Moreover, if society deems punishment as appropriate retribution for moral wrongdoing, then retroactivity can be justified. Proponents say that morality cannot have a special exemption for those who commit the oldest sins in the newest kind of ways. Proponents also suggest retroactive laws only need to be used in exceptional circumstances, when the wrongdoer has transgressed 'natural law'. Then again, that brings us back to the point the opponents made by saying law-making becomes unpredictable and arbitrary. Again, who's to say ex post facto law is applicable or not? The Nuremberg trials have shown, though, that taking a retrospective approach is not as unthinkable as it is sketched to be.

Although the aforementioned example of the Nuremberg trials concerns individuals, there are also cases that concern states as a whole. These mainly involve wrongful acts of governments in the past, for which retrospectively retribution is demanded. Most noteworthy is the case of the Atlantic slave trade. From the 15th to 19th century, Europeans would assist the forced migration of slaves from Africa to America. Currently, slavery is abolished and the idea of reparations for slavery has prevailed. This idea implies that some form of compensatory payment needs to be made to the descendants of Africans who had been enslaved as part of the Atlantic slave trade. Countries that were involved in slave trade, however, mainly reject this retroactive suggestion. Most countries apologise for their involvement, but appear not to be willing to add reparations in the form of payment to that.

# Major Parties Involved

This section is divided up into the nations' perspective upon individual retroactive law cases and wrongful acts of whole states, which are retrospectively disapproved of.

## Civilian cases

*Brazil*

According to the 5th article, section XXXVI of the Brazilian Constitution, laws cannot have ex post facto effects, unless, as specified in section XL in the same article, the retroactive criminal laws benefit the accused person.

*France*
Article 2 of the French Code Civil states: 'Legislation provides only for the future; it has no retrospective operation'. Technically, this prohibits ex post facto laws. However, in practice the Code Civil can be overruled by subsequent laws, which has made it so that retroactive laws can be passed within certain limits in the case of financial or tax legislation. Nevertheless, in criminal law, ex post facto laws are a no go, although an exception is made for retroactive applications benefiting the accused person.

*India*
In article 20(1) of the Indian Constitution, reaching a verdict on the basis of ex post facto laws is prohibited, but the ex post facto laws are still considered valid. Therefore, trials under an ex post facto law are not prohibited.

*Indonesia*
The Indonesian constitution prohibits trying citizens under retroactive laws in any circumstance.

*Israel*
Israel enacted the 1950 'Nazi and Nazi Collaborators (Punishment) Law' for the purpose of punishing acts that occurred during the Second World War, when Israel did not exist as a state.

*Japan*
Article 39 of the constitution of Japan prohibits the retroactive application of laws. If a new law comes in after the deed, the lighter punishment must be given according to article 6 of the Criminal Code of Japan.

*Pakistan*
Article 12 of the constitution of Pakistan prohibits any law to be given retroactive effect.

*Russian Federation*
Ex post facto law punishment in criminal and administrative law is prohibited by article 54 of the constitution; ex post facto tax laws by article 57 of the constitution.

*South Africa*
Section 35(3) of the South African Bill of Rights prohibits *ex post facto* criminal laws, except that acts which violated international law at the time they were committed may be prosecuted even if they were not illegal under national law at the time. It also prohibits retroactive increases of criminal punishments.

*United Kingdom*
Ex post facto laws are frowned upon, but permitted through the doctrine of parliamentary sovereignty. Parliament overrules all, even the European Convention on Human Rights, which deems the principle of non-retroactivity as important and of which the UK is a signatory.

*United States*

Congress is prohibited from passing ex post facto laws by clause 3 of Article I, Section 9 of the United States Constitution. States are prohibited from the same by clause 1 of Article I, Section 10.

## State cases

*Western countries*
Countries such as the United States and the United Kingdom were mainly involved in the Atlantic slave trade and, despite apologising, appear unwilling to extend their apologies with additional payments for all damage slavery has brought about. They do not seem to wish seeing states have to go that far for past wrongful acts.

*African countries*
African countries that were wronged by slave trade seek justification in any way, shape or form. That would explain why they are in favour of states taking more responsibility for their past wrongful acts and go as far even as making payments in order to compensate for the damage they have inflicted with their wrongful acts.

# Timeline of events

The table below consists of three prime examples of applications of retroactive law in the past.

| Dates | Events |
|---|---|
| **15th century – 19th century** | *Atlantic slave trade*<br>See General Overview |
| **1915 – 1917** | *Armenian Genocide*<br>The Ottoman Empire exterminated about 1.5 million Armenians, of which most were Ottoman citizens. It is also known as the Armenian Holocaust. Turkey has never recognised the disaster as being 'genocide', because they do not want to pay considerable sums of money in reparations and save themselves from the public embarrassment. |
| **1945 – 1946** | *Nuremberg trials*<br>See General Overview |
| **1962** | *Shaw v. Director of Public Prosecutions*<br>Shaw had created magazines that contained personal adverts for prostitutes. The adverts included personal contact details, photographs and descriptions of their services. Shaw was accused of, amongst other things, corrupting public morals. Although Shaw argued such a charge was not recognised by the law of England, the conviction was upheld nevertheless. |
| **1982** | *'Bottom of the Harbour' Tax Evasion*<br>In Australia in the 1970s, companies would avoid tax by stripping the company of its assets and profits before tax fell due, leaving the company then unable to pay. These were called 'bottom of the harbour' schemes, because figuratively the stripped companies would be sent to the 'bottom of the harbour'. In 1980, the Crimes (Taxation Offences) Act was passed, punishing companies applying such schemes. In 1982, the Taxation (Unpaid |

| | |
|---|---|
| | Company Tax) Assessment Act was passed, retroactively recovering tax from 'bottom of the harbour' schemes which were entered before the 1980 Act was passed. |

# Previous attempts to solve the issue

Currently, ex post facto laws are mainly forbidden, especially in criminal cases. However, the three examples of the Timeline of Events show that judges may like to divert from this stance on the matter of non-retroactivity. Public reactions differ very greatly. In the case of the Nuremberg trials, most people were happy with the Nazis being punished for all the atrocities of the Second World War they are associated with. In the case of Shaw, people widely criticised the conviction, since Shaw's actions simply complied with the law at the time. Lastly, in the case of 'bottom of the harbour' tax evasion it was mainly a clash between those who deem the principle of non-retroactivity important and those who deem punishing tax evasion important. Despite the laws against retroactivity in a wide range of human rights treaties, retroactivity is still prevalent.

# The Future

Retroactive law has been made and continues to be made in countries that ostensibly accept the principle of non-retroactivity as being a right. Important to consider will be whether that is a good thing or not.

# Important Decisions a Resolution Must Take

Non-retroactivity is an important principle, but does it deserve its status of a fundamental human right? Application of retroactive laws is unpredictable the way it is going right now, since in reality it is not prohibited as much as it is limited. A resolution should take into account whether it wants retroactive law to be more commonly accepted or more properly prohibited.

# Further Reading & Bibliography

*For more information about ex post facto law*

https://en.wikipedia.org/wiki/Ex_post_facto_law

*For more information about the three examples and pros and cons of retroactive law*

http://users.cecs.anu.edu.au/~James.Popple/publications/articles/retroactive/clj.pdf