Ius Comparatum – Global Studies in Comparative Law

Eva Steiner

Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions

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Eva Steiner
The Dickson Poon School of Law
King's College London
London, UK

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Foreword

This survey of the temporal effects of judicial decisions in different jurisdictions is welcome on several grounds. It deals with an unusual, indeed wholly exceptional situation: that in which a court finds it necessary to limit the temporal effects of its decision. Yet the practice of temporal limitations raises interesting questions of general importance. Moreover, while the practice is found in many, but by no means all, legal systems, there seems to be little common ground on the scope of the practice, or indeed on its rationale.

The most understandable category of cases is perhaps that where a court is competent to strike down legislation: a competence which is necessary in federal systems and in the European Union but which is increasingly common in other jurisdictions. In such cases, the court may be explicitly authorised to limit the effects of its judgement, as is the Court of Justice of the EU in the case of EU regulations; or even to suspend the effects of its judgement, as is the Federal Constitutional Court in Germany; and this practice of suspension is frequently adopted by the Supreme Court of Canada.

But temporal limitations may also be found where courts (normally the highest courts in the system) deem it necessary to overrule, or to depart from, earlier judicial decisions, as with prospective overruling, as adopted by the U.S. Supreme Court. Such temporal limitations may be regarded as justified where the consequences would otherwise cause injustice or severe harm, generally social, economic or financial. Or indeed such limitations may be considered necessary where, for diverse reasons, the instant decision, if not limited in its temporal effects, would have such adverse consequences.

It is difficult to categorise the situations where the question of temporal limitation properly arises, and to assess the advantages and disadvantages. But the issues are so well explored by Eva Steiner in her opening chapter and by the authors of the reports on the legal systems surveyed in this book that the temptation to discuss them in this foreword must be resisted. Suffice it to say that readers of the book will find much of interest in comparing the different national systems. They will be

led to reflect on the practical aspects of the topic and the difficulties arising, and on jurisprudential and constitutional issues, including such matters as the role of the courts, the nature of the judicial function, the role of precedent as a source of law and more widely the separation of powers between legislature and judiciary. This book is thus a valuable contribution to legal practice and to legal theory.

December 2014 Francis G. Jacobs

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About the Contributors

Gary K.Y. Chan is an Associate Professor at the SMU University, School of Law (Singapore).

Dr. Niamh Connolly is an Assistant Professor at Trinity College Dublin, School of Law (Ireland).

Humberto Dalla Bernardina de Pinho is an Associate Professor at the Rio de Janeiro State University (Brazil) and Attorney General's Assistant for the State of Rio de Janeiro.

Dr. Hildegard Rondón de Sansó is Emerita Professor at the Central University of Venezuela, Faculty of Law (Venezuela) and Judge at the Venezuelan *Corte Suprema de Justicia.*

James Douglas is Judge at the Supreme Court of Queensland (Australia).

Dr. Alejandra Rodríguez Galán is the Professor of Constitutional Law at the University of Buenos Aires (Argentina) and *General Secretarie, Asociación Argentina de Derecho Comparado*.

Ana Margarida Gaudêncio is an Assistant Professor at the Coimbra University School of Law (Portugal) and a founding member of the Portuguese Association for Theory and Philosophy of Law and for Social Philosophy (the Portuguese section of the International Association for Legal and Social Philosophy, or IVR).

Dr. Antonios Karampatzos is an Assistant Professor in Private Law at the National and Kapodistrian University of Athens, Law School (Greece) and Attorney-at-Law.

Richard S. Kay is the Wallace Stevens Professor of Law and Associate Dean for Research and Faculty Development at the University of Connecticut School

of Law. He is the editor of *European Human Rights Law: Text and Materials* (3d edition, Oxford University Press, 2008) and *Standing to Raise Constitutional Issues: Comparative Perspectives* (Bruylant, 2006) and the author of *The Glorious Revolution and the Continuity of Law* (Catholic University of America Press, 2014).

Zdeněk Kühn is an Associate Professor of Jurisprudence at Charles University, Law School (Czech Republic) and Justice at the Supreme Administrative Court of the Czech Republic.

José Manuel Aroso Linhares is an Associate Professor of Legal Theory and Philosophy of Law at the Coimbra University, School of Law (Portugal) and Vice President of the *Associação Portuguesa de Teoria do Direito, Filosofia do Direito e Filosofia Social* (Portuguese Association for the Theory and Philosophy of Law and for Social Philosophy).

Georgios Malos (LL.M., Athens and Saarbrücken) (PDipl in Economics for Competition law, King's College London) is attorney-at-law (Athens), Mayer Brown LLP (Brussels).

Dr. Patricia Popelier is the Professor of Constitutional Law at the University of Antwerp, Faculty of Law (Belgium).

Dr. Adam Sagan is an Academic Councillor at the Institute for German and European Labour and Social Law, University of Cologne (Germany).

Dr. Lionel Smith is James Mc Gill Professor of Law at Mc Gill University, Faculty of Law (Canada) and Professor of Private Law at the Dickson Poon School of Law, King's College London (England). He is also the Director of the Paul-André Crépeau Centre of Private and Comparative Law and a member of the American Law Institute, the European Law Institute, the International Academy of Comparative Law and the International Academy of Estate and Trust Law.

Dr. Eva Steiner is Senior Lecturer in French Law at King's College London, the Dickson Poon School of Law (England). She is a member of the International Association of Comparative Law, the *Société de Législation Comparée* (Paris) and the Society of Legal Scholars (United Kingdom).

Michele Taruffo is the Professor of Civil Procedural Law at the University of Pavia (Italy). He is also a member of the *Accademia dei Lincei*, the American Law Institute, the *Bielefelder Kreis*, the International Association of Procedural Law, the *Instituto Brasileiro de Direito Processual*, the *Association Henri Capitant des Amis de la Culture Juridique Française*, the *Associazione Italiana di Diritto Comparato* and the *Associazione Italiana tra gli Studiosi del Diritto Processuale.*

Dr. Sébastien Van Drooghenbroeck is the Professor at the University of Saint Louis, Law Faculty, Bruxelles (Belgium). He is also an assessor in the Council of State of Belgium.

Dr. C.H. van Rhee is the Professor of Comparative Civil Procedure and European Legal History at Maastricht University, Faculty of Law (The Netherlands). He is also a Fellow of the Maastricht European Private Law Institute, member of the European Law Institute and council member of the International Association of Procedural Law.

Dr. Wytze van der Woude is an Assistant Professor of Constitutional and Administrative Law at Utrecht University (The Netherlands).

Dr. Sarah Verstraelen is a FWO Postdoctoral Fellow at the University of Antwerp (Belgium).

Chapter 1
Judicial Rulings with Prospective Effect-from Comparison to Systematisation

Eva Steiner

Abstract Overruling of earlier decisions, when it occurs, operates retrospectively with the effect that it infringes the principle of legal certainty through upsetting any previous arrangements made by a party to a case under long standing precedents established previously by the courts. On this account a number of jurisdictions have had to deal in recent past with the prospect of introducing in their own systems the well-established US practice of prospective overruling whereby the court may announce in advance that it will change the relevant rule or interpretation of the rule but only for future cases. However, adopting prospecting overruling raises a series of issues mainly related to the constitutional limits of the judicial function coupled with the practical difficulties attendant upon such a practice.

This opening chapter is an attempt to provide some answers to these issues through jurisprudential and comparative analysis. The great reservoir of foreign legal experience furnishes theoretical and practical ideas from which national judges may draw their knowledge and inspiration in order to be able to advise a rational method of dealing with time when they give their decisions.

The Backdrop of Prospective Decision-Making-A Brief Introduction

The question of the temporal effects of judicial decisions needs to be considered in the context of today's unprecedented growth in domestic case law and the continuing increase of overruling decisions resulting from the implementation of new policies and rapid changes in societal conditions and values. These constant changes in the law arising from the necessity to address current needs interfere with the intertwined principles of legal certainty and legitimate expectations which are emphasized today in a variety of contexts, both in national and supra-national

E. Steiner (✉)
The Dickson Poon School of Law, King's College London, Somerset House Strand, London WC2R 2LS, UK
e-mail: eva.steiner@kcl.ac.uk

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jurisprudence.[1] As a result of the tensions between the unavoidable continual restatement of legal rules and the desirable stability and predictability of the law, the controversy on the unjust consequences caused by the retrospective application of court decisions which depart from established precedent have reopened today.

It is common ground that judgments are retrospective in operation since judges adjudicate on past facts and conducts i.e. those which gave rise to the dispute. The necessary retrospective operation of court decisions is notoriously problematic when a court invalidates legislation, announces a new interpretation or introduces a novel doctrine or principle. When this happens it has the consequence of upsetting any previous arrangements made by the parties to a case under long-standing precedents previously established. One of the manifestations of the principle of legal certainty is that individuals are entitled to rely upon the rules as they were stated at the time they made these arrangements rather than the rules which are laid down at the time of the judgment. The law can only be certain when citizens know what to expect. On the other hand, it falls within the function of the courts to keep the law up to date by continually restating legal rules and giving them a new content. Since the power of adapting the law to social changes has been left in part to the judiciary, how could the seemingly unfairness caused by the necessary retrospective effect of an overruling decision be reconciled with the evolutionary nature of the judicial process?

In view of this difficulty, common and civil law jurisdictions have had to reflect in recent years on the possible introduction in their legal system of the well-established US practice of prospective overruling whereby a court has a power to announce in advance a new better rule or interpretation for future cases whenever it has reached a decision that an old rule established by precedent is unsound. More specifically, prospective overruling is a device whereby an appellate court limits the effect of a new ruling to future cases only or, more commonly, to future cases plus the case before the court which presents the opportunity for the announcement of the change.[2]

This technique can be traced back in the American jurisprudence of the turn of the twentieth century.[3] Early expositions of the idea in American legal writing show that, at that time, writers were mostly concerned with the hardship caused by the retroactivity of overruling decisions in sensitive areas such as criminal law

[1] Legal certainty is a multifaceted concept which includes aspects such as the non-retroactivity of law, the protection of legitimate expectations, the fact that statutory law should be precise, clear, accessible and known in advance by citizens. The principle of legal certainty is recognised by the majority of European legal systems including the European Court of Justice (*Defrenne v. Sabena*, 1976) and the European Court of Human Rights (*Marckx v. Belgium*, 1979). Academic writing on legal certainty in the context of EC and EU laws includes Raitio, J. (2003) *The Principle of Legal Certainty in EC Law*. Springer.

[2] The expression 'prospective overruling' will be used throughout the discussion in a broad meaning of prospective operation of judicial decisions, including constitutional invalidation of legislation.

[3] For a detailed account of early American literature see, Levy, B. H. (1960) Realist Jurisprudence and Prospective Overruling. *The University of Pennsylvania Law Review*, *109:1*, 1–30.

contract and property rights.[4] But it was in Justice Cardozo's opinion in the 1932 US Supreme Court *Sunburst* case where the technique of prospective overruling was presented as a distinct and legitimate method of deciding cases. In *Sunburst*, the question raised by the appellant was whether it was constitutionally permitted for a court (here the Supreme Court of Montana) to pronounce a new rule of law as the correct rule but nonetheless apply the old rule in deciding the case at hand. Justice Cardozo held for a unanimous court that it was not a denial of due process for a court to adhere to a precedent in an adjudicated case and simultaneously to state its intention not to adhere to this precedent in the future:

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed, there are cases intimating, too broadly, that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted.[5]

Today prospective overruling is a much debated issue in so far as it questions the constitutional limits of the judicial function. One of the main objections addressed to this technique is that rulings having only prospective effect can only be characterized as mere dicta and giving such a power to judges would amount to the judicial usurpation of the legislative function.[6] The practical difficulties attendant upon such a method should not be ignored either. In particular, prospective overruling can create on its own more injustice and instability in the law than the mischief it intended to mitigate. In certain circumstances it can discourage litigants from challenging an old rule. It can also lead to inequality of treatments between the successful claimant and other persons placed in the same legal situation.

These questions and difficulties invite a fresh inquiry- both in theory and judicial practice- into the technique of prospective overruling, and more broadly the prospective application of judicial rulings. This introductory chapter owes a lot to the foreign legal reporters who have offered their precious collaboration and have provided sources and material from their home jurisdiction on the subject. These national reports were essential to appreciate that, whilst attempts have been made to introduce prospective effect in appropriate cases, it remains a limited practice across jurisdictions. In view of this relatively modest use of the technique, the main objective of this chapter is to possibly define common principles apt at generating a more systematic, and therefore 'reassuring,' approach to prospective overruling. Indeed even if the models of judicial rulings with prospective effect which have been proposed in relevant legal systems are based on criteria and rationales which can be

[4] See, Freeman, R. H. (1918). The Protection Afforded Against Retroactive Operation of an Overruling Decision. *18 Colum. L. Rev.*, 230.

[5] *Great Northern* Railway *Co. v. Sunburst Oil & Refining Co*, 287 U.S. 358 (1932). See also Cardozo, B. N. (1921). *The Nature of the Judicial Process*, Yale University Press, esp. pp. 142–49.

[6] See Lord Devlin. (1976). Judges and Lawmakers. *Modern Law Review, 39:1*, 1–16.

held satisfactory (2), the extent to which these justifications change the nature of the judicial function is still uncertain (3). In view of this uncertainty, some suggestions for a more systematic approach to the prospective operation of judicial decisions will be offered in the last part of this chapter (4).

Models of Judicial Rulings with Prospective Effects

Comparative Observations

Unlike the US where the question of temporal effects of judicial rulings was considered early on, other major jurisdictions in the world, essentially from civil law tradition, addressed this issue much later. The prevalent narrative in most civil law jurisdictions has always been that, unlike parliamentary legislation, judicial decisions are not proper sources of law and therefore do not create *legal rules*. Since the power to make substantive law is vested exclusively in the legislature, civilian courts cannot make law but are bound to decide cases according to the best understanding of the law established by legislation and custom. This sharp distinction operated between courts' decisions and legislative enactments has always carried with it the consequence that, whereas new legislation does not operate retrospectively, new judicial rulings are essentially retroactive. Furthermore, in civil law systems, where there is no doctrine of *stare decisis* and precedents are not formally binding, it is more difficult to know when a change has taken place since *jurisprudence* arises out of an accumulation or repetition of decisions in the same direction. Therefore, the precise moment when a judicial rule or interpretation has been modified is often difficult to determine. Overruling decisions are generally easier to identify in common law systems where judicial rulings are given official status through the operation of the doctrine of *stare decisis*; in such circumstances a single judgment is sufficient enough to give rise to a ruling with binding effect for the future.[7] Having said that, even in common law systems where precedents

[7]Precedents being less *certain* in the civil law than in the common law is not a new claim. See Roubier, P. (1960). *Le Droit Transitoire* (*Les Conflits de Lois dans le Temps)*. Paris: Dalloz &Sirey, at p. 26; also, Goodhart, A. L. (1934) Precedent in English and Continental Law. *The Law Quarterly Review, 50:*40–65, at pp. 58–59, who argues that in common law jurisdictions there seems to be a stronger reluctance to abandon precedent. For Goodhart, in the common law tradition, 'the most important reason for following precedent is that it gives us certainty in the law.' 'It is better than the law should be certain than that every judge should speculate upon improvements in it' (quoting the Earl of Halsbury L.C. in *London Street Tramways Co v. London County Council* [1898] A. C. 375).

Note however that today, overruling may be more detectable in civil law systems when changes of case law are decided in full chamber. A superior court may decide to sit in full if the issues raised are considered to be of exceptional importance. See the example of the Czech Supreme Court in Kuhn, Z. Towards a Sophisticated Theory of Precedent – Prospective and Retrospective Overruling in the Czech Legal System (This book).

are considered to be proper sources of law, the declaratory theory derived from Blackstone's famous dictum that judges do not create law but merely discover it had the effect to hamper the reflection about the temporal effect of judicial decisions.[8] And, even though the traditional declaratory approach has not remained unchallenged in modern time, there is still a deep seated belief that courts have only the power to grant retroactive relief, only the legislature is entrusted with the power to fashion new laws for the future.[9] It is clear from the foregoing that in a system where the declaratory theory remains persuasive and judicial rulings operate retrospectively there is little chance for the doctrine of prospective overruling to take root.

One might be tempted to draw from these general observations the conclusion that the diversity of approaches towards precedents has influenced the way individual legal systems deal with this issue. Whereas this is to a certain extent true, it also appears that the categorizations and distinctions made in various jurisdictions transcend the traditional division between common and civil law systems. In fact, the decision as to the backward or forward application of judicial rulings is primarily dependent on the nature and factual circumstances of the case at hand and is mainly based on considerations of convenience or on sentiment of justice; and most of the time the outcome of a particular dispute rests on the balancing of the diverse interests involved rather than on a rigorous application of established criteria.

[8]Blackstone, W. (1765). *Commentaries on the Laws of England*. 1, pp. 69–70. Against the declaratory theory see, Lord Reid. (1972). The Judge as Law Maker. *12 Journal of the Society of Public Teachers of Law*, 22–29, at 22 : '*There was a time when it was thought almost indecent to suggest that judges make law-they only declare it . . . but we do not believe in fairy tales anymore.'* The declaratory theory has been rejected in some common law based legal systems such as Singapore. See the comments made on the 2010 Court of Appeal judgment in *Review Publishing Co Ltd v Lee Hsien Loong* by Chan, G.K.Y. Prospective Overruling in Singapore: A Judicial Framework for the Future? (this book). At the other end of the spectrum is Australia where the declaratory theory remains to this day persuasive. See Justice J. Douglas and als. Judicial Rulings with Prospective Effect in Australia (this book).

[9]This is discussed further in Part 3 below. One of the most emphatic attacks against prospective overruling seen as a device which 'turns judges into undisguised legislators' is by Lord Devlin (1976), op cit at 6. '*Courts in the United States have begun to circumvent retroactivity by the device of deciding the case before them according to the old law while declaring that in the future the new law will prevail . . . I do not like it. It crosses the Rubicon that divides the judicial and the legislative powers.'* See also the rejection of prospective overruling by the High Court of Australia in *Ha v New South Wales* [1997] HCA 34 on the grounds that it is 'inconsistent with judicial power..' and that 'the adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power.' Contrast with Lord Nicholls' opinion in *National Westminster Bank plc v Spectrum Plus Ltd and others* [2005] UKHL 41 concluding (at 39) that prospective overruling can sometimes be justified as 'a proper exercise of judicial power.'

Types of Judicial Rulings with Prospective Effect

The expression *judicial rulings with prospective effect* in a broad meaning encompasses three types of situations: (a) the situation where a court decides on the temporal application of a change of ruling in respect of a validity of a statute; (b) the situation where a court decides on the temporal application of a change in respect of the meaning or operation of a statute (either in the absence of transitional provisions in the statute itself or when their meaning is unclear); (c) the situation where a court decides on the temporal application of a change in respect of a judicial rule (overruling). In these three types of situations the court may announce its decision prospectively.

There is a strong argument that in the event of a statute being silent about the temporal effect of its provisions (b) it should be for Parliament, not judges, to remedy this defect. However, the practice of the courts on the subject of prospective effect does not offer a neat distinction between judicial rulings dealing with statutory law and those concerned with judge-made law.[10] Therefore, in the following discussion the expression 'prospective overruling' will be used in both instances.

The forms prospective overruling may take include, first, *pure prospective overruling*.[11]

Judges adopt *prospective overruling* in its 'purest' form when they declare that a new precedent is confined to future cases arising from events occurring after the announcement of the new holding; the dispute at hand being governed by the old ruling. This generally occurs in circumstances where the immediate application of the new ruling would be particularly harsh on the parties before the court. In such circumstances the principle of legitimate expectation in the continuing application of the previous case law would be particularly at risk. This model will be typically used in cases where the protection of public rights or civil liberties is at stake. A fairly common illustration is when a court overrules a past precedent by giving a new interpretation on statutory time limitations for a particular class of actions with the consequence that such a change would deprive a party to a pending case from having his case heard in court if applied immediately. Therefore, if as the consequence of such a ruling the plaintiff's action would be time barred, the court may apply the new interpretation prospectively, thus preventing the plaintiff's action to be denied as inadmissible. This has happened notably in the context of time limit for actions for defamation. For example, in France, the Court of Cassation took upon itself to overrule prospectively a former interpretation of a time-limitation rule for libel in

[10]Cardozo himself thought there was no adequate distinction to be made between changes of rulings concerning statutes or common law. See Cardozo (1921), op cit at 5, pp. 148–149.

[11]For an excellent exposition on the forms of prospective overruling, see Lord Nicholls' opinion in *National Westminster Bank plc v. Spectrum Plus Ltd and others* op cit at 9; see also a much earlier study by Fairchild, T. E. (1967–1968). Limitation of New Judge-Made Law to Prospective Effect Only: Prospective Overruling or Sunbursting. *Marquette Law Review*, *51: 3*, 254–270.

a case where a radio station was sued for breach of the principle of presumption of innocence against a lawyer charged for professional misconduct.[12] In this case, not applying prospective overruling would have denied the defendant in the case to seek remedy in court and thus deprived her of her right to a fair trial within the meaning of article 6 § 1 of the European Convention on Human Rights.[13] Similar solutions can be observed in other jurisdictions where an issue of time limitation or availability of review is raised in a case together with a breach of a fundamental right.[14]

However, despite the foregoing, *pure prospectivity* remains an exceptional device for three compelling reasons. One is that, if used too often, it would hamper the normal course of legal development through case-law. In some jurisdictions the courts themselves stress this point by declaring in the text of their judgment that the appellant *has no vested rights* to courts decisions remaining unchanged.[15] Secondly, litigants would have no incentive to sue or appeal if they knew in advance that overruling would not improve their situation. Finally, for a court to merely announcing a new rule without applying it to the case at hand is equivalent to a *mere dictum* and thus faces the objection that in so doing judges act as legislators. This objection is considered further in part 3 of this chapter.

Other forms of prospective overruling are more limited and selective in their departure from the normal effect of court decisions. A common variation of prospective overruling is what has been termed *limited pure prospectivity* or *qualified prospective overruling* or *selective prospectivity*, whereby a new ruling applies not only to future cases but also to the instant case (*ex nunc*) but return to the old rule for all cases predating this decision including cases still open for review. A

[12] *Radio France SA*, Cass. 2, 8 July 2004, D. 2004, 2956.

[13] Same solution applied in similar circumstances two years later in the 2006 case of *Le Provencal v. Mme Véronique X*.

[14] In the Czech Republic, see judgment of 5 August 2010 relating to the statutory limitation of a defamation claim; see also, Supreme Administrative *Court, Gaudea v Czech National Bank* 17 December 2007, both cited in Kuhn, Z. op cit at 7. See also the 1986 Argentinian case of *Tellez* commented upon in Rodríguez Galán, A. Judicial Rulings with Prospective Effect in Argentina (this book).

[15] See in France, Court of Cassation, 9 October 2001, '*l'interprétation jurisprudentielle d'une même norme à un moment donné ne peut être différente selon l'époque des fait considérés, et nul ne peut se prévaloir d'un droit acquis à une jurisprudence figée'*; in Court of Cassation, 25 June 2003,'*la sécurité juridique ne saurait consacrer un droit acquis à une jurisprudence immuable, l'évolution de la jurisprudence relevant de l'office du juge dans l'application du droit.'* In Argentina, the *Sanchez* judgment, commented upon in Rodríguez Galán A op cit at 14, denies the appellant '*any vested right to court decisions being maintained throughout the stages of a law suit*..' in response to the appellant's objection to the retroactive application of a new precedent in his case. Similar declarations are common in Germany; the Federal Constitutional Court held in 2004 that the fundamental right of equality before the law under article 3 (1) of the Basic Law does not grant an individual entitlement to the continuation of a line of case law that the courts no longer hold to be correct. See Sagan, A. Changing the Case Law Pro Futuro in Germany – A Puzzle of Legal Theory and Practice (this book).

significant drawback with this model is that the new precedent does not necessarily (although it might) apply to other similar cases pending before the courts and is thus tantamount to inequality of treatment between litigants in similar position. This cannot be a satisfactory outcome in view that equality of application of the law is a manifestation of the principle of legal certainty as well as being a component part of the rule of law.[16]

In view of the foregoing criticisms addressed to prospective overruling, would a better approach to the question be to abandon the term *prospective* and use instead the phrase *non-retroactive overruling* as has been done in some jurisdictions both in their judicial practice and academic writing? This seems to be a better description of what a court actually does when confronted with the temporal effect of its decision. Non-retroactivity entails acting upon the *backward* application of a new principle of law in a way which fits the particulars of the situation in dispute. Seen from this angle, it becomes apparent that a court determines the outcome in relation to particular facts. *Non-retroactive overruling* thus becomes a judicial tool fashioned to mitigate the adverse consequences of judicial changes and a proper method of deciding cases. Presented this way it appears to be more consistent with what is expected from judges and therefore is most prone to promote consensus between judicial activists and those in favour of judicial restraint. *Non-retroactivity* is now examined in more detail.

Criteria for Limiting the Retrospective Effect of Judicial Rulings

Judges tend to proceed pragmatically when issues of prospective application arise. The idea of justice and the practical administration of society prevail over formal logic. Most of the time justification for non-retroactivity takes the form of a set of policy considerations raised by each particular dispute courts have to resolve. The principles of reliance, legal certainty, legitimate expectations and fairness are commonly cited in civil cases to support non-retroactivity; similarly, fair warning and due process of law are used in criminal proceedings; in the area of public law, the potential disruption in the running of public services justifies that constitutional rulings of invalidity do not operate retrospectively.

Deeper concern about the jurisdictional or theoretical basis of the ruling that operates prospectively may sometimes lead to the articulation of a number of proper factors or set of guidelines provided by the court itself to limit retroactivity. A typical illustration is the three factor retroactivity test laid down in 1971 by the US Supreme Court in *Chevron Oil Co v. Huson*. This test requires a three-part analysis as described by Justice Stewart in his opinion:

[16]See the US case of *Harper v. Virginia Department of Taxation*, 509 US. 86, 97 (1993) where selective prospective application was rejected on these very grounds.

> In our cases dealing with the non-retroactivity question, we have generally considered three separate factors. First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."[17]

A second illustration is provided by the European Court of Justice. In *R (Bidar) v. Ealing London Borough Council* where the Court sitting in Grand Chamber reiterated its basic approach that in defined circumstances it may exceptionally limit the temporal effect of a ruling:

> The court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other member states or the Commission may even have contributed . . .[18]

A final example of proposed guidelines in respect of prospective effect is the list of recommendations made by the special working committee set up in the early 2000s by the French Court of Cassation. In its Report to the Court the working group suggested that, in narrowly defined circumstances, decisions of the Court might be applied 'non-retroactively'[19] Without setting out any formal factors or criteria to be taken into account when considering whether a new ruling by the Court should apply retrospectively or not, the committee nevertheless recommended that the Court should limit the retrospective temporal effect of its ruling where there was (i) a strong motive of general public interest or (ii) a manifest disproportion between the general benefits attached to the retrospective effect of a court ruling (e.g. the

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[17] *Chevron Oil and Co. v. Huson*, 404 U.S. 97 (1971). Under the influence of Justice Scalia, a fervent advocate to a return to the Blackstonian declaratory model of adjudication, the Supreme Court has, since, retreated from prospective judgments in a series of 1990s decisions dealing mainly with federal law. See *Harper*, op cit. at 16. On these developments see Kay, R.S. Retroactivity and Prospectivity of Judgments in American Law (this book).

[18] [2005] 2 WLR 1078, 1112, at 66; in the 1976 landmark case of *Defrenne v. Sabena* ECR 455, concerning the application of article 119 of the EEC treaty, the Court already conceded to limit the temporal effect of its decision in view of the possible economic consequences of attributing direct effect to the provisions of article 119. It decided that' *the direct effect of article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim*'(at 75).

[19] Molfessis, N. (2005) *Les Revirements de Jurisprudence. Rapport remis à Monsieur le Premier Président Canivet*, Paris: LexisNexis.

fact that persons in like cases are treated equally) and the potential unfairness such a retrospective change in the law would occasion to the parties involved. The working group further recommended procedural safeguards in so far as prospective overruling could only be applied by the Court of Cassation itself which, for this purpose, should, first identify clearly and explicitly the meaning and scope of its new ruling in the case at hand and, secondly, allow each party to the case to put forward their respective views on whether to overrule a previous decision retrospectively or prospectively.

Constitutional Declaration of Invalidity

Special difficulties have been encountered in constitutional cases where a constitutional court strikes down legislation, or a longstanding program, or institution, as being unconstitutional.[20] Such declarations of invalidity may dramatically upset the running of public services or jeopardize the legitimate expectations of a category of citizens if they are given full retroactive effect. Two striking examples can be given to illustrate this point. One is the American case of *Brown v. Board of Education* where the US Supreme Court ordered in 1955 the dismantling of racially segregated schools in several states. Removing retroactively illegal schools under this new ruling would have affected the lives of thousands of pupils, parents, teachers and employees.[21] Similarly, in the 1985 Canadian *Manitoba Language Reference* case, where the Supreme Court held that the Constitution required that the province of Manitoba legislation be enacted in English and in French, the Court ruling had the potential effect to invalidate all of the statute law of the province which, following the common law tradition, was only enacted in English. Thus, applying the declaration of invalidity retroactively would have left the province without laws and posed serious disruption in the legal system.[22]

In order to avoid undesirable consequences in similar circumstances of invalidity, a first solution consists of applying prospectively the declaration of invalidity to cases in which the issue was raised as well as to future cases. As a consequence, despite the fact of the statute being deemed not to have existed at all, the decision of invalidity will not fully operate retroactively. Many authors have pointed out the conceptual difficulty here. Indeed, where a ruling of unconstitutionality is applied prospectively it necessarily means that the courts are upholding an unconstitutional law, albeit only for a limited period of time.[23]

[20]The remarks that follow are also relevant in the context of annulation of administrative decisions where, in order to avoid administrative chaos, the court may issue a declaration prospectively.

[21]See Kay, R.S. op cit at 17.

[22]See Smith, L. Canada: The Rise of Judgments with Suspended Effect (this book).

[23]See G. Chan op cit at 8 on Singapore, a jurisdiction where this very point has been widely discussed in academic writing.

A slightly different approach from prospective effect is the *suspension* of the declaration of invalidity until a certain date, thereby allowing the legislature to enact valid legislation during the defined period.[24] Suspension of the nullified provisions for a defined period entails the maintaining of these provisions, or some of them, in the legal system in order to prevent a legal vacuum.[25] It is interesting to note that in the European Court of Justice tax case of *Banco Popolare di Cremona v Agenzia Entrate Ufficio Cremona*, Advocate General Jacobs proposed the suspension approach in respect of the Court's rulings, suggesting that the retrospective and prospective effect of a ruling of the Court might be subject to a temporal limitation that the ruling should not take effect until a future date, namely, when the State had had a reasonable opportunity to introduce new legislation.[26]

Contrary to the prospective and suspensory approach, a more orthodox view militates in favour of invalidity *ab initio* (*ex tunc*) each time a statute is found unconstitutional. In this respect, Irish law is of particular interest in that it highlights the particular dilemma posed by unconstitutional statutes where judges are faced with a choice between two unsatisfactory options; one being to declare the unconstitutional statute void *ab initio*, which may lead to unjust and chaotic consequences;

[24]For example, in France, the 1958 Constitution, art. 62 provides that when a provision is declared unconstitutional following a challenge by a citizen in an ordinary court and its referral by the latter to the Constitutional Council (art. 61–1 of the Constitution), "it shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by the said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge (*Une disposition déclarée inconstitutionnelle sur le fondement de l'article 61–1 est abrogée à compter de la publication de la décision du Conseil constitutionnel ou d'une date ultérieure fixée par cette décision. Le Conseil constitutionnel détermine les conditions et limites dans lesquelles les effets que la disposition a produits sont susceptibles d'être remis en cause)*".

[25]See further the decisions of the Federal Constitutional Court of Germany cited in Sagan, A. op cit at 15. Also, the Supreme Court of Canada in the Manitoba Language Reference case. See Smith L. op cit at 22. Suspensory declarations of invalidity are also known in Ireland. See Connolly, N. The Prospective and Retroactive Effect of Judicial Decisions in Ireland (this book). In Venezuela, such constitutional rulings are referred to as *deferred unconstitutionality* and *temporary or interim constitutionality'*. See Rondon de Sanso, H. Judicial Rulings with Prospective Effect in Venezuela (this book).

In some jurisdictions the power to suspend a declaration of invalidity and maintain the consequences of invalidated legislation is established by constitutional legislation itself. Such is the case of Belgium in article 8 of the 1989 Special Law on the Constitutional Court which states: "... Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court." See further on this point, Verstraelen, S. and als. The Temporal Effect of Judicial Decisions in Belgium (this book).

Suspension may also be designed in exceptional circumstances to delay for a short period the order for release of a person held unlawfully – but who poses threat to himself or others – in order to allow the authorities to remedy the illegality affecting the basis for the detention See for instance the Irish case of *FX v Clinical Director of the Central Mental Hospital (2)* [2012] IEHC 272 commented upon in Connolly, N. op cit.

[26]Opinion of Advocate General Jacobs, case C-475/03, 17 March 2005, at 72–88.

a second option consisting of limiting the retrospective effect of the declaration of constitutional invalidity which runs counter the principle that unconstitutional law cannot be effective. Such a difficulty was manifest in two Irish leading cases, *Murphy v. Attorney General* and *A v. Governor of Arbour Hill Prison*, where the issues raised by invalidity were considered at length.[27] A possible way to escape such a theoretical conundrum would be to follow the solution frequently adopted by the German Constitutional Court whereby, instead of annulling the norm with immediate consequential retroactive effect, judges deliver a mere declaration of incompatibility subject to a future date before which no litigant may rely on the incompatibility in any claim against the State. In practice this has the same effect as a suspension order but, in theory, it is more consistent with the division of law making authority in so far as the court does not directly address or deal itself with the validity of the norm; the legislature is ultimately in charge of removing the norm from the statute book.

The Irish cases of *Murphy* and *A* further highlighted the problem posed by a potential, albeit limited, right to redress for harm caused pursuant to unconstitutional legislation, especially in overpaid taxation cases such as *Murphy*. Since a finding of unconstitutionality operates *erga omnes* (in relation to all), its benefit not being confined to the litigant in the case at hand, it may lead to further abundant litigation and have *potential catastrophic consequences* in the event of full redress being granted.[28] This would not be the case with the other above-mentioned models of declaration of invalidity since limiting a declaration of unconstitutionality to prospective effect only has the consequence of denying a remedy.

More generally, such difficulties in dealing with declarations of invalidity may have adverse consequences on the upholding of the rule of law in a legal system. Thus, it has been argued that if a finding of unconstitutionality had these devastating consequences for society in general and the legal system in particular which the courts found themselves unable to control, then this would inevitably impact on the practical willingness of the courts to make such a finding of unconstitutionality.[29]

Prospective Overruling and the Nature of Adjudication: Judges as Legislators?

The question of prospective application of judicial decisions is inevitably interconnected with jurisprudential issues such as the concept of law, the nature of precedent and the role of the judicial branch in the law making process. From a

[27]Both cases are examined in detail in Connolly, N. op cit at 25.

[28]The expression is used by Denham CJ in *DPP v. Jason Kavanagh, Mark Farrelly & Christopher Corcoran*, [2012] IECCA 65.

[29]See Hogan J in *FX v. Clinical Director of the Central Mental Hospital* (no2) [2012] IEHC 272, 21.

comparative perspective the sharing of legislative power between legislators and judges greatly varies from one legal system to another in accordance with domestic constitutional theory, existing legal rules and local practice relating to the binding force of precedents, the characteristics and status of the enacted law and the wider or narrower freedom of judicial interpretation. Notwithstanding these differences, a widespread depiction of judges who decide prospectively is that they bear too much resemblance to a legislator. Such a picture clashes with the still prevalent tenet that judges find the law, they do not make it. Judges themselves are very often eager to show restraint and rarely concede that they *make* law. This approach has as its theoretical basis the so-called declaratory theory – referred to earlier in this chapter – whereby judges do not make or change law: they simply discover and declare the law which is throughout the same. Consequently, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. Following this view, any attempt to limit the retrospective effect of judicial decisions is seen as a potential violation of the principle that judges do not create rules and are primarily bound by statutes. Today the principle of separation of powers between the legislature and the judiciary prevails over the declaratory theory in the discussion of judicial rulings with prospective effect. Thus, it is often argued that prospective overruling is outside the constitutional limits of the judicial function. In *National Westminster Bank plc v. Spectrum Plus ltd* Lord Nicholls summarized as follows the constitutionally based argument against prospective overruling:

> Prospective overruling robs a ruling of its essential authenticity as a judicial act. Courts exist to decide the legal consequences of past events. A court decision which takes the form of a 'pure' prospective overruling does not decide the dispute between the parties according to what the court declares is the present state of the law. With a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as thus declared to the parties to the dispute before the court. The effect of a prospective overruling of this character is that, on the disputed point of law, the court determines the rights and wrongs of the parties in accordance with an answer which it declares is no longer a correct statement of the law. Making such a ruling would not be a proper exercise of judicial power in this country. Making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges.[30]

As mentioned earlier in this chapter, the difficulty with statements such as this is that as long as judges are perceived as mere interpreters of the law with no normative power attached to their decisions, prospective overruling will not achieve the status of a legitimate form of judicial decision-making.

The claim that judges do not create rules has been so widely challenged that it seems unnecessary and time consuming to reopen here the discussion on the subject, except perhaps to say that the lawmaking role of judges has been much more evident since the coming into force of bills of rights. These bills have had the effect of limiting the legislative competence of Parliaments around the world through invalidation by courts of parliamentary statutes which are found incompatible

[30]Op cit at 9, 28.

with the basic rights of the citizens. In such a new legal environment, it seems chronologically misplaced to contend that judges do not act as legislators. In fact, the more we observe the workings of the judicial process today, the more it becomes obvious that judges are indeed lawmakers.

Indeed, a realist, non-formalistic examination of the judicial process reveals the following elements:

1. **All major legal systems recognize the power for judges to legislate between gaps.**

   Judges fill the spaces left open by the legislature within the limits of their competence. This shows that they indubitably engage in judicial legislation even though legislative responsibility is ultimately assigned to the legislative authority.
2. **As much as statutory law, case law displays elements of generality.**

   In giving a judgment what a court does is twofold: it resolves a legal dispute and it makes a statement of law. A court decision is therefore made of elements of particularity as well as elements of universality. This general aspect of judicial rulings is particularly relevant when it comes to the temporal effects of judgments. Thus, in a legal system based on the premise that decided cases make law for the future, court decisions will necessarily have a prospective effect; and even in a system where precedent is not formally classified as a source of law and is merely persuasive and not binding, the prospective aspect remains a characteristic feature of the judicial process.
3. **Case law plays a major role in both common and civil law countries.**

   To exclude case law from the concept of *law* not only strikes at the very roots of the common law legal systems but also undermines the legal systems of civil law jurisdictions where statutes are rarely applied in isolation. Without judicial intervention defining the meaning and the scope of legislative rules it would very often be impossible to implement statutory provisions. In civil law systems, the complementary nature of legislation and case law has been particularly emphasised by a French jurist, Boulanger (1953): *La jurisprudence c'est la loi interprétée, modifiée, complétée* (case law is nothing other than the interpretation, the alteration and the finishing touch of enacted legislation).[31] Elsewhere, Boulanger (1961) further argues that precedents are *an integral part of the legislative text itself*.[32] Following this view, a change of case law is equivalent to an amendment to the statute itself, including all temporal effects any statutory amendments traditionally enjoy.[33]

[31] Boulanger, J. (1953). Jurisprudence. In *Répertoire de Droit Civil*. Paris : Dalloz.

[32] Boulanger, J. (1961). Notations sur le Pouvoir Créateur de la Jurisprudence Civile. *RTDC 59*, 417–441.

[33] It may be added to conclude on this point that changes in case law are known and commented upon just like new legislation and most agencies and individuals rely upon judicial decisions to arrange their affairs.

4. **From a definitional stand point the concept of law in a substantive or material (as opposed to formal) meaning necessarily includes case law.**

   The view that being bound by law implies being bound both by law in a formal sense and by other sources such as precedents is sustained in a number of jurisdictions. A noticeable example is the European Court of Human Rights which has always understood the term *law* in its substantive sense, not its formal one, so as to include both statutes and unwritten law such as case law.[34]

5. **That judges are lawmakers can further be emphasized from a functional standpoint by drawing an analogy between the judicial and the legislative functions.**

   At the turn of the twentieth century, the French jurist F. Gény (1919), in his seminal work on legal sources and methods of interpretation, had already shed some light on how the *process of research* which is imposed upon judges in finding the law is very similar to that incumbent on the legislator itself.[35] Despite the process of research in the case of a judge being set in motion by some concrete situation, judges have still to consider both justice and social utility before reaching their decision; these are considerations which dominate legislative activity as well. In short, judges shape their judgment of the law following the same aims as those of a legislator proposing to regulate a question. To express it differently, judicial rulings are *functionally* comparable to legislative rules. This functional aspect is considered further in the following point.

6. **Lawmaking and adjudication are essentially processes in which a reconciliation of competing interests needs to be achieved**.

   Both in legislation and decision-making the social interests served by symmetry, certainty and equality of treatment must be balanced against the individual interests served by equity and fairness in particular instances. The idea that the function of law is to reconcile *social interests* is strongly associated with the American legal scholar Roscoe Pound, a common lawyer, who himself drew from a civil law jurist Ihering (1913) and his functional approach to law. In his survey on social interests Pound (1943) concludes as follows:

   > Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of interests as a whole.[36]

[34]See *Sunday Times v. United Kingdom* (1979), 2, EHRR 245 and *Kruslin v. France* (1990), 12, EHRR 547.

[35]Gény, F. (1919) *Méthode d'Interprétation et Sources en Droit Positif*. Paris: LGDJ.

[36]Pound, R. (1943). A Survey of Social Interests. *57(1) Harvard Law Review*, 1–39; Ihering, R. (1913). *Law as a Means to an End.* New Jersey: The Law Book Exchange Ltd (1999).

Today, the body of case law across jurisdictions shows that reconciliation of interests has increasingly become the task of the courts rather than of the legislature; and the *balancing exercise* described by Pound has become a dominant form of legal reasoning amongst judges.

Taking all these above-listed points into consideration it becomes difficult to deny the status of *law* to judicial rulings. Thus, from both a definitional and a functional point of view *prospectivity* or *non-retroactivity* seems fully consistent with the judicial function.

In Pursuit of a More Systematic Approach to the Prospective Operation of Judicial Decisions

Is there an overarching formula capable of rationalizing the temporal effect of judicial decisions? Can one devise a method using abstract tenets and definitions? Where to draw the line between what is supposed to be permitted and what is not? Can a coherent and generally accepted scheme for dealing with the retroactive / prospective application of new judicial rulings be achieved when there is at present no consensus on judges being lawmakers; or even a clear definition of the proper allocation of lawmaking authority?

These are teasing questions which nevertheless have the advantage of drawing attention to the need for some meaningful rationalized resolution in this area.

Whichever side of the debate on these queries seems more attractive, retrospective decision-making will continue to produce difficult and seemingly inequitable cases, especially in the current context of an increasingly litigious society. Unless efforts are made to formulate a more rational analytical structure to overcome these difficulties they are likely to persist and intensify. In the search for a workable legal framework in this area, a comparison between the various legal systems examined in detail in the following chapters suggests that there are at least two possible ways of achieving some degree of systematization.[37]

A first somewhat simple method is to resolve issues of prospective effect according to the field of law involved in the case at hand. This approach rests on the assumption that different areas of law involve different sets of considerations, thus necessitating a tailor-made solution in terms of prospective / retrospective

[37] Apart from the two methods suggested under the current heading, one can think also of a system which focuses on the predictability and/or creativity of the new change. Thus, where the change of ruling was predictable it is applied to the instant case and to future cases; on the contrary, where it was sudden, pure prospective overruling is to be considered. In the same vein, where the court offers a new interpretation of an otherwise precise and clear statutory provision or established judicial rule it is to be applied to the case at hand; when the change relates to an open texture provision or amounts to a reversal of a settled case law prospective overruling seems justified. The underlying rationale for the latter distinction is that the more creative an interpretation, the more likely temporal disruptions will be felt.

operation of judicial overruling decisions. A more elaborate alternative is to take inspiration from the work undertaken by French jurist Paul Roubier (1960) on the issue of inter-temporal conflicts of law. Roubier's scheme is undoubtedly to this day the most accomplished legal framework on the subject. Distinguishing, on the one hand, between the different phases of the legal situation under court scrutiny and drawing, on the other hand, a neat distinction between retroactivity, prospective effect and immediate application of a new ruling, Roubier's theory provides a lead for what might be the best suited methodology to deal with temporal effects of judicial rulings.

Before exploring further these two possible leads for a workable framework in this area, it may be appropriate to first articulate a number of prerequisites with a view to promote a more consensual view on the subject and serve as a basis for further systematization.

Prerequisites

These are presumptions rooted in judicial practice which, not only provide a number of safeguards against potential misuse of prospective application by judges, but also assist in the building of a more cohesive foundation for a set of transitory rules and principles that may apply to changes in judge made law.

1. Overruling should generally remain limited (even though one cannot forbid courts to exercise the privilege of overruling their own decision with a view to improving the law). Social interest dictates that law shall be uniform and impartial; adherence to precedent promotes these two imperatives.
2. Hardship involved in the retrospective effect of judicial decisions is inevitable. Only when such hardship is felt to be too great or to be unnecessary, should retrospective operation be withheld. Judicial rulings with prospective effect should therefore be limited to cases of exceptional difficulty.
3. In any event, retrospectively depriving people of vested legal rights is unjust. Although this principle has been established with regards to enacted law it should also apply to judge-made law since fairness is equally part of the judicial process. It follows that, unless there are particularly compelling reasons to do so, courts are not able to re-open or re-decide cases which have been definitely determined under the old rule.[38] In such circumstances, the rights of the parties have been fixed by the final judgment under the *res judicata* principle.[39]

[38]In the U.S. under both Section 73 (2) of the Restatement (Second) of Judgments and Rule 60 (b) of the Federal Rules of Civil Procedure, parties may exceptionally challenge and be granted relief from a final judgment where there had been for instance a substantial change in the law following an initial otherwise closed litigation. See Kay, R.S. op cit at 17.

[39]Public policy also dictates that there be an end to litigation. Besides the concern for finality, unlimited retroactivity of judicial rulings would produce chaos in the legal system.

4. The retrospective effect of judicial rulings should only be limited by courts of final appeal. To paraphrase Cardozo (1921):

> We will not help out the man who has trusted to the judgment of some inferior court. In this case, the chance of miscalculation is felt to be a fair risk of the game of life . . . .he knows that he has taken a chance, which caution often might have avoided. The judgment of a court of final appeal is felt to stand upon a different basis.[40]

Degrees in Prospective Effect According to Category of Cases

As indicated above, a first attempt towards systematization consists in distinguishing between different fields of law. Three relevant areas have been generally identified in the foreign material under review: criminal law, civil law and tax law.[41] They are now considered in turn.

Criminal Cases

In the area of criminal law there should be identical limits that constrain new legislation and change in judicial interpretation. As much as retroactive criminal legislation is not permitted, new criminal precedent should not retroactively apply to actions that took place prior to the judicial decision announcing the new rule. Indeed, the principle *nullum crimen, nulla poenae sine lege* calls for an application of the new principle established by the courts only to acts done subsequent to the delivery of the judgment. Consequently, a court may not through new interpretation of a statute criminalize actions that were legal when committed; or aggravate a crime (i) by bringing it into a more severe category than it was in when it was committed or (ii) by adding new penalties or extending sentences. Acts done prior to a change of case law should remain governed by former precedent, except when the new ruling introduces more lenient criminal law such as lower penalties and punishments (under the doctrine of retroactivity *in mitius*).[42] It results from the foregoing that courts should apply only prospectively criminal interpretations imposing greater

[40]Cardozo (1921), op cit at 5, pp. 147–148.

[41]See the following chapters.

[42]However, retroactivity should not operate when defendant's convictions have become final under prior precedent; amnesty laws can however provide relief in such cases.

The way courts deal with changes in criminal procedure is also problematic. To avoid the reversal of final criminal convictions of persons who have been incarcerated following rules of criminal procedure that have become illegal under new constitutional rulings (e.g. absence of counsel at a specific stage of the proceedings), with the attending disruption in the running of the administration of justice (high number of potential petitioners), courts tend to hold the new procedural rules non retroactive to convictions that have become final prior to the new ruling. Some have pointed out the inequity of this kind of *selective prospectivity* on those defendants who were unfortunate to have their conviction finalised when the new rule was announced. For further

liabilities or penalties. It would otherwise be utterly unconstitutional to subject people to punishment for conduct which they would not know was criminal under existing law for this would deprive a defendant of the right of fair warning – a right upheld in jurisdictions abiding by the rule of law.[43] Despite the foregoing, there have been instances where courts have interpreted criminal provisions to reach acts that were lawful when committed; however this has generally occurred when the new judicial expansion of criminal liability concerned a previous judicial interpretation that presupposed a measure of evolution and whose amendment was predictable.[44]

Civil Cases

Full retroactivity of a judicial ruling may cause particular hardship in civil law situations where there is a high degree of parties' reliance on the prior state of the law. This is particularly true of such fields of law as contract and property where parties may have not only paid particular attention to existing rules at the time of their dealings but also sought legal advice on certain aspects of their transactions before making any formal engagement or promise. Here the new principle should be announced for future cases only and ought not to be applied in the case at hand, all transactions entered into or events occurring before that date being governed by the law as it was before the court gave its ruling.[45]

Tax Cases

The body of case law existing in this area shows that far reaching consequences may flow from the retrospective effect of rulings in tax matters which justifies in certain circumstances the use of prospective overruling. When a tax has been found unconstitutional tax payers will be seeking refund for improperly assessed taxes during a period of time. In view of the large number of people concerned, such claims, which could not have been foreseen, might seriously affect the financial situation of public bodies involved and even drive some of them to bankruptcy. In view of this, there is a general consensus amongst jurisdictions that these claims should be dealt with prospectively only.

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discussion in the context of the American legal system and jurisprudence, see Kay, R.S. op cit at 17.

[43]This would perhaps be a more sensitive issue in legal systems were there is an entrenched bill of rights or a written Constitution.

[44]As an illustration, see the American Supreme Court judgment in *Rogers v. Tennessee* 532 US 451 [2001].

[45]In Roubier's system examined in the next paragraph this corresponds to *survie de la loi ancienne* (survival of the previous law).

Roubier's Scheme

In his authoritative lasting study on inter-temporal conflicts of law the French jurist Roubier (1960) advocates a system revolving around the notion of *situations juridiques* where what matters is the stage of development of the relevant *situation* when the new law comes into force, i.e. is it fully extinguished; or is it still alive either in its modes of creation or in its effects? It needs to be stressed here that Roubier does not address directly the temporal effect of judicial decisions themselves since he relies on the traditional civilian model of adjudication according to which there could not be questions of conflicts in time between successive judicial rulings. Yet Roubier does not actually completely exclude the possibility of tackling the temporal conflicts between judgments.[46] This flexibility provides an opportunity to adapt his system to the present context of judicial rulings.

As already indicated, Roubier's temporal system is tripartite. It distinguishes between retroactive effect / immediate effect of the new law / and survival of the old law. It also rests on the assumption that juridical situations are not completed instantaneously. They consist of facts which are dispersed in time; some of these facts may occur before the new law or ruling comes into force; some after. With this in mind, Roubier operates a sharp distinction between *retroactivity* and *immediate effect*, two temporal effects which, according to him, are very often mixed up in practice. For Roubier, it is only the retroactive effect of a new law which is problematic, such retroactivity strictly referring to fully extinguished facts (*faits accomplis-facta praeterita*) which cannot be touched by the new law. By contrast, *immediate effect*, which is the application of the new law to a present situation which is still alive either in its modes of creation or in its effects (*situations en cours-facta pendentia*), should always be promoted to become the common way of regulating inter-temporal conflicts of law.[47]

It is suggested here that Roubier's analysis outlined above could serve as a model intended to equip judges with a solid theoretical framework whenever they are faced with the option of issuing a ruling with prospective effect.

Alternative Methods for Dealing with Prospective Overruling: Conclusions

In recent years many jurisdictions have retreated in part from prospective overruling after having introduced it in their judicial practice. Such is notably the case of France, Germany and the Court of Justice of Luxembourg; and even in the United States where the practice was pioneered its application has become with time very selective and limited.

[46]Roubier (1960) op cit at 7, pp. 24–25.

[47]Roubier, idem, at pp. 172–177.

In England too there are to this day recurrent hesitations as to whether prospective overruling should be introduced into the law. Meanwhile, the device has been rejected in Australia and is unknown in Greece and Italy.

In such circumstances, some may find it legitimate to wonder whether such a practice is truly needed and to enquire about other possible methods of dealing with the prospective effect of judicial rulings.

Is Prospective Overruling a Necessary Device?

It can be argued first that today judges have limited time and resources to accomplish their task. In such circumstances why should they waste their time in announcing how they will decide in the future? This is a seemingly fair argument considering that overruling decisions are generally foreseeable. Indeed, they are not the result of mere coincidence even when changes occur through what is perceived as a *sudden* decision. Significant changes in case law can be gradually detected through the incremental evolution of case law on a particular issue. The French scholar F. Zenati (1990) further argues that, since judicial decisions are a mere reflection of the evolving social order, they are necessarily *foreseeable*; consequently, there is no need for restricting the retrospective effect of a judgment. In the following excerpt Zenati contends that any wise litigant aware of social changes is expected to predict what the case law on a particular issue will be in the future and makes his own arrangements in anticipation. On account of this, Zenati concludes that there is no such thing as *retroactivity* in judicial practice:

> Si une loi rétroactive peut être jugée insupportable parce qu'elle impose arbitrairement un ordre nouveau qui n'existait pas à l'état latent dans la société, ce grief ne peut pas être adressé à la jurisprudence qui est au contraire le reflet de l'ordre social. Autrement dit, la jurisprudence, contrairement à la loi, est toujours prévisible; il suffit de vivre avec son temps pour appréhender le sentiment du droit qui prévaut et qui ne manquera pas à terme d'être consacré par les juges. Ce pressentiment peut permettre aux sujets de droit d'organiser leurs intérêts dans la perspective de cette consécration future pour ne pas souffrir de sa survenance. Il n'y a donc pas véritablement de rétroactivité dans la jurisprudence.[48]

In the same vein, there is a series of existing factors which may signal that the case law of an appellate court is about to change. Amongst them are the so-called *phenomenon of resistance* by the lower courts, the new binding jurisprudence of a supra-national court and the criticisms voiced by legal commentators against the view taken by a court on a particular issue.

More generally courts should, when possible, engage in a process of giving fair warning to potential litigants when dramatic changes in the case law are about to take place. This will allow members of the public to choose their conduct in an informed manner. Fair warning may take the form of an *obiter dictum* when in

[48]Zenati, F. (1990). *La Jurisprudence*. Paris:Dalloz, at p.154.

fact what the court does is prospectively overruling. Such was the case in *Hedley Byrne v. Heller Partners* where the then House of Lords stated a new principle of liability for negligent misrepresentation, but where the defendant, who came within the general description, was not held liable.[49] It has been argued that the Hedley Byrne technique is *prospective overruling in disguise* and that, relying on such precedent, *a naked use of prospective overruling is unnecessary*.[50]

Should the Issue of Temporal Effect of Judicial Decisions be Left to the Legislature?

This question has been the subject of controversy between common law judges. The view that power to give decisions with prospective effect should be the subject matter of parliamentary enactment was defended by a distinguished judge of the then House of Lords, Lord Simon in *Jones v. Secretary of State for Social Services* – a case where incidentally Lord Reid made his famous statement that the power to overrule previous decisions (granted by the 1966 Practice statement on precedent in the House of Lords)[51] ought to be exercised sparingly.[52] According to Lord Simon:

> To proceed by Act of Parliament would obviate any suspicion of endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary.[53]

However, in *National Westminster Bank v. Spectrum Plus*, Lord Nicholls seemed to favor the option of a *practice statement* with criteria established by the superior courts:

> These objections [to prospective overruling] are compelling pointers to what should be the normal reach of the judicial process. But, even in respect of statute law, they do not lead to the conclusion that prospective overruling can never be justified as a proper exercise of judicial power. *In this country the established practice of judicial precedent derives from the common law. Constitutionally the judges have power to modify this practice.* Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive

[49] [1964] A.C. 465.

[50] Friedmann, W. (1966). Limits of Judicial Law-Making and Prospective Overruling. *29 Modern Law review,* 593, at 605. However, some forms of implicit overruling may be controversial. The marital rape judgment in *PGA v. The Queen* delivered by the High Court of Australia in 2012 offers a good, albeit unusual, illustration of the adverse consequences of a judicial declaration that a common law rule had already been implicitly overruled at the time when the alleged offence took place.

[51] *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

[52] [1972] AC 944, at 966.

[53] Idem, at 1026.

> consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions. If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution.[54]

One possible conclusion that can be drawn from these two excerpts by two eminent judges is that the answer to the issues raised in this chapter ultimately lies in what one considers to be the *business* of judges. In this respect, Cardozo's remarks (1921) that, when it comes to the judicial process, *there are few rules*; *there are chiefly standards and degree*, are of particular relevance.[55] Therefore, if within each of the separate legal systems under review in this book and, more generally, across jurisdictions, legal actors cannot agree on a formal systematic set of rules apt to regulate the prospective and/or non-retroactive application of judicial rulings, perhaps the *default way* to proceed can be taken from Cardozo's wise words whose echoes are truly endless.

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[54]Op cit at 9, 39–41.

[55]Cardozo (1921), op cit at 5, p. 161.

Part I
European Jurisdictions

Chapter 2
The Prospective and Retrospective Effect of Judicial Decisions in Ireland

Niamh Connolly

Abstract This chapter examines the operation of the common law system in Ireland. The Republic of Ireland differs from many common law jurisdictions in that it has a written constitution which empowers judges to invalidate unconstitutional legislation. The importance of judicial decision-making in constitutional cases has influenced judicial practice more generally. Irish judges feel a constitutional duty to prioritise doing justice in each case. They have historically been less formalistic than judges in some common law jurisdictions. They follow precedent in a reasonably flexible way which allows the common law to develop. They have a creative role, although they exercise self-restraint in changing the law due to the separation of powers. This chapter considers whether the Irish legal system accepts prospective overruling or similar techniques designed to limit the retrospective effect of judicial decision-making. The question of retrospective effect has arisen most acutely in constitutional cases, where the courts find a statute to be invalid after it has been in force and people have relied on it. Two landmark cases limit the effects of a ruling of unconstitutionality by different means. *Murphy v Attorney General* states that an unconstitutional statute is void ab initio and that there should be redress in all but exceptional cases. *A v Governor of Arbour Hill Prison* precludes people who have been convicted under an unconstitutional statute and whose cases have reached finality from availing of the invalidity. The relationship between these authorities requires clarification, but they represent a functional equivalent of prospective overruling. If similar measures can apply when judges develop common law rules, then it appears that Irish law accepts prospective overruling.

N. Connolly (✉)
Law School, House 39, Trinity College Dublin, College Green, Dublin 2, Ireland
e-mail: nconnoll@tcd.ie; niamh.connolly@tcd.ie

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Introduction

The Republic of Ireland possesses a common law system, governed by a written constitution.[1] Its common law nature and the substance of many laws reveal its close historical ties with the law of England and Wales. However, Ireland's constitutionalist order diverges markedly from the English model. The constitutional framework has strongly influenced the conception of the judicial function in Ireland. A self-assured judiciary adopts a reasonably flexible approach to precedent in the common law, in order to do justice between the parties in each case.

Prospective overruling has not been expressly adopted in Ireland. As in England, some decisions employ techniques which resemble prospective overruling. The problem of the retroactive effect of judicial changes to the law has arisen most obviously in the constitutional context. Irish judges have the power to declare that statutes which have been in force are unconstitutional and invalid. This function has the potential to create serious problems in unwinding actions taken when the statute was thought to be lawful. Over the past 30 years, the courts have struggled to find a solution which upholds constitutional theory while also avoiding chaos or injustice. The measures which the judiciary have used to restrict the retrospective effect of a finding of unconstitutionality may be regarded as a form of prospective overruling. If similar measures might apply when judges develop common law rules, then it appears that Ireland does accept prospective overruling. It would, however, remain vanishingly rare, and only appropriate in cases where a change to the law would have exceptionally prejudicial effects on people who relied on the previous understanding of the law.

The Irish Legal System's Constitutional Framework

Compared with other common law jurisdictions, Ireland has a distinctive constitutional order, characterised notably by vigorous judicial review of the constitutionality of legislation. The People are sovereign.[2] The State is "subject to the constitution, which limits, confines and restricts its powers."[3] The Constitution is predicated on the separation of powers.[4] Article 15.2.1° attributes the "sole and exclusive power of making laws" to the *Oireachtas*, which body comprises the President and a

[1] Bunreacht na hÉireann (The Constitution of Ireland) 1937 (Ireland).

[2] Article 6, Bunreacht na hÉireann 1937 (Ireland); see also Finn v Attorney General [1983] 1 IR 154 (IESC); Riordan v An Taoiseach (No 1) [1999] 4 IR 321 (IESC).

[3] Byrne v Ireland [1972] IR 241 (IESC).

[4] Buckley and Others (Sinn Féin) v Attorney General and Another [1950] IR 67, 81 (IESC); Boland v An Taoiseach [1974] IR 338, 370 (IESC); Maguire v Ardagh [2002] 1 IR 385, 575 (IESC).

bicameral parliament.[5] The *Oireachtas* is prohibited from enacting any law which is inconsistent with the Constitution; any unconstitutional laws are invalid.[6] The High Court and the Supreme Court may determine the validity of any law by reference to the Constitution.[7] The Constitution Review Group terms this "a key provision of the Constitution which to date has proved to be conspicuously successful."[8]

The Common Law in Ireland

Ireland has inherited both the common law method and the substance of many laws from its connection with the United Kingdom. Between 1800 and 1922, Ireland was an integral part of the United Kingdom legal order. The United Kingdom's House of Lords was the court of ultimate appeal for Irish cases.[9] From 1924 until 1933, appeals could be brought from the Irish Supreme Court to the Privy Council in London.[10] There was a great deal of continuity in Irish law before and after independence.[11] Both the 1922 Constitution and the 1937 Constitution expressly provided that all the substantive laws in force in Ireland immediately prior to the introduction of the new Constitution would continue in force.[12]

The Republic of Ireland's written constitution "was superimposed on, and indeed presumes the existence of, the common law system."[13] Many areas of law are predominantly governed by case law. For example, the law of judicial review of administrative acts is largely judge-made.[14] Other examples include contract

[5] Article 15.1.2, Bunreacht na hÉireann 1937 (Ireland); Wireless Dealers Association v The Minister for Industry & Commerce (Unreported, Supreme Court, 14th March, 1956) (IESC).

[6] Articles 15.4.1° and 15.4.2°, Bunreacht na hÉireann 1937 (Ireland); In Re Article 26 of the Constitution and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill [1995] 1 IR 1, 39 (IESC).

[7] Article 34.3.2°, Bunreacht na hÉireann 1937 (Ireland).

[8] Constitution Review Group. 1996. *Report of the Constitution Review Group*. Dublin: Stationery Office.

[9] Article 8, Act of Union 1800 (United Kingdom).

[10] Article 66, Constitution of Saorstát Éireann (Constitution of the Irish Free State) 1922; Courts of Justice Act, 1924 (Ireland); Constitution (Amendment No 22) Act 1933 (Ireland).

[11] Performing Rights Society v Bray UDC [1928] IR 506, 511 (IESC); Irish Shell Ltd v Elm Motors Ltd [1984] IR 200, 225–226 (IESC).

[12] Article 73, Constitution of The Irish Free State 1922 (Ireland); Article 50 Bunreacht na hÉireann 1937 (Ireland).

[13] A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, 115 (IESC).

[14] Ghandi Nawaf Mallak v The Minister for Justice, Equality and Law Reform [2012] IESC 59, para 1 (IESC).

law, the constitutional protection of citizens' fundamental rights, and the law of evidence. It is widely accepted that judges make law, and that their role is not merely interpretative, but also creative.[15]

On its face, the provision which grants the Legislature the "sole and exclusive power of making laws" seems incompatible with the common law system.[16] To avoid the conflict, this rule must be understood to refer to "laws" in the sense of statutes. However, in *DPP v Cash*,[17] Charleton J held that the constitutional allocation of the legislative function to Parliament restricts judges' power to make new common law rules.[18] If so, the Constitution reinforces the common law's own stricture that judges may develop existing common law, but may not create entirely new rules.

The Place of Statutes

The courts are keenly aware of the imperative not to encroach on the legislative function.[19] The power of the courts to decide cases by applying judge-made rules is subordinate to statute law. If Parliament has enacted a statute which applies to the case before the court, the court must interpret and apply the statute.[20] A statute must prevail over a conflicting common law rule.[21]

As in any legal system, the importance of the power of interpreting written law should not be underestimated.[22] The Interpretation Act 2005 guides judges in interpreting statutes, and they may use a purposive approach to discern Parliament's intention.[23] The common law frequently retains a supporting role in giving meaning to the terms and concepts used. Parliament is understood to be aware of the pre-

[15]Henchy, S. 1962. Precedent in the Irish Supreme Court. *Modern Law Review* 25: 544, 555; Walsh, B. Foreword to First Edition. In McMahon B, and Binchy, W. 1990. *Irish Law of Torts.* 2nd ed. Dublin: Butterworth: v ff; see also In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 32 (UKHL).

[16]Article 15.1.2, Bunreacht na hÉireann 1937 (Ireland); Wireless Dealers Association v The Minister for Industry & Commerce (Unreported, Supreme Court, 14th March, 1956) (IESC).

[17]DPP v Cash [2007] IEHC 108 (IEHC).

[18]Ibid para 62.

[19]See Hogan, GW and Whyte, GF. 2003. *JM Kelly: The Irish Constitution*. 4th ed. Dublin: Tottel: 256.

[20]The State (Murphy) v Johnston [1983] IR 235, 240 (IESC); In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, paras 36–38 (UKHL).

[21]Geasley v DPP [2009] IECCA 22, para 45 (IECCA).

[22]Crilly v T & J Farrington Limited [2001] 3 IR 251, 286 (IESC).

[23]Mulcahy v Minister for Marine (unreported, High Court, Keane J, 4 November 1994), page 23 (IEHC); C(R) v Minister for Health [2008] 1 IESC 33, 36 (IESC).

existing law when it drafts legislation.[24] In interpreting laws, judges must not be influenced by their own preferences as to what they should say.[25] The judge's function is to apply the law, not to reform it.[26]

The courts are very conscious of the need not to trespass on the legislative function in performing their duty to interpret statutes.[27] They are "strictly confined to ascertaining the true meaning of each statutory provision".[28] They have no right to interpret the statute to say what the judges wish it did say. They cannot fill gaps in the statute and are sometimes powerless to avoid an unjust result.[29] In *The State (Murphy) v Johnston*,[30] an error in a criminal statute made a nonsense of it. The Supreme Court ruled that the courts had no power to rectify the error. Only Parliament could correct it, even though it meant that many prosecutions for drunk driving would fail on a technicality until the legislation was amended.[31]

Precedent

The common law method aims to achieve a delicate balance between two goals, which may frequently conflict. The law should be certain and predictable; it should also be just and move with the times.[32] Precedent is "the means by which the common law achieves, so far as possible, uniformity, consistency, predictability and certainty."[33] Since people rely on the law to organise their affairs, it should be consistent. Citizens should be able to inform themselves of the law.[34]

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[24]JF v The Minister for Health and Children (Unreported, Supreme Court, 10 April 2008), page 8 (IESC).

[25]Finlay, T. 2005. The Role of the Judge. *Judicial Studies Institute Journal*: 1, 3.

[26]TD v. Minister of Education [2001] 4 IR 259, 332 (IESC); Norris v Attorney General [1984] IR 36, 53 (IESC).

[27]Private Residential Tenancies Board v Linnane [2010] IEHC 476 (IEHC).

[28]McGrath v McDermott [1988] IR 258, 276 (IESC).

[29]PJ v JJ [1993] 1 IR 150, 154–155 (IEHC); EC v Clinical Director of the Central Mental Hospital 2012 IEHC 152, para 34 (IEHC).

[30]The State (Murphy) v Johnston [1983] 1 IR 235 (IESC).

[31]Ibid 240; Re Green Dale Building Company [1977] 1 I.R. 256, 266 (IESC).

[32]Reid, J. 1974. The Judge as Law Maker. *Journal of Society of Public Teachers of Law* 12: 22, 26.

[33]Geasley v DPP [2009] IECCA 22, para 39 (IECCA); Health Services Executive v 248 Named Complainants [2013] 24 ELR 206, 213 (IELC); Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349, 378 (UKHL); Attorney General v Ryan's Car Hire Ltd [1965] IR 642, 653 (IESC); Hutchinson, AC. 2000. The Importance of Leading Cases: a Critical Analysis. In *Leading Cases of the Twentieth Century* ed. O'Dell, E. Dublin: Round Hall: 14.

[34]Irish Trust Bank Ltd v Central Bank of Ireland [1976–7] ILRM 50, 53 (IEHC); In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189 (IEHC).

The doctrine of precedent is entwined with the hierarchical courts structure: "the authority of precedent is vertical and that lower courts are bound by decisions of higher courts."[35] Courts are obliged to follow and apply relevant authorities emanating from higher courts, "even when they disagree with them and even when such disagreement appears well founded."[36] A court may refuse to follow a precedent from a court of the same level if it was decided disregarding an important argument. However, it is more appropriate for a trial court to apply the rules of precedent, and, if necessary, its decision can be appealed to a higher court, which will not be constrained by the same case law.[37]

Developing the Common Law

The law must also change: it is not "a mausoleum."[38] Both continuity and creativity are legitimate values in the development of the common law.[39] Precedent is not a straight-jacket. Judges can use their power to interpret past authorities to nudge the law in new directions. They have wide latitude in determining the *ratio decidendi* of a prior case.[40] Whenever collegiate judges have agreed on the outcome but given divergent reasons, this sows the seeds of uncertainty and creative ambiguity. Determining the effect of an apparent precedent frequently requires complex analysis of the case law, including the contexts in which principles were developed and the interrelationship between different decisions.[41] By distinguishing or reinterpreting a decision, later judges might determine that it supports a principle quite different from what was previously thought.[42]

Besides, rules which were created by judges "can be changed and altered by judges."[43] The common law judge, conscious of the bounds of his power to make

[35]Geasley v DPP [2009] IECCA 22, para 42 (IECCA); McDonnell v Byrne Engineering Co. Ltd (Unreported, Supreme Court, Irish Times, October 4, 1987) (IESC); The Health Service Executive v MX [2011] IEHC 326, para 63 (IEHC).

[36]Geasley v DPP [2009] IECCA 22, para 42 (IECCA).

[37]Irish Trust Bank Ltd v Central Bank of Ireland [1976–7] ILRM 50, 53 (IEHC); In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189 (IEHC); Kadri v Governor of Wheatfield Prison [2012] 2 ILRM 392, 401 (IESC).

[38]McInerney v Liddy [1945] IR 100, 104 (IEHC); McDonnell v Ireland [1998] 1 IR 134, 157 (IESC); In the Matter of Flightlease (Ireland) Ltd [2008] 1 ILRM 543, 558 (IEHC).

[39]Posner, R.A. 1999. *The Problematics of Moral and Legal Theory.* Cambridge, Massachusetts: Belknap Press, Harvard University Press: 244.

[40]The State (Quinn) v Ryan [1965] IR 70 (IESC).

[41]The People (DPP) v Mallon [2011] IECCA 29, para 49 (IECCA); Gormley v Smyth [2010] IESC 5, para 21 (IESC).

[42]Henchy n 15 above 558.

[43]The State (Lynch) v Cooney [1982] 1 IR 337, 369 (IESC).

law and the dangers of making sweeping pronouncements, is usually cautious. Judges usually refrain from attempting to propound and delimit an exhaustive set of rules for future application.[44] Even when they develop new principles, they leave them open-ended.[45] The contours of a new rule are best defined, "step by step, precedent after precedent, and when set against the concrete facts of a specific case."[46]

Yet the common law is capable of dramatic evolution.[47] Changes in law and society eventually provoke eruptions in the case law. The Irish law on the recognition of foreign divorces needed to change after divorce was introduced in this jurisdiction.[48] The law of unjust enrichment provides a striking example of an area in which the common law rules have been transformed in the past quarter century. For example, the House of Lords abolished a long-established common law rule that money could not be recovered on the ground that it was paid by mistake, if the mistake was a mistake about the law.[49] While the common law method is built on judicial restraint, occasionally judges deem it necessary to take a larger step than usual. Hutchinson reconciles the tension between stability and change in the common law by placing its transformative capacity at the centre.[50]

A Permeable Legal System

Irish judges frequently look to the case law of other jurisdictions for guidance or support.[51] Because Ireland is a small jurisdiction, in which relatively few cases are decided, there may be no recent domestic precedent on a point.[52] English case law is a particularly strong influence.[53] Decisions of the English courts delivered

[44]Ryan v Attorney General [1965] IR 294, 344–345 (IESC); The People (Attorney General) v O'Brien [1965] IR 142, 161 (IESC).

[45]Attorney General v Ryan's Car Hire Ltd [1965] IR 642, 654 (IESC).

[46]Murphy v Attorney General [1982] 1 IR 241, 315 (IESC).

[47]A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, 115–116 (IESC); Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349, 378 (UKHL).

[48]GMcG v DW [2000] 1 IR 96, 104, 106 (IEHC).

[49]Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349 (UKHL).

[50]Hutchinson n 33 above 2.

[51]Murray, J.L. 2008. Judicial Cosmopolitanism. *Judicial Studies Institute Journal* 2: 1, 12; see Attorney General v Ryan's Car Hire Ltd [1965] IR 642 (IESC).

[52]Goodall, K. 2000. What Defines The Roles Of A Judge? First Steps towards the Construction of a Comparative Method. *Northern Ireland Legal Quarterly* 51: 535, 544.

[53]Brady, J.C. 1978. English Law in the Republic of Ireland. *University of Tasmania Law Review* 6: 60.

since Irish independence are of persuasive authority.[54] The Irish courts also pay attention to the evolution of the common law in other countries which share our heritage. Authorities from other legal systems will be more likely to be adopted in Ireland if the two systems have a similar approach to the area of law. As various private law rules have evolved differently in different common law jurisdictions, precedents advanced in argument as authority are examined to determine how well they fit. For example, the law on remedial constructive trusts in Ireland resembles that which has developed in New Zealand, but departs strongly from English law, which does not recognise this remedy. The Irish Supreme Court has emphasised the idea of a consensus among common law jurisdictions.[55] Our courts will be more likely to make radical changes in the common law in this jurisdiction, when such changes conform with the evolution of the law in comparator jurisdictions. This wider context offers comfort for the judiciary when they choose to make significant changes to common law rules without wishing to appear to depart from precedent.

We should distinguish between foreign influences in public and private law, because Ireland's constitutional order contrasts significantly with that of many common law jurisdictions.[56] In constitutional cases, Irish judgments have frequently discussed the law of the United States. More recently, they refer to European constitutional courts. Murray CJ explains this as a "transnational communication of knowledge, concepts and ideals of justice" which inform the interpretation of national law.[57]

Ireland's Constitutional Jurisprudence

The law-making power of judges is particularly important in constitutional law.[58] The interpretation of the Constitution in each case "can shape what the Constitution means in the future".[59] A deep and complex body of constitutional case law has developed rapidly over the past half century. Ireland's constitutional jurisprudence thus offers a striking example of the power of case law to transform the law.

The Constitution contains a declaration of fundamental rights, which partially adopts and subsumes rights traditionally recognised in the common law tradition,

[54]Irish Shell Ltd v Elm Motors Ltd [1984] IR 200, 225, 227 (IESC); see also Henchy n 15 above 549.

[55]In Re Flightlease (Ireland) Limited [2012] 2 ILRM 461, 483–484 (IESC).

[56]The State (Quinn) v Ryan [1965] IR 70, 126 (IESC); Irish Shell Ltd v Elm Motors Ltd [1984] IR 200, 227 (IESC).

[57]Murray n 51 above 16.

[58]Walsh, B. 1980. In O'Reilly J. and Redmond, M. *Cases and Materials on the Irish Constitution*. Dublin: Incorporated Law Society of Ireland: xi.

[59]Walsh, B. 1996. Constitutional Adjudication. *Holdsworth Law Review* 17: 153, 155, 162.

such as habeas corpus.[60] Articles 40 to 44 of the Constitution protect fundamental rights, under subheadings which include personal rights, family, education, private property and religion. These extensive guarantees of fundamental rights were one of the "conspicuous novelties" of the Constitution.[61] Initially, neither its drafters nor the legal profession believed that the fundamental rights provisions would have far-reaching effects.[62]

Since the early 1960s, the superior courts have vigorously developed a body of case law giving meaning to the personal rights enunciated in the Constitution.[63] Significantly, they determined that the Constitution also protects an open category of unenumerated personal rights.[64] The courts have followed the common law methodology in determining the content of the category of unenumerated personal rights. Rather than developing an abstract or general theory of rights, the courts wait for litigants to claim that they enjoy a certain right before deciding whether the claimed right does indeed fall within the constitutional guarantee. As common lawyers, Irish judges prefer deciding on concrete rather than hypothetical scenarios.[65]

They treat the constitution as a living document, to be interpreted in light of contemporary values rather than adhering to the values of the society which enacted it.[66] The substance and effect of constitutional provisions can evolve over time, with the effect that a law which might be compatible with the constitution at one time can become unconstitutional at a later time.[67] This implies a need for the Supreme Court not strictly to be bound by precedent.[68]

Dissenting judgments provide raw material for the common law to evolve.[69] However, until 2013, Article 34.4.5° provided that, in cases where the Supreme Court was called upon to determine the constitutionality of a law, the Court would give a single judgment. There would be no assenting or dissenting opinions.[70] This

[60]Kelly, J.M. 1967. *Fundamental Rights in the Irish Law and Constitution*. 2nd ed. Dublin: Allen Figgis & Co: 22.

[61]Hogan and Whyte n 19 above 1245.

[62]Kelly n 60 above 15.

[63]See e.g. Ryan v Attorney General [1965] IR 294 (IESC); Kelly n 60 above 25; see also Hogan, G.W. and Whyte, G.F. 1994. *The Irish Constitution*. 3rd ed. Dublin: Butterworths: 675.

[64]Ryan v Attorney General [1965] IR 294, 344–345 (IESC); McGee v Attorney General [1974] IR 284 (IESC).

[65]Walsh n 59 above 160.

[66]Ibid 154.

[67]Blake v Attorney General [1982] IR 117. 125 (IESC); McMenamin v Ireland [1996] 3 IR 100 (IESC); McGee v. Attorney General [1974] IR 284, 318 (IESC); The State (Healy) v Donoghue [1976] IR 326 (IESC).

[68]Hogan and Whyte n 19 above 987–988.

[69]Barrington, D. 1987. The Constitution in the Courts. In *The Constitution of Ireland 1937–1987,* ed. Litton, F. Dublin: Institute of Public Administration: 121.

[70]Ní Loinsigh, N. 2014. Judicial Dissent in Ireland: Theory, Practice and the Constraints of the Single Opinion Rule. *Irish Jurist*: 123; see e.g. Crotty v An Taoiseach [1987] IR 713 (IESC).

"one judgment rule" was not applied to statutes inherited from prior constitutional regimes.[71] The Constitution has now been amended to remove this restriction, except for cases where the President refers a Bill to the Supreme Court before promulgation to verify its constitutionality.[72] The rationale behind the "one judgment rule" was to enhance the certainty and authority of determinations by the highest court in the land on the validity of laws. However, it risked doing so by creating a "false picture of unanimity".[73] Dissenting judgments legitimately serve the useful purpose of articulating minority reasoning which might persuade future generations.

Reviewing the compatibility of enacted legislation with the Constitution raises particular risks of encroachment on the legislative function. The courts, keenly aware of the separation of powers, regularly address the limits of their power in this regard. They use a presumption of constitutionality to avoid condemning legislation where possible. Furthermore, if a statute is unconstitutional and invalid, the courts cannot substitute an unobjectionable provision for it.[74] Nor can the court recommend to the Legislature how to replace it.[75] The judiciary refrains from enforcing socio-economic rights, because to do so would infringe the separation of powers: "it is not the function of the courts to make an assessment of the validity of the many competing claims on national resources".[76] Lastly, the theory of unenumerated rights has declined in recent years and judges emphasise the need for restraint in identifying new constitutional rights.[77] In a recent case, the Supreme Court found that the text of the Constitution did not indicate a right constitutional right to end one's life at a time of one's choosing.[78]

The Relaxation of Precedent in the Supreme Court

Common law courts are challenged to find the appropriate balance "between certainty and flexibility."[79] Precedent must not be "our master".[80] Before the 1960s, it was generally assumed that the doctrine of *stare decisis* applied to decisions

[71] Melling v Ó Mathghamhna [1962] IR 1 (IESC); The State (Shanahan) v Conroy [1964] IR 239 (IESC); The State (Quinn) v Ryan [1965] IR 70 (IESC).

[72] Article 26.1.1°, Bunreacht na hÉireann 1937 (Ireland).

[73] Kelly n 60 above 33.

[74] The State (Woods) v Attorney General [1969] IR 385, 398 (IESC).

[75] Somjee v Minister for Justice [1981] ILRM 324 (IEHC); Mhic Mhathúna v Ireland [1995] 1 ILRM 69 (IEHC); Maguire v Ardagh [2002] 1 IR 385, 575 (IESC).

[76] TD v. Minister of Education [2001] 4 IR 259, 288 (IESC); O'Reilly v. Limerick Corporation [1989] I.L.R.M. 181, 195 (IEHC).

[77] IO'T v B [1998] 2 I.R. 321, 370 (IESC); TD v. Minister of Education [2001] 4 IR 259, 281 (IESC); Keane, R. 2004. Judges as Lawmakers: The Irish Experience. *Judicial Studies Institute Journal*: 1, 14.

[78] Fleming v Ireland [2013] IESC 19 (IESC).

[79] Henchy n 15 above 558.

[80] Reid n 32 above 25.

of the Supreme Court, rendering them immune from future challenge.[81] In 1962, Henchy J, writing extrajudicially, argued that a legal order based on a rigid, supreme constitution should not adhere to the *stare decisis* rule. He reasoned that the English courts could assume that Parliament has the power to overturn all their decisions through legislation, whereas in Ireland, an erroneous interpretation of the Constitution, if it were not susceptible to correction by the Supreme Court itself, could only be cured by recourse to the People in a referendum.[82]

The first sign of a rejection of *stare decisis* came in *The State (Quinn) v Ryan*,[83] where the Supreme Court invalidated a provision which it had previously upheld as compatible with the Constitution.[84] Strictly speaking, the decision in *Ryan* did not require overruling the previous authority because the earlier case had not considered the arguments on which the current challenge was based. However, Walsh J expressed strong views on the doctrine of *stare decisis*. Like Henchy J, Walsh J considered it implausible that the People, in enacting the Constitution, intended to give the case law of the Supreme Court the same normative status as the Constitution itself. This would be the inevitable consequence if every interpretation of the Constitution by the Supreme Court was fully binding in all future decisions.[85] Walsh J concluded that for any court of final appeal, *stare decisis* might not "ever be anything more than judicial policy, albeit strong judicial policy."[86]

Shortly afterwards, in *Attorney General v Ryan's Car Hire*[87] the Supreme Court expressly overruled one of its own previous decisions for the first time. Kingsmill Moore J approved the distinction "between the general principle of following precedent and the strict rule of *stare decisis*."[88] Judges are not infallible and the primary concern of judges must be to do justice. The rigid rule of *stare decisis* must be replaced by a "more elastic formula", whereby a court of ultimate appeal can refuse to follow a precedent when it is clearly of the opinion that it was erroneous.[89] It remains reasonably unusual for the Supreme Court to reverse its prior positions. More often, there might be two seemingly inconsistent authorities and the challenge is to work out whether and how they can be reconciled.[90]

There is one notable exception to the power of the Supreme Court to overrule its past decisions. The President may refer Bills voted in Parliament to the Supreme Court, in order to determine, before promulgation, whether they contradict the

[81] Kelly n 60 above 30; see Henchy n 15 above 553.

[82] Henchy n 15 above 557.

[83] The State (Quinn) v Ryan [1965] IR 70 (IESC).

[84] State (Dowling) v Kingston (No. 2) [1937] IR 699 (IESC).

[85] The State (Quinn) v Ryan [1965] IR 70, 127 (IESC).

[86] Ibid 125.

[87] Attorney General v Ryan's Car Hire Ltd [1965] IR 642 (IESC).

[88] Ibid 653.

[89] Ibid 654.

[90] The People (DPP) v Mallon [2011] IECCA 29, para 48 (IECCA).

Constitution.[91] Article 34.3.3° prohibits any court from later questioning the validity of a law which was approved by the Supreme Court prior to promulgation under an Article 26 reference. The Irish Constitution thereby gives one specific and limited category of decision unusually wide, binding and permanent effect.[92] The Article 26 reference procedure is the only case in which future courts will be bound by a decision concerning a point which was not argued before the court. The sweeping effect of a declaration of validity in an Article 26 reference is said to deter the President from using this power.

Reasons Not to Follow a Precedent

A court may be justified in refusing to follow a precedent if there was a severe defect in the original authority. This means more than that the previous decision must have been wrong. The defects which justify disregarding a precedent include insufficient authority having been pleaded or submissions being incorrect, or the judge having misunderstood an important element.[93] A decision can be stigmatised as *per incuriam* if it failed to consider "a relevant argument, an important judicial precedent or a relevant statutory provision".[94] For example, *Geasley v DPP* concerned a precedent which was clearly decided in ignorance of the law: it turned on a statutory wording which was no longer in force at that time.[95] This defect entitled the later judge to refuse to follow it.

In *Re Worldport Ireland Limited*, decided in 2005, Clarke J stated that a "clear error in the judgment" might suffice.[96] He also indicated that the age of the precedent is relevant where the law has subsequently advanced.[97] Another case asks whether the precedent is "manifestly wrong".[98] More recently, some judges may be applying a more liberal approach, which could apply where there is a disagreement about the law between courts of the same level.[99] In *EC v Clinical Director of the Central Mental Hospital*, Hogan J emphasises the need for caution and respect in departing from a precedent of the same level, before setting out the reasoning which

[91] Article 26.1.1°, Bunreacht na hÉireann 1937 (Ireland).

[92] The State (Quinn) v Ryan [1965] IR 70, 120 (IESC).

[93] Irish Trust Bank Ltd v Central Bank of Ireland [1976–7] ILRM 50, 53 (IEHC).

[94] Geasley v DPP [2009] IECCA 22, para 43 (IECCA).

[95] Ibid para 44.

[96] In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189 (IEHC); Kadri v Governor of Wheatfield Prison [2012] 2 ILRM 392, 401 (IESC); Rory Brady v Director of Public Prosecutions [2010] IEHC 231 (IEHC).

[97] In Re Worldport Ireland Limited (In Liquidation) [2005] IEHC 189 (IEHC).

[98] Rory Brady v Director of Public Prosecutions [2010] IEHC 231 (IEHC).

[99] FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271, para 25 (IEHC).

compels him to a contrary solution.[100] Similarly, in *XA v Minister for Justice*,[101] he states that the matter is so fundamental that he cannot follow another High Court precedent with which he disagrees.[102]

The Limits of Making and Changing Judge-Made Law

Although we accept that judges make law, there are still limits to the power of judges to make common law rules. Common lawyers frequently speak of judges "developing" the common law.[103] This is "a helpful description, not a misleading euphemism."[104] Lord Bingham points out that changing the common law in a modest, incremental fashion ensures that change remains within the confines of what citizens might reasonably expect.[105] Existing principles may be expanded or adapted, but it is not usually possible for judges to invent entirely new rules. How far judges have the power to modify the common law seems is a question of degree: it is not entirely clear where the line should be drawn.[106]

Irish courts confronted the limits of their power to develop the common law in a series of decisions on the nullity of marriages. During the 1980s, judges expanded the common law grounds on which nullity could be declared, to cover cases of mental illness which prevented a person from carrying on a caring interpersonal relationship.[107] In *UF v JC*, the court was asked to recognise a new ground to annul a marriage due to the homosexuality of one spouse. In the High Court, Keane J criticised the recent extensions of the law. He believed it was impermissible for judges to introduce entirely new grounds for nullity.[108] However, Keane J's decision was overturned on appeal to the Supreme Court, which approved the homosexuality of a spouse as a new ground for nullity and expressly approved the earlier decisions as extensions warranted by analogy with existing rules.[109]

In contrast, the Supreme Court ruled in *L v L* that a proposed change to the common law was impermissible. The High Court had awarded equitable ownership of half of the family property to a wife following her separation from her husband.[110]

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[100] L v Clinical Director of the Central Mental Hospital [2010] IEHC 195 (IEHC).

[101] XA v Minister for Justice, Equality and Law Reform, Ireland and the Attorney General [2011] IEHC 397 (IEHC).

[102] Ibid para 32.

[103] Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349, 378 (UKHL).

[104] In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 33 (UKHL).

[105] Bingham, T. 2008. The Rule of Law. *Judicial Studies Institute Journal*: 121, 126.

[106] Hogan and Whyte n 19 above 259.

[107] RSJ v JSJ [1982] ILRM 263 (IEHC); D v C [1984] ILRM 173, 188–189 (IEHC).

[108] UF v JC [1991] 2 IR 330, 341 (IESC).

[109] Ibid 354, 356.

[110] L v L [1992] I.L.R.M. 115 (IESC).

Existing rules authorise the creation of trusts over property in circumstances of relationship breakup where the plaintiff has contributed financially to the acquisition of the property. In *L v L*, the wife had made no financial contribution, having worked full-time in the home. The Supreme Court held that the High Court decision moved beyond merely extending existing law. The courts do not have the power to "identify a brand new right".[111]

Recently, the Irish courts have been consistently rejecting the power to make new common law rules. Accordingly, Hogan J refused to invent a new tort of reckless lending in *Healy v Stepstone Mortgage Funding Limited*.[112] On a number of occasions, Charleton J has ruled that the Constitution prohibits judges from creating new common law rules.[113] In *Re Flightlease (Ireland) Limited*, the Supreme Court refused to move to a test of a test of real and substantial connection for jurisdiction in private international law. This was not "a matter of detail but a fundamental reorientation of the law".[114]

In *Hussein v The Labour Court*,[115] Hogan J reluctantly applied a common law rule which deprived a worker who did not have an employment permit of legal protection against exploitation. Disturbed by the court's inability to offer redress, he stated that he would transmit a copy to the executive and legislative organs of government for them to consider possible legislative reforms. This unusual step demonstrates that Hogan J would have wished to change the rule if he could, accepted that it was for the Legislature to consider reform, and was open to initiating an unusual degree of dialogue between the judicial and legislative powers. Respect for the separation of powers and the idea of democratic legitimacy are not the only reasons why judges defer to Parliament when the law needs reform. Judges accept that the Legislature is better situated to make informed holistic policy decisions.[116] In *UF v JC*, Keane J indicated that judicial law-making could entail a fragmented approach and the risk of uncertainty.[117]

A Judicial Culture Which Prioritises Justice over Formalism

Although judges respect the limits of their law-making power, on the whole, the case law suggests that Irish judges are more willing than their counterparts in some other common law jurisdictions to use their power to modify the common law. In *London Street Tramways v London City Council*, Lord Halsbury articulated a highly

[111] Ibid 120.

[112] Healy v Stepstone Mortgage Funding Limited [2014] IEHC 134 (IEHC).

[113] DPP v Cash [2007] IEHC 108, para 62 (IEHC); ICS Building Society v Grant [2010] IEHC 17 (IEHC).

[114] In Re Flightlease (Ireland) Limited [2012] 2 ILRM 461, 495 (IESC).

[115] Hussein v The Labour Court [2012] 2 I.L.R.M. 508 (IEHC).

[116] In Re Flightlease (Ireland) Limited [2012] 2 ILRM 461, 488 (IESC).

[117] UF v JC [1991] 2 IR 330, 348 (IESC).

formalist perspective, when he accepted the occasional injustice as preferable to the inconvenience of having each question reargued in every case.[118] Kingsmill Moore J strenuously rejected this view in *Attorney General v Ryan's Car Hire*.[119] Irish judges generally seem to be relatively willing to emulate Lord Denning's flexible and inventive approach to the common law.[120]

Many dramatic innovations in Irish common law are informed by the constitutional background.[121] The constitutional tort exemplifies this. In *Meskell v Córas Iompair Éireann*,[122] the Supreme Court ruled that a constitutional right can be protected by legal action "even though such action may not fit into any of the ordinary forms of action in either common law or equity."[123] Another dramatic example of judicial law-making creating new rights is *Murphy v Attorney General*, which established a right to recover wrongfully demanded taxes from the State.[124] This preceded similar developments in Canada and the United Kingdom.[125]

In private law, the Irish courts also moved ahead of other common law jurisdictions in awarding compensatory damages for negligently inflicted psychiatric harm.[126] They have been highly receptive to proprietary remedies including the remedial constructive trust.[127] Some of these changes may reflect sympathy for parties who found themselves in difficult situations. The liberal development of the law on marital nullity seems to fit this mould.[128] Innovative landmark decisions do not usually result from conservatism and disciplined legal reasoning.[129] In a contest between the 'legally correct' answer and the desired, just solution, the latter frequently triumphs. The concern to do justice in each individual case outweighs the risk of complicating or undermining the wider structure of rules and doctrine.

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[118]The London Tramways Company, Limited v The London County Council [1898] 1 AC 375, 380 (UKHL).

[119]Attorney General v Ryan's Car Hire Ltd [1965] IR 642 (IESC).

[120]Stevens, R. 1975. Judicial Legislation and the Law Lords: Four Interpretations – II. *Irish Jurist*: 216.

[121]Healy v Stepstone Mortgage Funding Limited [2014] IEHC 134, para 9 (IEHC).

[122]Meskell v Córas Iompair Éireann [1973] IR 121 (IESC).

[123]Ibid 132–133.

[124]Murphy v Attorney General [1982] 1 IR 241, 287 (IESC).

[125]Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] 1 AC 70 (UKHL); Kingstreet Investments v. New Brunswick (2007) 276 DLR (4th) 342 (SCC).

[126]McMahon, B. and Binchy, W. 1990. *Irish Law of Torts.* 2nd ed. Dublin: Butterworth: 305.

[127]Kelly v Cahill [2001] 2 ILRM 205, 211 (IEHC); Dublin Corporation v Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J), pp. 119, 120 (IEHC): Budd J cites In Re Irish Shipping Ltd (In Liquidation) [1986] ILRM 518 (IEHC) and HKN Invest OY v Incotrade PVT Ltd [1993] 3 IR 152 (IEHC); In Re Frederick Inns Ltd [1991] ILRM 582, 591–592 (IESC).

[128]RSJ v JSJ [1982] ILRM 263 (IEHC); D v C [1984] ILRM 173 (IEHC); UF v JC [1991] 2 IR 330 (IESC).

[129]Hutchinson n 33 above 5.

The apparent tendency of the Irish judiciary to favour substantive justice over a more formalist approach, which would favour certainty and predictability, is influenced by the Constitution.[130] Article 40.3.1° obliges the State "as far as practicable, by its laws to defend and vindicate the personal rights of the citizen." In addition, the State must, through its laws, "protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." This constitutional duty binds the judiciary as an organ of the State. In addition, the Preamble invokes the ideal of justice. Walsh J interpreted this as imposing on judges a duty to interpret people's rights in conformity with the ideal of justice.[131]

In light of these constitutional provisions, Finlay CJ identifies the first fundamental function of the judge as to do justice between the parties.[132] Secondly, the judge must be seen to do justice. Thirdly, he must consider the longer term effects of his decision, including on the public and including on the development of case law.[133] He emphasises that achieving the just outcome in the individual case is the highest priority. Kavanagh believes that the Irish Constitution led the Irish judiciary to reject the positivist notion that they could be required to "blindly enforce the law as it was, irrespective of what injustice that would cause".[134] Binchy argues that the mindset which our judges developed to adjudicate on constitutional matters informed their reasoning in other areas, so that they moved, "from the incrementalist philosophy of the common law into a way of thinking that looks for the broad principle, expressed in more abstract and, at times, rhetorical language."[135]

Another explanation for the relative flexibility of Irish judges may relate to the size of a legal system.[136] Goodall argues that there is a weaker need for a legal system in a small jurisdiction to be highly formalist. There is less fear of opening the floodgates to an uncontrollable flow of cases. In a small jurisdiction, judges can be confident that they will be able to refine the legal principles as future cases gradually arise. She also observes that smaller legal systems tend to have more consistency in the judgments given throughout their courts structure.[137] This increased innate coherence within the system may free the judges of the superior courts from the strictest adherence to *stare decisis*: we need not fear that occasionally changing a common law rule would lead to chaos.

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[130]Goodall n 52 above 538.

[131]McGee v Attorney General [1974] I.R. 284, 319 (IESC).

[132]Attorney General v Ryan's Car Hire Ltd [1965] IR 642, 653 (IESC).

[133]Finlay n 25 above 1–2; see also O'Doherty v Attorney General [1941] IR 569, 582 (IEHC); Quinn v IBRC [2012] IEHC 36, para E4 (IEHC).

[134]Kavanagh, A. 2012. The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice. *Irish Jurist* 48: 71, 81.

[135]Binchy, W. 2001. The Irish Legal System. *International Journal of Legal Information* 29: 201, 203.

[136]Goodall n 52 above 538.

[137]Ibid 541.

The success of landmark decisions depends on them being accepted as 'politically valid and socially acceptable'.[138] The judiciary is a strongly legitimate authority within the Irish constitutional order.[139] It is on an equal footing with the other powers of the State and granted the power to control the actions of the legislature and the executive. Society views this strong and active judiciary as legitimate. Ireland ranks third in the world for public confidence in the independence of the judiciary.[140] In this context, it is natural for judicial power to possess a high degree of self-confidence which emboldens its decision-making. Ultimately, there is no evidence that the public considers Irish judges to have struck the wrong balance between certainty and justice.

The Declaratory Theory of Judicial Decision-Making

The traditional understanding of the role of the judge in the common law has been that the judge discovers and declares what the law already is.[141] This declaratory theory of law is essentially a fiction, or "fairy tale".[142] It usefully circumscribed the law-making power of judges, keeping them conservative, deterring them from overstepping the bounds through a zealous desire to reform the law. Some advocates of the declaratory theory want judicial rule-making, if it must happen, to be "covert and imperceptible".[143] The fiction has been challenged in more recent times. Moves away from the strictest form of adherence to precedent reflect the acknowledgement that judges can, indeed, change the common law.[144] It is now generally accepted that judges do make law, and that this is proper, within the appropriate limits.[145]

Kleinwort Benson v Lincoln City Council[146] breathed new life into a modern conception of the declaratory theory of law. This conception does not imply that the law is "static and unchanging" or that judicial decisions are "infallible or immutable".[147] In *Kleinwort Benson*, a claim for restitution turned on whether the payments could be described as mistaken, when everyone thought that they were legal at the time they were made. After the payments were made, the courts

[138]Hutchinson n 33 above 5.

[139]Goodall n 52 above 550–551.

[140]Schwab, K. 2014. *The Global Competitiveness Report 2013–2014.* World Economic Forum: 223.

[141]Jones v Secretary of State for Social Services [1972] A.C. 944, 1026 (UKHL).

[142]Reid n 32 above 22.

[143]Bingham, T. 2000. *The Business of Judging*. Oxford: Oxford University Press, 2000: 27.

[144]Ibid 28.

[145]Ibid 27.

[146]Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349 (UKHL).

[147]R v Governor of Brockhill Prison, ex parte Evans (No 2) [2001] 2 A.C. 19, 48 (EWCA).

ruled that local authorities had lacked the capacity to engage in these deals.[148] Lord Browne-Wilkinson's view was that, since the law changed after the payment was made, then "at the time of payment, the payer was not labouring under any mistake".[149] However, he was in the minority. Lord Goff, leading the majority, acknowledged the fiction of the idea that judges discover pre-existing law, but reasoned that the common law is nonetheless based on a form of the declaratory theory. This means that judicial statements of the law must be applied to events which occurred at an earlier date, and applied equally to all cases. Consequently, he rejected prospective overruling as having "no place in our legal system."[150] Since the payments were unlawful when they were made, and the parties believed them to be legally required, they were mistaken. Lord Goff also rejected two proposed defences, which would protect payments which were either made on a settled understanding of the law or honestly received.[151]

There has not been much explicit discussion of theories of judicial decision-making in the Irish case law. It is generally accepted that judges can change the law from what it was previously. In *A v Governor of Arbour Hill Prison*, Murray CJ said that we have moved on from the belief that judges merely draw on existing law "at least in its purest form . . . "[152] One of the few explicit references to declaratory theory came from Hogan J in *FX v Clinical Director of the Central Mental Hospital (No 1)*.[153] Hogan J invoked the declaratory theory, while suggesting it was not fully representative of what occurred when the court departed from previous authority and acknowledging the difficulty that parties would have relied upon the law as it was believed to be before the change.[154] In *Re Flightlease*, Clarke J acknowledged that judgments can effect "radical change" to the common law, which can have an unsettling effect on citizens' transactions.[155]

It is understood that judgments generally have retrospective effect.[156] In *A v Governor of Arbour Hill Prison*,[157] Murray CJ affirms the common law position that judicial decisions as to what the law is apply retrospectively to facts which have already occurred.[158] Lord Goff said he could not "imagine how a common law system, or indeed any legal system, can operate otherwise if the law is be applied

[148]Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 A.C. 1 (UKHL).

[149]Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349, 357 (UKHL).

[150]Ibid 379.

[151]Ibid 384.

[152]A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88, 116–117 (IESC).

[153]FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271 (IEHC).

[154]Ibid para 46.

[155]In Re Flightlease (Ireland) Ltd [2008] 1 ILRM 543, 558–559 (IEHC).

[156]Reid n 32 above 23.

[157]A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88 (IESC).

[158]Ibid 117.

equally to all and yet be capable of organic change."[159] In *West Midland Baptist Association v Birmingham Corporation*, the House of Lords considered whether it could legitimately revisit a judge-made rule of law.[160] Lord Reid reasoned that whichever rule the judges chose must be taken to have applied all along: "[w]e cannot say that the law was one thing yesterday but is to be something different tomorrow."[161] That would mean that people who were previously affected by the old rule would, if it was now changed, have been deprived of the benefit of the "correct" rule. This raises the question of whether the retrospective effect of changes to the common law should ever be limited.

Prospective Overruling in English and Irish Law

Two distinct aspects of the judicial function in Ireland could raise questions about the temporal effects of judicial decision-making. The first arises when judges change common law rules. The second occurs when then declare a statute which has been in force for a period to be contrary to the Constitution. It may be important to protect past reliance on the accepted understanding of the law.[162] Judges are keenly aware of this issue and their first response is restraint when tempted to change the law.[163] Another partial solution is the availability of defences such as limitation,[164] laches, and res judicata.[165] A range of other potential responses falls under the heading of "prospective overruling".[166] The Irish courts have engaged with these difficulties in depth in the constitutional context. There are strong indications that the Irish judiciary regards these questions as two sides of the one coin.[167] On the other hand, academic commentators have doubted that the same solutions should apply in both types of case.[168]

[159] Kleinwort Benson v Lincoln City Council [1999] 2 A.C. 349, 379 (UKHL).

[160] West Midland Baptist Association v Birmingham Corporation [1970] A.C. 874, 898 (UKHL).

[161] Ibid 898–899.

[162] Nicol, A. 1976. Prospective Overruling: A New Device for English Courts? *Modern Law Review* 39: 542, 543.

[163] In Re Flightlease (Ireland) Ltd [2008] 1 ILRM 543, 558 (IEHC).

[164] See Cadder v Her Majesty's Advocate [2010] UKSC 43, paras 105–106 (UKSC); McDonnell v Ireland [1998] 1 IR 134 (IESC).

[165] In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 26 (UKHL); Murphy v Attorney General [1982] 1 IR 241, 314 (IESC).

[166] Arden, M. 2004. Prospective Overruling. *Law Quarterly Review* 7, 7.

[167] A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, 117 (IESC); FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271 para 46 (IEHC).

[168] Binchy W. and Byrne, R. 2002. *Annual Review of Irish Law 2001*. Dublin: Round Hall: 658.

The English courts have not fully adopted the technique of prospective overruling, but occasional dicta have expressed support for the notion.[169] In *Hall v Simons*, Lord Hope said he hoped the change to the law which abolished the previous rule that barristers were immune from suit would operate from the date of the judgment.[170] In *Jones v Secretary of State for Social Services*, Lord Simon suggested that the most satisfactory solution might have been to apply the law as it then stood to the parties in the case, while prospectively overruling it for the future. However, he believed that judges should not claim the power to use this technique without statutory authorisation by Parliament, as it would affect the constitutional balance of powers between the Legislature and judiciary.[171] In *R v Governor of Brockhill Prison, ex parte Evans (No 2)*, the House of Lords considered the possibility of prospective effect in cases where judicial interpretation of a statute changed. Lord Slynn observed that "there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants".[172] However, there was no justification for this in the present case.

The House of Lords again considered prospective overruling in *Re Spectrum Plus* in 2005.[173] It changed the common law rules on distinguishing between types of security which received different levels of preference on insolvency. This would affect many commercial lenders. Lord Nicholls concluded that,

> there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law.[174]

This might arise where a decision,

> would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles[175]

However, the reliance on a previous understanding of the law by commercial actors in the present case was far from sufficient to justify the exceptional measure of prospective overruling. Based on these authorities, it seems prospective overruling might be possible in England, if a sufficiently exceptional case arose.[176]

There are also dicta against prospective overruling. In *Evans*, Lord Hobhouse considered it "extremely doubtful" that there would ever be a case which would

[169] Arden n 166 above 11.

[170] Hall v Simons [2002] 1 AC 615 (UKHL).

[171] Jones v Secretary of State for Social Services [1972] A.C. 944, 1026 (UKHL).

[172] R v Governor of Brockhill Prison, ex parte Evans (No 2) [2001] 2 A.C. 19, 26 (EWCA).

[173] See Sheehan, D. and Arvind, T.T. 2006. Prospective Overruling and the Fixed-Floating Charge Debate. *Law Quarterly Review*: 20.

[174] In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 40 (UKHL).

[175] Ibid para 40.

[176] Cadder v Her Majesty's Advocate [2010] UKSC 43, para 58.

justify limiting the retrospective effect of a judicial statement of the law.[177] He disapproved of the idea as a denial of the courts' constitutional function to grant the parties their legal rights. Furthermore, it would invade the legislative power for judges to declare a legal rule to bind others in the future. Lastly, he said, a statement of the law which was not applied to the determination of the case before the court must necessarily be *obiter dictum* and therefore cannot constitute an authoritative precedent for the future. Lord Hobhouse's objections reflect the sense that there is a distinction between the legitimacy of the common law judge deciding a case in a manner which will be followed in the future, and independently of a decision in a case before him, purporting to invent a new rule.[178] As Lord Nicholls expresses it so clearly: "Prospective overruling robs a ruling of its essential authenticity as a judicial act."[179]

Irish judgments do not directly discuss prospective overruling except in the specific constitutional context. Many of the considerations which English judges evoke would apply. The very cautious approach in England and Ireland contrasts with American acceptance of prospective overruling. This may reflect wider differences in legal culture between these jurisdictions. American adherence to legal realist and law and economics analysis provides a favourable environment for prospective overruling.[180] The declaratory theory of judicial decision-making, even in its more sophisticated and modern forms, finds prospective overruling problematic.[181]

Several distinctive features of Irish judicial culture might affect our judges' views on prospective overruling. On one hand, the courts' constitutional duty to do justice in all cases might argue against prospective effect in ordinary common law cases. On the other hand, Irish judges' less strict adherence to precedent may raise more acute problems of reliance and a stronger sense that the declaratory theory is outmoded. Another consideration which may be relevant is that there are likely constitutional constraints on retrospectively imposing new liabilities – either criminal or civil – through a change in the law.[182] Retrospectively depriving people of vested legal rights would be unjust and unconstitutional.[183]

[177]R v Governor of Brockhill Prison, ex parte Evans (No 2) [2001] 2 A.C. 19, 48 (EWCA).

[178]Devlin, P. 1979. *The Judge.* Oxford: Oxford University Press: 12; R v Governor of Brockhill Prison, ex parte Evans (No 2) [2001] 2 A.C. 19, 48; Nicol n 162 above 550.

[179]In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 28 (UKHL).

[180]Sheehan and Arvind n 173 above.

[181]Ibid 23; see Friedmann, W. 1966. Limits of Judicial Lawmaking and Prospective Overruling. *Modern Law Review* 29: 593, 593, 605.

[182]Hamilton v Hamilton [1982] IR 466 (IESC); Dublin City Council v Fennell [2005] 2 ILRM 288 (IESC); Sloan v Culligan [1992] 1 IR 223 (IESC); In Re Hefferon Kearns Ltd. (No. 1) [1993] 3 IR 177 (IEHC).

[183]In Re Health (Amendment) (No. 2) Bill 2004 [2005] IESC 7; [2005] 1 IR 105 (IESC).

Functional Equivalents of Prospective Overruling

Although the English courts have not explicitly employed prospective overruling in a common law context, they do use other approaches which closely resemble prospective overruling.[184] Friedmann considers the landmark judgment on liability for negligent misstatement in *Hedley Byrne v Heller*[185] tantamount to prospective overruling.[186] The House of Lords could simply have dismissed the case on the ground of the exclusion clause agreed by the parties. Instead, it set out detailed opinions on how it would deal with liability for financial misstatements in future. Technically, the judgments were *obiter dicta*, but they established a new cause of action which was followed in future cases.[187] Secondly, Lady Arden identifies the decision of the House of Lords in *Royal Bank of Scotland v Etridge (No 2)* as a "low key" example of a form of prospective overruling.[188] The case concerned undue influence in the context where a loan is secured against the property of the borrower's spouse. Lord Nicholls set down criteria which would – *in the future* – be used to assess whether a bank had taken sufficient steps to protect a spouse's interests. He clearly stated that the new criteria would apply to future actions, while previous criteria would continue to govern past transactions.[189] Both these decisions have been followed in Ireland and there is no reason why similar approaches to stating the law for the future would not be used in this jurisdiction.

In *Vesey v. Bus Éireann*,[190] the Irish Supreme Court expressed its reluctance to change the common law without warning. The plaintiff successfully sued the defendant in negligence after a traffic accident. The defendant argued that damages should be reduced because the plaintiff lied consistently about the amount of his loss. Hardiman J said that even if courts have an inherent power to reduce damages because of dishonesty, "it would not be appropriate to exercise it without warning in the circumstances of the present case."[191] Commentators wondered whether Hardiman J meant a warning by a trial judge, because

> there is no principle that an appellate court, which is entitled and indeed required to develop legal principles, has to relieve the litigants in a case before them of the prospect of their being affected, to their surprise, by the articulation in their case of a new legal principle.[192]

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[184]Rodger, A. 2005. A Time for Everything Under the Law: Some Reflections on Retrospectivity. *Law Quarterly Review*: 57, 78.

[185]Hedley Byrne v Heller [1964] A.C. 465 (UKHL).

[186]Friedmann n 181 above 605; cf Nicol n 162 above 551.

[187]Securities Trust Ltd. v. Hugh Moore & Alexander Ltd. [1964] IR 417 (IEHC); Bank of Ireland v Smith [1968] 102 I.L.T.R. 69 (IEHC).

[188]Arden n 166 above 10; In re Spectrum Plus Ltd (in liquidation) [2005] UKHL 41, para 15 (UKHL).

[189]Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773, 812 (UKHL).

[190]Vesey v Bus Éireann [2001] 4 IR 192 (IEHC).

[191]Ibid 201–202.

[192]Binchy and Byrne n 168 above 658.

Hardiman J revisited his remarks in *O'Connor v Dublin Bus*.[193] This judgment indicates that he viewed the judgment in *Vesey* as itself beginning a process of giving fair warning to dishonest plaintiffs that they could be penalised. He said,

> it is fair publicly to state what I believe to be the inherent powers of the court in cases of gross dishonesty, precisely so as to remove the possible unfairness involved in exercising those powers without warning.[194]

Hardiman J's *obiter dicta* have subsequently been understood to represent the law and therefore themselves constitute the prior warning that the courts will henceforth penalise people who are grossly dishonest in their pursuit of a legal action.[195] The leading text on practice and procedure sternly warns its readership that plaintiffs would ignore Hardiman J's warning at their peril.[196] This, then, is another functional equivalent of prospective overruling.

Irish Constitutional Law and the Retroactivity Problem

In Ireland, the problem of the implications of a judicial decision for prior conduct has been considered primarily in the context of unconstitutional legislation.[197] Judicial review of the constitutionality of legislation which is already in force is a defining feature of the legal system. Constitutional theory indicates that a law which is not authorised by the superior norm cannot be valid.[198] This implies that we should also deprive the invalid law of legal effect and reverse acts purportedly justified by it. However, experience has shown that undoing what has been done under an unconstitutional statute can be highly problematic. It may be impractical or undesirable.[199] This is a common problem across jurisdictions.[200] The United States Supreme Court has, controversially, ruled that it can deny retroactive effect

[193] O'Connor v Dublin Bus [2003] 4 IR 459 (IESC).

[194] Ibid 502.

[195] Larkin v Joosub [2006] IEHC 51 (IEHC); Allied Irish Banks, plc v McKenna [2013] IEHC 194 (IEHC).

[196] Delany H. and McGrath, D. 2012. *Civil Procedure in the Superior Courts*. 3rd ed. Dublin: Thomson Reuters, 2012: paras 16–52.

[197] O'Neill, A. 2006. Invalidity and Retrospectivity under the Irish and Canadian Constitutions. *Constitutional Forum Constitutionnel*: 147.

[198] Kelsen, H. 1986. The Function of a Constitution. In *Essays on Kelsen*, ed. Tur, R. and Twining, W. Oxford: Clarendon Press: 109, 119.

[199] O'Neill, A. 2007. The Effect of a Finding that Legislation is Unconstitutional: The Approach of the Irish Supreme Court. *Common Law World Review* 36: 220, 221; Murphy v Attorney General [1982] 1 IR 241, 322.

[200] Cappelletti, M. and Adams, J.C. 1966. Judicial Review of Legislation: European Antecedents and Adaptations. *Harvard Law Review* 79: 1207, 1223; see Chicot County Drainage Dist. v Baxter State Bank, 308 US 371, 374 (USSC).

to constitutional decisions.[201] Canada permits the suspension of declarations of unconstitutionality where necessary to avoid creating a danger to the public, threatening the rule of law, or prejudicing citizens without vindicating the rights infringed.[202]

Constitutional rulings in Ireland have raised the prospect that elections,[203] criminal trials[204] and the levying of income tax[205] were all unconstitutional for extended periods. In the early 1970s, the Supreme Court found that the Electoral Act 1923 was unconstitutional but did not consider the effect this finding might have on the validity of prior elections.[206] A few years later, in *de Búrca v. Attorney General*, the Supreme Court ruled that the Juries Act was unconstitutional because it established unrepresentative juries. O'Higgins CJ expressed the concern about the possibility of the invalidation of "tens of thousands of criminal jury trials".[207] He argued that the "overriding requirements of an ordered society" would defeat any attempt to declare all previous jury trials invalid on foot of *de Búrca* or to invalidate prior elections after *McMahon*.[208]

In *The State (Byrne) v Frawley,* a convicted person did challenge the validity of his jury trial.[209] The judges who heard the case divided between two incompatible reasons why he should be left in prison. Finlay P in the High Court and Henchy J in the Supreme Court held that the applicant was estopped by his conduct from protesting that his jury was unlawful.[210] In contrast, O'Higgins CJ in the Supreme Court upheld the validity of the trial and rejected the idea of estoppel.[211] He reasoned that trials with restricted jury panels were not fundamentally flawed and that the public interest would militate against invalidating them. If this reasoning were not adopted, he believed it would "follow with inexorable logic" that each earlier jury trial would be a nullity and sentences imposed would have no legal authority. This could not be allowed: "could organised society accept such a conclusion?"[212] He expressly rejected the view that acquiescence or estoppel could reincarnate an unconstitutional statute.[213] Ultimately, the Supreme Court opted 3:2 for the combination of invalidity and estoppel.

[201] Linkletter v Walker 381 US 618 (1965) (USSC).

[202] Schachter v Queen (1992) 93 DLR (4th) 1, 28 (SCC); R v. Bain [1992] 2 SCR 679 (SCC).

[203] McMahon v Attorney General [1972] IR 69 (IESC).

[204] De Búrca v Attorney General [1976] IR 38 (IESC).

[205] Murphy v Attorney General [1982] 1 IR 241 (IESC).

[206] McMahon v Attorney General [1972] IR 69 (IESC).

[207] De Búrca v Attorney General [1976] IR 38, 63 (IESC).

[208] Ibid 63.

[209] The State (Byrne) v Frawley [1978] IR 326 (IESC).

[210] Ibid 350.

[211] Ibid 342.

[212] Ibid 341.

[213] Ibid 341–342.

Invalidity ab Initio of Unconstitutional Statutes and Redress

In the leading Irish constitutional case of *Murphy v Attorney General*, the Supreme Court found that the income tax laws were unconstitutional because they discriminated against people who were married.[214] Henchy J led the majority, ruling that the terms of the Constitution necessitated the conclusion that an unconstitutional statute was void ab initio.[215] Purported enactments outside the delimited scope of Parliament's power to make laws are to be deemed null and void from the time of enactment, in the same manner as if they had been created by a person lacking the legislative power. Both general constitutional principle and Article 15.4.2° indicate that an unconstitutional statute must be void from the beginning.[216]

In a lone dissenting judgment, O'Higgins CJ held that a declaration of unconstitutionality only rendered laws invalid from the date of the declaration.[217] This solution would avoid the difficulty of conduct engaged in under the authorisation of the impugned law suddenly becoming unlawful.[218] He further considered it "unthinkable" that the People could have intended that "laws, formally passed, which went into operation and which were respected and obeyed, could, years after their enactment, be declared never to have had the force of law".[219]

After finding that an unconstitutional law is void ab initio, Henchy J unequivocally asserted the general principle of a right to redress. He stated,

> the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress.[220]

In *Murphy,* the remedy sought was restitutionary. Another common form of redress is to release a person who is being detained.[221] In addition, a number of Irish cases in the last 15 years have explored the potential conditions for State liability to compensate citizens for damage caused by the enactment of unconstitutional laws. In *An Blascaod Mór Teo v Commissioners of Public Works (No. 4)*,[222] Budd J rejected strict liability and suggested that the State should only be liable

[214]Murphy v Attorney General [1982] 1 IR 241 (IESC).

[215]Ibid 307.

[216]Ibid 309; The People (DPP) v Cunningham [2012] IECCA 64 (IECCS); see also Walsh n 59 above 161.

[217]Murphy v Attorney General [1982] 1 IR 241, 300 (IESC).

[218]Ibid 297.

[219]Ibid 300.

[220]Ibid 313; Redmond v Minister for the Environment (No. 2) [2004] IEHC 24; [2006] 3 IR 1, 3 (IEHC); see also Byrne v Ireland [1972] IR 241, 281 (IESC).

[221]Article 40.4.2°, Bunreacht na hÉireann 1937 (Ireland); FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271, para 41 (IEHC).

[222]An Blascaod Mór Teo v. Commissioners of Public Works (No. 4) [2000] 3 IR 565 (IEHC).

for damages in respect of invalid legislation "in exceptional circumstances".[223] However, *Redmond v Minister for the Environment (No. 2)*[224] adopted a more liberal approach to the possibility of compensatory damages for the enactment of unconstitutional laws. Herbert J rejected the view that the courts should be slow to award compensation for loss caused by invalid statutes or only do so in extreme circumstances.[225] In *Blehein v Minister for Health and Children*,[226] Laffoy J offered further support to the availability of compensatory damages as redress for the infringement of citizens' rights by unconstitutional laws. The plaintiff had been detained in a mental health institution for long periods under legislation which was declared unconstitutional. Laffoy J rejected an argument that the obligation to obey laws in force should preclude the award of a remedy when a statute was later invalidated.[227] Ultimately, however, the plaintiff's claim for damages was mostly statute barred, and for some of his losses, his right was fully vindicated by the declaration of unconstitutionality.[228]

Given Irish law's general commitment to granting concrete remedies for breaches of constitutional rights, Hogan J has described the "scope, range and effectiveness of the remedies available where an unconstitutionality has been established" as one of "the Constitution's great strengths."[229] However, the admirable constitutional principles that unconstitutional statutes are completely void and that citizens should obtain redress for acts done under them can have dramatic implications. In Murphy itself, the finding of unconstitutionality undermined the legal basis on which income taxes had been levied in the State for a decade. How could the State possible give back such vast sums of money?

One Solution: An Exceptional Defence to Claims for Redress

The facts of *Murphy* present a clear example of a case where full redress would entail fiscal chaos.[230] Having insisted on the principles of invalidity ab initio and a *prima facie* right to redress, Henchy J relied on defences to prevent unjust or chaotic consequences. He emphasised that the common law has developed various defences which protect people who act justifiably in reliance on the law they reasonably understand to be in force. He referred to

[223]Ibid 584.

[224]Redmond v Minister for the Environment (No. 2) [2006] 3 IR 1 (IEHC).

[225]Ibid 3.

[226]Blehein v Minister for Health and Children [2010] IEHC 329 (IEHC); Blehein v Minister for Health and Children [2013] IEHC 319 (IEHC).

[227]Blehein v Minister for Health and Children [2010] IEHC 329, para. 10.6 (IEHC).

[228]Blehein v Minister for Health and Children [2013] IEHC 319 (IEHC).

[229]FX v Clinical Director of the Central Mental Hospital (No 2) [2012] IEHC 272, para 20 (IEHC).

[230]Muckley v Ireland [1985] IR 472, 482 (IESC); see also Doyle, O.J. 2008. *Constitutional Law: Text, Cases and Materials*. Dublin: Clarus: 449–450.

> prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, *res judicata*, or other matters (most of which may be grouped under the heading of public policy) . . . [66]

In addition, Henchy J proposed that there must be cases in which full redress was not awarded:

> the law has to recognize that there may be transcendent considerations which make such a course undesirable, impractical, or impossible.[231]

Full redress might not be possible when the circumstances made it "impossible, or unjust, or contrary to the common good" to undo what was done under an unconstitutional law.[232]

The solution adopted in *Murphy* is to accept the retroactive effect of the declaration of invalidity, but to allow an exceptional policy-motivated defence to some claims for full redress.[233] This defence to the general rule which Henchy J so emphatically asserted must be strictly limited to rare cases of exceptional difficulty.[234] The defence was refused in *O'Rourke v Revenue Commissioners*, where far lesser amounts were at stake.[235] Mere expense or inconvenience is not enough to deny the right to redress.[236] Keane CJ has acknowledged that the decision in *Murphy* had adopted a form of prospective overruling, but noted that, "the circumstances in that case were exceptional and, it may be, unique."[237]

While the Murphy defence to the principle of redress is essentially pragmatic, it may be defensible from a constitutional perspective. Kelly reasons that, if the right to redress is itself constitutionally founded in Article 40.3, which requires the State to vindicate the rights of citizens, it follows that this right, like other constitutional rights, is not absolute.[238] Consequently, it may be legitimate for the State to curtail the right to redress when it conflicts with other rights or compelling demands of the public interest.[239]

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[231] Murphy v Attorney General [1982] IR 241, 314 (IESC).

[232] Ibid 323.

[233] Ibid; See In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105 (IESC).

[234] Byrne, R. and Binchy, W. 2006. *Annual Review of Irish Law 2006*. Dublin: Round Hall Sweet & Maxwell: 176; See Hogan and Whyte n 19 above 906.

[235] O'Rourke v The Revenue Commissioners [1996] 2 IR 1 (IEHC).

[236] De Búrca v Attorney General [1976] IR 38, 72 (IESC).

[237] Kelly v Minister for the Environment [2003] 2 ILRM 81, 92 (IESC).

[238] Hogan and Whyte n 19 above 908.

[239] A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, 128 (IESC).

Distinguishing the Date of Invalidity from Completeness of Redress

The practical difference between finding that the statute is void ab initio but denying a remedy (as in *Murphy*), and limiting the temporal effect of the invalidity is not obvious: the two approaches produce "more or less the same result." Conceptually, however, they are very different.[240]

On the analysis adopted in *Murphy*, the inquiry in cases concerning the constitutionality of laws or other enactments falls into two stages. In the first place, the direct effect of the finding of incompatibility is that the measure is void. In principle, it has been void from the outset. The second, distinct stage of analysis is to determine whether the law offers a remedy to restore a just state to the relationship between the parties. In *Murphy*, Henchy J is quite clear that, in those cases where he limits redress, he does not deny the principle that unconstitutional statutes are void.

The eminent Constitution Review Group differentiated between two possible solutions to the problems which a finding of unconstitutionality can cause: (a) declaring that the law only becomes invalid at a specified date, or (b) circumscribing the effects of its invalidity. The Group recommended that the courts should not depart from the principle that unconstitutional statutes are void ab initio. On the second question, it expressed concern that the pragmatic solutions used in previous cases, such as the doctrine of estoppel, might not be available in every problematic case. Consequently, it recommended:

> amending the Constitution to provide the courts with an express discretion, where justice, equity or, exceptionally, the common good so requires, to afford such relief as they consider necessary and appropriate in respect of any detriment arising from acts done in reliance in good faith on an invalid law.

The Group expresses the reservation that this amendment should not be so broad as to tempt the State to enact unconstitutional laws, and proposes that it should direct judges in exercising their discretion as to the consequences of invalidity to weigh the rights of every affected person.

An Alternative Solution: Limiting Invalidity to Prospective Effect

Murphy established the "orthodoxy" in Irish law that unconstitutional statutes are void ab initio.[241] It was applied in *Muckley v Ireland*[242] and expressly approved by Barrington J in *McDonnell v Ireland*.[243] Later, however, this approach would

[240] McDonnell v Ireland [1998] 1 IR 134 (IESC).

[241] Doyle n 230 above 450.

[242] Muckley v Ireland [1985] IR 472 (IESC).

[243] McDonnell v Ireland [1998] 1 IR 134 (IESC).

be called into question in the second major case on the effect of declarations of invalidity: *A v Governor of Arbour Hill Prison.*[244] The road to the A Case, which seems to favour limiting the retroactive effect of declarations of unconstitutionality, begins with *McDonnell v Ireland*.[245] A postal worker who was convicted of membership of an unlawful organisation lost his job in the public sector, under a statute which was subsequently found to be unconstitutional.[246] The plaintiff's claim for redress was statute barred. However, O'Flaherty J's *obiter* remarks on the temporal effect of declarations of unconstitutionality would later prove influential.

O'Flaherty J seemed to lean towards the possibility of limiting a declaration of unconstitutionality to prospective effect only, with the consequent denial of a remedy. He based his views on the premise that, "laws should be observed until they are struck down as unconstitutional".[247] Given the mandatory nature of the requirement to obey enacted laws, O'Flaherty J reasoned that,

> A rule of constitutional interpretation, which preserves the distinct status of statute law which, as such, is necessitated by the requirements of an ordered society and by "the reality of situation" (to adopt Griffin J.'s phrase), should have the effect that laws must be observed until struck down as unconstitutional. The consequences of striking down legislation can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity.[248]

This reasoning suggests that the presumption of the validity of laws prior to challenge implies that a declaration of unconstitutionality can only have prospective effect. It is doubtful that this conclusion is logically supported by its premise. Furthermore, Doyle points out that this logic is inconsistent with both *Murphy* and the outcome of *Muckley v Attorney General*. In *Muckley v Attorney General*,[249] the Supreme Court "foiled" Parliament's efforts effectively to reinstate the original pre-*Murphy* tax demands against married couples who were in arrears and therefore had not yet paid the unconstitutional taxes.[250] According to O'Flaherty J in *McDonnell,* only the specific plaintiffs who challenge an unconstitutional law may obtain the benefit of its invalidation. In *Muckley*, however, the successful plaintiffs had not initiated the original challenge to the validity of the taxation statute in *Murphy*.

Matters came to a head in *A v Governor of Arbour Hill Prison.*[251] In *CC v Ireland*,[252] the Supreme Court found that the provision criminalising unlawful carnal knowledge with a child was unconstitutional because it did not allow for a

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[244] A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88 (IESC).

[245] McDonnell v Ireland [1998] 1 IR 134 (IESC).

[246] Cox v Ireland [1992] IR 53 (IESC).

[247] McDonnell v Ireland [1998] 1 IR 134, 143 (IESC).

[248] Ibid 144.

[249] Muckley v Ireland [1985] IR 472 (IESC).

[250] Scannell, Y. 2000. The Taxation of Married Women – Murphy v. Attorney General (1982). In *Leading Cases of the Twentieth Century* ed. O'Dell, E. Dublin: Round Hall Sweet & Maxwell: 327, 350.

[251] A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88 (IESC).

[252] CC v Ireland [2006] IESC 33; [2006] 4 IR 1 (IESC).

defence that an accused person was honestly mistaken as to the age of the child.[253] The applicant in the *A Case* had been convicted of unlawful carnal knowledge of a child, whom he knew to be 12 years old. Laffoy J in the High Court accepted that he was not validly convicted. As the unconstitutional statute had ceased to exist with the coming into force of the Constitution in 1937, "the offence with which the applicant was charged did not exist in law when it was purported to charge him with it".[254]

The Supreme Court, however, reversed this ruling. It drew widely from the *Murphy* Supreme Court decisions, and thus superficially accepted *Murphy*, in order to create a decision which contradicts *Murphy* in very important ways. Murray CJ praised O'Flaherty J's dicta in *McDonnell* as, "the logical and ineluctable application of the principles and considerations set out in the judgment of the Court in Murphy".[255] He described the Constitution as "holistic", invoking the ideas of an ordered society and the common good.[256] He qualified the "abstract" rule that unconstitutional statutes are void as incompatible with the administration of justice.[257] The Chief Justice interpreted *Murphy* as authority against the undoing of all that was done pursuant to an unconstitutional law.[258] Murray CJ characterised the applicant's case as a "collateral" attack on a final verdict in a criminal trial.[259] He stated the rule, applicable in the criminal law context, as being that a person convicted of a criminal offence, and who has not impugned his prosecution, may not generally later challenge his conviction due to the unconstitutionality of the statute, though as an exception to the rule there may be cases in which such a conviction should be revisited.[260]

Despite the Chief Justice's reliance on *Murphy*, the approaches endorsed in the two cases are incompatible. Doyle argues persuasively that the critical importance of *Muckley* is that it demonstrates conclusively that *Murphy* did indeed render the unconstitutional statute void ab initio.[261] It proves that *Murphy* involves two separate stages of analysis; the first resulting in the statute being found to be void ab initio, and the second considering the parameters of the redress available to taxpayers. Secondly, *Murphy* affirmed a general principle that there should be redress. Murray CJ's highly expansive reading of the *Murphy* defence, to the detriment of the primary principle of redress, "reversed the principle and the

[253] Ibid 78–79.

[254] A v Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, 95 (IESC).

[255] Ibid 141.

[256] Ibid 113.

[257] Ibid 113.

[258] Ibid 137.

[259] Ibid 114.

[260] Ibid 143.

[261] Byrne and Binchy n 234 above 178.

exception".[262] There is an enormous difference between saying something is not an absolute rule and saying it is not a rule at all.

The Supreme Court decision has been widely criticised by legal scholars. The philosophical problem with its reasoning is that it purports to maintain the validity of a law which is incompatible with the constitution, contrary to the hierarchy of norms and constitutional principle. By narrowing the category of persons against whom the statute is deemed invalid to those who brought the successful legal action, this approach would permit the continued infringement of other citizens' rights in exactly the same way as had led to the court's finding of unconstitutionality, to the knowledge of the courts, which are charged with upholding the Constitution. This would undermine the courts' duty to do justice and to treat parties equally. The *A Case* is also criticised for mischaracterising the claim of the applicant. He was not seeking redress for past wrongs, necessitating the retroactive effect of the invalidation of the law in question. Rather, he sought to be released from prison, because there was currently no legal ground for detaining him[263] Doyle and Feldman conclude that overruling Murphy and introducing prospective invalidity would, though not the best reading of the constitution, be "more consistent and defensible" than the position which obtains after the A Case.[264]

However, the decision also has eminent supporters. Former Attorney General Gallagher defends the Supreme Court judgments as "a detailed and cogent rationale for a decision that was not only legally justifiable but, in my view, sensible and consistent with justice."[265] Strikingly, the United Kingdom Supreme Court has expressly adopted the reasoning and solution proposed by Murray CJ in the *A Case*.[266] *Cadder v Her Majesty's Advocate* followed a ruling of the European Court of Human Rights that criminal trials should not have used incriminating statements made by accused persons without access to legal advice.[267] Awareness of the ECHR ruling had "disrupted and delayed the progress of criminal trials throughout Scotland" as many accused persons objected to their trial.[268] This created "compelling reasons" for limiting its effect on past convictions.[269] The United Kingdom Supreme Court allowed the appellant's appeal against his conviction but ruled that any convicted person who did not appeal in good time cannot avail of the clarification of the law. It emphatically endorsed the position taken by the Irish Supreme Court

[262]Doyle n 230 above 451.

[263]Fanning, R. 2005. Hard Case; Bad Law? The Supreme Court Decision in A v Governor of Arbour Hill Prison. *Irish Jurist* 40: 188, 207–208.

[264]Byrne and Binchy n 234 above 178.

[265]Gallagher, P. 2010. The Irish Constitution – Its Unique Nature and The Relevance of International Jurisprudence. *Irish Jurist*: 22, 44.

[266]Cadder v Her Majesty's Advocate [2010] UKSC 43 (UKSC).

[267]Salduz v Turkey (2009) 49 EHRR 19 (ECtHR).

[268]Cadder v Her Majesty's Advocate [2010] UKSC 43, para 56 (UKSC).

[269]Ibid para 56.

in *A v Governor of Arbour Hill Prison*. In particular, Lord Hope and Lord Rodger adopted Murray CJ's solution.[270] Lord Hope quoted the principle that, in a criminal case, where the State relies in good faith on the validity of a statute, and the accused person does not challenge the validity of the prosecution before the case reaches finality, then the final decision stands even if a later decision finds that the statute was invalid. Lord Hope concluded that,

> there are strong grounds for ruling today . . . that the decision in this case does not permit the reopening of closed cases.[271]

This is a forceful declaration from the highest court in the United Kingdom, but it is also necessarily *obiter dictum*, since it does not concern the case before the court. If, however, the courts heed this restriction on the effect of the ruling in this case, it will have limited the legal consequences of the finding of the inadmissibility of incriminating statements obtained without legal advice to certain categories of litigant.

Reconciling the Authorities

Subsequent Irish cases have confronted the need to reconcile *Murphy* and the *A Case* – and continue to apply both these precedents. The decision of Laffoy J in the 2010 compensatory redress case of *Blehein v Minister for Health* is encouraging for the *Murphy* analysis.[272] The State had relied on the decision of O'Flaherty J in *McDonnell*, but Laffoy J distinguished McDonnell as not applying where the plaintiff had personally challenged the validity of the law in question. Laffoy J dismissed the argument based on people's obligation to obey the law, at least in so far as it applied to the plaintiff who had successfully challenged the statute, as inconsistent with the decision of the Supreme Court in the *Murphy* case.[273] She also expressly related redress in the form of compensation for prejudice caused by invalid laws to Henchy J's recommendation of all "permitted and necessary redress" in *Murphy*. The compensatory damages cases indicate that, despite Murphy coming under attack in *A v Governor of Arbour Hill Prison*,[274] *Murphy* remains good law and Irish law recognises an expansive right to a remedy for harm caused pursuant to unconstitutional legislation, subject only to a very limited exception.

In parallel, recent case law, especially in the criminal context, has confirmed and applied the precedent set in *A v Governor of Arbour Hill Prison*. Consequently, the exact contours of the relationship between the two cases are unclear: are the

[270] Ibid paras 60, 62.

[271] Ibid para 60.

[272] Blehein v Minister for Health and Children [2010] IEHC 329, para 10.2 (IEHC).

[273] Ibid para 10.6.

[274] A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88, 128 (IESC).

restrictive *A Case* rules limited to demands to overturn criminal convictions? On Murray CJ's own characterisation, the *A Case* decision turns on the undoing of previously final judicial determinations. The principle, as he frames it, applies to criminal prosecutions.[275] *Cadder v Her Majesty's Advocate* derived from the A Case a principle applicable to criminal cases.[276] On this view, the *A Case* provides for a specific rule concerning criminal convictions under unconstitutional laws, whereas the more general principles remain those articulated in *Murphy v Attorney General*. The *Murphy* logic could still apply to other matters, such as overpaid taxes. Another possibility is that the *A Case* concerns the standing of an applicant to raise the matter of a declaration of unconstitutionality in a separate case, rather than the substantial effects of a finding of unconstitutionality, which remain as expounded in *Murphy*.

Most of the subsequent authorities on this problem arose in the criminal context, following a Supreme Court ruling that the legislation relied upon to authorise search warrants was unconstitutional.[277] This had the potential to affect a large number of criminal trials and led to several cases about whether other convicted persons should now be released. In *DPP v Hughes*, the applicant fell foul of the *A Case* principle, since he had pleaded guilty and thereby acknowledged his guilt regardless of the invalidity affecting the search warrant.[278]

In *The People (DPP) v Cunningham*, the appellant argued that the *A Case* should be distinguished, firstly because he had an appeal outstanding when the law was declared unconstitutional.[279] The Court of Criminal Appeal ruled that the principle in the *A Case* could not apply where the appellant had an appeal in being when the law was found unconstitutional. Only where an appeal was concluded or the time limit for an appeal had expired could the conviction be said to be final. The Court proceeded to consider whether the appellant was estopped from benefiting from the declaration that the law was unconstitutional. The *A Case* applicant had pleaded guilty, had not appealed, and never raised an issue about his knowledge of the victim's age. This was material to the *A Case* decision, and did not apply to the applicant in *Cunningham*.[280] Overall, *Cunningham* seems to endorse, but limit, the decision in the *A Case*. The finality principle can only apply when an appeal was disposed of or no appeal was instituted within the time limits. In addition, *Cunningham* emphasises the estoppel aspect of the decision in *the A Case*.

Cunningham also expressly espouses the views expressed in the *Murphy Case* that unconstitutional laws are void ab initio and inoperative as against the citizenry

[275] Ibid 143.

[276] Cadder v Her Majesty's Advocate [2010] UKSC 43 (UKSC).

[277] Damache v DPP [2012] IESC 11 (IESC).

[278] DPP v Hughes [2012] IECCA 69 (IECCA).

[279] The People (DPP) v Cunningham [2012] IECCA 64 (IECCA); A v Governor of Arbour Hill Prison [2006] 4 IR 88, 143 (IESC).

[280] The People (DPP) v Cunningham [2012] IECCA 64, para 72 (IECCA).

in general, and that there is a general principle of redress.[281] The court confirms the existence of the *Murphy* defence, and that it is exceptional. The statement that unconstitutionality does not require all acts done under the invalid law to be undone is compatible with either *Murphy* or the *A Case*. It is important for the future to know which rationale is used, and how exceptional the denial of redress is. By endorsing both authorities, *Cunningham* does not resolve these questions.

In *People (DPP) v Kavanagh*, the Supreme Court also applied the principle in the *A Case* to prisoners convicted under an unconstitutional statute.[282] As they had raised the constitutional argument in their appeal, they were not estopped from relying on the invalidity of the statute.[283] Denham CJ restated the general principle that a finding of unconstitutionality does not operate only in relation to the litigants who bring a challenge. It will affect others, at least as concerns current and future dealings.[284] The Chief Justice formulated the general rule, based on the *A Case*, as follows:

> In general, a finding of the invalidity of a statute is applied prospectively, and to cases in which the issue was raised but in which finality had not yet been reached.[285]

This appears to confirm the reversal of the *Murphy* position that an unconstitutional statute is void ab initio – unless the more recent formulation is limited to cases of criminal convictions.

Continuing under the rubric, "Potential catastrophic consequences", Denham CJ expressly refrained from indicating her view as to when "a court would decline to give full (or even partial) retroactive effect to a finding of unconstitutionality if this were to have catastrophic consequences".[286] However, she added an endorsement of the *Murphy* Case's proposition that in exceptional cases, full redress may need to be denied for the public good:

> While the first duty of the courts is to secure legal redress for those whose rights have been infringed by unconstitutional action, this duty is, as Article 40.3.1 itself recognises, tempered by considerations of feasibility and practicability.[287]

The law on the effects of a finding of unconstitutionality is not entirely clear, because the case law continues to approve elements from both the *A Case* and *Murphy*, without resolving the fundamental contradiction between the solutions used in these two cases. It appears that unconstitutional statutes are indeed deemed to be invalid ab initio, but that, while there is a general right to redress, that right is limited in some cases. In cases involving criminal convictions under an

[281] Ibid para 73.

[282] People (DPP) v Kavanagh [2012] IECCA 65, para 54 (IECCA).

[283] Ibid para 62.

[284] Ibid para 72.

[285] Ibid para 65.

[286] Ibid para 74.

[287] Ibid para 74.

unconstitutional statute, it is pertinent whether the criminal process has reached its final determination, with no possibility of further appeal, and whether the applicant is estopped by his own conduct from raising the question of invalidity. More generally, the public good and the avoidance of exceptionally disruptive consequences may, in very limited cases, require the denial of full redress to affected persons.

Suspensory Declarations

Another interesting development has introduced the possibility of a brief suspension of an order to release people from detention, in very limited circumstances. In principle, when a person is detained without legal authority, the court must order his immediate release.[288] However, in very exceptional cases, the Irish courts may place a stay on an order for habeas corpus.[289] In *FX v Clinical Director of the Central Mental Hospital (No 2)*, the applicant was detained in the Central Mental Hospital after committing a serious crime.[290] His detention was ruled unlawful (the statue was not unconstitutional, but statutory procedure had not been followed).[291] Hogan J was faced with the decision as to whether the applicant must immediately be released. The applicant was "possibly the most seriously disturbed individual currently detained" in the State and there was strong medical evidence that "he would pose a real and immediate risk to himself, identifiable individuals and to society at large".[292] The respondents argued that the court had a general discretion to stay the order of release to allow the authorities to regularise the legality of the applicant's detention. Hogan J considered that this "superficially attractive option" had very dangerous implications for constitutional liberties and the rule of law.[293] On the other hand, he feared that, if findings of unconstitutionality lead inexorably to devastating consequences, there is a risk that the courts will hesitate to declare transgressions by the State. Mindful of the dangers of allowing remedies from infringements of fundamental constitutional rights such as personal liberty to become excessively discretionary, Hogan J chose to use a limited power to exercise discretion to place a stay on the order for release, in order to allow the executive a brief opportunity to solve a difficult problem.[294] However, he carefully

[288]The State (Browne) v Feran [1967] 1 IR 147 (IESC); The State (Trimbole) v. The Governor of Mountjoy Prison [1985] IR 550 (IESC).

[289]N v Health Service Executive [2006] 4 IR 374 (IESC); JH v Russell [2007] IEHC 7; [2007] 4 IR 242 (IEHC).

[290]FX v Clinical Director of the Central Mental Hospital (No 2) [2012] IEHC 272 (IEHC).

[291]FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271 (IEHC).

[292]FX v Clinical Director of the Central Mental Hospital (No 2) [2012] IEHC 272, para 4 (IEHC).

[293]Ibid para 6.

[294]Ibid para 25.

circumscribed this discretion. He said that the suspensory order for release under Article 40.4.2° can only apply to "persons detained for their own good" who pose a danger to themselves or others. Furthermore, the court must always keep the period of suspension very short (in this case 2 days).[295] In the Supreme Court, Denham CJ also affirmed the importance of the right to liberty. She characterised the relevant Supreme Court precedent as "controlling the release, for the purpose of protecting the person who is incapable of protecting themselves".[296] This implies that the Supreme Court believes that this exception should be very strictly limited.

The Need for Pragmatism

The Irish constitutional cases clearly illustrate that there are some extreme circumstances in which there are compelling reasons not to follow the logic of constitutional theory through to reversing all that has been done under an invalid law. Indeed, as Hogan J has warned, if redress must always follow a declaration of invalidity, there is a risk of a chilling effect on the judicial defence of citizens' rights.[297] The sweeping scale of the full consequences of a declaration of unconstitutionality risks deterring the courts from exercising their power to declare laws invalid.[298]

Faced with those exceptional cases in which there is a truly compelling reason not to allow full redress to people affected by an unconstitutional law, something has to give. Any possible solution to the difficulties posed by fully upholding constitutional principle requires a compromise. The Constitution Review Group considered that the American approach of limiting retrospective effect is pragmatic, but "intellectually difficult to defend" and "leads to arbitrary results".[299] O'Neill describes the Canadian approach of allowing an unconstitutional law to remain effective for a time as "counterintuitive and unpalatable", yet she approves of the requirement for the Canadian courts to identify clear reasons for the departure from principle.[300] Two alternatives which emerge from the Irish constitutional case law are that we could deny either that the unconstitutional statute is invalid or that redress should be given. Both of these escape routes sacrifice sound principle and justice to pragmatic considerations. However, it seems less objectionable to limit the remedy than to deny the principle that a law which conflictswith a higher norm

[295]Ibid para 27–28.

[296]FX v Clinical Director of the Central Mental Hospital [2014] IESC 1 para 79 (IESC).

[297]FX v Clinical Director of the Central Mental Hospital (No 2) [2012] IEHC 272, para 20 (IEHC).

[298]FX v Clinical Director of the Central Mental Hospital (No 2) [2012] IEHC 272, para 21 (IEHC); Gallagher n 265 above 49.

[299]Constitution Review Group n 8 above.

[300]O'Neill n 197 above 147.

must be completely void. It is critically important, in the interests of justice, that we continue to insist that only truly exceptional cases could justify sacrificing the rights of individuals to the common good as was done in *Murphy*.

Conclusion: Relationship Between the Constitutional and Common Law Contexts

As we have seen, Irish law has devoted far more attention to issues related to prospective overruling in the constitutional context than in relation to changes to the common law. However, having adopted techniques to limit the full retrospective effect of their decisions in constitutional cases, it is likely that the courts would be open to some form of prospective overruling in other contexts if necessary. This is supported by the indications that judges consider limiting the retrospective effect of judgments in common law and constitutional contexts to be very closely related.[301] The judgment in *FX (No 1)* seems to blur the division between constitutional and other cases where the courts might wish to protect reliance on a previous understanding of the law. The courts' primary duty is to protect individual rights, but this is not always "feasible or practicable."[302] This judgment seems to treat retrospectivity as raising similar considerations regardless of the context in which it arises.

If there is not a clear distinction between the constitutional cases and the common law context, then we might infer that prospective overruling is already part of Irish law across the board. It may just be that, as in England, we are still waiting for a case outside the constitutional context where the circumstances are sufficiently exceptional to warrant prospective overruling. In the meantime, pure prospective overruling remains a hypothetical possibility beyond the context of the invalidity of enacted legislation.

[301] FX v Clinical Director of the Central Mental Hospital (No 1) [2012] IEHC 271, para 46 (IEHC).

[302] Ibid para 47.

Chapter 3
Effects in Time of Judgments in the Netherlands: Prospective Overruling and Related Techniques

C.H. van Rhee and Wytze van der Woude

Abstract In the Netherlands, the established rule is that there is no system of precedent even though especially the judgments of the Dutch Supreme Court and the other highest courts are very *authoritative* and *persuasive*. Nevertheless, lower judges and the four highest courts are in principle *not* bound by previous judicial decisions. As regards court cases, the declaratory theory is formally adhered to: the judge does *not* create new law, but states the law as it is. As a result, court rulings are, as a general rule, relevant retrospectively.

The formal adhesion to the declaratory theory is not only undermined by everyday practice, it is also mitigated by the formal recognition of what could literally be translated from Dutch legal doctrine as the 'law forming task' of the judiciary. Within this context, Dutch courts occasionally address the effects in time of their judgments. The present contribution discusses the various ways in which this is done in practice and pays specific attention to the technique of prospective overruling.

The Way Precedent Operates in the Netherlands

In the Netherlands, the established rule is that there is NO system of precedent. Lower judges and the four highest courts[1] are in principle *not* bound by previous

[1] An important characteristic of the organization of the Dutch judiciary is that, although the Netherlands have a Supreme Court (Hoge Raad), in cases of administrative law there are three courts whose cases cannot be brought to the Supreme Court. Their decisions are final, which means

C.H. van Rhee (✉)
Department of Foundations and Methods of Law, Faculty of Law, Maastricht University, PO Box 616, Maastricht 6200 MD, The Netherlands
e-mail: remco.vanrhee@maastrichtuniversity.nl

W. van der Woude
Faculteit REBO – Departement Rechtsgeleerdheid, Afdeling SBR, Achter Sint Pieter 200, Utrecht 3512 HT, The Netherlands
e-mail: W.vanderWoude@uu.nl

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judicial decisions. This rule is laid down in Article 12 of the General Provisions Act (Wet algemene bepalingen) of 1829.

Status of Judge-Made Law in the Netherlands

In the Netherlands, judgments of the courts are formally *not* a source of law (in that sense, 'case *law*' or 'judge-made *law*' does not exist). Nevertheless, especially the judgments of the Dutch Supreme Court (*Hoge Raad*) and the other highest courts are very *authoritative* and *persuasive*. As regards court cases, the declaratory theory is formally adhered to: the judge does *not* create new law, but states the law as it is (even though in everyday practice the fallacy of this approach is recognized, e.g. in case law where the Dutch Supreme Court specifically states that it will fill in a so-called 'open-ended norm'; see HR 27 November 1981, NJ 1982, 503 ('Pensioenvereveningsarrest', also known as 'Boon v. Van Loon')).[2]

The formal adhesion to the declaratory theory is not only undermined by everyday practice, it is also mitigated by the formal recognition of what could literally be translated from Dutch legal doctrine as the 'law forming task' (*rechtsvormende taak*) of the judiciary. More and more the highest courts are enabled to declare their interpretation of a legal matter outside the context of a concrete case before them through various institutional arrangements. The oldest of these arrangements is the possibility for the Supreme Court to give 'rulings in the interest of the law' (*cassatie in het belang der wet*, which is of French origin). 'Rulings in the interest of the law' may occur in cases that were decided upon by a lower court, in which all parties involved refrain from lodging cassation appeal. Whereas such a case would normally not find its way to the Supreme Court, the Public Attorney may decide to bring the case before the Court in order for it to rule on the legal question at hand. Its ruling, however, carries no consequences for the parties in the initial proceedings. The only possible rationale behind this instrument is to allow the Supreme Court legal means to assert its position as an *authoritative* and *persuasive* interpreter of the law. In 2012 three Acts of Parliament were passed to strengthen this position further. The Act on Strengthening Cassation (Wet versterking cassatierechtspraak) and the Act on Preliminary Questions to the Supreme Court both focus on the

that, in their field, they serve as the highest judicial body. The Central Appeals Tribunal (Centrale Raad van Beroep) predominantly deals with cases concerning social security and the civil service, the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven) rules on disputes arising from several specialized Acts in the socio-economic domain (e.g. Competition Law and Telecommunication Law), and finally, the competence of the Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) lies in all other fields of administrative law where a formal decision of a government body, which is not a general provision, is at the basis of court proceedings. The Supreme Court deals with all other cases, including tax matters.

[2]Cf. Kottenhagen (1986), 23 ff. See also Haazen (2001), 11 ff.

Supreme Court. The first Act facilitates the Supreme Court in a fast track ruling procedure to decide on the inadmissibility of appeals in cases where such appeals are manifestly ill-founded and holds lawyers to a higher than usual standard of competence and education to be able to bring an appeal at the Supreme Court. The second Act contains an amendment to the Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) and allows lower judges to raise preliminary questions to the Supreme Court in civil proceedings where there is a multitude of claims of a similar nature. In the explanatory memoranda of both Acts the rationale behind these instruments was justified in the interest of the 'development of the law' (*rechtsontwikkeling*)[3] or the 'forming of law' (*rechtsvorming*),[4] as well as promoting 'unity of case law' (*rechtseenheid*).[5] The fast track inadmissibility procedure facilitates the Supreme Court by letting the Court concentrate on more fundamental questions of law. The procedure on preliminary rulings aims to accomplish the same by permitting the Supreme Court to establish its line of reasoning in cases or fields of law where large aggregations of legal questions arise. With regard to these preliminary rulings, the amended Code of Civil Procedure obliges lower courts to take the preliminary ruling of the Supreme Court into account in their judgments.

Nevertheless, the Legislature still formally adheres to the general notion of Article 12 of the General Provisions Act. By way of the new legislation and providing the aforementioned rationale, the Legislature makes it more than implicitly clear that although lower courts are allowed to think for themselves, the general expectation is that they will follow the Supreme Court's case law in the vast majority of cases.

In administrative law, the 2012 Administrative Proceedings Amendment Act (Wet aanpassing bestuursprocesrecht) and its Explanatory Memorandum evoke a similar expectation. This Act amends the General Administrative Law Act (Algemene wet bestuursrecht), and establishes three 'Grand Chambers' (*grote kamers*) of five judges for each of the three highest administrative courts (the Central Appeals Tribunal, the Trade and Industry Appeals Tribunal, and the Administrative Jurisdiction Division of the Council of State). Enabled by the fact that members of one of these courts almost always serve as replacement-members in the other two courts, the three separate administrative courts are to be represented in these Grand Chambers. According to Article 8:10a of the newly amended General

[3]Explanatory Memorandum on the Act on strengthening Cassation, TK (2010/2011) 32576, nr. 3 and the Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

[4]Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

[5]Explanatory Memorandum on the Act on strengthening Cassation, TK (2010/2011) 32576, nr. 3 and the Explanatory Memorandum on the Act on Preliminary Questions to the Supreme Court, TK (2010/2011) 32612, nr. 3.

Administrative Law Act, proceedings before these Grand Chambers are only justified in the interest of 'unity of case law' and the 'development of the law'.[6,7]

The conclusion of this can only be that Dutch constitutional doctrine is not free from ambivalence. On the one hand, Dutch judges are formally not allowed to 'make' law. On the other hand, the national Legislature expects some degree of 'unity of case law', a considerable contribution to the 'development' of the law, and in some cases the 'forming' of law. An exact boundary between especially the latter and judge-made law is not given in this respect.

The practice of application of Article 94 of the Constitution does offer some insight into this matter. Again, according to Article 94 of the Constitution, courts may not apply national law if 'such application is in conflict with provisions of treaties or resolutions by international institutions that are binding on all persons'. In his farewell address, Supreme Court President S.K. Martens showed that in the vast majority of cases strict application of Article 94 offers no remedy to the parties involved.[8] In most cases where national legislation was deemed in violation of international law (predominantly the European Convention on Human Rights), non-application of national law would lead to a 'legal vacuum'. For instance, in a 2003 case of the Administrative Jurisdiction Division of the Council of State, the removal of voter rights of those under legal guardianship (usually mentally disabled persons) under Article 54 of the Constitution was deemed in violation of Article 25 of the International Covenant on Civil and Political Rights because of discrimination between the mentally disabled that were under guardianship and those who were not. The Administrative Jurisdiction Division of the Council of State could have chosen for non-application of Article 54. However, in doing so a situation would arise in which there were no rules for removal of voter rights of the mentally disabled at all. The Division argued that the choice for this or other possibilities of legally addressing this discrimination was not theirs to make. The variety of options was so extensive that according to the Division it fell outside the 'law forming task' of the judiciary to choose. In doing so, plaintiffs were told that they were right about the discriminatory nature of Article 54 of the Constitution, but that this was a matter for the national Legislature, to whom this issue was implicitly deferred. In 2008 a constitutional amendment was passed that allows persons under legal guardianship the right to vote.

There is an abundance of examples in which courts argue similarly. According to Martens, courts will only fill the void left by the non-application of national law ex-Article 94 of the Constitution when there is either only one possible way to remedy

[6]The Explanatory Memorandum on the Administrative Proceedings amendment Act also mentions the interest of the 'forming of law' by the administrative courts. TK (2009/2010) 32450, nr. 3.

[7]Furthermore, the 2012 amendment of the General Administrative Act grants members of the three courts the right to render 'conclusions' in proceedings before either of the other two courts, provided that these proceedings are not held before a single-judge chamber (i.e. only with regard to more difficult legal issues).

[8]Martens (2000).

the incompatibility of national law with international law, or when the national Legislature has been made aware of such incompatibility by previous judgments, but did not act upon it. Case law on this is sparse, especially where it involves the latter option. This latter option does, however, provide some examples of prospective overruling, as we shall see below.

But let us return to the declaratory theory. As a result of the fact that the declaratory theory is formally adhered to, court rulings are, as a general rule, relevant retrospectively. The fact that the court formally only states the law as it is also appears where for a long time it was not the habit of the Dutch Supreme Court to indicate specifically that its interpretation of the law had changed; even the text of landmark cases often does not reflect that they contain a major change. The first case in private law where a different approach was chosen and where the Supreme Court indicated that its interpretation of the law had changed is HR 7 March 1980, NJ 1980, 353 (known as 'Stierkalf-arrest').[9]

In the Netherlands, there are no general judicial transition rules. General transition rules as regards judicial decisions may be hard to formulate since much depends on the specific circumstances of the case. J.M. Smits advocates a topical approach to the matter, distinguishing between different types of cases.[10] It has been argued that at least two criteria should be taken into consideration in this specific area: (1) legal certainty and (2) a reasonable degree of predictability of changes in the court's established interpretation of the law.[11]

The Dutch Supreme Court has formulated transition rules on an *ad hoc* basis in a number of cases from 1981 onwards.[12] This happened for the first time in a private law case in 1981: HR 27 November 1981, NJ 1982, 503 ('Pensioen-vereveningsarrest' or 'Boon v. Van Loon' mentioned above). The Court decided that entitlements to a pension of one of the spouses had to be taken into consideration in divorce proceedings when dividing the assets of the spouses. This judgment changed an approach based on a different rule dating from 1959 and, therefore, the Court specifically provided that the new interpretation of the law would only be relevant for the case at hand and future cases. The Court stated, amongst other things, that legal certainty would be endangered if the new interpretation could also be invoked by spouses who had previously been involved in divorce proceedings.

It has been a matter of debate whether this case can be classified as prospective overruling. In the end everything seems to hinge on the definition of prospective overruling: according to various scholars prospective overruling occurs only where the Court decides that its new interpretation is relevant for future cases but not for the case at hand. In Boon v. Van Loon the ruling was also relevant for the case at hand, so the new interpretation was valid *ex nunc* and, consequently, it is not a case

[9] See Kottenhagen (1986), 19 ff.

[10] Smits (2000).

[11] Groenhuijsen (2003).

[12] Smits (2000), 16, 23–24.

of prospective overruling in the classic sense.[13] Some Dutch authors nevertheless consider Boon v. Van Loon to be an example of what they call 'qualified prospective overruling'.[14]

A similar example where no prospective overruling occurred but where the Court decided about the effects of its judgment in time is ECLI:NL:HR:2013:BZ2653. It is a criminal case concerning the definition of rape. The defendant had forced a French kiss upon the victim. In earlier case law, this had been qualified as rape by the Court since it was considered to be sexual penetration of the body of the victim without consent. In the case at hand, the Supreme Court explicitly changed its approach. It ruled that a French kiss cannot be equalled to sexual intercourse or a similar act. Consequently, the Court determined that a forced French kiss would not be qualified as the crime of rape according to the applicable article of the Dutch Criminal Code anymore. The Court also decided that its new interpretation of rape could not be considered as a new (factual) circumstance that would allow those convicted of rape in earlier cases to reopen their case by way of the remedy of 'revision'. Consequently, the relevance of the Court's new interpretation of rape was limited to the case at hand and future cases (*ex nunc*).

When it comes to questions of admissibility, the Criminal Law Division of the Supreme Court has recently been more specific in its approach to judicial transition rules. When the aforementioned Act on Strengthening Cassation entered into force on 1 July 2012, several cases were pending before the Supreme Court that were deemed to qualify for the new fast track inadmissibility procedure. Since no transition period was stipulated by the Legislature, it was up to the Supreme Court to decide whether or not pending cases could be subject to this new procedure.[15] The Supreme Court (or at least, the Criminal Law Division of the Supreme Court) ruled that it would only apply the new procedure in cases in which cassation was filed for after 1 October 2012, because before that date the parties preparing a procedure before the Supreme Court could not have known if and when the Act on Strengthening Cassation would enter into force. Although this case law is prospective in nature, it cannot be seen as prospective overruling, given the fact that the Supreme Court did not overrule its own case law, but rather set a fixed date for application of new legislation.

A final example of a case that cannot be classified as prospective overruling is HR 24 April 1992, NJ 1993, 643. It concerns a case in which the Supreme Court was, nevertheless, concerned about the effects of its ruling in time. In the case, the Court determined when pollution of the environment (soil) can be viewed as a tort for which the State can claim damages from those responsible for the pollution

[13] Kottenhagen (1986), 279 ff.

[14] Uzman et al. (2010), p. 27.

[15] On 11 September 2012 (NJ 2013, 241; NJ 2013, 242; NJ 2013, 243; NJ 2013, 244) the Supreme Court ruled on four different cases that were used as test cases (with four different Attorneys General rendering conclusions) in this regard. All cases qualified for the new fast track procedure, but were declared inadmissible on the basis of the 'old' procedure.

(given the fact that the State will incur costs for cleaning up the polluted soil). The Supreme Court decided that such behaviour can only be considered a tort from 1 January 1975, since at that time it must have been clear for businesses that the State would take action in such cases to clean up the environment and incur costs, something that was according to the Court not clear before this date (although this date might in the opinion of the Court not be applicable in some cases of very severe pollution in which the required clarity may have existed before the date mentioned in the judgment).

Criticism of the Retrospective Effect of Judicial Decisions in the Netherlands

The retrospective effect of judicial decisions has been criticized in the Netherlands in legal writing, but only to a limited extent.[16] Generally speaking, the effects in time of judicial decisions have only received attention rather sparingly. This may also be due to the fact that the courts use various techniques to limit the effects of judicial decisions where such is necessary without using transition rules. In his PhD thesis, O.A. Haazen lists a variety of these methods, such as (1) unlimited retrospective effect of the judicial decision combined with an exception for the parties to the action in cases where the application of the rule would not be reasonable and equitable, (2) unlimited retrospective effect with an exception for specific types of cases, (3) retrospective effect for a specific time period only (e.g. 40 years), (4) unlimited retrospective effect unless an excusable *error iuris* can be proven, etc.[17]

The Use of the Technique of 'Prospective Overruling' in the Netherlands

Prospective overruling was first discussed in Dutch legal literature in 1950, in an inaugural lecture by J. Drion.[18] An early example of attention for the effects of judicial decisions in time by the Dutch Parliament dates from 1958. In that year the Dutch Parliament discussed a bill on fiscal procedure 'and some members submitted that a Supreme Court decision reversing a previous ruling should only apply to facts and circumstances that would transpire after the publication of that decision'.[19] This

[16] Cf. Kottenhagen (1986) and Haazen (2001).

[17] Haazen (2001), 27–28.

[18] Drion (1950).

[19] Gribnau and Lubbers (2013), 185. Cf. Parliamentary Papers 1958/59, 4080, no. 7, 4.

proposal for prospective overruling generated little enthusiasm in Parliament, and did not give rise to a change in the law nor in judicial decisions.[20]

The number of cases in which 'prospective overruling' has been used by the Dutch courts is limited. An important example in the area of private international law is a case about the applicable property regime governing a marriage concluded under the 1905 Hague Convention on the Law applicable to Matrimonial Property Regimes, which was subsequently denounced by the Netherlands in 1977 and replaced by new rules. In this case the Dutch Supreme Court decided that the new law would not be applied to the case at hand, nor to previous cases, and this decision was motivated by the requirements of legal certainty (HR 27 March 1981, NJ 1981, 335 (known as 'Haagse Italianen')).[21]

HR 17 January 2003, NJ 2003, 113 is another example of prospective overruling. It is a case in which cassation appeal was lodged at the Dutch Supreme Court against a judgment of the court of appeal in the town of 's-Hertogenbosch. One of the defendants was domiciled in Belgium and, therefore, the summons had to be served on that defendant according to the EU Service Regulation. Article 9(2) of this Regulation determines that 'where according to the law of a Member State a document has to be served within a particular period, the date to be taken into account with respect to the applicant shall be that determined by the law of that Member State'. When service was effected in the case at hand, the law of the Member State, i.e. Dutch law, was not clear according to the Supreme Court. As a result of this, mistakes had been made in the service of the summons and the claimant was of the opinion that these mistakes could be corrected later in the procedure. The Court determined that in this case it would indeed offer the claimant the possibility to correct its mistake even though it had become clear in the meantime that the applicable law prevented such correction. The Court explicitly ruled that it would also allow a correction in other cases where this mistake had been made, provided that the incorrect service had been effected before 1 April 2003 at which time the right interpretation of the law should be considered known to all litigants.

Another case in which the law was considered to be unclear is HR 27 April 2007, NJ 2008, 121. The unclearness concerned the moment a cassation appeal should be lodged at the Dutch Supreme Court against rulings of the Court of Justice of the (former) Netherlands Antilles and Aruba in which only part of the case was decided by way of a final judgment. Here, also, the Supreme Court decided that it would do justice according to what now appeared to be the wrong interpretation of the law, but only up to a certain moment, in this case for cassation appeals lodged against judgments of the Court of Justice that had been pronounced before 1 June 2007. For the future, the right interpretation would be followed.

A final example of a case in which the law was considered to be unclear by the Dutch Supreme Court is HR 27 May 2011, NJ 2012, 625. The case concerned the time period in which an appeal could be lodged against a judgment of a court by

[20] Gribnau and Lubbers (2013), 185.

[21] Smits (2000), 22.

a trustee in bankruptcy proceedings. The Supreme Court decided that its ruling in this case made clear what was previously unclear, i.e. the procedural steps that had to be taken by the trustee for filing the appeal, and therefore the Court decided that in this case the relevant time period for filing the appeal would only start to run for the trustee from the day after it had given its judgment. This would be different in future cases since in these cases the law would be clear as a result of the ruling of the Supreme Court.

Other examples of cases in which prospective overruling occurred concern tax law and social security law. It is held in the Netherlands that the Dutch Supreme Court and the other highest courts are more likely to provide a transition regime in tax law or social security matters than in the area of private law.[22] Since administrative agencies that operate in these fields issue large quantities of similar decisions, not providing such a regime could result in the opening or re-opening of vast numbers of legal procedures.

In the field of social security law the Central Appeals Tribunal changed its position on the question whether the relationship between a company and its managing director should be considered to be an employment relationship, if this director is also the main shareholder of the company. Answering this question was important when it came to qualifying for certain benefits (e.g. disability benefits). Beginning in 1968, the mere existence of a labour contract between the company and its managing director sufficed. In 1985 the Tribunal concluded that it would be more suitable to determine the relationship between the director and the company on the basis of the specific circumstances of each case, rather than on the basis of the existence of a labour contract. In light of legal certainty, however, the Tribunal postponed the effects of its change in interpretation until the moment 'the revised opinion of the Tribunal would be sufficiently commonly known'.[23]

In 1987 the same Tribunal declared a decision of 9 February 1984 to revoke the unemployment benefits of a woman because of her marriage discriminatory and the legislation on which this decision was based in direct violation of Article 26 of the International Covenant on Civil and Political Rights. In applying Article 94 of the Constitution as mentioned before, the Tribunal allowed the Legislature to develop new rules, rather than imposing its own. This case does, however, offer one of the very few examples in which the Tribunal 'warns' the Legislature implicitly to act, because it states that in cases on similar administrative decisions after 23 December 1984 it will strike down administrative discriminatory decisions regardless of the consequences for the national finances.[24] And indeed the Tribunal kept its word. In a 1989 case concerning pensions, the discrimination of widowers, who did not qualify for certain pensions even though widows and orphans did, wasruled in violation of

[22]Ibid., 25.

[23]CRvB 4 October 1985, AB 1986, 38.

[24]CRvB 14 May 1987, RSV 1987, 246.

Article 26 of the Covenant. Since the administrative decision with regard to the widower involved was made after 23 December 1984, he was granted the pension as a result of this ruling.[25]

The Tax Division of the Dutch Supreme Court can impose a transition measure to limit the temporal effect of its decisions and has up to now done so on a number of occasions.

> In broad outline, tax courts can currently draw on three categories of transition measures. The first category concerns transition measures whose gist is that the aim and purpose of the old regime continue to apply to certain specified cases. 'Prospective overruling' falls within this category. The second category concerns transition measures whose effect is that the new regime applies only in part. This category contains such arrangements as transition schemes [scope of application of the new regime widens incrementally every year] and phase-out schemes [scope of application of the new regime narrows incrementally every year]. The third category concerns optional schemes, where the taxpayer has a choice: he can opt for either the old regime or the new one.[26]

Prospective overruling occurred in at least three decisions in tax matters, two from 1991 and one from 2000.[27] 'In these decisions the Court reversed its position on the issue of sound business practice to the taxpayer's disadvantage.' In HR 13 November 1991, BNB 1992, 109 the relevant part of the decision reads as follows:

> 3.6 The circumstance that the party interested could rely on existing case law for considering his method of calculating profits in line with sound business practice, implies that he cannot be requested to pass to another calculation method without any limit. Such transition should reasonably meet legitimate expectations.
>
> This requirement is violated if the taxpayer has to abandon his usual method of calculation regarding loans and bonds already acquired. Therefore it is acceptable for the taxpayer to apply the old calculation method for bonds that he had already purchased when he could first take account of this court's decision, namely 1 January 1992. Bonds purchased after this date, have to be valued in accordance with what sound business practice requires ...[28]

The two other cases concerning 'sound business practice' (in which a similar decision was taken) are HR 18 December 1991, BNB 1992, 181, and HR 28 June 2000, BNB 2000, 275.

According to Gribnau and Lubbers, 'Compelling justification for using prospective overruling is needed in tax matters, for example an anticipated disproportionate budgetary impact of the court decisions on public revenue.'[29] As stated above, the same rationale seems to apply in social security matters.

In tax matters, one also finds cases where the Court declares that it will not change its case law, but that it may do so in the future if the Legislature does not

[25] CRvB 7 December 1988, AB 1989, 10.

[26] Gribnau and Lubbers (2013), 193.

[27] Ibid., 192.

[28] This translation is derived from Gribnau and Lubbers (2013), 182.

[29] Gribnau and Lubbers (2013), 195.

introduce new legislation.[30] In such cases the Court grants the Legislature a *terme de grâce* to amend e.g. unjustified discrimination in violation of Article 26 of the International Convention on Civil and Political Rights. In these cases the Legislature is not obliged to introduce legislation retroactively. Statute may enter into force for the future only. If the Legislature fails to amend legislation, the Court may initiate regulatory modification. Any judicial decision that follows from such an initiative will only be applicable to future cases and, therefore, this may be qualified as a kind of prospective overruling.[31] Relevant case law is HR 15 July 1998, BNB 1998, 293 and HR 12 May 1999, BNB 1999, 271, in which the violation of Article 26 of the Convention was established, but referred to the Legislature in a similar fashion as the case concerning the unemployment benefits for married women, and HR 24 January 2001, BNB 2001, 291 and 292, where it was decided that the Legislature had indeed introduced the relevant legislation and that no court intervention was needed.

In criminal law, one finds cases in which the Dutch Supreme Court applies prospective overruling too. An example is HR 6 January 1998, NJ 1998, 367 ('Pikmeer II'). The case concerned criminal liability of decentralized administrative organs. In this case, the Supreme Court considered that it would change its case law, but also determined that in the case at hand it would still apply previous case law. Legal certainty was one of the relevant reasons for opting for prospective overruling.

Another example of prospective overruling is HR 27 February 2001, NJ 2001, 499. The case concerned the question whether an appeal against a first instance decision in criminal matters in which the defendant had *not* been indicated by his name, could also be lodged without the defendant indicating his name. Previously this had been deemed possible, but in the case under consideration the Supreme Court decided that this would no longer be possible for the reasons provided in the court decision. Nevertheless, the Court also decided that it would hold the anonymous appeal in the case at hand admissible since in the opinion of the Court the defendant could not have been aware of the change.[32]

HR 12 November 2002, JOL 2002, 621 is a criminal case in which (amongst other things) the interpretation of a particular article of the Dutch Criminal Code was at issue. The article regulates the powers of the defendant's lawyer while the defendant is absent in court. The Supreme Court decided that the interpretation of this article had been under discussion for some time and that as a result the lawyer had not acted in the manner that was prescribed according to the interpretation of the article which the Court now considered to be correct. Therefore, the Court decided that it would disregard the fact that the lawyer had made the relevant mistake and would continue hearing the case.

[30] Wattel (1990), 528; Smits (2000), 23.

[31] Gribnau and Lubbers (2013), 191–192.

[32] '3.8. Niettemin zal de Hoge Raad in dit geval, nu de verdachte niet bekend kon zijn met deze gewijzigde opvatting, de verdachte in zijn beroep ontvangen.'

In administrative law, several examples of prospective overruling can be found. Some of these examples require a basic knowledge of Dutch administrative law: for a case to be admissible before an administrative court, the party concerned first needs to file a complaint against an administrative decision with the administrative body that made it. Only if this procedure is not satisfactory, can the party lodge an appeal with an administrative court.

One of the first examples is a 1984 case before the Trade and Industry Appeals Tribunal concerning the administrative decision to temporarily revoke a transport company's permit for violating the terms of the collective employment agreement for chauffeurs. In the standing case law of the Tribunal these administrative decisions were suspended for the duration of the court proceedings (thus allowing companies, for the time being, to proceed as usual). The Tribunal changed its position on these semi-automatic suspensions, but argued nevertheless that a sudden change in case law was not desirable. It granted the company the suspension it sought, but ruled that its new position on the matter would be applied to all similar cases from 1 January 1985 onwards.[33]

In a 2004 case, the question at hand was whether or not a Milk Control Station was an administrative organ as indicated above. If so, its decisions would have legal effect and (but this was not in dispute) an appeal to an administrative court would (eventually) be admissible. For technical reasons concerning Dutch administrative law, the Milk Control Station (as well as similar organizations) was no longer considered to be an administrative organ in the eyes of the Trade and Industry Appeals Tribunal. To grant the supervisory bodies on dairy production a transition period to get 'their statutes and decision making process' in order, the Tribunal decided to effectuate this change in case law from 1 January 2005 onwards.[34]

In the Brummen case of 2003, the Administrative Jurisdiction Division of the Council of State ruled that an administrative decision and the grounds on which it rested were presumed to be legal if the grounds on which an appeal was filed against it were dismissed by an administrative court in prior judicial proceedings, and the party involved refrained from lodging further appeals with the highest administrative courts. The Division did not hold this break in its standing case law against the plaintiff, because he laboured under the assumption of the earlier case law. The change of interpretation by the Division was only to be implemented in later cases.[35]

In 2011 the Administrative Jurisdiction Division of the Council of State decided that all pollution-related grounds for appeals in cases concerning environmental permits (*omgevingsvergunningen*) under the new Act on General Provisions of Environmental Law (Wet algemene bepalingen omgevingsrecht) were allowed before an administrative court if during the prior complaint procedure at least one pollution-related complaint was lodged. This means that if during the prior procedure complaints regarding, for example, noise pollution were made, all other

[33]Cbb (vz.) 19 April 1984, AB 1985, 554.

[34]Cbb 19 May 2004, AB 2004, 269.

[35]ABRvS 6 August 2003, AB 2003, 355.

pollution-related appeals (e.g. water pollution) would be admissible. In case law concerning permits under the old system for pollution-related complaints, this leniency was not practised. The case before the Division concerned a permit under the old system, and these cases can be lodged before the Division for years to come. In order to create some degree of unity in case law, the Division found that the appeals in cases concerning permits under the old system would be adjudicated by using the interpretation it gave for permits under the new system. However, in light of legal certainty, this change of case law would only be applied to cases in which the original administrative decision was made after 1 April 2011.[36]

A final, and recent, example of prospective overruling can be found in ABRvS 29 February 2012 AB 2013, 235 in which the Administrative Jurisdiction Division of the Council of State stated that 'from now on ... new grounds of appeal will only be admissible, if they are filed no longer than 3 weeks after the Division has asked for an expert's report'.

The Circumstances or Contexts in Which It Might Be Appropriate to Use or Not to Use the Technique of Prospective Overruling in the Netherlands

The courts in the Netherlands seldom pay explicit attention to the effects in time of their judgments. Where they do, it seems that no effort is made to formulate general rules, but solutions are provided on an *ad hoc* basis.[37]

In criminal law, the following (cumulative) criteria have been advocated in legal literature[38] for prospective overruling to be justified:

1. The judicial decision which produces a change in the interpretation of the law must significantly affect the criminal liability of the defendant or his position as a party in the criminal lawsuit;
2. This judicial decision must be detrimental to the defendant;
3. The change could not have been anticipated by the defendant when he committed the acts for which he is prosecuted.

Van Kreveld[39] found that from 'the modest volume of relevant case law of the highest administrative court' in the Netherlands it appears 'that there is a cause for limiting the temporal effect of a judicial decision if the following cumulative conditions are met:

1. The new interpretation signals a sudden and fundamental change;

[36] ABRvS 9 March 2011, AB 2011, 130.

[37] Haazen (2001), 630–631.

[38] Groenhuijsen (2003).

[39] van Kreveld (2008), 212.

2. Groups in society or administrative bodies have acted in good faith and in keeping with the older, rejected interpretation;
3. Full or partial retroactive force clearly leads to substantial social or administrative problems, seriously disadvantages citizens, or necessitates a full, if pointless, repetition of countless decision-making processes;
4. On balance it is to be preferred that the courts limit these consequences of the retroactive force of transition law themselves, rather than that they leave it to the legislator or the executive.'[40]

'Van den Berge[41] argues that limiting retroactive force should not be an option in cases of adjusting case law, concretising standards, correcting errors or making alterations resulting from increased understanding.'[42]

The Advantages or Disadvantages That Have Been Identified in the Netherlands as Regards Prospective Overruling

Obviously, the most important advantage of prospective overruling that has been identified in the Netherlands is that it serves legal certainty in the sense that the court announces a new interpretation for future cases only.

An important disadvantage that has been identified is that by way of prospective overruling the development of the law is realized at the expense of the litigants in the individual case. These litigants will not benefit from the new interpretation. It has been suggested that this problem may be circumvented by making active use of 'cassation in the interest of the law' for providing new interpretations or by announcing new interpretations by way of *obiter dicta* in cases where the new interpretation cannot be applied due to procedural reasons or due to issues of substantive law.

Some authors have claimed that one should differentiate between the application of the new interpretation *ex nunc* (i.e. for the case at hand and future cases) and the application for future cases only (prospective overruling). Where the new interpretation is not revolutionary in the sense that the parties could have known about it beforehand the new interpretation should be applied *ex nunc*, whereas prospective overruling should be reserved for cases where the new interpretation is so revolutionary that it could not have been expected by the litigants.[43]

[40] Gribnau and Lubbers (2013), 194.

[41] van den Berge (2005), 40.

[42] Gribnau and Lubbers (2013), 194.

[43] See for the topics discussed in this section: Kottenhagen (1986), 276 ff.

The Argument that Prospective Overruling Should Not Be Used When a Decision Turns Purely on the Construction of a Statute

In the Netherlands, we have not found the argument that prospective overruling should not be used when a decision turns purely on the construction of a statute. However, we found the related argument that judicial decisions should *not* have retrospective effect in certain cases (as a result of which the judge should decide *ex nunc* or by way of prospective overruling). Retrospective effect is acceptable when courts purely interpret legal rules. It becomes problematic, however, when the Legislature provides open-ended norms which have to be applied by the judge or when the court creates new jurisprudential rules or reverses formerly established case law. Especially in the latter case, deciding *ex nunc* or by way of prospective overruling seems to be justified.[44]

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[44]Cf. Popelier et al. (2013), 5.

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Chapter 4
The Ability to Deviate from the Principle of Retroactivity: A Well-Established Practice Before the Constitutional Court and the Council of State in Belgium

Sarah Verstraelen, Patricia Popelier, and Sébastien Van Drooghenbroeck

Abstract In Belgium, every judicial decision has, in principle, retroactive effect. Parliament gave the Constitutional Court and the Council of State the ability to deviate from this initial retroactive effect when the Court or Council *deems this necessary.* It appears from the Constitutional Court's case law that the Court repeatedly makes use of this ability to attach prospective effects to its decisions. A variety of reasons is given to justify a temporal modulation, such as the protection of legal certainty, the prevention of financial and/or administrative difficulties and the possibility for Parliament to revise the annulled norm. Similar considerations are invoked before the Council of State, but the latter is much more reluctant to deviate from the initialretroactive effect and it imposes a higher burden of proof on to the

When writing this report, Sarah Verstraelen was a PhD fellow on a project on the temporal effects of judicial decisions financed by the Flemish Scientific Fund (FWO). She is now an FWO Postdoctoral Fellow at the University of Antwerp. Patricia Popelier is professor at the University of Antwerp. Sébastien Van Drooghenbroeck is professor at the Université Saint Louis. The case law in this contribution was updated until 1 July 2014.

S. Verstraelen
Faculty of Law, University of Antwerp, City Campus, Venusstraat 23, office SV. 172, Antwerp 2000, Belgium
e-mail: sarah.verstraelen@uantwerpen.be

P. Popelier
Faculty of Law, University of Antwerp, City Campus, Venusstraat 23, office SC. 126, Antwerp 2000, Belgium
e-mail: patricia.popelier@uantwerpen.be

S. Van Drooghenbroeck (✉)
Doyen de la Faculté de droit, Université Saint-Louis, Boulevard du Jardin Botanique, 43, Bruxelles 1000, Belgium
e-mail: vandroo@fusl.ac.be

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requesting parties. Since the recent law reform of 2014, the Council is moreover deprived of the power to modulate *ex officio* the retroactive effect of its annulment decisions.

Introduction

In Belgium, judicial decisions as a rule have retroactive effect. This rule applies to both decisions of the ordinary courts, and those of specialized courts such as the Constitutional Court and the Council of State.[1] The regime applying to both categories of courts, however, differs in many respects. For ordinary courts, retroactive effect results from declaratory theory, according to which courts do not create law (Roubier 1960). In the case of abstract review by specialized courts, it was considered that if the court finds that an administrative decision or Act of Parliament violates the law or the constitution, the norm was afflicted with this irregularity since its coming into force. It was felt that for this reason, the norm should be removed from the legal order *ex tunc* (par. 2).

In the case of annulment decisions pronounced by the Constitutional Court or the Council of State, Parliament provided for the possibility to deviate from the principal rule of retroactivity (Art. 8(3) Special Law on the Constitutional Court (SLCC); Art. 14*ter* Coordinated Laws on the Council of State (CLCS)). This allows the court to find a balance between legality, which is affected by the irregular norm, and legal certainty, which may be affected if the norm is annulled with retroactive effect. The respective provisions provide that where the Court or the Council so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court. Parliament did not provide for a similar provision in the case of referral decisions, but this did not retain the Constitutional Court from appropriating this power for itself. The Council of State, for its part, has a similar competence to maintain the effects of a nullified provision. Until recently, however, it was not allowed to deviate from the principal retroactive effect where the annulment concerned an individual act.

Similar powers for ordinary courts to deviate from the principal retroactive affect is neither provided by law nor developed in established case law. Such power was considered to imply a particular acknowledgment that courts in fact do have a creative role in the development of the law. In only two cases did the Court

[1]The Constitutional Court has the power to annul federal and subnational statutes and give referral decisions to courts regarding the constitutionality of these statutes. These statutes are called "laws" if they emanate from the federal parliament, "decrees" if they emanate from the subnational Communities and Regions and "ordinances" if they are adopted by the Brussels Parliament or the Joint Community Council in Brussels. The Council of State acts as the supreme court regarding administrative courts but also has the power to annul administrative acts and regulations.

of Cassation[2] decide to limit the retroactive effect of its decision. This reluctant stance stands in sharp contrast with the case law developed by the Court since 2007 regarding the temporal effect of referral decisions pronounced by the Constitutional Court (par. 3).

The Constitutional Court frequently makes use of the possibility to definitively or provisionally maintain the effects of an annulled provision. The reason-giving for such decisions, however, often leaves much to be desired. The Council of State is a less frequent user of this possibility, but provides a more elaborated reason-giving. An analysis of the case law of both courts, nevertheless, reveals that they rely on similar reasons for deviating from the principal retroactive effect of their decisions (par. 4).

Retroactivity as the Principal Rule

Ordinary Courts

As mentioned above, declaratory theory explains the retroactive effect of judicial decisions of the ordinary courts. According to this theory judges merely explain the meaning of legal texts as they always were and always should have been interpreted (Roubier 1960; Haazen 2001; Dirix 2008–2009; Velu 2011). ROBESPIERRE established that *"Le mot de jurisprudence ce doit être effacé de notre langue; dans un pays qui a une constitution, une législation ce n'est autre chose que la loi"* (Scholten 1954). Likewise, BLACKSTONE, eighteenth-century lawyer and fervent adherent of the declaratory theory, asserted that judges merely determine pre-existing law: "*For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law, that is, that it is not the established custom of the realm, as has been erroneously determined"* (Blackstone 1796). In this theory, syllogisms suffice for the judge to settle a judicial dispute. Applying the general rule (*maior*) to the concrete facts of a case (*minor*) is supposed to lead to the one possible conclusion (Scholten 1954; Merryman 1969; van Gerven 1973; Wiarda 1999; Lasser 2004; Schollen 2011).

Labeling the temporal effects of judicial decisions as 'retroactive' seems at odds with this theory. According to declaratory theory, there is no question of transitory issues, as the old precedent is deemed inexistent (Scholten 1954; Haazen 2001; Molfessis 2005). If the court determines the law as it always existed, the decision has a declaratory instead of a retroactive effect. The different approach taken under each of these labels, however, cannot conceal that declaratory and retroactive decisions create the same effects.

In the end, it may come as no surprise that judgments of the ordinary courts are characterized by a retroactive effect, as judicial decisions are necessarily

[2]The Court of Cassation is the supreme court in Belgium. This court controls the legality of judicial decisions but does not assess the facts of a case.

pronounced after the events which lead to the judicial procedure or after the adoption of the act at issue (Husserl 1955; Rivero 1968; Ost 1998; Rigaux 1998; Le Berre 2000; Ost and Van Drooghenbroeck 2002; Dirix 2008–2009; Tulkens and Van Drooghenbroeck 2011; Verstraelen 2015).

The Constitutional Court

The Constitutional Court has the power to review federal and subnational Acts of Parliament against rules allocating powers between the federal and the subnational authorities, against title II of the Constitution regarding fundamental rights, and against the Articles 143 (federal loyalty), 170 and 172 regarding taxes and Article 191 regarding the protection of foreigners on Belgian soil (Art. 142 Belgian Constitution; Art. 1 and 26 Special Law on the Constitutional Court).

Parliamentary acts can be challenged before the Belgian Constitutional Court in two different ways: through an annulment procedure or by way of a preliminary reference.

Annulment Procedures

The annulment procedure implies an abstract control of the Parliamentary Act. The annulment request must be lodged before the Court within a period of 6 months after publication of the Act in the Official Gazette. The federal government, the subnational executives, the presidents of parliamentary assemblies at the request of two-thirds of their members, as well as every person with an interest have access to the court (Art. 2 and Art. 3, § 1, SLCC). A decision to annul applies *erga omnes* and is final as from its publication in the Official Gazette.

Annulment decisions are given retroactive effect. Reports of the parliamentary debates concerning the 1983 law on the Court of Arbitration, as the Constitutional Court was initially named, reveal that this was considered the obvious outcome of the annulment procedure (Parl.Doc. No 579/2). According to the Legislative Branch of the Council of State, which gives non-binding advice on bills and proposals of laws and regulatory acts, it was "logical" that annulment decisions should have effect *ex tunc* (Parl.Doc. Senate No 704/1, No 246/2). Subsequent doctrine affirmed that retroactive effect was self-evident (Gillet 1985; Krings 1985–1986; Rigaux 1986; Simonart 1988a). Nevertheless it is hard to argue that a Parliamentary Act is unconstitutional from its coming into force, especially since the Constitutional Court, in ninety percent of the cases, reviews acts against the equality clause.[3]

[3]This is due to the fact that the Court, initially, had very limited competences and used the equality clause to broaden its scope of reference norms. In 2013 the equality clause was invoked in 158 out of 183 judgments pronounced by the Constitutional Court, see the Year Report 2013, at p. 315–316, which can be consulted at www.const-court.be (accessed in July 2014).

If circumstances change, a difference in treatment may no longer be justified or, conversely, it may become necessary to differentiate if certain categories are no longer comparable (Popelier 2008; Dubuisson and Van Drooghenbroeck 2011).

The annulment *ex nunc*, implying a prospective effect from the date of the decision, was rejected as an alternative, because this was considered similar to an abolishment by Parliament and therefore bore too much resemblance to an Act of Parliament. Nevertheless, an annulment *ex tunc* is undeniably more far-reaching than an annulment *ex nunc*, in particular since, as explained below, the annulment *ex tunc* opens a new term to challenge final decisions made on the basis of the Act before its annulment. Interestingly, a comparative study reveals that the majority of Constitutional Courts within the European Union pronounce judgments with, as a principle, a prospective effect (Hufen 2008 Partie 2).

The retroactive effect of the Constitutional Court's judgments aims at wiping out the irregular norm, as if the latter never existed. This is a fiction, since the annulled norm undeniably did create legal effects, such as administrative acts enacted or judicial decisions pronounced on the basis of the irregular norm. The annulment does not automatically eliminate these consequences from the legal order; this takes additional actions by the parties and/or the Public Ministry. The Special Law on the Constitutional Court provides the possibility to lodge an action to retract a final judicial decision or to challenge an administrative act (Art. 10–18 SLCC). The former possibility is, from a comparative point of view, rather exceptional. Usually the judgments of constitutional courts do not impact upon final judicial decisions, except in penal cases (Verstraelen 2013).

Preliminary References

Every court has the duty to refer a preliminary question to the Constitutional Court if, in a concrete case, the constitutionality of a parliamentary act is questioned (Art. 26, § 2 (1) SLCC). The Special Law on the Constitutional Court, however, provides for exceptions to the principal duty to refer (Art. 26 §§ 2–4 SLCC). Even though a concrete case triggers the preliminary reference, the Constitutional Court exercises an abstract norm control as it does not decide the given case, but only deals with the constitutionality issue (Simonart 1988b; Melchior 1994–1995; Alen and Muylle 2008; Martens 2009).

Initially the referral decisions were said to come into force *inter partes*, as Article 28 of the Special Law on the Constitutional Court provides that the referral decision is binding upon the referring court as well as any other court passing judgment in the same case. Nevertheless, in reality, the effects of the referral decision go beyond the boundaries of that concrete case. Courts, including the supreme courts, are not obliged to refer a preliminary question to the Constitutional Court if the latter court already ruled on a question or appeal on an identical subject (Art. 26 §2 (1) 2° SLCC). Moreover, if the Constitutional Court in its referral decision finds that a parliamentary act is unconstitutional, this opens a new term for an annulment request (art. 4(2) SLCC), resulting in an annulment *erga omnes*.

Referral decisions, like annulment decisions, have an effect *ex tunc*. The unconstitutional provision is considered to have violated the constitution since its coming into force (Krings 1985–1986; Popelier 2008). As the referral decision was presumed to have merely an effect *inter partes*, little attention was paid to its temporal effects. When bearing in mind that Acts of Parliament can be challenged through preliminary references without time limits, and that the consequences of the referral decision go beyond the concrete case, fact that the referral decision does exceed the limits of the concrete case, it becomes clear that the finding of unconstitutionality, and in particular its retroactive effects, may seriously affect legal certainty.

The Council of State

The Administrative Litigation Branch of the Council of State[4] is the supreme administrative court in Belgium. It has the power to annul individual and regulatory administrative acts of (mainly) administrative authorities (Art. 14 CLCS).

The Council's decisions also have a retroactive effect. This issue was discussed only incidentally throughout the parliamentary debates in 1939, preceding the establishment of the Council of State. It was merely asserted that the annulled act was considered irregular from the beginning (*ab initio*) (Parl.Doc. Senate No 80; House Nos 281/1, 341/1, 644/4). Article 14 of the Council of State, regarding annulment requests, does not explicitly give retroactive effect to annulment decisions (Boes 2012). Only in 1996 did an amendment provide for clarity by inserting Article 14*ter* in the coordinated laws on the Council of State, which allows for deviations from the principal rule of retroactivity.

Again, the retroactive effect of the annulment decisions rests upon a fiction. The annulment does not lead to a *tabula rasa*; it is not always simple to radically wipe out the effects of a decision if it has already been executed (Lust 2012).

In some cases the retroactive effect of an annulment is toned down for reasons of legal certainty, equity and continuity of public service, so that certain effects of the annulled norm are maintained. For example, the public servant whose appointment to office is annulled, will preserve the salary he received for his services (Wirtgen 2004; Mast et al. 2009; Lefranc 2012). However, the coordinated laws on the Council of State do not leave open this possibility for acts based upon the annulled act (compare Art. 10–18 SLCC), which creates ambiguity. For example, it is uncertain whether an administrative act based upon a basic act retroactively disappears when the basic act is annulled. Neither doctrine nor case law provide for a univocal answer (Lefranc 2012).

[4] As mentioned, the Council of State also has a Legislation Section. In this contribution, the term 'Council of State' in principle refers to the Administrative Litigation Section.

The Possibility to Deviate from the Principal Rule

Ordinary Courts

The declaratory theory was abandoned and replaced by the constitutive theory which acknowledges that judicial decisions may constitute (new) law (De Page 1961; Haazen 2001; Lagerde 2006). Society's increasing complexity gave evidence that the legalist approach favored by declaratory theory was no longer tenable (Van Gerven 1973; Maris 1996; Schollen 2011; Verstraelen 2015). Moreover, judicial norm creation is encouraged by Article 5 of the judicial code, which prohibits the denial of justice, even in the case of silence, ambiguity or incompletion of the law.

Once it is acknowledged that judges can create law, the problematic nature of retroactivity becomes apparent, as a new jurisprudential rule will be applied to facts which arose before the creation of this new rule. If parties are confronted with a rule the existence of which they could not know, this affects legal certainty and legitimate expectations.

Parliament did not provide for the ordinary courts, including the Court of Cassation, to mitigate the retroactive effect of their decisions, nor did the Belgian courts adopt the practice of prospective overruling developed in US case law. It is argued that such evolution would be incompatible with Article 6 of the Judicial Code, which explicitly states that judges are not to pronounce judgment by way of general rule (Rivero 1968; Ost and Van Drooghenbroeck 2002; Molfessis 2005).

Nevertheless, the claim that courts cannot mitigate the temporal effects of their own judgments is untenable, since the temporal effect is a substantial part of their decision (Verstraelen 2015). The Belgian Court of Cassation mitigated (more or less) the temporal effects of its judgments in only two decisions. This poor record is remarkable especially since in its latest year reports the Court explicitly mentions that contributing to the unity and finding of law constitutes its core business, and explicitly acknowledges that it contributes to law creation (Year Report 2011, 2012, 2013).

The first judgment dates from 9 September 1993 and concerns a case regarding marriage in international private law (Cass. AR 9426). Before the recent codification, international private law was mainly of a jurisprudential nature. According to the old reference rule, the nationality of the husband determined the legal system regarding marital property that was to apply in case the spouses had different nationalities. The Court of Cassation reversed this rule in 1993, ruling that the first marital residence determines the applicable legal system. It hereby confirmed the national (and international) striving for equality between spouses, which lay at the basis of the Belgian national legal framework adopted in 1976 (Coipel 1994; Liénard-Ligny 1994; Watté 1994; Popelier 2001; Ost and Van Drooghenbroeck 2002; Verstraelen 2014a). The case concerned a Belgian woman and an Italian man married on 26 April 1952. Considering the retroactive effect of judicial decisions, the new rule should have applied to their case. Nevertheless, the Court ruled that in this case the Italian legal system remained applicable, thereby mitigating the

retroactive effect of its decision. It referred in general wordings to the system of transitional law applicable to written laws and reasoned that the legal marital property regime, applicable in the absence of a marriage settlement, is so closely linked to marriage that the spouses must have certainty about the applicable legal system at the moment of marriage. Hence, in 1952, the spouses knew that the Italian legal system would determine their marital property regime, and new rules were not to interfere with this acquired right. It remains, however, unclear why legal certainty was so important in this case, since nothing prevented possible modifications of the substantial laws within the Italian legal system confronting the couple with different rules by the end of their marriage. There is no indication, then, why the Court of Cassation tempered the retroactive application of its decision in this case, while legal certainty is also – and often more – at stake in other cases. One possible explanation is that, at the time, international private law was essentially of a jurisprudential nature, exposing very clearly the creative role of the court.

About a month later the Court of Cassation ruled for the second and last time on the temporal effects of its decision. The *Marckx* judgment, pronounced by the European Court of Human Rights, precedes this case (ECtHR *Marckx* 1979). In the *Marckx* judgment of 13 June 1979, the Strasbourg Court found that the Belgian law and in particular art. 756 of the Civil Code, violated the Articles 8 and 14 of the Convention, because it abridged the inheritance rights of so-called 'illegitimate' children, born out of wedlock. The Strasbourg Court, however, considering the principle of legal certainty inherent to the Convention, dispensed the Belgian State from re-opening legal acts or situations that antedated the delivery of its judgment (§ 58). This was, for that matter, the first judgment where the European Court of Human Rights explicitly limited the retroactive effect of its decision (Tulkens and Van Drooghenbroeck 2011; Popelier 2014).

The Court of Cassation referred to the *Marckx* judgment in its judgment of 15 May 1992, concerning a succession that devolved to the heirs on 22 May 1983, and in its judgment of 21 October 1993, concerning a succession that devolved to the heirs on 30 April 1984 (Cass. AR 6583; Cass. AR 9616). It established in both decisions that the succession occurred after the Strasbourg judgment and therefore confirmed the court of appeal's decision to not apply the discriminating Belgian provisions to this case. As the Court of Cassation simply adopts the ruling of the European Court of Human Rights, it cannot be inferred from these judgments that the Court, as a rule, accepts its competence to modulate the temporal effect of its decisions (Popelier 2001; Ost and Van Drooghenbroeck 2002; Verstraelen 2014a).

Constitutional Court

In order to tone down legal uncertainty that may arise from the retroactive annulment of laws, the Constitutional Court is given the power to maintain the consequences of the annulled provisions. Article 8, third sentence, of the Special Law on the

Constitutional Court, provides that "Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court."

It should be noted that if the Court finds a violation, it has to annul the unconstitutional provision (Art. 8(1) SLCC). Hence, the Court maintains the *consequences*, but not the annulled provision itself (Rosoux 2007). Therefore, these effects acquire a new legal foundation: they are now based upon the judgment of the Constitutional Court that pronounces their maintenance instead of the annulled provisions (Lust and Popelier 2001–2002).

The words 'by a general ruling' were only afterwards inserted in Article 8 by the Law of 10 May 1985 regarding the effects of annulment judgments pronounced by the Constitutional Court (Art. 1, *Official Gazette* 12 June 1985). Parliament intended to avoid arbitrariness by prohibiting the Constitutional Court to maintain the legal effects of some particular individual judicial decisions or administrative acts (Parl.Doc. Senate No 579/3; Velaers 1990). The Court itself would violate the principle of equality if it were to make exceptions for very specific and individual cases (Parl.Doc. Senate No 483/2). This, however, does not prevent the Court from distinguishing between subject matters or between judicial decisions and administrative acts dependent upon the date of their pronouncement or enactment (Parl.Doc. Senate No 579/3; Moerenhout 1999).

The Court can definitively or provisionally maintain the effects of the annulled provision. Inspiration for maintaining definitively was found in the then Article 174 EEC Treaty and Article 31 of the Additional Protocol to the Treaty concerning the establishment and statute of a Benelux Court of Justice (Parl.Doc. Senate No 246/1). Article 174, second sentence, EEC Treaty stated: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive." The similarity with Article 8, third sentence, of the Belgian law on the Constitutional Court is striking.

A definitive maintenance implies that although the unconstitutional provision was annulled, its effects remain final (Simonart 1988a). Hence, the application of the Articles 10–18 of the Special Law on the Constitutional Court is excluded: administrative acts and judicial decisions based upon the annulled provision remain valid, with the Constitutional Court's judgment as their new legal foundation (Lust and Popelier 2001–2002; Rosoux 2007).

Another option is the provisional maintenance for the period specified by the Court. In this case, the Court enables Parliament to adopt a new regulation within the given period of time (Parl.Doc. Senate No 246/2, Moerenhout 1999). Inspiration for this alternative was found in the practice of the German *Bundesverfassungsgericht* (Parl.Doc. Senate 246/2; Velaers 1990). The German Court, instead of annulling a norm with retroactive effect, has the power to merely declare it unconstitutional, so that the norm does not immediately disappear from the legal order. This gives the lawmaker time to remedy the unconstitutionality (Schroeder 2014).

With the possibility to maintain provisionally, the Constitutional Court is granted a far-reaching power: the Court is not only a 'negative lawmaker' in that it removes

norms from the legal order, it acts in fact as a 'positive lawmaker' by imposing the continued application of an irregular norm (Behrendt 2006; Rosoux 2007; Brewer-Carias 2011; Verstraelen 2015).

For a long time it was debated whether provisional maintenance measures could also cover new effects, established after the annulment (Critically: Velaers 1990; Beirlaen 1991; Debaedts 1994; Storme 2004). During parliamentary debates it was underlined that an annulled norm cannot create new legal situations (Parl.Doc. Senate No 246/2; Parl.Acts 26 April 1983). Nevertheless, in its case law the Constitutional Court evolved in another direction: in 36 out of 47 judgments in which the Court provisionally maintains the effects of an annulled provision, the maintenance measures – sometimes implicitly – seem to encompass new effects (Moerenhout 1999; Rosoux 2007; Popelier 2008; Verstraelen 2015). For example, in 2011 the Court found that consumers and employees alike are exposed to harmful substances in restaurants and bars. Therefore, it considered that excluding bars that only served pre-packed food from the smoking prohibition violated the constitution (Constitutional Court (CC) No 37/2011). The Court maintained the consequences of the unconstitutional norm for several months, to enable bars to bring themselves into lines with the general smoking prohibition. During these months, smoking in these bars was still allowed, despite its unconstitutional nature. The Court, moreover, sometimes explicitly refers to the necessity to continue the application of an unconstitutional norm as a reason for maintenance (CC No 79/92, CC No 132/2004).

Parliament did not provide for similar powers to mitigate the temporal effects of referral decisions (Parl.Doc. Senate No 246/2). This is striking, since Article 8, third paragraph of the Special Law on the Constitutional Court, regarding maintenance in the case of annulment decisions, was inspired by the European Court of Justice. Apparently it went unnoticed that this Court had, at the time of the parliamentary discussions in Belgium, already modulated the temporal effects of referral decisions. This is remarkable because the *Defrenne* judgment, in which the Court of Justice proceeded in this way for the first time, was a case against the Belgian airline SABENA (Court of Justice (CJ) 43/75, CJ 61/79, CJ 66, 127 and 128/79, CJ 4/79, CJ 109/79, CJ 145/79).

In practice, however, it soon became clear that if the Court is to exercise its preliminary task properly, it must be able to modulate the consequences of its referral decisions. Throughout its case law the Court looked for ways of circumventing the prohibition to modulate the temporal effects of its referral decisions (Popelier 2008). For example, the Court declared that a particular parliamentary act was still constitutional, but warned that the same act would be considered unconstitutional in the future (CC No 53/93, CC No 56/93).

In 2003, when the Special Law on the Constitutional Court was amended, the issue was discussed in depth in parliament (Parl.Doc. Senate No 2-897/6). Melchior and Arts, then presidents of the Constitutional Court, appealed to Parliament to extend the maintenance competence to referral decisions, considering their far-reaching effects (Parl.Doc. Senate No 2-897/6). The most important counter-argument was that third parties have limited possibilities to intervene in preliminary

procedures (Parl.Doc. Senate No 2-897/6). This problem, however, could have been solved by imposing an interest requirement similar to the one applied in annulment procedures. In that case, a third party would have to give evidence of *a justifiable interest* affected by the challenged law instead of *a justifiable interest in the case pending before the referring court*. In any case, the Court decided, for the first time in case No 44/2008, to soften the interest requirement in a preliminary procedure in this direction (CC No 44/2008; CC No 89/2008; CC No 117/2008; CC No 13/2009; CC No 171/2009; CC No 17/2010).

With its notable judgment of 20 December 2007, the Court of Cassation also takes position in the discussion about the temporal effects of referral decisions. According to the Court of Cassation, if the Constitutional Court establishes in a referral decision that the constitution is violated, it is for the judiciary to determine the temporal consequences thereof. The Court of Cassation confirmed this thesis in subsequent judgments. In each of these judgments the Court of Cassation concluded that the judge had to apply the challenged Act to facts which occurred before the referral decision was pronounced, as if the latter decision did not exist. Hence, while the Court of Cassation is reluctant to modulate the effects of its own judgments, it does consider itself competent to limit the retroactive effect of referral decisions, although the lawmaker purposefully denied this competence to the Constitutional Court (Cass. AR C070227N; Cass. AR C060019N; Cass. AR C070642N; Cass. AR C090570N).

One may assume that the Constitutional Court wished to convey a powerful message when, in 2011, it analogously applied, for the first time, Article 8, third sentence, of the Special Law on the Constitutional Court to the preliminary procedure (CC No 125/2011). Considering our analysis above, this reversal in the Court's case law may not come as a surprise (Verstraelen 2011–2012). The Court used broad and general considerations, enabling the analogous application in future referral decisions (§§ B.5.1.-B.5.6.). In subsequent judgments, the Court explicitly emphasized that it will only apply this maintenance power in exceptional circumstances, namely when the benefit flowing from setting aside the provision that was declared unconstitutional by the Constitutional Court, is disproportional to the distortion this would cause to the legal order (CC No 1/2013; CC No 3/2013; CC No 48/2013). In its case law the Court upholds a strict interpretation of this requirement. Until now, the Court has, besides decision No 125/2011, decided in only two other preliminary reference procedures that such exceptional circumstances were present and, consequently, that Article 8, third paragraph, of the Special Law on the Constitutional Court, should be analogously applied (CC No 60/2014; CC No 67/2014).

Council of State

Although the Council of State was established in 1946, art. 14*ter* of the coordinated laws on the Council of State was only inserted in 1996. Article 14*ter* introduced a maintenance competence with the purpose to prevent a legal vacuum and to

avoid legal uncertainty caused by the retroactive annulment of administrative decisions (Parl.Doc. House Nos 281/1, 341/1, 644/4). During the parliamentary proceedings an overview of the maintenance judgments pronounced so far by the Constitutional Court was provided. Article 8, third sentence, of the Special Law on the Constitutional Court clearly served as a source of inspiration: it was almost literally repeated in Art. 14*ter*.

Article 14*ter* of the coordinated laws on the Council of State stated: "Where the Council so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions of administrative regulations are to be considered maintained or be provisionally maintained for the period appointed by the Council." Hence, one important alteration was added: the Council could only maintain the consequences of regulatory provisions. During the parliamentary debate, individual acts were explicitly excluded. It was considered recommendable to first make the Council familiar with its new maintenance power and, if need be, to extend the system to annulled individual administrative acts after an evaluation (Parl.Doc. House No 644/4).

The exclusion of individual administrative acts was remarkable, in particular considering the parliamentary debates leading to Article 8, third sentence, of the Special Law on the Constitutional Court. During these debates, the building permit, i.e. an individual administrative act, was used as an ideal example to demonstrate when it could be necessary to annul a norm, *in casu* the permit, but to maintain its consequences, *in casu* preventing the demolition of the building that was already raised (Parl.Doc. Senate No 246/2). Moreover, the Council of State decided already in 1985 to maintain the consequences of an irregular individual administrative act (Council of State (CS) No 25.424). In this judgment, it annulled the appointment of a lecturer on May 31, but, considering the disturbing effect of the annulment on the examination proceedings of that academic year, the Council maintained the consequences of the appointment until 1 October 1985. Recently the Council confirmed this case law by annulling an allocation decision on 9 June 2009, but maintaining the consequences until 1 August 2009. The Council considered that the potential harm for the applicant of having to function another several weeks in the primary school in question, did not outweigh the certain harm that the disruption would cause to the providing of education by this school following from the retroactive application of the judgment (CS No 194.015).

The Constitutional Court was asked whether Article 14*ter* of the coordinated laws on the Council of States violated the equality principle by only allowing for the maintenance of regulatory provisions, to the exclusion of individual administrative acts (CC No 164/2012). According to the Court reasonable considerations justified this limitation, as in the case of regulatory provisions, which by definition are addressed to an undetermined number of persons, the risk of disproportional consequences is higher.

Although an official evaluation of the maintenance power by the Council of State, as announced during parliamentary debate, has not been conducted, Parliament recently amended Article 14*ter* of the coordinated laws on the Council of State. Article 3 of the Law of 20 January 2014 regarding the reform of the competences,

procedure and organization of the Council of State extended the possible application of article 14*ter* to all acts and regulations annulled by the Council, including individual administrative acts (Official Gazette 3 February 2014). This Article 3 amended the first paragraph of Article 14*ter* as follows: "On the request of the defending or intervening party, and if the Council so deems necessary, it shall specify which effects of the annulled individual administrative act, or, by a general ruling, of the nullified provisions of administrative regulations, are to be considered maintained or be provisionally maintained for the period appointed by the Council."

The extension to individual administrative acts, however, may give rise to an unequal treatment of persons challenging the legality of an administrative act before the Council of State, which may maintain the consequences of an irregular act, and those who challenge its legality before an ordinary court, which does not have such power. In case No 73/2013, the Constitutional Court assessed the absence of any power for the Brussels' Court of Appeal to maintain when using its power to annul acts of the Belgian Institute for Postal services and Telecommunication (BIPT). It did not consider the difference in treatment unconstitutional, because the lawmaker could take into account that the risk of disproportionality is higher in the case of regulatory provisions, as prescribed by Article 14*ter*, compared to individual acts, as those enacted by the BIPT. Inversely, this implies that the current extension of Article 14*ter* to individual administrative acts indeed constitutes an unjustified difference in treatment.

The law of 20 January 2014 did not only extend the scope of Article 14*ter* of the coordinated laws on the Council of State to individual acts; it also added a paragraph. According to this paragraph, the decision to maintain the effects of an annulled norm can only be imposed when exceptional reasons justify an infringement on the principle of legality. Furthermore, the Council can only maintain after an adversarial procedure and must do so in a reasoned decision, in which the Council may take the interests of third parties into account. In what follows, we shall discuss this reform when relevant.

Like the Constitutional Court, the Council of State can maintain definitely or provisionally. As for the difference between both measures, we refer to our explanation regarding annulment decisions by the Constitutional Court. In the case of provisional maintenance, the Council, like the Constitutional Court, accepts the emergence of new consequences after annulment. This is illustrated in a judgment from 1 April 2005. In this case, the French Community (one of the federated entities in the Belgian federal system) made it possible to obtain a degree as geometrician-real estate surveyor in after-hours education for which employees get study leave, through a so-called 'integrated test'. According to the Council of State, this infringed upon the exclusive competence of the federal government to regulate access to a specific profession. The Council, however, decided to maintain the consequences of the annulment until the end of the school year. This way, degrees obtained by the end of that year, months after the annulment decision, still gave access to the said profession (CS No 142.753).

Article 14*ter* of the coordinated laws on the Council of State does not explicitly state that the finding of an irregularity is necessarily sanctioned by an annulment.

Therefore it is not clear whether the maintenance decision simply postpones the annulment of the norm or, as in the case of the Constitutional Court, the annulment follows immediately while the maintenance judgment serves as the legal ground for the (new) consequences of the irregular act (Renders 2010; Theunis 2011–2012; Lindemans 2012). One can cautiously deduce the second option from the Council's case law. In its decision, the Council annuls the act before deciding to maintain. Moreover, the Council usually considers that 'the consequences of the annulled norm' should be maintained instead of the norm as such (CS No 96.807; CS No 142.753; CS No 158.604; CS No 158.605; CS No 164.521; CS No 164.523; CS No 191.272; CS No 196.106; CS No 198.039; CS No 198.040; CS No 217.085; CS No 221.078. Exceptions are 'older' judgments: CS No 71.610; CS No 82.185; CS No 106.318; CS No 161.063; CS No 162.616).

In 2011, a preliminary question was referred to the Constitutional Court regarding the constitutionality of Article 14*ter* because by maintaining the consequences of an annulled norm, the courts are prevented from not applying unlawful administrative acts as required by Article 159 of the Constitution.[5] The Constitutional Court, however, found no violation (CC No 18/2012). It considered that Article 159 of the Constitution does not lay down an absolute rule. Its application can therefore be restricted if this is necessary to ensure observance of fundamental rights. According to the Court, the lawmaker, by adopting Article 14*ter*, established a fair balance between, on the one hand, the interest in remedying unlawful situations and, on the other hand, the concern that existing situations and legitimate expectations, after a certain laps of time, are no longer threatened (Lust 2000; Renders 2002, 2010; Wirtgen 2004; Andersen 2010; Theunis 2011–2012; Verstraelen 2012b).

Practice of the Constitutional Court and the Council of State

In this paragraph, we discuss the maintenance practice of the Constitutional Court and the Council of State together. Considering the similarity between Article 8, third sentence, of the Special Law on the Constitutional Court and (former) Article 14*ter* of the coordinated laws on the Council of State, both courts were in fact granted a similar competence.[6] In what follows we will examine how this textual and theoretical similarity is reflected in the practice of both courts.

[5] Article 159 of the Constitution states: "Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law".

[6] Because the Law of 20 January 2014, which amended Article 14*ter* of the coordinated laws on the Council of State, became effective from the first of March 2014 (Art. 39 of the Law of 20 January 2014; Art. 51 of the Royal Decree of 28 January 2014), the discussed case law of the Council of State entails the application of the former Article 14*ter*.

Discretionary Competence

According to Article 8, third sentence, of the Special Law on the Constitutional Court and Article 14*ter* of the coordinated laws on the Council of State, the Court resp. the Council has the power to maintain where it "so deems necessary". Hence, it is the sovereign decision of these courts whether maintenance of the consequences of an annulled norm is appropriate (Velaers 1985; Rosoux 2007). During the parliamentary debates preceding the adoption of Article 8, third sentence, of the Special Law on the Constitutional Court, this competence was criticized for its far-reaching, almost legislative scope (Parl.Doc. Senate No 246/2, No 246/6, No 483/2; Velaers 1990; Lust and Popelier 2001–2002; Rigaux and Renauld 2009). Nevertheless, this potential normative interference by the Court did not influence the principle choice for an annulment *ex tunc* (Acts Senate 28 April 1983).

The Constitutional Court applies Article 8, third sentence, of the Special Law on the Constitutional Court in almost one out of four annulment decisions: the Court maintained in 86 out of the 353 annulment judgments rendered by the Court so far (Verstraelen 2015).[7] This can hardly be considered an excessive use, although the Court clearly is less reluctant than the Council of State, which considers that it should use its power to maintain with 'wisdom and prudence' (CS No 164.368; CS No 164.522). Since 1996, hardly 58 judgments gave evidence that Article 14*ter* was explicitly used or that its application was requested.[8] In only 19 judgments the Council in effect decided to maintain (Verstraelen 2015).

Noteworthy, Rosoux deters from this discretionary power that the Constitutional Court is not obliged to give reasons for its decision to maintain or not maintain the consequences of an annulled norm (Rosoux 2007). It is, however, difficult to share this view. Quite the contrary: the broad discretionary power of the courts fortifies the duty to give reasons. The courts cannot use their freedom without justification to society (Adams 2008–2009). We will return to this duty to give reasons.[9]

Ex Officio or on the Party's Request

The Court or the Council (according to the former Article 14*ter*) can maintain by virtue of its own office, or on request of a party. Whether parties request application of Article 8, third sentence, of the Special Law on the Constitutional Court, can be deterred from part A in the Court's judgment, which recapitulates the parties'

[7] In a period of approximately 30 years, from 1985 to, and including, June 2014. See the yearly reports of the Constitutional Court, accessible on www.const-court.be

[8] For this rapport, decision No 226.144 from 21 January 2014 is the last judgment of the Council of State that dealt with the possible application of Article 14*ter* of the coordinated laws on the Council of State.

[9] See section "Reasons".

positions. The Constitutional Court's case law reveals that the Court in not less than 65 out of 86 maintenance judgments modulated *ex officio* the retroactive effect of its annulment decision (Verstraelen 2015). Parties do more often explicitly request the analogous application of Article 8 in preliminary procedures, since the Court's precedent in case no 125/2011 (E.g. CC No 85/2012; CC No 1/2013; CC No 3/2013; CC No 48/2013).

The Council of State reveals a reverse tendency. Only in exceptional circumstances did the Council maintain *ex officio* (E.g. CS No 71.610; CS No 74.861, CS No 82.125, CS No 185.304, CS No 158.605). A reason for this is found in the burden of proof imposed by the Council. If a party requests a modulation, it must prove that the retroactive effect entails serious consequences. The Council rejected several requests to apply Article 14*ter*, for lack of evidence that retroactive annulment would harm legal certainty to an unacceptable extent (CS No 100.963; CS No 127.983; CS No 164.368; CS No 164.258; CS No 183.473; CS No 187.224; CS No 214.028; CS No 216.841; CS No 217.996; CS No 221.648). Since the recent reform of Article 14*ter,* the Council has entirely lost its power to maintain *ex officio*, but is only able to act on the request of the defending or intervening party. This addition is conspicuous, as the Council until now made a very cautious use of its power to maintain *ex officio*.

The application *ex officio* of the power to maintain can be problematic if parties are not given room for dispute. An annulled norm, when maintained, can still find application.[10] If parties did not have the chance to give arguments, this is questionable in the light of Article 6 ECHR (ECtHR *Ruiz-Mateos* 1993; ECtHR *Milatova* 2005; ECtHR *Soffer* 2007; Lombaert 1998). It is therefore to be welcomed that parties in recent preliminary procedures argue in their statements the analogous application of Article 8, third sentence, of the Special Law on the Constitutional Court (Mahieu and Pijcke 2011).

The Council of State goes one step further when it reopens the debates to enable all parties to make their position known regarding the possible application of Article 14*ter* of the coordinated laws on the Council of State (CS No 212.127; CS No 216.047; CS No 218.227; CS No 220.085; CS No 220.914). Here as well, evidence for the necessity of a maintenance measure remains crucial; the Council, in several cases, rejects also after reopening of the debates the request to maintain, for lack of evidence of the detrimental effects of the retroactive annulment (CS No 216.841; CS No 217.996). The law of 20 January 2014 makes this requirement concrete and explicit in the second paragraph of the amended Article 14*ter.* The Royal Decree of 28 January 2014 even lays down the precise procedural rules to ensure this debate takes place (Official Gazette 3 February 2014). The Constitutional Court, on the other hand, seems to find itself sufficiently competent to assess all possible consequences of a retroactive annulment, without arguments or evidence provided by the parties.

[10]See further section "Exclusion of the Petitioner from the Maintenance Measure".

Definite or Provisional

Consequences After Expiration of the Term

Both courts can decide to maintain the consequences of a norm either permanently or provisionally. Discussion arose regarding the consequences of a provisional maintenance if the lawmaker fails to interfere. This was debated in particular regarding the Constitutional Court's decisions to maintain, but, considering the similarity between the two norms granting the power to maintain, the arguments also apply to the decisions pronounced by the Council of State. In particular, it is discussed whether administrative acts and judicial decisions which were maintained provisionally can be questioned after the term has expired (Velaers 1990; Moerenhout 1999), or whether they remain immune, while only new consequences lack a legal basis (Simonart 1988a). The first option gives more incentives to Parliament to act, while legal certainty is best served by the latter option. Therefore, we are more inclined to endorse the second option, which puts the difference between definitive and provisional maintenance into perspective. As Muylle (2007) noted, the difference does not so much concern the fate of the maintained consequences, but rather the period envisaged. Moreover, the first option is difficult to reconcile with the fact that the Constitutional Court and the Council both accept that new consequences are established during the period of provisional maintenance.

Balance of Definite and Provisional Maintenance Decisions

The Constitutional Court maintained provisionally for a determined period in 44 judgments, definite in 39 judgments and pronounced a provisional as well as a definite maintenance in 3 judgments.[11] The judgments of the Council of State as well demonstrate a balanced distribution amongst both categories: the Council maintained definite in ten judgments and provisionally in nine judgments (Verstraelen 2015).[12]

Date of Expiration

In the case of a definite maintenance, both courts usually maintain the consequences of the unconstitutional or unlawful norm until the moment of the annulment judgment, the date of publication of that judgment, or – with regard to the Council of State – the date of notice of the judgment to the parties (This concerns the majority of definite maintenance judgments pronounced by the Constitutional Court and the

[11]The data encompass all maintenance judgments pronounced from 1985 to, and including, June 2014.

[12]The data encompass all maintenance judgments pronounced from 1996 to, and including, January 2014.

Council of State, see e.g. CC No 40, CC No 56/2002; CC No 105/2007; CC No 140/2008; CS No 96.807; CS No 106.318; CS No 164.521; CS No 191.272; CS No 196.106; CS No 198.039). It is surprising, to say the least, that this accounts for the majority of the definite decisions. When the Constitutional Court was established, the option of an annulment *ex nunc*, i.e. with immediate effect, was rejected because of its similarity to an abolishment, which was considered an act of lawmaking. However, if courts maintain the consequences of an annulled norm until the day of pronouncement, publication or notice, this in fact comes down to an annulment *ex nunc* (Simonart 1988a; Lombaert 1998).

The supreme courts may also limit the temporal effects of a definite maintenance by maintaining the consequences of an annulled norm until a given date which precedes the pronouncement of the annulment judgment. In practice this occurs only exceptionally (CC No 37/96; CC No 186/2005; CC No 49/2007; CC No 134/2012; CS No 82.185; CS No 164.523; CS No 221.078). For example, the court may maintain until the date upon which a new norm, which replaces the annulled one, comes into force (CC No 186/2005; CS No 164.523). The Constitutional Court considered it appropriate in two judgments to maintain the consequences of an annulled norm until the date of publication of a previous referral decision which established that the norm was unconstitutional. As mentioned above, when the Court in its referral decision establishes that a law is unconstitutional, the norm does not disappear *erga omnes*, but a new term for an annulment request is opened. In both cases, the annulment was pronounced on the request of a party, after reopening the 6 month period for the institution of an action for annulment following a referral decision (CC No 49/2007; CC No 134/2012). By using such specific term, the court demonstrates that it clearly envisages the consequences an annulment may entail.

In some cases, the Constitutional Court considers that the consequences of an annulled norm are maintained, without determining a specific term. It can be presumed that in these cases, the Court opts for the general rule, i.e. the maintenance of all (CC No 100/2000; CC No 73/2003; CC No 1/2005; CC No 54/2008; CC No 184/2011) or a certain category of consequences (CC No 32/93; CC No 104/2006) until the publication of the annulment judgment in the Official Gazette. Considering requirements of legal certainty and transparency, it is recommendable that the Court explicitly mentions the temporal scope of a maintenance.

As for the provisional maintenance, it can be noted that none of both articles limits the term that can be granted to the lawmaker. Such limitation exists in the Austrian system, where the period in which the Constitutional Court can postpone an annulment is constrained to a maximum of 18 months according to Article 140 (5) of the Austrian Constitution (Stelzer 2014). In Belgium, the courts can appreciate freely how much time the lawmaker will need to adopt a new law. This term will be determined with consideration of the irregularity. Hence it will matter whether the entire regulation needs revision or whether a minor addition will suffice (Verstraelen 2015).

Average Term

The annulment judgments of the Constitutional Court reveal an average term of 9 months, ranging from a minimum of 2 months (CC No 49/2001) to a maximum of 18 months (CC No 116/2011). Unfortunately, the Court shows no consistency in determining a term. Moreover, the Court does not give reasons for its choice (Verstraelen 2015).

The Council of State maintains the consequences of an annulled norm for an average term of 7 months. The shortest term amounted to 3 months and was determined in the case already discussed above, regarding the access to the profession of geometrician-real estate surveyor, where the Council maintained the consequences until the end of the running school year (CS No 142.753). The Council granted a term of 1 year in two cases (CS No 198.040; CS No 217.085).

The Constitutional Court pronounced a notable judgment in this respect which dates from 17 March 2004 (CC No 45/2004). The Court considered that the federal lawmaker, by modifying a certain registration tax rate, infringed upon regional fiscal competences. In order to respect the legitimate expectations of tax payers, the Court provisionally maintained the consequences of the law until the coming into force of provisions, adopted by the regional Parliaments, establishing a new tax rate (B.7. and dictum). Hence, the Court, instead of determining a specific term, called upon the regional authorities to establish a registration tax. This way, it was left to the regional Parliaments to decide for how long the federal law was entitled to infringe upon their competences.

Reasons

In the judgments of the Constitutional Court, the reasons given for the maintenance of the consequences of an annulled norm are often confined to, at most, one paragraph. As the Court usually imposes a maintenance measure *ex officio* and parties did not have the possibility to give their views in their written statements, it is difficult to detect the real reasons which inspired the Court to opt for this specific measure. The general considerations do not reveal the underlying balance of interests. A more elaborated reason giving would improve the predictability of the Court's practice regarding the use of Article 8, third sentence, of the Special Law on the Constitutional Court. This would encourage parties to anticipate a possible maintenance and give arguments in their written statements. Considering the far-reaching scope of the Court's competence to maintain, which resembles positive law making, it is a minimum requirement for the Court to give account of its reasons.

The case law of the Council of State shows a different picture. Initially the Council also remained concise in its reason giving (e.g. CS No 82.185). Recent case law, however, demonstrates that the Council pays increasing attention to its power to maintain. The reopening of the debates regarding the possible application of Article 14*ter* of the coordinated laws on the Council of State (CS No 212.127; CS

No 216.047; CS No 218.227; CS No 220.085; CS No 220.914), leads to judgments which (almost) exclusively and extensively examine the arguments to maintain or not (CS No 216.841; CS No 217.996; CS No 217.996; CS No 221.078). In that respect, the recent reform of Article 14*ter*, that explicitly added that a decision to maintain should be reasoned and taken after a debate, seems redundant.

From the analysis of maintenance judgments by both courts, it seems that the reasons put forward for justifying maintenance measures are quite diverse. This may not come as a surprise, as the decision to maintain always depends upon the concrete norm that is annulled. Nonetheless, out of the case law of both courts, six large categories of reasons can be distilled (Popelier 2008; Verstraelen 2015).

First of all, a widely used argument by both courts is the protection of legal certainty. Considering the retroactive effect of an annulment, (almost) every annulment decision affects legal certainty (CS No 136.919). Therefore, it can be presumed that the protection of legal certainty underpins each measure to maintain, even if this is not explicitly mentioned in the judgment.

Next, both courts take into account the consequences of an annulment for the functioning of public services. For example, the Constitutional Court referred to the required continuity of the policy regarding social welfare (CC No 4/91), education (CC No 33/92), care for the elderly (CC No 40; CC No 41) and the functioning of the new inspectorate (CC No 32/93). Likewise, the Council of State maintained to secure the continuity in the functioning of hospitals (CS No 196.106) and considering the vital importance of the fight against crime (CS No 198.039; CS No 198.040). Within this category, a separate set of arguments can be distinguished. Unquestionably, Belgium is subjected to an increasing number of supranational obligations. Accordingly, the Constitutional Court repeatedly maintained the consequences of an annulled norm because the latter, despite its deficiencies from a constitutional point of view, fulfilled European requirements (CC No 11/2009; CC No 33/2011; CC No 45/2012; CC No 76/2012).

Third, both courts give consideration to the excessive consequences which the retroactive effect of an annulment might entail. The Council of State repeatedly maintained when the annulled norm had already served as the legal ground for many (individual) decisions (CS No 106.318; CS No 164.521; CS No 164.523). The Constitutional Court as well applied Article 8, third sentence of the Special Law on the Constitutional Court so as not to jeopardize the legitimate expectations of tax payers (CC No 45/2004) or endanger running procedures (CC No 30/98; CC No 56/2002; CC No 158/2004), or to safeguard the legal position of employees (CC No 58; CC No 71; CC No 2/89; CC No 146/2007) or acquired permits (CC No 63/2000). It should be reminded that in the latter case, Articles 10 to 18 of the Special Law on the Constitutional Court allow for the reopening of terms to challenge such decisions if the Court does not maintain the consequences of the annulled norm.

A fourth consideration is found in two judgments of the Constitutional Court, where the Court maintained the consequences of an annulled norm so as to safeguard the purpose of the law (CC No 2/92; CC No 4/2011).

The last two considerations concern the prevention of financial and administrative difficulties and the granting of a term to enable Parliament to revise the legislation. Both considerations are frequently mentioned in the case law of the Constitutional Court, but only sporadically in the case law of the Council of State. Instead, the Council of State on several occasions underlined that mere administrative and financial difficulties do not justify application of Article 14*ter* of the coordinated laws on the Council of State. As annulment decisions as a rule entail certain difficulties, the parties should make the financial consequences sufficiently concrete (CS No 132.989; CS No 133.275; CS No 164.522; CS No 204.782; CS No 214.028). The Constitutional Court, on the other hand, does not only give consideration to possible administrative and financial difficulties for the government (CC No 6/93; CC No 37/96; CC No 78/2003; CC No 49/2004; CC No 186/2005; CC No 39/2007; CC No 54/2008; CC No 104/2008; CC No 37/2011; CC No 116/2011; CC No 135/2012), but also to possible financial consequences for third persons who had already applied the annulled norm (CC No 42/97; CC No 29/2005; CC No 184/2011; CC No 67/2012).

The Constitutional Court's special position may explain why this Court is more willing than the Council of State to grant Parliament the time required for revising regulation. The Constitution reveals a distrust of the executive – with as a clear example Article 159 of the Constitution which submits the executive to the reviewing power of the courts – while it demonstrates great confidence in Parliament. Therefore, the Council of State's power to control the administrative authorities was not considered problematic, in contrast to the Constitutional Court's power to review Acts of Parliament. The Constitutional Court's inclination to give Parliament time to adapt its legislation, can be viewed from this angle. It gives Parliament the chance, in particular in politically delicate questions, to develop a new Act which complies with constitutional requirements but can nevertheless rely on political balances.

Exclusion of the Petitioner from the Maintenance Measure

If the petitioner is not excluded from the maintenance measure, his efforts lead to a Pyrrhic victory. The court proves the petitioner right by annulling the norm, but due to the maintenance measure the norm will still be applied in concrete cases. One may fear that interested parties, other than interest groups, will be reluctant to spend time, effort and money in procedures from which they will not benefit, solely for *la beauté du droit*. This may contravene Article 13 of the European Convention of Human Rights, alone or combined with Article 6 of the same Convention (White and Ovey 2010), which guarantee the right to an effective remedy. Again we can refer to the Austrian constitution, more particularly to Article 140 (7) of this constitution that requires the Constitutional Court to exclude the petitioners, the so-called *case in point*, from maintenance measures. In that case, the petitioners always benefit from the declaration of unconstitutionality (Stelzer 2014).

In Belgium, however, it is presumed that neither the Constitutional Court nor the Council of State can grant an exception to the petitioning parties. This presumption is based on the statutory requirement to decide 'by a general ruling' as explained above (Parl.Doc. House No 644/4; Lust 2000; Wirtgen 2004). Nonetheless, the claim that by granting such exception, the Court or the Council would act arbitrarily or discriminate is untenable. Indeed, the petitioning parties, who invested time and efforts in challenging the constitutionality or legality of the norm, can hardly be put on a par with persons who omitted to act and thereby accepted the application of the norm (Verstraelen 2012b). In the recently amended Article 14*ter* of the coordinated laws on the Council of State, the phrase 'by a general ruling' is explicitly preserved in case the Council maintains the consequences of a regulatory administrative act. Thus the question remains whether requesting parties can be excluded from the temporal limitation.

The Constitutional Court did make an individual exemption in two annulment judgments. In both cases, the annulment request was lodged on the ground of Article 4, second paragraph of the Special Law on the Constitutional Court, which reopens the term for annulment requests after a referral decision which establishes a violation of the constitution. In case No 56/92 the Court maintained for reasons of legal certainty, to the exclusion of the consequences of the annulled provisions concerning the case which had given rise to the referral decision. In case No 140/2008 the Court definitely maintained for reasons of budgetary and administrative difficulties, except as regarded the petitioner.

In case No 18/2012, where the Constitutional Court discussed the relationship between Art. 159 of the Constitution and Article 14*ter* of the coordinated laws on the Council of State, the Court considered that the Council of State, if it deems so necessary considering the circumstances of the case, can exclude from the decision to maintain the consequences of the annulled regulation those petitioners which timely lodged an annulment request against that regulation, taking account of the principle of equality and non-discrimination (B.9.3.). Undeniably, while meeting the concerns regarding an effective legal remedy expressed above, this runs counter to the literal phrasing of Article 14*ter* of the coordinated laws on the Council of State and, more broadly, Article 8, third sentence, of the Special Law on the Constitutional Court (Verstraelen 2012b). Future case law will tell whether the Council of State will make use of this opening made by the Constitutional Court, and whether the Constitutional Court will apply it in other cases than the ones grounded on Article 4, second paragraph of the Special Law on the Constitutional Court (Verstraelen 2015).

Exclusion from Liability

The Belgian Court of Cassation confirmed that the Belgian State is liable for damages caused by a fault for which the executive (Cass. *Pas.* 1920) or Parliament (Cass. AR C050494N, Cass. *TBP* 2007, Alen 2007; Popelier 2011; Van Ommeslaghe

and Verbist 2008–09) can be held responsible. The annulment of a norm by the Constitutional Court or the Council of State can therefore engage the Belgian State's liability. In this paper, we will leave aside the debate regarding the question whether the finding of a violation in itself constitutes a fault (see at length Maes 2004, 2007; Leclercq 2006; Wirtgen 2008; Van Ommeslaghe and Verbist 2008–2009; Alen 2010; Verrijdt 2010; Popelier 2010–2011; Bocken and Boone 2011; Dubuisson and Van Drooghenbroeck 2011).

If the court decides to maintain, however, a liability claim is no longer possible for damages which occur in the period in which the maintenance decision applies. This is generally accepted as regards the maintenance measures pronounced by the Constitutional Court on the basis of Article 8, third sentence, of the Special Law on the Constitutional Court. The Court's decision to maintain provides a legal basis for the consequences of the annulled norm; allowing claims for damages would undermine the useful effect of the maintenance measure (Van Oevelen and Popelier 1997; Popelier 2006–2007; Muylle 2008; Van Ommeslaghe and Verbist 2008–2009; Alen 2010; Feyt and Tulkens 2014). It can be presumed that a maintenance measure pronounced by the Council of State on the basis of Article 14*ter* of the coordinated laws on the Council of State, also temporarily hinders liability claims, as this provision has the same purpose as its counterpart in the Special Law on the Constitutional Court: avoiding legal uncertainty, solving a possible legal vacuum created by the retroactive effect of the annulment, and giving the lawmaker time to remedy the irregularity (Verstraelen 2012a, see however, pointing to the opposite stance: CS No 225.912, Feyt and Tulkens 2014). Thus, the decision to maintain allows the lawmaker to take the time required for finding a coherent solution without concerns for liability claims This, at least, in theory; in practice the legislator more often than not turns to last-minute patchwork.

The exclusion of liability may incline the court to actually annul norms that are contrary to the law or the constitution. Therefore, scholars plea for the extension of the possibility to maintain, laid down in Article 8, third sentence of the Special Law on the Constitutional Court, to preliminary procedures (Parl.Doc. Senate No 246/2, No 2-897/4, No 2-897/6, Alen 2007; Van Ommeslaghe and Verbist 2008–2009).

These considerations, however, lead to the following result. If a norm is annulled, but its consequences are maintained, a claim for damages is excluded and, in the case of irregular administrative decisions, Article 159 of the Constitution which prohibits courts to apply irregular administrative decisions, is foreclosed. If, moreover, petitioners are only rarely excluded from the maintenance measure, it becomes clear that (requesting) parties are left empty-handed. Despite the fact that the norm violates the law or the constitution, the measure to maintain leads to the further application of the norm. Only the lawmaking authorities can provide for remedy (Popelier 2006–2007). Hence, the impact of the measure to maintain should not be underestimated.

On a final note, we refer to the recent reform of the Council of State. It was mentioned above that from now on, Article 14*ter* of the coordinated laws on the Council of State also applies to individual administrative acts. It is conceivable that the decision to maintain in that case will infringe the right to an effective remedy,

as guaranteed by Article 13 ECHR alone or combined with Article 6 ECHR. This is in particular the case if such decision hinders liability claims. However, during the recent reform of the Council of State, Parliament also gave the Council the power to grant compensation to the petitioner or an intervening party, taking into account all circumstances of public and private interest (Art. 144 (2) Belgian Constitution, Art. 11*bis* CLCS). The Council is able to grant such compensation, not only after an annulment, but also for all damages which follow from irregularities established in the judgment (Verstraelen 2014b). This seems to imply the possibility to give the petitioner compensation despite modulation of the temporal effect. The possibility to grant compensation is of major importance as it offers a possibility of redress to the requesting party, i.e. the victim of the unlawful act (Verstraelen 2014b).[13]

Conclusion

From the foregoing we can conclude that a contrast exists between objective and subjective legal proceedings regarding the possibility to modulate the temporal effects of judicial decisions. Ordinary courts firmly hold on to the retroactive effect of their decisions. The Court of Cassation modulated the temporal effects of its decisions in hardly two cases, despite the fact that in its yearly reports it explicitly acknowledges that it has a law creating function. This reluctant position, however, did not prevent the Court from assuming the power to limit the retroactive effects of referral decisions pronounced by the Constitutional Court. Since the Constitutional Court explicitly reclaimed the power to determine the temporal effects of its referral decisions, the Court of Cassation's further reaction remains to be seen.

The importance of a measure to maintain pronounced by either the Constitutional Court or the Council of State should not be underestimated, especially since the Constitutional Court makes use of this power in a quarter of its annulment judgments. Considering the quasi legislative nature of such decision, the Court's reason giving often falls short. Combined with the fact that the Court often imposes a maintenance measure *ex officio*, this leads to unpredictability. Parties have no insight in the balance of interests which led to the application of Article 8, third sentence, of the Special Law on the Constitutional Court. This results in a vicious circle: should the Court give a more elaborated reason giving, the parties, knowing which arguments may influence the Court's decision, would address this in their written statements, which, in turn, would allow the Court to an even more detailed reason giving.

As for the Council of State, the trend is set in motion. The Council shows the necessary wisdom and restraint in applying the power to maintain and generally

[13]The Council of State is, contrary to a claim for damages before the civil judge, not obliged to grant full redress. The Council may take into account all circumstances of public and private interest when it rules on the question of compensation.

gives detailed reasons for its decision whether or not to maintain the consequences of an annulled norm. The Council demands that the parties clarify the concrete detrimental effects of an annulment. If the parties fail to do so, the Council will refuse the request to maintain the consequences.

The different emphasis in the use of the power to maintain which appear when comparing the practice of both courts may not come as a surprise, considering the different nature of the Constitutional Court on the one hand, and the Council of State on the other. The consequences of a measure to maintain, however, should not be underestimated, when reminding the exclusion of liability claims. In this respect, more attention should be paid to the position of requesting parties. Excluding them from the measure to maintain, or granting them an equitable form of compensation, could offer some form of remedy.

To conclude, we notice that more attention is being paid to the temporal effects of judicial decisions in the Belgian legal system. This evolution must be applauded, when bearing in mind the far-reaching and considerable consequences of the retroactive effect of judicial decisions.

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Chapter 5
Changing the Case Law *pro futuro* – A Puzzle of Legal Theory and Practice

Adam Sagan

Abstract The method of restricting the temporal effect of judgments to future cases has a longstanding tradition in German legal practice, which the Federal Constitutional Court has not called into question. The topical case law, however, does not offer a coherent solution to this complex issue. The method of *pro futuro* restriction is widely used in the field of civil law, in particular in company law and employment law, also by the Federal Constitutional Court itself, but not by the Federal Administrative Court and the Federal Court of Justice in the domain of criminal law. Some academic authors argue that the constitutional rules restricting the retroactive introduction of statutory law should be applied to changes in the case law as well, but the courts have repeatedly rejected this proposal with reference to functional differences between the legislature on the one hand and the judicature on the other. In fact, the issue of temporal effect of judgments correlates with the broader question of whether judges are restricted to applying directives of the legislature by a purely cognitive process or are generating legal rules in a decisionistic process.

The Importance of Case Law in Legal Practice

In general, German courts are not legally required to follow the rulings of other courts and there is no legal rule that establishes the legally binding effect of case law or precedent.[1] According to article 20(3) of the Basic Law (*Grundgesetz*),

Dr iur (University of Cologne), MJur (Oxon), Academic Councillor at the Institute for German and European Labour and Social Law, University of Cologne. I am indebted to Michael Grünberger for valuable comments on an earlier draft of this paper. The usual disclaimer applies.

[1] Federal Court of Justice 09.07.2002 – X ARZ 110/02 – [2002] Neue Juristische Wochenschrift Rechtsprechungs-Report 1498, 1499.

A. Sagan (✉)
Institut für Deutsches und Europäisches Arbeits- und Sozialrecht (IDEAS), Universität zu Köln, Albertus-Magnus-Platz, Köln D-50923, Germany
e-mail: adam.sagan@uni-koeln.de

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courts are solely bound by 'law and justice'. The term 'law' refers to statutory laws enacted by the legislature (*materielle Gesetze*). This reflects the democratic principle according to which principal decisions on the matter of material justice are to be taken by Parliament and not by the judiciary.[2] It follows that courts have no legislative capacity *strictu sensu* and – in general – no court has the capacity to authoritatively interpret statutory laws in a way that would be legally binding on other courts. In the domain of civil law, this is a consequence of paragraphs 322 and 705 of the Code of Civil Procedure (*Zivilprozessordnung*), which strictly limit the legal effect of a judgment to the case at hand. Accordingly, civil judgments are applicable only *inter partes*. This rule also applies in other areas of law and there are few exemptions to it, the most prominent being paragraph 31 of the Act on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*). According to this provision, rulings of the Federal Constitutional Court (*Bundesverfassungsgericht*) apply *erga omnes* and in certain cases have the same legal force as statutory law.

Thus, precedent is in general not legally binding. Nonetheless, it is of utmost importance in legal practice. Empirical studies in the field of civil law have demonstrated that in 95 % of its decisions the Federal Court of Justice (*Bundesgerichtshof*) decides on matters with reference to its previous judgments, and in most cases such reference is used as a main argument. In addition, the courts of first and second instance commonly refer to the judgments of the Federal Court of Justice without any further scrutiny of those decisions or attention to (potential) counterarguments.[3] It is commonplace that the lower courts, which institutionally belong to the *Bundesländer*, are *de facto* bound by the Federal Courts' interpretation of statutory law,[4] and this can be explained by procedural arrangements. According to paragraphs 511(4)(No 1) and 543(2)(No 2) of the Code of Civil Procedure (*Zivilprozessordnung*), an appeal (on a point of law) is admissible if the decision of the higher court is necessary to ensure uniform adjudication. Under this rubric, leave for appeal is given if a judgment departs from the legal reasoning of a decision of a higher court, in particular a Federal Court. Therefore, on the one hand, the courts of first and second instance are free to dissent from the legal reasoning of the Federal Courts; on the other hand, the applicable procedural rules provide that the dissenting judgment can be appealed to a higher court. Of course, it is highly probable that the judgment will be overturned if an appeal is lodged. Similar procedural rules apply in the judicial branches of the other four Highest Federal Courts, ie the Federal Administrative Court (*Bundesverwaltungsgericht*),[5] the Federal Fiscal

[2] R Herzog and B Grzeszick, in T Maunz and G Dürig (eds), *Grundgesetz* (C.H. Beck, Munich, 2013) art 20 [60, 66].

[3] P Krebs, 'Die Begründungslast'(1995) 195 Archiv für die civilistische Praxis 171, 182.

[4] D Olzen, 'Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen' [1985] Juristenzeitung 155, 157.

[5] Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*), paras 124(2) (No 4) and 132(2) (No 2).

Court (*Bundesfinanzhof*),[6] the Federal Labour Court (*Bundesarbeitsgericht*),[7] and the Federal Social Court (*Bundessozialgericht*).[8] However, different procedural rules apply to the Federal Court of Justice in the area of criminal law.

Whereas the aforementioned procedural rules provide for uniformity in the individual branches of the judiciary, further rules applicable to the Federal Courts are intended to secure a uniform interpretation of statutory law at the federal level. First, each of the five Highest Federal Courts consists of several senates. If a senate intends to diverge from a ruling of another senate of the same court, it has to refer the matter – after a reference to the respective senate – to a Grand Panel (*Großer Senat*). A Grand Panel will then rule on the interpretation of statutory law, but not decide the case. This interpretative decision – one might say its *ratio decidendi* – will then be binding on all senates of the Federal Court in question. Its senates are not allowed to depart from the reasoning of the Grand Panel without a further reference to the Grand Panel.[9] In other words, only a Grand Panel is allowed to revise and eventually overturn its own decisions. Second, if a Federal Court intends to dissent from the interpretation of statutory law given by another Federal Court, it has to refer to the Joint Panel of the Highest Federal Courts (*Gemeinsamer Senat der obersten Gerichtshöfe des Bundes*). This is rare, but the procedure is set out in article 95(4) of the Basic Law and aims at securing the uniformity of legal practice[10]; the details of the procedure are governed by the Act on the Uniformity of the Jurisdiction of the Highest Federal Courts (*Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes*). Obviously, the establishment of Grand Panels at the Federal Courts and a Joint Panel of the Highest Federal Courts is to secure the uniform interpretation of statutory law at the level of the Federal Courts. However, the underlying premise is that the courts of first and second instance will follow the Federal Courts' (uniform) interpretation of statutory law.

In addition, each of the five Grand Panels is entitled to further develop the law by judicial interpretation (*Rechtsfortbildung*).[11] This method of interpreting statutory law is available to all courts, including the courts of first and second instance, but in practice it is primarily used by the Federal Courts. It enables them to fill lacunae in statutory law and to substantiate blanket clauses. The Federal Constitutional Court acknowledged that in this context the courts create the principles and rules of law according to which they decide the relevant case at hand.[12] The Constitutional Court deems this particular function of the judiciary to be 'virtually indispensable' in a

[6]Code of Fiscal Court Procedure (*Finanzgerichtsordnung*), para 115(2) (No 2).

[7]Code of Labour Court Procedure (*Arbeitsgerichtsgesetz*), paras 64(3) (No 3) and 72(2) (No 2).

[8]Code of Social Court Procedure (*Sozialgerichtsgesetz*), paras 144(2) (No 2) and 160(2) (No 2).

[9]See Courts Constitution Act (*Gerichtsverfassungsgesetz*), para 132; Code of Administrative Court Procedure, para 11; Code of Fiscal Court Procedure, para 11; Code of Labour Court Procedure, para 45; and Code of Social Court Procedure, para 41.

[10]Basic Law, art 95(3)(1).

[11]See the references in (n 9).

[12]Federal Constitutional Court 26.06.1991 – 1 BvR 779/85 – BVerfGE 84, 212.

modern state.[13] Judgments of the Federal Courts that further develop the law by way of interpretation and the legal rules evolving therefrom can – in a broader material sense – be called 'judge-made law' (*Richterrecht*). The relevance of this type of 'rule-making' in German legal practice cannot be overestimated. For example, the absence in statutory law of any substantive rules on industrial action means that this area of law is almost entirely governed by decisions of the Federal Labour Court. Hence, the topical decisions of the Federal Labour Court substitute statutory laws regulating industrial action (*gesetzesvertretendes Richterrecht*).[14] Consequently, in the field of collective action the German legal system very much operates like a case law system and supports the finding of the European Court of Human Rights (ECtHR) that 'case-law has traditionally played a major role in Continental countries, to such an extent that whole branches of positive law are largely the outcome of decisions by the courts'.[15] Another example of this is the award of damages in case of fault in conclusion of a contract (*culpa in contrahendo*). The relevant provision in paragraph 311 of the Civil Code (*Bürgerliches Gesetzbuch*) came into effect on 1 January 2002. It merely contains a general acknowledgement of the longstanding legal practice of the Federal Court of Justice after 1945[16] and the former Imperial Court (*Reichsgericht*), which, since the early twentieth century, adjudicated on *culpa in contrahendo*.[17] In addition, the intention of the drafters of paragraph 311 of the Civil Code was to leave further development of the law to the judicature.[18] As a consequence, the substantive rules are made by the courts and not by the legislature.

Finally, a solicitor is in general under a contractual obligation to advise clients on the basis of the legal practice of the Federal Courts even if he or she holds a different opinion.[19]

The Legal Status of Case Law in a Civil Law System

In absence of a better term, in the remainder of this report the standing body of Federal Courts' judgments will be referred to as 'case law', although the term 'law' is slightly incorrect because, in general, the judgments have a mere factual, practical,

[13] Federal Constitutional Court 19.10.1983 – 2 BvR 485, 486/80 – BVerfGE 65, 182.

[14] Federal Labour Court (Grand Panel) 21.04.1973 – GS 1/68 – BAGE 23, 292.

[15] *Kruslin v France* (App no 11801/85) ECHR 24.4.1990 [29].

[16] See eg Federal Court of Justice 13.07.1954 – I ZR 60/53 – [1954] Neue Juristische Wochenschrift 1561.

[17] See eg Imperial Court 07.12.1911 – VI 240/11 – RGZ 78, 239.

[18] Bundestagsdrucksache 14/6040, 14.05.2001, 162.

[19] Federal Court of Justice 28.9.2000 – IX ZR 6/99 – BGHZ 145, 256.

or procedural, but not legally binding effect on the lower courts. In a 1973 landmark decision the Federal Constitutional Court stated:

> Traditionally judges are bound to statutory law and this is a constituent component of the principle of separation of powers and the rule of law [*Rechtsstaatsprinzip*]. The Basic Law, however, stipulates that the judiciary is bound to 'law and justice' – article 20(3) of the Basic Law. According to a universally held view, this is incompatible with strict legal positivism. The formulation reflects that the 'law' de facto and in general is in accordance with justice; however, this is not necessarily and not always the case. The law is not identical with the entirety of written statutory law. There may be more laws than the positive rules set by the public authorities as the law has its roots in the constitutional order taken as a whole which can have the effect of correcting written law. It is the task of the judiciary to find and to apply such law. According to the Basic Law, judges are not limited to applying the rules of the legislature in their literal sense to each individual case. This would presuppose the principal absence of any lacunae in the positive legal order, a condition that might be defensible with regard to the principle of legal certainty, but is unattainable in practice. The task of the judges is not limited to finding and pronouncing the decisions of the legislature. It can include shedding light on and applying the ideals of justice which are imminent to the constitutional order but which are not or merely imperfectly reflected in written statutory law; this task requires a critical assessment which is not free of voluntative elements.[20]

This Federal Constitutional Court decision received criticism for its tacit acknowledgement of (higher) natural law and its reference to an undefined constitutional principle of material justice which as a consequence granted judges the power to overcome the boundaries of statutory law. However, in accordance with the ruling of the Federal Constitutional Court, it is universally accepted that the courts are not restricted to a literal interpretation of statutory laws; the courts are not merely '*la bouche qui pronounce les paroles de la loi*'.[21] Their function implies a certain aspect of rule-setting. Nonetheless, the legal status of case law is a fundamental, yet dubious and highly contested matter. The academic debate, however, focuses on the methodological boundaries of the interpretation of statutory law and the constitutional limitations to judicial powers vis-à-vis the legislature.

The orthodox opinion in German legal theory rejects the idea that case law has in and of itself any kind of normative quality. According to this view, statute and custom are the sole sources of law and, due to the constitutional principle of separation of powers, judicial decisions cannot assume legislative character and cannot be legally binding.[22] Consequently, case law is held not to be a source of law, but a source of legal reasoning (*Rechtserkenntnisquelle*)[23] and must have an

[20]Federal Constitutional Court 14.02.1973 – 1 BvR 112/65 – BVerfGE 34, 629 (translation by the author).

[21]Federal Constitutional Court 08.04.1987 – 2 BvR 687/85 – BVerfGE 75, 223.

[22]E Picker, 'Richterrecht und Rechtsdogamtik'in C Bumke (ed), *Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung* (Mohr Siebeck, Tübingen, 2012) 85, 102 and 116.

[23]K Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer, Berlin and others, 1991) 432.

adequate legal basis in statutory law.[24] Other authors have argued that longstanding case law could evolve into legally binding customary law (*Gewohnheitsrecht*). This opinion rests on the assumption that judge-made rules could over time become universally accepted legal practice with normative power. However, even authors who argue that every judicial decision creates an individual rule and reject the idea that there is a bright-line distinction between legislation and adjudication, argue that case law has no legally binding effect whatsoever.[25]

A minority opinion refers to the de facto legal quality of case law and the procedural rules that secure the uniform application of statutory law. Accordingly, it qualifies case law as an autonomous legal source.[26] Numerous authors favour a 'presumptive binding force' of case law which has to be rebutted if a lower court wants to dissent from case law.[27] Furthermore, some contemporary authors go even further and object to the idea that courts could, in effect, be bound by statutory law because of their authority to determine its content by interpretation, a position that culminates in a rather radical conclusion coined by Walter Grasnick: 'There is no law. There are only judges.'[28]

The aforementioned debate reflects a more general discussion in legal theory on the interpretation and application of law.[29] The so-called *Interessenjurisprudenz*[30] understands all norms of statutory law as deliberate decisions of the legislators intended to balance and to reconcile conflicts of interests. Accordingly, judges shall not only be bound by written statutory law, but also by the principles that underlie the legal order and reflect the importance the legislator attributed to particular interests. The so-called *Wertungsjurisprudenz*[31] introduces a more

[24]E Picker, 'Richterrecht und Richterrechtssetzung' [1984] Juristenzeitung 153, 158; cf F Müller, 'Richterrecht – rechtstheoretisch formuliert' in Hochschullehrer der Juristischen Fakultät der Universität Heidelberg (eds), *Richterliche Rechtsfortbildung* (C.F. Müller, Heidelberg, 1986) 65, 78–84; F Müller, *Richterrecht* (Duncker & Humblot, Berlin, 1986) 96–110.

[25]M Jestaedt, 'Richterliche Rechtsetzung statt richterliche Rechtsfortbildung'in C Bumke (ed), *Richterrecht zwischen Gesetzesrecht und Rechtsgestaltung* (Mohr Siebeck, Tübingen, 2012) 49, 68.

[26]B Rüthers, *Das Ungerechte an der Gerechtigkeit* (3rd edn, Mohr Siebeck, Tübingen, 2009) 126–9; B Rüthers, C Fischer and A Birk, *Rechtstheorie* (7th edn, C.H. Beck, Munich, 2013) § 6 [243–48].

[27]F Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (Springer, Vienna/New York, 1982) 510–1; K Langenbucher, *Die Entwicklung und Auslegung von Richterrecht* (C.H. Beck, Munich, 1996) 120; cf D O Effer-Uhe, *Die Bindungswirkung von Präjudizien* (Cuvillier, Göttingen, 2008) 84–6.

[28]'Pater Brown und die Kamele' [2010] Mypos 12, 17.

[29]For an extensive discussion, including the temporal effect of judgments, see C Louven, *Problematik und Grenzen rückwirkender Rechtsprechung des Bundesarbeitsgerichts* (C.H. Beck, Munich, 1996) 180–204.

[30]P Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 Archiv für die civilistische Praxis 1–313.

[31]Larenz (n 23) 119–124; cf Federal Constitutional Court 17.05.1960 – 2 BvL 11/59, 11/60 – BVerfGE 11, 126, 130–1.

stringent differentiation between individual interests and their evaluation by the legislator. In addition, it suggests that the content and the purpose of legal norms are not determined by the will of the legislator. Instead, and in accordance with Hegelian legal philosophy, legal norms are held to have an immanent, objective meaning that is independent of the intentions of the persons who participated in the legislative process. The objective meaning of statutory laws follows, in particular, from their systematic context within the legal order and the idea of material justice (*Rechtsidee*). Despite the differences in their theoretical groundwork, both *Interessenjurisprudenz* and *Wertungsjurisprudenz* are underpinned by the idea that general principles of law can be derived from the structural order of all statutory law and that in every individual case those principles enable the evaluation of competing interests.

If one accepts the assumption of a holistic legal order, it follows that the function of judges is principally limited to the reproduction and reconstruction of assessments deriving from the will of the legislator or the entirety of the written legal order. In any case, judges must not be influenced by their personal evaluation of competing interests. Hence, ideally, a judge should be restricted to a purely cognitive act without any voluntative element. In addition, such cognitive act can only result in one right answer, which truly and accurately reflects the legislators' assessment of competing interests.[32] In this particular regard, *Interessenjurisprudenz* and *Wertungsjurisprudenz* exhibit striking similarities to the declaratory theory and the 'one-right-answer doctrine'. On the issue of temporal effect of judgments, both doctrines submit that judges should be limited to pronouncing decisions based on the assessments of the legislator or the legal order taken as a whole; consequently, any change in the case law is tantamount to the mere correction of a previous error. In this context, the Federal Constitutional Court deviated from its 1973 ruling and described the interpretation and application of the law as a cognitive process, which in general is prone to error.[33] Of course, from this perspective it follows naturally that any error should be reversed immediately and retrospectively.

A rival opinion[34] argues that the written legal order is necessarily fragmented. It therefore challenges the idea that the legal order provides a coherent system that determines the outcome of every possible case. Rather, with reference to Gadamer's hermeneutics, this opinion submits that judges read provisions of written law in accordance with a preconception that reflects their personal conviction of material

[32]See C-W Canaris, Federal Labour Court 06.01.1971 – 3 AZR 384/70 – (case note) [1972] Sammlung Arbeitsrechtlicher Entscheidungen 22–3.

[33]Federal Constitutional Court 28.09.1992 – 1 BvR 496/87 – [1993] Neue Zeitschrift für Arbeitsrecht 213.

[34]J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, Athenäum Fischer, Frankfurt am Main, 1972); J Esser, 'Möglichkeiten und Grenzen des dogmatischen Denkens im modernen Zivilrecht'(1972) 172 Archiv für die civilistische Praxis 97–130.

justice (*Vorverständnis*).[35] In the absence of legal rules on how to interpret statutory law, judges will choose the method of interpretation that corresponds with their preconceptions. Thus, the interpretation and application of law is a rhetoric and decision-making process that is influenced by statutory law, the methods of its interpretation, existing case law, and legal literature. As a consequence, judicial decisions are functionally comparable to the creation of legal rules, although they operate on a lower level in the hierarchy of norms when compared to statutory law enacted by the legislature. It follows that, on the basis of this opinion, the issue of temporal effect of judgments would have to be resolved in accordance with, or at least be similar to, the (constitutional) principles restricting the retrospective effect of statutory laws.

Constitutional Boundaries of the Retrospective Effect of Judgments

In general, a court's decision is based on its interpretation of statutory law. It will apply its interpretation from the date the statutory law entered into force. In this sense, any judicial decision has retrospective effect because it interprets and applies the relevant legal rules to cases where the facts occurred in the past. Against this background, the retrospective effect of judicial decisions is the natural state of affairs. In addition, as precedent is, *strictu sensu*, not legally binding, there is no common legal rule that binds the courts to previous case law. In general, any court is therefore free to depart from previous case law and apply a new position to any case even if the case under consideration would have been decided differently under previous case law. However, there are some vague limitations to a retrospective change in the case law, deriving, in particular, from the constitutional principle of legitimate expectation (*Vertrauensschutz*), which follows from the rule of law (*Rechtsstaatsprinzip*). In 2010 the Federal Constitutional Court summarized its relevant case law as follows:

> Although decisions of specialized courts [*Fachgerichte*] affect only the individual case at hand and are legally binding only *inter partes*, they can clarify contested legal issues and can be of some value as precedent for future cases. This function of case law is reflected in the procedural rules applicable to the Federal Courts and follows in particular from the provision on the appeal on a point of law [*Revision*] according to which the harmonization of the case law is one of the tasks of the Federal Courts. However, as the courts of first and second instance are not legally bound by the case law of the Federal Courts, except for the individual cases which the Federal Courts have decided, acts of the judiciary can only to a limited extent be a source of legitimate expectation comparable to statutory law, which is of universal binding force. For constitutional reasons the administration of justice is not homogeneous because article 97 [of the] Basic Law guarantees the independence of

[35] J Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (2nd edn, Athenäum Fischer, Frankfurt am Main, 1972) 135.

> the judges. No party can rely on the expectation that a judge will continuously adhere to a particular point of view as laid down in previous case law. Accordingly, if the legal situation is uncertain, the case law of the Federal Courts is less suitable as a basis for legitimate expectations than clarifying statutory law. The case law of the Federal Courts has not the legal status of statutory law and it does not produce a binding force comparable to statutory law. Apart from the individual cases that the Federal Courts have themselves decided, the applicability of their case law solely rests on the persuasive power of their arguments and the authority and competence of the Federal Courts. Legitimate expectations may only evolve from longstanding and settled case law.[36]

In another judgment, the Constitutional Court added that judicial decisions would not alter the legal situation, but merely declare what the legal situation is.[37] This, of course, reflects the principle of the declaratory theory, according to which the courts do not create legal rules. Against this background, a change in the case law does not violate the constitutional principle of legitimate expectations if the court gives adequate reasons for its new opinion and this new opinion does not exceed the confines of a 'foreseeable evolution' of the case law. However, the Constitutional Court explicitly stated that due regard to the principle of legitimate expectation could be paid if a court on a case-by-case basis restricts the temporal effect of a decision that departs from earlier case law.[38]

Some authors maintain that the fundamental right of equality before the law according to article 3(1) of the Basic Law restricts the authority of the courts to change their case law.[39] However, the Federal Constitutional Court decided that article 3(1) of the Basic Law does not grant an individual entitlement to the continuation of a line of case law that the courts no longer hold to be correct.[40] Indeed, the general principle of equality (*allgemeiner Gleichheitssatz*) requires that like cases are decided in the same way. However, with regard to overturning earlier case law, it merely prohibits arbitrary changes in the case law.[41] Such changes will not be deemed arbitrary and thus will not violate the general principle of equality if they are justified by objective reasons. This is a rather low threshold as the court is merely required to base its new case law on objective reasons. Nonetheless, a recent opinion in legal literature argues that objective reasons should be the exclusive test for a change in the case law because acts of the judiciary are by their very nature

[36]Federal Constitutional Court 21.07.2010 – 1 BvL 11/06 and others – BVerfGE 126, 369 (translation by the author).

[37]Federal Constitutional Court, 28.09.1992 – 1 BvR 496/87 – [1993] Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis 140.

[38]Federal Constitutional Court 15.01.2009 – 2 BvR 2044/07 – BVerfGE 122, 248, 279–80.

[39]G Dürig/R Scholz, in T Maunz/G Dürig (eds), *Grundgesetz* (C.H. Beck, Munich, 2013) art 3 [402–7].

[40]Federal Constitutional Court 04.08.2004 – 1 BvL 1557/01 – [2005] Neue Zeitschrift für Verwaltungsrecht 81.

[41]Federal Constitutional Court 11.11.1964 – 1 BvR 488/62 and others – BVerfGE 18, 224, 240; 11.05.1965 – 2 BvR 259/63 – BVerfGE 19, 38, 48.

retrospective.[42] This opinion challenges the idea that judgments create legitimate expectation, because courts are unable to legally bind themselves to their earlier case law. The principle of legitimate expectation, however, requires that a state authority is able to create legal rules that it is bound by in future cases. As the courts are unable to bind themselves to a particular interpretation of statutory law, there cannot be any legally relevant expectation that a court will follow its previous case law in the future.[43]

Only a small number of cases that concern the issue of legitimate expectation in the context of a change of case law have been decided by the Federal Constitutional Court. In the vast majority of those cases, the Court did not find a breach of the Basic Law. It accepted a change in the case law where it was reasonable to expect such a change due to significant changes in factual or legal circumstances.[44] In several decisions the Court found that the relevant change did not exceed the confines of a foreseeable evolution of the case law.[45] For example, it held a change in the case law to be foreseeable if its aim was to correct scarcely tolerable discrepancies between the case law of the administrative courts and the employment courts. If two branches of the specialized courts decided similar cases differently it was, according to the Constitutional Court, to be expected that such differences would be abolished at some point in time.[46] However, the Federal Constitutional Court held a decision of a Chamber of a Regional Court (*Landgericht*) to violate the constitutional principle of legitimate expectation. Without prior announcement, the Regional Court had departed from its practice of accepting illegible signatures on written submissions. On the basis of its new practice, the Chamber dismissed an appeal. However, the Constitutional Court referred not only to the constitutional principle of legitimate expectation, but also to the fundamental right to a fair trial:

> No litigant can rely on the expectation that the judge will come to or adhere to a particular legal opinion. This would run counter to the principle of independence of the courts (article 97 of the Basic Law) because of which the case law is necessarily inhomogeneous. The claimant could therefore not expect that the Regional Court would follow the case law of the Federal Courts that expressed a rather generous approach to the formal requirements for the signature in written submissions to the courts. However, the Chamber [of the Regional Court] was not allowed to abruptly depart from its longstanding previous practice according to which the signatures of the claimant were sufficiently clear. This departure precluded the claimant from adapting to the new procedural practice of the Chamber. However, a procedural practice that is in conformity with the rule of law does not require that litigants

[42] L Brocker, 'Staatsfunktionengerechte Auslegung des rechtsstaatlichen Rückwirkungsverbots' [2012] Neue Juristische Wochenschrift 2296.

[43] J Burmeister, *Vertrauensschutz im Prozeßrecht* (De Gruyter, Berlin/New York, 1979) 32–5.

[44] Federal Constitutional Court 12.05.2009 – 2 BvL 1/00 – BVerfGE 123, 111.

[45] Federal Constitutional Court 06.05.2008 – 2 BvR 1926/07 – [2008] Neue Zeitschrift für Verwaltungsrecht 1111; 15.01.2009 – 2 BvR 2044/07 – BVerfGE 122, 248; 18.12.2012 – 1 BvR 2366/11 – [2013] Neue Juristische Wochenschrift 523.

[46] Federal Constitutional Court 06.05.2008 – 2 BvR 1926/07 – [2008] Neue Zeitschrift für Verwaltungsrecht 1111.

> be notified of intended changes in the case law. In addition, the judge has to pay attention to the formal requirements as enshrined in the procedural codes. Otherwise legal proceedings cannot operate in an orderly manner. However, in order to achieve this aim, judges and litigants have to cooperate on the basis of mutual consideration. This aim will not be achieved if a court accepts a particular signature over many years, with the result that a legal representative of the party concerned will legitimately expect that this signature is valid, but then the court departs from its practice without prior warning. This applies in particular where an appeal is dismissed as a result of a change in the procedural practice. It would have been possible to the Chamber to inform claimants, in general, that the formal requirements for a proper signature would change in the future. Under these circumstances, and if the signature had then not been amended, the dismissal of the appeal would not have come into conflict with constitutional law in case.[47]

The reasoning of the Federal Constitutional Court illustrates that there is no general obligation of the lower courts to adhere to the case law of the Federal Courts. Instead, the Regional Court was bound to its own procedural practice, which it was not allowed to modify without prior notification to litigants. However, it does not follow from the decision of the Constitutional Court that constitutional law would oblige the specialized courts to announce intended changes to their case law or to generally restrict the retrospective effect of their judgments. Although the Constitutional Court refers to a possible announcement of the Regional Court, it has to be noted that such announcement would not have required a final judgment. It would have sufficed to inform the parties during the course of the proceedings that the Chamber intended to change the formal requirements for signatures on written submissions. The reasoning of the Constitutional Court focuses on the matter of procedural practice rather than on changes in the interpretation of substantive law.

Nonetheless, the Federal Constitutional Court itself has a longstanding and extensive tradition of restricting the retrospective effect of its own judgments. In numerous cases the Court set a time limit that precluded the retrospective application of the decision in question and granted a notice period within which the legislature or other state authorities could remedy the breach of constitutional law.[48] For example, in 2008 the Federal Constitutional Court quashed a provision of the Federal Election Act (*Bundeswahlgesetz*) that, in certain complex situations, could have had a peculiar effect in that, after having obtained a specific number of votes, a political party would lose seats in Parliament if it obtained any more votes. The Constitutional Court found that the relevant provisions of the Federal Election Act violated the Basic Law, but granted the legislature a period of about 3 years to remedy the violation of constitutional law because it would require a substantial revision of the said Act.[49]

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[47]Federal Constitutional Court 26.04.1988 – 1 BvR 669/87 and others – BVerfGE 78, 123 (translation by the author).

[48]See eg Federal Constitutional Court 09.02.2010 – 1 BvL 1/09 and others – BVerfGE 125, 175, 255–6; 20.12.2007 – 2 BvR 2433, 2334/04 – BVerfGE 119, 331, 382–3; 10.11.1998 – 2 BvR 1057, 1226, 980/91 – BVerfGE 99, 216, 243–4.

[49]Federal Constitutional Court 03.07.2008 – 2 BvC 1, 7/07 – BVerfGE 121, 266.

A rather academic debate concerns the question of whether the courts are, in addition to the principle of legitimate expectation, bound by the more restrictive constitutional rules that apply to the retrospective effect of statutory law. The Federal Constitutional Court has rejected this proposition in general and stated that its case law on the retrospective effect of statutory laws should not be applied to judicial decisions.[50] Some authors argue that the courts may not change their case law retrospectively in a way that the legislature would not be entitled to because a change in the case law could have the same effect as the enactment of new statutory law. In this regard, the powers of the courts could not exceed those of the legislature.[51] The prevalent opinion, however, opposes this proposition as it would result in a rigid continuity of standing case law and discourage litigants from seeking a change in the case law.[52] Also, the Federal Constitutional Court has drawn a clear distinction between statutory law and case law, emphasizing that case law does not have a legally binding effect comparable to statutory law.[53]

Another question is whether constitutional law prevents a court from restricting the retrospective effect of its new case law in the sense that it will be applicable only to future cases (*pro futuro*). This issue has not yet been explicitly addressed by the Federal Constitutional Court and has not been subject to a wider debate in legal literature. On the basis of the declaratory theory it has been argued that each party has a constitutional right to the 'correct' application of statutory laws to their case even if this is contrary to previous case law. Restrictions on the retrospective effect of judgments would be tantamount to an incorrect interpretation of statutory law.[54] Such restrictions would also be contrary to the constitutional principle that courts are bound by statutory law. This principle obliges courts to apply the 'correct' interpretation of statutory law immediately.[55] Furthermore, applying new case law only *pro futuro* would violate the constitutional principle of separation of powers because the power to change the law is reserved to the legislature.[56] However, this

[50]Federal Constitutional Court 16.12.1981 – 1 BvR 898/79 and others – BVerfGE 59, 128.

[51]D Medicus, 'Über die Rückwirkung von Rechtsprechung' [1995] Neue Juristische Wochenschrift 2577, 2582; H Prütting and S Weth, 'Zur Anrechnung von Unfallrenten auf Betriebsrenten'[1984] Neue Zeitschrift für Arbeitsrecht 24, 26; see further Federal Constitutional Court 16.12.1981 – 1 BvR 898/79 and others – BVerfGE 59, 128, 165.

[52]F-J Säcker, Higher Regional Court of Düsseldorf 18.09.1967 – 5 W 19/67 – (case note) [1968] Neue Juristische Wochenschrift 708; see further U Koch, 'Die Bewältigung von selbst- und fremdbestimmten Rechtsprechungsänderungen durch das Bundesarbeitsgericht' [2012] Soziales Recht 159, 160; D Olzen, 'Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen' [1985] Juristenzeitung 155, 159–61; G Robbers, 'Rückwirkende Rechtsprechungsänderung' [1988] Juristenzeitung 481, 484.

[53]Federal Constitutional Court 21.07.2010 – 1 BvL 11/06 and others – BVerfGE 126, 369.

[54]See HP Westermann, Federal Court of Justice 18.03.1974 – II ZR 167/72 – (case note) [1975] Juristenzeitung 327, 330.

[55]Brocker (n 42) 2999.

[56]See Picker (n 24) 161.

view is contested.[57] Critics, first, call the declaratory theory into question because in their eyes it underestimates the impact of changes in societal circumstances on the case law. Second, it is argued that there is not merely one correct interpretation of statutory law. Instead, the 'correct' interpretation and application of statutory law requires consideration of when the relevant facts took place. Thus, the principle of legitimate expectation could have the result that the application of the former and now 'incorrect' interpretation of statutory law is the 'correct' judicial decision.[58] Third, the restriction of the temporal effect of judicial decisions *pro futuro* would not usurp powers of the legislature because the courts are undoubtedly entitled to change their case law (with retrospective effect). Therefore, they must, *a fortiori*, be entitled to make mere prospective changes to their case law, which are less far-reaching than changes with retrospective effect.[59] Fourth, the critics propose a distinction between two functions of Federal Courts decisions. The Federal Courts are, on the one hand, meant to decide individual cases; on the other hand, they give guidance to the lower courts on the interpretation of statutory law. Hence, the Federal Courts may make a distinction between deciding the case at hand and the mere announcement of a new point of view as a reference for future cases and as guidance for lower courts. Strictly speaking, such an announcement could be understood as a mere *obiter dictum* provided it does not affect the decision of the case at hand.[60] Fifth, by restricting the temporal effect of new case law *pro futuro*, the courts would interpret statutory law differently at different points in time. This is, nonetheless, still a mere interpretation of statutory law not comparable to the enactment of statutory law. If the courts were entitled to change their case law at all – which they undoubtedly are – they must also be entitled to determine at what point in time the change will come into effect.

Restriction by the Federal Courts of the Temporal Effects of Judgments

Before drawing some general conclusions, the remainder of this paper provides an overview of the judgments of the Federal Courts on the issue of temporal effect. Of course, such overview will be highly selective and not exhaustive due to the extent

[57] For an extensive account, see V Klappstein, *Die Rechtsprechungsänderung mit Wirkung für die Zukunft* (Duncker & Humblot, Berlin, 2009) 268–307.

[58] Robbers (n 52) 487.

[59] C Bittner, 'Höchstrichterliche Ankündigungsrechtsprechung – Rechtsfortbildung ins Ungewisse?' [2013] Juristenzeitung 645, 651.

[60] See ibid 648–9. Numerous examples of judgments, in which a court merely pronounces a 'tendency' to change its case law, can be found in the case law of the Federal Labour Court; see eg Federal Labour Court 20.02.1986 – 2 AZR 244/85 – [1986] Neue Zeitschrift für Arbeitsrecht 739 and 13.07.1993 – 1 AZR 675/92 – [1993] Der Betrieb 1479.

of existing case law. It will focus on rulings that, according to the relevant court, should only be applied to future cases as this is the exception to the general rule of the retrospective effect of judicial decisions.

Federal Court of Justice

It is predominantly in older civil law cases that the Federal Court of Justice has restricted the temporal effect of a change in the case law. In more recent cases, the Court refers to the case law of the Federal Constitutional Court on the constitutional limitations for the retrospective effect of statutory law, although it continuously emphasizes the significant functional differences between a change of statutory law and a change in the case law.[61] This approach has reduced the Federal Court of Justice's use of *pro futuro* restrictions.

One of the Federal Court of Justice's first decisions on the retrospective effect of a change in the case law dates back to 1969. The Court rejected a restriction of its new case law to future cases and stated:

> In principle, acts of the judiciary do not create new law if they assess similar cases differently even when there is no change in statutory law. Usually, the courts act on the assumption that a change in the case law is merely a clearer identification of the legal situation. This, however, does not preclude applying the principles of the retrospective effect of statutory law to a change of the case law by way of analogy, provided that such analogy is necessary with regard to the circumstances of the individual case. This can be the case if, in particular, the change of the case law is based on an *ex post* change of factual circumstances and is, in its factual effect, comparable to a change of statutory law and, in addition, reasons of material justice or legal certainty mitigate against a retrospective effect because it would be incriminatory or negate a previously held right.[62]

In this case the Federal Court of Justice did not restrict the temporal effect of its decision because the case required the application of the principle of misuse of rights, as well as the balancing of competing interests. Therefore, in the absence of a bright-line distinction between the proper use of the right in question and its misuse, the claimant could not have legitimately expected that the court would rule in his favour. In addition, the Federal Court of Justice noted that the change in the case law had previously been demanded in legal literature and therefore the claimant could have expected the courts to change their case law.

In a 1974 case, the Federal Court of Justice decided that a private limited partnership (*Kommanditgesellschaft*), the sole partner of which with unlimited liability

[61] See Federal Court of Justice 29.2.1996 – IX ZR 153/95 – BGHZ 132, 120, 128–32, Federal Court of Justice 07.03.2007 – VIII ZR 125/06 – (2007) Neue Zeitschrift für Miet- und Wohnungsrecht 363 [28]; and Federal Court of Justice 19.07.2011 – II ZR 300/08 – [2011] Neue Zeitschrift für Gesellschaftsrecht 1023 [40].

[62] Federal Court of Justice 08.10.1969 – I ZR 7/68 – BGHZ 52, 365, 369–70 (translation by the author).

(*Komplementär*) was a limited liability company (*Gesellschaft mit beschränkter Haftung/GmbH*), had to use the suffix 'GmbH & Co.' in its trade name (*Firma*) in order to show that no natural person was liable for the obligations of the company. This was based on the application of a provision of the Limited Liability Company Act (*GmbH-Gesetz*) to a private limited partnership by way of analogy. The Court conceded that no one could have realized this particular duty because, first, it did not follow from a literal interpretation of statutory law; second, it was not acknowledged in previous case law and; third, it was rejected by the prevailing opinion in legal literature.[63] In addition, a violation of this newly created obligation would result in the retrospective personal liability of the managing director (*Geschäftsführer*) of the limited liability company, something that he could not have foreseen. In a subsequent judgment in 1978, the Federal Court of Justice decided that the obligation would only come into effect after the publication and dissemination of its 1974 judgment.[64] In effect, the Federal Court of Justice created a new obligation that became effective after a transitional period, the length of which was not clearly specified, and it neither provided specific legal reasons for this result nor did it refer to constitutional law.

In 1976 the Federal Court of Justice decided on the competences of a supervisory board (*Aufsichtsrat*) of a public limited company (*Aktiengesellschaft*) that consisted of only two board members. The Court held that such a board could not validly act on behalf of the company to conclude contracts of service with the members of the board of directors (*Vorstandsmitglied*). However, it acknowledged that this issue had been contested in legal literature over a long period of time and had not been previously decided by the Federal Court. Therefore, it would run counter to the principle of good faith and not strike a fair balance between the competing interests if previously concluded contracts were annulled retrospectively after the parties had acted in accordance with these contracts over many years. The Court compared the conflicting interests of the company and the member of the board of directors and argued that the retrospective application of its new case law would have a disparate impact on the board member because his entire economic existence was based on the assumption of the validity of his contract with the company. The Court came to the conclusion that its new case law should not be applied retrospectively to existing contracts. Instead, contracts already concluded were to be regarded as legally valid, both in the past and in the future.[65]

In a similar vein, in 1991 the Federal Court of Justice interpreted paragraphs 113 and 114 of the Public Limited Companies Act (*Aktiengesetz*). According to this judgment, certain consultancy agreements between a company and a consultant would automatically become invalid upon the appointment of the consultant to the supervisory board of the company. The Court emphasized that prior to its decision this legal consequence could not be derived from statutory law, case law, or legal

[63]Federal Court of Justice 18.03.1974 – II ZR 167/72 – BGHZ 62, 216, 228.

[64]Federal Court of Justice 08.05.1978 – II ZR 97/77 – BGHZ 71, 354, 356–7.

[65]Federal Court of Justice 23.10.1975 – II ZR 90/73 – BGHZ 65, 190, 194–5.

literature. This would, in principle, suffice to maintain the validity of the contract in question. However, the Court went on to ascertain whether the annulment of the contract in that particular case would have a disparate negative effect on the consultant.[66] In a subsequent case, in 1994, the Federal Court of Justice applied its new interpretation of paragraphs 113 and 114 of the Public Limited Companies Act to a consultant who had been appointed to the supervisory board of a company. In this case the Court acknowledged that the consultant could not have foreseen its new case law and therefore could have legitimately expected his contract with the company to be valid. However, the Court held that the consultant would not carry a heavier burden than the company if the contract were annulled retrospectively.[67]

The first sentence of paragraph 766 of the Civil Code (*Bürgerliches Gesetzbuch*) reads as follows: 'For the contract of suretyship [*Bürgschaft*] to be valid, the declaration of suretyship must be issued in writing.' According to longstanding and settled case law of the Federal Court of Justice, this requirement could be satisfied by a blank signature. However, in 1996 the Federal Court of Justice changed its case law and held contracts of suretyship that were concluded by a blank signature to be null and void and extended its new case law to contracts already concluded. The Federal Court of Justice referred to the case law of the Federal Constitutional Court and pointed out that its judgment did not have a legal quality similar to statutory law and could not be viewed as on an equal footing with statutory law. Hence, departing from previous case law would in general not violate the rule of law according to article 20(3) of the Basic Law. In addition, court decisions would, by their very nature, be applicable to cases not yet fully completed. The application of judicial decisions to past events would therefore be a case of pseudo-retrospective effect (*unechte Rückwirkung*) that, according to the Federal Constitutional Court's case law on the retrospective effect of statutory laws, is generally in line with constitutional law. However, the Federal Court of Justice went on to explain that this line of the Federal Constitutional Court's case law could not be transferred to changes in the case law. Nonetheless, in the domain of private law the principles of legal certainty and material justice could be upheld by applying the principle of good faith according to paragraph 242 of the Civil Code. This provision requires striking a balance between the protection of legitimate expectations and the continuity of the law, on the one hand, and the constitutional right to a judgment that is materially in line with statutory law, on the other hand. The Federal Court of Justice held that a restriction of the temporal effects of its judgments *pro futuro* should be reserved to cases that concern the legal existence of a contract for the performance of a continuing obligation (*Dauerschuldverhältnis*) and in which the retrospective annulment of such a contract would endanger the economic existence of one of the affected persons.[68]

[66]Federal Court of Justice 25.03.1991 – II ZR 188/89 – BGHZ 114, 127, 136–7.

[67]Federal Court of Justice 04.07.1994 – II ZR 197/93 – BGHZ 126, 340, 349.

[68]Federal Court of Justice 29.02.1996 – IX ZR 153/95 – BGHZ 132, 120, 128–32.

This restrictive approach of the Federal Court of Justice paved the way for future cases on different issues of civil law in which it departed from previous case law. The main argument in subsequent decisions was that a change in the case law merely had pseudo-retrospective effect and therefore was generally acceptable.[69] Any decision as to whether or not to restrict the temporal effect of a decision *pro futuro* should be made on a case-by-case basis by striking a balance between the conflicting interests. In some judgments the Court maintained that past events could only be exempted from the application of new case law if a contract for the performance of a continuing obligation was annulled or where the annulment of a contract would endanger the economic existence of one the parties.[70] Furthermore, the Court rejected the restriction of the temporal effect *pro futuro* of a decision that annulled a particular clause in the standard business terms (*Allgemeine Geschäftsbedingungen*) of a lease agreement. According to the Court, the user of such terms would bear the risk if the terms were annulled by the judiciary, even if the terms had previously been treated by the parties as valid over a long period of time.[71] In contrast, the Federal Court of Justice restricted the temporal effect of a decision that enabled shareholders of a real estate investment trust (*Immobilienfonds*) to restrict or exclude their personal liability to investors. Without further reasoning and without reference to the facts of the case at hand, the Court decided that investors in existing investment trusts could rely on its previous, more restrictive case law.[72] In a similar vein, and contrary to its previous longstanding case law, in 2003 the Federal Court of Justice decided that shareholders joining an existing partnership under the Civil Code (*Gesellschaft bürgerlichen Rechts*) were liable in person for the obligations of the company that accrued prior to their taking shares. Again, the Court generally restricted the temporal effect of its new case law without paying attention to the facts of the individual case; it held it to be disproportionate that the personal liability of the shareholders was established retrospectively because this liability could not have been foreseen at the relevant point in time.[73] The decisions in two cases about the personal liability of shareholders appear to be underpinned by the idea of generally preventing a disparate negative effect rather than balancing conflicting interests of individual persons. In both cases, however, the time when the new case law was applicable was at the publication of the Federal Court of Justice's judgment that announced the change in the case law.

[69] See eg Federal Court of Justice 07.03.2007 – VIII ZR 125/06 – (2007) Neue Zeitschrift für Miet- und Wohnungsrecht 363 [28].

[70] Federal Court of Justice 12.03.2001 – II ZB 15/00 – BGHZ 147, 108, 124.

[71] Federal Court of Justice 05.03.2008 – VIII ZR 95/07 – [2008] Neue Zeitschrift für Miet- und Wohnungsrecht 363 [20]; see further Federal Court of Justice 18.01.1996 – IX ZR 69/95 – [1996] Neue Juristische Wochenschrift 924, 925.

[72] Federal Court of Justice 21.01.2002 – II ZR 2/00 – BGHZ 150, 1, 5.

[73] Federal Court of Justice 07.04.2003 – II ZR 56/02 – BGHZ 154, 370, 377–78.

In 2011 the Federal Court of Justice summarized its case law as follows:

> Generally, the so-called pseudo-retrospective effect of case law of Federal Courts is legally unproblematic. The courts are not legally bound by settled case law, which in the light of better knowledge is no longer convincing. However, the rule of law and the principle of legitimate expectations, which follows therefrom, require that it is established in each and every single case of a retrospective change of the case law whether the interest in the continuity of the previous legal situation should prevail over material justice according to the principles of proportionality and reasonability.[74]

Unlike in its civil law decisions, in its criminal law decisions the Federal Court of Justice virtually ignores the temporal effect of its judgments. The most prominent example is a 1966 decision in which the Court – without any prior announcement – lowered the relevant threshold of blood-alcohol concentration applicable to the statutory offence of driving while under the influence of alcohol according to paragraph 316 of the Criminal Code (*Strafgesetzbuch*).[75] This ruling raised serious concern with regard to constitutional law because, according to article 103(2) of the Basic Law, the principle of *nulla poena sine lege* prescribes that an act may only be punished if it was defined by law as a criminal offence before the act was committed. However, again in 1990 the Regional Court of Dortmund diverged from former case law and applied an even lower threshold of blood-alcohol concentration under paragraph 316 of the Criminal Code. On a constitutional complaint (*Verfassungsbeschwerde*), the Federal Constitutional Court upheld the judgment of the Regional Court on the basis that the new case law was based on new empirical and scientific data and did not create a new criminal offence.[76]

Federal Labour Court

In the domain of employment law, the Federal Labour Court has a longstanding tradition of restricting the temporal effect of its judgments. On 5 December 1969 it quashed a provision of pre-constitutional statutory law on the remuneration of an employee during the time of a post-contractual non-compete obligation (*nachvertragliches Wettbewerbsverbot*).[77] In principle, the ruling would have had the effect of annulling contractual non-competition clauses that had their legal basis in the quashed provision. However, with reference to the principle of legitimate expectation, the Court decided, in a subsequent decision of 20 April 1972, that employers and employees should enjoy a transitional period within which they could

[74]Federal Court of Justice 19.07.2011 – II ZR 300/08 – [2011] Neue Zeitschrift für Gesellschaftsrecht, 1023 [40] (translation by the author).

[75]Federal Court of Justice 09.12.1966 – 4 StR 119/66 – BGHSt 21, 157.

[76]Federal Constitutional Court 23.06.1990 – 2 BvR 752/90 – [1990] Neue Juristische Wochenschrift 3140.

[77]Federal Labour Court 05.12.1969 – 3 AZR 514/68 – BAGE 22, 215.

amend their contracts in accordance with the new decision of the Court. Thus, the new case law would be applicable as of 1 January 1971.[78] However, the claimant of the case at hand could immediately rely on the new case law because he had sought the change in the case law and therefore should enjoy its benefits.[79]

In 1974 the Federal Labour Court declared, rather generally, that the protection of legitimate expectations would weigh so heavily that it had to be taken into account even when a change in the case law was imperative. No person should suffer a disadvantage if he or she had acted in accordance with the case law applicable at the relevant time. However, this should not prevent the Court from changing its case law. According to the Federal Labour Court, the conflicting aims of changing the case law and protecting legitimate expectations could be reconciled if the Court announced its new case law and only applied it in subsequent cases.[80] In a further judgment the Federal Labour Court explicitly stated that a change in the case law would significantly alter the legal situation and employers and employees should be given an opportunity to adapt to the new legal situation. In this particular case the Federal Labour Court refrained from applying more stringent requirements for the termination (*ordentliche Kündigung*) of an employment contract. The new case law would have limited the employer to the use of a mere conditional dismissal combined with the option of altered conditions of employment (*Änderungskündigung*) and would have invalidated the termination of the contract in the case at hand. However, the employer could not have foreseen the respective restriction at the time the termination was declared.[81] In this case, the new case law was not applied to the individual employee who had initiated legal proceedings and sought the change in the Federal Labour Court's case law.

A 1975 ruling of the Federal Labour Court quite drastically altered certain requirements for the election of employees to the supervisory board of incorporated companies (*Kapitalgesellschaften*). This change in the case law would have invalidated previous elections, with the consequence that the supervisory boards of numerous companies were wrongfully established, and some of the resolutions of such boards would be null and void. However, the Court did not find it necessary to restrict the temporal effect of its judgment because the time limit for challenging the validity of elections of employees to a supervisory board was only 2 weeks according to statutory procedural rules.[82] For this reason previous elections could not be challenged on the basis of the Court's new case law.

[78]Federal Labour Court 20.04.1972 – 3 AZR 337/71 – BAGE 24, 235, 241–43.

[79]Federal Labour Court 20.04.1972 – 3 AZR 337/71 – BAGE 24, 235, 241–43; see further Federal Labour Court (Grand Panel) 21.04.1971 – GS 1/68 – BAGE 23, 292, 319–20.

[80]Federal Labour Court 29.03.1984 – 2 AZR 429/83A) and others – [1984] Neue Zeitschrift für Arbeitsrecht 169, 171; see further Federal Labour Court 27.09.1984 – 2 AZR 62/83 – [1985] Neue Zeitschrift für Arbeitsrecht 455, 456.

[81]Federal Labour Court 20.06.1985 – 2 AZR 418/84 – juris.

[82]Federal Labour Court 02.09.1975 – 1 ABR 50/74 – BAGE 27, 246.

One of the most contested issues of employment law in the 1980s was the question of whether, and under what circumstances, conditions of employment in an individual employment contract could be validly replaced by a works council agreement (*Betriebsvereinbarung*). The Federal Labour Court had not established any specific or burdensome requirements for such a replacement for more than 25 years. However, in 1986 the Grand Panel of the Federal Labour Court decided that a works council agreement, which was intended to replace an individual employment contract, taken as a whole must not be less favourable to the affected employees than their previous individual contracts.[83] In a subsequent decision in 1990 a Senate of the Federal Labour Court held that the ruling of the Grand Panel could not be applied to past events despite the fact that it would have merely pseudo-retrospective effect from the constitutional law perspective. The Senate argued that the employers had acted in line with the former case law when they had concluded the respective works council agreements. The legal relationship between these two kinds of agreements was not regulated by statutory law, and the change in the case law had an effect similar to the amendment of statutory law. In addition, the retrospective application of the decision of the Grand Panel would result in the insolvency of the individual employer who was the respondent in the case at hand. In order to protect the jobs in question, the previous case law was held to be applicable until the decision of the Grand Panel was published[84] in one of the standard legal journals.[85]

Several cases[86] in which the Federal Labour Court restricted the temporal effect of its judgments concern occupational pension schemes (*betriebliche Altersversorgung*) where changes in the case law affect long-term contracts, which are of crucial economic importance for employees and pensioners. For example, in 1995 the Federal Labour Court decided that certain part-time employees who worked less than half of the average weekly working time could not be excluded from an occupational pension scheme.[87] As a result of this new case law, employers had to extend their pension schemes to many employees who had previously not been included, and to directly pay a pension to former employees. The Federal Labour Court considered the temporal effect of its decision and came to the conclusion that – despite the financial burden for employers – its judgment should have retrospective effect. The Court noted that there are differences between enacting new statutory law and a new interpretation of statutory law by a Federal Court. It stated that the constitutional principle of protection of legitimate expectations was

[83]Federal Labour Court (Grand Panel) 16.09.1986 – GS 1/82 – BAGE 53, 42.

[84]German law does not require the specialized courts to release their decisions to the public.

[85]Federal Labour Court 20.11.1990 – 3 AZR 573/89 – [1991] Neue Zeitschrift für Arbeitsrecht 477, 479–81; see further Federal Labour Court 18.9.2001 – 3 AZR 679/00 – [2002] Neue Juristische Online Zeitschrift 1636, 1639.

[86]See eg Federal Labour Court 10.3.1972 – 3 AZR 278/71 – BAGE 24, 177; 24.10.1974 – 3 AZR 590/73, BAGE 26, 333.

[87]Federal Labour Court 07.03.1995 – 3 AZR 282/94 – [1996] Neue Zeitschrift für Arbeitsrecht 48, 52–55.

the more important the closer the function of the case law under review comes to enacting statutory law. In order to fully understand this argument, one has to bear in mind that whole branches of German labour law (for example, the right to collective action) are not regulated by the legislature. Hence, in these areas of labour law the function of the Federal Labour Court is often described as a substitute legislature (*Ersatzgesetzgeber*).[88] In these areas, the Court implicitly argues, the protection of legitimate expectations is of more importance, and only less so in areas regulated by the legislature, in which the function of the Federal Labour Court is limited to the more conventional interpretation of statutory law. The Court concluded that, first, no employer could have expected the discrimination of certain part-time employees to be justified; second, the development of its case law was foreseeable and; third, the employees had an overwhelming economic interest in obtaining an occupational pension. Similarly, the Court held in 2002 that no employer, when setting up an occupational pension scheme, could have expected that a general foreman could be treated less favourably than technical and commercial clerks.[89]

An important 2001 decision of the Federal Labour Court stated that a change in the case law must not establish new and retrospectively applicable requirements for past terminations of an employment contract that could not be subsequently satisfied by the employer.[90] This decision concerned the legal obligation of an employer to inform the staff council (*Personalrat*) prior to the termination of an employment contract, which is a legal prerequisite for the validity of the termination. The decision of the Federal Labour Court became an important precedent after the 2005 judgment of the European Court of Justice in *Junk*, according to which the European Directive 98/59/EC prescribed that an employer had to notify an intended collective redundancy to the competent public authorities prior to the termination of the employment contracts.[91] The decision of the European Court of Justice ran counter to the settled case law of the Federal Labour Court, according to which a notification prior to the end of the notice period (*Kündigungsfrist*) was sufficient.[92] Under the impression of the decision of the European Court of Justice in the *Junk* case and the obligation to harmonious interpretation of national law according to article 288(3) of the Treaty on the Functioning of the European Union (TFEU), the Federal Labour Court changed its case law and decided that employers had to inform the authorities prior to the termination of employment contracts. However, with a view to the constitutional principle of legitimate expectation, this new case law should not come into effect until the competent authority, the Federal Labour

[88]B Rüthers, 'Arbeitskampf in einer veränderten Wirtschafts- und Arbeitswelt' [2010] Neue Zeitschrift für Arbeitsrecht 6, 13.

[89]Federal Labour Court 19.03.2002 – 3 AZR 229/01 – juris.

[90]Federal Labour Court 18.01.2001 – 2 AZR 616/99 – [2002] Neue Zeitschrift für Arbeitsrecht 455.

[91]European Court of Justice 27.01.2005 – C-188/03 – [2005] ECR I-885.

[92]Federal Labour Court 13.04.2000 – 2 AZR 215/99 – [2001] Neue Zeitschrift für Arbeitsrecht 144, 145.

Market Authority (*Bundesagentur für Arbeit*), changed its administrative practice by issuing a press release and amending its official forms.[93] This decision can be contrasted with the decision of the Federal Labour Court on paid annual leave in the aftermath of the European Court of Justice judgment in *Schultz-Hoff* in 2009.[94] Again, the Federal Labour Court had to change its case law. However, in this context it held that the mere existence of the European Directive on Working Time 93/104/EC had the effect that no employer could rely on the Federal Labour Court's case law after the Directive came into effect.[95] This decision received much criticism in legal literature because the Federal Labour Court implicitly acknowledged that it had violated its obligation to refer the relevant matter to the European Court of Justice in accordance with what is now article 267(3) of the TFEU and, what is worse, because the Court expected employers to foresee that its previous case law was not in line with European law.[96]

Employment contracts often refer to conditions of employment set out in a collective bargaining agreement (*Tarifvertrag*). Over several decades the Federal Labour Court rejected a literal interpretation of such clauses. It held that they should merely have the effect of treating employees who are members of the trade union and those who are not alike. According to German law, the collective agreement confers directly applicable rights only on the former, but not the latter. A reference clause (*Bezugnahmeklausel*) in individual employment contracts counterbalances this difference and entitles all employees to the collective agreement's conditions of employment. With its decision of 14 December 2005 the Federal Court changed its opinion with the effect that, contrary to its former case law, employers would be bound to collective agreements that were concluded even after they had resigned from the membership in the respective employers' organization. In such circumstances, the application of the collective agreement would be based solely on the (new interpretation of the) reference clauses in the individual employment contracts. With regard to its longstanding former case law, the Federal Labour Court restricted the retrospective effect of its new case law. However, the new case law would not apply as of the publication of the judgment announcing the change in the case law, but to all employment contracts concluded before 1 January 2002.[97] This was the date upon which new statutory provisions on standard employment terms

[93]Federal Labour Court 13.07.2006 – 6 AZR 198/06 – [2007] Neue Zeitschrift für Arbeitsrecht 25 [42].

[94]European Court of Justice 20.01.2009 – C-350/06 and C-520/06 – [2009] ECR I-179.

[95]Federal Labour Court 23.03.2010 – 9 AZR 128/09 – [2010] Neue Zeitschrift für Arbeitsrecht 810 [111].

[96]A Sagan, 'Europäischer und nationaler Vertrauensschutz bei Rechtsprechungsänderungen im Arbeits- und allgemeinen Privatrecht' [2010] Jahrbuch Junger Zivilrechtswissenschaftler 67, 89–90.

[97]Federal Labour Court 14.12.2005 – 4 AZR 536/04 – [2006] Neue Zeitschrift für Arbeitsrecht 607 [25–27].

came into effect. This part of the decision was heavily criticized in legal literature because the Court itself had applied its old case law after 1 January 2002.[98]

Public Law

Restrictions on the retrospective effect of judgments have also been used by the Federal Courts in the area of public law, albeit to a lesser extent than by the Federal Court of Justice and the Federal Labour Court. It appears that the Federal Administrative Court has not restricted the temporal effect of any of its judgments *pro futuro*. With a single sentence in a 1967 judgment the Court declared with apodictic certainty that 'a change in the case law is not a change in the legal situation'.[99] In 1996 the Court was explicitly asked whether a court had to make a prior announcement before changing its case law. The Court, again very briefly, replied in the negative.[100] According to the Court, it would be reasonable from the perspective of practical policy (*Rechtspolitik*) to announce intended changes in the case law. However, where the particular question was decisive in a specific case, the absence of such announcement would not hinder the court in changing the case law. The Court did not consider any restriction of this rather uncompromising view with regard to the function of the case law of the Federal Courts in the legal system or the constitutional principle of legitimate expectation.

In addition, in 2009 when the Federal Administrative Court changed its case law on the issue of competitor complaints (*Konkurrentenklagen*) in the civil service sector, it held that the constitutional principle of legitimate expectation would not require the Court to apply its previous case law to the case at hand. It argued that, according to the case law of the Federal Constitutional Court, a change in the case law would be unproblematic with regard to the principle of legitimate expectation provided the court gives adequate reasons and does not exceed the confines of a foreseeable development of the case law. Against this background, the Federal Administrative Court referred to previous rulings in which it already had overturned some aspects of its older case law. Therefore, according to the Court, the final change in its case law was sufficiently predictable.[101]

In contrast to the restrictive practice of the Federal Administrative Court, the Grand Panel of the Federal Fiscal Court in 2007 restricted the retrospective effect of a ruling in which it departed from its previous case law on the question of the heritability of loss deductions according to paragraph 10d of the Income Tax Act

[98] R Giesen, 'Bezugnahmeklauseln – Auslegung, Formulierung und Änderung' [2006] Neue Zeitschrift für Arbeitsrecht 625, 628–9.

[99] Federal Administrative Court 19.10.1967 – III C 123.66 – BVerwGE 28, 122.

[100] Federal Administrative Court 28.02.1995 – 4 B 214/94 – [1995] Neue Juristische Wochenzeitschrift 867.

[101] Federal Administrative Court 04.11.2010 – 2 C 16.09 – BVerwGE 138, 102 [59].

(*Einkommensteuergesetz*).[102] Its new case law was less favourable to taxpayers as certain tax deductible losses were no longer heritable. In its lengthy and principled judgment the Court held, first, that its previous case law, which it had upheld for more than 45 years, had not become customary law because it had been subject to constant criticism in legal literature. Second, it found that the continuity of the case law of the Federal Courts was of essential importance to legal certainty in order to ensure that taxpayers could foresee the criteria applied by the tax authorities and the Financial Courts and act accordingly. However, this would not preclude a change in the case law even if the respective case law had been established over a long period of time. Substantial reasons could necessitate the departure from such case law in order to prevent a 'petrification' (*Versteinerung*) of the case law. Third, the Court noted that the principle of legal certainty and the protection of legitimate expectation, on the one hand, and the idea of material justice and the fact that the courts were legally bound to statutory law, on the other hand, were on an equal footing as they followed from the fundamental constitutional principle of the rule of law. Therefore, these conflicting principles had to be balanced in accordance with the principle of practical concordance (*praktische Konkordanz*). After a reference to the case law of the Federal Court of Justice and the Federal Labour Court on the restriction of the temporal effects of their rulings, the Federal Fiscal Court stated that case law is not comparable to statutory law. Nonetheless, the Federal Constitutional Court's case law on the restriction of the retrospective effect of statutory law could be adopted by way of analogy if applicable. Fourth, the Federal Fiscal Court decided that its new case law should be applicable as of the publication of its ruling. This restriction should apply in general and without regard to the facts of the individual case because all taxpayers could rely on the former case law, and the new case law was not merely the result of a simple interpretation of statutory law but rather required taking into account abstract principles of law, complex assessments, and the balancing of competing interests. The Federal Fiscal Court explicitly accepted the argument of the Federal Labour Court that the constitutional principle of legitimate expectation should have more importance the closer the function of the case law in question comes to statutory law. The more the legislature refrained from regulating a particular area of law, the more pressing was the constitutional obligation of the courts to protect confidence in their case law in its function as guidance for individual behaviour.[103] In this context, the Court pointed out that due to the procedural rules of the Fiscal Court Act its decision would not only affect the individual case at hand but de facto had an impact on the general public. The ruling would not only substantiate but also constitute the legal situation (*Rechtslage*). In effect, a change of the case law would also change the legal situation.

[102]Federal Fiscal Court (Grand Panel) 17.12.2007 – GrS 2/04 – BFHE 220, 129 [90–112].

[103]Federal Fiscal Court 17.12.2007 – GrS 2/04 – BFHE 220, 129 [104] with reference to H Buchner, 'Vertrauensschutz bei Änderung der Rechtsprechung' in G Hueck and R Richardi (eds) *Gedächtnisschrift für Rolf Dietz* (C.H. Beck, Munich, 1973) 175, 192.

Some of the early decisions of the Federal Social Court, which were not applied to past events, concern the introduction of more stringent procedural rules for the submission of an appeal.[104] In a 2005 case, the Court changed its case law on the rate of interest payable from the commencement of legal proceedings (*Prozesszinsen*) but refrained from applying its new case law retrospectively because the affected public health insurance funds could not have foreseen this change and therefore could not have provided precautionary financial measures in their budgets.[105]

Finally, a 2006 ruling of the Federal Social Court on the issue of unemployment benefits sparked some controversy in legal literature. In an *obiter dictum* the Court 'considered' changing its case law on the eligibility of (former) employees for the said benefits, where those employees had terminated their contract of employment. According to the new case law, such termination should not impair the entitlement to unemployment benefits provided the former employees had reached an agreement with the employer for a severance payment that was less than half a month's salary per year of service. This threshold was introduced by a new statutory provision in the Dismissal Protection Act (*Kündigungsschutzgesetz*) and although it had no direct legal connection to the statutory unemployment insurance, the Federal Social Court used the occasion to revise its case law.[106] In reaction to the decision of the Court, which it affirmed in later judgments,[107] the Federal Labour Market Authority (which disburses unemployment benefits) adapted its administrative practice accordingly. Because the new case law and the new administrative practice of the Federal Labour Market Authority were more generous to the beneficiaries of unemployment payments, no cases on this particular issue were brought before the courts anymore. It was not until a rather atypical case reached the Federal Social Court in 2012 that the new case law could finally be introduced.[108] Against this background, the 2006 decision of the Federal Social Court was criticized on the ground that it was not the proper function of the judiciary to regulate administrative practice by *obiter dicta*.[109]

Conclusion

The German legal system has an ambivalent approach to the concept of precedent and judge-made law. *De jure*, the specialized courts are not obliged to follow the case law of another court, with the exception of judgments of the Federal

[104]Federal Social Court 18.03.1987 – 9b RU 8/86 – BSGE 61, 213; 02.12.1992 – 6 RKa 5/91 – [1993] Neue Zeitschrift für Sozialrecht 471; 10.11.1998 – B 4 RA 30/98 R – [1999] Die Sozialgerichtsbarkeit 78.

[105]Federal Social Court 28.09.2005 – B 6 KA 71/04 R – BSGE 95, 141 [40].

[106]Federal Social Court 12.07.2006 – B 11a AL 47/05 R – BSGE 97, 1 [19–20].

[107]Federal Social Court 08.07.2009 – B 11 AL 17/08 R – BSGE 104, 57 [19].

[108]Federal Social Court 02.05.2012 – B 11 AL 6/11 R – BSGE 111, 1 [19–25].

[109]Bittner (n 59) 652.

Constitutional Court and the individual cases in which a higher court has passed judgment. *De facto*, however, the case law of the Federal Courts is not only relevant to the cases they have decided, but is of general importance as the Federal Courts are the highest authority on the interpretation and the further development of statutory law.[110] This general importance is underpinned by the procedural rules establishing a system of Grand Panels supported by specific obligations to refer to these Panels in the event of differences of opinion or the possibility of divergent judgments. The respective set of procedural rules ensures the unity of the case law within and as well as among each of the Federal Courts.[111] In addition, the procedural rules commit the courts of first and second instance to grant leave to an appeal (on a point of law) if such courts diverge from the case law of the Federal Courts. Thus, in theory, a first or second instance court's decision that is contrary to the case law of a Federal Court can always be overturned.

The method of restricting the temporal effect of judgments to future cases has a longstanding tradition in German legal practice. However, the topical case law does not offer a coherent solution to this complex issue. From the perspective of constitutional law, the question of whether the courts are permitted to restrict the temporal effect of their judgments *pro futuro* has not been explicitly addressed by the Federal Constitutional Court. However, the Constitutional Court has not called into question the respective practice of the Federal Courts, and a majority of legal scholars accepts the power of the Federal Courts to restrict the temporal effect of their rulings.[112] Nonetheless, it is unclear under what circumstances constitutional law prevents the specialized courts from applying new case law retrospectively. In this regard, the main constitutional parameter is the constitutional principle of legitimate expectation. However, its operation in the area of temporal effects of judicial decisions is, as yet, unsettled. Generally, the Federal Constitutional Court takes a generous approach based on a categorical and rather formalistic distinction between statutory laws and case law, arguing that only the former are of universally binding force and that the courts are not legally bound by the latter. Therefore, no litigant could expect the courts to adhere to previous case law.[113] Of course, this approach of the Constitutional Court is intended to retain the judiciary's flexibility and to allow the courts to amend their case law from time to time as they see fit. Clearly, the Constitutional Court is determined to prevent a petrification of the case law that would deter litigants from challenging standing case law of a Federal Court. However, the Constitutional Court did accept that longstanding and settled case law could result in legitimate expectations that are protected under constitutional law.[114] The circumstances of this exception to the general rule, however, remain unclear. It

[110] See Krebs (n 3).

[111] See (n 9).

[112] See Klappstein (n 57).

[113] See Federal Constitutional Court (n 36).

[114] See ibid.

does, therefore, not come as a surprise that some authors have taken a firmer stance on this issue, emphasizing the importance of case law in legal practice and possible similarities to statutory law.[115] Certainly, it would be helpful if the Constitutional Court gave more detailed and practical guidance to the Federal Courts with regard to the constitutional limits of overturning case law and applying new case law to past events.

Regarding the practice of the Federal Courts, the method of *pro futuro* restriction is widely used, with the sole exceptions being the Federal Administrative Court[116] and the Federal Court of Justice in the domain of criminal law.[117] The said restriction has a longstanding tradition in the field of civil law, in particular in company law and employment law. This can be explained by the fact that the topical case law of the Federal Court of Justice[118] and the Federal Labour Court[119] focuses on decisions that concern the validity of long-term contracts.[120] The effect of a *pro futuro* restriction, however, vary from case to case. Typically the new case law is applied as of the publication and dissemination of the judgment in which it is announced.[121] It appears that in a majority of the cases no exception is made for the litigant who has strived for the change in the case law.[122] In addition, the scope of the restriction varies. In some cases it was held to be generally applicable,[123] whereas in other cases it was applied on a case-by-case basis.[124]

Generally speaking, there are two main rationales that are used in the field of civil law as a basis for changing the case law with retrospective effect and rejecting a *pro futuro* restriction. First, the Federal Courts at times argue that a change in the case law is to be expected because of criticism of their past case law in the legal literature. Second, the courts refer to the case law of the Federal Constitutional Court on statutory laws with retrospective effect. In general, the Constitutional Court holds such laws to be constitutional if the affected matters have not been fully concluded in the past but are ongoing at the time the respective Act comes into force. Drawing on this line of the Constitutional Court's case law, the Federal Court of Justice[125] and

[115] See (n 51).

[116] See Federal Administrative Court (n 99); Federal Administrative Court (n 100).

[117] See Federal Court of Justice (n 75).

[118] See Federal Court of Justice (n 62) to Federal Court of Justice (n 74).

[119] See Federal Labour Court (n 77) to Federal Labour Court (n 97).

[120] See Federal Court of Justice (n 68) and Federal Court of Justice (n 70)36.

[121] See Federal Court of Justice (n 64), Federal Court of Justice (n 73) and Federal Fiscal Court (Grand Panel) (n 102).

[122] See Federal Court of Justice (n 73), Federal Labour Court (n 81), Federal Fiscal Court (Grand Panel) (n 102); to the contrary (n 79).

[123] See Federal Court of Justice (n 73).

[124] See Federal Court of Justice (n 70).

[125] See Federal Court of Justice (n 68).

the Federal Labour Court[126] argued that their rulings would only affect matters that were still under legal review and thus not fully concluded. However, this argument ignores the functional and temporal differences between acts of the legislature and acts of the judiciary and is prone to justify any application of new case law to past events.

A rather new phenomenon is the obligation to change the case law retrospectively after a ruling of the European Court of Justice. This stems from the obligation of the national courts to interpret national law in accordance with European Directives. In the field of employment law the Federal Labour Court has not found a consistent answer to this particular issue. With regard to collective dismissals it continued its former case law, which was contrary to European law, until the relevant administrative bodies had adapted to the ruling of the European Court of Justice in the *Junk* case.[127] On the other hand, in the domain of paid annual leave it changed its case law retrospectively arguing in essence that employers could have foreseen that its former case law was not in line with European law.[128]

In the area of tax law the Grand Panel of the Federal Fiscal Court in a principled judgment explained that the issue of retrospective effect of judicial decisions is fundamentally intertwined with the function of the Federal Courts and the legal status of their case law.[129] This reflects the general discussion in legal theory that concerns the legal quality of judicial decisions and the possibility of judge-made law. In the end, the issue of temporal effect of judgments correlates with the broader question of whether judges are restricted to applying directives of the legislature to an individual case by a purely cognitive process[130] or are generating legal rules in a decisionistic process which they afterwards apply to the case at hand.[131] Following the former argument, judges will in general be bound by the decision of the legislature on the temporal effect of statutory law applicable to the case in question. From the latter point of view, it is, however, for the judge to decide on the point in time when a new line of case law will come into effect. Arguably, the root of the issue lies in the rather blurred line demarking the different functions of the legislature and the judiciary. Against this background, the Federal Fiscal Court[132] convincingly argued that the courts have all the more reason to restrict the temporal effect of their decisions *pro futuro* the more they act in lieu of a dormant legislature.

[126] See Federal Labour Court (n 85).

[127] See Federal Labour Court (n 93).

[128] See Federal Labour Court (n 95).

[129] See Federal Fiscal Court (Grand Panel) (n 102).

[130] See Heck (n 30) and Larenz (n 31).

[131] See Esser (n 34) and (n 35).

[132] See Federal Fiscal Court (n 103).

Chapter 6
Towards a Sophisticated Theory of Precedent? Prospective and Retrospective Overruling in the Czech Legal System

Zdeněk Kühn

Abstract The Czech legal system is the example of the country in transition from the communist authoritarian system of the 1980s into a new democracy. The issue of precedent (or case law) is a good example of this. In discussing the role of case law, the era of the 1990s was full of debates about the actual importance of judge-made law in a newly emerging legal system. Many lawyers in the 1990s or early 2000s rejected any value which precedents might have in a civil law system. In contrast, the second decade of the twenty-first century is facing a completely different scenario. Now one can hardly find a Czech scholar who would continue to claim that case law has no law making function and no force. Instead, new problems emerged, including temporal application of new precedents. With the beginning of the second decade of the twenty-first century the issue of prospective effects of precedents started to be analyzed. First, this debate took place in judicial decisions, then legal doctrine followed. The case law and legal scholarship try to outline several basic models of temporal effects of case law. The actual model depends on the area of law and parties involved.

Introduction

The problem of prospective overruling has become an issue at the end of the first decade of this century. The contrast between the situation of the 1990s and early 2000s is nicely visible if we compare two editions of the only Czech book dealing in detail with the problem of precedent and case law. Its first edition published in 2006 has not discussed the issue of prospective overruling, just briefly mentioned it. Instead, the most important idea of the book was to persuade its readers that case law matters, precedents shall be published, they shall be taken seriously and should be used before courts. Likewise, judges shall not ignore it (see Kühn et al. 2006).

Z. Kühn (✉)
Charles University Law School, Namesti Curieovych 7, CZ 116 40 Prague, Czech Republic
e-mail: kuhnz@prf.cuni.cz; zdenku@seznam.cz

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Within mere 7 years, the situation has changed dramatically. In the second decade of this century, you can hardly find a Czech scholar who would continue to claim that case law has no law making function and no force whatsoever. Instead, new problems emerged, including temporal application of new precedents. That is why the second edition of the book published in 2013 includes the entire chapter on prospective overruling (Kühn 2013). As nicely put by Michal Bobek, this issue belongs to the "second generation" of the problems relating to precedent in the Czech Republic:

> Within [those seven years between publication of the first and second editions] the entire understanding of case law has undergone major transformation in the Czech legal system. Perhaps no major textbook on jurisprudence today continues to claim that case law has no lawmaking potential. However, while jurisprudence is slowly moving towards recognition of case law, legal practice has made a considerable move. Recently, legal practice has become to deal with the problems which we can call problems of the "second generation" relating to the rise of case law. The question today is not whether case law is binding and where we can find it. The questions of the second generation are more complex: when is it possible to overrule case law or deviate from it? By whom? What about temporal application of overruling? (Bobek and Kühn 2013, at 19)

In the subsequent text I will first explain how and why this fast transformation in the Czech legal system happened. Then I will discuss various options of temporal effects of the case law. I will outline the basic models through which the legal system can deal with this issue. In the third section I will analyze the practice of general courts and the Constitutional Court. Finally, I deal with the case law of the Supreme Administrative Court, which provides possibly the most complex mechanism to deal with temporal effects of overruling in the Czech legal system.

The Birth of the Czech Conception of Precedent

Until the end of the 1990s overruling in the Czech legal system was usually invisible. It happened sometimes through sudden action of the high court, often through gradual modification of previous case law. The key problem of the 1990s was the predictability of case law and the fact that legal scholarship and many judges maintained that case law was not binding and that is why it did not matter.

The lack of any debate about temporal effects of overruling can be explained by multiple reasons. First, the mainstream opinion of postcommunist legal scholarship rejected the very notion that case law is also part of the law in a broader sense. If it were non-law, no one would need to discuss its temporal effects (Kühn 2011, 207 ff.). In addition, what mattered was the absence of any institutionalized overruling of the high court precedents.

The situation in the Czech legal culture in the 1990s was a direct continuation of a formalist model of legal reasoning, typical of the late Communist era. Its specific judicial ideology can be well described – in the words of a prominent contemporary Hungarian legal philosopher – as "the degeneration of legal positivism" (Varga

1995, 83) or "a dull rule-positivism" (Varga 1995, 142). Under the common perception, the work of a judge was thought of as primarily mechanical. It might be said that the quality of judicial and legal reasoning was poor (in general see Kühn 2011).

The typical post-Communist conception of judicial independence in the 1990s included the proposition that judges must decide only according to 'the [statutory] law', which, however, effectively meant that in hard cases – and even in some easy cases – where a simple logical syllogism could not be applied, they might decide in the way they see fit.[1] Judges guided by the ideology of textualism were not obliged to give consideration to precedents, legal writings, the intention of the legislature, the rationally reconstructed purpose of the law, all of which constitute something which was not 'law' in the ideology of bound judicial decision-making and textual positivism. They had to adhere only to the letter of the law; where the letter of the law did not offer any easy solution, pure arbitrariness and unpredictability could enter the scene.

Even those judges who understood the value of persuasive sources of law did not usually acknowledge openly in their opinions that they make use of such sources. Yet, the problem relating to this reticence lied not only in the aesthetics of judicial opinions. The very fact that these persuasive authorities were not openly cited caused many other judges to think that persuasive authorities were without any merits. In a simplified intellectual world of post-Communist limited law, everything was either binding (therefore, legally relevant) or non-binding (and, therefore, legally irrelevant). Twenty or ten years ago it was not uncommon to find a judge who during trial rejected even any reference to precedent or legal science because she is not 'bound by them' and, therefore, they are without any importance for her reasoning, which remains independent of anything but the letter of the law.[2] Even though it was not admitted by those espousing the concept of limited law, this sort of judicial independence resulted in the antithesis of judges being 'bound' by law, as the law's inability to unequivocally determine for them a clearly obvious outcome results in them not being bound by anything at all.

Renewed discussion on the role of precedent appeared in Central Europe shortly after the fall of the Communist regimes. With the emergence of judicial review and the overall rise of the judiciary, the old clichés concerning the role of precedent in the legal system started to be questioned all over post-Communist Europe. Even today one might still plausibly claim that the issue of precedent is neglected in Central Europe. Law students for the most part do not study them; they are not used to working with them. Therefore, the existing education method is statutory rule-oriented, and many students have not encountered a single judicial decision throughout their entire program of university study. Though recently the emphasis on precedents in

[1] According to some authors, that is one the reason the independence of judges is "a concept often misunderstood" in the post-Communist region. Cf. Emmert 2002.

[2] In the course of the late 1990s and early 2000s, while being a practitioner before Czech law courts, I encountered such an attitude many times.

legal education is improving, they are approached in a peculiarly scholastic way – their headnotes are viewed as further material for students to memorize.

The most important reason for the fall of the old (post-Communist) conception of weightless precedent is, in my opinion, twofold. First, in the course of the first decade of this century all Czech high courts (Constitutional Court, Supreme Court, Supreme Administrative Court) launched on-line publication of their case law. Thus everyone has got the access to thousands of decisions.[3] Second, the law on courts and judges was amended in 2000[4] and grand chambers of the Supreme Court were created. Those grand chambers, one sitting for civil law issues, one for criminal law, are the only judicial body empowered to overrule previous precedents of the Supreme Court. It is prohibited for a small panel composed of three judges which decides cases routinely to deviate from its earlier legal opinion. Instead it is obliged to send the issue to its respective grand chamber. Grand chambers have been made part of the Supreme Administrative Court from its very beginning in 2003.[5] To put it simply, any overruling today can take place only through a special body within the high court – grand chambers at the Supreme Court and the Supreme Administrative Court, or decision made *en banc* at the Constitutional Court. This strengthened the force of precedent and its weight in legal reasoning.

Last but not least the duty of both high courts to send the issue to the grand chamber has been sanctioned by the Constitutional Court's case law. According to the Constitutional Court, if the high court deviates from its previous case law without the approval of its grand chamber the party's fundamental right to a lawful judge is violated. This violation provides the Constitutional Court a very convenient avenue to quash the decision of the high court without addressing the substance of the dispute at stake.[6] Not surprisingly, within the first decade of the existence of grand chambers the issue prospective overruling emerged.

Now the consensus in Czech legal scholarship seems to be that case law really means, at least to some extent, also law making. The legal rule is not the text of the law but its meaning as interpreted by courts. The text of the law is the carrier of the rule, whose meaning must be interpreted and often developed by courts. Viewed

[3]Supreme Court has published all its case law since 2000. All decisions of the Supreme Administrative Court (which started to operate in 2003) and the Constitutional Court (created in 1993) are now available on-line.

[4]The Law No. 335/1991 (all numbers of laws referred therein refer to the Official Gazette, in Czech *Sbírka zákonů*), on courts and judges, as amended by the law No. 30/2000. Today the same institution is in the Law No. 6/2002, on courts and judges (§ 20). The Czech law has been inspired by the German model (see Alexy and Dreier 1997, 17). Cf. the *en banc* practice of US Federal Courts of Appeals which usually decide in three-judge panels, but one reason to transfer such a case to a larger composition is the fact that it is desired to depart from case law established in that particular circuit. For a general overview of this practice, see, e.g., Ginsburg and Falk 1991.

[5]The Law No. 150/2002, procedural code on administrative judiciary (§ 17).

[6]Cf. the Constitutional Court's judgments of 20 September 2006 No. II. ÚS 566/05, of 11 September 2009 No. IV. ÚS 738/09 (both with respect to the Supreme Court) or the judgment of 18 April 2007 No. IV. ÚS 613/06 (with respect to the Supreme Administrative Court).

by those bound by the law the rule is what has been interpreted by law courts from the text of the law. However, judicial law making is not identical to legislative law-making. Judges still struggle to find law, not to make it,[7] even though law making from the objective point of view is unavoidable (see Kühn 2002). A good example is the new interpretation of statute of limitation of defamation claims, as I shall discuss below. While the previous rule, as interpreted by the Supreme Court case law, gave the right to sue defamation claims without any statutory limitation, the Supreme Court grand chamber provided a contrary reading that those claims are subject to strict limit of 3 years.[8]

The Constitutional Court repeatedly emphasized that "*judikatura*" (term comparable to French *jurisprudence*, case law) is law in its substantive meaning. That is why courts have the duty to alter case law in a principled way, without hindering legitimate expectation of those at stake.[9] In its discourse with the ordinary courts in the 1990s, the Czech Constitutional Court fashioned a new conception of precedent for the ordinary judiciary.[10]

On the one hand, the Constitutional Court emphasized that a judge is not bound by the case law of the Supreme Court and is entitled to deviate there from she finds good and legitimate reason to do so. Replying to the arguments of an ordinary judge that the decision is correct because the ordinary judge is bound by case law, the Czech Constitutional Court emphasized that the ordinary court must assess the validity of the established case law by taking into account societal and legal development.[11]

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[7]This seems to be the consensus of Czech legal scholarship, quite often influenced by German scholarship. Cf. Melzer 2010.

[8]Cf. the Constitutional Court's judgment of 5 August 2010 No. II. ÚS 3168/09 and the text relating to the footnote 52 below.

[9]A good example of the theoretical problems relating to case law in the 1990s was the case referring to the sudden change of case law by the Supreme Court – judgment of the Constitutional Court of 18 February 1999, No. I. ÚS 526/98 (as translated at http://www.usoud.cz/en/decisions/): "*Consideration of the predictability of the law (its consequences) cannot be restricted only to its grammatical text. It is judicial decision making which – although it does not have a classical precedential nature – interprets the law, or completes it, as the case may be, and its relative constancy guarantees legal certainty and also insures general confidence in the law. This applies particularly to the Supreme Court, which is the supreme judicial body in the field of the general judiciary (*cf. *Art. 92 of the Constitution). This, of course, does not deny that judicial case law can develop and change with regard to a number of aspects, in particular with regard to changes in social conditions.*"

[10]In fact what made the change of the Czech conception of precedent was not legal scholarship but the case law of the Czech Constitutional Court. It shall be noted that Constitutional Court in its first decade was composed of several legal philosophers who were trained in the West. One of the 'Founding Fathers' of the Czech Constitutional Court's jurisprudence was Pavel Holländer, a legal philosopher who served as justice between 1993 and 2013. In more detail see Kühn 2011, Chapter 5.

[11]The judgment of 21 November 1996, No. IV. ÚS 200/96. Cf. similarly the German Federal Constitutional Court, BVerfGE 18, 224 (240) and BVerfGE 84, 212 (227).

On the other hand, the Constitutional Court proclaimed in the late 1990s that ordinary court judgments are arbitrary and, therefore, unconstitutional, to the extent that the judge decides contrary to the 'established' case law of the Supreme Court unless she rationally explains why she disregarded the applicable jurisprudence.[12] The effects of the decision are far reaching. A precedent, although not binding, has a force of its own, and lower courts must give strong arguments for declining to follow it. The 'discursive' authority of precedent – as outlined by the Czech Constitutional Court – means that it is the *duty* of all judges to consider higher court precedents, and not just a matter of random judicial choice. At the top of the system, both supreme courts and the Constitutional Court are bound by their own precedent and must follow it unless *en banc* proceedings establish a new precedent.

In 2012, the legislature affirmed the conception of precedent envisaged by the Constitutional Court's case law. The Civil Code enacted in 2012[13] provides as one of its basic principles that everyone who seeks legal protection can expect that his case would be decided in the same way as another case decided by law courts which is similar in essential features; if her case is decided in a different way the party who seeks legal protection is entitled to persuasive explanation of reasons relating to this deviation (Section 13 of the Civil Code).

The conception of precedent in the Czech Republic is thereby discursive, not formally binding. We should not be surprised that Czech legal scholarship adamantly denies that judicial precedents have formally binding force. In most cases, lawyers avoid using the very word "precedent". Instead, as I have already mentioned above, the term "*judikatura*" (case law) is used. Putting aside other reasons, this is due to the fact that the Czech together with other Continental lawyers understand the term 'precedent' to mean something different and much more rigid than do their Common Law counterparts. The English doctrine that precedent cannot be overruled even by the highest court itself – although repudiated even in Britain in 1966 – still has a huge impact on Continental legal thinking which identifies the concept of precedent basically with this English notion. As Dawson put it:

> The hostility still shown in France toward the whole conception of judicial precedent may be due in part to dismay inspired by the English example. [. . .] The extreme to which the English doctrine of precedent has been carried during the last seventy years [1898–1966] has helped, I believe, to perpetuate in Europe a basic misunderstanding, by obscuring a primary purpose of a system of precedent. That purpose is to restrict, not to enlarge, the powers of judges. (Dawson 1968, 413–414)

Moreover, Continental judges, including post-Communist ones, operate within a judicial culture which approaches the hierarchical ideal of state authority, based on a strictly hierarchical ordering, specialization and a logically legalistic attitude, which stands in clear contrast to the less hierarchical, more pragmatic and more substance and problem-oriented common law judges (Damaška 1986, 18 ff.). Thus, it is very likely that establishing a rule of precedent in Continental systems – and above all

[12]The first decision in that line is the judgment of 25 November 1999, No. III. ÚS 470/97.

[13]Civil Code, Law No. 89/2012.

in post-Communist systems – would entail the extension of mechanical textual positivism to the sphere of case law. These formalist and mechanical Continental predispositions are plainly seen in the growing number of complaints in the Czech Republic about the phenomenon of "case positivism", that is a too rigid observance of the judge-made rules as formulated in the earliest reported decisions while disregarding the entirely divergent facts of later cases (cf. e.g. David 2008 or Bobek and Kühn 2013, 175 ff.). When common lawyers praise the virtues of their system of precedents, they have in mind the flexibility of law; when their East European counterparts think about the same problem, they are always afraid of the law's rigidity. In the words of Damaška, if precedent were recognized as legally binding in Continental Europe:

> decisional standards would in time become intolerably rigid, each new decision a drop in the formation of an ever longer stalactite of norms. In short, while a judicial organization composed of loosely hierarchical judges may require a doctrine of binding precedent as an internal ideological stabilizer, a hierarchical career judiciary may well be better off without it. (Damaška 1986, 37)

Discursive vertical force of precedent combined with its binding nature at the high court (horizontal) level is a sort of response to this problem. Lower courts are supposed to follow precedents, at the same time they might provoke overruling by bringing new arguments and trying to persuade higher courts to change their legal opinions.

Retrospective and Prospective Overruling Generally[14]

It is the principle in all civil law countries as well as in common law systems[15] to apply a new judge-made law rule to all cases before the courts. It does not matter whether or not those cases had been brought to courts before the high court made a new precedent. It does not matter when the action which would be the reason for the lawsuit took place. It does not matter whether a new precedent is a completely new interpretation of the law or whether it is the result of overruling previous case law. I call this situation *incidental retrospectivity*. A new legal opinion is applied *retrospectively*. Older cases which had meanwhile been finally decided cannot

[14]The following text is based on my Czech text, Kühn 2013.

[15]Cf. with regards to common law Juratowitch 2008, 199 ff. Cf. *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, s. 379 (Lord Goff of Chieveley states that prospective overruling has no place in British common law). Recently, this strict legal opinion has been somewhat modified in the judgment of the House of Lords *National Westminster Bank plc v. Spectrum Plus Limited and others* [2005] UKHL 41 ("*Never say never*", noted in para 41 Lord Nicholls of Birkenhead after an in-depth analysis of US, Indian, ECHR and ECJ case law; cf. also para 74 of Lord Steyn opinion: "*I would not rule out the possibility that in a wholly exceptional case the interests of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively.*").

be reopened only because of subsequent decisions which overruled earlier precedents.[16] Adjective "*incidental*" implies that retrospective effects are to some extent accidental, i.e. the case had not been finished before the new opinion was made.

Both civil and common law is based on the premise that courts do not make law but just try to find the law in its sources, such as statutory law, customs, legal principles etc. (declaratory theory). In this view, overruling of an earlier precedent is just the correction of the previous mistake in interpretation of law. The nature of judicial law making rests in finding the correct meaning of the law, no matter how fictitious this might be in reality. As nicely summarized by Lord Reid in his fierce defense of retrospective application of a new judge-made law rule: "*We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that* [the existing rule] *is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation. But that often happens when an existing decision is reversed.*"[17] A Czech judge would agree entirely with this assertion.

That is why it is not possible to apply the older (erroneous) legal opinions on older legal relations which had taken place before a new legal opinion was made by the competent judicial body, in the Czech Republic a grand chamber. The fiction of Czech law is that although case law finally determines the meaning of law it is never an autonomous and original source of law. It never functions on its own. It always functions linked to another source of law, it interprets it, albeit the link is often very distant and almost invisible. It is true that this understanding is often fictitious. This fiction, however, stands as a foundational legitimizing narrative of Czech as well as Continental judiciary. That is why I do call the application of a new judge-made law rule "retrospectivity" rather than "retroactivity".

Only *modern* law in a formal sense (statutes as carriers of legal rules) is connected with the prohibition of retroactivity with all its consequences.[18] The development of law and its making in a formal sense is discontinuous, the beginning and end of its existence (validity) is fixed, its application is determined by complex temporal rules.

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[16]It is the old rule that reopening of the proceedings is in such situations impossible. To put it simply, reopening could be possible only if new evidence arose. New evidence is a factual issue, that is why overruling earlier case law is never the issue of fact. Cf. already judgment of the Czechoslovak Supreme Administrative Court of 29 October 1937 No. 15043/37, recently judgment of 1 March 2004 No. IV. ÚS 792/02 ("different *(subsequent) interpretation of law, as made in the judgment of the Constitutional Court, is not the circumstance which would justify reopening of proceedings*"). The only exception to this rule is derogation of unconstitutional law by the Constitutional Court – according to Constitutional Court Act, Art. 71 para 1 (law No. 182/1993) if criminal judgment had been made according to the law which has been found unconstitutional, the proceedings shall be reopened if the actual judgment has not yet been served.

[17]*West Midland Baptist (Trust) Association Inc v Birmingham Corporation* [1970] AC 874, at 898.

[18]I emphasize modern as earlier civil law prior to nineteenth century did not satisfy those requirements. In Austrian Empire these formal requirements were stated for the first time by creation of Imperial code (*Reichsgesetzblatt*) in 1849. Cf. Bobek 2007.

On the other hand, law in a broader, substantive sense cannot be reconciled with the ban on retroactivity. Law in a substantive meaning is a plethora of popular practices (commercial customs, but also those statutory rules which effectively delegate rule-making on some addressees who further define what is in some place and some time "usual" according the code, what is "without unnecessary delay" etc.), administrative practice (law making through decisions of administrative authorities in individual cases), last but not least case law. The development of this kind of law is continuous, gradual. For instance, the precise moment when the customary rule has been modified is hard to determine. If the case law is modified in a different way than through a formal decision of a grand chamber, it can be very complicated to say since when a previous precedent has been finally overruled. Such a change, if made by series of judgments gradually undermining previous opinion, is not linked to the exact date since when it becomes applicable. Rather, it is part of continuum within which it is more or less likely that a new rule would be applied.[19]

Continuous and gradual development of judge-made law is challenged by the institution of grand chambers. Grand chambers attempt at institutionalizing and rationalizing judicial modifications of case law. Rather than overruling through a number of judgments undermining previous legal opinion, grand chambers do overrule precedents by a single decision, binding on the entire high court. While making judge-made law explicit, modifications of case law made by grand chambers do call for more precise rules on its prospective or retrospective application.

Temporal rules on overruling do relate to the problem of legal certainty and confidence of the rules' addressees to the old interpretation. Formal and institutionalized overruling by grand chambers might still be quite surprising and unpredictable. That is why formal overruling by grand chamber shall be ideally product of previous trends visible to outsiders or at least professionals in the legal field at stake, for instance value conflicts within the earlier case law, critical appraisal of the case law by legal scholarship, publication of the lower courts' judgment in the official case reporter despite the fact that it is in conflict with the Supreme Court's case law.[20] It can also happen that the high court would note in its decision its readiness to refer

[19]Cf. for instance Czech Supreme Administrative Court's judgment of 20 August 2009, No. 1 Afs 33/2009 – 124, paras 25 and 26. The Supreme Administrative Court accepts case law of the Constitutional Court conflicting with its own case law without referring the case to the grand chamber. However, if there is conflicting case law of both courts for some time, it might be the problem to say when finally the Supreme Administrative Court accepted the constitutional case law. Quite often, the change takes place gradually, through a series of step by step judgments. In contrast, the Czech Supreme Court requires any change of its case law to take place through its grand chambers, so even though overruling is mandated by the Constitutional Court case law, it is still necessary to send the case to the grand chamber. The precise moment of overruling is obviously much more visible in the latter example.

[20]This happened before the Czech Supreme Court overruled its case law on statutory non/limitation of defamation claims. Before, the judgment of the High Court in Olomouc of 17 February 2004, No. 1 Co 63/2003, was published in the Supreme Court case reporter as No. 4/2008 [*Sbírka soudních rozhodnutí a stanovisek*].

the issue to the grand chamber in the future. Those facts might matter while deciding about the level of trust in continuing application of the old case law.

I have already noted that in the Czech Republic a new judge-made law rule is applied to all cases pending before the courts no matter when they were brought to law courts (*incidental retrospectivity*). However, in some exceptional cases the application of a new rule would be too harsh. What is at stake, obviously, is legitimate expectation in continuing application of the old case law. Such situations call for limiting retrospective impact of the new rule. This can be achieved through several constructions.

One extreme, more or less theoretical, would be pure prospectivity. A new precedent would be applied only to the future relations which would emerge after a new rule was published by the court. The precedent would not be applied even to the case at stake. Therefore litigants who brought the case to the high court would not benefit from it. This doctrine is never applied in the Czech Republic.[21] The reasons for that are obvious. If that approach would prevail the legal development through courts would stop. Claimants, being aware that overruling cannot improve their situation, would have no incentive to sue or appeal, perhaps save repeated litigants. Last but not least purely prospective application of a new precedent is too explicit confirmation of judicial law-making, which would make most high court judges at least uncomfortable.

Another option is *limited pure prospectivity*. Judge-made law rule produced by overruling is applied only to the future cases, that is cases which emerged after a new legal opinion was announced. However, unlike pure prospectivity a new precedent is applied to the very case which initiated overruling. In fact, this is just a slightly modified pure prospectivity. As such, it is in conflict with the principle that equal cases shall be decided equally. Let us imagine example of two plaintiffs, both suffering damage from the same accident, both suing the same defendant. The high court would overrule its earlier precedent, but only the plaintiff whose case gave rise to this new precedent would benefit from it. The second plaintiff's case would end up according to the old rule (Reynolds 1991, 181). That is why limited pure prospectivity is very rare in law.

Surprisingly, limited pure prospectivity has been applied recently by the Czech Constitutional Court in one type of cases. This relates to the impact of annulling the law for being unconstitutional by the Constitutional Court. Until 2010 the iron rule was to apply annulment in all cases still pending before the courts. However, since 2010 a new trend is clearly visible. It seems to limit the application of annulling only to those litigants which gave rise to annulling. Predictably this new approach opened hot debates about injustice caused by the fact that several cases were pending before the Constitutional Court, but just party to the only one case actually benefited from annulling the law. Others would have to sustain the application of the law which has

[21]It seems that pure prospectivity is applied only in the USA, and there very exceptionally. In 1964 the US Supreme Court applied this doctrine in *England v. Medical Examiners*, 375 U.S. 411 (1964).

been found unconstitutional. In fact, the parties can hardly influence who would be the lucky one as picking up the case which would initiate annulling the law is often influenced by the activity of constitutional justices themselves.[22]

Another option is *limited retrospectivity*. In this case a new legal opinion made by overruling is applied to (1) to the case which initiated overruling, (2) to all legal relations which emerged after the new precedent had been announced (prospective element), and (3) to all older cases, if lawsuits had been made prior to the moment when the new precedent was published (limited retrospective element). Unless someone had sued before the day overruling was announced, he cannot claim rights which he would get according to the new precedent. The only exception would be the situation in which violation of rights lasts beyond the day the new precedent was announced.

The advantage of this model is the fact that it protects legitimate expectation of those who trusted in the "correct" interpretation of law and that is why they had sued before case law has been changed. Those plaintiffs knew that case law is incorrect, therefore they based their legal opinion on a correct interpretation of law. In a way, those people were "smarter" than courts. This type of trust is often neglected by prospective models of overruling. There is no reason why we shall ignore those people who had interpreted law correctly from the very beginning, if this correct interpretation would be later confirmed by overruling. On the other hand, this model treats differently those who would sue only after overruling was announced, even though their claims had emerged before. This implies that they had no legitimate expectation in a correct interpretation of the law. In this case the argument in favor of prospective overruling and legitimate expectation of another party is much stronger.

Limited retrospectivity is occasionally applied by the Court of Justice of the European Union (ECJ). ECJ does not apply it in cases of overruling, but in other situations when it modifies law in a substantive sense. A good example is *Defrenne* case.[23] ECJ proclaimed direct effect of the ban of sex discrimination and the principle of equal pay according to Article 119 EEC Treaty. However, ECJ took into account a number of employer who might be affected and the fact that the Commission itself so far has not claimed direct effect of Article 119. Similarly the EEC member states claimed that Article 119 had no direct effect. Therefore ECJ summed up that

> [i]n view of the large number of people concerned such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy. Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground

[22] See the opinion of the Constitutional Court sitting *en banc* of 14 December 2010, No. Pl. ÚS-st. 31/10. The Constitutional Court proclaimed that search and seizure made according to the provision which was found unconstitutional by the Court cannot be challenged if it had happened before the publication of the Court's judgment.

[23] Judgment *Defrenne II*, 43/75, ECR 455 (1976).

> of the possible repercussions which might result, as regards the past, from such a judicial decision. However, in the light of the conduct of several of the member states and the views adopted by the Commission and repeatedly brought to the notice of the circles concerned, it is appropriate to take exceptionally into account the fact that, over a prolonged period, the parties concerned have been led to continue with practices which were contrary to Article 119, although not yet prohibited under their national law. [. . .] Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim.[24]

Temporal Application of Overruling Before the Czech Supreme Court and the Czech Constitutional Court

On the European continent high courts usually do not proclaim far reaching temporal rules relating to judgments overruling previous case law. Some outstanding scholars even stood up against the very possibility of doing so.[25] High courts prefer incidental retrospectivity combined with occasional temporal rules which protect legal certainty and legitimate expectations. This usually happens through the application of open-ended or like provisions, for instance the lack of fault, excusable error of law,[26] or abuse of rights with respect of those who want to benefit from overruling in a way which is in conflict with public order. Czech law follows this trend, although this happens mainly through case law, while legal scholarship is mostly silent.

As far as I know the first Czech judge who spoke up against retrospective overruling was Constitutional Court's Deputy Chief Justice Eliška Wagnerová in her dissenting opinion in 2005 *Kinský* case.[27] Prior to 2005 if the restitution laws did not provide the right to claim property nationalized by the communist regime, the claimants could still avoid the problem by suing directly according to the Civil Code. The Constitutional Court overruled its earlier case law and proclaimed as being unconstitutional if someone circumvents restitution laws by suing to determine ownership according to the Civil Code. Deputy Chief Justice highlighted that this novel opinion of the Court "*does not deal with the impact of overruling made after twelve years of the existence of case law relating to restitution. It did not address*

[24] Paras 70–75.

[25] For instance in Austria this is the case of Franz Bydlinski, a scholar influential in his writings also in the Czech Republic. See Bydlinski 2001

[26] Cf. also § 19 of Czech Criminal Code, Error of law: (1) Who is not aware of unlawfulness of his action while committing criminal offence does not cause crime if he could not avoid this error. (2) Error could be avoided if the perpetrator shall know the law due to his statutory duties, decision of the administrative agency, contract, profession, position or function or if the perpetrator shall recognize unlawfulness without obvious problems.

[27] The opinion of the Constitutional Court of 1 November 2005, No. Pl. ÚS-st 21/05, published as No. 477/2005 Official Gazette.

the question of equality before the law of those complainants whose cases would be decided after announcing this overruling, being aware of the fact that constitutional justices are bound by overruling."

The Czech Constitutional Court encountered this problem soon. It escaped the retrospective effect of overruling by highlighting legitimate expectations of those who had followed case law applicable before overruling. This line of case law has been approved by the Constitutional Court sitting *en banc*: "While reviewing abstract issues of constitutionality the Constitutional Court is not able to envisage or model all possible scenarios which could appear in the future."[28] The Constitutional Court had to face many situations in which case law of ordinary courts applied overruling mechanically, without taking into account sometimes even bizarre effects of application of newly interpreted rules. For instance, in case No. I. ÚS 428/06[29] the Constitutional Court was dealing with the case which was close to Catch 22 scenario. A claimant made originally claim before the administrative authority according to the restitution law. The authority was found not having jurisdiction over the case so the case was referred to the civil court deciding according to the Civil Code. He succeeded but after a series of decisions the last judgment was quashed by ordinary courts as being in conflict with the new Constitutional Court's precedent of 2005. The claimant was told that he shall make the claim according to the restitution law, that is exactly what he did at the very beginning, but now all the deadlines were long gone. The Constitutional Court rejected formalistic reasoning of the ordinary courts:

> The Constitutional Court considers self-evident and important for judicial law-finding that all individual aspects of every case shall be considered. Various cases and their specific circumstances might be quite complex and untypical; this does not free ordinary courts from making all efforts to find just solutions, no matter how difficult it might seem to be. Ordinary courts did not deal with all specifics of this case.

The Constitutional Court explained the difference which justified deviation from its 2005 precedent: "*It could not be disregarded (or suppressed) that this case was very different* [from 2005 precedent]. *It shall be highlighted that the complainant sued according to the restitution law; this is the first difference from the quoted precedent. His intent was not to "circumvent the meaning and purpose of restitution legislation", but legitimately ask to get the immovable property* [...] *public authorities decided that* [the restitution law] *could not be applied; the complainant was asked to sue according to general rules* [...]" The Court then explained how and why the complainant got into the dead road like Catch 22: "*The complainant might feel to be outmaneuvered into the situation without any solution; he claimed immovable according to the restitution law, his claim was rejected and he was sent to sue according to* [the Civil Code]; *then he made the lawsuit according to the Civil Code but his claim was rejected as he was supposed to sue according*

[28]The judgment of 1 July 2010 No. Pl. ÚS 9/07, published as No. 242/2010 Official Gazette, para 54 (restitution of the Church property case).

[29]The judgment of 4 December 2008, No. I. ÚS 428/06.

to the restitution law." Those steps of public authorities established "*legitimate expectations that public authorities would deal with the issue according to the* [Civil Code]." What is for the purpose of this paper most important, the Constitutional Court rejected the very idea that "*the complainant shall have guessed the future development of case law which has been modified in the course of solving his hard case [. . .] The duty to predict future legislative and judicial development of law cannot be imposed on parties of any case*."

In a series of similar decisions[30] the Constitutional Court narrowed down the impact of the 2005 precedent. However, the analysis of the 2005 precedent always remained within the scope of distinguishing facts of the case from the binding precedent. That is why the first decision which deals openly and explicitly with the problem of retrospective application of overruling is the judgment written by Deputy Chief Justice Eliška Wagnerová in the case dealing with overruling earlier precedents on statutory limitation of defamation claims.

In this case[31] plaintiffs sued the man who was driving drunken and killed their father and husband. This has been confirmed in criminal trial. The lawsuit for loss and sufferings has been made after the defendant's guilt had been established by criminal court and he had refused to pay damages. It was not possible in that time to bring this claim in the course of criminal proceedings. At the same time it would be too risky to bring civil lawsuit before the final criminal judgment has been made (the defendant continued to refuse any liability; in case he would be found not guilty the plaintiffs would risk paying him costs of civil litigation). After all, it was not necessary to sue immediately because the lawsuit for loss and sufferings was not subject to any statute of limitation. At least this was the opinion of the case law in that time. However, in the course of civil litigation the case law was overruled by the Supreme Court's grand chamber. Therefore, the appellate court and ultimately the Supreme Court rejected the lawsuit and held that lawsuits for loss and sufferings are subject to 3 years statutory limitation. In other words the courts applied a new precedent.

The plaintiffs filed a constitutional complaint criticizing the Supreme Court for violating their legitimate expectations and the principle of legal certainty. First, the Constitutional Court emphasized that overruling made by the Supreme Court's grand chamber is not in conflict with the principles of legal certainty. That is why its new legal opinion is also applicable to all pending cases, retrospectively. On the other hand it is possible to imagine (albeit exceptional) cases in which retrospective application of the new legal opinion could be unconstitutional. If the defendant invokes statute of limitation, all things considered it could be the argument contrary to *bonos mores* (good manners). Then using the defense of statute of limitation is

[30]Cf. Constitutional Court's judgments of 25 September 2008 No. II. ÚS 519/08; of 25 June 2009 No. I. ÚS 89/07; of 5 August 2009 No. I. ÚS 566/07.

[31]Judgment of 5 August 2010 No. II. ÚS 3168/09. Cf. case note Kühn 2010.

"*the abuse of this right at the expense of that party which did not cause passing the statutory limitation*".[32] Therefore the defense shall be ignored by courts and the lawsuit shall be recognized despite the new case law.

This judgment is the most important case with respect to retrospective and prospective overruling in private law relations. It says that the rule is incidental retrospectivity, that is to apply the legal opinion made by overruling to all pending proceedings. The only exception relates to those rare cases which meanwhile established legitimate expectations of addressees of rights and duties, whereas protecting another party according to a new judge-made law rule would be contrary to public policy. It is the duty of those who do not want to apply the new rule retrospectively to bring such arguments which would justify exceptional non-application of the new rule.[33] Exceptional non-application of the new legal opinion is achieved not through a judge-made temporal rule but through statutory substantive rule, such as the ban to act against public policy or *bonos mores*.

The exceptional deviation from incidental retrospectivity shows the reality of private law relations. On the one hand, they protect trust of one party in the continuing interpretation of the law, on the other hand they shall not ignore legitimate expectation of another party that the incorrect interpretation would be overruled and new (correct) interpretation of the law established.[34] In a large number of average private law relations there is no reason why the trust of the former party shall prevail over the legitimate expectations of the latter. It must be something really specific (long criminal proceedings, rational and meaningful explanation why the plaintiffs did not sue earlier etc.) that would justify limiting retrospective application of overruling.

This explanation is consistent with both Central European scholarship (Bydlinski 2001; Kühn 2013) and the analyzed judgment of the Constitutional Court. Ironically, the Constitutional and Supreme Court did not get the message of the Constitutional Court. Quite the contrary, they started to apply the Constitutional Court's judgment broadly. Now both the Constitutional and the Supreme Court effectively changed the impact of overruling from incidental retrospectivity into purely prospective application of the new judge-made law rule. In fact, any older lawsuit is found subject to non-limitation, that is subject to the older (overruled) case law.[35]

[32]Para 21 of the judgment.

[33]Even if those argument do not persuade the court, the court would have to address them and explain why they do not matter in this case.

[34]In his article, Bydlinski has asked cynically whether knowledge of case law would be tested and whether it matters for prospective application of case law whether or not the person knew the old case law (Bydlinski 2001).

[35]Cf. e.g. Constitutional Court's judgment of 5 September 2012, No. II. ÚS 3/10.

Prospective and Retrospective Overruling in the Supreme Administrative Court

Of the Czech high courts, the Czech Supreme Administrative Court (SAC) has worked out the most complex methodology of temporality of overruling. The SAC is the high court in public law area, it protects public (as opposed to private) rights of individuals against the public power. It routinely decides the conflicts between individuals or corporations on the one hand, and the public authority, on the other. Overruling in its decision making capacity is quite frequent. The basic principle of the SAC is that change of case law cannot deprive the private party of her access to an administrative court. A typical example is the situation in which a new precedent states that the lawsuit should have been made earlier than according to the old case law, typically in a different (previous) stage of administrative proceedings. In this case the trust in the previous law in a substantive sense (law as interpreted by overruled case law) shall not be violated.

One of the first judgments in which the SAC addressed the issue of overruling and its temporal application was the case *Gaudea v. Czech National Bank*.[36] The SAC dealt with strict concentration of legal arguments before administrative courts which could be made only within 60 days since the receipt of administrative decision. However, subsequent change of case law might bring new issues which no one might have imagined while making original lawsuit. In some cases it might happen that the plaintiff did not bring an argument because she simply did not envisage it considering the earlier case law. However, a new legal argument might appear facing the shift in the case law of the SAC, the Constitutional Court, the Court of Justice of the EU, or the European Court of Human Rights. If this new argument benefits the plaintiff, it seems too harsh to say that the plaintiff had to bring the argument on time within 60 days limit. If we follow this strict opinion, we would force the plaintiff to be smarter than courts themselves. That is why the SAC reached the conclusion that in such exceptional situation the court shall allow to bring a new argument even after 60 days had passed. The plaintiff can make an argument based on a new case law until the final judgment in her case is made. The SAC argued, inter alia:

> Article 95 para. 1 of the Constitution which states that judge is bound by *the* law [statute] shall be interpreted in a broader sense, that judge is bound by law. Being bound by law implies being bound both by law in a formal sense (statute) and by other sources of law including legal principles and precedents. Precedents shall also be considered sources of law, even in a written system of law, although only providing binding interpretation of

[36] See the judgment of 17 December 2007, No. 2 Afs 57/2007-92. This judgment was originally met with some hesitation among justices of the SAC, so it was not published in the Official case reporter of the SAC. However, today no one disputes its validity. In fact, the SAC grand chamber soon took over its legal opinion in its decision of 15 January 2008, No. 2 As 34/2006-73, published as No. 1546/2008 SAC reporter, *AQUA SERVIS v. Ministry of environment.*

> written rules of law. To sum up the court deciding about some legal issue always interprets the rule at stake established in some law and this interpretation cannot ignore interpretation made by the court of the same or higher level.[37]

This legal opinion shows the application of the concept of law in a substantive sense. The text of law is rarely applied in isolation. It is always enriched by the meaning given by case law and legal practice generally.

A classical problem of prospective and retrospective overruling has been articulated in detail by the SAC grand chamber in 2008.[38] In this case the grand chamber allowed judicial review of a new type of administrative decisions, contrary to the older case law which did not allow it. The grand chamber then explained temporal application of its new opinion which fully equals to incidental retrospectivity: (1) overruling shall not be sufficient reason to reopen those administrative or judicial proceedings which had ended before a new legal opinion was made; (2) courts have the duty to respect a new legal opinion since its publication in all pending cases.[39] In para 56 the grand chamber made a mistake, though. First, it said that established case law of high courts represents legal rule in a substantive meaning. Then, however, being counterintuitive to its preceding text, it added that "*change or specifications of case law could be considered as an amendment to the legal statute in a functional sense including all temporal effects any amendment traditionally enjoys*." This is not true, though. In this paper I have tried to explain that we cannot apply traditional temporal rules relating to statutory (formal) law with respect to case law, which is law in a substantive sense.

Overruling made by the grand chamber soon created a different sort of problems. The grand chamber addressed the issue what happens if the plaintiff did sue on time contrary to the old case law, however, consistent with a new precedent. It did not address the issue what happens if the plaintiff did not sue on time, consistently with the previous case law. Applying a new precedent mechanically, he could not sue later because he was supposed to sue sooner, as the new case law says. The SAC encountered this situation soon and made it clear that a new legal opinion cannot deprive plaintiff of his access to the court. Thus partially the precedent has prospective effects.[40]

The SAC thus combines classical incidental retrospectivity with purely prospective effect of its overruling. The rule is traditional incidental retrospectivity (full application of a new legal opinion to all pending proceedings). The incidental retrospective effect stops when it could hamper the plaintiff from her right to protect

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[37] Judgment No. 2 Afs 57/2007-92 (emphases added). In this case SAC noticed that overruling had taken place before the lawsuit was made so there was no need to go beyond 60 days limit to make all arguments.

[38] See decisions of 21 October 2008, No. 8 As 47/2005-86 and No. 6 As 7/2005-97.

[39] See idem, paras 57.

[40] Judgment of 30 January 2009, No. 2 As 41/2008-77 (*Mostecká uhelná v. Krajský úřad Ústeckého kraje*).

her public rights. If this new legal opinion deprives a party of her access to the administrative court, and if that party acted according to the old case law, a new legal opinion shall not be applied (pure prospectivity).

It is visible that the SAC provides temporal effects of its overruling which is much more rule-like than the Supreme Court or Constitutional Court. In part, it is caused by the purpose of the administrative judiciary which is to protect public rights of individuals and corporations. This makes some problems which do exist in horizontal (private) law relations much easier. That is why the SAC does not hesitate to leave incidental retrospectivity and goes in direction towards purely prospective effect of its precedents. It is true, however, that those considerations close eyes to the fact that even before administrative courts do exist horizontal relations between private individuals. For instance if the court deals with the lawsuit made by a neighbor against the agency's decision to allow building a house, at stake is not just the right of the neighbor but also the right of the builder. Simplicity of the SAC case law is thus based on ignoring these horizontal relations in primarily vertical relations state/individual.

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Chapter 7
The Role of Case Law and the Prospective Overruling in the Greek Legal System

Antonios Karampatzos and Georgios Malos

Abstract The sources of Greek Civil law are traced back to the Roman-Byzantine Law as enshrined in the *Hexavivlos,* hence linked to the legislation of Justinian, Roman law and fundamental principles as expressed in the Pandects. The sources of Greek law are statutory legislation and customs. The former enjoys a clear quantitative and qualitative superiority. With regard to international law, *dualism* is the prevailing theory, while *acquis communautaire* enjoys undisputed supremacy. *Positivisation* of legal principles may be viewed as a means of convergence between *idealism* and *legal positivism*. The legislator enjoys the *legislative prerogative,* not reaching, though, the point of *legislative monopoly*. Judicial rulings do not qualify as a source of law; by contrast, they are only binding as to the specific case under judicial review (*res judicata*). *Precedent* creates no binding effect to any judge; however, any deviation should be attempted *in a sparing manner* for the sake of legal certainty and foreseeability. Settled case law and particularly that of the Supreme Courts may, though, be regarded as an *indirect* source of law with a *quasi legislative* and superior persuasive power. By way of exemption, case law is recognized as a source of law in the field of administrative law where violation of judge-made rules may give reason for annulment. The notion of prospective overruling is not encountered in the Greek legal system where any judicial ruling may only have a *'retrospective'* effect, while statutory law has almost exclusively prospective effect.

A Short Introduction to the History of Greek Civil Law

The Greek law of contracts belongs to the Roman-Germanic family of law. The sources of Greek civil law back to the time of the Greek Revolution of 1821 were

A. Karampatzos (✉)
Athens Law School, National & Kapodistrian University of Athens, 32, Alopekis Street, Athens 10675, Greece
e-mail: akarampat@law.uoa.gr

G. Malos
Mayer Brown LLP, Brussels, Belgium
e-mail: georgiosmalos@googlemail.com

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Roman-Byzantine Law[1] and customary law, which varied throughout the territory of what would be the Greek state after 1830.[2] Following Liberation, Byzantine-Roman law and customary law came to the forefront. French law also survived through the translation of the French Commercial Code that was in force. As to Civil law, the first important measure to be taken was the Royal Decree of 23rd February 1835, which stipulated the parallel force of the laws of the Byzantine emperors as contained in the *Hexavivlos* of Constantine Armenopoulos and of customs[3]; therefore, modern Greek Civil law was intimately re-linked with the law in force at the time of the fall of the Byzantine Empire and even earlier, with the legislation of Justinian, with the very sources of Roman law and those principles which were regarded as the *raison ecrite* of civilized nations and whose contemporary expression was the law of the Pandects then in force in Germany (Stathopoulos/Karampatzos, Contract Law in Greece, 3rd ed., 2014, pp. 24–25; in detail Papadopoulou-Klamaris, Entwicklungsphasen des griechischen Zivilrechts bis zur Einführung des griechischen BGB, in: Festschrift für R. Stürner, Band II, 2013, pp. 1143–1159). The Roman-Byzantine law was not regarded as extraneous by the social *corpus* (as the founding father of the Greek Civil Code, Professor Georgios Balis, stated in his Report to the Head of the Government and the Minister of Justice accompanying the final draft version of the Civil Code on 17th December 1939) and therefore it was argued that no breach with the Roman legal tradition occurred.

The Greek Civil Code was drawn up in the 1930s among political and economic turbulences, but it came into force only after the end of the Second World War, namely on 23rd February 1946, 111 years after the first Royal Decree regulating Greek Civil law. Georgios Balis, a prominent legal scholar and the head of the drafting committee of the Greek Civil Code (hereinafter: CC), argued that there was no reason for the newly established Civil Code to be a mere reproduction of a foreign Civil Code; on the contrary, this legislation ought to reproduce Civil law as applied by that time in the Greek territory subject to adjustment in line with modern social and economic context (Balis in his speech for the ratification of the Civil Code on 15th March 1940; see also Papadopoulou-Klamaris, supra).

The influence of the approach of the Pandects as incarnated in the German Civil Code (Bürgerliches Gesetzbuch, hereinafter: BGB) is another decisive factor to be mentioned. Pecuniary relations were thoroughly modeled after the relevant provisions of BGB, while previous legal tradition stemming from the Byzantine years could not be ignored. Such a feature was the introduction of a wide scale

[1] That was Roman law as developed throughout the Byzantine Empire and insightfully summarized in the so-called *Hexavivlos* of Constantine Armenopoulos in the fourteenth century AD.

[2] Nonetheless, Ottoman law was still effective in the case of certain legal relations, namely those linked with real estate transactions, while French law also applied to commercial transactions, in which Greek traders and shipmen were intensively involved with due to flourishing trade mainly on the islands.

[3] According to this Decree, where customs had prevailed they would take precedence.

of general clauses into CC based upon the principle of equity (i.e. good faith and common usages). Such general rules, though, had long been a feature of Greek customs. Other examples of general rules or clauses are the civil protection of personality (Art. 57 CC), the prohibition of abusive exercise of a right (Art. 281 CC), the possibility of termination or adjustment of a contract due to an unforeseen change in circumstances (Art. 388 CC) etc. – up until recently such provisions were not encountered in BGB.[4]

The Sources of Greek Law

The sources of Greek law *(sources formelles)*[5] are (i) legislation, that is, statutes enacted by the State, and (ii) customs,[6] whose importance though is extremely limited nowadays. This is explicitly envisaged in Art. 1 CC, pursuant to which

> rules of law are incorporated in laws and customs.

Amongst these two sources there is a de facto quantitative and qualitative superiority of positive statutory law (Stathopoulos/Karampatzos, supra, p. 26) due to clarity and certainty provided by the latter.

Moreover, the generally accepted rules of international law (Art. 28 § 1 of the Greek Constitution, hereinafter: C) are rendered a direct source of domestic law (pursuant to the aforementioned constitutional provision). This category encompasses rules of international customary law as well, even stemming from international conventions not yet ratified. By way of contrast, international treaties do not constitute a separate source, since these treaties become domestic law by virtue of their ratification by a law. *Dualism* is predominant in Greece; therefore, international conventions and treaties have to be incorporated into the national law as described above in order to be legally effective. Art. 28 § 1 C reads, namely, as follows:

> The generally recognized rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any

[4]The Greek Civil Code was also influenced –to a lesser extent, though– by the Swiss Code of Obligations and the French Civil Code. Moreover, the decisive influence of the Greek Orthodox Church upon formulating family relations and the relevant provisions of Family law incorporated in the corpus of the Code shall not be overlooked.

[5]These sources are called so only due to the fact that they are established by the competent authority, which has been granted relevant legislative power; so Tsatsos, The Problem of the Sources of Law (in Greek, *Το πρόβλημα των πηγών του Δικαίου*), 1941, p. 131.

[6]*Opinio necessitatis* shall not be encountered in the whole social corpus in order for a custom to be classified as a source of law. It suffices that a *longus usus* is further classified as having a regulatory character by parties involved in this practice; so Tsatsos, ibidem, p. 191.

> contrary provision of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.

Both aforesaid categories of international law are granted a superior formal force in relation to the ordinary laws (*"they prevail over any contrary provision of the law"*; Art. 28 § 1 C); in the hierarchy, namely, they rank after the Constitution and have precedence over common laws (Stathopoulos/Karampatzos, supra, p. 27).

Last, but currently of utmost significance, is the issue of *supremacy* (interchangeably referred to as *primacy*) of EU law over national law. This fundamental principle was not embodied in the founding Treaties of the EU,[7] but was subsequently established by the case law of the Court of Justice of the European Union (hereinafter: CJEU). Pursuant to this principle, any national law –the Greek Constitution included– that conflicts with EU law must be *ignored* by national courts so that EU law may take effect. National law is neither rescinded nor repealed, but its binding force is suspended.

No matter what theoretical disputes may have arisen in the past, nowadays primacy of EU law is undoubtedly accepted by Greek scholars and courts.[8] The Court of Justice of the European Union has steadily invoked arguments from the point of view of international law, such as the nature of EU law as common and uniformly mandatory for all Member States.[9]

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[7] It is worth mentioning here that in the planned Treaty establishing a Constitution for Europe, an explicit embodiment of this principle was foreseen; see Art. I-6 of the Treaty establishing a Constitution for Europe, which read as follows: *"The Constitution and law adopted by the institutions of the Union in exercising competence conferred on it shall have primacy over the law of the Member States"*. However, the Treaty of Lisbon, namely the Treaty on European Union and the Treaty on the Functioning of the European Union, does not contain any explicit reference to this principle.

[8] Art. 28 §§ 2, 3 C read as follows:

> *2.* Authorities provided by the Constitution may by treaty or agreement be vested in agencies of international organizations, when this serves an important national interest and promotes cooperation with other States. A majority of three-fifths of the total number of Members of Parliament shall be necessary to vote the law ratifying the treaty or agreement.
>
> *3.* Greece shall freely proceed by law passed by an absolute majority of the total number of Members of Parliament to limit the exercise of national sovereignty, in so far as this is dictated by an important national interest, does not infringe upon the human rights and the foundations of democratic government and is effected on the basis of the principles of equality and under the condition of reciprocity.
>
> *Interpretative clause: Article 28 constitutes the foundation for the participation of the Country in the European integration process.*

[9] The CJEU enshrined the *precedence principle* in the *Costa v. Enel* case (6/64). In that case, namely, the Court declared that the legislation issued by European institutions are to be integrated into the legal systems of Member States, which are obliged to comply with them. EU law enjoys precedence over national laws; therefore, if a national rule is contrary to an EU law provision, Member States' authorities shall not apply it.

Positivisation of Legal Principles

Antipositivism, namely expressed as an inherent aspect of legal idealism, has been, in the past, the prevailing approach in the Greek legal system [Tsatsos, The Issue of the Interpretation of Law (in Greek, *Το πρόβλημα της ερμηνείας του δικαίου*), 2nd ed., 1978, p. 15, Mitsopoulos, Problems of Validity of Law (in Greek, *Προβλήματα ισχύος του δικαίου*), Nomiko Vima 1976, p. 1 and Despotopoulos, Philosophy of Law (in Greek, *Φιλοσοφία του Δικαίου*), 2000, 2nd ed., p. 136, are the main representatives of this opinion. On the contrary, Manesis, Critical Considerations on the Notion and Importance of Law (in Greek, *Κριτικές σκέψεις για την έννοια και τη σημασία του Δικαίου*), in: In memoriam of Konstantinos Tsatsos, 1980, pp. 365, 384, has steadily supported the introduction of positivism into the Greek legal system]. Tsatsos suggested that natural law with an alterable content does not have the validity of law; it may operate however –being the most suitable incarnation of the idea of justice itself– as a *guideline* for the establishment of positive law. Tsatsos further supported the view that the principal source of law is the idea of the justice itself, that is, *social freedom*, while Despotopoulos traced the fundaments of law in *ethics,* mentioning that anyone who establishes positive law has to be inspired from natural law – in other words, one has to establish law according to justice [Despotopoulos, The System of Law from a Philosophical Aspect (in Greek, *Το σύστημα του δικαίου από τη σκοπιά της φιλοσοφίας*), in: Minutes of the Academy of Athens, meeting on 18.04.2000, p. 235].

Nonetheless, antipositivism has been steadily criticized. Stathopoulos [Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays (in Greek, *Νομικός θετικισμός και ιδεαλισμός στη σοφιστική διδασκαλία και τον πλατωνισμό – Η σημερινή θετικοποίηση του ιδεαλισμού*), Elliniki Dikaiosini 2013, pp. 1–29] emphasizes on the main weakness of antipositivism, namely the inherent difficulty in concretizing the exact content of the idea of justice, as envisaged above, and the source of the supra-positive rules deriving therefrom. This approach entails a high degree of subjectivism that leads to legal uncertainty, which, in turn, renders the law vulnerable and subject to ideological and political manipulation. Stathopoulos suggests that the only way to secure both legal certainty and justice is through positivisation of abstract legal principles; therefore, any supra-positive principles that demand to be applied, so that the drawbacks of pure positivism are eliminated, shall be incorporated into statutory law either in the Constitution or in ordinary law of a lower hierarchical scale.[10]

One will gratefully accept today that the positivisation of abstract legal principles has been the main step towards convergence between legal positivism and idealism.

[10]Stathopoulos highlights further the fact that the absolute power granted to the legislator within the framework of pure legal positivism is the main effect to be mitigated (*'der eigentliche Sündenfall'* of pure positivism, according to Welzel in Naturrecht oder Rechtspositivismus?, 1962, p. 334).

Through this procedure, that is, the incorporation of abstract legal principles into positive law, most frequently in form of constitutional provisions, these legal principles turn into statutory rules; therefore, as such, they are rendered legally valid and binding.

Nonetheless, there has been an issue with regard to the legal validity of principles *that may not have been positivised*. However, this issue may be of no relevance when considering that there is no fundamental legal principle that has not been positivised [Stathopoulos, supra, p. 22]. Even the abstract idea of justice, characterized as *'self-established'* by Mitsopoulos [Problems of Validity of Law (in Greek), Nomiko Vima 1976, p. 14], due to its acclaimed generality that does not allow its incorporation into a single statutory provision of general validity, has been positivised in the Greek Constitution, namely through the establishment of constitutional provisions not subject to revision. The constitutional legislator, recognizing the paramount significance of principles that lie in the heart of our legal culture and democratic system, has exempted them from any eventual constitutional amendment. According to Art. 110 § 1 C:

> The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of Art. 2 § 1 ("Respect and protection of the value of human being constitute the primary obligation of the State."), Art. 4 § 1 ("All Greeks are equal before the law."), § 4 ("Only Greek citizens shall be eligible for public service, except as otherwise provided by special laws.") and § 7 ("Titles of nobility or distinction are neither conferred upon nor recognized to Greek citizens."), Art. 5 § 1 ("All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of the others or violate the Constitution and the good usages.") and § 3 ("Personal liberty is inviolable. No one shall be prosecuted, arrested, imprisoned or otherwise confined except when and as the law provides."), Art. 13 § 1 ("Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs.") and Art. 26 ("1. The legislative powers shall be exercised by the Parliament and the President of the Republic. 2. The executive powers shall be exercised by the President of the Republic and the Government. 3. The judicial powers shall be exercised by courts of law, the decisions of which shall be executed in the name of the Greek people.").

In light of the above, there can be no doubt that the contribution of natural law, as a means of mitigating any unfair outcome resulting from the strict application of legal positivism –following Aristotle's demand for *'individualized justice'*–,[11] to the whole shaping and structure of the Greek legal system is more than evident.[12]

[11]Riezler does not accept strict criticism on legal positivism mentioning that even within the framework of this approach law has to be applied in accordance with its scope, while the judge has to search for and take into serious consideration the context of conflicting interests that led to the adoption of the statutory provision under scrutiny, but also the state of power at the time of the establishment of the relevant law (Der totgesagte Positivismus, in: Naturrecht oder Rechtspositivismus, 1962, pp. 239–240). Riezler appears further to deny any link to pure formalistic positivism as envisaged by Kelsen.

[12]Nevertheless, there is a dissenting opinion in Greek literature, pursuant to which "human rights stemming from natural law did not preexist, so there were not positivised, but rather established";

Nowadays, abstract legal principles have been positivised either in the Constitution or in international conventions or in ordinary law such as general clauses (e.g. Art. 288 CC, good faith etc.).

> The positivisation of abstract legal principles intimately linked with justice has been overall acclaimed even by scholars with an idealistic background; see Beys, Legal Principles in Theory and Practice (in Greek, *Οι δικαιικές αρχές στη θεωρία και στην πράξη*), Dike 2006, p. 1106, who regards the positivisation of the principle of proportionality as the utmost culmination of this procedure; also Doris, Introduction to Civil Law (in Greek, *Εισαγωγή στο Αστικό Δίκαιο*), Vol. A', 1991, p. 33 (*"positivisation of objectified principles binding for the legislator and the judge"*). Furthermore, supporters of the so-called *'soft'* or *'inclusive positivism'* such as Coleman, Saper, Lyons and Waluchow accept the positivisation of moral considerations that "*become part of the law because the sources make it so"*; see further in Leslie Green, Legal Positivism, Stanford Encyclopedia of Philosophy, 2003.

At any rate, any invocation of principles that do not fall under statutory law may be regarded either as redundant or even threatening for the integrity of positive law (Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 22), since it may even lead to its distortion.[13]

The Primacy of the Legislator and the Stance Adopted by Case Law

The primacy of the legislator is a fundamental characteristic of the Greek legal system. The judge, whose functional and personal independence is provided for by the Constitution (Art. 87 C), guarantees the observance of the laws and the protection of the citizen from illegalities.

On the other hand, agreement can easily be reached that judicial rulings, in principle, do not qualify as a source of law. The judge remains subject to the law deriving from the aforesaid sources and has no competence to make law. According to Art. 87 § 2 C:

> While fulfilling their duties, judges shall be subject only to the Constitution and the laws.

Manesis, Critical Considerations on the Notion and Importance of Law, in: In memoriam of Konstantinos Tsatsos, 1980, p. 402.

[13]By way of contrast, Supreme Federal Courts in Germany have often reasoned their decision on generally recognized principles of law or argued on legal certainty or on the social consequences of their judgment *(consequentialist approach)*; nonetheless, it remains unclear if these principles are regarded as principles standing above positive law or if they have been positivised through the establishment of constitutional provisions; see further Neumann, Positivistische Rechtsquellenlehre und naturrechtliche Methode – Zum Alltagsnaturrecht in der juristischen Argumentation, in: Rechtspositivismus und Wertbezug des Rechts, 1990, pp. 141, 151.

Pursuant to the relevant strict provision of the Greek Constitution (Art. 26), faithfully adhering to the principles expressed by Montesquieu, the three functions of the state, that is, the legislative, the executive and the judicial, are clearly separated.[14] In the Greek legal system, the legislator enjoys the so-called *legislative prerogative (Rechtsetzungsprärogative des Gesetzgebers),* though this prerogative does not reach the point of *legislative monopoly (Rechtsetzungsmonopol).*[15] In practice, additional sources of law appear; therefore, legal pluralism, a basic consideration encountered in sociology of law, is still present – though significantly restricted.

The above mentioned framework, even if not obvious at once, provides, though, the judge with a really active and 'creative' role regarding the implementation of law. Mainly due to the introduction of ambiguous provisions and general clauses whose abstract and impersonal stipulations need to be further concretized, the role of the judge is crucial and it may even be maintained that in these cases the judge somehow 'creates' law; this 'creative' role of the judge emerges especially in the so-called *'hard cases'* [see Posner, How Judges Think, 2008, passim; also the same, in: The New York Review of Books, The Court: A Talk with Judge Richard Posner (an interview-discussion with Eric Segall), 29.09.2011]. In the words of Judge Posner (in: The New York Review of Books, supra):

> if a case is difficult in the sense that there is no precedent or other text that is authoritative, the judge has to fall back on whatever resources he has to come up with a decision that is reasonable, that other judges would also find reasonable, and ideally that he could explain to a layperson so that the latter would also think it a reasonable policy choice. To do this, the judge may fall back on some strong moral or even religious feeling. Of course, some judges fool themselves into thinking there is a correct answer, generated by a precedent or other authoritative text, to every legal question.

Such cases actually reveal how below any shining veneer of strict separation of powers there often seems to lurk somewhere the reality of 'judge-made law'. However, a serious caveat must be entered here: in civil law systems –such as the Greek one– such judicial decisions are only binding as to the specific cases under judicial review (*res judicata)*; there is no further commitment to those particular rulings for anyone else not involved in the cases considered. Therefore, the next judge called upon to issue a decision in a similar case is not bound to follow it, even if it may have come from a superior court or any of the Supreme Courts; the next

[14]This is not always the case, though it is the rule.

[15]The legal phenomenon of legislative monopoly *(Rechtsetzungsmonopol)* was particularly eminent when extended codifications took place and was based upon the assumption of the completeness of these ventures. According to the relevant German doctrine, the main prerequisites so that this monopoly is granted to the legislator are the following: an extended codification without any gaps *(lückenlos)*, of a permanent character *(dauerhaft)* –even if social context alters– and including clear and explicit provisions *(klar und eindeutig)*; so Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 60.

judge is, namely, free to interpret it applying her own considerations, thus following her own interpretation no matter what settled case law might order.[16]

It is rather self-evident that the aforementioned primacy of the legislator does not entail that she may act in an arbitrary manner. For she is bound to the Constitution and the constitutionality of laws may be reviewed by any Greek court –there exists, therefore, a so-called *'dispersed constitutionality control'*–, though only as to the specific case brought to them; and if a certain statutory provision is deemed 'unconstitutional', then the court shall not apply said provision. For, as provided for in Art. 93 § 4 C

> The courts shall be bound not to apply a statute whose content is contrary to the Constitution.

Though, a statutory provision, even if assessed as running contrary to the Constitution, may not be nullified, in principle, with an *erga omnes* binding effect.

According to Art. 100 C the *Special* Supreme Court of Greece (Art. 100 C)[17] has the sole and *exceptional* competence to render a statutory provision invalid with an *erga omnes* binding effect. More particularly, when controversial decisions over the constitutionality of a statutory provision have been issued by the Supreme Courts of the three jurisdictions present in Greece –i.e. Council of State (Supreme Administrative Court), Areios Pagos (Supreme Civil and Criminal Court) and Court of Audit–, the Special Supreme Court has the final say on this matter. Its judgment has an *erga omnes* effect and, therefore, the statutory provision at dispute is rendered void (Spiliotopoulos, Handbook of Administrative Law (in Greek, *Εγχειρίδιο Διοικητικού Δικαίου*), 9th ed., 2001, p. 450). The judgments of this Court are irrevocable (Art. 100 § 4 C) and the provisions of a statute declared unconstitutional shall be invalid as of the date of publication of the respective judgment (or as of the date specified by the latter).[18]

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[16] As mentioned in theory, only if any constant practice of courts creates a sense of a general binding rule (*opinio juris*) in the citizens is a rule of customary law generated, but the reason for the legal force of this rule and therefore the source of production of law is not the court decision itself, but the custom derived from the relevant case law; see Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 21. Though, in any case, both prerequisites for the establishment of customary law must be present, namely *longus usus* and *opinio necessitatis*. See, however, in more detail below in the text.

[17] Art. 100 § 1 C reads as follows:

> A Special Supreme Court shall be established, the jurisdiction of which shall comprise: [. . .] e) the settlement of controversies on whether the content of a statute enacted by Parliament is contrary to the Constitution, or on the interpretation of provisions of such statute, when conflicting judgments have been pronounced by the Supreme Administrative Court, the Supreme Civil and Criminal Court or the Court of Audit.

[18] Relevant judgments develop their effect as of the date of their publication in the Gazette of the Government (Law no. 345/1976, Art. 21 § 2).

The Role of Case Law in the Greek Legal System

In a jurisdiction where the majority of its rules are of customary origin such as Common law,[19] the role of the courts in formulating the exact content of these rules is paramount. On the contrary, the pendulum swings to other side where positive law prevails, where namely the importance of case law as a source of law is significantly restricted – if even recognized as such.

As already alluded to above, case law of national and international courts is not and has never been recognized as a typical source of law in the Greek legal system [Tsatsos, The Problem of the Sources of Law (in Greek), 1941, p. 234, includes case law in Chap. 7 under the title 'False sources' *(ψευδείς πηγές)*; see also Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual (in Greek, *Η μεθοδολογική αξία της θεωρίας περί κανονιστικής δύναμης του πραγματικού*), Dike (*Δίκη*) 2008, pp. 8–28]. According to Tsatsos (supra, pp. 131, 238):

> The judge makes law for the specific case brought before him.

Though, moving away from the principles of legal positivism, case law may be viewed as an *indirect* source of law, included in the so-called *sources matérielles*. These sources of law, namely case law and jurisprudence *(Rechtswissenschaft),* are not recognized as typical sources of law because they lack in typical validity [the majority of Greek scholars classify case law as a factor of formative force; in between Doris, Introduction to Civil Law (in Greek, *Εισαγωγή στο αστικό δίκαιο*), Vol. A', 1991, p. 84, Simantiras, General Principles of Civil Law (in Greek, *Γενικές Αρχές Αστικού Δικαίου*), 4th ed., 1988, no. 52]. The procedure through which these sources produce law is not reflected in any statutory provision and therefore this law may not be treated as positive law stricto sensu (Tsatsos, The Problem of the Sources of Law, 1941, p. 131). Pursuant to Tsatsos, though (ibidem, p. 131), case law should not be treated as a mere *cognitive* source of law *(Rechtserkenntnisquelle).* Nowadays, among Civil law legal systems it is yet widely accepted that case law practically –i.e. de facto*, not de jure*– functions as legislator, even if this may run contrary to the classic separation of powers, through the establishment of rights and institutions, which enjoy a *'quasi legislative'* power and,

[19]The first traces of Common law date back to the customary rules of Anglo-Saxon England and the system of the so-called *'rode circuit'* of royal judges. These judges traveled from place to place throughout the country holding trials and deciding cases and then returning back to their basis in Westminster, where they debated on their experiences and their relevant judgments. Given that legislation was scarce at the time, the law that judges applied was usually local customary law. When the judges exchanged their views, it was broadly recognized that local customs they had applied had much in common with local customs of other areas in the country; and those 'common' customary rules are viewed as the fundamental basis upon which the whole structure of Common law was reproduced; see further Smith, A History of England*,* pp. 54–55, Brooke, From Alfred to Henry III, 871–1272, pp. 182–185.

in essence, develop a certain binding force in case law (Tsatsos, ibidem, pp. 240–241; Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual, Dike 2008, pp. 8–28).

At any rate, case law plays a particularly helpful role as a *declaratory* factor that de facto co-defines the interpretation of a statutory provision. There is no doubt that within the framework of the Greek legal system settled case law and specifically that of Supreme Courts is viewed, at least, as an essential source of cognition of law *(Rechtserkenntnisquelle)* and, moreover, as being equipped with superior persuasive power (see Karampatzos, ibidem). This augmented significance of case law in the course of tracing the exact meaning of statutory provisions has led to the point that case law is granted the character of a *subsidiary* source of law [Meier-Hayoz, Der Richter als Gesetzgeber, 1951, p. 259, stated that there exists indeed a *"limited obligation of compliance"* with previous judgments, while Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 248, introduced the notion of *'presumptive binding force' (präsumtive Verbindlichkeit)* of a court precedent, according to which the court may not deny a precedent but may discuss it in detail and depart from it where this is sufficiently justified].

The Role of the Judge in the Greek Legal System

As already mentioned above, according to the Greek Constitution the judge is exclusively bound to the Constitution and positive law (Art. 87 § 2 C). To return to and reemphasize the critical point: in the Greek legal system the power of a judge to somehow 'create' law may not exceed the boundaries set by positive law. Statutory rules which are subject to interpretation conducted by the judge are the raw (legal) material based upon which the judge shall construct her *computatio*. Therefore, the judge is twofold restricted: she must not ignore statutory rules and she must not cross the boundaries alluded to above. According to Kriele (Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 160):

> Denn das Fundament allen juristischen Denkens sind die Dezisionen des Gesetz- und Verfassungsgebers. Wenn auch die Theorie von Rechtsetzungsmonopol rein postulatorisch und wirklichkeitsfremd ist, so ist doch die Prärogative des Gesetz- und Verfassungsgebers ein Grundsatz, der noch überall anerkannt war, wo immer es Gesetz und Verfassungsgeber gegeben hat, und dem festzuhalten auch heute unausweichliche Voraussetzung jeder Ordnung überhaupt ist. Wo immer der Gesetz- oder Verfassungsgeber Dezisionen getroffen hat, sind diese verbindlich.

Even in case of a *regulatory gap*, analogy of law is used in order to fill this gap; thus, the construction of a *computatio* shall be attempted within the same boundaries without, in principle, any recourse to principles falling outside the scope of statutory law. Any considerations to be attempted by the judge should be in line with the broader considerations already expressed by the legislator as incorporated in the text of the relevant statutory provisions; however the judge is not bound to any formalistic approach rooted in old-fashioned pure positivism that no longer

affects legal reasoning in the Greek legal system [Stathopoulos, Legal Positivism and Idealism in the Legacy of the Sophists and Plato – The Positivisation of Idealism Nowadays, Elliniki Dikaiosini 2013, p. 22; Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts (in Greek, *Μεθοδολογία του Ιδιωτικού Δικαίου και Ερμηνεία των Δικαιοπραξιών*), 2000, paras. 426 et seq.].

In all circumstances, the role of the judge within the framework of this *'quasi legislative'* power is particularly important when concretizing the content of general clauses or filling regulatory gaps. The issue of classifying case law as a source of law when regulatory gaps emerge has attracted the attention of Greek legal scholars mainly in the early decades of the previous century. Tsatsos rejected any such consideration arguing that even in the case that the system of positive law is not complete, this calls for interpretation of the already existent legal provisions without any recourse to sources or principles or rules not based upon primary legal rules of positive law. Any teleological interpretation is not ventured in vacuum but rather rests upon the considerations already incorporated in statutory provisions of positive law and the ultimate objective to be served by application of the regular provisions. This teleological approach is nothing more than the logical evolution and specification of the primary positive rule. Any recourse to extraneous systems such as an alleged recognition of case law as an additional –formal– source of law is denied [Tsatsos, The Problem of the Sources of Law, 1941, p. 240; see also Karampatzos, The Methodological Impact of the Doctrine of the Normative Power of the Factual, Dike 2008, pp. 8–28].

It might be true that the incorporation of general principles without any concrete content into statutory provisions leaves a margin of legal uncertainty, which is inherent in antipositivism. However, in this case, despite the positivisation of such principles, legal certainty is secured on a higher level, given that it is already known to anybody involved that the source of such binding rule is the relevant statutory provision. The judicial application of general clauses is, surely, not an easy task to fulfill, in particular when taking into account the fact that e.g. in the Greek Civil Code there exist a plethora of statutory provisions that include general clauses to be concretized. Such an example is Art. 388 CC (termination or adjustment of a contract due to an unforeseen change in circumstances) according to which a contract may even be dissolved despite the fundamental principle of *pacta sunt servanda*, following the demands of good faith as further entrenched in the general clause of Art. 288 CC (in detail Karampatzos, Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law, European Review of Private Law 2–2005, pp. 105–147). Another example is the concretization of the content of the indeterminate legal notion of 'reasonable compensation' in Art. 932 CC, granted for moral damages in tort cases.

Any court judgment must be specifically and thoroughly reasoned (see Art. 93 § 3 C). The judge is frequently called upon, moving in blur waters, to come up with the best possible solution in particularly complex cases (in such cases Dworkin regards the judge involved as Hercules so as to indicate the extent of effort to be undertaken; so in Law's empire, 1986, p. 239). Nonetheless, even then, the judge is

not entitled to bear the lion skin of the legislator and thus behave like a disguised legislator. She enjoys no other powers than the judicial one as envisaged in the relevant constitutional provisions and therefore she should be restricted to her role moving within the boundaries already set by the legislator. In the Greek legal system any thought of judicial activism leading to the so-called 'state of the judges' is, in principle, undesirable and reprehensible, and above all a dangerous sign for the power equilibrium within the democratic institutions. To put it in a nutshell: the notion of a judge viewed as a super-legislator is not recognized in the Greek legal system.[20]

Notwithstanding the above, Litzeropoulos, a prominent legal scholar of the twentieth century, sustained that the judge does not merely apply the law in a pure mechanic way. The judge is not just the mouth that pronounces the words of the law –as Montesquieu's approach–, not just a mere passive being, incapable of moderating either her force or her rigor; the judge rather supplements legislation. This practice may lead to the establishment of a judge-made law. Under the scope of this broad notion of law falls every rule that cannot be deduced in an immediate and unquestionable way from relevant statutory provisions. Such a rule comes into existence with a concrete content obtained through the interpretation of the law attempted by the courts. Nonetheless, the judge is not totally free to make her own considerations but is rather bound to the law. Pursuant to Litzeropoulos the judge does not create law *ex nihilo*; she only adjudicates the case brought before her and reaches a judgment through a long procedure of reasoning [Litzeropoulos, The Specific Nature of Judge-made Law (in Greek, *Η ιδιαιτέρα φύσις του νομολογιακού δικαίου*), 1935, p. 1]. It is worth mentioning, though, that Litzeropoulos had firmly supported the introduction, into the Greek Civil Code, of a provision similar to Art. 1 of the Swiss Civil Code, according to which, in the absence of a statutory provision or customary law, the judge would be entitled to decide in accordance with the rule that it would establish as legislator; however, no relevant provision was introduced into the Greek Civil Code.

All in all, the 'creative' role of the judiciary is particularly obvious when it comes to settled case law of Supreme Courts or with regard to *hard cases* (see Posner, supra, section "The Primacy of the Legislator and the Stance Adopted by Case Law"), where the present statutory provisions are not capable of providing a satisfying solution to the legal problem that has emerged in practice. The most frequent case where the judge is called upon to become a composer of a music

[20]In Germany a vivid tendency with regard to granting an ever-growing *'quasi legislative'* power to established case law has been thoroughly expressed by prominent scholars. Pursuant to them, a newly emerged *'case law positivism' (Rechtsprechungspositivismus)* may be recognized (see Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 195, who further suggests the introduction of a *presumption of correctness* of judicial precedent, namely that established by Supreme Courts). According to the latter approach, continuation of law and safeguarding trust in an established case law, would be the principal benefits. In any case, overruling would be possible if there were serious reasons to justify such an overruling. See also Alexy, Theorie der juristischen Argumentation, 2nd ed., 1991, p. 334.

play instead of being just a pianist is the case of a 'regulatory gap'. Still within this framework, however, the judge is free *not* to comply with settled case law but follow her own assessment of facts, which is largely safeguarded as a central parameter of her functional independence envisaged in the Greek Constitution itself.

Judge-Made Law in the Field of Greek Administrative Law

Administration, that is, the executive power, is, of course, also subject to the law and the Constitution. The legality of its acts is to be scrutinized by administrative courts, which may annul them if contrary to the law (or the Constitution).

A specific trait of Greek administrative law is its scarce codification. As a result, the role of the courts with regard to cases falling under the scope of administrative law is mostly restricted to interpreting an impersonal and general statutory provision and adjusting it to the particular case brought before court. Moreover, in the field of administrative law it is not a rare case where no relevant statutory provision exists to be applied, but still the judge is obliged to adjudicate the case and issue a decision, even if she may have to issue a new impersonal general rule to be applied.

In this vein and under the strong influence of settled case law of the French Conseil d' Etat, the decisions of the Greek Council of State are viewed as a source of law, though not in the same perception as in Common law jurisdictions. More particularly, settled case law deriving from the judgments of the Council of State may introduce so-called *'case law rules'*. If the administration undertakes a legislative act that runs counter these rules, this may be viewed as a reason for annulment of the administrative act concerned.

As overall accepted, though, by Greek scholars in the field of administrative law, there is no generation of a new rule simply by interpreting a statutory rule, but rather only in cases where in the reasoning of the decision one may trace the application of a non-existent statutory rule that is applied by consequent decisions. In France, decisions of the Conseil d' Etat, in which judge-made law is established for the first time, are broadly known as *arrêts de principe.*

In Greece there is no statutory provision according to which administrative courts are bound to apply such judge-made rules; however, these rules are indeed applied, de facto, by hierarchically lower administrative courts for the sake of legal certainty, foreseeability and protection of founded trust on behalf of the citizens in the consistent conduct of the administration. Therefore, the administration itself acts pursuant to this judge-made law with the firm conviction that it is bound to it, because in case that these judge-made rules are not observed and applied, the relevant legal consequences are, in essence, identical to the case when statutory law is violated. So, if such a judge-made rule is violated through an administrative act, then the latter may be annulled before the competent administrative court.

Compared to France, however, generation of judge-made law in the field of administrative law is in Greece restricted. This may be explained through the fact

that rules established as judge-made law already existed in the French legal system and the Greek legislator incorporated them, to a certain extent, in statutory law. An indicative instance for this is the provision of Art. 48 of the Presidential Decree no. 18/1989, which regulates the function and jurisdiction of the Greek Council of State. All four reasons for annulment that may be invoked in the course of a petition for annulment had already been established by French case law.[21] The Greek legislator transferred these rules in the statute of the supreme administrative court, though the *exact content* of these rules is not statutorily fixed and here comes the judge to play her most essential role.

As a conclusion it may be inferred from the above that, in the field of administrative law, case law is indeed recognized as a source of law. Any violation of these judge-made rules may give a reason for annulment pursuant to the third reason envisaged in Art. 48 of the Presidential Decree no. 18/1989, which provides for a *'violation of law' (violation de la loi)*. According to settled case law of the Council of State and as broadly accepted by Greek scholars as well (see Spiliotopoulos, Handbook of Administrative Law, 9th ed., 2001, p. 518), the notion of 'law' in this provision encompasses not only positive law (Constitution, EU law, legislative and administrative acts) and general principles of administrative law, but also the so-called *'detailed judge-made rules'*. These rules have been judicially established as explanatory of the exact content of impersonal statutory provisions. The fact that these rules are part of settled case law veiled with the de facto status of law means that any violation of them may entail a reason for annulment.

In all circumstances, the judicial activism often shown by the Council of State, on various critical socio-economic matters, sometimes crosses the line drawn by the sacred principle of the separation of powers (mainly Art. 26 C) and becomes intolerable in a democratic society, whereby the legislator enjoys the primacy of enacting legal rules.

The Status of Stare Decisis (or Precedent) in the Greek Legal System

One should not lose sight of the fact that one of the most evident arguments in favor of recognizing binding force to precedent is *legal certainty*. Pursuant to consistent

[21] For instance, 'acts of legislative content' issued by the Government (according to Art. 44 C) that lie in the core of enactment of political power are exempted from judicial review. This statutory rule is envisaged in Art. 45 § 6 of the Presidential Decree no. 18/1989, but it had already been established as judge-made law through the pertinent settled case law of the Conseil d' Etat in France.

case law, people adapt their transactional conduct in accordance with precedent, expecting that conflicts arising from similar cases will be adjudicated in line with precedent.[22]

In the Greek legal system precedent creates no binding effect to any judge. As already explained above, this well-founded approach is firmly grounded upon the principles of separation of powers, namely between judicial and legislative power, and that of independence of the judge, as entrenched in Art. 87 § 1 C. The judge is endowed with functional and personal independence and is exclusively bound to the Constitution and to statutory or customary law, as mentioned above; thus, she is not bound to previously issued court decisions, even if issued by hierarchically superior courts. Moreover, according to Art. 77 § 1 C:

> The authentic interpretation of the statutes shall rest with the legislative power.[23]

Papanikolaou, a legal scholar specialized in the field of Methodology of Private Law, recurs to the separation of powers, as provided for in the Constitution, to further justify his position that case law is not recognized as source of law in the Greek legal system *in the sense that judges are not equipped with the authority to 'create' primary legal rules* [see indicatively Papanikolaou, (in Greek, *Μεθοδολογία του Ιδιωτικού Δικαιου και Ερμηνεία Δικαιοπραξιών*), 2000, para. 88; see also the same, Constitution and the autonomy of Civil law (in Greek, *Σύνταγμα και αυτοτέλεια του Αστικού Δικαίου*), 2006, passim]. This power is granted to the legislator, who is believed to possess a more insightful knowledge of facts and consequences of a legislative act not only upon society but also upon other fields of law, while she is expected to largely contribute to legal certainty. The legislator further enjoys democratic legalization that stems from the electoral procedure, according to the *'democratic principle'* (see further Wank, Grenzen richterlichter Rechtsfortbildung, 1978, p. 119). Pursuant to Papanikolaou, the judge has to provide the fairest decision for the case brought before her in line with what law commands, so that this judgment may serve as a useful basis for similar considerations to be assessed in the course of prospective decisions for

[22]The introduction of a lenient version of precedent into the Greek legal system had already been proposed by Litzeropoulos during the debate on the drafting of the Greek Civil Code. Litzeropoulos proposed, namely, that judgments of the Plenum of Areios Pagos (Supreme Civil and Criminal Court) on ambiguous legal issues should be veiled with binding force – however this suggestion was not adopted. Litzeropoulos was struggling to find a balance between legal certainty, an indispensable feature for any legal order, and flexibility of law. Towards this direction, he proposed that only decisions of the Sections and the Plenum of Areios Pagos should develop an *erga omnes* binding effect, contrary to Common law legal systems where precedent –even theoretically– may be established by hierarchically inferior courts. For the decisions of the Supreme Court should be considered as being equipped with a reinforced power of persuasion (see Litzeropoulos, The Specific Nature of Judge-made Law, 1935, pp. 1–29).

[23]See also Art. 77 § 2 C, which reads as follows

> A statute which is not truly interpretative shall enter into force only as of its publication.

substantially similar future cases *(Rechtseinheit*) [Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts, 2000, para. 82]. As the argument goes, the continuity of case law is of utmost significance for legal certainty *(Rechtssicherheit)* and foreseeability *(Vorhersehbarkeit)* of judicial judgments, but also for the fundamental principle of justice itself, which calls for equal treatment of substantially similar cases *(Gleichbehandlungsgrundsatz).*

As regards the margin left to any judge to deviate from settled case law without any recourse to specific reasons why doing so, this is regarded as indispensable for the further development of the law maintaining its plasticity and flexibility, so that the so-called *'risk of law cementation' (Rechtszementierungsgefahr)* is avoided (Litzeropoulos*,* The Specific Nature of Judge-made Law*,* 1935, p. 17, stands for a combination of certainty and flexibility, which have to be features of every legal system; the *'risk of law cementation'* that results from the recognition of a *quasi* binding effect of judge-made law is highlighted by Esser, Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht, in: Festschrift für F.v.Hippel*,* 1967, pp. 113 et seq.; see also the same, Vorverständnis und Methodenwahl in der Rechtsfindung*,* 1970, pp. 192–193). The judge is entitled to follow her own considerations no matter if these coincide with other expressed in previous settled case law.[24] This practice avoids any stagnation in case the legislative and social context alters in the meantime (Litzeropoulos, supra, p. 10; see also Gerland, Die Einwirkung des Richters auf die Rechtsentwicklung in England, 1910, who was particularly hostile against the Common law system of precedent). Law interpretation, such as the law itself, entails, in general, a strong element of temporality *(Zeitlichkeit).* Newly emerging social needs and considerations, particularly when these have already been incorporated into recent statutory provisions, may even justify any deviation from any settled case law. This deviation calls for an updated consideration of the *normative content* of the law, above all on the basis of concrete legal arguments (Papanikolaou, Methodology of Private Law and Interpretation of Juridical Acts, 2000, paras. 85 et seq.).

Nonetheless, legal certainty and foreseeability demand that any deviation from consistent case law should be attempted *in a sparing manner* (see once more Papanikolaou, supra, para. 86). This may be viewed as an encouragement to courts, and namely those following cassation procedures, to apply settled case law in order to further safeguard the principle of legal certainty. Where, namely, the judge is encouraged to interpret the law, she is subject to the previous interpretation already attempted by other judges [Kriele, Theorie der Rechtsgewinnung, 2nd ed., 1976, p. 243, who establishes a burden of proof for anyone arguing (*Argumentationslast*) in favor of a departure from settled case law (*Vermutung zugunsten der Präjudizien*)]. According to Tsatsos, the judge accepts this interpretation due to its intellectual and

[24]Nevertheless, Areios Pagos, in a notorious decision that dates back to 1930 (decision no. 227/1930), quoted that settled and uniformly applied precedent has the validity of law; however, this mindset was not since then reiterated by the same or other courts and remained just an isolated *dictum* without any further serious impact.

ethical authority (Tsatsos, The Problem of the Sources of Law, 1941, p. 241), though this authority does not suffice to consider case law as a source of law.

Papanikolaou further maintains that, within the framework of the Greek legal system, legal certainty and foreseeability of law, based upon settled case law –in particular Areios Pagos' case law–, do not suffice themselves so that such consistent case law remains unaltered in the light of new considerations or a substantial change in the socioeconomic context (so also Larenz/Canaris, Methodenlehre der Rechtswissenschaft, 3rd ed., 1995, p. 259). Additionally, no claimant who attempts to initiate proceedings pursuant to Art. 20 § 1 C,[25] with the intention to alter settled case law, shall be obstructed from doing so and having his case being adjudicated according to the content of statutory law to be applied in his case on the basis of specific, 'individualized' considerations, without these considerations being restrained by settled case law.

The Problem of Prospective Overruling

General Remarks on the Practical Function and First Appearance of Prospective Overruling

Before proceeding to an analysis of the role of prospective overruling in the Greek legal system, it may be useful to first state, in brief, the practical function and first appearance of said doctrine.

Prospective overruling is a jurisprudential device whereby an appellate court overrules one of its earlier decisions, but in a manner that purports to operate only in relation to subsequent transactions (*prospective*, *ex nunc* effect). As Thomas E. Fairchild suggests (Limitation of new judge-made law to prospective effect only: "Prospective overruling" or sunbursting, Marquette Law Review, Vol. 51, Issue 3 Winter 1967–1968, p. 254):

> Prospective overruling is a device whereby a court limits the effect of a new rule to future transactions only, or, more commonly, to future transactions plus the case before the court which presents the opportunity for the announcement of the change.

In other words, prospective overruling is not to declare the law as it has always been, but to change it for the future.[26] The basic meaning of prospective overruling is

[25] According to Art. 20 § 1 C:

> Every person shall be entitled to receive legal protection by the courts and may plead before them her/his views concerning her/his rights or interests, as specified by law.

[26] On the contrary, the CJEU, when acting in its jurisdiction as envisaged in Art. 267 of the Treaty on the Functioning of European Union (TFEU), repeatedly quotes that it gives to a rule of EU law the meaning and scope of that rule as it ought to have been understood and applied from the time of its coming into force; see *inter alia* C-209/03, *R (Bidar) v. London Borough of Ealing* (2005), para. 66.

to construe an earlier decision in a way as to suit the present day needs and demands. And its most distinctive feature is the temporal limitation of overruling denying any retrospective application of a judicial judgment, which is deemed to be the rule in Common law jurisdictions.

Nevertheless, in Common law jurisdictions, a judicial declaration that a *statute* is invalid means that the statute was invalid ab initio. This may expose a person to civil or criminal liability for actions believed lawful when committed. People generally conduct their affairs on the basis of what they understand the law to be. This retrospective effect of a change in the law of this nature may have unfair consequences. The law as 'reformulated' will be applied to the parties and other litigants even though the 'old law' was current when they entered into the transaction in question. What is acclaimed to be achieved through the application of prospective overruling is precisely a soother, regular passing from the starting point of the formerly valid ruling, which had been established either statutorily or judicially, to the new ruling, without causing severe disruption to this sequence of rulings. Prospective overruling is a judicial tool fashioned to mitigate such adverse consequences.

Prospective overruling, although not under this label, first appeared in the mid-nineteenth century in the Ohio case *Birngham v. Miller* (1848).[27] Nonetheless, a primary appearance of prospective overruling was attempted by Sir William Blackstone, who attempted to rationalize the judicial function of overruling previous Common law decisions through his so-called *declaratory* theory (Commentaries on the Laws of England, 1st ed., 1765, vol. 1, p. 70):

> If it be found that the former decision is manifestly absurd of unjust, it is declared not that such a sentence was bad law, but that it was not law.

However, it was not until 1932 when the main aspect of prospective overruling as known nowadays was propounded by Justices Cardozo and Lerned Hard, who were strongly in support of the doctrine of prospective overruling. In the notorious case *Great Northern Railway Co v. Sunburst Oil & Refining Co* (1932),[28] Justice Cardozo held that the US Constitution neither prohibits nor requires prospective overruling. Further, he was of the view that the law should keep up with the changes occurring in the society; the law has to be dynamic and not static. If a society is undergoing a change and citizens are bound by an old law, it will lead to grave injustice. Therefore, prospective overruling constitutes an important tool in the hand of judiciary to give fair and timely justice to its citizens.

Prospective overruling was continuously applied by the US Supreme Court in the 1960s and 1970s, in both civil and criminal cases. In *Linkletter v. Walker* (1965)[29] it was stated that

[27] 17 Ohio 45.

[28] 287 US 358; due to this judgment prospective overruling is often referred as *'sunbursting'*.

[29] 381 U.S. 618, 639.

> The accepted rule today is that in appropriate cases the Court may in the interests of justice make the rule prospective.

However, since then the US Supreme Court has retreated. In *Griffith v. Kentucky* (1987),[30] the court abandoned prospective overruling when directly reviewing criminal cases, while some years later prospective overruling was abandoned in civil cases as well.[31]

In the UK prospective overruling has never been adopted as a practice. This traditional approach was stated crisply by Lord Reid in *West Midland Baptist (Trust) Association Inc v. Birmingham Corporation* (1970)[32]:

> We cannot say that the law was one thing yesterday but is to be something different tomorrow. If we decide that [scil. the existing rule] is wrong we must decide that it always has been wrong, and that would mean that in many completed transactions owners have received too little compensation.

In *Launchbury v. Morgans* (1973)[33] Lord Wilberforce noted that

> We cannot without yet further innovation, change the law prospectively only.

In more recent years, in *Kleinwort Benson Ltd v Lincoln City Council* (1998),[34] Lord Goff of Chieveley underlined that the system of prospective overruling

> has no place in our legal system.

Apart from the above, there have also been *principled* arguments against prospective overruling. According to the most notable of these arguments, as stated in *National Westminster Bank plc v. Spectrum Plus Limited and others* (2005)[35]:

> Prospective overruling is outside the constitutional limits of the judicial function. The recognition of such a doctrine would amount to judicial usurpation of the legislative function. Power to make rulings having only prospective effect is not inherent in the judicial role. Prospective overruling robs a ruling of its essential authenticity as a judicial act. Courts exist to decide the legal consequences of past events. A court decision which takes the form of a pure prospective overruling does not decide the dispute between the parties according to what the court declares is the present state of law. With a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as this declared to the parties before the court. The effect of a prospective overruling of this character is that, on the disputed point of the law, the court determines the rights and wrongs of the parties in accordance with an answer which it declares is no longer a correct statement of law. Making such a ruling would not be a proper exercise of judicial power in this country. Making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges.

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[30] 107 S Ct 708.

[31] *James v. Beam Distilling Co v Georgia* (1991) 501 US 529 and *Harper v. Virginia Department of Taxation* (1992) 509 US 86.

[32] AC 87, 898–899.

[33] AC 127, 137.

[34] 2 AC 349, 379.

[35] *National Westminster Bank plc v. Spectrum Plus Limited and others* (2005) UKHL 41, 28.

At least in the Continental legal systems, the constitutional separation of powers between the legislature and the judiciary orders that the legislature makes the law, the courts administer the law. Parliament makes new law, by enacting statutes having prospective and varying degrees of retrospective effect.[36] Nonetheless, in Common law jurisdictions the boundary between making and administering law is not in all respects quite so clear-cut. It can hardly be doubted that in essence Common law is a judge-made law. Having said that, it should be further noted, though, that judges do not have a free hand to change the Common law. All too often the continental law interpreter rather pays little regard to the fact that judicial development of the Common law comprises the *reasoned* application of established Common law principles to current social conditions. Justice Cardozo, the pioneer of prospective overruling across the Atlantic, expresses this thought in an unsurpassable way (Cardozo, The Nature of the judicial process, 1921, p. 141):

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'.

Prospective Overruling in the Greek Legal System

It rather goes without saying that in the Greek legal system the judge is not entitled to establish law prospectively (Litzeropoulos, The Specific Nature of Judge-made Law, 1935, p. 19). For she adjudicates cases and transactions already concluded; therefore, her judgment may only have a 'retrospective' effect. The judge interprets the law and this interpretation recurs to the past. This is an additional feature that distinguishes judge-made law to positive law system. On the other hand, Art. 77 § 2 C rules that *"a statute which is not truly interpretative shall enter into force only as of its publication"*; according to this fundamental constitutional principle, statutory law –contrary to a judicial judgment– has an exclusively prospective effect.

This negative stance against prospective overruling is endorsed by Greek legal scholars. In particular, Papanikolaou (Methodology of Private Law and Interpretation of Juridical Acts, 2000, paras. 86–87) adopts an openly negative approach against any potential introduction of prospective overruling in the Greek legal system as had been proposed in the past by Litzeropoulos.[37] As already mentioned

[36] See *Wilson v. First County Trust Ltd (No. 2)* [2004] 1 AC 816, 831–832, para. 19.

[37] Litzeropoulos, The Specific Nature of Judge-made Law, 1935, p. 17, supported the view that the only obstacle towards an effective combination of legal certainty and flexibility of law is the peculiar element of retroactivity of judge-made law; therefore, he suggested that precedent should be binding to courts, which should though have the competence to overrule the precedent with an exclusive prospective effect through reaching a new judgment. See further supra note 22.

above, pursuant to Papanikolaou's approach –which nowadays actually reflects the relevant prevailing view in Greece–, legal certainty and foreseeability of law, based upon settled case law, do not preclude themselves consistent case law from being altered in the light of new considerations or substantial changes in the socioeconomic context. Hence once again: no claimant that attempts to initiate proceedings with the intention to alter settled case law shall be obstructed from doing so and having her case being adjudicated according to the content of statutory law to be applied in her case on the basis of specific, new considerations. And, sure enough, in such a case there is no need for having recourse to any 'prospective-overruling idea' whatsoever, since settled case law is not endowed with formally binding force.

In conclusion: the contribution offered here has (it is hoped) confirmed that in so far judge-made law and precedent are not recognized in the Greek legal system as formal sources of law –suggestion which does not tone down the admittedly 'creative' role of the Greek judge, as described above–, while prospective overruling of judicial decisions remains a rather meaningless institution within our legal system. It has further turned out that only the sovereign legislator is entitled to proceed to 'prospective overruling', altering the current legal status with a prospective, *ex nunc* effect. Statutory retrospective effects are, in principle, not excluded, as long as they do not relate to criminal cases[38] or to taxation.[39]

[38]See Art. 7 § 1 C:

> There shall be no crime, nor shall punishment be inflicted unless specified by law in force prior to the perpetration of the act, defining the constitutive elements of the act. In no case shall punishment more severe than that specified at the time of the perpetration of the act be inflicted.

[39]See Art. 78 § 2 C:

> A tax or any other financial charge may not be imposed by a retroactive statute effective prior to the fiscal year preceding the imposition of the tax.

Chapter 8
The Portuguese Experience of *Judge-Made Law* and the Possibility of *Prospective* Intentions and Effects

José Manuel Aroso Linhares and Ana Margarida Gaudêncio

Abstract This essay explores the possibilities and limits of *judge-made law* in Portuguese legal order from the perspective of plausible *prospective* intentions. The first part reconstitutes the normative (procedural) framework and this one as a way to institutionalize proposes-claims of stability and uniformity in the administration of justice. The second one exposes briefly the trends of Portuguese academic debate about the normative force and the constitutive tasks of judicial jurisprudence. The third and last one pays special attention to the problems of time and change concerning judicial rulings and reconstitutes the affinities with *prospective overruling* which may be considered in Portuguese legal system.

Even though it is «misleading» to invoke a «unified "civilian" type of legal system» («standing in simple contrast to the common law system»),[1] we should begin by clarifying that in the Portuguese legal order, as is the case in general with *romano-germanic* systems, there is no institutional framework and no cultural presuppositions (a legal-dogmatic or legal-theoretical *corpus*) that allow us to reconstruct precedents (and the resources they provide) under the strict possibilities of a formally binding case law *stare decisis.* However, rejecting the a-problematic transposition of an alien *institutional situation* (and a different *cultural environment*) – simultaneously excluding the *natural* use (in its specific strong sense) of such categories as *overruling* in general, and *prospective overruling* in particular – does not mean ignoring the plural signs of convergence between the two systems

[1] In the words of MacCormick and Summers (1999), «Introduction», p. 3.

J.M.A. Linhares (✉) • A.M. Gaudêncio
Faculdade de Direito da, Universidade de Coimbra, Patio da Universidade, 3004-545 Coimbra, Portugal
e-mail: linhares@fd.uc.pt; anagaude@fd.uc.pt

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(and the tendency these signs reveal),[2] just as it does not mean concluding that the experience of *problem-solving precedents* and the possibilities of an authentic *judge-made law* are condemned, in the Portuguese legal order, to a mere (more or less intensive, but always contingent) de facto force or persuasive *auctoritas (faktische Geltung),*[3] if not to purely sociological relevance. This conclusion, if *necessarily* taken outright, would exemplarily deprive these precedents of a normative or practical-methodological significant bindingness, thus simultaneously rejecting not only the claim to recognise judicial jurisprudence as an authentic source of law, but also the opportunity to identify prior adjudicative decisions as criteria effectively included in the legal system (i.e. as an autonomous systemic *stratum* or at least a «group of argumentative forms» used in *external* or second order justification[4]). The (more or less radical) defence of this *necessity* (with all the exclusions this entails) is, as a matter of fact, only to be seriously taken as a nuclear element of a certain possible conception of Law (the rightful, although not always very orthodox, heir of nineteenth century legalist formalism): and whilst it is certain that this understanding still plays an important (although frequently silent or not fully assumed) role in the routines of judicial practice, it is no less certain that in *academic house* in general (and meta-dogmatic arenas in particular) the concept of Law in question has since long lost its paradigmatic (dominant) status, counting only as one concept amongst other plausible ones. However, this emphasis, apparently redundant here, may yet have some relevance, showing us that the discussion of the overall bindingness of precedents (with the possibility of distinguishing different *ways of bindingness*) is certainly not unknown in Portuguese academic debate,[5] but not so clearly identifiable when dealing exclusively with the practice of the courts and their *doing what comes naturally*, very specially when determining how far this practice and its canons observe, or claim to observe, prior decisions

[2]In fact, it can easily be recognised that both experiences correspond to the same nuclear (civilisationally specific) understanding of Law!

[3]Persuasive authority here certainly more in the sense that O. A. Germann helps us to understand than in Esser's one: in Esser's reconstitution of *Überzeugungskraft* the decisive interference of *Sachangemessenheit* and the «force» that corresponds to the substantial merits (or the quality of reasons) of the concrete adjudication must, as a matter of fact, be recognised. For a reconstitution of the factors that determine (or at least influence) this de facto force, see Orrù (1983), pp. 65 ff. («Motivi e modi della conquista dell' effetività della norma giudiziale . . . »). For a global reconstitution of meta-dogmatic (legal-theoretical and legal-methodological) positions on *judge-made law* (considering the meaning of a mere persuasive authority and the plausible alternatives, but also paying attention to the exemplary concepts of Germann, Kriele and Fikentscher), see António Castanheira Neves (1995b), pp. 82–89 (section IV, B. c 4) and Alexy/Dreier (1999), pp. 40–47 (III, «The Rationale of Precedent»).

[4]In the words of António Castanheira Neves and Robert Alexy respectively: the Portuguese scholar's specific position will be considered *infra* (Section 2.2. of this report) and Alexy's conception is certainly the one we may exemplarily identify in *Theorie der juristischen Argumentation*: Alexy (1978), pp. 334–341 (2.5. «Zur Verwertung von Präjudizien»).

[5]It may even be said that the problem in question has exemplarily justified two explicit global answers (or lines of answer): we shall allude to the main positions of this debate *infra*, section 2.

as a governing model. Renouncing the claim of inventing an *exterior* point of view (supposedly equidistant from the interlocutors of the debate, their theoretical presuppositions and their normative perspectives),[6] we begin with an allusion to the normative framework (and especially the procedural rules and devices) that most directly influence the discussion that concerns us **[1]**. The next step synthesises the (dogmatic and meta-dogmatic) arguments invoked in the academic debate to propose a map of two main (global) positions on the relevance of *judge-made law* **[2.]**. The final section draws together the possible conclusions concerning the existence-inexistence of prospective effects that may be associated with the Portuguese experience of *Richterrecht* **[3]**.

1. Any consideration of an institutional framework concerned with judicial rulings and their relevance will certainly involve describing an order of normative (procedural) possibilities. These will be organised into two *ensembles*, the first (and most significant) primarily and directly invoking the purpose of *stability* and *uniformity* in the administration of justice (with the effect or expectation of *predictability*) **[1.1.]**, and the second only indirectly assuming this purpose **[1.2.]**.

1.1. It was precisely this intention of *uniformity*, associated with a specific understanding of *legal certainty*, that expressly determined the creation in 1926, as confirmed by the *Civil Procedure Code* in 1939 (and preserved in the new Code of 1961[7]) of a peculiar form of appeal addressed to the final instances of ordinary jurisdiction – the Supreme Court of Justice *(Supremo Tribunal de Justiça),* and also, since 1963, the Supreme Administrative Court, both acting with a *qualified* composition (*em tribunal pleno*).[8] The definitive decision concerning this form of appeal, not only regarding a concrete case but also a *jurisprudential conflict* (between two *contradictory decisions* issued at higher or intermediate levels of the judiciary), would therefore produce as a necessary *outcome* (due to the generalisation of the corresponding solution) a *rule* which, directly inspired by a specific institution from the Portuguese *ancien régime*, was called an *assento.*[9] What kind of a rule was this? Not a concrete (casuistic) jurisprudential rule («merged in the concrete details»

[6] In the absence of sociological empirical *data* or corroborated regularities (or other semio-narrative typifications of action) concerning effective decision-making practices (in terms of routines and innovation), it must be concluded that this claim is doomed to failure!

[7] Articles 763–770 of the *Código de Processo Civil* (Decree-Law No. 44129 of 28th. December 1961).

[8] There was also an institutional consecration of these *assentos* in the secondary rules of the *Civil Code* of 1966: «In the cases declared in statute law, the courts are allowed to stabilise, through *assentos*, doctrine with general binding force» [Civil Code *(Código Civil)*, hereinafter referred to as the CC, article 2].

[9] Referring to the *assentos da(s) Casa(s) da Suplicação*, produced since 1518 (the binding formal prescriptive force of which was explicitly consecrated in the so-called *Lei da Boa Razão* of 1769). On the historical origins and evolution of the *assentos*, see Braga da Cruz (1974), mostly pp. 283–289 (notes 109 and 110), Almeida Costa (2012), § 51, pp. 333–337, pp. 333, note 5, and pp. 404–406 (note 2), and Espinosa Gomes da Silva (2006), pp. 343–344, and 343, note 1, p. 374–376, 464, 470–471. Highlighting the differences that separate this institution from the 20th century *assentos*, see also Castanheira Neves (1983), pp. 517 ff., and Bronze (2006), pp. 700–713.

of the cases to which it owed «its origin»[10]), but an authentic (self-sufficient) *general and abstract normative proposition* which presented itself simultaneously as a binding *erga omnes* stable programmatic (anticipatory) prescription (explicitly projected into the future and as such able to introduce a radically new position or «doctrine»), not only with the «force», but also the main intentional and structural features of a (relatively unchangeable![11]) *statute*. The *life* of this institute – whose concept of unity and *rationale* (assuming *à outrance* a certain kind of overlapping normativism and legalism) was explored (deconstructed) and conclusively criticised by Castanheira Neves in a monumental monographic study written between 1973 and 1983[12] – came to an end in 1996 (following an explicit decision by the Constitutional Court[13]). Why do we recall here the main features of this anomalous regime of *assentos* – whose qualification, whether as *legislatio* or *jurisdictio,* if not a *tertium genus*, divided Portuguese doctrine[14]? Certainly because it is important to understand the different procedural devices that nowadays explicitly aim to stabilise judicial jurisprudence. These are procedural devices which, when they assume the form of appeals, preserve some of the nuclear procedural presuppositions of the *assentos* – namely the identification of «conflict of jurisprudence» as the production of «two or more contradictory decisions on the same question of law and under the same legislation» –, the *outcome* of which is or should be, however, completely different.

[10]To use the formulations proposed by Fitzgerald, *apud* Shiner (2007), p. 14.

[11]In 1961, the *Civil Procedure Code* stated that the court in question could not change its fixed decision.

[12]Castanheira Neves (1983).

[13]It was the Constitutional Court Judgment No. 743/96, published in the Official Journal (*Diário da República*) on the 18th. July 1996, that declared partially unconstitutional [with general obligatory force, according to the article 281/3 of the *Constitution of the Portuguese Republic (Constituição da República Portuguesa)*, hereinafter referred to as the CRP] the statute of the article 2 of the *Civil Code*. This unconstitutionality – invoking the article 115/5 of the *Constitution of the Portuguese Republic* (today it corresponds to the article 112/5) [«No statute law is allowed to create other categories of legislative acts or to confer to acts of other nature the power to, with external efficacy, interpret, integrate, modify, suspend or repeal any of its precepts»] – wounded precisely the jurisdictional competence to fixate doctrine with general obligatory or binding force. Another important piece in this complex puzzle is the Decree-Law No. 329-A/95, 12th. December: see specially article 4/2 and article 17/2, the first one revoking the quoted article 2 of the Civil Code, the second stating that the former *assentos* will then on have the same value than the *judgments that stabilise jurisprudence* (those we shall identify *infra*). This latter solution means, as a matter of fact, that those decisions are binding to the cases in which they are pronounced, and constitute judicial jurisprudential guidelines for future cases – which is institutionally translated by different possibilities for appeal on the basis of such decisions when, in future analogous cases, the courts decide differently [see art. 17/2 of the Decree-Law No. 329-A/95, 12th. December: «The *assentos* already pronounced have the value of the judgments pronounced in accordance with the terms of articles 732-A and 732-B»]. For a reconstitution of this complex development, see Castanheira Neves (1994), pp. 67 ff.. See also Teixeira de Sousa (1996), pp. 707–718.

[14]For a brief, clear synthesis of this discussion see Castanheira Neves (1995a), pp. 346–347. See also Castanheira Neves (1994), pp. 88 ff.

The main devices are the following:

α) In civil procedure, there are different possibilities: **(a)** an *amplified (extended) judgment to make jurisprudence uniform (julgamento ampliado da revista)*, with a preventive function, for which, in the due course of an ordinary appeal (as a kind of presentment of divergence), responsibility (convenience or indispensability) is directly assumed by the President of the Supreme Court (even though it may be required by the parties involved) [Civil Procedure Code *(Código de Processo Civil),* from now on CPC,[15] articles 686–687[16]]; **(b)** an *extraordinary appeal to make jurisprudence uniform* (also deciding the *sub judice* case)*,* interposed by the parties, invoking precisely the *contradiction* between the decision on their case and a previous one, both having been produced (as *res judicata*) by the Supreme Court (CPC, article 688[17]); **(c)** an *extraordinary appeal* exclusively *to make jurisprudence uniform* (without deciding the *sub judice* case)*,* invoking a *contradiction* (between two decisions of the Supreme Court) and interposed by the Public Prosecution (*Ministério Público*), when this one is not part of the cause (CPC, article 691[18]); **(d)** an *ordinary appeal* to the *Supreme Court of Justice* on a decision by a lower court, stating that the latter decided contrarily to uniform judicial jurisprudence issued by the former (CPC, article 629/2 c)[19]; **(e)** an *ordinary appeal* to the Supreme Court of Justice on a decision of the intermediate instance (*Tribunal da Relação*), when this contradicts another decision made by the same instance, unless there has already been stated a judicial decision to uniform judicial jurisprudence which conforms with it (CPC, article 629/2 d)[20,21]; **(f)** an *extraordinary appeal for revision*

[15]The numbers of the articles identified in the text all refer to the new version of the *Civil Procedure Code* which, under Law No. 41/2013 of 26th. June 2013, came into force on 1st. September 2013. The notes identify the numbers in the previous version.

[16]Articles 732-A and 732-B in the previous version.

[17]See articles 688–695, articles 763–770 in the previous version. On this subject, see Lebre de Freitas /Ribeiro Mendes (2008), pp. 201–219, Ribeiro Mendes (2009), pp. 183–190, Abrantes Geraldes (2010), pp. 505–530, Abrantes Geraldes (2013), pp. 383–402, Teixeira de Sousa (2007), pp. 18–19.

[18]Article 766 in the previous version. See Abrantes Geraldes (2010), pp. 519–520, and Abrantes Geraldes (2013), pp. 394–395.

[19]Article 678/2 c) in the previous version. On this subject, see Abrantes Geraldes (2010), pp. 47–50, and Abrantes Geraldes (2013), pp. 42–44, Lebre de Freitas/Ribeiro Mendes (2008), pp. 13, 19–20.

[20]See the former Article 678/4, revoked by the Decree-Law No. 303/2007, 24th. August; see Abrantes Geraldes (2013), pp. 44–46.

[21]See also the *ordinary* (but *exceptional*) *appeal* to the Supreme Court of Justice on a decision of the intermediate instance (*Tribunal da Relação*), when this contradicts another decision made by the same instance or the Supreme Court of Justice, unless there has already been stated a judicial decision to uniform judicial jurisprudence which conforms with it (CPC, article 672/1 c) – article 721-A/1 c) in the previous version: this article was introduced by the Decree-Law No. 303/2007, 24th. August. See also, mobilising the same global criteria of identification, article 671/2 b). See Abrantes Geraldes (2013), p. 45, n. 70, pp. 275–316.

of a definitive decision (*res judicata*), based on its incompatibility with a definitive decision made by an international appeal court that is binding upon the Portuguese State (CPC, art. 696 f)).[22]

β) In criminal procedure, there are parallel institutional possibilities: **(a)** an *extraordinary appeal to stabilise judicial jurisprudence* [Code of Criminal Procedure *(Código de Processo Penal)*, hereinafter referred to as the CPP, articles 437/1 and 5], which is *necessarily* interposed by the Public Prosecution, when the Supreme Court of Justice decides contrarily in two different cases; **(b)** an *extraordinary appeal* to the Supreme Court of Justice on a decision made by the intermediate instance (*Tribunal da Relação*), which is *necessarily* interposed by the Public Prosecution, when there is no admissible ordinary appeal and this decision contradicts another made by the same instance or by the Supreme Court of Justice, unless the decision in question complies with the judicial jurisprudence formerly established by the Supreme Court of Justice (CPP, article 437/2 and 5); **(c)** an *extraordinary appeal* (also *necessary* with regard to the Public Prosecution) on any decision which contradicts the judicial jurisprudence established by the Supreme Court of Justice (CPP, article 446/1 and 2); **(d)** an *extraordinary appeal* interposed by the Public Prosecution (the General Public Prosecutor, or *Procurador Geral da República*) exclusively «in the interest of unity of law» (without «efficacy in the process» in question) «whenever there are reasons to believe that an established jurisprudence» is effectively «surpassed» (and should be changed) (CPP, article 447)[23]; **(e)** an *extraordinary appeal for revision* of a definitive condemnatory sentence based on its incompatibility with a definitive decision made by an international court which is binding upon the Portuguese State (CPP, article 449/1 g)).[24]

γ) In administrative procedure, there are three main devices which support the stabilisation of jurisprudence: **(a)** an *extended judgment to make jurisprudence uniform* (produced either by the Central Administrative Court or the Supreme Administrative Court, the intermediate and higher levels of administrative jurisdiction respectively), the opportunity (although not entirely the initiative) for such proceedings being considered and decided by the President of the courts in question in the due course of an ordinary appeal [Administrative Courts Code of Procedure *(Código de Processo nos Tribunais Administrativos)*, hereinafter referred to as the

[22] Art. 771 f) in the previous version: this paragraph was introduced to the article 771 by the Decree-Law No. 303/2007, 24.th August.

[23] The *extraordinary appeal to stabilise judicial jurisprudence* can be determined by the Public Prosecution (the General Public Prosecutor, or *Procurador Geral da República*), more than 30 days after it became definitive (CPP, article 447/1). And it can also be interposed an *extraordinary appeal*, as referred in the text, by the Public Prosecution (the General Public Prosecutor, or *Procurador Geral da República*), from an established jurisprudence, when considering it to be «surpassed», independently of any concrete case (CPP, article 447/2). In both cases, without «efficacy in the process» in question (CPP, article 447/3). See Simas Santos/Leal-Henriques (2008), pp. 204–205, Simas Santos/Leal-Henriques (2011), pp. 214–215.

[24] See Simas Santos/Leal-Henriques (2008), pp. 173–205.

CPTA,[25] article 148]; **(b)** an *appeal to unify jurisprudence* addressed to the *Supreme Administrative Court* by the parties (and also the Public Prosecution), once again citing a *contradiction* between a current decision and a previous one, the decisions in question having been produced either at intermediate or final levels (CPTA, Article 152)[26]; **(c)** an *ordinary appeal* to the *Supreme Administrative Court* on a decision made by a lower court, stating that a decision by the latter contradicts uniform judicial jurisprudence issued by the former (CPTA, article 142/3 c).[27]

All these devices, even though aiming for stability and uniformity, produce an outcome which is completely different from the previous *assentos*: it is no longer a general and abstract programmatic-prescriptive *rule* (abstracting in intention and autonomous formulation from the case in question), but a concrete adjudicative decision (inseparable from the case and from a specific *context of realisation*[28]).[29] This means that it is this decision as such, as an authentic *prior judgment* – an authentic jurisdictional *criterion* – that should be used in future decisions as a model or *exemplum,*[30] with the normative-institutional consequences we have already identified (the possibility of appeal when the new decision contradicts the previous one), but also primarily with a very relevant methodological translation which may be recognised as invoking a (particularly strong) *presumptive bindingness.* The prior judgments in question will benefit from a *presumption of justness* or *correctness* («*Richtigkeit*»), meaning that they should be understood as substantially adequate according to the juridical significances inscribed in the legal system they presuppose. This presumption is, however, refutable: if the judge contemplates

[25]Law 15/2002, 22th. February.

[26]The decision that verifies the existence of the contradiction annuls the impugned decision and replaces it, deciding the controverted question (CPTA, art. 152/6).

[27]See Vieira de Andrade (2012), pp. 393 ff., Aroso de Almeida/Cadilha (2010), pp. 963 ff., 1003–1013.

[28]«[I]f the *assento* was a norm-premise to apply logically-formally, the precedent is a model of solution to mobilise analogically, regarding the *rationes decidendi* of the decided and the *sub judice* cases . . . » Bronze (2006), pp. 710–711.

[29]Some confusion may, however, result (and has effectively resulted) from the procedure used in the publication of judgments, undoubtedly because the judgment-*acórdão* in question is normally identified through (if not with) its brief summary (which has an abstract formulation) [see *infra*, note 54]. Other (more substantial) difficulties in understanding the specificity of this qualified jurisprudence should also be attributed to the a-critical preservation of the procedural presupposition «the same fundamental question of law» (suggesting an understanding *in abstracto* of this question), and also to the formulation of the purpose of «uniformity of jurisprudence» (the much more open term «unity of Law» should be used instead) [see Bronze (2006), pp. 706–707, 713 (and note 97)]. Moreover, there is still the troubling exception of devices **α)-(c)** and **β)-(d)** (concerning a judgment which is not applied to the litigation in course), whose prospective effect will be considered *infra*, section 3.

[30]We shall abstract from the possibility of distinguishing precedents and examples (the first ones being related to «criteria of vertical or horizontal bindingness among the courts», the second ones being also heuristically used «when they do not apply specifically to the matter at hand»): see Antonino Rotolo (2007), p. 178, note 27.

refuting it, he must normatively and methodologically justify this change in orientation, complying with a *burden of contra-argumentation* (*Argumentationslast).* It is relevant to add that the *Präjudizienvermutung* we have just invoked as a specific methodological canon has an explicit prescriptive legal translation in the Portuguese legal order, even though it is not a global one. As a matter of fact, referring (exclusively) to the *extraordinary appeal to stabilise judicial jurisprudence* in criminal procedure, article 445/3 of the CPP confirms that «the decision which solves the conflict does not constitute judicial jurisprudence that is binding upon the judicial courts»,[31] but these courts shall warrant (justify) the divergences concerning «the judicial jurisprudence stabilised in that decision».

1.2. In order to complete this description of the institutional framework, two other devices must be considered, the direct objective of which is no longer to make jurisprudence uniform but to respond to supposed problems of integrity or validity (unconstitutionality and illegality) that affect statutory law. Those devices are: **(a)** the possibility of the impugnation of an administrative statute and the corresponding possible declaration of its illegality, produced *erga omnes* by the competent Administrative Court (CPTA, articles 72–77); **(b)** decisions of the Constitutional Court declaring a statute unconstitutional or illegal *(fiscalização abstracta da constitucionalidade e da legalidade)*, which also enjoy general binding force [*Constitution of the Portuguese Republic (Constituição da República Portuguesa)*, hereinafter referred to as the CRP, article 281]. Even though the feature concerning the extension of juridical effect *(general binding force)* brings those two decisions close to one of the institutional characteristics of the old *assentos*, it should be noted that (unlike the *assentos*!) both undoubtedly benefit from an authentic jurisprudential identity. They are not «positive-programmatic» rules, but instead negative binding declarations of invalidity (producing an effect of cassation),[32] meaning that even when they cannot be treated exactly and entirely as a kind of *negative «legislation»* (exclusively cancelling «some legal provisions from the legal system»), we should understand them as «confined to ascertaining the normative content implicit in the Constitution».[33]

2. It is now time to ask how dogmatic and meta-dogmatic debate deals with the normative constitutive tasks of judicial jurisprudence, i.e. with the possibility, effective existence and degree of normative force of judge-made law. It is not difficult to simplify the discussion, concentrating it into two major (though differently proportioned) trends.

2.1. The first, presupposing a normativistic *modus* for conceiving of universality or universability (inseparable from general and abstract rules) – if not the explicit claim to understand (think and perform) law as a system of norms more or

[31]The previous formulation of this article imposed a bindingness upon the judicial courts. As we shall see *infra* (2.2.1. and 3.), these statutory *differences* are not methodologically so relevant as it may at first sight appear.

[32]In this sense, see in particular Castanheira Neves (1983), pp. 611–616.

[33]In the words of Antonino Rotolo (2007), p. 178.

less radically supported by a legalistic concept of bindingness (inseparable from political-constitutional *potestas*) –, argues that the status of judicial jurisprudence as source of law depends on the competence to create such rules or at least to produce decisions with «general binding force». This means concluding that judicial jurisprudence *was* explicitly a direct source of law when it produced *assentos*, as it *is* now unequivocally a (direct, voluntary) source of law when it produces *erga omnes* declarations of unconstitutionality and illegality[34,35]. Since they remain associated with the context of a concrete case, all the other manifestations of jurisprudence – including the stabilising *judgments* as *qualified precedents*[36] (naturally notwithstanding the admissibility-inadmissibility rules of appeal generally identified and the kind of *vertical bindingness* they generate[37]) – have an exclusively de facto validity or effective weight, even though this may certainly be more or less persuasive – and with degrees of influence which may depend on the rank of the court, the explicit intention to make jurisprudence uniform (if not to adopt a prospective orientation), the integration within an established trend (if not line) of jurisdictional decision, and the support from a dominant doctrinal *communis opinio.*

The main arguments proposed by this general trend (notwithstanding the relatively wide spectrum of conceptions it covers) have less to do with a generic affirmation of a family identity (confirming the Portuguese order as a characteristic

[34]See exemplarily Inocêncio Galvão Telles (1999), pp. 141–145, Oliveira Ascensão (2005), pp. 318–331, esp. 329–331, Santos Justo(2012), pp. 206–208.

[35]Sometimes an argument is constructed upon the «publication rule» defined in Article 119/1 g) of the Constitution. For a critical exploration of this argument (the corresponding constitutional prescription in this context is Article 122/2 g), see Castanheira Neves (1983), pp. 410 ff.

[36]In Judgment TC 575/98, the Constitutional Court stated that the *amplified judgments to make jurisprudence uniform* (732-A and B) constitute as such *qualified judicial precedents* ("precedentes judiciais qualificados"). As the problem in question had explicitly to do with the revocation of the *assentos,* the Constitutional Court was, as a matter of fact, considering explicitly the statutory solution which conferred to the former *assentos* the same value of these *judgments to stabilise jurisprudence* (Decree-Law 329-A/95, article 17/2). See Isabel Alexandre (2000), pp. 103–163, pp. 103 ff., 110–118, 125–136, 154–163, Abílio Neto (2010), pp. 15–16. Menezes Cordeiro stated on this subject that the revocation of the *assentos*, and the prescription that the former *assentos* would have the same binding force of the *amplified judgments to make jurisprudence uniform* implied that the statute in question (17/2 of the cited Decree-Law 329-A/95) should be recognised as organically unconstitutional (not only because it meant to be retroactive, but mostly because it was enacted by the Government, in a matter which was reserved to the Parliament): see Menezes Cordeiro (1996), pp. 799–811, 804–811. See, critically, Teixeira de Sousa (1996), *passim*.

[37]Some other perplexities might result from the change in the legal regime from *assentos* to *decisions that stabilise jurisprudence*. On this subject, Isabel Alexandre refers that, in civil procedure, the latter can be more binding than the former ones, since the *assentos*, though they had general binding force, did not interfere in the legal regime of *appeals*. Therefore, if a judicial decision issued after the *assento* contradicted the general rule corresponding to this *assento*, there could be no appeal on this basis. Nowadays, if a judicial decision taken after the *decision to make jurisprudence uniform* contradicts this one, there is an autonomous basis for a specific appeal, as mentioned *supra*, 1.1. α). See Isabel Alexandre (2000), p. 159 (invoking Alberto dos Reis (1985), p. 266).

code system), than with a specific interpretation of the Portuguese constitutional order and the understanding of the independence of judicial power that this order requires, if not directly with the four *secondary rules* prescribed at the beginning of the Civil Code (CC, articles 1–4[38]) or (more significantly still) with the constitutional prescription dealing precisely with the issue of the «independence of the courts» (CRP, article 203) in which the said courts are stated to be bound exclusively by statutory law (the contrast with the German *Gesetz und Recht* offering a persuasive line of argumentation). This justification does not change significantly (nor does it alter the conclusion that can be drawn) when the proposed argumentation recognises the possibility of judicial jurisprudence playing a *creative* role in the concrete cases, just as it does not have to change significantly when the position in question (if not overcoming normativism, at least rejecting a strict legalist conception) accepts an unequivocal extension of the concept of system, involving not only rules but also principles.[39] It does not change, or does not have to change, under the condition (or presupposition) that such recognition and expansion (more or less explicitly treating principles and rules as *norms*) remains compatible with an a-problematic distinction between *interpretation* and *application* (or at least with a concept of the creative role of jurisprudence which may be said to be predominantly hermeneutic). If this is the case, the (de facto) relevance of prior judgments may, as a matter of fact, focus on the nucleus of interpretation, reducing the constitutive importance of judicial jurisprudence (as persistent jurisprudence) to the so-called *precedent of interpretation* (operating in a universalised or generalised way).[40]

2.2. The second trend (in contrast with the broad spectrum of the first) focuses on the possibilities of Castanheira Neves's *jurisprudentialism*[41] and explores judge-made law beyond a strict dogmatic perspective. Thus the problem of the constitutional admissibility (or legitimacy) of *Richterrecht*, notwithstanding its autonomous

[38]The interpretation of this ensemble of secondary rules produced (and still produces!) recurrent arguments, not only when the rules in question still included reference to the *assentos*, but also since this mention has been suppressed.

[39]As a matter of fact, it should not be forgotten that in civil law contexts it is relatively common to hear that the «"universalization" argument» is decisive in treating a judicial decision as a precedent and that this argument is inseparable from the experience of principles: see exemplarily Troper/Grzegorczyk (1999), pp. 126–127 [«Therefore it is perfectly safe to say that, in France, what is really a precedent is the formulation of principle . . . » (*Ibid.*, p. 127)]. However, the relevant question is not this one. The relevant question concerns the kind of concept of principles that is actually invoked here, since the (explicit or implicit) purpose is to understand a universalisation process which remains a-critically bound by a normativistic concept of (general and abstract) rule.

[40]With reference to the dichotomy proposed by Troper and Grzegorczyk, distinguishing between *precedent of solution* and *precedent of interpretation* (the former presenting a ruling for the solution of a case and the latter «determining an appropriate interpretation of written law or of legal principles for the cases of the type in question», concluding that «the latter is more easily accepted» in the system of codified law»: *ibidem*, p. 126. See also (concerning this dichotomy), Bankowski/MacCormick/Morawski/Ruiz Miguel (1999), p. 484 (some of the formulations quoted are from this last article).

[41]See, in particular, Castanheira Neves (1998), *passim*.

dogmatic and prescriptive relevance (highlighted in the answers provided by the first trend[42]), should now be considered (and problematised) from the perspective of two overlapping explicit meta-dogmatic interpellations, the first concerned with the system and legal methodological reflection **[2.2.1.]** and the second involving an explicit answer to the problem of the sources of law (in an explicitly *non-traditional* way) **[2.2.2.]**.

2.2.1. The connection between rethinking the legal system and the methodological perspective – as an *internally plausible* reflexion on the *praxis of realisation*, a praxis whose *prius*, in its permanent novelty and uniqueness, corresponds to *practical controversy* – makes perfect sense if we introduce the key reference to an autonomous (institutionalised) understanding of *legal rationality.* According to this conception, legal rationality (in its nuclear analogical *modus*) corresponds to an irreducible main dialectics, the one we identify invoking the perspectives of *system* and *problem* (and the constitutive circle, if not «methodological unity», they produce). The system in question is, as a matter of fact, conceived of as an open, dynamic one, with several different (not methodologically equivalent) strata in permanent regressive re-composition. One of these strata is precisely judicial jurisprudence (or, alternatively, *judge-made law*). The others consist of normative principles (taken as *jus* and *foundational warrants*), statutes, legal dogmatics and legal reality.[43]

It is the methodological priority of controversy that gives this re-composition its unmistakably specific meaning. On one hand, because the *perspective of concreteness* restores *interpretation* to its fully normative (*not* hermeneutical) «integral sense» of «the realisation of law» (an «integral sense» which is incompatible with any methodologically plausible splits between *interpretation* and *application*, *interpretation* and *filling of gaps*).[44] On the other hand, because the immediately constitutive juridical relevance of the controversy (distinguishing *concreteness* from pure *singularity*) enables us to move beyond a purely topical assimilation of legal materials, not only introducing a decisive counterpoint between foundational warrants *(fundamentos)* and rules or criteria *(critérios)* – i.e. distinguishing the systemic layers that should be assumed and treated as such – but also attributing different presumptions of *bindingness* or normative force to these layers, all of which are, in fact, treated as (explicit or implicit) rebuttable presumptions (whose refutation determines a particular burden of contra-argumentation),[45] with principles (as warrants) benefitting from a presumption of *communitarian validity*, statutes (as criteria) from a presumption of *political-constitutional pedigree* or *authority-potestas*, legal dogmatic models (as warrants or criteria) benefitting from a presumption of *rationality* or *rational conclusiveness* and, last but not

[42] Albeit with the a-problematic support of a silent (not explicit) concept of Law.

[43] Castanheira Neves (1993), pp. 77 ff., 155–159, Castanheira Neves (1995c), pp. 109 ff.

[44] Castanheira Neves (1992), pp. 78 ff., Castanheira Neves (1993), pp. 74–77, 83–154, Castanheira Neves (2003), pp. 45 ff.

[45] Castanheira Neves (1993), pp. 154 ff., Castanheira Neves (1995b), pp. 82–90.

least, precedents-*exempla* (as criteria) benefitting from a singularly contextualised presumption of *correctness (justeza)*.[46] Allusion to this multi-layered system is indispensable to understand the answers that, in contrast with the first trend, this second one is able to provide, concluding that *assentos* (even though produced by courts) *did not have* the (systemic) identity of jurisdictional criteria (they required the methodological treatment due to general and abstract statutory rules), and that all the other court decisions mentioned (including the stabilising *judgments*), when invoked as criteria for later decisions, *do have* the systemic-methodological identity of authentic judicial rulings, benefitting from a basic presumption of correctness (with varying degrees of strength and, therefore, in the event of any deviation, requiring more or less intensive counter-argumentation).

2.2.2. This systemic-methodological perspective, which brings this proposal (at least with regard to precedents) significantly close to those assumed by Kriele, Alexy and Pawlowski[47] (but also Orrù[48]) – in the same way that, assuming the «civilian» institutional specificity of the Portuguese legal order, it rejects Fikentscher's concept of a strictly binding *Fallnorm*[49] –, is perhaps enough to consider the bindingness of single precedents or prior judgments (considered as such), but clearly insufficient to put globally the problem of judge-made law. This problem requires an answer where the theme of *sources of law* may be explicitly *re-thinked*. Once more Castanheira Neves's *jurisprudentialism* opens the path to that answer, not only considering the constitutive process specifically involved in judicial experience[50] (in which law is constituted as *judicium*, precisely «as it is adjudicatively realised», in a peculiar temporal dimension of the present which presupposes the system as a rationalising *tertium comparationis*, if not an indispensable condition of *thirdness*), but also by arguing that this process in civilian systems (in order to successfully correspond to a constitutive and objectivising integration in the *corpus juris*) requires the decisive participation of legal dogmatics (as the only systemic stratum able to reflexively consider the dynamics of the legal system and the *system/problem* dialectics). This means assuming the importance of a normatively productive *iuris-prudentia* as *jurists'*

[46]See also Bronze (2006), pp. 627 ff. and Linhares (2012), pp. 58 ff.

[47]Cfr. the reconstitution proposed by Castanheira Neves (1995b), pp. 85–86 with the one proposed by Alexy/Dreier (1999), pp. 43–44.

[48]The very persuasive pages where Orrù recognises a mere difference of degree between common law and civil law systems should be recalled: *Richterrecht*, cit., pp. 109–111(«Differenze relativamente minime tra *common law* e *civil law*»). «In ogni caso, sia il giudice continentale, sia quello inglese sono obligati a consolidare le loro decisioni inserendole nel sistema: possono essere diversi i modi in cui questa coerenza viene cercata e dimonstrata, ma il risultato cui si deve arrivare è sostanzialmente il medesimo . . . » (*Ibid.*, p. 111).

[49]Castanheira Neves, «Fontes do direito», cit., pp. 86–88.

[50]For Castanheira Neves, the problematic of the *Sources of Law* can only be correctly understood by considering the constitution of law as a true *constitutive* process, with different consequent (successive) moments – the *material moment*, the *validity moment*, the *constitutive moment* and the *objectivation moment*: *ibidem*, pp. 56 ff. In the same sense, see Bronze (2006), p. 715 ff.

law (Juristenrecht), integrating the reciprocally constitutive contributions of judicial jurisprudence and legal doctrine, without neglecting any plausible dialogue with meta-dogmatical legal discourses.[51]

3. How do the institutional framework described [*supra,* **1.**] and the perspectives on judicial lawmaking (and its «character» and limits) that have been briefly reconstituted **[2.]** specifically project themselves within the problem of *change (of law)* and the convenience of dividing over time the possible effects of the decision or decisions which introduce such a change? This problem, invoking as concurrent claims on one hand the correctness and flexibility of decisions (the attention paid to the specific concreteness of actual cases), on the other hand the reasonable expectation that precedents will be followed, together with the rejection of retroactivity and the protection of stability and reliance (if not attention to individual rights in general and human rights in particular), focuses our attention on the nucleus of *prospective overruling*.

We have already said that no authentic *prospective overruling* (in the strong sense introduced by American common law) is conceivable in the Portuguese legal system. Some affinities may, however, be considered, paying attention to the institutional paths already described, in conjunction with the interpretive (dogmatic and meta-dogmatic) perspectives identified.[52]

When the invoked previous decision is not *qualified* by an institutionally explicit aim of stabilisation or uniformity, it may simply be said that the problem of time (or divisions of time) is not, as such, relevant, either the concept of mere persuasive *authority* (and the traditional theory of legal sources) is followed, or an authentic *presumptive bindingness* (whether sustained or not in a revised theory of sources) is assumed. All the difficulties associated with the possible change in the equilibrium between certainty and correctness are considered here within a specific context of application or realisation and, as such, posed and solved in a plausible (internal or/and external) contextualised exercise in justification – with the certainty that this will be particularly demanding when the methodological connection between the burden of argumentation and the intention to deviate from the precedent is recognised, and even more so when the objectivising (rationalising) intervention of legal dogmatics and its criteria are required, with the possibility of deviating from these criteria (argumentatively rebutting the corresponding *presumption of rationality)*.

[51] Castanheira Neves (1995b), pp. 88–93.

[52] We shall not explore an evident possibility of the determination of a prospective effect, namely the one (also very common in civilian systems) performed by legal doctrine. This happens when «scholars, in commenting on important decisions of the highest courts, are able to foresee some possible overruling» [Troper/Grzegorczyk (1999), p. 134] and this foresight may have a very persuasive argumentative backing when the *obiter dicta* of the decisions give explicitly that sign: «Sometimes it happens that, examining the arguments used and paying attention to the *obiter dicta*, one may guess that the court is probably going to change its orientation in future cases . . . » (Taruffo/La Torre (1999), p. 179).

Nothing changes substantially when the previous decision invoked is a qualified judgment (stabilising jurisprudence). What happens is that the judgment deviating from this stabilising jurisprudence, regardless of the degree of correctness of its justification, allows for an appeal to the Supreme Court, deferring the definitive justification (the confirmation or rejection of change) to another moment and another level of *jurisdictio*. It can only be acknowledged that what does happen is that the risk every lower court always faces (that its departing decision may be reversed by the higher court) is significantly greater here (with the motivational effect that can easily be predicted). However, the troubling exception concerns the devices identified in sections **α)-(d)** and **(e)** and **β)-(b)** and **(c)**. The question that should be asked regarding this exception (which has no unique or unequivocal answer) is the following: does the inadmissibility of the appeal (an inadmissibility justified by the congruence of the decision in question with a previous qualified judgment) allow us to speak of a vertical formal bindingness? Whatever the answer may be, what can be said in general terms is that this inadmissibility corresponds to an institutionalised constraint which has an unequivocal preference for stability – although this does not mean that deviation is not possible (and justifiable). It will certainly be possible, *a fortiori*, if (as is the case with the second outlined trend) [*supra*, section 2.2.1.] we seriously take the possibility of methodologically (argumentatively) rebutting the statutory *presumption of authority* (whenever the solution obtained in concrete, mobilising a statute as a criterion, conflicts irremediably with a principle or an argument of principle).

What of the process of producing this qualified jurisprudence as the last word on an ordinary and extraordinary appeal? When the qualified judgment decides the case at bar, the openness to flexibility and change seems unequivocal (and all will depend on the context in which the case is applied or realised). The exception derives now from the devices alluded *supra* in **(α)-(c)** and **(β)-(d)** and it is precisely here that we have the most significant correspondence to a prospective ruling, even though the legally presupposed conditions – the status of Public Prosecution *when it is not a party* in the first possibility and overcoming the 30-day period after *res judicata* in the second – seem to have little to do with reliance or guarantee (considering the possibility of change). What we are indisputably faced with here is a stabilising judgment that is not applied to current litigation (which does not substitute the previous *res judicata* decision), but is only imposed on future decisions. This exclusion of the case at bar certainly corresponds to a peculiar regime.[53] Its weight is not, however, sufficient to dictate that the judgment in question or the criterion it generates should necessarily be treated in the future as an abstract proposition like the *assento* (even less, as a kind of a statute). On the contrary, it seems perfectly plausible and desirable that the ruling, as such, may be experienced in the

[53] See Ruiz Miguel/Laporta (1999), p. 286, discussing an analogous regime (former art. 1718 Civil Procedure Act). This regime was changed, but a plausible analogy remains: see articles 490–493 of the Civil Procedure Act, consecrating possibilities of appeal to be proposed not only by the Public Prosecution (*Ministerio Fiscal*) but also by the Ombudsman (*Defensor del Pueblo*).

future without abstraction from the concrete case that originated it (even though its adjudication had no effect on that case!) or, to be more precise, that the said ruling, as is the case with all other stabilising judgments – notwithstanding the abstract formulations that still correspond to its *summaries* (and which generalise the context in question and the corresponding ruling)[54] –, may be treated methodologically as an authentic jurisprudential criterion. Thus its binding force *pro future* may be inseparable from the presumption of correctness or reasonableness that favours it and is not treated as an anomalous presumption of authority-*potestas*.[55]

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[54]Although this is not significantly different from the procedure regularly used when court decisions (including those which have no stabilising purpose) are published in official pages (with a summary of their *rationes decidendi*). In all of them, it is naturally also possible to access the complete decision.

[55]One final correspondence, certainly not so interesting (since it is associated with an adjudication which is mainly *negative*) involves a singular recent exemplum dealing with the device described *supra*, **1.2.(b)**, i.e. a decision of the Portuguese Constitutional Court in which a peculiar deferring of effects may be noted (Decision No. 353/2012). This decision (Judgment-Ruling No. 353/2012) referred to the State Budget Law for 2012 (Law No. 64-B/2011 of 30th. December) and declared Articles 21 and 25 therein – concerning, respectively, government employees and retired people – unconstitutional as violations of the principle of equality [One of the measures in this Budget (for the explicit purpose of financial austerity) was to suspend holiday and Christmas subsidies for government employees and retired people whose basic remuneration or monthly pension amounted to over € 1100, and to proportionally reduce these subsidies for government employees and retired people whose basic remuneration or monthly pension amounted to between € 600 and € 1100]. These articles were declared unconstitutional with general binding force but, unlike the declaration of *ex tunc* effects which is normal – in accordance with the terms of Article 282/1 of the CRP – the effects of the decision were postponed under the terms of Article 282/4, meaning that the declaration of unconstitutionality produced no effects in the year 2012 (to which the mentioned Budget Law respected). This deferring effect was justified by the Constitutional Court on the grounds of the economic condition of the country and the *fact* of the execution of the Budget, since the decision was taken 6 months after it had began to be executed [Constitutional Court Judgment No. 353/2012, published in the Official Journal (*Diário da República*) on 20th. July 2012]. The correspondence to *prospective overruling* is certainly less relevant than the previous example, even though we may invoke in defence of the present one the fact that the declaration of unconstitutionality in question is not purely negative, which simply means emphasising that the decision in question not only declares the illegitimacy of the said budgetary measures, but also states-specifies the sense in which its provisions need to change (albeit in the new 2013 Budget). This is certainly not enough to establish a family resemblance to the Italian *sentenze monito,* but helps us to appreciate a certain prospective intention! [On a possible comparison between *prospective overruling* and *sentenze-monito*, in the Italian system of law, see Federico Roselli (1999), pp. 280–283].

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Chapter 9
Judicial Rulings with Prospective Effect in Italy

Michele Taruffo

Abstract In the Italian legal system there are just a few rules concerning precedents, but there is no binding precedent. Even the judgments of the supreme courts are not binding: they have just a weak persuasive force, mainly because of their high and excessive number. However, precedents are frequently quoted, but mainly in the form of short and general statements. In Italy there is no prospective overruling.

1. In the Italian legal system there are no general rules directly concerning precedents in the proper meaning of the word. Only in some rules of the code of civil procedure there are indirect references to precedents. For instance, art.118 disp. att., c.p.c. says that that judge may make a reference to corresponding precedents in the opinion that justifies the decision. Moreover, art.360 *bis* n.1 of the same code says that the appeal to the supreme court (the *Corte di Cassazione*) is not admissible when the decision appealed decided legal issue following the case law of the same court, and the appeal does not justify a further decision on the same issues. Notwithstanding the lack of general rules, in the last decades the quotation of precedents has become of a common –and even excessive- use at any level of civil and criminal jurisdiction.

The Italian legal theory is not unanimous about the problem of whether or not precedents should be considered as proper "legal sources" (such as statutes), but the prevailing opinion is positive, mainly because precedents are actually referred to in the legal practice as if they were true legal sources.[1] Moreover, the Italian case law includes every year dozens of thousands of decisions, mainly of the supreme court (the *Corte di Cassazione*), but also of the Constitutional Court and of the most important Appellate courts, and even –several times- of courts of first instance. The Constitutional Court issues just some hundreds of judgments per year, but the *Corte*

[1] See e.g. Pizzorusso, A., *Fonti del diritto,* 2nd ed., Bologna-Roma, 2011,705.

M. Taruffo (✉)
Professor of Civil Procedural Law, University of Pavia, via Guicciardini n.10, 20129 Milan, Italy
e-mail: michelino.taruffo@unipv.it

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di Cassazione produces an impressive flow of judgments: to consider only the civil justice, they are ordinarily more than 30,000 (thirty thousands!) every year. This court has a special office (called *Ufficio del Massimario*) performing the function of extracting from the court's opinions the most relevant legal rules (called *massime*) that are deemed to be published and quoted.

This is the most peculiar and maybe interesting feature of the Italian system of precedents.[2] Although the judgments (with their opinions) are published and can be read in their complete text (and many times they are published and commented in legal journals), the largely prevailing habit is to make reference to such short statements (usually of just a few lines), that are the *massime.* Of course such a use is now very easy because of the immediate connection with the data bank of the supreme court. Then it is now "normal" to find dozens of quotations almost at any paragraph of a legal brief or of a decision, independently of the real relevance of such quotations for the specific legal question.

It should be underlined that such a use (and abuse) of the *massime* has not much to do with the reference to precedents in the proper sense of the word. While precedents, and their force, are based upon the analogy between the *facts* of the former case and the *facts* of the case at hand, nothing similar happens with the Italian "precedent". Also because the *Corte di Cassazione* deals only with legal issues and does not consider the fact of the case, but mainly because of the general habit of Italian lawyers to deal only with legal questions and not with facts, the *massima* usually is just a short statement expressing a merely *legal* proposition: sometimes it simply repeats what is said in an article of a statute, while many times it says how a legal rule should be interpreted or how a general legal principle should be intended and applied. There is no reference to the facts of the case that has been decided (although, but very rarely, sometimes there is a reference to the specific *legal* questions of the case). It should be clear, therefore, that to speak of "precedents" in the Italian legal system may be misleading, if one has in mind the proper Anglo-American notion of a precedent.

2. Lacking any specific regulation of the force and effect of a precedent, there is no specific theory about it. Correspondingly, any precedent has only some merely *persuasive* effects. However, such effects may vary in their force from case to case. Usually the decisions issued by the *Corte di Cassazione* are said to be specially persuasive for the following judges, and also for the court itself. Actually in several cases a precedent of the supreme court is followed by the court and by lower judges, and the same *massima* is quoted in many decisions. When it happens, there is a *giurisprudenza consolidata* or *conforme.*

However, the persuasive effect of the precedent may be –and often is- very weak, for many reasons. On the one hand, the *Corte* itself contradicts its own case law, and

[2] About this system see more broadly Taruffo, M., *Precedente e giurisprudenza*, in *Rivista trimestrale di diritto e procedura civile,* 2007, 709; Id., *Precedents in Italy,* in *Precedents and the Law. Reports of the XVIIth Congress International Academy of Comparative Law. Utrecht, 16–22 July 2006,* ed. by E. Hondius, Bruxelles 2007, 179.

this may happen dozens of times every year. For instance, different civil chambers of the court may decide the same legal issue in different ways. Even precedents issued by the *Sezioni Unite* of the court (a special panel whose function should be just that of fixing precedents and to solve conflicts among the decisions of the "simple" chambers), are often unable to condition and to orient subsequent decisions issued by these chambers. On the other hand, the judges of the lower levels (i.e. intermediate appellate courts and first instance judges) are not formally bound to follow the precedents of the supreme court. It may happen –and actually sometimes it happens- that a judge of first instance criticizes a decision of the supreme court and solves a legal issue in a completely different way. In such a case, the only obligation of the judge is to justify his "independent" decision.

In Italy there is no special theory of judicial decisions (such as the so-called declaratory theory). The general legal theory is coherent in acknowledging that any interpreter determines the meaning of the rule that is interpreted.[3] The same may be said about the judge (any judge): actually he has the inherent power to interpret the legal rules of any level (constitutional rules, general principles, statutory rules), provided he does it by means of the standards of legal interpretation that are commonly recognized. In a sense, the judge has a broad discretionary (and creative) power as an interpreter of the law. The supreme court is the authority of the last instance performing the function of controlling the correctness of the legal decisions made by the judges of the lower levels. Therefore, in most cases precedents are connected to statutory rules because they are *interpretations* of such rules or principles.

Being acknowledged the creative role of the judge-interpreter, there are no special problems about the "judge as legislator". It is usually recognized that in many cases the judges actually make the law, while the legislator is inefficient, slow and inadequate.

3. In the Italian system the main problems concerning precedents is –as abovesaid- the terribly excessive number of judgments issued by the *Corte di Cassazione*. This is the cause of great confusion, variability, disorder in the case law, and –in a word- of the usually weak force of precedents.

4. The retrospective effect of judicial decisions is not discussed in the Italian legal doctrine. It is assumed as normal and unproblematic that *of course* many decisions (with the exception of injunctions imposing or prohibiting specific future behaviors) deal with factual and legal situations that occurred in the past. Then the main function of the decision is to restore the violations of rights, to compensate damages, to provide a remedy to past illegal behaviors, and so forth. If, for instance, the decision says that a contract was void for lack of the conditions required by the law, necessarily the effect of the decision goes back to the moment in which the contract was concluded. If a car accident caused damages, of course the compensation is referred to the past, i.e. to the damages suffered by a person. In some cases this

[3] See e.g. Gentili, A., *Il diritto come discorso,* Milano 2013, 7, 151; Guastini, R., *L'interpretazione dei documenti normativi,* Milano 2004.

does not happen: for instance, a judgment of divorce does not go back, since its legal effects begin at the moment when the decision is final, but the conditions determining the divorce emerged in the past.

5.-6.-7.-8.-9. In the Italian legal system there is no prospective overruling in the proper sense of the word. As abovementioned, in the case law –and even in that of the *Corte di Cassazione*- there is an extremely high frequency of changes in the interpretation of the same legal rule or principle. But it happens when the court decides a specific case and interprets the law that has to be applied in that case. When there are precedents, normally the court (or any other judge) makes a reference to such precedents and sometimes the precedent is followed. When the decision does not follow the precedents, usually the judge explains the reasons why he decides that way. It may be said that it is an *overruling,* since the precedent is set aside, but it is not *prospective*, since it is already set aside just in the diverging decision. In a word: the judge does not overrule "for the future"; he simply decides not to apply the precedent and explains the reasons why he does not follow the precedent *just in that case*. Nothing strange in it, if it is considered –as abovementioned- that the judge has a broad discretionary power in the interpretation of the law. So to say, he is not an "undisguised legislator": he is acknowledged as an active and creative interpreter that determines the meaning of the rule that applies as a standard to decide the case. When a precedent is not applied, no problem. It simply means that the case is decided in a different way.

Part II
North-American Jurisdictions

Chapter 10
Retroactivity and Prospectivity of Judgments in American Law

Richard S. Kay

Abstract In every American jurisdiction, new rules of law announced by a court are presumed to have retrospective effect – that is, they are presumed to apply to events occurring before the date of judgment. There are, however, exceptions in certain cases where a court believes that application of the new rule will upset serious and reasonable reliance on the prior state of the law. This chapter summarizes these exceptional cases. It shows that the proper occasions for issuing exclusively or partially prospective judgments have varied over time and that there are still substantial differences in approach according to the particular jurisdiction and the kind of law under consideration. The chapter concludes with a brief survey of some of the still unresolved jurisprudential and constitutional problems raised by recognition of the power of courts to issue non-retroactive judgments.

Introduction

Appellate decisions generally consist of two elements – the resolution of a dispute and a statement of law explaining that resolution (Stone 1985, p. 188). The resolution of the dispute is necessarily only retroactive – a judge cannot resolve a case before it arises. Therefore, this report discusses prospectivity and retroactivity only with respect to the general statements of law explaining those resolutions. Because such statements are a court's best explanation of the legal rules governing those facts, it follows that they should also apply to cases with the same facts that arise after the judgment. Every reasoned judgment, therefore, is always *at least* prospective. But, if a court thought its reasoning was appropriate for facts that arose before the judgment in the one case before it, why should it not apply that reasoning in other cases based on facts that occurred before that judgment? In this sense, it seems logical to apply the legal rules announced in a judgment retroactively as well.

R.S. Kay (✉)
School of Law, University of Connecticut, 65 Elizabeth Street, Hartford, CT 06105, USA
e-mail: Richard.kay@law.uconn.edu

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The idea that rules declared on Day Two govern people's actions on Day One raises immediate alarms. In American law, as in most law, retroactive rules are disfavored. The United States Supreme Court expressed the prevailing attitude thus:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Prods., 511 U.S. 244, 265–66 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990), (Scalia, J., concurring) (citations omitted)). Of course, even statutes written to apply only prospectively have a necessarily retroactive effect. People reasonably assume that the law will stay as it is when planning some activities, so any change in the law will upset some settled expectations (Fisch 1997, p. 1087; Alexander and Sherwin 2001, p. 152). But, apart from this inevitable effect, American courts interpreting legislation indulge a strong presumption against retroactivity. *Landgraf* (1994, p. 265).

Several provisions of the Unites States Constitution are motivated, at least in part, by concerns about the evils of retroactive law. Article I, Sections 9 and 10 prohibit "ex post facto" laws,[1] although the Supreme Court has interpreted those provisions to prohibit only laws imposing or increasing *criminal* penalties on past conduct. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). Article I, Sections 9 and 10 also prohibit "bills of attainder" or legislative declarations of criminal guilt. Article I, Section 10, Clause 1 forbids states – but not the federal government – from "impairing the Obligation of Contracts." The Fifth Amendment prohibits the taking of property without just compensation.[2] Finally, the Fifth and Fourteenth Amendments prohibit state and federal governments from depriving any person of "life, liberty or property without due process of law." Due process has been construed to require that every law be a rational means of achieving a legitimate public purpose. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1954). In meeting this requirement, "retroactive legislation [has] to meet a burden not faced by legislation that has only future effects." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). But it is enough if the retroactivity of the law is itself rationally justified. *Pension Benefit Guar. Corp.*, (1984, p. 730).

Notwithstanding this well-established hostility to retroactive legislation, the presumption is quite the opposite when it comes to the judgments of courts. The

[1] Article I, Section 9, Clause 3 refers to concerns on a federal level, whereas Section 10, Clause 1 concerns state laws.

[2] The "takings" prohibition strictly applies only to the federal government but the Supreme Court has held that an identical limitation is imposed on the states by the Due Process Clause of the Fourteenth Amendment. *Chi. B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

strong presumption is that statements of law contained in judgments – even when they announce new rules or overturn old ones – apply to conduct predating that judgment.

This seeming inconsistency derives from the "declaratory" theory of adjudication – the historical view of legislatures as making new law and of courts as finding and declaring pre-existing law.[3] The theory had its roots in the Blackstonian understanding of judgments as merely "the principal and most authoritative evidence" of a law with a prior and independent existence (Blackstone 1765, Vol. 1, p. *69). Under this view, even when a court announced a new common law doctrine, it was merely restating objective reason – or "established custom" or "divine law", something which had always existed and had never varied (Blackstone 1765, Vol. 1, pp. *69–70). Courts, that is, are assumed to engage in interpretive not creative acts.[4] Joseph Story, a preeminent early American legal authority, embraced this idea with enthusiasm. Legal rules, he claimed, were "antecedent" to judicial decisions and the latter were valuable only for "their supposed conformity to those rules" (Story 1852, pp. 503, 506). The theory that legislatures make new rules while courts simply recognize controlling rules that have been there all along explains why rules announced by the legislature have only prospective effect while those announced by judges have retroactive effect as well. Partly for this reason, the constitutional provisions that prohibit retroactive laws generally have been held inapplicable to judicial acts.[5]

Modern jurisprudence, of course, has largely debunked this simple picture and has recognized an inevitable law-making power in courts.[6] From this recognition, however, it should follow that the retroactivity of rules arising from adjudication is as worrisome as that associated with legislation. Once we recognize that courts also may formulate "new rules," we must account for cases in which people have acted in substantial and reasonable reliance on the previous state of law. Why not apply a new judicial rule, like a new legislative rule, only to the future?

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[3] For an example of this theory being used in a judicial decision, see *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908).

[4] As noted by George P. Fletcher, courts do not "bring new laws into being," but provide "readings or renditions of the meaning implicit in some independently existing, external object." Fletcher (1985, p. 1273). William Blackstone also commented that "[J]udges do not pretend to make a law but to vindicate the old one from misrepresentation." Blackstone. (1765, Vol. 1, pp. 69–70).

[5] In keeping with this principle, see *Frank v. Mangum*, 237 U.S. 309, 344 (1915) (ex post facto laws); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924) (impairment of contracts). However, occasionally judicial acts are contravened by constitutional law; see *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1041–45 (E.D. Wis. 2010) (retroactive application of new tort liability violates Due Process Clause of Fourteenth Amendment). The United States Supreme Court has sometimes made an effort to restrain judicial innovation that may result in an unexpected imposition of criminal liability. This is discussed in Part III.A *infra*.

[6] As noted by Richard H. Fallon, Jr. and Daniel J. Meltzer: "It would only be a slight exaggeration to say that there are no more Blackstonians." Fallon and Meltzer (1991, p. 1759).

An example from 1848 illustrates the point. *Bingham v. Miller*, 17 Ohio 445 (1848). The defendant in a contract action pled that she was a *feme covert* and thus immune to legal action. In response, the plaintiff introduced into evidence an act of the Ohio legislature dissolving the defendant's claimed marriage. The Supreme Court of Ohio held that legislative divorce was unconstitutional under the doctrine of separation of powers. Nevertheless it affirmed the judgment for the plaintiff (*Bingham* 1848, p. 447). The legislature had exercised this power for over 40 years and to:

> declare all the consequences resulting from [legislative divorces] void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted, and children born, and it would bastardize all these, although born under the sanction of apparent wedlock, authorized by an act of the legislature before they were born .... On account of these children, and for them only, we hesitate .... [W]e are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional .... We trust we have said enough to vindicate the constitution, and feel confident that no department of state has any disposition to violate it, and that the evil will cease.

Bingham (1848, pp. 448–49).

In the early twentieth century, as the force of the declaratory theory began to wane, the idea of limiting judgments' effect to future transactions was increasingly proposed as a reasonable approach when courts created new legal rules and especially when they overruled established precedent. In 1921, Chief Judge (as he then was) Benjamin Cardozo noted that in some cases:

> when the hardship [of the retroactive effect of judge-made law] is felt to be too great or to be unnecessary, retrospective operation is withheld .... It may be hard to square such a ruling with abstract dogmas and definitions. When so much else that a court does, is done with retroactive force, why draw the line here? The answer is, I think, that the line is drawn here, because the injustice and oppression of a refusal to draw it would be so great as to be intolerable.

(Cardozo 1921, pp. 146–47).[7] The practice had become prominent enough by 1931 that an article in the American Bar Association Journal proposed that legislatures explicitly authorize courts to declare that new judge-made rules would operate only prospectively.

In 1932, the constitutionality of such "prospective overruling" was challenged in the United States Supreme Court. *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). The Montana Supreme Court had previously held that when the Montana Railroad Commission reversed a determination of freight charges' reasonableness, shippers could recover the excess amounts paid under that determination. In this case, the Montana court overruled that holding but applied the

[7]The practice had already been noted and defended in legal commentary. In 1917, the great scholar John Henry Wigmore argued that courts "should not have any more difficulty than the legislature in making a distinction between forward and backward application." Levy (1960, p. 10) (discussing Wigmore (1917, pp. xxxvii–xxxviii)).

old rule to the parties before it and allowed the shipper to recover the unreasonable charges. The railroad argued that this deprived it of property without due process of law because it had been forced to refund the payments by virtue of an interpretation of the statute now acknowledged to be wrong. *Great N. Ry. Co.* (1932, pp. 359–61). In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, the Supreme Court rejected this argument in a unanimous decision written by now Justice Cardozo:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed, there are cases intimating, too broadly, that it *must* give them that effect; but never has doubt been expressed that it *may* so treat them if it pleases, whenever injustice or hardship will thereby be averted.

Great N. Ry. Co. (1932, p. 364) (emphasis added and citations omitted). Justice Cardozo described the "declaratory" understanding of adjudication as merely one of several permissible approaches. A state court might:

> hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been .... The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature .... [W]e may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule .... [W]e are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process

Great N. Ry. Co. (1932, pp. 365–66). This decision put to rest any constitutional concerns with state courts' prospective judgments.

The balance of this chapter will examine how courts have responded to this possibility and attempt to summarize the state of the law. Like any attempt to describe American law in general, it will be complicated by the federal character of the jurisdiction. The law of prospectivity and retroactivity can be and very often is different from state to state. My summary account of state law, therefore, must be taken as more indicative than definitive. In addition, I will describe the development and current state of the subject in connection with federal law – the law of the United States. Although it will be apparent that the division is in some ways artificial, I will also divide the treatment between judgments of civil law and criminal law.

Prospective Judgments in Civil Law

State Law

Statements of law contained in a judgment are uniformly presumed to apply to events predating that judgment. The negative impact of such retroactive application of judicially created rules must be substantial before a court will consider limiting

the rules to future cases. It follows that, at a minimum, a judicial decision must create a genuinely new rule of law before it may be even be a candidate for prospective-only application. Only then does a judgment "create[] an interregnum during which social relations have been conducted within institutional arrangements subsequently determined to be legally vulnerable" (Currier 1965, p. 240). As noted, the clearest case is when a court explicitly overrules a prior decision but it may also be present when a court formulates a rule for the first time.

When deciding whether to depart from the default of full retroactivity, the primary consideration is the nature and degree of the parties' reasonable reliance on the prior state of the law. This consideration "can hardly be overemphasized." *Beavers v. Johnson Controls World Servs., Inc.*, 881 P. 2d 1376, 1384 (N.M. 1994). Courts view some fields of law – such as contract and property – as especially likely to induce such reliance. Apart from the injustice of erasing or devaluing rights deemed to have already "vested" in their holders (Traynor 1977, p. 544), these are fields where individuals may have actually paid attention to existing rules of law, perhaps even consulted legal advisers, before engaging in a given transaction (Traynor 1977, p. 544; Currier 1965, p. 242; Eisenberg 1988, p. 122).

By contrast, new rules of tort law seldom upset significant reliance interests. "Ordinarily," for example, "persons who drive carelessly do not do so in conscious reliance upon some rule of law" (Fairchild 1967–1968, p. 261).[8] The scope of tort liability may, however, affect some decisions on whether and how much insurance a party obtains, as well as that party's decision to investigate an incident for which it might be held liable. Thus, courts often make decisions eliminating tort immunity for municipalities and charitable institutions prospective-only.[9] It should be noted that in calculating the reliance that justifies making judicial decisions non-retroactive, courts almost always consider *categories* of cases; not the presence or absence of reliance by the particular parties before the court (Schaefer 1967, pp. 642–43).[10]

[8]The same may be true of "strict liability" torts, which by definition do not turn on the degree of care exercised by a defendant. Intentional torts to the person, such as battery, assault or infliction of mental distress are also likely to occur without reference to governing law. This conclusion is less clear, however, with respect to intentional torts to property such as trespass or conversion which may often be the result of deliberate decision. We can also suppose that some instances of possible defamation or misrepresentation might be undertaken only after consideration of the relevant law.

[9]See, for example: *Parker v. Port Huron Hosp.*, 105 N.W.2d 1, 14–15 (Mich. 1960); Dufour (1985, p. 331). Note that Roger J. Traynor argues that the cost to previously injured persons of withholding application of the newly recognized liability outweighs any hardship to taxpayers of the municipality. Traynor (1977, p. 546).

[10]A decision to apply retroactively new law formulated through *administrative* adjudication must take into account actual reliance on the old law by the party before the court. *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 519–20 (9th Cir. 2012). In fact, serious doubt has been expressed about how often primary conduct is genuinely influenced by explicit consideration of the current state of the law. "Thus, in many cases, the parties, because of their not uncommon ignorance of the legal principle that controls their actions, will not be able to make a *bona fide* claim of surprise." Yale Law Journal Note (1962, p. 346).

The serious costs that full retroactivity can impose have been emphasized in certain (federal) constitutional cases. Striking down a longstanding and deeply entrenched public program or institution as unconstitutional may dramatically upset the lives of many people. While seldom described in such terms, the United States Supreme Court's judgment in *Brown v. Board of Education* ordering the dismantling of racially segregated schools but only "with all deliberate speed" might be understood as such a case. *Brown v. Board of Education,* 349 U.S. 294, 300–01 (1955). That decision made school systems in 20 states and the District of Columbia illegal. Immediately eliminating this illegality would have radically disrupted the lives of tens of thousands of students, parents, teachers, and employees. As it turned out, implementation of the *Brown* judgment went on for decades (Claus and Kay 2010, pp. 496–500; Currier 1965, pp. 231–32).

Likewise, when courts found that the composition of many state legislatures violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution under the Supreme Court's "one person-one vote" doctrine, a question arose as to the validity of laws passed by the mal-apportioned legislatures. Courts uniformly held that the mal-apportioned legislatures could make valid laws until a conforming legislature could be convened.[11] Similarly, the Supreme Court refused to invalidate completed actions of the Federal Elections Commission and the federal bankruptcy courts even though both had been found illegally constituted.[12]

In each case where prospective operation is suggested, there are necessarily competing considerations. Retroactive application might undermine reasonable actions taken in reliance on the former law. On the other hand, the very content of the judgment declares the new rule to be superior to the old one. Prospective-only operation, therefore, entails a decision to apply an inferior rule to prior transactions. In accommodating the relevant factors, many state courts have settled on some variation of a test formulated by the United States Supreme Court in its 1971 decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[13] The test considers three factors:

[11]See, for example: *Ryan v. Tinsley*, 316 F.2d 430 (10th Cir. 1963); *Mann v. Davis*, 238 F. Supp. 458, 459 (E.D. Va. 1964) ("If the present legislature could not act in this interim, a potentially dangerous interregnum could result, for there would be no legislature available in an emergency.").

[12]See *Buckley v. Valeo*, 424 U.S. 1, 142 (1976); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87–88 (plurality opinion of Brennan, J.), 92 (Rehnquist, J., concurring in the judgment) (1982). In both of these cases the Court actually went further, staying its judgments for some period to allow Congress to address the constitutional issues and formulate a reasonable transition to a legally conforming system.

[13]Examples of states implementing tests based on *Chevron Oil* include: *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1381–85 (N.M. 1994); *Stowers v. Branch Banking & Trust Co.*, 731 S.E.2d 367, 370 (Ga. Ct. App. 2012); *DiCenzo v. A-Best Prods. Co.*, 897 N.E.2d 132, 135–41 (Ohio 2008); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 351–52 (W. Va. 2009); *Schmill v. Liberty Nw. Ins. Corp.*, 114 P.3d 204, 206–08 (Mont. 2005). The *Chevron Oil* case is discussed further at *infra* text accompanying notes 25–28.

1. whether the decision to be applied non-retroactively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression;
2. if, in light the new rule's purpose and effect, retrospective operation would further or retard its operation; and
3. the extent of the inequity imposed by retroactive application, namely the injustice or hardship that would be caused by retroactive application.[14]

A court examines these factors, it must be stressed, against the background presumption that retroactivity is "overwhelmingly the norm." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (opinion of Souter, J.). Thus, a litigant seeking prospective-only application must firmly convince a court that each factor favors such a decision.

Once we have established the possibility that a court may limit the retroactive application of its judgment, other questions arise. We might expect such a decision would mean that the new rule is to apply only to primary conduct occurring after the date the decision is announced and to no conduct occurring before that date. While that is sometimes the case, there are other possibilities. A court might make a new norm *partly* retroactive, applying it to some but not all prior events. For example, when the Connecticut Supreme Court expanded an enterprise's "slip and fall" tort liability to include injuries caused by a foreseeably unsafe "mode of operation," it applied its holding to "all future cases and, as a general rule, to all previously filed cases in which the trial has not yet commenced . . . ." *Kelly v. Stop & Shop, Inc.*, 918 A.2d. 249, 265 n.9 (Conn. 2007).[15] The court apparently concluded that the costs of adjusting to the new rule would not be excessive if litigation had not yet reached the trial stage.

The simplest approach of starting the rule running at the moment of decision has, for reasons which will become apparent, been labeled "pure prospectivity." Neither the litigant in the case announcing the new rule nor any other person whose claim is based on prior events will be subject to the new rule. *James B. Beam* (1991, p. 536).[16] Pure prospectivity makes clear the two distinct activities of an appellate court: articulating the law and deciding the case in controversy. Since the new rule plays no role in determining the outcome of the litigation, it is technically dicta and, as such, communicates only a prediction of what the law will be (Schaefer 1982, p. 22). It is at best, as Justice Cardozo recognized in the *Sunburst* decision, only a "prophecy, which may or may not be realized in conduct . . . ." *Great N. Ry. Co.* (1932, p. 366). A court might even postpone the moment the rule becomes

[14]Paraphrased from *Chevron Oil* (1971, pp. 106–07).

[15]Note, however, that the plaintiff in the instant case *was* granted the benefit of the rule. This formula was modified in *Humphrey v. Great Atlantic & Pacific Tea Co.*, 993 A.2d 449 (Conn. 2010). *See infra* note 20.

[16]For a recent example see *Barnett v. First National Insurance Co. of America*, 110 Cal. Rptr. 3d 99, 104 (Cal. Ct. App. 2010) (declining to apply new rule to parties before the court and implicitly declining to apply new rule to other parties that had relied on the old rule).

applicable to some date further in the future. This variation is sometimes called "prospective-prospective overruling." In these cases, a court may reason that parties affected by the new rule need additional time to adjust their behavior. So, when the Wisconsin Supreme Court abrogated the doctrine of governmental immunity from tort liability on June 5, 1962, it held the "effective date of the abolition of the rule" would be July 15, 1962 in order "[t]o enable the various public bodies to make financial arrangements to meet the new liability." *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 626 (Wis. 1962).[17] When, later the same year, the Minnesota Supreme Court reached a similar conclusion, it expressed its "intention to overrule the doctrine of sovereign tort immunity as a defense with respect to tort claims ... arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the prosecution of such claims." *Spanel v. Mounds View Sch. Dist. No. 621*, 118 N.W.2d 795, 803 (Minn. 1962). This both allowed institutions to buy liability insurance and gave the legislature a chance to craft an alternative liability regime that would accommodate the special interests of the public entities. *Spanel* (1962, pp. 803–04).[18] The "alternatives of time and method are almost limitless." (Rogers 1968, p. 57).

Judgments applying "pure prospectivity," appear to be relatively infrequent. Much more commonly, a court applies the new rule to the litigants in the instant case but "then return[s] to the old one with respect to all other[] [cases] arising on facts predating the pronouncement." *James B. Beam* (1991, p. 537). This course is sometimes called "selective prospectivity." *James B. Beam* (1991, pp. 537–38). In part, this practice is motivated by a desire to connect a judgment's statements of law to the particular controversy before the court (Eisenberg 1988, p 131; Moschzisker 1924, pp. 426–27). More prominent is the worry that not granting the benefit of the new rule to the party arguing for it in the case in which it is announced would discourage other litigants from advancing claims that would change existing law. It would, therefore, deprive the legal system of the law-reform benefits that derive from judicial consideration of those claims (Ghatan 2010, pp. 180–81).[19] Critics have questioned this premise. The fact that courts maintain retroactive application

[17] The court presumably was thinking of the time it would take to secure adequate insurance. See Durgala (1962–1963, p. 60). When next year the same court abolished the immunity of religious institutions, it postponed the effect of its holding for 3 months. *Widell v. Holy Trinity Catholic Church*, 121 N.W.2d 249, 254 (Wis. 1963). In both cases, however, the plaintiff in the case at bar was allowed to recover. *Holytz* (1962, p. 626); *Widell* (1963, pp. 254–55).

[18] See also *Smith v. State*, 473 P.2d 937, 950 (Idaho 1970) (tort liability of state would "govern all future causes of action arising on or after 60 days subsequent to the adjournment of the First Regular Session of the Forty-First Idaho State legislature unless legislation is enacted at that session with respect to the abolition of the sovereign immunity of the state.").

[19] "Eliminating a litigant's incentive to argue for a change in the law may serve to stifle the development of the common law" (Ghatan 2010, p. 193). The same author also notes, however, the argument that the option of prospective overruling encourages legal change insofar as it allows courts to undertake it without imposing the serious dislocation that retroactivity may create (Ghatan 2010, p. 193).

in the great majority of cases is enough to motivate most litigants. Some parties, moreover, will have a continuing interest in the legal rule so that even if they fail to benefit in the first case, they will profit from its adoption in future ones (Rogers 1968, p. 49).

In addition to doubts about its incentive effect, critics of selective prospectivity emphasize the inevitable inequity that results (Eisenberg 1988, p. 129). The best known example of this defect is the 1959 decision of the Supreme Court of Illinois in *Molitor v. Kaneland Community Unit. District 302*, 163 N.E.2d 89 (Ill. 1959). The plaintiff was 1 of 14 school children suffering burns and other injuries when, due to the negligence of its driver, a school bus struck a culvert and exploded into flames. The Supreme Court used the case to reconsider and to abolish the tort immunity of school districts. *Molitor* (1959, pp. 89–98). It noted, however, that retrospective application of the decision would work a hardship on school districts that may have failed to secure adequate insurance or to investigate prior accidents on the assumption they could not be held responsible for them. It decided that the new liability would apply only in "cases arising out of future occurrences." It made an exception, however, for "the plaintiff in the instant case." It cited the two standard reasons for such an exception: if it failed to apply the new rule, the "announcement would amount to mere *dictum*"; and, "more important," it would "deprive appellant of any benefit from his effort and expense" and eliminate any "incentive to appeal the upholding of precedent." *Molitor* (1959, pp. 97–98).

The unattractive consequences of this solution became apparent when seven other children hurt in the same accident – including three of the first plaintiff's siblings – sought relief. *Molitor v. Kaneland Cmty Unit. Dist. 302*, 182 N.E.2d 145, 146–47 (Ill. 1962). Originally all eight children had filed a single complaint. But only one child, randomly chosen, was named in the first appeal to the Supreme Court. The trial court, relying on the Supreme Court's explicit exception for only "the plaintiff in the instant case," dismissed the complaints. The Supreme Court reversed since it "now appears the [first] appeal was treated by the parties as a test case ...." *Molitor* (1962, pp. 145–46). The facts of this case highlight the arbitrary quality of selective prospectivity. The Court's second decision eliminated the inequity for those involved in the same accident but left in place the different treatment accorded every other victim of municipal negligence who was injured before the date of the first decision.[20]

[20]Another instance of judicial adjustment of a holding of partial retroactivity to avoid a glaring inequity is *Humphrey* (2010), in which the Connecticut Supreme Court modified its statement in *Kelly* (2007, p. 265 n.9) – discussed at *supra* note 15 – that an expanded rule of tort liability would apply only to future cases and "previously filed cases in which trial ha[d] not yet commenced" on the date of decision. *Humphrey* (2010, pp. 451–52) (quoting *Kelly* (2007, p. 265 n.9)). In *Humphrey* (2010), the Court agreed that the new rule should also apply to cases where trial had begun *and* the plaintiff had raised at trial the same claim as that later adopted in *Kelly. Humphrey* (2010, p. 453). The Court was unwilling to sustain differences occasioned by the happenstance that one case had reached it before the other. *Humphrey* (2010, p. 453).

Federal Courts

Despite these concerns, most state courts do maintain the option of non-retroactivity. The situation in federal courts is more complicated. After an initial period of infrequent and uncritical use of non-retroactivity, the United States Supreme Court systematized its approach in 1971 by articulating the three-factor *Chevron Oil* test, cited above, for deciding whether to apply a judgment non-retroactively. Then, in the early 1990s, the Supreme Court reversed course and held that federal courts must always apply their judgments retroactively. The following is a brief summary of that evolution.

A set of cases in the nineteenth century recognized – indeed, appeared to require – non-retroactive application of judge-made changes in *state law* insofar as that law was applied in federal court litigation founded on "diversity jurisdiction," providing a federal forum where the parties to a controversy reside in different states. U.S. Const. art. III, § 2 (creating diversity jurisdiction). At that time, federal judges in diversity cases had developed and applied their own federal *common* law,[21] but deferred to state courts' interpretations of *enacted* state law, i.e. statutes and constitutions. In an 1847 diversity case appealed from the federal court in Mississippi, however, the Supreme Court decided that it should defer to state courts' interpretations of enacted state law only prospectively. *Rowan v. Runnels*, 46 U.S. (5 How.) 134, 139 (1847). The Supreme Court had previously held, in the absence of any state court interpretation on the point, that a provision of the Mississippi constitution prohibiting the sale of slaves was ineffective without state legislation implementing it. After the contract at issue had been made, however, the Supreme Court of Mississippi held the provision self-executing. *Rowan* (1847, pp. 134–35). The United States Supreme Court agreed that federal courts should conform to state court interpretations "from the time they are made." "But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made." To do so would render the independent federal diversity jurisdiction "utterly useless and nugatory." *Rowan* (1847, p. 139). The dissenting opinion highlighted the anomaly of such a holding, arguing that it "gives to the Constitution of Mississippi different meanings at different periods of its existence . . . ." *Rowan* (1847, p. 140) (Daniel, J., dissenting). This approach was followed in several other federal diversity cases dealing with the validity of bonds issued by local governments under an authority that had first been confirmed by decisions of the state courts but subsequently denied under changed interpretations of state constitutions.[22]

[21] See, for example, *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). This policy was reversed in 1938 in the famous case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Under current law, federal courts in diversity cases must apply the law of the state where the court sits.

[22] See, for example: *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Douglass v. County of Pike*, 101 U.S. 677 (1879). See also *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910). For a critical review of these cases, see Thompson (1992).

The underlying concern about the unfairness of retroactive decisions evident in these cases, as well as in the state court decisions already canvassed, also surfaced in connection with federal court judgments applying federal law. On three occasions in the 1960s, perhaps influenced by its decisions refusing to apply new rules of criminal procedure retroactively,[23] the Supreme Court refused to give its holdings in civil cases retroactive effect.[24] Only in the 1971 case of *Chevron Oil Co. v. Huson*, however, did the modern Supreme Court consider the issue of prospectivity in depth. The plaintiff had sustained a personal injury while at work on Chevron's off-shore drilling platform. Recovery for such claims was governed by a federal statute, the Outer Continental Shelf Land Act, which specified no statute of limitations. Most courts that had addressed the issue had held that the limitations period was controlled by the equitable doctrine of laches. *Chevron Oil* (1971, pp. 98–99). Then, in a 1969 decision, after Huson had filed his complaint, the Supreme Court rejected those cases and interpreted the Act to borrow the neighboring state's personal injury limitations period. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). For Huson, that was Louisiana and its 1 year statute of limitations now barred his claim. *Chevron Oil* (1971, p. 99).

But the Supreme Court held that its 1969 decision "should not be invoked to require application of the Louisiana time limitation retroactively to [Huson]." *Chevron Oil* (1971, p. 100). The Court went on to elaborate the three-factor test already mentioned: (i) the rule was genuinely new; (ii) retroactive application was not necessary to further the operation of that rule; and (iii) retroactivity "could produce substantial inequitable results." *Chevron Oil* (1971, pp. 106–07). In this case, each factor favored prospective-only application. *Chevron Oil* (1971, p. 107). Eight Justices joined this opinion.[25] As already noted, the *Chevron Oil* test soon became the standard way of deciding prospectivity questions in state courts.[26]

Three decisions in the early 1990s, however, reversed the adoption of the *Chevron Oil* test in federal courts. By this time, the Supreme Court, as will be discussed below, had retreated from the idea that it could limit the retroactive effect of

[23] Discussed in Part III.B *infra*.

[24] In two of these cases, this determination relieved the court of the responsibility for holding completed elections invalid. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1968). The third involved the clarification of a rule of federal jurisdiction, which the Court did not apply to the litigants before it in view of their reasonable reliance on the alternative reading. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 422–23 (1964). The Court referred to, but did not employ, the option of prospectivity in two antitrust cases. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 496 (1968); *Simpson v. Union Oil Co.*, 377 U.S. 13, 24–25 (1964). An earlier case subsequently referred to by the Court in support of the practice is more properly understood as an example of the policy, discussed in text preceding note 32, of not re-opening finally adjudicated cases. *Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

[25] Justice Douglas concurred without reaching the question of retroactive effect. *Chevron Oil* (1971, p. 109).

[26] *See supra* text accompanying notes 13–14.

decisions creating new constitutional rules of criminal procedure.[27] The three civil decisions each dealt with the question of whether taxpayers were entitled to a refund of state taxes paid under a statute later held unconstitutional. In the first, the Supreme Court held that taxpayers were not entitled to a full refund. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990). Four justices applied the *Chevron Oil* test, observing that state authorities had reasonably supposed the taxes valid when imposed and that refunds "could deplete the state treasury [and] threaten[] the State's current operation and future plans." *Am. Trucking* (1990, p. 182) (opinion of O'Connor, J.). Four dissenting justices, however, objected to the very idea that courts could apply two different laws to identical controversies simply because they arose at different times. *Am. Trucking* (1990, pp. 205–06) (Stevens, J., dissenting). They read *Chevron Oil* narrowly, confining it to a court's power to adjust "rules of tolling, laches, and waiver" for equitable reasons. *Am. Trucking* (1990, p. 221). *Chevron Oil* did not "alter the principle that consummated transactions are analyzed under the best current understanding of the law at the time of decision ...." *Am. Trucking* (1990, p. 222) (Stevens, J., dissenting). Ultimately, the Court denied the refunds because the ninth judge, Justice Scalia, believed that the state tax in question had been and continued to be constitutional. *Am. Trucking* (1990, pp. 204–05) (Scalia, J., concurring in the judgment). But he made clear in his concurrence that he agreed with the dissenters on prospectivity. "Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense." *Am. Trucking* (1990, p. 201) (Scalia, J., concurring in the judgment).

The writing was now on the wall. The next year, in the second unconstitutional state tax case, the Court issued five separate opinions, none with the support of more than three justices. But again, one could count five votes for the proposition that, when the Court decided a constitutional issue and applied it to the parties at bar, it must apply that holding to any other cases still open. *James B. Beam* (1991, pp. 543–44) (opinion of Souter, J.); *James B. Beam* (1991, pp. 548–49) (Scalia, J., concurring in the judgment).

Finally, in the third case, the Court produced a single majority opinion expressing the new understanding:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule .... [W]e now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). Although it expressed a view of adjudication distinctly hostile to any form of non-retroactivity, the majority opinion actually forbade only "selective prospectivity," in which a court refuses to

[27] *See infra* text accompanying notes 56–61.

apply a new rule to other cases concerning conduct predating the court's judgment, but does apply it to the parties before it. It did not, therefore, overrule *Chevron Oil*, which was an instance of "pure prospectivity" in which the plaintiff had been given the benefit of the earlier limitations period.[28] The United States Court of Appeals for the Ninth Circuit recently held that, in the absence of an explicit holding that *Chevron Oil* had been overruled, it was still bound to apply new rules purely prospectively when the three *Chevron Oil* factors so required. *Nunez-Reyes v. Holder*, 646 F. 3d 684, 690–95 (9th Cir. 2011); (Fisch 1997, p. 1062).

The Supreme Court's decisions retreating from prospective judgments show the influence of the factors already discussed that have worried courts and commentators about the practice. A central concern is a necessary departure from what was understood as the essential judicial role. This understanding reflected, at some level, the Blackstonian view of adjudication. This was most explicit in the separate opinions of Justice Scalia. The judge's job, he asserted, "is to say what the law is, not to prescribe what it shall be .... [A prospective holding] presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is." *Am. Trucking* (1990, p. 201) (Scalia, J., concurring in the judgment); (*James B. Beam* 1991, p. 549 (Scalia, J., concurring)); (*Harper* 1993, pp. 106–07 (Scalia, J., concurring)).[29]

Closely related was regard for the constitutional imperative that federal courts adjudicate only real "cases or controversies." U.S. Const. art. III, § 2, cl. 1. Some have argued that this precludes a federal court from pronouncing on a legal issue unless it is necessary to resolve the dispute at bar. A purely prospective holding, the enunciation of a "'prophecy, which may or may not be realized in conduct' ... would be beyond the authority of a federal court" (Yale Law Journal Note 1962, p. 932). This is doubtful as a matter of constitutional interpretation (Currier 1965, pp. 216–20). But the Supreme Court had appeared to accept the reasoning in an earlier criminal procedure case. *Stovall v. Denno*, 388 U.S. 293 (1967). It declined to apply a new rule retroactively though it conceded that it had applied it to the parties in the case first announcing it. In that first case, retroactive application was an "unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum [and of] [s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies ...." *Stovall* (1967, pp. 300–01) (Roosevelt 1999, pp. 1111–12).

[28]Two justices in the second of the three state tax cases acknowledged that the decision "does limit the possible applications of the *Chevron Oil* analysis, however irrelevant *Chevron Oil* may otherwise be to this case." *James B. Beam* (1991, p. 543) (opinion of Souter, J.). "We do not speculate," they went on to say "as to the bounds or propriety of pure prospectivity." *James B. Beam* (1991, p. 544) (opinion of Souter, J.). In 1995, seven justices joined an opinion confirming that "*Harper* [the third tax case] overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).

[29]For further discussion, see *infra* text accompanying notes 77–78.

In sum, if the limits of constitutional federal jurisdiction obliged a federal court to apply a new rule, at least to the party in the case announcing it, then the only kind of prospectivity available was "selective prospectivity." The Supreme Court, however, became unwilling to accept the inequity of making the applicability of a rule turn on the arbitrary matter of which case happened to reach the Court first (Shannon 2003, p. 866). In an earlier case, Justice Harlan had protested the consequences of this policy:

> Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.

Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting). These arguments, which had already convinced a majority of the Court in the field of criminal procedure, ultimately led the Court to establish a policy of "full retroactivity" in the adjudication of federal civil cases. *Harper* (1993, p. 97).

It is important to recall that the development just traced is applicable only to changes in *federal* law. As already noted, state courts applying state law retain the option of prospective-only effect when declaring new rules. Such a practice, moreover, continues to be constitutionally permissible under the rule of *Great Northern Railway Co. v. Sunburst Oil & Refining Co*. (1932). These courts have generally rejected the reasoning of the United States Supreme Court's post-*Chevron Oil* cases. Indeed, the *Chevron Oil* analysis remains the most common test in state jurisdictions for deciding whether to apply a new rule retroactively – notwithstanding its abandonment by the Court that created it.[30] When, however, state courts apply a new judge-made rule of federal law, the Supremacy Clause of the federal Constitution requires that they apply it retroactively in accordance with the holdings of the United States Supreme Court. *Reynoldsville Casket Co.* (1995, p, 754), *Harper* (1993, p. 100).

The Limits of Retroactivity

Whether in state or federal court, there are necessary limits to the ordinary retroactive application of judicial pronouncements. Although the United States Supreme Court has said that "a rule of federal law, once announced and applied . . . must be given full retroactive effect by all courts adjudicating federal law," it restricts that command to "cases still open on direct review." *Harper* (1993, pp. 96–97). No one suggests that a new rule requires courts to re-open and re-decide every

[30]Some recent examples include: *Heritage Farms, Inc. v. Markel Insurance Co.*, 810 N.W.2d 465, 479–80 (Wis. 2012); *Beaver Excavating Co. v. Testa*, 983 N.E.2d 1317, 1328 (Ohio 2012); *Bezeau v. Palace Sports & Entertainment, Inc.*, 795 N.W.2d 797, 802 (Mich. 2010); *Ex parte Capstone Building Corp.*, 96 So. 3d 77, 90–95 (Ala. 2012).

case ever litigated to which a new rule might apply. A rule's retroactivity does not extend to cases that have proceeded to:

> such a degree of finality that the rights of the parties should be considered frozen .... [T]hat moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become res judicata.

United States v. Estate of Donnelly, 397 U.S. 286, 296 (1970) (Harlan, J., concurring).[31]

This limit is illustrated by *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). Bondholders whose rights had been reduced under a federal statute subsequently declared unconstitutional sought to recover the full amount originally due. The Supreme Court noted that a 1936 District Court proceeding – in which the validity of the governing law was not raised – had confirmed a prior adjustment and had never been appealed. *Chicot Cnty. Drainage Dist.* (1940, pp. 372–74). The law's constitutionality was thus res judicata and could not be raised in a collateral proceeding. *Chicot Cnty. Drainage Dist.* (1940, p. 378). As the Court put it in a later case, "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case." *Fed. Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

The limits of retroactivity are grounded in strong practical policy. "A contrary rule," as one state court noted, "would produce chaos in the legal system, as judgments could be continually opened and reopened with every fluctuation in the law." *Quantum Res. Mgm't, L.L.C. v. Pirate Lake Oil Corp.*, 112 So. 3d 209, 217 (La. 2013), *cert. denied sub nom. Haydel v. Zodiac Corp.*, 134 S. Ct. 197 (2013).[32] A nineteenth century Supreme Court decision put the matter powerfully:

> [T]he maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in [our] jurisprudence, that commentators upon it have said, that *res judicata* renders white that which is black, and straight that which is crooked.

Jeter v. Hewitt, 63 U.S. (22 How.) 352, 364 (1859).[33] This concern for finality qualifies all of the United States Supreme Court decisions endorsing the general principle of retroactivity.Justice Souter conceded that "one might deem the distinc-

[31] *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.).

[32] The complainants had asked to re-open a 1925 tax sale on the basis of a 1983 United States Supreme Court decision. *Quantum* (2013, p. 211).

[33] The Court was commenting particularly on the doctrine as adopted in Louisiana but, as one commentator noted, it would "apply with equal truth to any of the United States." Black (1902, p. 764).

tion arbitrary, ... why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring?" *James B. Beam* (1991, p. 541) (opinion of Souter, J.). Such equity, however, "could only be purchased at the expense of another principle. Public policy dictates that there be an end of litigation .... Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time." *James B. Beam* (1991, p. 542) (opinion of Souter, J., quoting *Moitie* (1981, p. 401) (internal quotation marks omitted)).

The policy of finality in civil litigation is not absolute. In exceptional cases, parties may collaterally attack otherwise final judgments – but only if the case is truly exceptional. Both the Restatement (Second) of Judgments and the Federal Rules of Civil Procedure articulate such a safety valve.

Section 73(2) of the Restatement states that a judgment "may be set aside or modified if ... "[t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust." Noting that this principle has sometimes been applied to cases where a later decision changes the law applied in an earlier (but unrelated) judgment, however, Comment (c) to this section labels such decisions "a misinterpretation of the rule and a very unsound policy." *Restatement of the Law, Second: Judgements 2d*. (1980).

Rule 60(b) of the Federal Rules of Civil Procedure specifies five grounds for "relief from a final judgment," none of which speak directly to a change in the governing law. Fed. R. Civ. P. 60(b)(1)-(5). A sixth merely refers to "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The rare cases in which the Supreme Court considered applying Rule 60(b)(6) in connection with a change in governing law are inconclusive.[34] One judge has described the state of Rule 60(b)(6) jurisprudence as characterized by "a strong current of unwillingness to reopen judgments but with some wriggle room for future arguments." *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1078 (7th Cir. 1997) (Easterbrook, Cir. J.).[35] Still, other lower federal courts have referred to the rule as "a grand reservoir or [sic] equitable power," *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d. Cir. 1963),[36] and have assumed that an "intervening change of controlling law" may justify exercising it. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004) (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)).In one case, a federal district judge allowed a plaintiff to re-

[34]Compare *Ackermann v. United States*, 340 U.S. 193, 198 (1950) (holding that a party's free choice not to appeal a decision later shown to be erroneous did not justify Rule 60(b)(6) relief), with *Polites v. United States*, 364 U.S. 433 (1960) (refusing to decide whether the decision not to appeal due to clearly applicable adverse law was an absolute bar to Rule 60(b)(6) relief after a "clear and authoritative change" in that law).

[35]This decision contains an extended argument for a strict interpretation of Rule 60(b)(6) when the motion to modify the judgment is based on a subsequent change in the law.

[36]Quoting Moore (2004, p. 308) (internal quotation marks omitted).

open an unappealed judgment that had rejected his claim that state tuition grants to racially segregated private schools violated the Equal Protection Clause. *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969). After the first judgment, the Supreme Court had pronounced a different and stricter test for evaluating such programs. Relying on Rule 60(b)(6), the District Court concluded that, in light of this "substantial change in the law ... to continue [the first judgment's] efficacy would be unjust to those initially and now affected by the order." This was especially true when the litigation affected matters of "public import." *Griffin* (1969, pp. 1180–82).[37]

This kind of relief is exceptional. When courts note the possibility of modifying a final judgment, they always stress the need to show particularly compelling reasons. The United States Court of Appeals for the First Circuit summed up the prevailing attitude:

> [T]he case law is very hostile to using a mistake of state law, still less a *change* in state common law, as grounds for a motion to reopen a final judgment under Rule 60(b)(6). Although the door is not quite closed, there is good sense—as well as much precedent—to make this the rarest of possibilities. Decisions constantly are being made by judges which, if reassessed in light of *later* precedent, might have been made differently; but a final judgment normally ends the quarrel. Indeed, the common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims. The finality of judgments protects against this kind of retroactive lawmaking.

Biggins v. Hazen Paper Co., 111 F.3d 205, 212 (1st Cir. 1997) (citations omitted) (paragraphs combined).[38]

Notwithstanding the occasional exception, then, it is fair to say that the presumptive – and in federal courts nearly compulsory – retroactive effect of civil judgments reaches back only to controversies still open to judicial resolution. At some point adjudication comes to an end and unsuccessful civil litigants are denied the solace of newer and friendlier law.

In criminal cases, however, where a defendant remains in custody, the finality of a conviction is not so unqualified. The continuing possibility of collateral attack so long as a defendant remains in custody has been critical in shaping the law of the retroactivity and prospectivity of judicial decisions. This is the subject of the next section.

[37] *See also Tsakonites v. Transpacific Carriers Corp.*, 322 F. Supp. 722, 723–24 (S.D.N.Y. 1970) (reopening final judgment under Rule 60(b) when the Supreme Court in the course of enunciating the new rule explicitly referred to that judgment as "reaching a contrary result on identical facts.").

[38] *See also Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections*, 174 F.3d 305, 311–12 (3d Cir. 1999) (stating that "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)" but noting an exception where a judgment's holding has been explicitly overruled by a higher court) (quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)).

Prospective Judgments in Criminal Law

Substantive Liability

Discomfort with retroactive law has been most acute in connection with retroactive criminal liability. Hence the United States Constitution explicitly prohibits all ex post facto criminal laws.[39] The values underlying these worries are not entirely clear. The reliance interest, so prominent in civil prospectivity jurisprudence, may play a role if an actor is likely to consult the criminal law before acting. But criminal acts, like most tortious acts, are seldom the subject of self-conscious reliance on the law (Krent 1996, pp. 2160–63). The objection to ex post facto criminality seems premised on some more rudimentary sense of fairness (Traynor 1977, pp. 548–49).

As noted, the Supreme Court has held that the constitutional limitation on "ex post facto laws" refers only to legislation; not to judicial acts.[40] Concern about retroactivity is at its nadir when judicial action *contracts* the scope of criminal behavior. Consequently, when a criminal statute is held unconstitutional, even a final judgment of conviction is deemed void and may be subject to collateral attack[41] (Traynor 1977, p. 553, n.54) (citing *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879)). "[C]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" Traynor (1977, p. 555) (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)). More serious issues arise when courts interpret criminal law to criminalize acts that appeared lawful when committed. Such cases seem to raise problems identical to those underlying the ban on ex post facto legislation. As a result, courts have strained to find ways to apply these new interpretations only prospectively (Rogers 1968, p. 64).

In *State v. Jones*, the Supreme Court of New Mexico changed its construction of the state statute criminalizing lotteries. *State v. Jones*, 107 P.2d 324 (N.M. 1940). The defendants had previously been convicted under the statute for holding a "bank night" promotion at a movie theater but on appeal the Supreme Court held that such bank nights were not lotteries. *Jones* (1940, p. 325). When the same defendants were prosecuted a second time for the same offense, the Supreme Court rejected its former interpretation and held that bank nights were lotteries. Since, however, the defendants "did only that which this court declared, even if erroneously, to be within the law[,] .... [t]he plainest principles of justice demand that [the new interpretation] should [be given only prospective effect] ...." The court, therefore, quashed the information and declared that its new view of the statute would be

[39] *See supra* text accompanying note 1.

[40] *See supra* text accompanying note 5.

[41] *See also infra* text accompanying notes 17–20.

observed only "in cases having their origin in acts and conduct occurring subsequent to the effective date of this decision." *Jones* (1940, p. 329).[42]

The Supreme Court of the United States dealt with a similar problem in *James v. United States*, a prosecution for tax evasion based on the defendant's failure to report embezzled funds as income. *James v. United States*, 366 U.S. 213 (1961). An earlier case, *Commissioner v. Wilcox,* had held that embezzled funds were not income for these purposes. *Commissioner v. Wilcox,* 327 U.S. 404, 410 (1946). Three justices thought *Wilcox* continued to be good law and would have dismissed the prosecution on that basis. *James* (1961, p. 248) (Whittaker, J., concurring in part and dissenting in part). Three different justices would have overruled *Wilcox* and remanded for a new trial. *James* (1961, p. 241) (Clark, J., concurring in part and dissenting in part); *James* (1961, p. 241) (Harlan, J., concurring in part and dissenting in part). A third set of three justices would have overruled *Wilcox* and dismissed this case because the existence of *Wilcox* made it impossible to attribute to the defendant the "willfulness" necessary to sustain a conviction. *James* (1961, pp. 221–22 (opinion of Warren, C.J.). The net result of this division was that the Court overruled *Wilcox* but did not apply its new interpretation to the case before it or to any tax returns before the date of the decision. *James* (1961, p. 222). It should be noted, however, that six justices rejected the idea that the Court could apply its interpretation of the criminal law prospectively only. In his opinion, Justice Harlan claimed that "[o]nly in the most metaphorical sense has the law changed: the decisions of this Court have changed, and the decisions of a court interpreting the acts of a legislature have never been subject to the same [ex post facto] limitations which are imposed on legislatures . . . ." *James* (1961, p. 247) (Harlan, J., concurring in part and dissenting in part). In his separate opinion, Justice Black was even more direct:

> We realize that there is a doctrine with wide support to the effect that under some circumstances courts should make their decisions as to what the law is apply only prospectively. Objections to such a judicial procedure, however, seem to us to have peculiar force in the field of criminal law. In the first place, a criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, raises serious questions of unconstitutional vagueness. Moreover, for a court to interpret a criminal statute in such a way as to make punishment for past conduct under it so unfair and unjust that the interpretation should be given only prospective application seems to us to be the creation of a judicial crime that Congress might not want to create.

James (1961, pp. 224–25) (Black, J., concurring in part and dissenting in part).

These cases demonstrate how judges try to avoid the retroactive application of a new, broader construction of a criminal statute. When it feels unable to apply such

[42]The case is discussed in Traynor (1977, pp. 548–49) and in Yale Law Journal Note (1962, p. 920). The latter source at 921 quotes *State v. Longino*, 67 So. 902, 903 (Miss. 1915), that to allow "punishment of an act declared by the highest court of the state to be innocent, because the same court had seen fit to reverse its interpretation of a statute, would be the very refinement of cruelty . . . ."

devices, the United States Supreme Court has adopted Justice Black's suggestion that "subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law" is a conviction based on an unknowable law, which deprives a defendant of "due process of law" and so violates the Fifth or Fourteenth Amendment. *James* (1961, p. 224). That was the Court's holding in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). The South Carolina Supreme Court had adopted a new and surprising interpretation of the state's criminal trespass law to sustain the conviction of civil rights demonstrators conducting a "sit-in" at a segregated lunch counter. *Bouie* (1964, pp. 349–50). The United States Supreme Court held that this "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" was a "deprivation of the right of fair warning." Such an interpretation, if "applied retroactively, operates precisely like an ex post facto law .... If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[43] *Bouie* (1964, pp. 352–54) (citing Hall 1960, p. 61).

The Supreme Court qualified this statement in *Rogers v. Tennessee*, 532 U.S. 451 (2001). Tennessee courts had previously construed the state murder statute to incorporate the common law requirement that a victim die within a year and a day of the defendant's act. In this case, the Tennessee Supreme Court abolished that requirement and upheld the challenged murder conviction. *Rogers* (2001, p. 455). In affirming, the United States Supreme Court denied that identical limits constrained legislation and judicial interpretation. Unlike legislatures, courts must routinely clarify and reinterpret prior holdings. This is especially true for the application of common law rules that "presuppose[] a measure of evolution that is incompatible with stringent application of *ex post facto* principles." Due process prohibits only new interpretations that are "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue."[44] *Rogers* (2001, pp. 461–62). In this case, the "year and a day rule" had never been successfully invoked in Tennessee and it had been in retreat in other American jurisdictions for decades. *Rogers* (2001, p. 455). Thus, its abolition was not so "unexpected and indefensible" as to deprive the defendant of due process of law. As long as a defendant had "fair warning" that this kind of change might occur, a court was entitled to give it retroactive effect. *Rogers* (2001, pp. 462–64).

[43] *See also Marks v. United States*, 430 U.S. 188 (1977) (reversing obscenity conviction that was unconstitutional under the First Amendment case law prevailing at the time of the trial even though the conviction might have been constitutional under a subsequently adopted standard in force at the time of the Supreme Court's decision).

[44] (Quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

New Constitutional Rules of Criminal Procedure

While American courts generally apply reductions in criminal liability retroactively and enlargements of that liability prospectively, the rules governing the application of changes in criminal procedure are much more complicated.

In the 1960s, the United States Supreme Court decided a number of cases dramatically enlarging the rights of criminal defendants, including the right to counsel,[45] to remain silent,[46] to fair procedures in identification by witnesses,[47] and to exclude improperly secured evidence.[48] The cumulative effect has more than once been described as a "revolution" (Kamisar 1995, p. 1).[49] Judged under these new constitutional standards, many prior convictions would be invalid. During the same period, the Supreme Court also expanded the opportunities to attack a constitutionally defective state court conviction in federal court through a petition for a writ of habeas corpus.[50]

The sum of these developments was ominous for a regime of thorough retroactivity. Thousands of incarcerated people were now in a position to reopen and possibly reverse their criminal convictions. One solution was to hold the new rules of criminal procedure at least partly non-retroactive. The issue came before the Supreme Court in 1965 in *Linkletter v. Walker*, 381 U.S. 618 (1965). Three years before, in *Mapp v. Ohio*, the Supreme Court had held that the Fourth Amendment made improperly seized evidence inadmissible in criminal prosecutions in state courts. *Mapp* (1961, p. 660). Linkletter was convicted of burglary in Louisiana in 1959 based, in part, on evidence subsequently held to be illegal. The state Supreme Court affirmed his conviction in 1960. After the decision in *Mapp*, Linkletter petitioned for a writ of habeas corpus. *Linkletter* (1965, p. 621). The United States Supreme Court held that the rule of *Mapp* was not retroactive. *Linkletter* (1965, p. 640). The Court cited some of the civil cases discussed above for the proposition that "the Constitution neither prohibits nor requires retrospective effect." "[W]e must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* (1965, pp. 629). Here, since *Mapp* was intended as a "deterrent to lawless police action" its purpose would not be "advanced by making the rule retrospective." Past police misconduct could not be undone "by releasing

[45] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[46] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[47] *United States v. Wade*, 388 U.S. 218 (1967).

[48] *Mapp v. Ohio*, 367 U.S. 643 (1961).

[49] For a revisionist account, see Miller (2010).

[50] See, for example, *Fay v. Noia*, 372 U.S. 391 (1963) (holding that failure to raise a constitutional claim in state proceedings did not preclude habeas relief in federal court). Under the current statute, habeas corpus is available for persons "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (2012).

the prisoners involved." Moreover, states' reliance on prior law was due the same respect that private reliance was given when new rules changed civil liability.[51] And given the number of potential petitioners, retroactive application "would tax the administration of justice to the utmost." *Linkletter* (1965, pp. 636–37).

The Court later rephrased the proper approach in a formula:

> The criteria guiding resolution of the question implicates [sic] (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297 (1967).[52] *Linkletter* itself denied retroactive operation only to cases that were already final when the new rule was announced. *Linkletter* (1965, p. 622).[53] In subsequent cases, however, the Court took a broader view of its authority to limit the retroactive effect of new constitutional rules. In *Stovall v. Denno*, the Court held that a new rule excluding evidence of a police-arranged eyewitness identification if counsel were absent would "affect only those cases and all future cases which involve confrontations ... conducted" after the new rule was announced. *Stovall* (1967, p. 296). Thus, it would apply neither to finally decided cases nor to some cases still open on direct review:

> [N]o distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable.

Stovall (1967, p. 300).

The Court set various effective dates for the applicability of new rules of criminal procedure. A rule excluding a defendant's statements made without adequate warnings about the right to counsel would apply only to cases in which the trial began after the new rule was announced. *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966) (concerning retroactivity of *Escobedo v. Illinois*, 378 U.S. 478 (1966), and *Miranda v. Arizona*, 384 U.S. 436 (1966)). The rule that electronic surveillance was a "search" or "seizure" subject to the Fourth Amendment would apply "only to cases in which ... .[the] electronic surveillance [was] conducted after" the judgment pronouncing the new rule.[54] *Desist v. United States*, 394 U.S. 244, 254 (1969) (concerning retroactivity of *Katz v. United States*, 389 U.S. 347 (1967)). New rules on permissible searches incident to arrest would apply only to searches occurring

[51] For a criticism of this equation, see Mishkin (1965, pp. 73–74).

[52] *See also* discussion at *infra* text accompanying notes 53–54.

[53] The Court defined "final" as "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [to the United States Supreme Court] had elapsed" before the law-changing decision. *Linkletter* (1965, p. 622 n.5). *See also Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966) (refusing to apply retroactively *Griffin v. California*, 380 U.S. 609 (1965), which prohibited prosecutorial comment on a defendant's decision not to testify, to cases already final on the date *Griffin* was decided).

[54] For a summary of the different approaches, see O'Sullivan (1983, pp. 174–75).

after the promulgation of those rules. *Williams v. United States*, 401 U.S. 646, 656 (1971) (plurality opinion) (concerning retroactivity of *Chimel v. California*, 395 U.S. 752 (1969)).[55]

The era of partial retroactivity, however, was short-lived. Starting in the late 1960s, Justice Harlan, who had joined some of the early opinions, issued a series of powerful dissents to the Court's decisions. He objected to a perceived departure from the Court's judicial role. He was especially offended by the Court's record of what we have called "selective prospectivity." Typically, the Court decided the constitutional question in one case and applied its new rule – necessarily retroactively – to the parties at bar. It decided the more general retroactivity question in a later case. This resulted in an intolerable inequity.[56] Justice Harlan thus advocated the full retroactivity of constitutional judgments. But by this he meant only their application to cases that not yet final in the sense that the defendants had exhausted all available appeals. This meant that, with limited exceptions, a petition for a writ of habeas corpus could not be based on a new rule of criminal procedure. *Mackey v. United States*, 401 U.S. 667, 690 (1971) (Harlan, J., concurring and dissenting).

A majority of the Court adopted these arguments after Justice Harlan had left the bench. The 1982 case of *United States v. Johnson*, 457 U.S. 537 (1982),[57] concerned the retroactivity of a 1980 case[58] holding that the Fourth Amendment prohibits warrantless entry into a residence to make a routine arrest. The Court held that its decisions should usually be "applied retroactively to all convictions that were not yet final at the time the decision was rendered." *Johnson* (1966, p. 573).[59] In a significant limitation, however, the Court permitted non-retroactive application of new rules that were "clear break[s] with the past." *Johnson* (1966, p. 558). In these cases, "prospectivity [was] arguably the proper course." *Johnson* (1966, p. 589) (quoting *Williams v. United States*, 401 U.S. 646, 659 (1971)). In 1987, however, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Court abandoned

[55] *See also Mackey* (1971, p. 667) (holding that the extension of the privilege against self-incrimination in *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968) did bar introduction of evidence before the date of those decisions); *Daniel v. Louisiana*, 420 U.S. 31 (1975) (per curiam) (holding that the rule of *Taylor v. Louisiana*, 419 U.S. 522 (1975), which found the systematic exclusion of women from jury panels unconstitutional, only applied to convictions obtained by panels constituted after that decision).

[56] See the quotation from Justice Harlan's opinion in *Mackey v. United States*, reproduced at *supra* text preceding note 30.

[57] By this time a substantial critical academic commentary had also developed. See McCall (1999, p. 809) ("[D]uring the 1970s ... scholars were having 'a veritable field day' with the Warren Court's opinions on prospective overruling.") (citing Beytagh (1975, p. 1558)).

[58] *Payton v. New York*, 445 U.S. 573 (1980).

[59] Ironically, this decision was held not to "affect those cases that would be clearly controlled by our existing retroactivity precedents," making the restoration of the retroactivity rule non-retroactive in a substantial number of cases. *Johnson* (1966, p. 573).

this "clear break" exception when it held that a new rule[60] limiting a prosecutor's ability to use peremptory challenges based on a potential juror's race would apply retroactively notwithstanding its admitted novelty. The Court thought the reasons for adhering to a rule of retroactivity were no less applicable to "clear break" cases than to less drastic changes in criminal procedure. Current federal law on the retroactivity of new decisions on questions of criminal procedure has thus reverted to the rule of *Linkletter v. Walker*: "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final ...." *Griffith* (1987, pp. 326–28).[61]

The key moment for cutting off the retroactive effect of judgments announcing new constitutional rules of criminal procedure, therefore, is when state court convictions have become "final" – i.e., when there is no further opportunity for direct appellate review either in the state courts or by writ of certiorari to the United States Supreme Court. As in civil litigation, this point has been defended, in part, by the need to bring proceedings to some identifiable close. There must, Justice Harlan had argued, "be a visible end to the litigable aspect of the criminal process .... If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all." *Mackey* (1971, pp. 690–91) (Harlan, J., concurring and dissenting).

Res judicata, however, did not shield a final criminal judgment from any challenge as it would a final civil judgment. "Because of habeas corpus and similar writs, ... [a] criminal judgment of conviction does not enjoy the same degree of finality until the defendant has been executed, died in prison, or been released." (Currier 1965, pp. 258–59). A habeas petition technically initiates a new civil action "for the enforcement of the right to personal liberty ...." *Fay* (1963, p. 423).[62] Expressly limiting retroactive application to cases "on direct review" was therefore essential to avoid potentially re-opening the conviction of every defendant still in custody. And because the exclusionary rule at issue in *Linkletter* was, on the Court's reasoning, unrelated to the merits of the prosecution, applying it retroactively would result in the "wholesale release of the guilty victims." *Linkletter* (1965, p. 637).[63] If it did nothing else, limiting the retroactive effect of new criminal procedure rules

[60]Developed in *Batson v. Kentucky*, 476 U.S. 79 (1986).

[61]In *Linkletter*, the Court acknowledged that *Mapp* was applicable to cases "still pending on direct review at the time it was rendered" but did not apply to "state court convictions which had become final before rendition of our opinion." *Linkletter* (1965, p. 622).

[62]In "extraordinary" cases, moreover, even when habeas corpus is not available, a final criminal conviction may be reviewed by application in federal court for a writ of coram nobis. *United States v. Denedo*, 556 U.S. 904, 916 (2009).

[63]However, see Yale Law Journal Note (1962, p. 951) (questioning the validity of the Court's forecast and suggesting that the "sense of injustice which compels retroactive application of the new rule in favor of convicted prisoners" was a more significant cost than that occasioned by "temporarily postponing hearings on civil cases").

to cases on direct review imposed a quantitative limit on the resulting disruption (Fallon and Meltzer 1991, p. 1815).[64]

Nonetheless, refusing to apply a new rule of criminal procedure to a class of defendants incarcerated as a result of trials in which those new rules were not observed necessarily involved an arbitrary element. The Court's approach in *Linkletter* kept "all people in jail who were unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." *Linkletter* (1965, p. 641) (Black, J., dissenting). And as the dissent was quick to point out, Linkletter had committed his offense *before* the defendant in *Mapp*, who had been released under that case's new exclusionary rule. *Linkletter* (1965, pp. 641–42) (Black, J., dissenting). If the courts had not delayed in resolving the *Linkletter* appeal, then he would have reached the Supreme Court first and been released under the new exclusionary rule. "Too many irrelevant considerations," noted one commentator, "including the common cold, bear upon the rate of progress of a case through the judicial system" Schaefer (1967, p. 645).[65]

Limiting the retroactive effect of new criminal procedure rules to cases on direct – not habeas – review has been defended not so much as an appropriate limit on retroactivity but rather as a necessary aspect of the restricted purpose of habeas corpus in federal courts. On this account, habeas did not exist to correct errors but to ensure that state courts adhered to the applicable federal standards of criminal justice. For this purpose, it generally sufficed that criminal prosecutions conformed to the law in effect at the time of the trial. *Mackey* (1971, pp. 691–92 (Harlan, J., concurring and dissenting); Roosevelt 1999, pp. 1093–94).

The Supreme Court crystallized its new approach in 1989 in *Teague v. Lane*, 489 U.S. 288 (1989). The plurality opinion in that case restated the background rule of full retroactivity of judgments on direct appeal expounded the previous term in *Griffith v. Kentucky. Teague* (1989, p. 304) (citing *Griffith* (1987, p. 314)). It then elaborated the limits of habeas corpus, including the inadmissibility of relying on rules not yet formulated at the time of the conviction in question. *Teague* (1989, pp. 308–09) (opinion of O'Connor, J.). "The relevant frame of reference," it emphasized, "is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Teague* (1989, p. 306) (quoting *Mackey* (1971, p. 682) (Harlan, J., concurring in part and dissenting in part)). The Court then established what a leading treatise refers to as a "quite differently structured doctrine of non-retroactivity": A rule declared only after a conviction was final could not be relied on in a subsequent

[64]In this respect, however, consider Justice White's dissent in *Shea v. Louisiana*, 470 U.S. 51, 64 n.1 (1985) ("[B]y the same token, it would be less burdensome to apply *Edwards* retroactively to all cases involving defendants whose last names begin with the letter 'S' than to make the decision fully retroactive.").

[65]*See also Shea* (1985, p. 63) (White, J., dissenting), Currier (1965, pp. 259–260); Dashjian (1993, p. 381 n.352).

collateral proceeding, subject to two narrow exceptions (LaFave et al. 2000, p. 866). A dissenting Justice summarized them accurately:

> Any time a federal habeas petitioner's claim, if successful, would result in the announcement of a new rule of law, ... it may only be adjudicated if that rule would [1] plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or [2] if it would mandate new procedures without which the likelihood of an accurate conviction is seriously diminished.

Teague (1989, p. 330) (Brennan, J., dissenting) (citations omitted) (internal quotation marks omitted). Although some parts of this analysis commanded the assent of only four justices in *Teague*, a majority of the Court approved it the following year. *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Teague*'s rules are now treated "as the settled guidelines for determining what law applies on habeas review" (LaFave et al. 2000, p. 880).

Teague's restriction on the use of "new rules" on collateral review has been interpreted very broadly. A new rule need not be the kind of "clean break" briefly significant under *United States v. Johnson*.[66] According to the *Teague* plurality, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague* (1989, p. 301). Consequently, even though a judgment is carefully and plausibly explained as an application of existing law, it may still be a "new rule." It qualifies, according to a later decision, so long as its outcome "was susceptible to debate among reasonable minds." *Butler v. McKellar*, 494 U.S. 407, 415 (1990).[67] "[A]ny reading beyond the narrowest reasonable reading of [applicable] precedent ... can readily be viewed as a 'new rule'" (LaFave et al. 2000, p. 882).

This understanding of eligible new rules is reinforced by the Court's parsimonious reading of *Teague*'s two exceptions. The first concerned new rules that placed "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague* (1989, p. 311) (quoting *Mackey* (1971, p. 692) (Harlan, J., concurring in part and dissenting in part)). This falls within the well-established doctrine that decisions narrowing the scope of criminal liability should be fully retroactive.[68] Therefore, a court recently held that it was proper to reconsider a final unappealed conviction for gun possession after the Supreme Court found the relevant law unconstitutional. *Magnus v. United States*, 11 A.3d 237, 243–46 (D.C. 2011).[69] This exception also allows collateral review when

[66] *See supra* text accompanying notes 57–60.

[67] For a recent application, see *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

[68] *See supra* text accompanying notes 40–41. "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey* (1971, p. 693) (Harlan, J., concurring in part and dissenting in part). *But see Warring v. Colpoys*, 122 F.2d 642, 647 (D.C. Cir. 1941).

[69] The rehearing was held to be a proper exercise of a court's power to issue a writ of error, *coram nobis*.

a court reinterprets a criminal statute to exclude a petitioner's conduct. *Bousley v. United States*, 523 U.S. 614, 620–21 (1998).

The second exception permits a habeas court to review an otherwise final conviction if it were obtained in violation of a later-formulated "watershed rule[] of criminal procedure," non-observance of which would result in "the likelihood of an accurate conviction [being] seriously diminished." *Teague* (1989, p. 313).

> In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.

Whorton v. Bockting, 549 U.S. 406, 418 (2007) (citations omitted) (internal quotation marks omitted). This exception has turned out to be extremely limited in practice. The Court had already recognized that the great bulk of the new procedures mandated in the rights revolution of the 1960s did not measurably enhance the truth-finding aspects of a criminal prosecution. They were aimed, rather, at deterring unconstitutional police misconduct. *Linkletter* (1965, p. 637). The Supreme Court has identified only one case whose rule would satisfy this criterion – *Gideon v. Wainwright*, which mandated legal representation at public expense for indigent defendants. *Whorton* (2007, p. 419). By contrast, the Court has declined to allow a death-row prisoner to challenge his execution based on a Supreme Court judgment – announced after his sentence had been pronounced – requiring that the aggravating factor essential to impose the death penalty be determined by the jury and not the judge. *Schiro v. Summerlin*, 542 U.S. 348, 352–56 (2004).

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.), which restricted the right of state court defendants to challenge their convictions by collateral review in federal court, creating, among other limitations, strict time limits. 28 U.S.C. § 2244(d) (2012). It also specified that if a particular claim had been "adjudicated on the merits in state court proceedings," a federal court could not issue a writ of habeas corpus unless the state adjudication either: (i) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (ii) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2) (2012). This requirement roughly mirrors the plurality approach in *Teague*. Notably, the "clearly established federal law" to which the state court decision must conform refers to law at the time of that state court decision; not to subsequently declared changes in the required procedures. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

The Act and the Court's doctrine are not precisely congruent, however. For example, the "new rule" that bars habeas relief under *Teague* is one announced after the petitioner's case became final. *Teague* (1989, p. 310). But the "clearly established Federal law" to which a state court decision must conform to bar relief under the statute is that existing at the time of the relevant decision, even if the law

is changed before the conviction becomes final – so that it might have been properly applied in reviewing the decision under *Griffith* and *Teague*. *Greene v. Fisher*, 132 S. Ct. 38, 44–45 (2011). Both sets of limitations – of *Teague* and of the Act – must be overcome before a federal district court may grant a habeas petition. *Horn v. Banks*, 536 U.S. 266, 271 (2002) (per curiam) ("[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.").[70]

The foregoing discussion concerns only the limits of retroactive application of new constitutional rules of criminal procedure in collateral review of state criminal convictions in federal courts. State law also typically allows collateral attacks on convictions even after direct review is no longer available. State courts are free to apply new rules of criminal procedure on such review, even if a federal court could not. *Danforth v. Minnesota*, 552 U.S. 264, 295 (2008). State courts, in fact, apply a range of approaches when deciding whether to apply such law. Many have adopted the federal approach articulated in *Teague*.[71] Other jurisdictions have kept the three factor test adopted – and now rejected – by the United States Supreme Court in *Linkletter v. Walker* and *Stovall v. Denno*.[72]

The Problems of Prospective Adjudication

As this summary indicates, the history – and indeed, the current status – of the once widely accepted idea that judicial pronouncements of law are thoroughly retroactive has been more than a little complicated. Currently, for civil cases, most state courts examine the relevant factors favoring or disfavoring prospective application on a case-by-case basis. Federal courts must apply any new rule of law to all cases still pending on direct review when the rule is declared. Almost all courts will find a way to apply a judicially-narrowed rule of criminal liability retroactively but will refuse to do the same when the scope of liability has been broadened. The United States Supreme Court, after a period when it made some new rules of criminal procedure selectively prospective, has now settled on a "firm rule of retroactivity," *Landgraf* (1994, p. 278 n.32), binding all federal courts. This retroactivity, however, reaches back only to cases in which direct appeals remain available. Reconsideration of a conviction in light of a subsequently announced procedural rule by way of collateral attack is permitted only within the narrow exceptions defined in *Teague*

[70] See also Yackle (2010, pp. 183–200) (discussing the relationship between the statute and the case law).

[71] *See,* e.g., *People v. Sanders*, 939 N.E.2d 352 (Ill. 2010); *Commonwealth v. Cunningham*, No. 38 EAP 2012, 2013 WL 5814388 (Pa. Oct. 30, 2013).

[72] *See, for example, State v. Knight*, 678 A.2d 642, 652 (N.J. 1996). On *Linkletter* and *Stovall*, see *supra* text accompanying notes 51–52.

v. Lane and the AEDPA.[73] State courts collaterally reviewing a judgment are not bound by *Teague* or the AEDPA and apply a variety of approaches. These divergent standards show that the retroactivity and prospectivity of judicially created law remains profoundly controversial in American jurisprudence.

The disagreement has often been expressed in terms of the practice's relation to the doctrine of stare decisis. The declaration of a genuinely new rule is, by definition, a break with the discipline of stare decisis.[74] Still, its advocates have argued that *prospective* overruling is supported by that doctrine's core purposes:

> At its core, *stare decisis* allows those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them. A decision *not* to apply a new rule retroactively is based on principles of *stare decisis*. By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law.

James B. Beam (1991, pp. 551–52) (O'Connor, J., dissenting).

The practice, therefore, "ensures realization of the goals underlying the principle of stare decisis without inhibiting the overturning of socially incongruent doctrine because of a concern for these values" (Auerbach 1991, p. 567).[75] This argument, however, turns out to be two-edged sword. The very capacity of a prospective ruling to minimize the upsetting of justified reliance may remove one of the greatest incentives to adhere to precedent:

> By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.

James B. Beam (1991, p. 548) (opinion of Blackmun, J.).[76]

By reducing the costs of overruling, non-retroactivity may have contributed to an increasing tendency to overrule controlling precedents and, therefore, on balance, to increase instability in the law, thus undermining the principal goal of stare decisis (Wistrich 2012, pp. 765–70).[77] "Prospective decisionmaking," according to Justice Scalia, "is the handmaid of judicial activism, and the born enemy of *stare decisis*." *Harper* (1993, p. 105) (Scalia, J., concurring). By reducing the jolts caused by judicial actions, prospective overruling may encourage and legitimate judicial

[73] *See supra* text accompanying notes 66–70.

[74] "Pure prospective overruling," however, maintains existing precedent in the particular case at bar.

[75] *See also* Stephens (1998, p. 1565).

[76] *See also James B. Beam* (1991, p. 549 (Scalia, J., concurring).

[77] Prospective-only judgments are also obviously in tension with the stare decisis policy of equitable treatment of litigants insofar as it distinguishes parties solely on the basis of when their dispute arose (Auerbach 1991, p. 571).

legislation, an enterprise basically inconsistent with the limited role of courts as interpreters and appliers of pre-existing law.[78]

In one nineteenth-century judgment the United States Supreme Court declared that a new interpretation of a statute "is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." *Douglass* (1879, p. 687). This has been a criticism of non-retroactive judgments as long as they have been rendered in American courts.[79] It was also a prominent theme in the Supreme Court's debate on the practice in the latter part of the twentieth century. Justice Harlan accused those willing to apply a new rule of criminal procedure only prospectively of feeling "free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise." *Mackey* (1971, p, 677) (Harlan, J., concurring and dissenting).

This disapproval, of course, assumes that it is improper for courts to make law. It depends, that is, at some level, on the ancient declaratory theory of adjudication. Indeed, in a concurring opinion endorsing full retroactivity, Justice Scalia quoted extensively from Blackstone. *Harper* (1993, pp. 106–07) (Scalia, J., concurring).[80] But this was a theory which the advocates of limited retroactivity had already rejected, indeed ridiculed for decades.[81] In some versions, the advocacy of non-retroactive judgments was part and parcel of the American legal realist critique of formalist jurisprudence. One commentator was pleased at the prospect that "the more courts begin to utilize prospective overruling the more it will become obvious that the judge is, in fact, inescapably a judicial legislator" (Levy 1960, p. 16).[82] And in an unusually candid judicial recognition of the realist position, Justice O'Connor defended non-retroactive judgments by citing *Marbury v. Madison*: "[P]recisely because this Court has 'the power to 'say what the law is," when the Court changes its mind, the law changes with it." *James B. Beam* (1991, p. 550) (O'Connor, J., dissenting) (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137

[78] *See* Rogers (1968, pp. 36–37) ("[A]n exploration of this doctrine of prospective overruling is but a specialized examination of the limits of judicial lawmaking with particular regard to the element of *time* of application of the overruling decision."); Leflar (1974, p. 342).

[79] See, for example, *Gelpcke* (1863, p. 211) (Miller, J., dissenting) ("[The majority] ... holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859.").

[80] In criticizing the *Linkletter* decision (*see supra* note 51), Paul Mishkin stressed the "*symbolic* ideal reflected in the Blackstonian concept and ... the emotional loyalties it commands." Mishkin (1965, p. 66) (emphasis added).

[81] See, for example, Traynor (1977, p. 535) (deriding as "moonspinning" the idea that "judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed").

[82] On the relationship between prospective overruling and legal realism, see Levy (1960, pp. 1–3); see also Rogers (1968, p. 74) ("[T]he time has come to openly recognize the legislation involved when courts overrule precedents.").

(1803).[83] By the late twentieth century, this was a position with which it was difficult to argue and it undermined the claim, prominently advanced by Justice Harlan, that non-retroactivity was somehow inconsistent with the nature of adjudication. *Mackey* (1971, pp. 677–81) (Harlan, J., concurring and dissenting).

To the extent that the practice of giving judgments only prospective effect reflects modern recognition of the law-making power of judges, however, we might expect it to be employed differently depending on the underlying source of the law being applied. The demise of the declaratory theory led first to the conclusion that the judicial creation and modification of rules of *common law* were inevitably exercises of judicial legislation. It was with respect to the common law that Holmes recognized that "judges do and must legislate, but they can do so only interstitially . . . ." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917).[84] The idea that *enacted* law does not pre-exist judicial cases invoking it, however, is markedly harder to sustain. It might follow that courts should limit the applicability in time of their common law judgments but not those bottomed on statutes or constitutions (Roosevelt 1999, pp. 1076, 1107).

A few cases support this intuition. As recently as 2010, the Massachusetts Supreme Judicial Court held that '[w]here a decision does not announce new common-law rules or rights but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment." *In re* McIntire, 936 N.E.2d 424, 428 (Mass 2010).[85] For the most part, however, neither courts nor commentators have suggested that the source of the law at issue was much of a consideration with respect to the temporal effect of a judgment. Cardozo thought there was no "adequate distinction" between changes of rulings concerning statutes or common law. The choice of whether to apply a new rule prospectively was not governed "by metaphysical conceptions of the

[83] Justice Scalia later claimed that this interpretation of *Marbury* "would have struck John Marshall as an extraordinary assertion of raw power." *Harper* (1993, pp. 106–07) (Scalia, J., concurring).

[84] In the particular case, Holmes was discussing both common law and admiralty jurisprudence.

[85] Notwithstanding this statement, the Court promptly proceeded to limit the retroactivity of new interpretations of enacted law. See *Shirley Wayside Ltd. P'ship v. Bd. of Appeals*, 961 N.E.2d 1055, 1065 (Mass. 2012); *Eaton v. Fed. Nat'l Mortg. Ass'n*, 969 N.E.2d 1118, 1132–33 (Mass. 2012). The Pennsylvania Supreme Court was less categorical but expressed the view that "[l]ogically, courts have greater control over questions of retroactivity or prospectivity if the 'rule' is of the court's own making, involves a procedural matter, and involves common law development. On the other hand, courts should have the least flexibility where . . . the holding at issue . . . involves an interpretation of a statute." *Kendrick v. Dist. Attorney of Phila. City*, 916 A.2d 529, 539 (Pa. 2007). By parallel reasoning, a court of last resort may feel more free to limit the retroactivity of a judgment changing judicial procedure under that court's "supervisory power" to manage the effective operation of the lower courts. *State v. Cabagbag*, 277 P.3d 1027, 1041–42 (Haw. 2012). Another category of cases which it has been suggested involves judicial legislation – and hence is appropriate for non-retroactive application – is that in which the judges supply a conspicuous gap in legislation. Cases where the Court chooses an appropriate statute of limitations where none is specified in the underlying statute may fall in this category. See, for example, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

nature of judge-made law, nor by ... the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice" (Cardozo 1921, pp. 148–49). True to that position, when he wrote the Supreme Court's *Sunburst* opinion, upholding the constitutionality of prospective overruling by state courts, he noted that the "alternative is the same whether the subject of the new decision is common law or statute." *Great N. Ry. Co.* (1932, p. 365) (citations omitted).[86]

In fact, some observers noted that prospective rulings have been *more* common in the case of new statutory interpretations than in the case of new common law rules (Hart and Sacks 1994, p. 604; Durgala 1962–63, pp. 54–56). The justification for such a priority has never been thoroughly explained. In *Sunburst*, Justice Cardozo assumed that the decision to apply judgments retroactively or prospectively – in whatever kind of case – was an aspect of the doctrine of stare decisis and that doctrine was itself a part of the common law and, therefore, within the authority of the judges. *Great N. Ry. Co.* (1932, p. 366). One writer has suggested that individuals are more likely to rely on statutory or constitutional rights than common law rights and are therefore entitled to a greater degree of protection (Rogers 1968, p. 54).

A recent decision of the United States Court of Appeals for the Sixth Circuit addressed the "seemingly compelling" argument that a state court was without power to treat a statutory interpretation as anything but fully retroactive. *Volpe v. Trim*, 708 F.3d 688, 702 (6th Cir. 2013). The court noted that legislatures often write broad statutes and rely on the courts to refine and apply them. *Volpe* (2013, p. 702). It was thus proper for a court to make "readjustments" in light of experience. *Volpe* (2013, p. 702). In these circumstances, "the judicial development of the legislatively-created concept is little different from the development of judicially-announced law" and, therefore, a court could properly consider whether its interpretation should apply retroactively. *Volpe* (2013, p. 702).

In sum, the current confused state of the law on the possibility of limited retroactivity of judgments demonstrates a persistent and possibly irresoluble tension in the American view of law and of the roles of legal institutions. The separation of powers is a fundamental dogma of the constitutional system. But it assumes that we are able to identify with some precision what distinguishes "legislative" from "judicial" functions (Currier 1965, pp. 221–22). The declaratory view of adjudication fits comfortably with that assumption. But the idea that the content of the law exists prior to and independent of its application by the courts seems to have been irretrievably lost. Even in the case of enacted written law, modern notions of interpretation have blurred the line between legislation and adjudication (Kay 2007, pp. 243–49). In these circumstances, what can it mean to complain that a prospective-only ruling is inconsistent with the judicial role? The difficulty is illustrated by a passage from one of Justice Scalia's separate opinions in the

[86]The *Sunburst* judgment is discussed at *supra* text preceding note 7.

Supreme Court's series of cases effecting the transition from employment of limited retroactivity to a "firm rule of retroactivity." *Landgraf* (1994, p. 278, n. 32):

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.

James B. Beam (1991, p. 549) (Scalia, J., concurring). In his separate opinion in the same case, Justice White pounced on this obscure description of the proper role of courts:

> [E]ven though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense "make" law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.

James B. Beam (1991, p. 546) (White, J., concurring). There is no more contested issue in American constitutional law than the propriety of independent policy-making by courts (Kay 2007). Prospective judgments dramatically spotlight that controversy and it is not surprising that it has been a difficult and contentious issue for courts and commentators alike. It will be impossible, however, to arrive at a coherent and generally accepted approach to the retroactive or prospective application of new judicial declarations of law until there is an equally well-accepted definition of the proper allocation of lawmaking authority.

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Chapter 11
Canada: The Rise of Judgments with Suspended Effect

Lionel Smith

Abstract In principle, all court orders in Canada have retroactive effect. However, the Supreme Court of Canada, proceeding pragmatically, has decided that it has the power to depart from this when it deems it appropriate to do so. Such occasions have arisen in relation to declarations of constitutional invalidity. Rarely, the Court has made orders that operate only prospectively. More commonly, indeed one might say quite routinely, it makes orders whose effect is suspended for a defined period. When the period expires, the order is retroactive, but the suspension allows the legislature to intervene and react to the court order with new legislation, before the order takes effect. The basis for such orders is contested by some.

Precedent as a Source of Law in Canada

Canada is a federation, with legislative competence shared between the federal Parliament and the ten provincial legislatures.[1] As a general matter, private law belongs to the provincial level.[2] One province, Quebec, has a civilian system of private law, derived from the customary French law that was applied during the time that it was a colony of France.

Sir William C. Macdonald Professor of Law, Faculty of Law, McGill University; Professor of Private Law, Dickson Poon School of Law, King's College London. I thank my colleague Robert Leckey for his helpful suggestions, and Natasha Perri for research assistance.

[1]The spheres of competence are set out in ss. 91–5 of the *Constitution Act, 1867*. There are also three territories, which exist by virtue of federal legislation, but which are treated for most purposes as separate jurisdictions at the provincial level. They have their own legislative assemblies and legislate in areas that belong to the provincial level.

[2]*Constitution Act, 1867,* s. 92(13). There are some particular private law matters (for example, bankruptcy, banking and bills of exchange) that are assigned to the federal level.

L. Smith (✉)
Faculty of Law, McGill University, 3644 Peel Street, Montréal, QC H3A 1W9, Canada

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In the common law provinces, the doctrine of *stare decisis* is operative.[3] Canadian courts are bound by decisions of courts that are higher in the hierarchy of courts. This means that first instance courts are bound by decisions of the Court of Appeal in the same province, while the provincial Courts of Appeal are bound by decisions of the Supreme Court of Canada. Although private law can vary across the common law provinces as a result of differences in statute law, the Supreme Court of Canada has the role of unifying the common law of Canada across those provinces.

A recent decision of the Supreme Court of Canada could be read as pointing towards a more relaxed view of *stare decisis.* In *Canada (Attorney General) v Bedford,*[4] one question was whether the trial judge was bound by *stare decisis* to follow an earlier holding of the Supreme Court of Canada. The Court said:[5]

> . . . a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

The implication of this passage is not entirely clear. The reference to a "new legal issue" seems unnecessary, because *stare decisis* only operates in relation to the legal issues that were decided in the earlier decision; it never applies when the later decision is concerned with a different legal issue. In contrast, the reference to "a significant change in the circumstances or evidence" is potentially far-reaching, although it is not clear that the Court appreciated this. Such a test has sometimes been proposed for when a court can depart from *its own* previous decision, but not as one that permits a lower court to depart from a decision of the Supreme Court of Canada.

In Canada, courts do not generally consider themselves strictly bound by *stare decisis* to follow decisions made at the same level of court. However, such decisions are treated with a great deal of respect. Hence, a trial judge in (for example) the Manitoba Court of Queen's Bench could choose not to follow a previous decision of the same court.[6] Although the Ontario Court of Appeal used to consider itself bound by its own previous decisions, it no longer does so, and neither do other Courts of Appeal.[7] However, where a previous decision is called directly into question, a Court of Appeal (which typically sits with a panel of three judges, chosen from

[3] G. Curtis, "*Stare Decisis* at Common Law in Canada" (1978) 12 U.B.C. L. Rev. 1; D. Parkes, "Precedent Unbound? Contemporary Approaches to Precedent in Canada" (2007) 32 Man. L.J. 135. For a detailed historical analysis, see M. Devinat, *La règle prétorienne en droit civil français et dans la* common law *canadienne : étude de méthodologie juridique comparée* (2005), at 134–73.

[4] *Canada (Attorney General) v Bedford* 2013 SCC 72.

[5] At [44].

[6] Parkes, ibid., 158–61.

[7] Parkes, ibid., 153–8.

among a much larger group) may choose to address the question with a larger panel of five judges. In this way, it is understood that the later court can not only differ from the previous decision, but can overrule it as far as that province's law is concerned.

It is clear that the Supreme Court of Canada is not bound by its own decisions, although naturally they are treated with great respect. A later decision of that Court can overrule a previous one, and it is not necessary that the later panel be larger than the earlier one (since the court usually aims to sit as a nine-judge panel that includes all of the judges). The Court has suggested that it will depart from its own previous holding only in fairly rare circumstances. In *Friedmann Equity Developments Inc. v Final Note Ltd.,*[8] the Court stated:

> A change in the common law must be necessary to keep the common law in step with the evolution of society . . . , to clarify a legal principle . . . , or to resolve an inconsistency . . . In addition, the change should be incremental, and its consequences must be capable of assessment.
>
> In the recent case of *Robinson*,[9] Lamer C.J., for a majority of the Court, relied on five factors to justify the reversal of an earlier decision of the Court in *MacAskill v. The King*, [1931] S.C.R. 330. These factors were the existence of previous dissenting opinions in this Court, a trend in the provincial appellate courts to depart from the principles adopted in the original decision, criticism of the case or the adoption of a contrary rule in other jurisdictions, doctrinal criticism of the case and its foundations, and inconsistency of the case with other decisions. While they are not prerequisites for a change in the common law, these factors help to identify compelling reasons for reform. On the other hand, courts will not intervene where the proposed change will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately measured . . .

However, it is fair to say that although this seems to suggest that the Court will always strive carefully to ensure that its decisions are consistent with its prior holdings, unless compelling reasons are shown, the reality is sometimes the contrary. This may be because the Court relies to some extent on counsel to point out which previous decisions may be important, and many counsel are specialized in particular fields of law. To take an example, in a 2005 case in criminal law, the Court was again asked to overrule its previous holdings. It said, "The Court's practice, of course, is against departing from its precedents unless there are compelling reasons to do so."[10] A number of Supreme Court of Canada cases were cited in support of this proposition, but somewhat strikingly, *Friedmann Equity Developments Inc. v Final Note Ltd.,* a private law decision, was not mentioned.[11]

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[8] *Friedmann Equity Developments Inc. v Final Note Ltd.* [2000] 1 S.C.R. 842, at [42]–[43], criticized in G. Hall, "Preserving the Clavicle in the Cat: Stunted Reform of Common Law Rules in the Supreme Court of Canada" (2001) 36 Can. Bus. L.J. 89. On the ability of common law courts to reform the common law, see Devinat, above, note 3, at 161–73.

[9] *R. v Robinson* [1996] 1 S.C.R. 683.

[10] *R. v Henry* 2005 SCC 76, [2005] 3 S.C.R. 609, at [44].

[11] To take another example, in *Garland v Consumers' Gas Co.* 2004 SCC 25, [2004] 1 S.C.R. 629 the Court set out a brand new framework for the analysis of unjust enrichment claims in common law Canada. This development took many commentators by surprise, and the Court did not even

What follows from this is that decisions coming from other provinces can only ever be persuasive, and not binding. For example, a decision of the Ontario Court of Appeal is binding on lower courts in Ontario, but not on courts in other provinces. The decision can be persuasive, as can decisions from other countries. There are, of course, degrees of persuasiveness, and a decision of the Court of Appeal of another province would be considered highly persuasive if it were directly on point. The Supreme Court of Canada has also rejected the suggestion that *obiter dicta* in its judgments can be binding on lower courts; again, they may be very persuasive, but not technically binding.[12]

Although Quebec is a civilian jurisdiction in relation to private law, the hierarchical structure of the province's courts is the same as in other provinces, and so is the system for the appointment of judges from among senior practitioners. The result is that there is some uncertainty about whether *stare decisis* formally applies in Quebec. In 2009, a majority of the Quebec Court of Appeal said:

> Dans ces circonstances et puisqu'il n'y a pas vraiment de stare decisis en droit civil, la Cour doit reprendre l'analyse de plusieurs questions de droit, notamment les critères permettant de conclure en une faute dans l'expression d'une opinion, de même que le droit aux honoraires extrajudiciaires dans les litiges régis par la Charte.[13]

But in 2011, the same Court said in a unanimous judgment:

> Source de stabilité et de structure pour le système juridique, l'autorité du précédent est l'un des fondements de la primauté du droit. Ce principe assure au justiciable non seulement une prévisibilité relative par rapport à la prise de décision judiciaire, mais également une protection contre l'arbitraire dans l'exercice de ce pouvoir.[14]

Whether or not precedent is classified formally as a source of law in Quebec is a matter of debate, but it is clear that at least informally, a version of the doctrine of *stare decisis* does operate.[15]

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address the considerations set out in *Friedmann Equity Developments Inc. v Final Note Ltd.* Then, in *B.M.P. Global Distribution Inc. v Bank of Nova Scotia* 2009 SCC 15, [2009] 1 S.C.R. 504, the Court decided a case involving mistaken payments, which in the common law is considered a paradigm example of unjust enrichment. This case, however, was decided with reference to English case law and without any reference to *Garland.*

[12] *Henry,* above, note 10, at [52]–[59]. *Obiter dicta* are statements about the law that are not essential to the court's resolution of the dispute. See the analysis of M. Devinat, "The Trouble with *Henry:* Legal Methodology and Precedents in Canadian Law" (2006) 32 Queen's L.J. 278.

[13] *Genex Communications inc. v Association québécoise de l'industrie du disque, du spectacle et de la vidéo* 2009 QCCA 2201, at [27] (footnote excluded).

[14] *Nechi Investments inc. v Autorité des marchés financiers* 2011 QCCA 214, at [22].

[15] See A. Popovici, "Dans quelle mesure la jurisprudence et la doctrine sont-elles source de droit au Québec?" (1973) 8 Revue juridique Thémis 189; J.E.C. Brierley and R.A. Macdonald (eds), *Quebec Civil Law: An Introduction to Quebec Private Law* (1993), at 121–5; A. Mayrand, "L'autorité du précédent au Québec" (1994) 28 Revue juridique Thémis 771.

Declaratory Theory of Judicial Decisions; Courts as Legislators

One might say that the declaratory theory of judicial decisions is not accepted inasmuch as everyone agrees that judges have a role in the law's evolution and development.[16] In Canada, this role has been much more evident since 1982, with the coming into force of the *Canadian Charter of Rights and Freedoms*. The *Charter* limits the legislative competence of Canadian legislatures and frequently leads to decisions that legislation is without effect. The development of the legal principles flowing from the text of the *Charter* has been a process involving judicial creativity. But even apart from the *Charter*, the law-making role of judges is obvious.

At the same time, the declaratory theory of judicial decisions is implicitly accepted inasmuch as judicial decisions are generally retroactive in operation.[17] This retroactivity must operate at least as far as the time when the facts occurred that gave rise to the dispute. On the orthodox view, the primary judicial function is the resolution of disputes by the application of the law; any law-making function is incidental to that primary function.[18] The most natural way to understand the normal retroactive effect of judgments is that the judgment declares the law, not only as it is, but as it was at the time the facts occurred.

In *British Columbia v Imperial Tobacco Canada Ltd.,*[19] the Supreme Court of Canada stated:

> The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.
>
> The judiciary has some part in the development of the law that its role requires it to apply. . . . But the judiciary's role in developing the law is a relatively limited one.
>
> . . . developments in the common law have always had retroactive and retrospective effect.

As elsewhere, the declaratory theory has sometimes been denounced as fictional, on the basis that it is inconsistent with the reality that judges can change or develop the law.[20] But if we accept that the law which judges declare is itself partly

[16]For a careful analysis of the declaratory theory as it has been received and criticized in Canadian common law, see Devinat, above, note 3, at 109–33.

[17]Devinat, above, note 3, at 428–30.

[18]L. Smith, "The Rationality of Tradition" in T. Endicott, J. Getzler, and E. Peel (eds), *Properties of Law: Essays in Honour of James Harris* (2005), p. 297.

[19]*British Columbia v Imperial Tobacco Canada Ltd.* 2005 SCC 49, [2005] 2 S.C.R. 473, at [50]–[51], [72].

[20]M.L. Friedland, "Prospective and Retrospective Judicial Lawmaking" (1974) 24 U.T.L.J. 170.

determined by matters that change over time, such as social conditions, then it is possible to reconcile the declaratory theory with changing law.[21]

In *Canada (Attorney General) v Hislop*,[22] a majority of the Supreme Court of Canada said:

> . . . the declaratory approach is derived from Blackstone's famous aphorism that judges do not create law but merely discover it: W. Blackstone, *Commentaries on the Laws of England* (1765), vol. 1, at pp. 69–70. It reflects a traditional and widespread understanding of the role of the judiciary in a democratic state governed by strong principles of separation of powers between courts, legislatures and executives. In this perspective, courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. On the other hand, legislators fashion new laws for the future.
>
> Blackstone's declaratory approach has not remained unchallenged in modern law. Commentators and courts have pointed out that judges fulfill a legitimate law-making function. Judges do not merely declare law; they also make law.
>
> However, this acknowledgement does not require abandoning Blackstone's declaratory approach altogether. The critique of the Blackstonian approach applies only to situations in which judges are fashioning new legal rules or principles and not when they are applying the existing law. In instances where courts apply pre-existing legal doctrine to a new set of facts, Blackstone's declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigants will have the benefit of the ruling . . .

As we will see below, however, the Court stated that although court orders are *generally* retroactive, they are not necessarily always fully retroactive.

Some cases, particularly under the *Charter,* have raised questions about whether courts sometimes act as legislators. This is particularly so where courts adopt the practise of "reading in". If a court concludes that a particular legislative provision is inconsistent with *Charter,* or with some other part of the Constitution, it is likely to declare that the provision is without legal effect. This may attract a concern that the judges have stepped outside their adjudicative role. Sometimes, however, Canadian courts do not merely "strike out" legislation; they instead "read in". This means that they conclude that the legislation must be read as if it contained words that the legislator did not include. Striking out rests on a conclusion that the relevant provision is unconstitutional, and indeed that it always has been so. Reading in is more controversial and more likely to attract concerns that judges are acting

[21] R.M. Dworkin, *Taking Rights Seriously* (1977), at 110–23; L. Smith, "Restitution for Mistake of Law: *Kleinwort Benson Ltd. v. Lincoln City Council*" 7 [1999] Restitution L. Rev. 148.

[22] *Canada (Attorney General) v Hislop* 2007 SCC 10, [2007] 1 S.C.R. 429, at [84]–[86]. See also the minority judgment of Bastarache J., who said (at [138]): "The basis for general retroactivity is not Blackstone's declaratory theory, but the Constitution itself." He was addressing "remedies for constitutional violations" and his reasoning was based on the supremacy of the Constitution, which means that any law inconsistent with it is void ab initio. However, retroactivity is also the general effect of judicial changes in the law that are not constitutional remedies, such as changes to private law. One could say that here too, the basis for retroactivity lies in the Constitution, since under the Constitution judges do not have the power to act as legislators.

legislatively. This is because, speaking generally, there is more than one way in which the constitutional problem could have been solved. The court chooses words to read into the legislation, but the legislature might have chosen different words, or might have enacted no law at all.

A prominent example was *Vriend v. Alberta.*[23] Vriend was dismissed from his employment at a private religious college because of his sexual orientation. The Alberta *Individual's Rights Protection Act*[24] prohibited discrimination in relation to employment on various grounds, namely race, religious beliefs, colour, gender, physical disability, mental disability, marital status, age, ancestry or place of origin. It did not forbid discrimination on the basis of sexual orientation. Vriend successfully claimed that the omission of this ground of discrimination was inconsistent with the *Charter.* The Court's conclusion was not that the Act was invalid, or that the provisions on discrimination in relation to employment were invalid; rather, those provisions had to be read *as if* they listed sexual orientation as a prohibited ground of discrimination.[25]

An even more dramatic example arose in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.[26] Here the issue was whether provincial courts were sufficiently independent from government, as required by the *Charter*.[27] The Supreme Court of Canada indicated that in order to satisfy this requirement of independence, the institutional structure must be such that it avoids the possibility or appearance of political interference; and in order to achieve this, a body, such as an independent remuneration commission, must be interposed between the judiciary and the other branches of government. The function of this body would be to depoliticize the process of determining judicial remuneration. In this decision, the Court went well beyond declaring legislation to be inconsistent with the Constitution, and took on a role much more like a legislator in stating how the institutional regime must be structured. As will be explained below, this ruling was also a prospective one. Given its prescriptive nature, stating what institutions must be created to satisfy the Constitution, it would hardly make sense as a retrospective holding; on the other hand, its prospective nature makes it seem even more legislative in character.

[23] *Vriend v Alberta* [1998] 1 S.C.R. 493.

[24] R.S.A. 1980, c. I-2.

[25] The majority made an order with full retroactive effect. Major J., dissenting on this point, would have made a declaration of invalidity with suspended effect. This remedy is discussed further below.

[26] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1998] 1 S.C.R. 3.

[27] Under s. 11(d) of the *Charter,* an accused person has the right to be presumed innocent until proven guilty "in a fair and public hearing by an independent and impartial tribunal".

Problems with the Retrospective Effect of Judicial Decisions

There have been some academic discussions of problems that can arise from the presumptively retrospective effect of judicial decisions.[28] A number of decisions of the Supreme Court of Canada have engaged with some of these problems.

It is important to note that the retroactive effect of a judicial decision cannot affect earlier cases that rest on a *res judicata.* In other words, even if a previous court applied what is now retroactively declared to be invalid legislation or an incorrect understanding of the law, it will not be possible to re-open a dispute that has been decided, and in which no appeal is pending. The retroactive effect can, however, have wide-ranging effects on other parties. In Canada, the main problem to which the courts have reacted is the dramatic effects that may arise when legislation is declared to be constitutionally invalid.

Suspended Effect

The primary Canadian response to this problem is one that has not been widely adopted in other jurisdictions. This is that the effect of a judicial ruling is suspended for a period defined by the court. Sometimes this has been mistaken for prospective overruling.[29] It is not. The reason is that when the period has elapsed, the judgment can take full retroactive effect. But the goal of the suspension is to allow the legislature to respond to the invalidity of its legislation. If, during the period of suspension, the legislature enacts valid legislation that addresses the matter, then the outcome is that the declaration of invalidity will, in a sense, be bypassed. The new, valid legislation will take effect before the old, invalid legislation becomes ineffective.

The first case in which such an order was made was the *Manitoba Language Reference.*[30] Manitoba became a province in 1870, joining Canada which had come into existence in 1867. The legislation of Manitoba, including that which received the English common law as the basic law of the province, was enacted in English. In the *Reference,* the Court held that the Constitution required that the province's

[28] P. Weiler, "Legal Values and Judicial Decision-Making" (1970) 48 Can. Bar Rev. 1, at 29–33; Friedland, above, note 18; Devinat, above, note 3, at 430–6.

[29] For example, by Lord Nicholls in *Re Spectrum Plus Ltd (in liquidation)* [2005] UKHL 41, [2005] 2 A.C. 680, at [22].

[30] *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721. In Canada, governments may refer questions of law to appellate courts, in the absence of a *lis* of the normal kind. The court issues judgment after argument from interested parties. Such cases, called "references", have been very important in the development of the Constitution.

legislation be enacted bilingually, in English and French. The result was that all of the statute law in the province was invalid, and had always been invalid. The Court so declared, but it also held that the outcome – a province without laws – was potentially inconsistent with the rule of law. It therefore suspended the effect of its declaration, for the minimum amount of time necessary for the law laws to be translated and re-enacted in a bilingual form.

The declaration of invalidity with suspended effect began as an extraordinary order for an extraordinary case. In a later case, the Court issued guidelines for its use, which appear to be fairly restrictive:

> Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option ... if:
>
> A. striking down the legislation without enacting something in its place would pose a danger to the public;
> B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
> C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.[31]

Although these guidelines have not been formally overruled or replaced, the use of this remedy has become fairly routine in cases where some violation of the Constitution is found.[32] The idea is to allow the relevant legislature to address the constitutional problem during the time of the suspension. In *Canada (Attorney General) v Hislop,* the majority of the Court said:[33]

> Like transition periods and other purely prospective remedies, the suspended declaration of invalidity is not fully consistent with the declaratory approach. By suspending the declaration of invalidity, the Court allows the constitutional infirmity to continue temporarily so that the legislature can fix the problem. In other words, the Court extends the life of a law which, on the Blackstonian view, never existed.

[31] *Schachter v Canada* [1992] 2 S.C.R. 679, at 719.

[32] For a thorough study, see G.R. Hoole, "Proportionality as a Remedial Principle: A Framework for Suspended Declarations of Invalidity in Canadian Constitutional Law", LL.M. (University of Toronto, 2010), online at https://tspace.library.utoronto.ca. Hoole notes that in the period between 2003 and 2010, the Supreme Court of Canada found legislation to be inconsistent with the *Charter* in 11 cases, and suspended the effect of the declaration in eight of them. This continues a rising trend documented in B. Ryder, "Suspending the *Charter*" (2003) 21 Sup. Ct. L.R. (2d) 267: suspension was used in three out of 22 cases in 1989–1993, in two of 12 cases during 1994–1998, and in 8 out of 14 cases during 1998–2003.

[33] Above, note 20, at [91].

But some have wondered whether the effect is to dilute the foundational nature of the Constitution.[34] To take one example, in *R. v Guignard,*[35] the accused put up a sign, on his own property, that criticized his own insurance company. He was prosecuted under a municipal by-law that forbade commercial signs in residential areas. The accused argued that the by-law infringed his constitutional right to freedom of expression. The Court agreed and declared the by-law to be invalid, but suspended the effect of its declaration to allow the municipality to revise its by-law. The consequences of the immediate declaration of invalidity that the Court thereby avoided were hardly as dramatic as those threatened in the *Manitoba Language Reference.*

Declarations with suspended effect often help to avoid chaotic effects on public finances. In *Re Eurig Estate*,[36] a litigant established that Ontario's system of probate fees was invalid because the fees were imposed by regulations, but they had to be imposed by primary legislation. The Court's order was given suspended effect. This allowed the Ontario legislature not only to impose a valid system of probate fees without loss of revenue in the interim, but to make that new system retroactive. In this way, the legislation denied any claim to recover the fees to all those who had paid under the prior, invalid system that had been in force since 1950.[37] The legislation excepted the estate of Donald Eurig, so that the estate whose executor brought the original claim that led to the declaration of invalidity was allowed to recover the invalid fees that had been paid.[38] This, however, was not constitutionally necessary and it would have been possible for the legislature to make the fees apply retroactively to that estate as well.[39]

To take a final and recent example, in *Canada (Attorney General) v Bedford*[40] the Court declared that three key criminal law provisions aimed at regulating prostitution were unconstitutional.[41] This was because they violated the constitutional rights to security of the person of prostitutes; in particular, these provisions made

[34] See Ryder, ibid., and D. Pinard, "A Plea for Conceptual Consistency in Constitutional Remedies" (2006) 18 National Journal of Constitutional Law 105; but note S. Choudry and K. Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 Sup. Ct. L.R. (2d) 205.

[35] *R. v Guignard* [2002] 1 S.C.R. 472.

[36] *Re Eurig Estate* [1998] 2 S.C.R. 565, 165 D.L.R. (4th) 1.

[37] There is no general prohibition on retroactive legislation in Canada.

[38] See the *Estate Administration Tax Act, 1988,* S.O. 1988, c. 34, Schedule, s. 7(2): "The estate of Donald Valentine Eurig, who died on or about October 14, 1993, is exempt from tax under this Act."

[39] Of course, the validity of retroactive legislation means that the legislature could have done something like this even without the Court's suspension of the effect of its judgment. However, that suspension greatly facilitated the financial management of the change to the probate fee system.

[40] *Canada (Attorney General) v Bedford* 2013 SCC 72.

[41] In particular, the provisions that created offences relating to keeping or being in a "bawdy-house" (which included a brothel); living on the avails of prostitution; and communicating in public for the purposes of prostitution. Prostitution as such is not a crime in Canada.

it unlawful for them to take steps that would protect them from physical harm. Even though the unconstitutionality of the offences in question arose out of the constitutional right to security of the person, the Court suspended its effect for 1 year, on the basis of very brief reasoning.[42] The Court said that "moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians."[43] By contrast, the suspended declaration would leave in effect for a further year the provisions that, the Court had concluded, violated prostitutes' rights to security of the person. The Court concluded that "[n]either alternative is without difficulty. However, considering all the interests at stake, … the declaration of invalidity should be suspended for one year."[44]

It seems fair to conclude that suspensions of declarations of invalidity have become the norm in Canada. In the test from *Schachter*, quoted above, danger to the public occasioned by an immediate declaration of invalidity was a reason for suspending the declaration; in *Bedford*, a mere (and undocumented) "concern" on the part of the public served to justify a suspension, even though the suspension prolonged the effects of a law that was unconstitutional because it endangered the claimants.

Prospective Effect

In contrast to the relatively routine declaration with suspended effect, judgments with truly prospective effect have not been adopted as a general solution in Canada, although they have been used on rare occasions.[45] At the level of the Supreme Court of Canada, one example was a case in which it was held that the system for setting the salaries of provincially-appointed judges was unconstitutional, because it did not

[42] At [166]–[169].

[43] At [167].

[44] At [169].

[45] Sometimes a court may make a ruling that seems to be prospective in effect, although apparently without realizing that this needs some special justification. One example is *Semelhago v Paramadevan* [1996] 2 S.C.R. 415, at 423, in which Sopinka J. (for the majority) said that the decision of the trial judge, that she was required to order specific performance, was based on a misunderstanding of law. He went on: "In the circumstances, this Court should abide by the manner in which the case has been presented by the parties and decided in the courts below. In future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy." A well-known English example is in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 A.C. 777, at 804, 812, in which Lord Nicholls (speaking for a majority) stated a certain legal standard applied to "past transactions" but that a new and stricter standard would apply "for the future". In neither of these cases did the courts seem to be aware that they were effectively engaging in changing the law prospectively.

guarantee the independence of the judiciary.[46] As has already been mentioned, the Court stated that the Constitution required an institutional structure that included an independent remuneration commission that would stand between the judges and the government, and so depoliticize the setting of judicial remuneration. With very little discussion of the basis for such an order, the Court said that its judgment would take effect prospectively, after a "transition period" that would end 1 year from the date it was issued. This order therefore combined a prospective decision with a suspension of the effect of that decision.

The second and more prominent example was in *Canada (Attorney General) v Hislop,*[47] which has already been mentioned. In an earlier decision in 1999, the Supreme Court of Canada had held that it was unconstitutional for legislation to discriminate as between different-sex and same-sex couples.[48] This discrimination was a violation of s. 15 of the *Charter*, which prohibits discrimination, and which came into force in 1985.[49] In *Hislop*, the question was how this applied to legislation providing federal pension benefits. The pension legislation had originally discriminated against same-sex partners. Following *M. v. H.*, the legislation was amended to avoid this discrimination, by extending benefits to same-sex partners; however, this legislative extension was made with prospective effect only. This set of amendments was now challenged on the basis that the effect of *M. v. H.* should have been that any discrimination after 1985 was unconstitutional, with the effect that the relevant benefits should be available to same-sex partners from 1985 onwards. The Court agreed that the amending provisions were unconstitutional in discriminating between same-sex and different sex couples. But the Court made its order a prospective one.

As stated above, although the majority of the Court noted that judicial declarations are generally retroactive, they are not necessarily always so:[50]

> There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than a retroactive remedy.

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[46] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1998] 1 S.C.R. 3. Choudry and Roach, above, note 25, at 214–7, discuss three cases between 1990 and 1997 in which the Supreme Court of Canada also included a "transition period", without clear acknowledgement that this made the order prospective in operation. Those authors are strongly critical of the Court's order in the *Reference re Remuneration,* because the Court suggested that some parts of its order were retroactive and some parts prospective.

[47] 2007 SCC 10, [2007] 1 S.C.R. 429. For a detailed analysis, see D. Guttman, "*Hislop v Canada* – A Retroactive Look" (2008) 42 S.C.L.R. (2d) 547.

[48] *M. v H.,* [1999] 2 S.C.R. 3.

[49] The *Charter* was proclaimed in force in 1982 but s. 15 came into effect only in 1985.

[50] Above, note 43, at [86]. It is not clear in what sense the judges meant that they were operating "outside the Blackstonian paradigm." A passage at [93] suggests that this occurs "when a court is developing new law within the broad confines of the Constitution." It may be that the Court here was stating indirectly that it sometimes plays a legislative role.

The majority went on to say:

> The question is no longer the legitimacy of prospective remedies, but rather when, why and how judges may rule prospectively or restrict the retroactive effect of their decisions in constitutional matters. The key question becomes the nature and effect of the legal change at issue in order to determine whether a prospective remedy is appropriate. The legitimacy of its use turns on the answer to this question.[51]

The Court justified its selection of remedy by noting several considerations: the ruling involved a substantial change in the law; the federal government had reasonably relied on an understanding of the law that its legislation was valid; the government had acted in good faith; it was not unfair to the plaintiffs, since granting full retroactivity would be to treat the newly evolved understanding of the constitutional requirements as having been in operation ever since the constitutional equality guarantee came into force; and the remedy struck a fair balance between the role of the courts and the role of Parliament.[52]

Conclusion

The Supreme Court of Canada, particularly in constitutional matters, is not overly concerned about the jurisdictional or theoretical basis of the orders that it makes. It proceeds pragmatically. As a result, it often makes orders that courts in other jurisdictions might think could not be justified without a specific legislative text. These include orders that operate only prospectively, and, more commonly, orders whose effect is suspended for a defined period.

[51] Above, note 43, at [96].

[52] A more recent case seemed likely to raise the issue of the power of Canadian courts to make prospective changes in the law outside of the constitutional context. In *Hryniak v Mauldin* 2014 SCC 7, the appellant obtained leave to appeal to the Supreme Court of Canada based on an argument that the Ontario Court of Appeal had attempted to change the law prospectively, and that this was not permissible. However, the appeal to the Supreme Court of Canada was resolved without the need to address this issue (see at [85]).

Part III
South-American Jurisdictions

Chapter 12
Judicial Rulings with Prospective Effect in Argentina

Alejandra Rodríguez Galán

Abstract This report discusses the issue of judicial rulings with prospective effects, in the framework of the Argentinian legal system. It must be mentioned that it reflects the vision of those who understood the law as a dynamic process through the various courts' interpretations. This essay is a reflection on the connections between judiciary review and judicial decisions with prospective effects. In this sense, the topic is very significant to understand on the one hand the value of the precedent as a stable decision and on the other hand, the need for overruling under special circumstances in a particular case. Indeed, the force of judicial precedent depends upon the extent to which each judicial system is willing to subordinate the necessity of modification of legal rules in accordance with social and economic changes to enhance certainty and predictability in the law. The debate gives room for a systematic study of these bonds in different judicial system which is the topic that brings us together in this publication.

Introduction

This report discusses the issue of judicial rulings with prospective effects,[1] in the framework of the Argentine legal system.

By way of introduction I will refer to the institutional organization under the Argentine Constitution.

[1] See The European Legal Forum. Law of the European Organizations. Dr. Ariane Wiedmann, MJur –Oxon- *Munich (DE)*, "Non-retroactive or prospective ruling by the Court of Justice of the European Communities in preliminary rulings according to Article 234 EC". Issue 5/6-2006.

A.R. Galán (✉)
Asociación Argentina de Derecho Comparado, Universidad de Buenos Aires, Talcahuano 1221 fourth floor, Buenos Aires 1014, Argentina
e-mail: alejandrarodriguezgalan@derecho.uba.ar; arodriguezgalan@csjn.gov.ar; argalan@gmail.com

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The Argentine Constitution was enacted in 1853, and our Founding Fathers drafted it essentially along the lines of the U.S. Constitution, responding to the Argentine traditions and needs, and in the frame of a Civilian legal system.

Like the U.S. model the Argentine Constitution (hereinafter the "Constitution") provides for a strict separation of powers among the three branches of government, the Executive, Congress and the Judiciary. In the matter at stake it vests the legislative power of the Nation in a bicameral Congress, while it grants to the Judiciary, formed by a Supreme Court and any lower courts as Congress may establish, the power to "to hear and decide all cases arising under the Constitution and the laws of the Nation".[2] Based on this clause, it has been held that courts are not allowed to render any decision or opinion outside the boundaries of a particular case.[3]

The adoption of the federal system of government implies that the exercise of sovereign power rests with the federal government, and the autonomous power retain by the provinces, within their respective authorities. According to this system of government there is a distribution of political power between a central government and local governments, with a coordinated and harmonious interaction within a common territorial environment. In their capacity of being preexisting entities of the Nation, endowed with political autonomy and economic autarky, the Argentine provinces retain all original attributes not delegated to the federal government.

The provinces have legislative powers which are exercised by the provincial legislatures, and jurisdictional powers done so through the local judicial power. It should also be noted that our system of judicial review is diffuse, which means that any national or provincial judge may declare the unconstitutionality of a law, as long as it opposite to the Constitution.

According to the Constitution, the Argentine Supreme Court has limited original jurisdiction in cases involving the Provinces, foreign ministers and other diplomats, while its appellate jurisdiction is regulated by law within the constitutional boundaries of federal jurisdiction.

Since its inception in 1862, the Argentine Supreme Court, following U.S. Supreme Court Justice John Marshall's reasoning in *Marbury v. Madison,* has adopted the American model of *judicial review*, according to which all courts, federal or provincial and of all levels, have the power to strike down an act of Congress, or an action of the Executive, as unconstitutional, and therefore making it inapplicable for the particular case.[4] One of the oldest acts still in effect, Law No. 48 enacted in 1863 sets down the requirements for access to Supreme Court's review.

[2] Art. 116 Argentina Constitution.

[3] Art. 2°, Law 27.

[4] See Supreme Court Cases "*Sojo*", "*Municipalidad c/Elortondo*" *and* "*Benjamín Calvete*" (Fallos 32:120; 33:162; 1:340).

A more recent reform to the National Procedural Code in 1990 grants the Supreme Court ultimate discretionary decision as to whether to hear or not a case.[5]

Based on a system of division of power, essential aspects of Argentine Constitution are as follows:

1. The executive power is vested in a President would be elected directly by the people by a system of majority run-off election with a threshold of absolute majority. Once elected, the president would last 4 years in office and could be reelected for one period.
2. The Legislative power is vested in a Congress, based on a bicameral structure: the Senate that holds the representation of the Provinces, and the Lower House, represents the people and keep legislative initiative in its hands, except in federal issues.
3. The Judiciary is vested in a Supreme Court and inferior courts of justice. Justices are nominee by the President with consent of the Senate, but requiring publicity of the sessions. Federal judges could be removed by impeachment.

As part of the system of division of powers, judicial independence is an essential feature.

Regarding the federal structure, provinces are able to sign international treaties, form economic regions, and acquire the right to exploit natural resources.

The Argentine Supreme Court (the "Supreme Court") is authorized to review final judgments rendered by superior provincial courts. For an appeal to be admissible by the Supreme Court, the superior provincial court's judgment must have resolved a federal question.[6]

1. **Could you give a brief description of how the precedent operates in your legal system? -In particular, are there any established rules of precedent? Are they rules of practice or legal/constitutional rules?**

All systems of law recognize the necessity for some adherence to judicial precedent.

The force of judicial precedent depends upon the extent to which each judicial system is willing to subordinate the necessity of modification of legal rules in accordance with social and economic changes to the desiderata of certainty and predictability in the law.

The term "precedent" has several different meanings.

First, the term describes a body of significant earlier rulings. The term can also be used to describe the results of a specific decision [rendered in a particular case] which is deemed of certain significance. Finally, the term can be used to refer to a

[5]International Academy of Comparative Law. XVII International Congress of Comparative Law. Washington, 2010. Constitucional courts as "positive legislators", Alfredo Vítolo y Alejandra Rodriguez Galán. National reporters.

[6]Garay Alberto F. "La doctrina del precedente en la Corte Suprema". Abeledo Perrot. Buenos Aires, June 2013, page 254.

rule that is broader than the decision that may be rendered in a particular case. The analysis of the structure of precedent will focus in these two former meanings.

Our analysis starts from the concept of precedent as the decision rendered in a case by a court that is deemed to set an example for an identical or similar later case. In this case the precedent arises from an express decision rendered by a court but there are also *sub silentio* precedents, which arise from a practice that is uniform, silent and uninterrupted but that is not based on a legal decision.

Finally, there is a Supreme Court that is the final interpreter of the Constitution and which establishes the valid precedents that will be applied by legislators and courts. It is also the Supreme Court the one that shall control abidance by its own precedents before other legislative bodies or courts that fail to follow the example set thereby.

Scholar Juan V. Sola argues that it is a usual mistake to believe that since the precedent system results from the fact that the origin of *judicial review* systems from the United States, a common law legal system, thus the precedent system would not be fully applicable in Civilian legal systems such as the Argentine one.[7]

The above presumption has some problems, the first one being that federal law in the United States is fully statute law and not common law; common law being exclusively applied in the States and not in all of their legal systems. The second mistake is that the binding nature of precedents arises from the need of abiding by the Constitution above the rest of the legal system. If this were not the case, each appellant would have a different Constitution according to the different legal approach adopted by the court randomly hearing the case. Therefore if a distinction is to be drawn between common law and statute law such distinction does not extend to constitutional precedents.

The common law system, with its experience on this matter, has exerted a great influence in the interpretation of constitutional precedents. Common law lawyers and common law courts are more trained in the use of rulings as creators of law and such skill is easily transposed to the interpretation of the Constitution through jurisprudence.

The development of the study of constitutional precedents received the influence of the ideas of Jeremy Bentham, who was critical of the power of the courts. This doctrine had a considerable influence in the United Kingdom and later in the United States, in two ways, first the positivism doctrines of precedent developed a system that resulted stricter than *stare decisis*; additionally a larger academic concern arouse as regards the rules that created precedents and as to the issues that were really binding which led to re-examine the notion of *ratio decidendi.*[8]

An argument in favor of the binding force of precedents concerns fundamental constitutional values and therefore, although the Argentine judicial system has no written express rules on the matter, court practices lead to the application of

[7] Sola Juan V. "Tratado de Derecho Constitucional", Vol. I. La Ley. Buenos Aires, May 2009. cap. I, II y III.

[8] Ibídem.

precedent for the sake of consistency of the system and to the extent that such precedents set an example and provide stability they even result a more efficient mechanism of dispute resolution.

Additionally, the reasoning of a Supreme Court decision must be based on the arguments raised by the parties during the constitutional debate, Attorney General legal opinion, and if the case may be, on the briefs filed by amicus curiae.

The fact that courts maintain the uniformity of the law and its interpretation and application on a case-by-case basis contributes to ensure the Rule of Law, which involves affording equal treatment to all in the sense of formal equality under the law.[9]

Hereinbelow we highlight the following Argentine Supreme Court cases which acknowledge the validity of precedents:

In the case *Pastorini c/ Rouillon* of June 23, 1883, rendered by Mr. Gorostiaga and Mr. Laspiur –both framers of the Argentine Constitution- precedents are described as a source of law.[10]

The same approach was adopted in re *Juan Carlos Milberg c/ Lopez Agrelo* of 1940,[11] and *Banco Hipotecario c/ Desiderio Quiroga* of 1941.[12]

In the case *Baretta c/ Provincia de Córdoba* of May 15, 1939, the Supreme Court based its opinion on U.S. constitutional doctrine citing both Cooley and Willoughby. The Supreme Court may not depart from its own precedents, except on sufficiently serious grounds that make a change of criterion unavoidable.

And although the above does not mean that the authority of precedents is decisive in all cases, or that the doctrine of *stare decisis* can be applied in constitutional matters without due reservations, it is also true that whenever the circumstances of the case to be adjudicated do not clearly reveal an error or the inconvenience of earlier decisions on the subject matter of the case, the solution of the case must be sought in the doctrine of the referred precedents.

In "*Sara Pereyra Iraola c/ Provincia de Córdoba*"[13] the Supreme Court held that actual departure from Supreme Court opinions, which loyal application is essential to ensure public peace and stable institutions, involves a serious breach of constitutional order.

In the case *Cesar Aníbal Balbuena* of 1981 the Supreme Court held that:

> A court decision which departs from a Supreme Court's earlier decision without providing any new arguments supporting departure from the categorical position adopted by the Supreme Court in its role as supreme interpreter of the Argentine Constitution and the laws thereunder, fails to provide due reasoning. Thus, in order to change the interpretation of applicable federal laws, the lower court should have specified the significant incurred by the Supreme Court upon setting the interpretation to be given to such laws, thus, it would not suffice for such lower court to state that it "simply and respectfully" disagrees with the Supreme Court's doctrine.

[9] Sola op cit.

[10] Fallos 25:364.

[11] Fallos: 189:292.

[12] Fallos: 183:409.

[13] Fallos 212:160.

In re "*Moltedo*" the Supreme Court established the so-called "moral abidance" (*acatamiento moral*) doctrine and justified *stare decisis* on efficiency grounds.

> Lower courts must morally abide by the doctrine laid down by Supreme Court decisions whereby conflicts of jurisdictions tend to protect litigants in order to ensure the efficiency and celerity of court decisions, and if in order to do it would become necessary to remove any obstacles that courts may find upon performance of their duties, any interpretations that would involve making means prevail over such goal must be disregarded.

In re "Lucero", it was held that the Supreme Court must follow its own precedents, such rule being of the essence of the Supreme Court's operation.

And although adhesion to its own precedents is not decisive in the adjudication of all cases that may arise, it is convenient in light that the purpose thereof is to ensure the permanence and certainty of Supreme Court decisions, particularly when called to decide similar claims on similar cases.

The case "Cerámica San Lorenzo" stands for the factual binding force of precedents by holding that "*Despite the fact that the Supreme Court only decides actual particular cases brought before it and that its decision is not binding for analogous cases, lower courts are under the duty of adjusting their judgments to Supreme Court decisions. Lower court judgments that depart from Supreme Court decisions without providing new arguments supporting a change of the position adopted by the Supreme Court, in its role as supreme interpreter of the Argentine Constitution and laws enacted thereunder, are lacking due reasoning, especially in those cases where the appellant has expressly raised such position.*"

Scholar Alberto Bianchi notes that the Supreme Court has not formally announced the use of the *stare decisis*, yet it became a practice since its implementation in the case "Cerámica San Lorenzo." In his view, this function is limited to cases where a legal rule is established within the area of jurisdiction of the Court as final interpreter of the Constitution.[14]

In the final analysis, as a practical matter the rule of judicial precedent ultimately may set the path to the stare decisis.

2. **What is the status of judge-made law in your legal system? Are they any theories of judicial decisions such as, or similar to, the so-called 'declaratory theory'? What is the nature of the joint operation of statute and precedents as sources of law?**

'The common law's attachment to what is often termed 'retrospective overruling' was premised in large part on the theoretical proposition that courts simply "declare" what the law is. According to this declaratory theory of the law, courts never actually make law when promulgating new rules or principles; rather they draw our attention to the state of legal affairs which has existed unnoticed for some time.

[14]Bianchi, Alberto, "De la obligatoriedad de los fallos de la Corte Suprema (una reflexión sobre la aplicación del stare decisis). "EL Derecho Constitucional". ED. vol. 200–2001, pp. 335–347.

The diffuse *judicial review* approach adopted by Argentina pre-supposes the existence of a written and supreme Constitution enforced by all the courts who exercise control of constitutional effectiveness over the rest of the legal system.

The role vested upon the courts as regards constitutional legal provisions is not merely declaratory, courts do not merely formulate the existing law, they reinterpret it. Both upon establishing the elements of the constitutional rule to the specific case and upon imposing the sanction thereof, judicial decisions have a constitutive nature. Although a court decision enforces a pre-existing rule that relates certain consequence to certain conditions, the truth is that the existence of the particular specific conditions, in relation to the particular specific consequence, is primarily established in each case by the court's decision.

From this perspective, the judicial decision represents the necessary individualization and application of the general and abstract rule to the case in question.

Thus, all judgments "create" law by establishing an individual rule applicable to the particular case, such individual rule being the product of the transformation that the court makes of the general hypothetical rule specifically for the case brought before it.

Such control is exercised equally over statutory law as well as over case law, so that we may say, to a certain extent, that they are both sources of law.'[15]

Case law goes beyond the classic meaning attached to the term under the common law, generally associated to case law in contracts, land law, torts and criminal law, which is to a certain extent a rule originated exclusively from judicial decisions and doctrines associated thereto. The fact that the law is enacted in the form of statute law, as is the case of most codes of Civilian-Continental jurisdictions, or of the U.S. federal law, does not mean that once the statute law has been passed by way of codes or federal statutes such statute law will not be subsequently subject to judicial interpretation in the form of case law or precedents. Therefore, the analysis of the economic consequences of judicial rulings and their efficiency applies to both systems.[16]

3. **In your legal system, what are the jurisprudential problems raised by case law generally and by the rules of precedent in particular (e.g courts as legislators?) which have not be dealt with under the previous rubrics?**

From a theoretical standpoint, in Argentina some legal scholars believe that the application of a constitutional legal provision by the Supreme Court or by any other court involves after the interpretation thereof, the creation of an individual rule. Thus, the judicial role as well as the legislative role involves both creation and enforcement of the law. Given that all Supreme Court decisions must be duly supported by reasoning, such reasoning is the basis of a future precedent, *i.e.* a constitutional rule created by judicial decisions.[17]

[15] Sola op cit.

[16] Legal scholar Richard Posner has associated efficiency with case law and precedents.

[17] Sola Juan V. cites the influence of Kelsen.

The process whereby law is constantly creating itself goes from the general and abstract to the individual and specific involves an ever growing individualization and specification dynamic.

From such standpoint, a constitutional legal provision, which is general *per se,* connects specific events to specific consequences which have been determined in an abstract manner. In some cases such consequences are not specifically provided for under the Constitution itself, thus it is necessary to determine in each case if the conditions provided in abstract by the general provision itself, specifically exist in the given case in order that the sanction established by the general rule may be ordered and enforced in the specific case, giving way to an individual rule.[18]

Other legal scholars argue that courts create law only in those exceptional cases in which there is a gap or "*laguna*" in the law. Furthermore according to this position, the judicial creation of law arises both in the case of legal gaps as well as in the case of conflicts of legal provisions. The technique usually applied by courts consists in placing the legal provisions within a hierarchical priority order and then, discarding the legal provision that is placed lower in the hierarchical order, this operation involves the total or partial invalidation of the legal provision in the particular case.[19]

The jurisprudential experience showed the last few years Argentina Supreme Court decisions have intended to include some matters in the legislative agenda or, in other cases, to point out the constitutional path Congress should take regarding certain affairs. Moreover, in some decisions it has changed the clear legislative intent, in order to -through judicial interpretation- square the law with the Court's interpretation of the Constitution.[20]

These measures are shown in different areas of the law:

(i) Back in 2004, in the cases *Castillo*[21] and *Aquino,*[22] the Supreme Court declared the unconstitutionality of the Labor Risks Law, law 24.557 as regards its procedural contents (a matter constitutionally reserved to provincial legislation) and the limits of indemnification for labor injuries, considering its provisions deny workers their right to a complete restitution. These cases, by invalidating the system created by law, even though with *inter partes* effects, implied a *de facto* annulment of the challenged legislation. In addition, the Court's rulings demanded congressional action in order to modify the system in accordance with court-established guidelines.

[18]Sola op cit.

[19]Bulyguin, Eugenio, "Los jueces crean derecho" (Judges create law) en "La función judicial", Etica y democracia. Jorge Malem, Jesus Orozco y Rodolfo Vázquez, compiladores. Ed. Gedisa, Barcelona. España, 2003.

[20]Brewer-Carias. Allan R. "Constitutional Courts as positive Legislators". A comparative Law Study. Alfredo Vítolo, Alejandra Rodriguez Galán, as National reporters. Cambridge University Press. US 2011, pages 193/211. -IXVII International Congress of Comparative Law. Washington, 2010.

[21]Fallos, 327:3610 (2004).

[22]Fallos: 327: 3753 (2004).

(ii) In *Vizzoti,*[23] the Supreme Court ruled that the limits to the base salary used to calculate termination compensation provided for in the Employment Law were unreasonable, in light of the constitutional obligation to protect workers against unjustified firings.[24] The Court then provided Congress with guidelines as to valid limits, indicating that "the Court's decision does not entail undue interference with congressional powers, nor a violation of the separation of powers, being only the duly exercise of the constitutionally-mandated judicial review over laws and governmental action".

(iii) In *Rosza*, decided in 2007,[25] the Supreme Court, in declaring the unconstitutionality of the regime concerning the appointment of interim federal judges, urged Congress to enact a new "constitutionally valid" regime, providing the guidelines that said new regime should follow, and granting Congress 1 year to implement the new system.

(iv) The Constitution provides that Supreme Court's appellate jurisdiction be exercised in accordance with the rules and exceptions provided for by Congress.[26] Following such rule, Congress has enacted legislation providing that all cases ordering the government to pay social security benefits must be appealed to the Supreme Court, which appeals actually delays payment to elderly people. In *Itzcovich,*[27] the Court declared that the appeal procedure has become unconstitutional; affecting petitioner's right to a speedy trial, emphasizing that reasonableness requires that a law continues to be coherent with the constitution throughout the period of its enforcement:

> When a rule frustrates or detracts the purposes of the law in which it is inserted, so as to conflict with constitutional principles, it is the justices' duty to desist from such rule and stop its enforcement in order to guarantee the Constitution's supremacy, as this is the moderating function of the Judiciary Power and one of the main guarantees against potential abuse by the government.

Shortly after the ruling, Law 26.025 was passed and modifications were introduced to the system to comply with the decision.

In other group of cases, the Supreme Court resorted to an "integrationist" interpretation in order to reconcile local legislation with Human Rights' treaties.

In 1992, in *Ekmekdjián c. Sofovich,*[28] the Supreme Court recognized that international treaties have precedence over internal legislation. The constitutional amendment of 1994 ratified this principle and even gave to a series of enumerated international documents "constitutional hierarchy".[29] Since then the Court has

[23] Fallos 327:3677 (2004).

[24] Argentine Constitution, Sec. 14 Bis.

[25] Fallos 330:2361 (2007).

[26] Argentine Constitution, Sec. 117.

[27] Fallos: 328:566 (2005).

[28] Fallos 315:1492 (1992).

[29] Argentine Constitution, Sec. 75 § 22.

held that constitutional review includes as well confronting internal laws and regulations with international conventions, having the power to declare such laws "unconventional".[30]

Among those documents, the Constitution gave constitutional status to the American Convention on Human Rights which, among other rights, establishes the right of any person accused of a criminal offense, to appeal the judgment to a higher court.[31]

The Argentine criminal legal system provided, for those cases tried before a three-judge panel in oral proceedings, only a limited review of the judgment before the *Corte Nacional de Casación Penal.* In *Casal,*[32] decided in 2005, the Supreme Court held that the only way to square the requirement established in the American Convention with the Argentine criminal legal system, was to interpret Sec. 456 of the Criminal Procedural Code as permitting an ample review of the prior ruling.

In other set of cases, the Supreme Court ruling did not only invalidate legislation, but replaced the unconstitutional rule with a different one.

The Argentine Constitution recognizes the right to marriage. In regulating such right, Congress established that divorce did not entail the right to a new marriage, a clause whose constitutionality was upheld several times. However, in 1986, the Supreme Court applied a "dynamic" –living constitution– approach and in *Sejean*[33] it considered that changes to societal perception requires giving a new scope to the right to human dignity, which led to the unconstitutionality of the statute that had been in force for almost a century. This decision was the prelude to a reform of the law of civil marriage, which new law, following the Supreme Court decision, admitted the possibility of a subsequent marriage.[34]

In *Portillo,*[35] decided 3 years later, the Court was required to rule on the constitutionality of mandatory military service. Petitioner claimed that to the extent military service might require the killing of other individuals, it affected petitioner's deep religious beliefs in violation of the free exercise of religion clause of the Constitution. The Court held that in peace times, compliance with military service as established by Congress violated such clause, but notwithstanding, it required petitioner to serve his time doing alternative civil service, redefining the concept of "national defense" and despite the fact that Congress did not provide for such an alternative.

[30] *Mazzeo,* Fallos 330: 3248 (2007).

[31] American Convention on Human Rights, Art. 8.2. h).

[32] Fallos, 328:3399 (2005).

[33] Fallos 308:2268 (1986).

[34] In a similar case, at the time this paper is written, a local court in the city of Buenos Aires has resolved (decision which is not yet final) that a Civil Code provision, defining marriage as the union of a man and a woman is unconstitutional, since it violates the equal protection clause of the Constitution.

[35] Fallos 312:496 (1989).

The Supreme Court has as well reinterpreted political will when it needed to square the law with new realities.

In *Petric,*[36] decided in 1998, it reinterpreted the scope of the right to reply recognized by the American Convention of Human Rights. Despite the Convention recognized such right against statements made through a "legally regulated medium of communication", the Court expanded its scope to statements made through printed press (which in Argentina is not, and cannot be legally regulated).

The Supreme Court, through its decisions, has also lessened the effects of certain legislative political choices that, in the Court's opinion, alter fundamental rights.[37] In *Milone,*[38] the Court mitigated the effects of a law concerning labor accidents that allowed labor insurance companies to pay the indemnification in monthly installments throughout the life of the individual. By declaring the mechanism unconstitutional, it obliged the insurance company to pay the indemnification in single, lump-sum payment.

The Court's ruling in the *Badaro* cases, concerning automatic adjustment of pensions ratifies this criterion. The Constitution provides for "mobile" pensions.[39] In *Badaro,*[40] the Court considered that Congress' inaction as regards the increase of pensions, in light of them having been seriously reduced due to high inflation, was a violation of the constitutional mandate, and therefore it urged Congress to pass legislation within a reasonable time to solve that problem.

The Court emphasized that it is not only a power but a duty of Congress to give effect to the constitutional guarantee of pension mobility, for which it must legislate and adopt measures to guarantee the full enjoyment of the right.

In view of the lack of action by Congress, in *Badaro II,*[41] the Court, while re-urging Congress to enact legislation, resolved to grant petitioner's request and adopted a criteria for readjusting pensions until Congress decides to act.

The financial crisis of the last months of 2001 gave occasion to numerous active rulings, first *Bustos*[42] and then *Massa*.[43] In such cases, petitioners sought the unconstitutionality of Executive Emergency Decrees 1570/01 and 214/02 which required the conversion of all dollar-denominated debts into peso ones, establishing an inflation adjustment mechanism. In Massa, probable the most significant one, the Court in upholding the constitutionality of the Decrees, provided for an additional interest in favor of petitioner, not envisaged by Congress.

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[36]Fallos 321:885 (1998).

[37]The Argentine Constitution provides that Congress has the power to regulate constitutional rights without altering them (Argentine Constitution, Secs. 14 and 28).

[38]Fallos 327:4607 (2004).

[39]Argentine Constitution, Sec. 14 bis.

[40]Fallos, 329:3089 (2006).

[41]Fallos 330:4866 (2007).

[42]Fallos 327:4495 (2004).

[43]Fallos 329:5913 (2006).

The Court's activist approach is shown as well in matters concerning the environment. In *Mendoza,*[44] the Supreme Court, in exercise of its original jurisdiction, received a complaint filed by a group of neighbors of a settlement known as *Villa Inflamable*, located in the outskirts of Buenos Aires, against the National Government, the province of Buenos Aires, the government of the City of Buenos Aires and 44 private companies, alleging damages caused by multiple diseases that their children and themselves had suffered as a result of the pollution of the hydrologic basin "Matanza-Riachuelo". In two landmark rulings the first in 2006 and the other in 2008, the Court ordered the defendants to present an environmental recovery program, entrusted the Matanza-Riachuelo Basin Authority its implementation and established detailed court-monitored guidelines as regards compliance in order to avoid inter-provincial conflicts, all of them matters traditionally within the realm of legislatures and the executive of both federal and provincial levels.

In our opinion, when a judge decides a case, the decision, by confronting the action being judged with the law gives some room for the judicial creation of –at least– rules of individual application by means of construction or by filling the gaps in the statute being considered.

It should be pointed out that in our country, judicial decisions, in principle, only have *inter parte* effects, since no constitutionally mandated *stare decisis* principle formally exist.

However, Argentine courts, in deciding cases, tend to follow the reasoning of other tribunals (even of their same level) in similar cases, and particularly those decisions of the Supreme Court, as a support tool –not as a mandatory rule– together with other sources of law, for interpretation of legal and constitutional provisions. Nowadays, it is almost impossible to find a judicial decision in our country which does not cite other cases in support of its ruling.

Notwithstanding the lack of binding effect of judicial decisions over other cases, the Argentine Supreme Court, since its early decisions has leaned towards establishing a de facto *stare decisis* rule as regards its interpretation of the Constitution and of federal laws, aiming to provide litigants with some degree of certainty as to how the law will be interpreted, a requirement the Court finds embedded in the due process clause of our Constitution. In García Aguilera, a case decided in 1870, barely 8 years after the Court's establishment, the Supreme Court held in a since then often repeated statement, that "lower courts are required to adjust their proceedings and decisions to those of the Supreme Court in similar cases".

Moreover, the Supreme Court frequently denies its discretionary review (equivalent to the US denial of certiorari) in those cases that deal with long established matters, unless petitioner raises new arguments; while it revokes –considering them to be without sufficient basis– those decisions that contradict prior Supreme Court rulings without giving new reasons to distinguish the ruling. It should be pointed out, however, that the Supreme Court has not considered itself obligated to this principle,

[44]Fallos 329:2316 (2006) and 331: 1622 (2008).

and has not hesitated in overruling its prior precedent without giving much reasons, and solely because of a change in the Court's majorities.

By this power, the Argentine Supreme Court, through its original and appellate jurisdiction -both ordinary and extraordinary-, has risen to become the final interpreter of the Constitution in all cases that come for its review. Although the Argentine Supreme Court powers are formally different from that of European constitutional courts, as one of the most prominent Argentine Constitutional Law scholars has said: "the Supreme Court is frequently called 'Court of Constitutional Guaranties' since it has been granted the power to defend the Constitution in its entirety, but essentially in those parts where it touches the intimate essence of the human dignity, of its freedom, of its rights".

Since the mid-twentieth century, and particularly after the return to democracy in 1983, in most matters the Argentine Supreme Court has adopted an activist role. The increase of the judicial review power over matters previously considered to be political questions; the judicial recognition of certain constitutionally guaranteed procedural safeguards in the absence of implementing legislation; the expansion of the standing to sue on constitutional matters (which expansion was helped by the Constitutional reform of 1994); and a "living constitution" approach to constitutional interpretation, particularly in light of the international treaties on human rights, among other issues, have made the judiciary, and specifically the Supreme Court, a key player in the political arena, not only through the declaration of unconstitutionality of laws and executive actions, but prompting or restraining the enactment of legislation in several matters, and indicating the path Congress should take regarding the regulation of certain affairs. Moreover, in recent years, the Supreme Court has strengthened its powers by accepting sua sponte constitutional review and by pretending to expand the effect of its decisions beyond the scope of the case being decided.[45]

Building on the separation-of-powers doctrine, it is a long established Supreme Court that to declare a law unconstitutional trough the judicial review should be the last resort and applicable only if the case cannot be solved on other grounds.

Chief Justice Ricardo L. Lorenzetti, in his concurring opinion in "Itzcovich",[46] in dictum, provided some guidelines as to when a law will be declared unconstitutional, in order to "contribute to judicial certainty": "It is necessary to differentiate among three different possibilities: "constitutional interpretation" (interpretación adaptativa), "subsequent unconstitutionality" (inconstitucionalidad sobreviniente) and the disqualification of the law as a result of its effects". He explained that to the extent constitutional interpretation consists in ascribing a meaning to a rule, when it comes to indefinite legal concepts, there are ways to interpret the rule considering the historical and social condition, without having to expel the rule from the legal system, indicating that only exceptionally the Court should declare the law unconstitutional.

[45] Alfredo Vítolo and Alejandra Rodriguez Galán, op cit. "Constitutional courts as "positive legislators".

[46] Fallos: 328:566.

Moreover, in a recent decision in which some aspects of the judicial reform enacted by Congress where discussed, *in re* "Rizzo", the Supreme Court provides a list of the latest cases in which the Supreme Court exercised its *judicial review* powers exhaustively.

"The Supreme Court declared the unconstitutionality of the following laws: the so-called Due Obedience and Full Stop laws (*Obediencia Debida y de Punto Final*) that barred trials involving serious human rights violations perpetrated during the Argentine military dictatorship (in *Simón*, Fallos: 328:2056); the Law of Civil Marriage which by forbiding the re-marriage of divorcees imposed a restraint on individual freedom (in *Sejean*, Fallos: 308:2268); Rules of Criminal Procedural of Argentina insofar they failed to acknowledge the accusation powers and autonomy of the Attorney General's Office (in *Quiroga*, Fallos: 327: 5863); criminal law which by punishing drug possession for personal consumption involved a violation of personal freedom (*Bazterrica* and *Arriola* cases, Fallos: 308:1392 y 332: 1963); the law that by allowing, without sufficient grounds, the interception of personal communications and the gathering of personal data, involved a violation of the right to privacy (in re *Halabi*, Fallos: 332: 111); the Employment Contract Law provisions that failed to acknowledge employees' rights to full protection by fixing a cap on statutory severance payments (in re *Vizzoti*, Fallos: 327: 3677) and denied luncheon tickets their nature as salary compensation (in re *Pérez*, Fallos: 332: 2043); Employment Risks Law insofar it prevented employees injured at work from recovering immediate full redress and compensation as results of the accident (in re *Aquino*, Fallos: 327: 3753) and not subject to a periodical payment schedule (in re *Milone*, Fallos: 327:4607); the Law of Union Associations insofar it provided union protection exclusively to representatives or officers of unions that held union legal personality (in re *Rossi*, Fallos: 332:2715) and afforded privileges to certain unions to the detriment of others that were merely registered unions (in re *Asociación de Trabajadores del Estado*, Fallos: 331: 2499).

The Supreme Court also struck down a social security law that barred pensioners access to court by unnecessary prolonging the court recognition of their subsistence payment rights (in re *Itzcovich*, Fallos: 328:566) and breached the pension adjustment mandate established by Article 14 bis of the Argentine Constitution (in re *Badaro*, Fallos: 330:4866)."[47]

4. **In your jurisdiction has the retrospective effect of judicial decisions been criticised? Since when? By whom? Did this lead (such in France, for example) to the set up of working groups aimed at discussing possible limits to the retrospective effect of judicial decisions?**

Historically, rules of law announced in judicial decisions were applied retroactively that is, to conduct or events that had occurred prior to the dates of those decisions. Today, the retroactive application of judicial decisions remains the norm.

[47] Supreme Court *in re* "Rizzo, Jorge Gabriel (apod. lista 3 Gente de Derecho) s/acción de amparo/c Poder Ejecutivo Nacional Ley 26855 /s medida cautelar". Date June 18, 2013.

A problem often arises, though, when a court considers the application of a rule of law that seems "new" in some significant way,[48] this will be discussed later in this paper.

Recognizing this problem, courts and legal scholars have considered whether and to what extent "new" rules of law should be applied only prospectively, that is, "only to events transpiring after the date of the precedent-setting decision (often termed pure prospectively) or only to such future occurrences and to the parties in the precedent-setting case itself (often termed modified or selective prospectively)."[49]

Regarding this subject matter, the issue at stake is not universal, nor is it perceived as having an equal approach by all the respective national judicial systems.

I consider this to be a matter that is dealt by, with its own national peculiarities and having both, a judicial as well as a technical dimension. In this context I am not aware that the retrospective effect of judicial decision has been criticized lately, at least not to my knowledge from a particular and narrow judicial aspect.[50]

5. **Has the technique known as 'prospective overruling' been used by the courts in your country? By which courts? On what grounds? To what degree? Was it done implicitly and/or explicitly? More generally, could you define 'prospective overruling' from the point of view of your jurisdiction and tell what situations it covers.**

In order to answer these questions, the status of this technique may be illustrated by explaining cases –mainly criminal cases- in which the Supreme Court has applied it and demarcated the scope of retroactivity.

By examining the following precedents an outline of the Supreme Court's development of modern retroactivity/prospectivity doctrine can be found.

On April 8, 1986 the Supreme Court rendered its decision in the "*Strada*" case.[51]

In cases as the one referred above, the Supreme Court's decisions held, generally, that the superior court of the case was the Court of Appeals (*Cámara)*. However, if in addition to the federal appeal any of the parties had also filed an appeal with the provincial court, the Supreme Court usually suspended the hearing of the federal appeal (*recurso de queja*) until the superior provincial court would resolve the pending provincial appeal.

By means of a long decision, the Supreme Court changed the position it held in its own earlier decisions and resolved that the superior court of the case, for the purpose of Article 14 of Law No. 48, "*is the judicial court vested as superior by the provincial constitution, unless such court would lack jurisdiction in the case . . . .*"

[48]Shannon, Bradley Scott, "The Retroactive and Prospective Application of Judicial Decisions". Harvard Journal of Law & Public Policy, Summer 2003.

[49]Ibídem.

[50]This report was submit before an academic seminar took place at San Andrés University, Law School, in Buenos Aires, last year.

[51]Fallos: 308:409.

Scholar Alberto Garay refers that the core issue in the "*Strada*" case involved whether such allocation, i.e. such division of tasks, made by provincial constitutions and laws was valid in light of Article 48 and the Argentine Constitution (the "Constitution").[52]

On April 15, 1986, 7 days after rendering its decision in the *Strada* case, the Supreme Court decided the "*Maria Esther Tellez v. Bagala S.A.*" case.[53]

If the Supreme Court resolved the "*Tellez*" case on the basis of the new principles laid down 7 days earlier in the "*Strada*" case, the appeal lodged in the "*Tellez*" case would have been denied as inadmissible.

However, the Supreme Court decided otherwise. Thus the Supreme Court decided not to apply, in the case, the new approach it had adopted a week earlier.

The Supreme Court decided that "*the new approach contained in re Strada would only be applied as regards the federal (so-called) extraordinary appeal (recurso extraordinario) taken from judgments notified subsequent to the Strada precedent*".

Additionally, the Supreme Court stated, in a general manner, that the "new approach" arising from such decision (i.e. *Strada*) would be applicable to all those cases where the judgment under appeal would have been notified subsequent to the date of the decision rendered in the *Strada* case (April 8, 1986).

The Supreme Court provided the following express grounds for such holding, that "*the immediate application of such approach would prevent the availability of Supreme Court review (by way of recurso extraodinario), at a stage when access to provincial courts would be unavailable due to the fact that the relevant prior procedural stage was already closed*".

According to Garay this appears as the decisive reason underlying the Supreme Court's decision not to apply the doctrine arising from the "*Strada*" precedent to the instant case.[54]

In fact, Garay argued that in both "Strada" and "Tellez" cases the Supreme Court had to decide –for the sake of the formal admissibility of the federal extraordinary appeal (recurso extraordinario)- which was the provincial court that was deemed to be the superior court which judgment could be appealed to the Supreme Court. However, the Supreme Court made a distinction between both cases, highlighting a significance difference. In fact in the Strada case the appellant had taken such appeal both from Appellate Court judgment and from the provincial Court judgment. Conversely, in the Tellez case the federal appeal had been taken, solely, from the judgment of a single instance court. No appeal had been taken to the provincial Supreme Court.

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[52]Garay, op cit. page 256.

[53]Fallos: 308:552.

[54]"Failure to provide a specific statutory support thereof is one of the main features that must be highlighted of the decision under analysis. The Supreme Court seems to have been aware that this was the first case that entered into a conflictive and unexplored zone of Argentine constitutional judicial law."

See Garay, op cit. 256 y ss.

Now I will refer to the other cases that were resolved by the Supreme Court applying the doctrine laid down in the *Tellez* case.

In the "*Giroldi*"[55] case, adjudicated 9 years after *Tellez,* the Supreme Court declared Article 459 item 2° of CPPN[56] unconstitutional on the grounds that it barred the chance that a superior court would review a judgment ordering a monetary payment below a certain amount.

Supreme Court held as follows are regards the constitutional issue:

> That the above determines that the most adequate manner to ensure the double instance guarantee in criminal cases provided under the American Convention on Human Rights (Article 8, item 2 paragraph h) is to declare the constitutional invalidity of the limitation established in Article 459, item 2 of CPPN, insofar it bars the admissibility of the cassation appeal from the judgment passed by criminal courts on the grounds of the amount of the penalty.

As a consequence of the above holding, the Supreme Court remanded the case to the Cassation Court to render a new judgment, through the relevant Panel. The prospective effect of the *Giroldi* case is as showed.

Shortly after deciding the *Giroldi* case, the Supreme Court was called upon to decide a series of cases which one of the main features was that in all of them the extraordinary appeal (*recurso extraordinario)* had been taken from judgments rendered by oral courts.

The "*Andrada*" case is the first example of this kind. Upon deciding this case, the Supreme Court held:

> That although this Supreme Court declared in the Giroldi case on April 7, 1995 the unconstitutionality of the limitation established in the legal provision mentioned above, on the grounds stated in the precedent published in Decisions -Fallos: 308:552, Tellez- it must be pointed out that the institutional authority of the approach adopted in the decision as regards the requirement related to the superior court of the case, in the frame of the federal courts, shall become effective for extraordinary federal appeals taken from judgments notified after the aforementioned decision [Emphasis added].

The emphasis in the justification of the unconstitutionality declared therein had been placed in the frustration of the double instance.

The *Strada-Tellez* doctrine was cited and applied in several cases.

What is interesting of these new precedents is that in them the Supreme Court seems to reformulate the holding or *ratio decidendi* in *Tellez,* restricting it to the material facts or features, for example, a restriction in non-criminal matters can be found in "*Sanchez*".[57]

6. **In your jurisdiction, have the courts ever indicated the circumstances/ contexts (this may be under the form of guidelines) in which it might be appropriate to use or not to use this technique (e.g. in the latter case, to**

[55]Fallos: 318:514 (1995).

[56]Code of Criminal Procedure of Argentina.

[57]Fallos: 332:1406 (2009).

prevent a person from claiming a violation of his human rights)? Have they also stated the moment at which and the terms on which overruling should take effect?

The comments of this matter are consistent with the results of the cases described above under the case by case decisions. In "*Tellez*", for example, the Supreme Court has adopted Judge Cardozo's concern as regards where to draw the division line that separates the old from the new case law. Such task, as was expressly stated, was to be supported on "grounds of convenience, utility and deep justice feelings". It was based on the need of determining the time as from when the new changes would become operative and resolved, as reflected in the above transcribed paragraph, that the principles established in the *Strada* case would be applicable to extraordinary appeals notified after July 8, 1986, date when such case was decided.[58]

In a recent case *in re* "*De Martino, Antonio Conrado s/ su presentación*" the Supreme Court revised a resolution of the Attorney General's Office designating an Interim State Attorney.[59] Notwithstanding the foregoing, and similarly to what has been held by this Supreme Court on the grounds of elementary legal certainty in similar cases (see cases *Barry* cited in Fallos 319:2151, *Itszovich* cited in Fallos 328:566 and *Rosza* in Fallos 330:2361) the actions and steps taken by such officer up to the date hereof are held valid and effective.[60]

7. **What are the advantages and disadvantages of prospective overruling that have been identified in your jurisdiction?**

The cases examined cover a set of situations, but do not cover all those that may arise as results of a change in the position adopted by Supreme Court decisions.

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[58] Garay, op cit. 268/269.

[59] Resolution PG 30/12 issued by the Attorney General.

[60] *"The claim is formally admissible pursuant to the general principle established by this Supreme Court in the decision published in Fallos 156:283 whereby the Supreme Court is vested with authority to assume jurisdiction over the matter, and to even act sua sponte, when the case involves or appears to be involved in the breach of fundamental principles inherent in the best and more proper administration of justice, watching over the efficiency thereof in compliance with the highest duties vested upon this Supreme Court. And this Court has found such a significant breach in such precedent, given that it impairs "the legal constitution of the federal courts, essential to adjudicate upon the cases", a situation that naturally extends to the representation of the Attorney General's Office before this Supreme Court pursuant to Article 120 of the Argentine Constitution and its regulatory law No. 24,946 as the necessary intervention of such Office before this Court renders its decision on the matter (Article 33, Code of Criminal Procedure of Argentina, Article 167)."*

Under such approach, the fact that the Supreme Court takes jurisdiction to hear a case exercising its judicial powers regulated by Article 14 of Law 48, as it happens in the instant case, in cases involving situations governed by federal rules where "...in order to ensure a proper administration of justice it was essential to preserve the exercise of the duties that the law vests upon the Attorney General's Office (in re Laparter, published in Fallos: 315:2255, and its citation in Fallos: 311:593). In view of the foregoing, this Supreme Court resolves to declare the illegality of Resolution 30/12 and to hold the validity and effectiveness of the actions performed by the interim State attorney up to the date hereof. See also question 9 below, *"Rosza"* case.

One of the most significant features of the use of this technique elaborated by the Supreme Court, as the Supreme Court itself points out, was to protect those appellants who had adjusted their conduct to the prior law in force. As to other situations, in principle, the general rule in favor of retroactivity continued to be in force.

The resolution of the question whether judicial decisions should be applied retroactively, or may, in certain circumstances, be applied only prospective, involves a balancing of a number of different considerations. Ultimately, the question comes down to whether the net benefits of one approach outweigh the net benefits of the alternatives.

And the Supreme Court acted, accordingly, in this manner. Since, finally, we cannot forget that the general rule still in place is the retroactive effect, the prospective effect being the exception.

8. **Has it ever been argued in your jurisdiction that prospective overruling should not be used when a decision turns purely on the construction of a statute?**

As legal scholar Martinez Ruiz pointed out, in "*Tellez*" case the Supreme Court has created a rule. Or, more precisely, it has created two rules. No (statutory) law establishes (a) the prospective effect of the Supreme Court precedents that change its earlier precedents in effect up to such date or (b) the prospective effect admitted, the time as from which such principles will become effective.[61]

No (statutory) law provides either, that the rule and principles arising from a precedent must always be applied retroactively. This has been and is, unquestionably, the traditional judicial practice. But nothing prevents the possibility that, in certain cases, such traditional practice may be revised and changed, provided there are good reasons for doing so.

Indeed, in "*Sanchez*" case, Ramón Sanchez had sued his employer for an occupational accident. Both the trial and appellate courts ruled for the plaintiff, but the Provincial Supreme Court reversed the judgment and remanded the case for a new judgment to be rendered in view of the new precedent adopted by such Provincial Supreme Court as to the statute of limitations. In its appeal the appellant, based on Tellez, objected to the retroactive application of the new judicial approach adopted as regards the statute of limitations.

However the Supreme Court agreed with the Attorney General's criteria.

> In this matter, I find that there is no constitutional grievance in the fact that the Court from which judgment appeal is taken would have considered –in a case such as the one commenced by the plaintiff, where no judgment making res judicata has been yet rendered- case law on the statute of limitations is applicable to cases such as the instant case on the basis of a precedent issued after the commencement of this action. Actually, the appellant has no vested right to court decisions being maintained throughout the stages of the lawsuit, because this would actually involve obliging the courts to keep their approaches unchanged, this being inadmissible. Accordingly, Your Honor has stated that the claims supported in

[61] Martínez Ruiz, Roberto, "Jurisprudencia Jurígena", La Ley 1986-C-167.

> the change of the case law do not trigger the possibility of filing the extraordinary appeal provided under Article 14 of Law No. 48 (Court Decisions (Fallos):302:785 and 305:2073, among others).[62]

9. **In the same vein, is there any issue that prospective overruling turns judges into 'undisguised legislators'?**

I consider it may be useful to address this issue by review decisions with prospective effects, such as the "Rosza" case, and the "Itzcovich" case [referred in question 3 above].

In the Rosza case, the Supreme Court was called to decide a very delicate matter. As results of the delay of the authorities in charge of handling the contest procedures to fill in court vacancies, from the selection of three candidates and the forwarding thereof to the Senate, there was a large number of federal Court offices that remained vacant, both in trial courts and in appellate courts. For Carlos Alberto Rozsa judges appointed surrogates, established the new regime and determined the scope of the declaration of unconstitutionality.

The Supreme Court, by a majority vote, resolved to declare the unconstitutionality of the Regime of Interim Replacements (Subrogancias) approved by resolution 76/2004 of the Judicature Council. In Rosza the Supreme Court had to resolve a conflict that was neither similar to the previous one nor involved a change in the Supreme Court's own earlier decisions. The Supreme Court had to decide the constitutional validity or invalidity of the procedural steps taken by the interim substitute judge hearing this case.

In "Itzcovich" case, given that the legal provision allowing an ordinary appeal was declared unconstitutional, the Government could not take an extraordinary appeal because the time deadline had expired. Therefore, the Supreme Court had to face a problem involving the retroactivity or prospective effects of such declaration.

If the Supreme Court would decide for the retroactivity, the ordinary appeal had to be simply denied in spite that, at the time it had been filed, it was supported by legislation in force. If it deemed that this result was "very unfair" it could consider the alternative of acknowledging a merely prospective effect to the judgment. Finally, although with some dissenting votes, the majority opted for the latter solution. The Supreme Court held:

> That the institutional authority of this decision shall not affect the treatment of this case and that of other ordinary appeals that to date are ready to be lodged with this Court, given that already complied with procedural steps cannot be deprived of validity and that actions taken under laws in force cannot be rendered without effect (see doctrine of Decisions: 319:2151 in the Barry case and footnotes thereof). This being so, given that the application of the new criteria throughout time must be presided by a special prudence for the sake that traced goals are not destroyed along the way. By virtue thereof, a dividing line has to be drawn for the operation of the new approach taken by this Supreme Court decisions, on the grounds of convenience, utility and in the most deep feelings of justice, need that also calls for fixing the precise moment in which such change will become effective (see Tellez case) (Fallos: 308:552).

[62] Garay, op cit. pages 282/283.

The Supreme Court decided to confer full prospective effects to the decision. That is to say that in spite of considering that the mechanism devised by the statute law was unconstitutional, the Supreme Court resolved the case as if such declaration would have never been formulated, basing the decision on the unconstitutional statute law.[63]

Conclusion

It has been pointed out that "All systems of law recognize the necessity of adherence to judicial precedent. A clash occurs only with respect to the weight to be accorded the authority of the decided case. The force of judicial precedent depends upon the extent to which each judicial system is willing to subordinate the necessity of modification of legal rules in accordance with social and economic changes to the desiderata of certainty and predictability in the law."[64]

In general terms, three different theories obtain as to the force of judicial precedent.[65]

Under the English rule of stare decisis, a prior case directly in point has the same force and effect upon the court which decided it and on all inferior tribunals as a statute, unless and until overruled by a higher court. If -the prior case was decided by the House of Lords, the point decided becomes the law of England, which can only be overturned legislatively by an act of Parliament. Judicial precedent, even of the single case, is law de jure which all inferior courts are obliged to follow, and which cannot be overruled even by the court which originally announced the rule.

The continental concept of judicial precedent presents the other view. Case precedent was given little weight in France following the great codifications. Under the then accepted theory, cases were to be decided only under the code provisions and analogical extensions thereof. It was then felt that there was little need of case law. While in more recent years judicial precedent has played an increasingly important role, it is still regarded as possessing persuasive rather than authoritative force.[66]

The doctrine of stare decisis as applied generally by American courts occupies mean criteria between these two positions. While the great majority of the United States formally adopted the common law, yet in America the institution of unwritten law did not gain such rigid adherence as in England.

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[63] Garay, op cit. page 289–295.

[64] Kirk Martha E., "Retrospective Effect of an Overruling Decision". Louisiana Law Review. Volume 7, Number 1°, November, 1946. For an excellent discussion of the various aspects of this problem, see Goodhart, Case Law in England and America (1930) 15 Corn. L. Q. 173.

[65] See Goodhart, "Precedent in English and Continental Law"(1934).

[66] Ibídem.

On the other hand, under the doctrine of jurisprudence constant, the jurisprudence will be followed, not because of any compelling or binding force, but under the theory that the jurisprudence thus established and applied is usually accepted as correct.[67]

Within a judicial review system, Argentina is still closer to the continental concept of judicial precedent, with its allowance for flexibility in legal thought and possibilities for a dynamic evolution of the law.

The Supreme Court appears to be examining for a workable compromise between the competiting objectives of jurisprudential development and the need for stability of its judicial decisions.

[67] Ibídem.

Chapter 13
Judicial Rulings with Prospective Effect in Brazilian Law

Humberto Dalla Bernardina de Pinho*

Abstract The text summarizes the evolution of the theory of precedent in Brazilian law, examining the innovations incorporated to the 1988 Constitution, the Code of Civil Procedure and the current text of Bill for the new Code of Civil Procedure. Then, the consequences of judicial expansion in Brazilian law are examined, as

General Reporter: Humberto Dalla Bernardina de Pinho. (Many thanks to my assistant reporters from Rio de Janeiro State University, hereby nominated: Ana Carolina Squadri (Master in Procedural Law at the State University of Rio de Janeiro. Federal Attorney AGU). Andre Roque (Master in Procedural Law, currently pursuing a Doctorate, from UERJ. Professor of Civil Procedural Law in post-graduate courses. Attorney-at-law). Diogo Almeida (Doctor in Procedural Law at Rio de Janeiro State University. Partner in the Rezende de Almeida Advogados law firm, Rio de Janeiro). Fernanda Medina Pantoja (Master's degree, pursuing a doctorate in Law from Rio de Janeiro State University. Professor at the Catholic University of Rio de Janeiro – PUC-Rio. Partner in the Wald & Associados Advogados law firm, Rio de Janeiro). Flavia Pereira Hill (Doctor in Procedural Law at the State University of Rio de Janeiro. Notary public in Brazil). Guilherme Luis Quaresma Batista Santos (Master in Procedural Law at the State University of Rio de Janeiro. Attorney-at-law since 2003, and legal consultant on litigation at Petrobras, since 2004). Leonardo Faria Schenk (Doctor and Master in Procedural Law from Rio de Janeiro State University. Professor of Civil Procedural Law at the La Salle Higher Institute of Higher Education – UNILASALLE/RJ – and the Rio de Janeiro State School of Magistracy. Attorney-at-law). Marcio Faria (Master's Degree, currently pursuing a Doctorate, from UERJ. Assistant Professor of Procedural Law – UFJF. Member of the Institute of Attorneys of Minas Gerais – IAMG). Mauricio Vasconcelos Galvão Filho (Founder of the Electronic Review of Post-Graduate Procedural Law, UERJ – www.redp.com.br. Master of Law from Rio de Janeiro State University. Specialist in Public and Private Law from EMERJ/UNESA. Attorney-at- law at the National Economic and Social Development Bank). Roberto Rodrigues (Master of Law and pursuing a doctorate in Law from Rio de Janeiro State University . Federal Attorney). Trícia Navarro (Doctor in Procedural Law at UERJ. Master in Procedural Law from UFES. Judge in Espírito Santo State, Full Member of the Brazilian Institute of Procedural law – IBDP)).

*Associate Professor at Rio de Janeiro State University. Attorney General's Assistant for the State of Rio de Janeiro. http://www.humbertodalla.pro.br. humbertodalla@me.com.

H.D.B. de Pinho (✉)
Rio de Janeiro State University, Rua Almirante Saddock de Sa, n 98, ap. 501, Ipanema CPF 016.692.127-00, Rio de Janeiro, RJ 22411-040, Brazil
e-mail: humbertodalla@gmail.com; humbertodalla@me.com

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well as the judicial rulings with prospective effect, its situation nowadays, and its perspectives with the Bill for the new Code.

Initial Remarks: Brazilian Law and the Mechanism of Precedent

Brazilian law belongs to the family of Civil Law, formed on the basis of the Roman-Germanic tradition. Unlike what happens under the system of Common Law, based on case law and the principal of *stare decisis*, prevalence is given to the sources of written law, whose provisions tend to be condensed into codes.

Brazilian independency came about in the year 1822,[1] yet only in 1850 did the new country begin to have a law to deal with judiciary organization and the civil proceeding.[2] Prior to that, the Portuguese procedural legislation was in force in Brazil.

On inheriting Portuguese law, the Brazilian system went so far, in its earliest stages, as to hear the so-called "settlements" of the House of Appeals, consisting of interpretative guidelines seeking to overcome doubts of judgment, which the lower-level judges were obliged to follow.[3] However, as they were rarely used in practice, they were abolished at the time of proclamation of the Republic in 1889.

In 1963, the Federal Supreme Court (STF) published its first statements, recording the unanimous or majority interpretation adopted in analogous cases in relation to a given legal issue. This was a groundbreaking move in the consolidation of case law, even though its normative statements took on merely moral or persuasive force. In 1988, the new Brazilian Federal Constitution provided for the creation of another court at national level, the Higher Court of Justice (STJ), which was allocated competence to judge cases discussing non-constitutional issues.

There was, thus, a sharing of responsibility for ensuring compliance with the rules throughout the entire country and the standardization of national case law between the STF (constitutional cases) and the STJ (infra-constitutional cases).

Subsequent reforms, from the 1990s onwards, conferred even greater effectiveness on precedents, by developing various mechanisms that allow speeding-up the proceeding, through the preliminary rejection of the plea[4]; the impediment of

[1] Since 1808, however, with the arrival of the Portuguese court in Brazil, seeking to flee the Napoleonic invasions, the colony already enjoyed great political importance.

[2] Regulation 737/1850.

[3] The settlements were laid down in Portuguese Law, in the Manueline Orders of 1512, Book V, Title 58, 1st Paragraph. The mechanism remained in Brazilian law even after the proclamation of independence, by virtue of the Decree of October 20 1823.

[4] Art. 285-A, inserted by Law 11,277, of February 07 2006.

appeals,[5] and their judgment by the reporting judge alone, when there is a statement or reiterated stance from the court.

Meanwhile the first precedents with binding effect, since the distant Portuguese settlements, were born in the field of controlling constitutionality. The structure established a mixed system, allying diffused control (granting competency to any organ of the Judiciary Branch to hear the issue of unconstitutionality) to the concentrated model.

This latter attributed to the STF the function of deciding, by means of a direct action, on the constitutionality or unconstitutionality of a law, producing precedents with effectiveness *erga omnes* and binding effects in relation to the organs of the Judiciary Branch and the federal, state and local Public Administration.[6]

Finally, in 2004, Constitutional Amendment No. 45[7] instituted the possibility of the STF issuing statements with binding effects, while maintaining the persuasive effectiveness of those already published, also limiting the examination of appeals by the constitutional court to those displaying "*general repercussion*".[8]

Along these lines, case law is not acknowledged as a formal source of law, given that it does not possess the force of law. In general, precedents are attributed a complementary value, as they express, in a subsidiary manner, the content of the rules and principles that make up the Brazilian legal system.

In other words, judges do not have a functional duty to follow, in successive cases, previous decisions handed down in analogous situations. However, the Higher Court of Justice, whose primordial function is to strive for the uniformity of interpretation of the federal legislation, has already asserted the importance of respect for precedents.

On the other hand, we find a clear trend of evolution towards granting ever-greater important to case law, just as happens in the countries of the continental European system. The force conferred on precedents is really quite convenient in the case of a country with continental dimensions, in which the large number of state and federal courts imposes greater care for the uniformity of the law.

The phenomenon of granting greater efficacy to court decisions can be identified in the numerous changes that have been made to Brazilian procedural legislation in recent decades. The upshot of these consecutive changes is that our current

[5] Art. 518, 1st paragraph, introduced by Law 11,276, of February 07 2006.

[6] The 1964 Federal Constitution, with wording given by Constitutional Amendment No. 16, dated November 26 1965, originally provided for a direct action to the STF, whose breadth was expanded in subsequent constitutional reforms, until reaching the present-day outlines, laid down in the Federal Constitution of 1988 (with wording given by Constitutional Amendment No. 3, of March 03 1993, with the direct action of unconstitutionality and the declaratory action of constitutionality. These procedures were only regulated, though, by Law No. 9,868, of November 10 1999.

[7] Constitutional Amendment n. 45/2004 changed the wording of art. 102, 2nd paragraph, and introduced art. 103-B into the Brazilian Constitution.

[8] In the plenary session of May 30 2007, the STF issued the first three statements with binding effects in Brazilian experience.

system contains precedents with efficacy at different levels, namely, persuasive, those preventing appeals and, at the highest level, binding precedents.

There is also the expectation that a new procedural code will be adopted, this currently before the legislature, which will change deeply the theory of precedents, incorporating the idea of standardization and stability of case law, obliging judges to follow it.

Hypotheses Addressed in the Federal Constitution

Identification of the system of precedents in the Constitution of the Federative Republic of Brazil depends on the search in the constitutional text for rules that give treatment to court decisions on merit that may serve as a reference for the hearing and judgment of future court cases, linked to the legal issue already decided on.

The first three hypotheses of precedents within the scope of the Federal Constitution derive from decisions on merit on issues of law handed down in objective judgments of constitutionality of legal rules made by the Federal Supreme Court in relation to (1st) direct actions of unconstitutionality (ADIn) of a law or federal or state normative rule, (2nd) declaratory actions of constitutionality (ADC) of a law or federal normative rule, stated in article 102, sub-item I, letter "a" of the CRFB (Constitution of the Federative Republic of Brazil) and the (3rd) actions of Asserting Non-compliance with a Fundamental Precept (ADPF), as set forth in article 102, 1st paragraph, of the CRFB.

Decisions rendered in an ADIn, ADC and ADPF constitute legal precedents in relation to a question of merit in matters of control of constitutionality[9] and control of non-compliance with a fundamental precept, with the application of the two former as legal precedents arising from the express provision stated in article 102, 2nd paragraph, of the CRFB/1988.

The 4th (fourth) hypothesis of a precedent occurs in the sphere of actions of a subjective nature, in relation to the judgment of extraordinary appeals in situations of appellate competency, with the demonstration of general repercussion, pursuant to article 102, sub-item III and 3rd paragraph of the CRFB, with the decision on the issue of merit of a constitutional nature amounting to a precedent, or rather, an issue of merit resolved in a situation of general repercussion will constitute a legal precedent.

Also within the realm of the Federal Supreme Court, the 5th (fifth) hypothesis of a precedent refers to the binding statement, addressed in article 103-D of the CRFB, along the lines proposed by Constitutional Amendment No. 45, where a legal statement formulated by the Constitutional Court will be held to be a precedent.

[9] "*Art. 102. (. . .) 2nd Paragraph. Definitive decisions on merit rendered by the Federal Supreme Court in direct actions of unconstitutionality and declaratory actions of constitutionality will produce efficacy against all and binding effect in relation to the other organs of the Judiciary Branch and the direct and indirect public administration, at the federal, state and local level (Wording given by Constitutional Amendment No. 45, of 2004)*".

The 6th (sixth) hypothesis of a precedent occurs in the realm of the Higher Court of Justice, in relation to decisions on merit on a question of law in a special appeal (article 105, sub-item III, CRFB).

We may thus conclude for the existence of 6 (six) hypotheses of constitutional rules that regulate the mechanism of precedents in the Brazilian Federal Constitution. However, we shall now focus on the two most important: the binding statement and general repercussion of the extraordinary appeal.

Addressed in article 103-A of the Federal Constitution, the binding statement was introduced into the Brazilian legal system, seeking to endow judgments with predictability, to ensure legal security in relations, while also allowing citizens equal treatment in identical situations handled by the Judiciary.[10]

The binding statement may be defined as a generic statement, with a normative standard, drafted by the Federal Supreme Court after reiterated judgments whose controversy is current and may lead to the multiplication of identical cases, adopting a determined legal position that is to be applied in similar cases within the scope of the Judiciary and the other Branches.[11]

This mechanism of binding precedents seeks to establish the interpretation of the Federal Supreme Court as being the correct one, in this way avoiding divergence of understanding within the Judiciary Branch itself, which might lead to the weakening and discredit of the Branch before society.[12]

In the opinion of doctrine, the origin of the binding statement lays in the Portuguese settlements, which consisted of doctrine with obligatory force established by the courts as a source of law for similar cases.[13]

In Brazil, Law No. 11.417/2006, in its turn, regulated the binding statement, establishing the form to be taken in the procedure for drafting the statement. The law states the parties enjoying legitimacy to propose the issue, review or cancellation of the statement, the quorum of 2/3 for approval, the possibility of manifestations by third parties, the efficiency of the statement over time, that is to say, it addresses the procedural aspects of preparation of the statement.

Besides the legal provision, the Internal Regulations of the Federal Supreme Court establish rules of internal effectiveness for issuing a binding statement. It

[10] "*Art. 103-A. The Federal Supreme Court may, ex officio or when urged, through a decision by two-thirds of its members, after reiterated decisions on a constitutional issue, approve a statement which, as from its publication in the official press, will have a binding effect in relation to the other organs of the Judiciary Branch and the direct and indirect public administration, at the federal, state and local levels, and also to proceed to its review or cancellation, as laid down in law.*"

[11] "*The binding statement, unlike precedents in the United States, is valid for its generic assertion and not for the grounds that underpinned a given decision at some Court.*" See ABBOUD, Georges, Súmula Vinculante versus precedentes: notas para evitar alguns enganos. *Revista de Processo.* Year 33, No. 165, Nov. 2008. p. 220.

[12] Cf. WAMBIER, Teresa Arruda Alvim. *Súmula vinculante: figura do common law?* Available at www.revistadoutrina.trf4.jus.br, Access on Sep. 09 2013.

[13] The settlements were revoked in Portugal by the Constitutional Court in CA 743/96. ABBOUD. Op. cit. p. 227.

should be noted that article 354-G of the Internal Regulations states that handing the proposal for the issue, review or cancellation of a binding statement will be by electronic means, and the citizens will have access to the corresponding information at the site of the Court.

Considering that the development of Law is healthy, a change in the understanding of the Federal Supreme Court was provided for by the Constitution in article 103-A, 2nd paragraph, in stating that the review or cancellation of a binding statement may be brought about by those who may file a direct action of unconstitutionality.

General repercussion may also be considered as a mechanism of binding a precedent, with the legal nature of a condition for the admissibility of an extraordinary appeal.

Introduced into the Federal Constitution in 2004, art. 102, 3rd paragraph, states that "*in the extraordinary appeal the appellant shall demonstrate the general repercussion of the constitutional issues discussed in the case, in the terms of the law, for the Court to examine admission of the appeal, and may only refuse it through a manifestation by two-thirds of its members*".

General repercussion is also addressed in the Internal Regulations of the Federal Supreme Court, since the publication of Amendment No. 21/2007.

Law No. 11,418/2006 disciplines the issue, establishing, besides the new mechanism for handling extraordinary appeals, the multiplying effect of the decision to acknowledge general repercussion. It may thus be said that general repercussion involves a filter for appeals, precisely a means of containing the case, which establishes what issues the Federal Supreme Court is to judge.[14] It falls to general repercussion to speed up the cases under way before the Higher Court, and also the other courts, given its multiplier effect.

It should be stressed that the existence of general repercussion is presumed, taking into account that only with the vote of eight judges will the constitutional issue be set aside.

Precedents and the Code of Civil Procedure

As already stated, the figure of the judicial precedent consists of a mechanism foreign to Brazilian legal culture, traditionally affiliated to civil law. However, it is precisely the logic of the doctrine of *stare decisis* that inspires the greater part of the procedural mechanisms introduced into the Brazilian Code of Civil Procedure by the legislative reforms carried out since the 1990s.

[14]FERRAZ, Taís Schilling. *Repercussão Geral – muito mais que um pressuposto de admissibilidade*. In: PAULSEN, Leandro. Repercussão Geral no Recurso Extraordinário, estudos em homenagem à Ministra Ellen Gracie, Porto Alegre: Livraria do Advogado Editora, 2011, p. 77.

These reforms had the clear aim of strengthening case law, through institution of the above-mentioned binding statements, and also preliminary judgments, mechanisms for filtering appeals and judgments by sampling.

Notwithstanding its classical submission to the primacy of the law, considered as a primary source of Law, the Brazilian system has been progressively incorporating the notion of legal precedents endowed with binding, and not merely persuasive, effectiveness, to decisions following those rendered in identical or analogous cases.

The first stage of the legislative reform in question was implemented by Laws Nos. 8038/90, 9139/95 and 9756/98, which changed the wording of art. 557 of the CPC (Code of Civil Procedure) to allow the reporter to summarily dismiss an appeal when it is patently inadmissible, groundless, impaired or contrary to the contents of a statement or dominant case law at the respective court, either the STF or a Higher Court, while also allowing its provisional acceptance, if the decision appealed is in patent conflict with a statement or dominant case law at the STF or a higher court.

A similar line was taken by Law No. 11,276/2006, in changing provisions of the Code of Civil Procedure, adding to article 518 the 1st paragraph,[15] which contemplates the faculty of the judge to refuse to hear an appeal lodged against a sentence which is in line with the understanding materialized in a statement from the STJ or STF.

In allowing the refusal to hear an appeal that challenges a sentence that is conformant with the statements of the STJ or STF, this mechanism, referred to by Brazilian doctrine as "*a statement preventing appeals*" stands out, without the slightest doubt, as one more step by the Brazilian lawmaker towards the search for the greater standardization and binding effect of case law.[16]

Law No. 11,277/2006, in its turn, in adding article 285-A to the Code of Civil Procedure, instituted a procedural mechanism known as "*preliminary rejection of the plea*" *or* "*preliminary sentence of groundlessness*", which allows the judge, in cases discussing issues of law exclusively, to reproduce a sentence rendered in a previous identical case, with no need to even cite the defendant.

The Higher Court of Justice recently established the understanding that preliminary sentences of groundlessness based on this provision may only be rendered if the understanding set out in them lines up with that of dominant case law at the higher courts, particularly the STJ itself or the STF, and thus the existence of a precedent at the same entity of judgment intending to apply article 285-A is not sufficient.[17] In spite of setting aside the literal nature of the provision in question, this interpretation

[15]"1st Paragraph. *The judge will not hear an appeal when the sentence is conformant with a statement from the Higher Court of Justice or the Federal Supreme Court."*

[16]THEODORO JÚNIOR, Humberto. *As novas reformas do Código de Processo Civil*. Rio de Janeiro: Forense, 2007, pp. 11–12.

[17]STJ. Special Appeal 1,109,398-MS, Reporting Justice Luis Felipe Salomão, judged on June 16 2011. Information Bulletin 477.

confers on the mechanism the function of standardizing case law, lining it up with the other mechanisms that pursue this objective.[18]

Judgment "*by sampling*" of repetitive extraordinary and special appeals, on the other hand, disciplined by articles 543-B and 543-C of the CPC, instituted, respectively, by Laws Nos. 11,418/2006 and 11,672/2008, consists of instruments *par excellence* for standardizing case law.[19]

Just a few cases are chosen which, given their characteristics, represent in the fullest and most reliable way possible the question of law involved. Thus, the understanding established by the STF or STJ at the time of their judgment(s) would then be applied by the lower courts in all other similar appeals that were suspended, awaiting the decision on the paradigm appeal(s).

With specific regard for the handling of repetitive extraordinary appeals, article 543-B inaugurated the new methodology, in instituting a prior incident of assessment of the existence of general repercussion by sampling. This incidence consists of an objective procedure, which goes beyond the original interest of the parties and whose outcome is equivalent to the creation of a general legal rule by the Federal Supreme Court.[20]

The Bill of the New Code of Civil Procedure

In procedural matters, the great event of 2010 was submittal to the National Congress of the bill for a new Code of Civil Procedure (Legislative Bill No. 166/2010, on the initiative of the presidency of the Federal Senate).[21] Voting has been concluded in the Senate, with approval of substitution made by the Reporter, Senator Valter Pereira, and the bill is currently before the House of Representatives under the No. 8,046/2010.

Besides conserving all the instruments focused on rationalizing the treatment of much-repeated cases, the Bill devotes a new chapter to regulating the Legal Precedent, imposing on the courts the duty to standardize and keep their case law stable, with the issuance of pronouncements equivalent to the statement of their dominant case law (art. 520).

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[18]RODRIGUES, Roberto de Aragão Ribeiro. *Ações Repetitivas*: o novo perfil da tutela dos direitos individuais homogêneos. Curitiba: Juruá, 2013, pp. 138–139.

[19]MANCUSO, Rodolfo de Camargo. *Recurso extraordinário e recurso especial*. 11. ed. Revised, updated and expanded according to laws 11.417/2006, 11.418/2006, 11.672/2008 and amendments to the regulations of the STF and STJ. São Paulo: Editora Revista dos Tribunais, 2010, pp. 356–357.

[20]DIDIER JR. Fredie; CUNHA, Leonardo José Carneiro. *Curso de Direito Processual Civil*. Meios de impugnação às decisões judiciais e processo nos tribunais. 9th ed. Bahia: JusPodium, v. 3, p. 338.

[21]The bill is the fruit of the work of a commission of jurists chaired by Federal Supreme Court Justice Luiz Fux.

To put into effect this express guideline, which asserts its harmony with the principles of legality, legal security, reasonable duration of the case, the protection of trust and isonomy, the Bill imposes observance of the parameters[22] set out in art. 521.

The new Code also admits and regulates, in the same provision, the procedure required to overcome the legal precedent (overruling), allowing the possibility of modulating the effects (prospective overruling), in considering the protection due to legal security, trust and isonomy.

There is also authorization for the judge to set aside application of the precedent to the case in point, provided there is a demonstration, clearly and properly supported, of the existence of a distinction in the case being judged (distinguishing) or superseding the understanding (overruling).[23,24]

Quite clearly, the regime of strengthening Precedents makes the admissibility of the case or the preliminary rejection of the plaintiff's plea conditional, in this latter case without the defendant's being cited.

In cases that dispense with the phase of proof, the preliminary decision for rejection is authorized in the Bill, when the case does not comply with a statement or ruling rendered in repetitive appeals by the Federal Supreme Court or Higher Court

[22] "*Art. 521. To put into effect the provisions of art. 520 and the principles of legality, legal security, reasonable duration of the case, the protection of trust and isonomy, the following provisions shall be observed:*

I – judges and courts shall follow the decisions and precedents from the Federal Supreme Court in concentrated control of constitutionality;

II – judges and courts shall follow the pronouncements of a binding statement, rulings and precedents in an incident of assumption of competency or the resolution of repetitive cases and in the judgment of repetitive extraordinary and special appeals;

III – judges and courts shall follow the pronouncements of the statements from the Federal Supreme Court in constitutional affairs, of the Higher Court of Justice in infra-constitutional matters, and the courts to which they are tied, in this order;

IV – if there is no pronouncement of a statement of dominant case law, judges and courts shall follow precedents:

a) from the plenary session of the Federal Supreme Court, in constitutional matters;

b) from the Special Court or the Sections of the Higher Court, in this order, in infra-constitutional matters;

V – in the absence of a precedent from the Federal Supreme Court or the Higher Court of Justice, judges and organs that make up an appellate court or regional federal court shall follow the precedents from the respective plenary session or special body, in this order;

VI – judges and organs that make up an appellate court shall follow, in matters of local law, the precedents from the respective plenary session or special body, in this order."

[23] Art. 499, 1st paragraph, of the Bill considers groundless any decision that goes no further than invoking a precedent without indicating its *ratio decidendi*, nor demonstrating that the case being judged is suited to it.

[24] For an understanding of the discipline of the duty to justify court decisions as an instrument of control of the application of precedents in the new Code of Civil Procedure, ROQUE, Andre Vasconcelos. Dever de motivação das decisões judiciais e controle da jurisprudência no novo CPC. *In:* FREIRE, Alexandre *et al. Novas tendências do processo civil*. Salvador: Juspodivm, 2013, pp. 247–263.

of Justice, or contrary to the understanding established in the incident of resolution of repetitive cases, or the assumption of competency or, also, when contrary to the pronouncement of a statement from an appellate court on local law (art. 333).

In the area of appeals, the Bill preserves the power of the reporter to reject out of hand acceptance of an appeal contrary to the guidance of the legal precedent (art. 945). One of the principal innovations of the new Code lays in creation of the so-called incident of resolution of repetitive cases, provided, given the asserted risk of an offense to isonomy and legal security, for the unified solution of serial cases containing a controversy on one selfsame issue of law (art. 988).

Regulated in such a way as to allow the full participation of the parties and others interested (*amicus curiae*), the incident allows the reporter, following the judgment of admissibility, to determine the suspension of pending cases, either individual or collective, under way in the state or region (arts. 989–994).

Once the incident is judged, "*the legal thesis will be applied to all individual or collective cases that address an identical question of law or under way in the area of jurisdiction of the respective court*", this also affecting future cases (art. 995), although a complaint is fitting against decisions that do not observe it (art. 1,000). The incident is also subject to the procedures for overruling a precedent and modulating the effects of that decision, reported above.

The Bill leaves unchanged, in essence, the procedure for the judgment of repetitive special and extraordinary appeals, applicable whenever "*there is a multiplicity of appeals based on an identical issue of law*" (art. 1,049-1,053), reported in the previous item.

Closing this brief summary, the new Code considers as "*judgment of repetitive cases*" both the decision rendered in an incident of resolution of repetitive cases, and also that arising from the judgment of repetitive special and extraordinary appeals, which may involve an issue of material or procedural law (art. 522) and authorize non-observance of the chronological order of judgment foreseen, also a ground-breaking feature, in its art. 12, 2nd paragraph.

The paramount aim of the Bill, on this point, lays in "*avoiding the inconvenience of conflicting decisions*", leading to "*huge procedural economy*, *as dozens, hundreds and even thousands of like cases may be resolved practically at one fell swoop.*"[25]

In spite of the applause from wide sectors of doctrine and the institutional support of the higher courts for the trend of strengthening precedents from case law, which was accepted by the bill for the new Code of Civil Procedure, this guidance has not been devoid of criticisms.

In this regard, it has already been pointed out that the strengthening of precedents in Brazil arose as a pragmatic response to the numerical crisis of the Judiciary Branch, attacked for its effects, not for its actual causes (the Judiciary's lack of funds, human resources and financial autonomy, inefficient management of resources, little respect for decisions at first instance, exaggerated formalism of

[25]THEODORO JÚNIOR, Humberto. Curso de direito processual civil. vol. I. 53ª ed. revised and updated. Rio Janeiro: Forense, 2012. p. XXXIII.

some procedural rules, inoperative nature of regulatory agencies with effective powers to inspect and punish, inefficient regulation of collective cases; the explosion of litigation following the 1988 Constitution, undue use of the Judiciary Branch as an instrument of moratorium of the public debt, among others).[26]

For this reason, the critics ponder, attacking only the causes of the crisis will produce transitory and partial results, which will lead, in a short time, to a new numerical crisis of cases before the Brazilian Judiciary Branch, possibly compromising the quality of court decisions.

Moreover, it has already been noted that all the benefits pursued by the proposal to strengthen precedents from case law – predictability, isonomy, procedural economic and discouragement of vexatious litigation, will only become reality if the formation and application of precedents is done properly.

This premise, though, is not always observed in the Brazilian courts. It is sought to strengthen precedents in Brazil in just a few years. Its justification lays not in a gradual evolution of the legal system, as occurred in Common Law, but in an urgent solution for the numerical crisis of cases.

The risks involved are obvious: without proper techniques of operating with precedents, there is the risk not only of their being formed unsuitably (without a proper deepening of debate and consideration of all the pertinent arguments), but also of their being applied automatically to cases that are not sufficiently similar.

Thus it is that, in an educational effort to transmit to the professionals of the law the proper techniques of operating with precedents in a country without this tradition, the latest versions of the bill for a new Code of Civil Procedure have incorporated provisions that detail their practical use.

Prospective Overruling in Brazilian Law

Another recent influence of common law (in particular of the United States procedural system) on Brazilian procedural law comes to light in the so-called Prospective Effects or Modulation of Effects over Time of decisions that revoke precedents.

If, on the one hand, the stability and predictability of court decisions in interpretation of the law are important for a democratic decision, as they allow the citizen to know and be able to trust in his own rights[27] set out in the legislative texts, on the other, it is important and vital for the system to modify its precedents when faced with a change to the social or legislative scene.

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[26]ROQUE, Andre Vasconcelos. A luta contra o tempo nos processos judiciais: um problema ainda à busca de uma solução. *Revista Eletrônica de Direito Processual*, v. VII, pp. 237–263, Jan./Jul. 2011, available at www.redp.com.br (accessed on Sep. 01 2013).

[27]MARINONI, Luiz Guilherme. Segurança dos atos jurisdicionais (princípio da ?). *Processos Coletivos*, Porto Alegre, vol. 2, n. 2, Apr.01 2011. Available at: http://www.processoscoletivos.net/doutrina/24-volume-2-numero-2-trimestre-01-04-2011-a-30-06-2011/122-seguranca-dos-atos-jurisdicionais-principio-da – Accessed on Sep. 072013.

The inspiration for seeking a procedural instrument to modulate the effects of a court decision, with a view to balancing legal security with the need to change legal understanding, lays in the Prospective Overruling of U.S. law.

Doctrine developed in the United States defines overruling as the change of a precedent by means of an express decision that it must no longer be the applicable law (or Controlling Law). This change has retrospective effects, limited only to a Statute of Limitations, a settlement between the parties (Accord and Satisfaction) or, obviously, through the occurrence of *res judicata*).[28] In this way, overruling a precedent ends up affecting others cases being judged.

Prospective overruling or Sunbursting,[29] in its turn, is a technique of judgment that has been much used in U.S. common law, principally as from the second half of the twentieth century, by virtue of the pressure of social needs to change the law, without putting at risk its stability, encapsulated in the rule of *stare decisis*.[30]

Prospective Overruling must be understood as the postponement of production of effects of a new legal rule. It is, in actual fact, an exceptional limitation of the retrospective effect of overruling.

In Brazil, if we consider the increase in the importance of case law in recent decades as a Precedent to be followed by judges and by the courts, the Prospective Overruling of Common Law finds similarity with what has been adopted and understood as the application of prospective effects of court decisions or, as denominated by doctrine, the "*modulation over time of the effects*" of decisions.

Modulation of effects consists of a procedural technique of decision that authorizes the Court to limit, in time, the effects of its decisions based on the principle of legal security and the public interest of exceptional importance.[31] Thus, a court decision whose effects, as a rule, would be *ex tunc*, has its limits in time modified, coming into effect at the time of publication of the decision (*ex nunc*) or at another subsequent moment (*pro futuro*).

The court that has most used modulation of the effects of its decisions in Brazil is the Federal Supreme Court (STF), not least due to its importance within the Brazilian Judiciary.

Historically, it falls to the STF to protect the Federal Constitution (art. 102, main section, of the 1988 Federal Constitution), and thus it is there that the control of

[28]FAIRCHILD, Thomas E. *Limitation of New Judge-Made Law to Prospective Effect Only: "Prospective Overruling" or Sunbursting*. Marquette Law Review: 1968. v. 51. p. 254. Available at: http://scholarship.law.marquette.edu/mulr/vol51/iss3/3.

[29]Sunbursting is a term little used these days. It arose in the Sunburst case (Great Northern Railway v. Sunburst Oil & Refining Company, 287 U.S. 358 [1932]) by the U.S. Supreme Court in 1932, in which the Sunburst company sued the Great Northern in the state of Montana, based on a judgment by the Supreme Court of that state. When the Supreme Court of Montana judged the case in 1921, it modified the precedent, but limited its effects to future cases only, and thus the new rule was announced for other cases yet to be filed, although the old rule was applied, for the last time, in favor of Sunburst.

[30]FAIRCHILD, Thomas E. *Op. cit.*

[31]MENDES et al. *Curso de Direito Constitucional.* 4. ed. São Paulo: Saraiva, 2009. p. 1319.

constitutionality takes place, this both concentrated (under the historic inspiration of the lessons of Hans Kelsen and the structure of the Austrian Constitutional Court – *Verfassungsgerichtshof*, where the constitutionality of a law is analyzed *in abstracto*, by means of an objective process) and also diffused (under the clear inspiration, during the genesis of the Brazilian republican system, of the U.S. Supreme Court, where the *quaestio juris* as to the constitutionality of a given legal rule reaches the Supreme Court, in the final instance of appeals, by means of an *extraordinary appeal* lodged by one of the parties in litigation).

While performing the *concentrated control* of constitutionality of the laws, a situation in which the judgments of the STF enjoy efficacy *erga omnes*, and binding on all the other federal and state courts, the STF has modulated the effects of its decisions on the basis of the rule laid down in art. 27 of Federal Law No. 9.868/1999.[32]

According to this rule,[33] in situations in which confirmation of the constitutionality or unconstitutionality of the legal rule may cause a serious shock to legal security or the national interest, the STF, by a majority of two-thirds of its Judges, may "restrict the effects of that declaration or decide that it will only come into effect upon becoming *rem judicatum* or at some other moment to be set."

Please note that, unlike some countries, such as Austria, where the application of a law can only be done "*for a period no greater than eighteen months*",[34] the Brazilian rule does not set a maximum period, allowing the Court discretion to, reasonably, weigh up what the maximum period for application of a law would be, setting the moment *pro futuro* in which its effectiveness would be contained by the grounds of the decision that revokes the prior precedent.

There have been various cases in which the STF made use of this procedural technique of judgment. For example, in *Declaratory Action of Constitutionality (ADC) No. 29,* judged by the Plenary Session on February 16 2012, the STF judged the constitutionality of a law (Complementary Law No. 135/2010) which raised new hypotheses of ineligibility for Brazilian Electoral Law, seeking to preserve the so-called "party loyalty" of the candidate to his/her party. The hypotheses of

[32] "*Art. 27. In declaring the unconstitutionality of a law or normative act, and taking into account reasons of legal security or exceptional social interest, the Federal Supreme Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only come into effect upon becoming rem judicatum or at some other moment to be set"*. As this rule is in a law which regulates "the proceeding and judgment of the direct action of unconstitutionality and declaratory action of constitutionality before the Federal Supreme Court", the STF was the first Brazilian court to adopt the procedural instrument of modulation over time of the effects of its decisions and later, by analogy, the STF began to adopt it in the judgment of other cases and appeals, just as other lower courts began to adopt it, likewise by analogy.

[33] Which, according to BRUNO VINICIUS DA RÓS BODART; (*in* Embargos de declaração como meio processual adequado a suscitar a modulação dos efeitos temporais do controle de constitucionalidade. *Revista de Processo.* v. 198. ago. 2011. p. 389); and GILMAR FERREIRA MENDES *et al* (*Op. cit* p. 1319) has as its inspiration art. 282 (4) of the Portuguese Constitution.

[34] MENDES, Gilmar Ferreira. *Jurisdição Constitucional.* São Paulo: Saraiva, 2004. pp. 364–365.

ineligibility instituted were judged constitutional, but for a reason of legal security, the STF modulated *pro futuro* the effects of its decision to suit it to the constitutional rule, making such hypotheses inapplicable to previous elections, including the national elections held in 2010, and also to the political mandates still in progress.

Another example was judgment of *Direct Action of Unconstitutionality* (ADI) No. 4,029, judged on March 08 2012. This action questioned the constitutionality of Federal Law No. 11,515/07, the outcome of conversion into law of a Provisional Measure of the President of the Republic, which created the Chico Mendes Institute for Conservation of Biodiversity, with powers similar to a regulatory agency for the environment.

In judging this action, the STF ruled that there had in fact been a formal unconstitutionality in the law, as there was a failure to respect the constitutional limits for issuing provisional measures by the President of the Republic, who may only do so in cases of urgency and great importance, however, the STF could not overlook reality: it was a law that set up an autarky for the protection of the environment (a fundamental right also stated in the Constitution) which had since 2007 been operative, with several administrative and normative acts already practiced.

In this case the court adopted modulation of effects in the modality denominated, in Common Law, "*pure prospectivity*", and thus "*the effects of the decision were postponed, pursuant to art. 27 of Law [No.] 9,868/99, to preserve the validity and efficacy of all Provisional Measures converted into a Law to date, and also those at present in progress in the Legislature*".

We note, thus, that in Brazil the technique of modulation over time of legal effects is used, in the majority, in cases of mere interpretation of rules as to their constitutionality or not, either material or formal, as we see in the system of concentrated control of constitutionality of the laws entrusted to the STF.

The following words from the vote of Justice AYRES BRITO, in Conflict of Competency (CC) No. 7,204-1 (judged on June 29 2005) make it clear that the STF may make use of the modulation over time of effects, also, when it is merely interpreting the constitutional text, without amending it, so as to avoid surprises for those under its jurisdiction, *verbatim*: "*The Federal Supreme Court, supreme watchdog of the Republican Constitution, can and must, for the sake of legal security, attribute prospective effectiveness to its decisions, with the precise delimitation of changes in case law that occur without a formal change to the text of the Constitution.*"

As a matter of fact, we note quite clearly that in Brazil the technique of the prospective effects of court decisions was created, precisely, from the theory of the nullity of unconstitutional acts.

However, these days, the STF has also applied the technique of prospective effects in the system of diffused control of constitutionality, when it renders decisions in appeals coming from other Courts in which the constitutionality of laws is challenged.

When an extraordinary appeal is judged at the STF, the effects of its judgment, as a rule, will be only *intra partes*, that is to say, limited to those litigants.

Exceptionally, given the importance of the issue, judgments of appeals in diffused control at the STF may have binding effects, and thus the result is *erga omnes*, and may be asserted against all.

In both situations, the STF may also modulate over time the effects of its decision, conferring upon it prospective effects.

The first application by the STF of this technique provided for in art. 27 of Federal Law No. 9,868/1999 in a case of diffused control of constitutionality came about in the judgment of Extraordinary Appeal ("RE") No. 197,917, on June 06 2002, which challenged a law in a certain municipality which set the number of its town councilors in conflict with the rules of the Federal Constitution.

In spite of the unconstitutionality of the law, the STF understood that, if the unconstitutionality were declared *ex tunc*, a situation of grave legal insecurity would be created, as the validity of the decisions taken by that Town Council while the law was in force would be compromised, since the make-up of the Council would be different.

Therefore, to avoid this situation of legal insecurity, the STF modulated the effects of the decision only until the end of the municipal legislature.

A more interesting example is found in the two judgments of *RE No. 500,171*, in which some students of a public federal university questioned the unconstitutionality of charging a registration fee they had had to pay. In the first judgment, on August 13 2008, the STF judged the merit of the appeal, for the unconstitutionality of charging the registration fee. This judgment, as a matter of fact, served as a precedent for the issuance of Binding Statement No. 12. However, the university appealed, alleging, for the first time in the proceeding, the need to modulate the effects of the decision, as it would not be able to return to all the students the fees which had for decades been charged, prior to the decision.

In the judgment of the Appeal for Clarification in Extraordinary Appeal ("RE" No. 500,171-ED), on March 16 2011, the STF states that it will hear, exceptionally, the university's appeal seeking clarification, despite the prior absence of this plea in the case through the university's inertia, as the modulation of effects of a court decision is a matter of public policy, and may be heard *ex officio* by the Court. In that case, if there had been no modulation of the effects "*as from the issuance of Binding Statement 12, safeguarding the right of those who had already brought lawsuits with the same legal subject*", the decision itself might be deprived of effectiveness, given the well-known fact that many public institutions of higher education in the country are in parlous economic circumstances.

However, on analyzing this and other similar judgments, we note a pernicious trend at the STF, in allowing the tardy plea to modulate the effects of the court decision only when politically convenient.

In CC No. 7,204-1, the Federal Supreme Court modified its understanding as to competency for the judgment of cases seeking indemnity for material and moral damages arising from a workplace accident, transferring this from the Ordinary Courts (i.e. the States) to the Labor Courts. However, out of respect for the security and administration of justice, it defined that the new understanding would come into effect as of Constitutional Amendment No. 45, of 2004, which changed the

constitutional rule of competency for such cases. Cases under way before the State Courts, in which a sentence on merit had already been rendered, would stay there. On the other hand, cases not yet judged on merit would be transferred to the Labor Courts, while maintaining the procedural acts practiced so far.

Another court, the Higher Court of Justice (STJ), responsible for standardizing case law in infra-constitutional cases, has displayed a certain resistance against applying prospective effects to the change in a position in case law, understanding that art. 27 of Federal Law No. 9,868/1999 authorized the modulation of effects by the Federal Supreme Court alone. In the judgment of Regulatory Appeal in Special Appeal No. 1,202,151, the 4th Bench of the STJ asserted that "*faced with the absence of legal authorization and the patent distinction between the techniques of judgment of a direct action of unconstitutionality and the jurisdictional activity constitutionally attributed to the STJ, we hold the modulation of effects of a decision performed by the Private Law Section unfitting, albeit in the case of an appeal representing controversy*".[35]

However, we find that the Higher Court of Justice has in some judgments already applied prospective effects to decisions that revoke precedents. In Habeas Corpus 28,598/MG,[36] the Higher Court of Justice understood that its new position; – that intimation of the Public Prosecutor's Office takes place upon the case records arriving at the institution and not with the prosecutor's statement of awareness, should be applied with future effects only, so as to safeguard legal security and trust.

As to the Regional Federal Courts, courts at 2nd Instance among the Brazilian Federal Courts, their case law shows that they themselves only modulate the effect of their decisions if the STF has already modulated effects in a judgment that is similar to what is being judged by those Courts.

As we saw in the introduction to this work, besides court decisions, the Statements, and in particular the recent Binding Statements, also perform the role of precedent in the Brazilian legal system.

However, given the peculiar formatting of the statements, pronouncements of case law consisting of reiterated judgments at the STF or STJ on a determined issue, as a rule we do not identify a specific form of prospective modulation of their effects when a statement is revoked or modified.

Some examples, though, can be found in the Brazilian system.

On the other hand, in the case of modification of a statement with binding effects (the exclusive competency of the Federal Supreme Court) either revising it or cancelling it pursuant to art. 103-A, main section and 2nd Paragraph of the Federal Constitution (which has not yet happened in the Brazilian system), anyone enjoying

[35]Higher Court of Justice. Regulatory Appeal in Special Appeal 1202151/RS. Reporting Justice MARCO BUZZI, FOURTH BENCH, judged on Oct. 16 2012. Court Gazette of Nov. 12 2012.

[36]Higher Court of Justice. 5th Bench. HC 28.598/MG. Reporting Justice Laurita Vaz. Court Gazette of Aug. 01 2005.

legitimacy to file a direct action of unconstitutionality may request its amendment or cancellation, so as to adapt it, after a careful discussion of the matter, to needs both legal and social.

However, the STF has already issued and promulgated a Binding Statement with prospective effects. In 2008, in the judgment of Extraordinary Appeal No. 556,664, which proposed the issuance of Binding Statement No. 8, the Court ruled, by majority, for partial modulation of the effects of the new Binding Statement, "taking into account the repercussion and legal insecurity that may occur in the case". This involved a judgment for the unconstitutionality of articles of certain laws that addressed the rules for lapse and limitation of tax credits, which were widely understood as being 10 years and, after the judgment, had their limitation of 5 years confirmed.

Now, if the judgment of this appeal, and also issuance of a binding statement arising from it, had effects *ex nunc*, this would generate great legal insecurity and serious harm to the public coffers, and thus the Judges of the STF saw fit to modulate the effects of the Statement "*so as to rule out the possibility of sums collected in these conditions being repeatedly held undue, with the exception of lawsuits filed before conclusion of the judgment*."[37]

The attribution of prospective effectiveness to the new precedent is permeated by debates surrounding issues of different kinds, at times recommending while at others forbidding its application, which demonstrates just how complex and up-to-date the issue is.

Among the principal advantages attributed to prospective effectiveness, we may list:

(i) It allows remedying an interpretation in case law considered obsolete[38];

Court decisions must harmonize with the current social and political values, so as to do justice and in this way also legitimizing the jurisdictional function. Thus, when significant social and political changes occur, which make the precedent obsolete and outdated, unfit to reflect the current state of things, it would generate dissatisfaction on the part of the citizens and compromise the substantial isonomy among them, since new legal situations, unleashed in the light of the new-socio-political scenario, would be judged in the previous framework, causing a feeling of unfairness and mistrust. Thus, the attribution of prospective effects to the new precedent would affect only new legal situations, occurring once the new

[37]STF, Special Appeal 556664, Reporting Justice Gilmar Mendes. Plenary Session, judged on June 12 2008, GENERAL REPERCUSSION – MERIT. Court Gazette 216 – DISCLOSED Nov. 13 2008, PUBLISHED Nov. 14 2008. See also the decision, taking the same line, in Special Appeal 559.943 (Reporting Justice Carmen Lucia. Plenary Session. Published Court Gazette of Sep. 26 2008): "Declaration of unconstitutionality with effect "ex nunc" except for lawsuits filed up to June 11 2008, on which date the Federal Supreme Court declared the unconstitutionality of articles 45 and 46 of Law No. 8212/1991."

[38]GASCÓ, Francisco de P. Blasco. *La norma jurisprudencial*. Valencia: Tirant lo blanch. 2000. p. 100.

precedent was established. On the other hand, application of the new precedent to past situations (full retroactive application),[39] prior to the new social and political configuration, would also prove unfair, for two reasons.

Firstly, given its apparition in the setting of the past socio-political scenario, in relation to which the previous precedent proved to be suited.

In second place, the attribution of prospective effect safeguards the legitimate trust of citizens in the system of precedents, to the extent that they preordain their behavior and relations in the light of the precedent in effect. There are thus cases in which the attribution of retroactive effects would amount to a surprise factor, surprising the citizens who had already set up relations in conformance with the precedent in force at the time, and shaking their trust.[40]

(ii) Safeguards the legal security and trust deposited by the citizens in a given line of case law:

The system of precedents arouses in the citizens legitimate trust, in that they can base their behavior and relations according to the parameters outlined in the current understanding of case law. It is asserted that this trust arises, to a great extent, from the stability of precedents, that is to say, from the propensity to maintain them over time.

However, it must be added that, as analyzed in the previous item, there are situations in which maintaining the precedent may generate a violation of the values of fairness and isonomy, forcing its revision. If the reasons that justify revision of the precedent are relevant, its overrule will be advisable, which will represent, per se, undermining stability. Alongside stability, predictability must be considered as factors fundamental for legal security. Thus, the attribution of prospective effects to the precedent, to have this applied to future cases only, strengthens the citizens' trust in the system, protecting those who based their relations on the parameters set by the precedent in force at the time.

[39] At this point there should be a distinction between the different modalities of efficacy attributed to precedents. Full retroactive application: application of the new precedent to all past and future cases, including those already *rem judicatum*. Partial retroactive application: the new doctrine regulates all new cases, except those whose judgment has already been finally concluded or whose reexamination is limited by other normative rules. Full prospective application: the new rule will only fall upon situations configured after the date of its affirmation or a certain future event, not affecting even the parts of the case that led to its formulation, the case in judgment and events that occurred previously will still be governed by the previous understanding. Partial prospective application: the new precedent must be applied to the case in judgment and to facts occurring subsequently, but not those previous. Prospective prospectivity: application of the new precedent as from a given moment in the future. MELLO, Patrícia Perrone Campos. *Precedentes. O desenvolvimento judicial do Direito no constitucionalismo contemporâneo.* Rio de Janeiro: Renovar, 2008, p. 261. ROSITO, Francisco. *Teoria dos Precedentes Judiciais. Racionalidade a Tutela Jurisdicional.* Curitiba: Juruá, 2012. p. 335.

[40] MELLO, Patrícia Perrone Campos. *Op. cit*, p. 265.

At times, the precedent revoked enjoys credibility among society, and so far the courts have given no signs as to the possibility of its modification (signaling).[41]

And there may be a situation consolidated on the basis of the previous normative interpretation, which would impede the application of retroactive effects. In this regard, in the judgment of Direct Action of Unconstitutionality (ADI) 2240,[42] the Federal Supreme Court declared the unconstitutionality of Law 7,619 from the State of Bahia, which had created a new municipality, although without decreeing its nullity, keeping it in effect for a period of 24 months. That is to say, the Brazilian Constitutional Court opted to set a milestone in the future as of when the new law would be null and void. Until then, the legal situations established on the basis of the unconstitutional law are protected.

On the other hand, application of the new understanding even to sentences that have become *rem judicatum* (full retroactive application) would compromise the administration of justice, as it would boost the trend to litigation, with the reopening of cases judged definitively, and would discourage the lower courts from applying precedents, as these could always be changed, affecting previous decisions that applied them regularly, while in effect. Consequently, prospective overruling can be an instrument in favor of security and trust in the system of precedents.

(iii) The implementation of a new public policy is projected precisely onto the future, and frequently there is no need to give it retroactive effects.

Quite often, the formation of a new understanding of a certain matter refers to the implementation of a new public policy, to be applied in future. On this point, there would be no need at all to attribute retroactive efficacy to the legal precedent, and it proves more suitable to apply prospective efficacy.

On the other hand, critics of prospective overruling point out the following disadvantages:

(i) A judicial resolution with merely prospective efficacy would be no more than an *obiter dictum*[43]:

The prospective overruling is criticized, more precisely full prospective application, in which the new precedent is not applied to the case in which the new understanding was applied, but to future cases only. It is argued that this would be more like an *obiter dictum*, or rather, like remarks made during judgment of the case, but which bear no influence on its outcome. It is understood that this stance discourages citizens from presenting new arguments and seeking a revision of the precedent, given that they themselves would not benefit from their arguments being accepted. The citizens' inertia would in the long run contribute to crystalizing

[41] MARINONI, Luiz Guilherme. *Precedentes obrigatórios*. São Paulo: Revista dos Tribunais. 2010. p. 421.

[42] Federal Supreme Court. Plenary Session. ADIn 2,240, Reporting Justice Eros Grau. Court Gazette Aug. 03 2007.

[43] GASCÓ, Francisco de P. Blasco. *Op. cit*. p. 101.

the precedent in effect and, as a consequence, to their becoming obsolete, which would compromise the citizens' trust in the system of precedents, increasing the feeling of unfairness.[44]

On the other hand, in favor of prospective overruling is the assertion that so-called partial prospective application is possible, in which the new precedent is applied to the concrete case in which it was established and also to future cases, which would get around the criticism above.

It should be stated that the choice between adopting totally or partially prospective effects depends on a prudent appraisal by the organ of judgment, weighing up, on the one hand, preservation of the stability and predictability of precedents, which would forbid their immediate application to the case in point, and on the other, benefiting the litigants with the new understanding set on the basis of their arguments. It should be borne in mind that, in a court dispute, there are counterpoised interests, and it is likely that adoption of the new understanding in the case in point will meet the interests of just one of the litigants, taking by surprise the other, who had taken his basis on the prior precedent.

(ii) The function of case law is focused above all on the production of retroactive decisions:

The action of the jurisdictional organs is focused mainly on deciding on situations that have already occurred, and thus retroactive efficacy would be inherent to them. The application of prospective effects to court decisions would be contrary to the very essence of the function of case law, bringing it closer to the specific function of the Legislative Branch, in the enactment of laws, with effects projected into the future.

However, there arises the counter-argument that the role of the Constitutional Courts is not only to judge the case in point, but also to strive for the integrity of the constitutional system.

The application of retroactive effect to certain precedents may compromise the legitimate trust of the citizens and predictability, as already clarified, and it is the role of the Judiciary Branch to be alert to such circumstances, so as to perform its role properly and act with fairness.

Lastly, it may be added that full retroactive application allows the new precedent to affect, also, sentences that have become *rem judicatum*, which undermines the unity of jurisdiction and is much criticized in doctrine.[45]

[44]Guilherme Nogueira highlights that the ideal of unifying case law cannot lead to its paralysis. There must be a focus on unification *in space*, so that the same interpretation is adopted by all the courts, but not its unification *in time*, preventing the adoption of a new interpretation, in harmony with the new political and social parameters. NOGUEIRA, Gustavo. *Stare decisis et non quieta movere: a vinculação aos precedentes no direito comparado e brasileiro*. Rio de Janeiro: Lumen Juris. 2011. p. 188.

[45]GRECO, Leonardo. A declaração de constitucionalidade da lei pelo STF em controle concentrado e a coisa julgada anterior – análise do Parecer 492 da Procuradoria Geral da Fazenda

Case law, as seen at the beginning of this report, even though not recognized among the sources of law, must today be considered as if it were, not least due to its growing importance in the Brazilian Proceeding.

When interpreting legal rules, particularly when these confer prospective effects on the new understanding formed, the Court create the law. Its denial may be considered a "*fiction*" by doctrine. Every time the court amends the understanding established in case law on a certain issue, there is the unquestionable presence of a "*normative effect*",[46] with both direct and indirect reflexes on the legal community and society as a whole.

Denying the creative power of case law and raising it as an insurmountable obstacle may end up stopping the courts from reviewing mistaken or obsolete interpretations, forcing them to condone and perpetuate injustices and, in consequence, not perform their function. Through the interpretation of rules and the formation of case law, the courts can enhance the legal system.

However, it is not a case of transforming the courts into organs of judgment without limits, not least because the Legislative Branch is not deprived of the power to enact new rules, even if contrary to the understanding formed in case law on the law revoked.

The law (and in particular, the Federal Constitution), constitutes the limit on the interpretative activity of the courts, and thus there is no incompatibility, but rather complementarity between the legislative and jurisdictional functions. Interpretation by the courts has been harmonizing and integrating to the law created by the lawmakers.

Therefore, the application of prospective effects to the interpretative function of the courts is due to a prudent weighing-up of the values involved, respecting the legitimate trust of the citizens, predictability and legal security, which are indispensable to the Democratic State of Law.

The blind and unconditional application of retroactive effects might, in certain specific cases, cause losses, not only to the citizens directly subject to application of the respective rule, but to the very legitimacy of the Judiciary Branch and the legal system in force.

Final Remarks

The new constitutional order, based on making principles positive, placing value on argumentative activity[47] and legal rationality, with the application of legal

Nacional. *In Revista Eletrônica de Direito Processual,* v. IX, ano 6. Jan-Jun 2012. www.redp.com.br.

[46]MOLFESSIS, Nicolas. *Les revirements de jurisprudence*. Paris: Lexis Nexis Litec. 2005, p. 12.

[47]FIGUEROA, Alfonso García. Princípios e direitos fundamentais. In: SOUZA NETO, Cláudio Pereira; SARMENTO, Daniel. (Coord.). *A constitucionalização do direito*: fundamentos teóricos e aplicações específicas. Rio de Janeiro: Lumen Juris, 2007, p. 16.

hermeneutics,[48] has changed the appearance of our legal system, entailing consequences such as the judicialization of politics and legal activism.[49]

Thus, the power formerly concentrated on the democratic lawmaker is now also wielded by the Judiciary Branch,[50] through the interpretation and application of the rules, and also the constitutional control exercised over legislative acts, creating a new pragmatic dimension, especially in the form of interaction between these two Branches.[51]

As a result of the increase in power of the jurisdictional organ, the responsibility of the judge has increased; he also finds himself pressed to increase his extra-dogmatic knowledge, in the philosophy of law, public policies and economics, for example.[52]

The increase in the judge's powers is a reality in various legal systems, as a form of enhancing the quality of justice,[53] and takes on various external forms, such as the use of procedural techniques[54] that allow greater management and adaptation of the proceeding, assuring the citizens of protection more egalitarian, fair and timely. This has strengthened the role of case law, which through brave and groundbreaking decisions has often allowed justice to be actually achieved, without prejudice to

[48] *"The law, rather than a rule or institution, is a work of hermeneutics, a discourse articulated between the rule and the fact, letter and spirit, order and disorder, force and justice."* CAMBI, Eduardo. *Neoconstitucionalismo e neoprocessualismo*: direitos fundamentais, políticas públicas e protagonismo judiciário. São Paulo: Revista dos Tribunais, 2009, p. 87.

[49] *"The idea of legal activism is linked to a broader and more intensive participation by the Judiciary in materializing the constitutional values and ends, with greater interference in the space of action of the other two Branches. The activist stance expresses itself by means of different conducts, which include: (i) direct application of the Constitution to situations not expressly contemplated in its text and regardless of a statement from the ordinary legislature; (ii) the declaration of unconstitutionality of normative acts issued by the lawmaker, based on criteria less strict that those of blatant and ostensive violation of the constitution; (iii) the imposition of conducts or abstentions on the public power, particularly in the realm of public policies."* (BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. RDE. *Revista de Direito do Estado*, v. 13, 2009. p. 77).

[50] On the crisis of representativeness of the Legislative Branch to justify judicial activism, particularly in the protection of fundamental rights, see: SARMENTO, Daniel. O neoconstitucionalismo no Brasil: riscos e possibilidades. In: QUARESMA, Regina; OLIVEIRA, Maria Lúcia de Paula; OLIVEIRA, Farlei Martins Riccio de. (Coord.). *Neoconstitucionalismo*. 1. ed. Rio de Janeiro: Forense, 2009, p. 293).

[51] On the subject, see: CABRAL, Trícia Navarro Xavier. Filosofia do direito, neoconstitucionalismo e processo contemporâneo. *Revista Ajuris*, v.123, pp. 297–335, 2011.

[52] MAIA, Antonio Cavalcanti. *Jürgen Habermas:* filósofo do direito. Rio de Janeiro: Renovar, 2008, p. 27.

[53] On the new trends around the world, see: CHASE, Oscar G.; HERSHKOFF, Helen (eds.), *Civil litigation in comparative context*. St. Paul: Thomson/West, 2007, pp. 241–260.

[54] On some of these techniques, consult: CABRAL, Trícia Navarro Xavier. Flexibilização procedimental. REDP – *Revista eletrônica de direito processual*, v.VI, pp. 135–164, 2010.

the important contribution of doctrine to the enhancement and sophistication of procedural law.[55]

This judicial activity, allied to the exponential growth of the Brazilian population,[56] and the appearance of new rights,[57] has paradoxically resulted in huge troubles for the very provision of jurisdiction, which reveals itself to be falling short, bureaucratic and, particularly, extremely slow, while the national authorities[58] have made countless attempts to achieve the reasonable duration of the case.[59]

Thus, new laws have been enacted,[60] justice is penetrating the backwoods,[61] and new methods of management of the justice secretariats have been implemented.[62] In spite of this, there is, in the words of Kazuo Watanabe,[63] a "*pent-up trend to litigation*", which, spurred on by the 1988 Constitution and the new profile of the judge, mentioned above, fills up the already overloaded in-trays of the Judiciary Branch.

At the Higher Courts, the situation is even more serious; according to official data from December 2012, at just the STF[64] and STJ,[65] there were 66,945 and 317,232 cases in the file, and an annual distribution, in 2012, of 46,392 and 289,524, respectively.

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[55]Cf.: CABRAL, Trícia Navarro Xavier. Segurança jurídica e confiança legítima: reflexos e expectativas processuais. In: FUX, Luiz (Coord.) *Processo Constitucional*. Rio de Janeiro: Forense, 2013, pp. 847–895.

[56]According to official data, in the last twenty years the Brazilian population has leapt from less than 147 million in 1990, to 200 million people in 2012, in increase of 36 % (www.ibge.giv.br, access on Sep. 11 2013).

[57]See, for example, the consolidation of the *Consumer Defense Code* (federal law 8,078/90), the *Statute of the Elderly* (federal law 10,741/2003), the *Statute of the Soccer Fan* (law 10,671/2003) and, more recently, the *Statute of Youth* (federal law 12,852/2013).

[58]The powers of the Republic have made "pacts" seeking, among other things, to improve the provision of jurisdictional services. See: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=165751, Access on Sep. 11 2013.

[59]On the question of the time of the proceeding, consult: http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=165751, acesso em 11 set. 2013.

[60]Just the CPC, which dates from 1973, has already been reformed over twenty times.

[61]See, for example, the march inland of the federal courts, based on the creation of 183 courts throughout the entire country (federal law 10,772/2003).

[62]In this context, we must mention the work of the National Council of Justice (CNJ), which has set *targets* for the entire Judiciary Branch: http://www.cnj.jus.br/gestao-e-planejamento/metas, access on Sep. 11 2013.

[63]WATANABE, Kazuo. Filosofia e características básicas do Juizado Especial de Pequenas Causas, *in Juizado Especial de Pequenas Causas* . WATANABE, Kazuo (coord). São Paulo: RT , 1985, p. 2.

[64]http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=REAIProcessoDistribuido, access on Sep. 11 2013.

[65]http://www.stj.jus.br/webstj/Processo/Boletim/verpagina.asp?vPag=0&vSeq=185, access on Sep. 11 2013.

In the light of all the foregoing, an *alternative* used for containment of cases, particularly at the phases of appeals, has been "*defensive case law*",[66] a reiterated practice of searching for tiny formal flaws and/or gaps in interpretation to cut down, at admissibility, thousands of intents to appeal.[67] In this regard, as pointed out by José Carlos Barbosa Moreira,[68] various illegitimate filters have been used routinely in Brazil, such as not admitting an appeal if the rubber stamp of its filing is illegible (which would apparently prevent proof of its timeliness) or the impossibility of overcoming a flaw of representation in exceptional routes, for supposed "*appellate non-existence*".

There is, thus, a patent intent to inhibit intentions to lodge appeals, identified in tens of thousands of decisions of inadmissibility. To have a more precise notion of the strength of this practice, suffice to note that even at the STF, a court that does not enjoy competency to analyze eminently procedural issues, according to data from the Getulio Vargas Foundation business school, of the ten decisions most-repeated at that Court, 9 (nine) concern questions of inadmissibility.[69]

Another way out has been the widespread use of judgments by sampling, supported by legal[70]/regulatory[71] changes, in which the Judiciary rules on only one or a few cases on a given matter, with the subsequent reproduction, almost infinite, of the same decision for the thousands of cases held up or already duly separated, by piles or lists, by the most varied assistants.

This measure, while apparently favoring isonomy (given that, in thesis, like cases will have like results), has triggered severe criticisms in doctrine, since, for example, due care or rigor is not always employed in the choice of the pilot case, or that representative of the controversy, that is to say, that which the judges will actually examine thoroughly so that, once the precedent has been established, such decision will be replicated for all those cases based on an identical legal issue.

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[66]Defensive case law, in the words of Justice Humberto Gomes de Barros, at the time of his taking office as President of the STJ, is a practice *"consisting of the creation of hindrances and pretexts to stop the appeals addressed to him from being received and heard"*. See: http://www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=551&tmp.texto=87057, access on Sep. 09 2013.

[67]On the issue: O novo Código de Processo Civil vs. A jurisprudência defensiva. *Revista de Processo*, v. 210. São Paulo: RT, 2012, pp. 262–302. O formalismo exacerbado quanto ao preenchimento de guias de preparo: ainda a jurisprudência defensiva dos Tribunais Superiores. *Revista de Processo*, v. 193. São Paulo: RT, 2011, pp. 231–253; O acesso à justiça e a jurisprudência defensiva dos tribunais superiores. *Revista do Instituto dos Advogados de Minas Gerais*, v. 16. Belo Horizonte: IAMG, 2010, pp. 371–388.

[68]BARBOSA MOREIRA, José Carlos. Restrições ilegítimas ao conhecimento dos recursos, *in Temas de Direito Processual. Nona Série.* São Paulo: Saraiva, 2007, pp. 267–297.

[69]In this regard, please see: http://supremoemnumeros.fgv.br/relatorios/relatorio-1-o-multiplo-supremo e http://www.conjur.com.br/2011-jul-06/justica-dar-conta-demanda-judiciario-legislativo, both with access on Sep. 11 2013.

[70]See arts. 543-B and 543-C, CPC, added, respectively, by laws 11,418/06 and 11,672/08.

[71]STF Internal Regulations, arts. 321–329, amended by regulatory amendments 21/2007 and 23/2008; and STJ Internal Regulations, arts. 255–257, complemented by Resolution No. 08/2008.

At times, the matter is not even reasonably debated along the ordinary routes, with various gaps and doubts concerning a given matter, and even so it is presented to the scrutiny of the judges for discussion and subsequent standardization; in other cases, the occurrence of a virtual judgment (as happens, for example, at the STF, when handling general repercussion[72]) hinders (or even prevents) all those interested from actually intervening and influencing that judgment, with the upshot that the future precedent, in actual fact, has a low rate of legitimacy, and consequently of acceptance among the legal community.

Lastly, it is not unusual, regrettably, for one selfsame issue that has been affected by a given judge has also been by another, a situation which, if not corrected in good time, will generate, at times at the very same higher court, two different precedents on the same issue.

In this regard, there are quite often cases in which lawsuits with the same legal grounds, and at times signed by the same counsel, are judged by means of quite different procedures, in a kind of random case law, as well defined by Eduardo Cambi.[73,74]

As if that were not enough, another artifice used to overcome the crisis of effectivity faced by the Judiciary Branch has been the repeated practice of disrespect for legal security, at the time of a change of course in case law on a certain issue.

Thus, for instance, the STF decided, in a clear violation of legal security, that the decision taken in RE-QO AI No. 715.423, which defined the relevant day for the

[72]The "Virtual Plenary Session" of the STF, for the judgment of General Repercussion, may be consulted at: http://www.stf.jus.br/portal/jurisprudenciaRepercussao/listarProcesso.asp?situacao=EJ, access on Sep. 11 2013.

[73]"(. . .) The idea of *random case law* falls precisely within this context, that is to say, when the same legal issue is judged in two or more different ways. Thus, if the party is lucky enough to have the case distributed to a given judge, with a favorable understanding of the legal issue involved, he obtains the jurisdictional measure; otherwise, the decision does not recognize the right he pursues." (CAMBI, Eduardo. Jurisprudência Lotérica, *Revista dos Tribunais*, São Paulo: RT, year 90, v.786, Apr. 2001, p. 111).

[74]We shall explain: imagine that a given appeal was distributed to the 1st Civil Chamber of a certain Appellate Court, which had, by coincidence, a position established on the legal thesis addressed therein; in this case, the reporting judge, finding support in art. 557, main section, CPC, may *refuse to hear* the appeal, if the guidance produced by the sentence *coincides* with that of the Appellate Court; however, it may be that if that same appeal had been distributed to the 2nd Civil Chamber of the same court, which is made up of judges who do not agree with the *dominant thesis* at the court, in this case, it is quite likely that this appeal will be heard and judged on its merit, by the bench as a whole, in a procedure quite different from what would have happened had the appeal been *drawn by lots* to the 1st Chamber. Please note: a matter of *luck* defined the procedure of the appeal, something which, obviously, cannot be tolerated by a legal system that respects the constitutional procedural guarantees.

incidence of general repercussion in the extraordinary appeal, could also be applied to cases in progress,[75] in patent offense to a procedural acquired right.[76]

At the time, it was understood as possible to apply the novel procedure of repetitive appeals described in art. 543-B of the CPC, with efficacy ex tunc, given the fact of, among other reasons, "*easing the works and speeding up the judgment of the matter*", as per an excerpt taken from the vote of Justice Menezes Direito in RE-QO 540.410,[77] a measure that in practice entailed, as the most sensitive consequence, the return of thousands of cases to the courts of origin, alleviating the workload of the STF, yet with manifest harm to those awaiting jurisdiction.[78]

We thus conclude this study by affirming that the adoption of the mechanism of the precedent in Brazilian law, and as a consequence, the manifestations of prospective overruling, call for greater institutional maturity, to avoid its violating either the target-principle of Legal Security and also the rendering of decisions with the paramount aim of reducing the number of cases or avoiding new appeals being lodged.

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[75]Previous and subsequent extraordinary appeals, when multiple, are subject to suspension, withdrawal and recognition of loss, and may be returned to their origin, if already pending at the STF, whenever they address issues with general repercussion recognized by the STF (art. 543-B, 1st and 3rd paragraphs, RE-QO AI 715.423, Justice Gilmar Mendes; RE-QO 540410, Reporting Justice Cezar Peluso, taken from www.stf.jus.br, item "general repercussion", access on Sep. 11 2013).

[76]This expression. was recently adopted by LACERDA, but had long been mentioned by MAXIMILIANO: "(. . .) The postulates in force on the date of the sentence establish the procedural rules, and its efficacy and executive force. (. . .) *The postulates reigning on the date of the sentence resolve its unimpugnability, remedies against the judgment, the admissibility of any appeal, as this constitutes a procedural acquired right"*. (MAXIMILIANO, Carlos. *Direito intertemporal*. 2. ed. São Paulo: Freitas Bastos, 1955, pp. 274 & 278. Similarly, LACERDA, Galeno. *O novo direito processual civil e os feitos pendentes. 2. ed.* Rio de Janeiro: Forense, 2006, p. 3; emphasis added).

[77]Page 1147 of RE-QO 540.410, whose entire content is available at http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555757, access on Sep. 11 2013.

[78]This was the assertion by Justice Marco Aurelio, in his defeated vote (page 1146 of RE-QO 540.410): "(. . .) relegating the proceedings, whose appeals were lodged on a date prior to the regulation, to their origin, may imply a consequence appropriate to general repercussion, and a most serious one, which is the court of origin declaring impaired the extraordinary appeal already admitted or, in the case of a point of view different from the Court in the case in which general repercussion was established, coming to modify the ruling formalized, a consequence, as I said, of the greater gradation of general repercussion, without the situation being supported by the repercussion (. . .)". (Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=555757, access on Sep. 11 2013).

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Chapter 14
Judicial Rulings with Prospective Effect in Venezuela

Hildegard Rondón de Sansó

Abstract This study analyzes and presents the situation of Venezuelan jurisprudence or case law with regard to the acceptance of rulings with prospective effect, understood as those rulings, the effect of which is intended to control future situations that are fully comparable to the situation currently being dealt with. The analysis of prospective ruling determines the value of precedent in the Venezuelan system and, specifically, that with a binding nature, like in the case of the provision of Article 335 of the Constitution of the Bolivarian Republic of Venezuela.

The paper refers to point I.b of the questionnaire prepared for the XIXth Congress on Comparative Law, to be held in Vienna in 2014. This point deals with the "*General Theory of Law*," and this paper delves into the subject of "*Judicial Rulings with prospective Effect*" The subject in French is found under the title: "*L´effet prospectif des décisions de justice*."

In Venezuelan law, the use of the term "*prospective*" as an adjective is uncommon, even though it is understood as referring to a future effect. It is possible that in other Latin American countries, which have been more intensely influenced by the Anglo-Saxon Law, the use of this term to refer to the effectiveness of rulings or actions in general is widespread. If one thing is true is that in our system, the term "*retroactive*" to refer to past effects is very usual even in regulatory texts, unlike the "*prospective*" effect, which is seldom mentioned.

We now proceed to answer the questions made by the General Rapporteur, following the same order in which they were posed.

1. **Could you briefly describe how does the concept of precedent operate in your legal system? Is there any particular provision establishing precedent? Are there practical, legal or constitutional rules on this matter?**

H.R. de Sansó (✉)
Urbanización Santa Sofía, Calle Norte, Quinta Bursan, N 229, El Cafetal, Municipio Baruta, 1060 Caracas, Venezuela
e-mail: sansohildegard@hotmail.com

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Even though the question refers to "*your legal system,*" we can infer from its context that the aim of the question is to address the **judicial** application of precedent.

We will deal with judicial precedent in a brief manner, before delving into it in more detail throughout this paper, by noting that it is a decision made ahead of the cases that are being heard by a judge, which refers to identical or similar circumstances to those submitted to the said decision. Therefore, a precedent could guide the judge in the issuance of the corresponding ruling. If a precedent has been classified as "*binding*," it will be mandatory for the judge and becomes a true legal rule in itself with full force and effect of a repealing law of any source deciding in a different sense. Therefore, it could repeal laws with different contents.

It should be borne in mind that Western legal systems are divided into those that address precedent as a fundamental source, like the Common Law or the Anglo-Saxon system, and the German-French or legalist system the essential source of which is the written law.

The principle of "*stare decisis,*" a Latin phrase that is interpretatively translated as "*to stand by decisions and not disturb the undisturbed*," is applied in the legal system based on Common Law. This phrase is used in Law to refer to a doctrine according to which rulings handed down by a court give rise to a **judicial precedent** and are binding, as jurisprudence or case law, on those that may be issued in the future on similar matters. This shortened phrase comes from a longer one: "**Stare decisis et non quieta movere**," which refers to the condition of an individual who has to quietly wait, without any disturbance, for the decision to be made.

According to the principle of *stare decisis* quoted above, previous rulings on identical matters should be assumed by courts, which, therefore, are obliged to abide by or comply with already resolved matters. This is a general maxim that expresses that when a matter has been resolved by means of a ruling that sets a precedent, said precedent shall be applied, unless other circumstances modify the *status quo*. Standing by the ruling issued before makes it necessary to back up the change adopted in a robust manner; therefore the *stare decisis* doctrine does not prevent previous decisions from being revised and, if necessary, annulled, with the added difficulty of considering a number of factors, including: the age of the preceding decision that is to be followed; the nature and degree of public and private confidence on which variation is supported and its compatibility or incompatibility with other legislative rules.

However, judges in the Common Law system, above all the American, are relatively free to dissent from the doctrine set by the precedent and have the power to create their own rule, thus emerging a **new precedent**, which allows Common Law to maintain a continuous dynamics of change.

The Royal Courts of Justice of Westminster developed the *stare decisis* system referred to above, according to which once a judge had decided on a cause, the other judges were obliged to follow suit.

The second branch of English law is "equity" which was a way to overcome the main flaw of Common Law, i.e. the fact that the precedent stopped Law from evolving. The Court of Chancery handed down its rulings based on equity.

Concerning countries of Roman-German tradition, they receive Roman rules directly, because in almost all peoples dominated by the Roman Empire, general law rules were applied. This circumstance led to a limited adoption of the custom system which, if existed, only constituted a subsidiary source. This means that due to the existence for historical reasons of general legal rules imposed by public power, those countries did not have to provide judicial rulings with an imperative and mandatory character for their judges; even rulings issued by the Constitutional Courts or the Courts of Cassation had a merely informative characters and could be an interpretation reference for lower court judges, without them having to restrict their possibility of dissenting and separating from jurisprudence decisions of higher courts.

Most systems, however, recognize that reiterated jurisprudence should somehow bind judges, because, while they are independent, it is necessary to prevent their rulings from being fully unforeseeable or that contradictory rulings are handed down.

The current Constitution of the Bolivarian Republic of Venezuela, dated December 30, 1999,[1] announces that a severe legalism is imposed in its Article 137 when it reads that the Constitution and the Law shall define powers of entities exercising the Public Power, which they shall abide by during the development of their activities.

In principle, articles of the Constitution do nothing but praise the **supremacy of law**, noting, in this regard, in its Preamble, as purposes of the Constitution "*the rule of law for this and future generations*." In defining sovereignty, Article 5 *ejusdem* reads that sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law.

Article 7, in turn, provides for the **principle of constitutional supremacy**, pointing out that the Constitution is the supreme law and foundation of the legal order and individuals and bodies exercising Public Power are subject to it. At all time, throughout the Constitution, but especially in the enunciation of duties, rights and guarantees, the law is described as the supreme source of Law and power regulation.

The Civil Procedure Code contains the sources governing civil proceedings. For instance, Article 9 of the Code stipulates that procedural law has been applied since the Code's entering into force, regardless whether proceedings were still ongoing. Article 12 of the same Code, in turn, requires judges to adjust their rulings to "*legal rules,*" unless the law empowers them to decide based on equity.

According to the Civil Procedure Code, the law only ceases to govern when it collides with any constitutional provision. In this regard, Article 20 of the aforementioned Code points out that "*in the event that the current law which application is requested collides with any constitutionalprovision, judges shall*

[1]Official Gazette No. 36,860, same date; however, it was published again in the Official Gazette Extraordinary No. 5,453 dated March 24, 2000 and was amended on February 15, 2009 and published in the Official Gazette, Extraordinary Issue, No. 5,908 dated February 19, 2009.

preferably apply the latter." This rule allows the so-called "*diffuse control of the Constitution*," because any judge may "*disregard*" the law that is breaching the Constitutional provision.

Up to this point, the system appears to be properly legalist; however, a number of elements have made us abruptly go from said system to the theory of precedent as the **main** source of law. In this sense, 1999 Constitution, in its Article 335, surprisingly, provides for that interpretations by the Constitutional Chamber with regard to the content, scope and principles of the Constitution shall be considered **binding** on the other Chambers of the Supreme Tribunal and the other courts of the Republic.

The Organic Law of the Supreme Tribunal of Justice, dated October 1, 2010,[2] underscores this trend by remembering that the Constitution foresaw the **binding interpretations of the Constitutional Chamber** when the said Law speaks about the "*content or scope of Constitutional provisions and principles*," which operates on the other Chambers of the Supreme Tribunal of Justice and the other courts of the Republic, as already seen.

To strengthen this principle, the Organic Law of the Supreme Tribunal of Justice stipulates as a competence of the Constitutional Chamber that of "*reviewing final rulings handed down by courts of the Republic, **in the event that they have ignored any precedent set by the Constitutional Chamber***." Numbers 11 and 12 *ejusdem* also empower the Chamber to "*review rulings issued by the other Chambers," provided they have **ignored a precedent** set by the Constitutional Chamber* and also when **diffuse control of constitutionality of the laws** or other rules has been exercised by the remaining Chambers of the Supreme Tribunal of Justice and the other courts of the Republic.

A judge's disregarding a **precedent** set by the Constitutional Chamber constitutes grounds for **nullification of the ruling** and penalization of the judge.

In this regard, the Constitutional Chamber, in its ruling of June 18, 2013, concerning an extraordinary appeal against a decision issued by the Superior Court on Civil, Mercantile, Transit, Labor, Minor and Labor Stability-related Matters of the Judicial District of the State of Aragua, stated that judges that, at the time of deciding on a similar case, refuse to accept the precedent set by the aforementioned Chamber will be held responsible for misconduct in the exercise of their function. In this case, the Chamber found that the judge issuing the ruling pointed out in the same that the Constitutional Chamber had regarded as binding a ruling and that this faced him with the following conflict of consciousness: "*applying the doctrine set in the referred ruling or disregarding in favor of justice, for the upholding of which the law is conceived as an instrument*." The judge opted for disregarding the precedent, due to which he was fined with 15 days of salary, following a warning that "*henceforth, you shall abstain from disregarding precedents established as binding by the Constitutional Chamber*."

The Organic Law of the Supreme Tribunal of Justice insists in the supreme hierarchy of the Constitutional Chamber concerning the interpretation of constitutional

[2]Official Gazette No. 39,522.

rules, empowering it to declare total or partial nullity of national laws and further acts with full force and effect of law passed by the National Assembly, provided they may collide with the Constitution[3]; as well as constitutions and laws of the different states of the country, municipal ordinances and other acts by deliberating bodies of states and municipalities, which are issued in direct and immediate enforcement of the Constitution of the Republic but may collide with it, and also acts by the National Executive, which may collide with the Constitution of the Republic and with those of the different state bodies exercising Public Power.

The aforementioned Law also empowers the Constitutional Chamber –and it is at this point where the figure of **precedent** appears– to "*review final rulings handed down by the courts of the Republic, when the said rulings have disregarded a* ***precedent*** *set by the Constitutional Chamber*..." (Art. 25, number 10); this rule is also applied to rulings by other courts that fulfill the aforementioned assumption (Art. 25, number 11). The Chamber has also powers to review final rulings through which diffuse control of the constitutional character of laws has been exercised (Art. 25, number 12).

It is in these rules relative to powers of the Constitutional Chamber of the Supreme Tribunal of Justice where jurisdictional precedent is expressly mentioned.

Outside the judicial sphere, precedent is also mentioned in the Organic Law of Administrative Procedures, published in the Official Gazette, Extraordinary Issue, No. 2,818 of July 1, 1981, but only in relation to an *administrative res judicata* (a matter already judged). In this regard, number 2, Article 19 of the aforementioned Law provides for that administrative acts will be absolutely void "*when they resolve a case that has previously awarded a final ruling and that has created particular rights, unless expressly authorized by law*."

A further rule linked to **precedent** is contained in Article 13 of the same Law referred to above: "*under no circumstances whatsoever an administrative act may violate a decision made in another act of higher hierarchy; or those of particular nature may violate an administrative provision of general character, even though they were issued by an authority equal to or higher than the one that issued said general provision*."

Non-retroactivity of the **previous criteria** is established by a rule of the Organic Law of Administrative Procedures as follows: "Article 11. *Criteria set by the different entities of the public administration may be modified, but the new interpretation may not be applied to previous situations, unless said interpretation is more favorable than the previous one. In any case, changing the said criteria shall not give rise to a right to review final acts*."

2. **What is the status of the Judge-made law in your legal system? Is there any theory that describes judicial rulings in an analogous manner as declaratory theories? What is the nature of the joint effect of law and precedent as sources of Law?**

[3]Organic Law of the Supreme Tribunal of Justice, Art. 25, number 1.

Before answering these questions, it should be pointed out that the concept of Declaratory Theory is presented in the literature as the thesis by virtue of which judges' rulings **do not create rights, but are intended to grant evidence of what Law is**; this is, to effect a judicial declaration.

The Declaratory Theory establishes that the judge does not create or change Law, but states, utters what Law has always been. Moreover, the judge may review past cases without changing the characterization of Law.

In the XXth century, the Declaratory Theory of State recognition, applicable to International Law, and according to which for a State to exist, other States have to recognize it, prevailed, vis-à-vis the Constitutive Theory of State (XIXth century). We have referred to these latter concepts because they can help to determine the scope of the Declaratory Theory in the judicial sphere.

However, in the specific case of the constitutional judge, whose decisions may be binding, said decisions do not necessarily consist of mere declarations. While original theses concerning constitutional jurisdiction only recognized the *negative judge*, this is, judges with nullifying powers, in the evolution of the system, these judges have been granted greater decision powers, because they are increasingly seen as the owners of the situations submitted to them, i.e. the most suitable individuals to solve them upon interpretation of the Constitution.

Meanwhile, in relation to the formulation of the second question, we observe that it is, in fact, composed of three different questions:

(a) The judge has the power to create, modify or extinguish the legal rule, since, as previously stated, originally, judges had been only granted the function of "*negative lawmaker*," in the sense that the judge has powers to extinguish the legal rules. However, with the recent development of constitutional jurisdiction, the constitutional judge has been granted the possibility to bridge the gap of a rule that has to be eliminated, thus finding a situation consistent with the principles the judge has to safeguard.

(b) Is the thesis of the merely declarative character of the ruling also employed in constitutional jurisdiction?

The answer derives from the question itself, because if judges may modify legal situations, condition their decisions and carry out the so-called **modulations**, which are accepted in almost all systems having constitutional justice and consist of providing judges' decisions with different contents and, at the same time, changing their effectiveness by modifying or broadening them, it is evident that their function is not limited to confirming a situation, but they are able to create, transform or extinguish legal situations.

Last of all, in constitutional jurisdiction, it is not possible to talk about a merely declarative effect of the sentence.

(c) The third question is that of determining how law and precedents coexist in a juridical system.

We have said that our system is legalist in the sense that the highest source of law resides in the formal law, obviously after the Constitution. This principle permanently appears in the constitutional text, in such a way that it would appear

to be an inarguable axiom. When Article 335 of the Constitution refers to its defense, it considers that the main guardian of sovereignty is the Constitutional Chamber, which, as an instrument to perform its task, is granted the power to hand down rulings on the interpretation of the Constitution, which are binding, that is, they are mandatory for all other courts of the Republic, including the other Chambers of the Supreme Tribunal of Justice.

If rulings of the Constitutional Chamber are binding for the judge, what happens if the judge finds a rule that contradicts the interpretation given by the Chamber? Which one should the judge follow? The ruling or the pure and simple rule? Several answers are possible to elucidate the preeminence of the binding ruling of the Constitutional Chamber over the rule contradicting it, because, above all, you have to precisely determine what the rule is. If it is a legal rule, it would appear that the ruling will prevail, since in this situation, it represents the constitutional text, as interpreted by the body with competence to do it. However, the situation is other if the conflict exists between said interpretation and the text of the Constitution, which has been drafted unambiguously and in a clear and accurate manner. In this case, the ruling misinterpreting this text should be disregarded with the justification of the corresponding judge, because applying it would constitute a violation of the Constitution. That is, if the rule is constitutional and it clearly expressed an opinion that was distorted or disregarded by the ruling, the judge has the power to disregard the ruling and apply the constitutional rule.

In fact, when the judge decides a case by means of an interpretation of a constitutional rule, the binding element in this case is the meaning given to the constitutional rule, which should be applied as a precedent for the case on which the judge must rule.

The judge's interpretation can never prevail over the specific rule contained in the text of the Constitution, because interpretation is nothing but a jurisdictional act that, because it is interpreting the sense of the Constitution, and it is going to have a high hierarchy among ancillary sources; however, the plain text of the constitutional rule cannot cease to be applied as a result of said interpretation if the same is openly contrary to its meaning. Therefore, we believe that a legalist system, like ours, where the Constitution is at the top of the legal hierarchy, cannot be ignored by a jurisdictional act, even though the same is trying to be the one determining the meaning of the constitutional rule, because jurisprudence on hierarchy of sources is logically found at a lower level than the express text of the constitutional rule, even though it deals with its interpretation.

Therefore, we believe that in the debate on the validity of the meaning and the scope of the constitutional rule, between the solution given by the Constitutional Chamber to the case and what can be inferred from the plain meaning of the words contained in the text of the article, this latter should prevail.

3. **In your legal system, what are the problems related to jurisprudence that derive from the case law and the rules of precedent, in particular those emerging from courts acting as lawmakers, in which both categories (case law and precedents) have not been confronted?**

Let us remember that the concept of **case law** is understood as the rules that have been created based on the interpretation by courts regarding specific cases. Accordingly, case law is not created by the lawmaker, but by the court based on a concrete case or the interpretation of the laws that the court has applied.

The question has been made in relation to the eventual conflict between case laws and the rules of precedent and, in this last instance, in those cases in which courts have assumed the role of lawmakers. In this regard, we have to insist in an idea that is repeatedly referred to in this paper, i.e. that Venezuela is not a system embracing the case law, but, on the contrary, Venezuela's is, in principle, a legalist system in which judges are obliged to apply the written law, naturally subjecting themselves to the hierarchical order of sources. According to this hierarchical order, the Constitution is the supreme rule, which illustrates the entire system and has an essentially regulatory content. The other rules appear by means of "*implementing acts*" that are understood as the process by virtue of which a general rule is particularized and an abstract rule becomes *concrete*, i.e., it comes to life through a specific assumption.

The immediate subsequent step in the order of sources after the Constitution is the rule with force and effect of a law; that is, it is immediately enforceable after the constitutional text which, in turn, may be object of implementing acts. In fact, the result of the implementing act that gives rise to the legal rule, when it is implemented, results in sub-legal acts that will also acquire their own hierarchy.

Specifically in relation to the question made, the case law doctrine is not applicable in the Venezuelan legal system, because judges should consider **the law** they are supposed to enforce; only if there is a precedent, i.e. a ruling on a case that is identical because it deals with similar assumptions as those pondered in the case object of the decision, the judge **may** apply it to settle the specific lawsuit. To this effect, a distinction has to be made between non-binding and binding precedent. In this regard, applying a non-binding precedent is optional for the judge, whereas in the case of a binding precedent, like the one that **contains the interpretation of a constitutional rule by the Constitutional Chamber, its application is mandatory**, to such an extent that failing to apply a binding precedent may constitute grounds for the removal of the judge. However, as stated in relation to the previous question, the judge may consider that the constitutional interpretation by the Chamber departs from the true meaning of the rule when the said rule is simple and easily understandable. For instance, the constitutional rule says that a certain action cannot be undertaken without any exception whatsoever if the ruling enunciates determined exceptional assumptions as existent. The judge should abide by the provisions of the constitutional rule and disregard the interpretation of said rule as it departs from the constitutional terms and norms.

In consequence, there is not any conflict between case law and precedent in Venezuelan law, but it does exist between precedent and implementation of the express rule. With regard to precedent, the same, according to Article 335 of the Constitution, shall be preferably and exclusively applied if it is originated by the Constitutional Chamber and deals with the interpretation of a constitutional rule, in which case, it will prevail over any other source, provided it respects the assumptions of the said rule, as we will explain in the subsequent answers.

4. **Have judicial rulings with retroactive effect been criticized in your jurisdiction? Since when? By whom? Like in France, has this situation led to the creation of working groups intended to discuss the setting of limits to the retroactive effect of judicial rulings?**

In this regard, we should point out that in the Venezuelan system the principles of the General Theory of Law are applied. According to these principles, the ruling declaring some acts void, alleging that they are vitiated by absolute nullity, has retroactive effect, because it declares that the act was vitiated from its origin and that, accordingly, it cannot be effective altogether; in this case, it is referred to as *ex tunc* effectiveness, which, as such, has a retroactive effect.

Among us, the distinction between the forms of termination of acts is clear. These differences are based on the effect that said acts of termination produce. The most important **modalities of termination** of legal acts include **nullity**, **repeal**, **derogation** (when it is general), **abatement of the act**, **exhaustion of the act** and **abatement** and **modification of its content** or of any of its characteristic elements. We are going to briefly refer to the effectiveness of each one of these figures, once their existence has been declared.

Nullity of an act occurs because said act is so severely vitiated that it can result in absolute nullity or voidability. The main difference between absolute nullity and voidability is that the first cannot be validated, is not susceptible to be corrected; that is, the individual controlling the act (judge or general official empowered to do this) cannot modify the act to correct the defects affecting it, because absolute nullity is an irregularity with such a nature that the act extinguishes by itself and there is not any means to provide it with new life. Meanwhile, relative nullity or voidability is characterized because both the author of the act or any individual empowered by law to do it can modify it to add or remove some elements. Therefore, if a non-essential stage of the proceedings is missing, it can be exhausted; or if essential documents have to be added to demonstrate the facts, this situation does not appear in the file. Likewise, any missing requirement, the existence of which has been evidenced in the file, is a true judgment element. All acts mentioned above constitute validation or correction acts and, of course, the corrected act has normal effects. Unlike, the act vitiated of absolute nullity, which is declared as such, totally extinguishes. In this case, the Latin aphorism "what is void cannot produce any effect" is applied.

It is therefore unquestionable that the declaration of absolute nullity of an act has a retroactive effect; and it could not be otherwise, because what is stated is that if the act is considered irremediably vitiated, nothing can correct it and it is as if it would have never existed. In consequence, the declaration is retroactive because it confirms that the act was irregular in the past and declares its ineffectiveness from the time when it appears in the judicial world.

The second termination figure is "*repeal*". This term has many meanings and some of them point out that it is determined based on whether the termination of the act is produced by the same entity dictating it. Another thesis states that repeal is a termination through the administrative way, unlike nullity that essentially takes place by the judicial way. This thesis is not correct, since the Organic Law

of Administrative Procedures provides for the figure of nullification which the Administration may declare of its own vitiated acts. That is, that it is not necessary that an entity alien to the administrative sphere, like a judge, operates for the act to be terminated by means of nullity. Therefore, how is it terminated? Repeal does not refer to nullity or formal defects of acts, but to inconvenience or inopportuneness of the act in terms of the law. The act does not satisfy the interests of the administration or does not satisfy them fully, even though it is a perfectly valid act, constituted in accordance with the more demanding standards of the administrative procedure.

The problem is other when it is related to the possibility that the judge may repeal the act due to its timing or convenience. We have to be very clear in this regard. Let us remember that the "merit" of the act, that is, deciding if it is useful or effective, corresponds to the Administration, something in which judges cannot interfere, because they do not have the power to decide whether it is convenient or opportune for the Administration to dictate or omit a measure. This can only be qualified by the entity empowered to dictate it. However, what the judge can determine is whether there is motivation for the act and whether it is consistent with the situation presented; that is, the only thing a judge can do is verifying whether there is or not a motive and if said motive, regardless of its decisive content, is clear enough and is not contradictory (that is, formal elements that do not constitute an opinion of law).

The Italian doctrine has imposed the notion of the "*lack of merit*" of the act, that is, the fact that the same does not refer to the purposes and satisfaction of interests for which it has been dictated. The lack of merit occurs as the inopportuneness of the act itself, i.e. the act does not obey to the interests being safeguarded or pursued at that time, or is inconvenient or became inconvenient to satisfy the purposes pursued by the administration. The effects of the inopportune act that is to be repealed i.e. the effects of the repeal are *ex nunc*, that is, operative in the future.

Another form of termination of acts is *abatement*, which is the circumstance under which the act loses one of the elements justifying its existence. This happens, for instance, in the case of an act intended to authorize a patent to deal with a determined illness, and later an experimental and innovative drug which cures said illness is developed. In this case, the effects of the act have been abated, i.e. the act has lost its intended purpose and no longer has to pursue it.

A further form of termination is *caducity*, which consist of termination of the act due to the lack of compliance by the recipient with the burdens the said act imposes. It is known that some administrative acts submit their recipients to the compliance with a series of duties. When these burdens or obligations of the recipient are not complied with and this lack of compliance is verified by the Administration; the act terminates due to caducity. An example of this is the lack of payment of a fee or good, the failure to take a step such as delivering a notice. We just have to point out that in the case of abatement and caducity, the effects always occur upon verification of the fact producing them and toward the future; that is, there are no retroactive effects.

Another form of termination of the administrative act is the one resulting from the **modification of its contents** or **any of its characteristic elements**. If the author

of the act considers that any of the assumptions comprising its typology has to be changed, it is worth asking if in this case, a new act has emerged or it is the same act that has changed in appearance. The doctrine has not unanimously decided what has to be **the answer**, but that the same is **casuistic** depending on the opportunity.

The description of the different modalities of termination of the act leads us to the conclusion that all of them only have effect toward the future, except for nullity, the effect of which is retroactive.

Furthermore, it is possible that the lawmakers grant a specific type of act an only immediate effectiveness, even though it is nullifying. In this same vein, this power can be granted the ruling judge or the administration, even without an express legal provision existing, but leaving the granting of the power of providing or not the act emerging from a determined proceeding with a retroactive effect, once the consequences derived from the effectiveness, either postponed or not, have been valued, to the opinion of the deciding entity or individual.

However, there is a ruling by the Constitutional Chamber, which surprisingly orders to retroactively apply a provision of the Criminal Code in relation to a crime of the disappearance of a person, on the grounds that the crime had a **continuous effect**, and, therefore, even though the crime was committed before the facts had been typified as crimes, said facts will continue to operate under the new law.

Analysis of Ruling No. 174706-1656, Presented by Judge Carmen Zuleta de Merchán

The Constitutional Chamber heard the request to review ruling No. 318 handed down on July 11, 2006 by the Criminal Cassation Court, deciding on the change of venue requested by Casimiro José Yánez in relation to the action against him for the crime of forced disappearance of people in prejudice to Marcos Antonio Monasterios Pérez.

On the Ruling to Be Reviewed

The ruling to be reviewed was issued by the Criminal Cassation Chamber on July 11, 2006 by judgment No. 318. which considers that the perpetration of the actions on file leads to presume the commission of crimes typified in Articles 177 and 182 of the Criminal Code (individual freedom), aggravated by the concurrence of the circumstance established in Article 77, numbers 1, 10 and 11, i.e. that the crime was committed with premeditation, taking advantage of the disaster that had occurred due to the heavy rains in the State of Vargas and in conjunction with other individuals to assure impunity. Therefore, the Chamber annulled the previous *habeas corpus* proceedings and demanded the public prosecutor to continue with

the investigation and the Direction of Intelligence and Prevention Services of the Ministry of the Interior and Justice to open a disciplinary investigation against Casimiro José Yánez.

On the date when the crime was allegedly committed, forced disappearance of people was not typified as a crime in the corresponding Criminal Code. However, the Chamber considered that it was a continuous crime, i.e. a crime against freedom, of an instantaneous nature but with a permanent effect. The fact is that with this decision, the constitutional principle of non-retroactivity of sentences and penalties (Art. 24) was disregarded.

5. **Has the technique known as prospective overruling been used by courts in your country? By what courts? On what criteria? On what basis? Has it been applied in an implicit or an explicit manner? Could you define prospective overruling in a general manner from the point of view of your jurisdiction and tell what situations are dealt with by the said technique?**

We should point out that the expression "prospective overruling" is unknown in the Venezuelan Law, unlike to other Latin American countries, like Peru or Colombia where, as we have seen in the specialized literature, the concept is frequently and broadly used. In Venezuela, this concept has not been upheld in any ruling; we could even say that no even in any comentary.

However, the above does not mean that the very meaning of the prospective overruling has not been applied in our Law.

In its broadest sense, prospective overruling refers to the sentence or judicial act intended to be applied in the future, i.e. it will regulate situations that have occurred subsequently its issuance. In this sense, it should be pointed out that this does not mean applying the classic difference as to the temporary effects of sentences, which distinguishes between retroactive effect (toward the past) and the immediate effect, i.e. upon and subsequently to the ruling. This difference is expressed with the Latin phrases: *ex tunc and ex nunc*, the first of which refers to the effect toward the past and the other to the fact that the act is only applied upon issuance of the ruling and thereafter.

Note that these categories refer to effects that are applied to **situations that exist at the time when the ruling is handed down and the difference** between them lies in the fact that the ***ex tunc* effect operates back in time with respect to the origin of the act or at a later time as stated by the sentencing judge, but always in the past**; whereas the *ex nunc* effect refers to the immediate effect. The condition of prospective effect in the ruling is going to regulate situations that have not been born at the time of its rendering.

The **prospective** effect is something more than the *ex nunc* effect, because it refers to the application of the precept contained in the ruling not only to situations that could be foreseen in the future, but also to others that have a similar assumption as that which was object of the ruling.

The prospective effect is underpinned by the force of the precedent, because it is intended to apply a judicial solution established in the ruling to analogous situations that may arise in the future.

The technique of prospective overruling is essentially intended to follow the **principle of procedural economy**, together with the **necessity of equitable treatment** of identical situations, so that to avoid juridical **discrimination**, which is contrary to the safeguard of human rights. In fact, the prospective overruling is that which has to be applied to one or more future situations; therefore its value is similar to that of the precedent because it is a precedent itself, that is, a decision the content of which is to have an effect on future situations that are equal to those that gave rise to it and have the same content.

To understand prospective overruling, it is necessary to analyze, albeit briefly, the different types of rulings based on their effectiveness, which operate in Procedural Law, more specifically, in Constitutional Procedural Law, which is where this concept has been most applied.

Classical or Traditional Modulation

According to the most widespread and known criterion, constitutional rulings are classified into **affirmative**, which uphold the decision, and **disallowing**, which dismiss the ruling.

Martínez Caballero remembers that, in Colombia, constitutional rulings cannot be challenged or rectified in the internal legal system and the only possibility of overcoming incorrect interpretation is the procedure of nullification of the constitutional ruling which, in spite of being established, has almost never been successfully exercised. It is pointed out that the force of these rulings may lie in the ironical phrase of Judge Jackson: "*We are not final because we are infallible, but we are infallible only because we are final.*"[4]

Modulation Impacting the Content

According to the content, rulings are classified into "*manipulative*" because they derive from the possibility of the constitutional court to "*manipulate the law*." The type of rulings that can result from manipulations or modulations of their contents include:

- Interpretative or conditional
- Additive
- Substitutive,
- Exhortative; and,
- With temporary effects.

An analysis of the types of rulings above follows.

[4] Judge Jackson of the US Supreme Court.

Interpretative or Conditional Rulings

Interpretative rulings are those in which the court restricts the scope of the challenged provision, either by limiting its application or its effects. These rulings are said to be manipulative because the text of the rule survives, but with an interpretation criterion that was not probably the one intended by the lawmaker.

Interpretative rulings may represent a rejection of any of the assumptions of the rule, which have been expelled from the legal framework, even though the regulatory statement from which they emerge remains unaltered. Opposite there are those rulings establishing interpretation according to the constitution of the regulatory statement. It would appear that in the Colombian Constitutional Court the practice of issuing this type of rulings has become rooted; this custom was inherited from the Supreme Court of Justice in those cases in which said Court controlled the constitutional character of laws; that is, before said function was assigned to it. In summary, interpretative or conditional rulings try to preserve the rule, only eliminating interpretations and applications that can be contrary to the legal order.

Additive Rulings

These rulings declare constitutional illegitimacy of the lawmaker's omission. *In this ruling, the Court does not annul the provision, but adds content to it to render it constitutional*. It adds a new element to the regulatory statement, expanding the rule for it to contain a factual assumption that it did not initially considered. It is unquestionable that in these cases, the constitutional court is stating a legislative omission, because its regulation is insufficient, since it has not provided for determined aspects that were required for the rule to adjust to the Constitution.

In our case, this situation is similar to the decision with respect to the provision in number 7, Article 336 of the Organic Law of the Supreme Tribunal of Justice, which empowers the Constitutional Chamber to hear the *unconstitutionality by omission*, when it states that the aim of the Article is "to dictate **rules or measures**" referred to in enforcement actions. In fact, Article 336, number 7 of the Constitution states as one of the powers of the Constitutional Chamber "*to declare the unconstitutionality of omissions by the municipal, state, national or legislative bodies, in failing to promulgate rules or measures essential to guarantee compliance with the Constitution, or promulgate them in an incomplete manner; and to establish the time limit and, where necessary, guidelines for correcting the deficiencies*." Meanwhile, Article 24, number 7 of the Organic Law of the Supreme Tribunal of Justice reads as follows: "*To declare the unconstitutionality of omissions by the municipal, state, national or legislative bodies, in failing to promulgate rules or measures essential to guarantee compliance with the Constitution, or promulgate them in an incomplete manner; and to establish the time limit and, where necessary, guidelines for correcting the deficiencies*."

This rule has been taken from number 7, Article 336 of the Constitution, but with a significant addition; upon stating the power to establish the time limit for rules to be issued, as well as overall essential guidelines, the following phrase was added: "*Without this implying usurpation of functions of other entities of the Public Power or overstepping attributions of the competent Chambers*." We believe that this addition responds to the experience acquired by the Chamber throughout the long process of controlling the National Assembly's appointment of the members of the National Election Board, which eventually were appointed by the Chamber.

Substitutive Rulings

These rulings were developed in Italy to refer to those cases in which the Court expels from the legal system a challenged provision and fills the regulatory gap with a specific rule that is rooted in the Constitution. In some sense, said rulings are a combination of unconstitutionality and additive rulings, because through their decision, they annul the challenged provision, thus giving rise to a vacuum that is filled by a new mandate stated by the ruling itself.

Undoubtedly, these rulings, given that they fill regulatory gaps, would appear to be fulfilling a legislative function, since, under the Constitution, they have to correct a failure, because the constitutionality control should always be subject to the supreme values of the Constitution.

Exhortative Rulings

This type of ruling urges lawmakers to change preexistent situations within a time limit expressly determined by the Court, with the additional consequence that if this does not happen, the court will directly apply the constitutional mandate in the future, thus being able to determine the nullity of the respective legal rule. These rulings include from a mere advice to lawmakers to coactive formulas that urge them to regulate a matter dealt with in the Constitution.

These rulings undoubtedly limit the freedom to shape the legal order developed by the lawmaker, because they warn about situations that should be addressed by the lawmaker to avoid unconstitutional results.

Rulings with Temporary Effects

In accordance with their nature, rulings classified based on their temporary nature may include the following modalities: (a) Retroactive or **ex tunc** unconstitutionality ruling; (b) **Ex nunc** rulings or rulings with prospective effects; and (c) deferred unconstitutionality or temporary constitutionality rulings.

(a) Retroactive Unconstitutionality or Ex tunc Ruling

According to this ruling, the Court may modulate temporary effects and in exceptional cases, apply them to situations consolidated while the rule that was declared as unconstitutional remained in effect. It has to be pointed out that in spite of the sensible nature of the criterion on which this assumption was typified, the same is very risky, because these rulings may impair legal security considering that they influence situations and/or rights already acquired and effects already produced.

(b) Rulings with Prospective Effects or Ex nunc Rulings

These rulings imply that the challenged provision is removed from the legal apparatus once the ruling has been notified; however, this does not change situations consolidated while the challenged provision was in force. A constitutional court may even go further and determine a transition period to avoid inconveniences for the economic and political stability of societies. It is recommended to set a sensible effectiveness term. This kind of ruling was literally invented by German constitutional jurisprudence for reasons of practical necessity. Opinions regarding the doctrine are divided and it has been criticized alleging whether it is possible from the legal viewpoint to require the citizen affected by an unconstitutional rule to support the effects of said rule, in spite of its irregular condition, which has been already known and declared.

In fact, the previous analysis leads us to the so-called deferred unconstitutionality or temporary constitutionality rulings, which are those that, while declaring unconstitutionality of a challenged legal provision, do not withdraw or annul it immediately, but delay the nullifying effect of the ruling for a determined time period, within which lawmakers may proceed to modify the challenged provision to render it compatible with the text of the Constitution, or replace it with other compatible legal provision. The court may also determine **temporary or interim constitutionality of the rule** until the legislative body modifies or replaces it with another rule that is compatible. This type of ruling is aimed at avoiding the damage that may arise from declaring unconstitutionality and nullity of the law, since this could lead to a regulatory gap and could also impact law expectations that are derived from the enforcement of the challenged provision.

Hans Kelsen[5] stated that the main characteristic of concentrated jurisdictional control is the issuance of general or *erga omnes* rulings with prospective effect. In this regard, Kelsen wrote that "*it would be convenient for the Constitutional Court to be able to rule that the nullification, especially of laws and international treaties, will not have any effect until the expiration of certainperiods upon its release,*

[5]"La garantía jurisdiccional de la Constitución". Editorial Kipus, 2006, page 69.

regardless of whether it is to provide the Parliament with the opportunity to replace the unconstitutional law with a law that abides by the Constitution, without the matter governed by the annulled law being out of regulation for a relatively long time."

Two different formulas can be used in deferred rulings: (a) certain constitutional courts declare unconstitutionality of the challenged legal provision, but also decide to expressly defer the effect of the ruling for a determined term, at the same time urging the lawmaker to replace the legal provision or to correct the unconstitutionality defects within the said term; (b) other constitutional courts declare temporary constitutionality of the challenged legal provision, setting an effectiveness term and urging the lawmaker to replace the provision or correct the defects.

Modulating the effects of rulings has been defended, pointing out that far from being a contrived technique of constitutional courts, or an interference of the constitutional judge in the lawmaker's competences, it has emerged from the very needs of the practice and, as such, it deserves to be applied considering the practical advantages it offers.

6. **By what courts? On what basis? To what extent? Could you define the term prospective overruling in a more general manner from the point of view of your jurisdiction and tell what situations are dealt with by said technique?**

The repealed Organic Law of the Supreme Court of Justice, in its Article 131, granted the judge the power to decide "*the effects of the ruling over time*." This power was referred both to rulings aimed at overall actions and those intended for particular actions; this implies, for instance, that nullity of an act that creates an individual legal situation may influence from the very moment of its inception, from the moment of its declaration and even at any other time the court may consider convenient. The possibility of determining the effects of a ruling in time, above all in relation to particular acts, revealed a significant degree of discretion by the administrative litigation judge at the closing of the cognition phase of the crux of the appeal, and the said judge acquired the power of safeguarding the administrative order. It is no longer a matter of a controversy that has been settled, but of the administrator of the solution resulting from the content of the ruling and, therefore, the same will have to determine whether his decision will change or not the sphere of interests within which said decision will operate.

Unlike the case of individual acts, in rulings establishing total or partial nullity of a regulatory act, the necessity for the judge's decision to set the effects over time is evident. The above derives from the fact that the authority deciding on the permanence or termination of a regulatory act is exercising a legislative function, because by means of the ruling, said authority can modify the legal order. In this regard, the question is in which sense the jurisdictional body can perform in the time-related sphere.

To this effect, the ruling can be brought back to the past, to the time when the judge detected the defect giving rise to nullification, because a vitiated rule cannot produce any effect. However, what would happen if we go back a little further, i.e. before the time at which preparatory actions were initiated? The answer could seem

to be negative in the sense that the only that would be voided would be the act and its effects, but not the preparatory phase, since its mention in the file plays a mere instrumental role (of the same nature of the existent evidence).

Now, going forward, the solution would not appear simple, but deserving of an in-depth analysis on a case-per-case basis. In fact, a positive answer would allow a vitiated and nullified act to survive for the time that the individual or body with the authority to declare its existence may decide, which would be equivalent to try to keep a dying person on life support. Even though logics inclines to deny the last possibility assumed, the ratio determining the judge's power to change the timing of his ruling tends to give a favorable answer, because the intention of that modifying power is, above all, allowing the judge to chose the timing and convenience of his decision in defense of the interests said judge is to safeguard.

It is worth asking if the above is valid both in the case of absolute or relative nullity. In our opinion, to give an appropriate answer, it has to be remembered that differences between both types of nullity somehow lie in the possibility of the second type to be validated, which is lacking in the first type. A further difference consists of the specific character of grounds for absolute nullity, as established in our system in Article 19 of the Organic Law on Administrative Procedures, which is in contrast with the residual nature that the aforementioned Law attributed to the grounds giving rise to relative nullity. The remaining comparison elements are referred to the powers of the administration in terms of the vitiated act, to such an extent that in the case of absolute nullity, Article 82 *ejusdem* stipulates that the Administration may declare termination of an act at any time. That is, the exercise of the power of termination is not limited by time or by the nature of the legal situation of the administrated ones, because its only obstacle in this regard is the existence of subjective rights that cannot emerge from an act vitiated by irremediable flaws. Last of all, suspension of the effects of an act may be requested through the administrative way and said suspension will be granted if the reason for the challenge is a defect of absolute nullity; a similar provision does not exist regarding relative nullity.

Having stated differences between absolute and relative nullity, it can be inferred that they are not relevant in terms of the timing to lodge the request for nullification by judicial process, because the time limit to exercise it is the same, regardless of the alleged defect. The law does not establish either the differences in relation to legitimacy of the appellant in a case or another; therefore, the main requirements for admissibility (caducity and suitability of the act to be challenged) are unified, regardless of the defect being claimed.

Finally, the law disregards the differences concerning the effectiveness of the declaration depending on whether it has an *ex tunc* or *ex nunc* effect.

This being said, the answer we gave with respect to the effects of the ruling, regardless of the defect of the annulled act, is inferred from the differences between both of them, because if they are not referred to effectiveness, the nullifying power of the judge can hardly be limited to the existence of a special type of defects.

The administration continuously and permanently issues individual acts on matters of its competence. The exercise of the administrative function essentially implies providing the administered party with the essential services the Adminis-

tration is responsible for. But parallel to this, the Administration's function is also expressed in its power to issue individual acts that, as such, refer to the particular situation of determined individuals or groups or individuals. The individual acts of the Administration are not isolated and exclusive to a unique situation, but they are constantly repeated in an almost analogous sense with regard to different recipients. For instance, permits concerning city planning are not an extraordinary and unique act, but they are everyday procedures related to construction works in general. In the same vein, the different activities concerning citizens' identification (such as issuance for the first time of identity cards, renewal of those already issued; changes in personal data including changes in marital status; correction of birth certificates; issuance of passports, granting of licenses to perform determined controlled activities (sales of alcoholic beverages, for instance) are always routine acts to such as extent that many of them are issued "in series". In contrast with the automation of the procedures mentioned above required by their identical nature, challenges of those acts are personal, barring exceptional circumstances. The necessity to appeal on a case-per-case basis the acts that basically have similar content is a waste of efforts, because the applicant will certainly obtain a response to the particular situation in question identical to those that have been given to many other previous applicants.

From the procedural point of view, where the principle of procedural economy is applied, initiating as many procedures as appealed identical acts exist would appear to be useless when, on the contrary, the effects of an original ruling could be extended to all similar situations, even though parties affected by said situations had belatedly sought the procedural way.

Cases Decided in Venezuela Having a Prospective Effect

Ruling Issued by the Political-Administrative Chamber, Dated July 15, 1999

The first case to be analyzed is that of AIDS patients against the Ministry of Health and Social Assistance of Venezuela. The ruling of the Political-Administrative Chamber of July 15, 1999 decided on a constitutional relief proceeding against said Ministry filed by several individuals, with the applicants being individuals bearers of the human immunodeficiency virus (HIV) of Acquired Immunodeficiency Syndrome (AIDS). The applicants claimed the following:

> 1) To order the Ministry of Health and Social Assistance, through their respective agencies, 'to regularly and periodically deliver medical drugs known as Transcriptase Inhibitors and Protease Inhibitors such as AZT or Zidovudine, DDI or Didanosine, DDC or Zalcitabine, D4T or Stavudine, 3TC or Lamivudine, Crixivan or Indinavir, Saquinavir or Invirase, and Norvir or Ritonavir, according to the combined prescriptions of specialist physicians at the Immunology and Infectious Disease Departments of hospitals and health care centers attached to the Ministry . . .

2) To order the Ministry of Health and Social Assistance to carry out or assume the payment of specialized tests such as "viral load, lymphocyte count, platelet count and all tests to detect opportunistic diseases and those required to have access to combined treatment of Transcriptase and Protease Inhibitors."

3) To order the Ministry of Health and Social Assistance to develop "an information, treatment and comprehensive health care policy in favor of the people we represent, as well as other people living with HIV/AIDS and who are going through a similar situation to that of the people we represent."

4) To order the Ministry of Health and Social Assistance to supply all medical drugs required for the treatment of opportunistic diseases, including antibiotics, antifungals, antidiarrheal drugs, chemotherapy, cryotherapy and all other drugs required due to their condition as HIV/AIDS patients.

5) Aiming at an equitable treatment and in the pursue of procedural economy and swiftness for a proper functioning of Courts, "to extend the recognized benefits to all citizens living with HIV/AIDS in Venezuela, who require therapy prescribed by specialist physicians, without it being necessary for them to permanently resort to the constitutional relief solution.

The petitioners of the constitutional relief quoted the ruling issued with regard to a similar matter by the same Political-Administrative Chamber on **January 20, 1998**, in the case of a group of troops of the National Armed Forces (FF.AA.), who were protected by the ruling that ordered the Ministry of Defense to deliver the proper antiviral drugs. Likewise, they referred to the ruling of the Political-Administrative Chamber of **August 14, 1998** in relation to the request by HIV positive patients to obtain antiretroviral therapy and comprehensive health care services; request which was granted.

The Chamber, upon granting the relief, pointed out that the problem of the high cost of treatment for AIDS patients, which was estimated throughout the entire patient's life at about USD 120,000, equivalent at the time of the ruling to about Bs.72 million, impacted the budget issue. Therefore, to safeguard the right to health on the one part and the effective legal protection, on the other, the Chamber presented two possibilities that would settle the claims of the HIV/AIDS patients: the amending budget procedure provided for in Article 32 of the Organic Law of the Budgetary Regime and the request for supplementary appropriations, depending on approval by the Congress or the Delegate Committee of the Congress. At the same time the Political-Administrative Chamber ratified the criteria it had set in its ruling of August 14, 1998, in the sense that a national prevention program should be established, stating, at the same time, the guidelines for said program.

The significance of the ruling is that its decision is extended to subjects that tare in the same situation as the original actors. To this effect, the ruling established as follows:

Upon declaring the existence of a violation of the rights to health, this Chamber shall decide on the request of the petitioners, in the sense that aiming at an equitable treatment and in the pursue of the procedural economy and swiftness for a proper functioning of Courts, "the benefits recognized are extended to all citizens living with HIV/AIDS in Venezuela, who require therapy prescribed by specialist physicians, without it being necessary for them to permanently resort to the constitutional relief solution.

Ruling Issued by the Supreme Court of Justice in Full Court on July 1,4, 1999

Another case in which the subjective effectiveness of the ruling was extended is the petition for unconstitutionality against the Regulations of the Free Port in the State of Nueva Esparta, which were issued through Decree No. 3,144 of December 30, 1998 (published in the Official Gazette Extraordinary Issue No. 5,293 of January 26, 1999). To this effect, the Court granted an unnamed precautionary measure which was extended to cover parties adhering to the plea.

Said extension was justified as follows:

> In this regard, it is worth highlighting that the new trends in Comparative Law have recognized the possibility of extending the effects of a final ruling to all those individuals that are in analogous situations to those originally favored.
>
> It has to be pointed out as a basis for the measure in question that the administrative litigation procedure operates on the Administration's functions; it is well known, however, that when said functions are materialized in individual acts, they shall be repeated in time, given their existence in multiple situations, because they almost always operate on current and necessary circumstances. The individual acts of the Administration are not, therefore, isolated acts exclusive to a unique situation, but they will be repeated permanently in analogous cases related to different recipients. For this reason, the Administration must dictate the so-called "serial acts," which, in turn, are subject to isolated challenges, given the individuality distinguishing them. The necessity to challenge on a case-per case basis the acts that have analogous contents substantially hinders the ability to exert actions. At the same time, it requires a necessary identity in rulings dealing with said challenges. As a consequence of this evident fact typical of the administrative dynamics, a rule like the Spanish one emerges.
>
> This Court observes that the telos of these juridical criteria seen from the procedural point of view is to avoid the inconvenience of forcing an individual to undertake an entire contradictory proceeding that will eventually prove said individual right in the final ruling, basing the decision on the same reasons that have repeatedly underpinned identical or similar cases already decided and declared final. Therefore, the court finds that the request is evidently appropriate. However, regarding precautionary issues, neither Venezuelan law nor comparative law reveal the possibility of extending to those intervening parties that have been admitted as such, the effects of an interlocutory judgment that accords to the original petitioners a preventative measure subsequently to the granting thereof; therefore said intervening parties are in the same condition as the original petitioners and they would be not only damaged in the event that elements contrary to their interest would derive from the file, but that they could also be benefited from acts already performed in the process in which they are intervening. This would be the case of benefits resulting from an incidental judgment that grants a precautionary measure like the one in file, provided they prove that they are in an identical situation as the petitioner who was granted the preventative measure. That is, the intervening party should prove that in this case, the requirements that should inescapably coexist for the precautionary measure to be legitimate have been verified; said requirements include fumus boni juris, periculum in mora, as well as the specific one set forth in paragraph one, Article 588 or the Civil Procedural Code.
>
> In this regard, this Court considers that the fact that fumus boni juris and the periculum in mora are verified with respect to the intervening party is not enough for the preventative measure to be granted, but that, as in the case in question, who is requesting the extension of the effects of an incidental ruling granting the precautionary measure, has to request it expressly, present elements demonstrating that the current situation is identical to that of the

original beneficiary of the precautionary measure and, finally, the extension of the measure should be agreed by means of express ruling by the court hearing the case.

Therefore, if as stated above, the intervening parties have the same interests as those of the original petitioners and considering that precautionary measures find their raison d'être in their own instrumental nature, in the sense that they are issued to prevent the petitioner from suffering damage that the final ruling cannot correct, this Court considers that it is appropriate to extend to the intervening parties the effects of the precautionary measure previously issued, with the proviso that, in the event that a reason may occur that justifies the repeal of the precautionary measure to the prejudice of the original petitioner, the same consequence would operate with respect to them; and it is hereby declared this way.

Ruling Issued by the Political-Administrative Chamber of the Supreme Court of Justice on July 7, 1999

A further case regarding the extension of the effects of a judgment in the administrative litigation sphere is the ruling issued on October 7, 1999 by the Political-Administrative Chamber in relation to an action for failure to act[6] introduced by two retired teachers of the Ministry of Education, who were asking the Ministry to order the entity for which they worked the regular readjustment of the amount of the pensions they were receiving, in accordance with Articles 199, 105 and 143 of the Organic Law of Education.

Other retired and pensioned teachers, amounting to about 3,000 teachers, attached to the same entity, adhered to the action claiming the same as the original petitioners.

A previous item of the ruling by the Political-Administrative Chamber established that issuing a declaration limited to the original petitioners was useless, because the recipients "*of an eventual compliance by the Administration with the decision would be all those individuals described in the rule providing for the requirement in Article 100 of the Organic Law of Education . . . teachers performing teaching or administrative functions*." In this regard, the Chamber considered that based on the nature of the procedural action exercised, which was intended to obtain from the judicial body an enforcement order under the same terms provided for by the rule establishing the obligation, said order, according to the Chamber's opinion, should comprise all those individuals addressed by the same, because this would guarantee its effects and, consequently, the attainment of the political-social or economic purposes it pursued. Before deciding on the issue, the Chamber expressly pointed out that the ruling to be handed down "*would entail an erga omnes effect, either for the Administration to comply with the legal provision with respect to all teachers pensioned by the Ministry of Education, or for it to refrain from complying, in absolute terms, in the event that the inexistence of that obligation is determined*."

In the operative part of its decision, once the action for failure to act was admitted, the Chamber proceeded to order the Ministry of Education to take the corresponding

[6]The topic of action for failure to act should be addressed.

budgetary measures as from the next fiscal year to increase the remuneration of retired and pensioned teachers by said Ministry, by the amount resulting from applying to the wage percentage allotted to said teachers when they were retired or pensioned, the increases in the base wage of the posts corresponding to teachers that are still active, or their equivalents in the event that their denomination has been changed. In other words, resuming the originally established criterion, the ruling is not exclusively limited to the original petitioners, but extends to all pensioned and retired workers that are in the same condition.

Ruling of July 26, 2000

Case file: 00-0856
Speaker: Héctor Peña Torrelles
Subject: Clarification of the ruling handed down by the former Supreme Court of Justice in Full Court on December 14, 1999, declaring partially founded the request for nullification on the grounds of unconstitutionality filed against the provision contained in Article 59 of the Organic Tax Code, nullifying the sole paragraph of the said Article 59.

To understand the problem, it has to be remembered that the Organic Law of the Supreme Tribunal of Justice, which was in force on the date of the ruling, in its Articles 119 and 131 provided for as follows: Article 119: "*In its final ruling, the Court shall declare whether nullification of the act or of the articles challenged is founded or not, upon examination of the reasons on which the claim is based, and* ***shall determine, in its case, the effects of the ruling over time*** *. . . "* Article 131, in turn, has a similar content and points out: "*In its final ruling, the Court shall declare whether nullification of the act challenged is founded or not and* ***shall determine the effects of its ruling over time*** *. . . "*

As seen, the lawmaker did not determine the *ex tunc* or *ex nunc* effect of nullification over time, leaving these effects over time of nullifying rulings in the hands of the judge. In the case in question, the ruling did not determine the effects of the nullifying decision, therefore, it should be necessary to abide by the jurisprudence of the former Supreme Court of Justice that stated that it produces *ex tunc* effects, i.e. with effect back in the past.

Furthermore, the Full Court of the Supreme Court stated in the clarification that the ruling provided the nullifying decision with an *ex tunc* effect by setting the terms of the enforcement, that is, the parameters and the time period based on which those affected by the nullified rule could exercise their rights.

At that time, the Political-Administrative Chamber stated that **determining the effects of rulings regarding nullification of general regulatory or other acts** has been related to the preservation of a proper balance between safeguarded rights and the principles of legal security and the preservation of overall interests, taking into account the impact a ruling may have within the structure of the State. To this effect,

the Chamber considered that the constitutional interpretation of legal rules should be intended to redirect them to the general principles of Law, upholding essential legal values.

Constitutional values operate this way to provide judges with meaning and orientation and, therefore, judges are able to contribute with a harmonic evolution of State and society. Every legal operator should inspire the interpretation of the legal framework in the light of constitutional values. Judgments upholding unconstitutionality are presented as the required link between the instrumental function of constitutional values and the political system, the effects of which are crucial to the delicate task of balancing social dynamics and political values declared by the constituent.

Articles 119 and 131 of the Organic Law of the Supreme Court of Justice attributed the power to determine the effects over time of the unconstitutionality declaration of a legal rule, with a view to correcting unfavorable effects and ,thus, providing the ruling, according to the circumstances, with *ex tunc* (starting in the past) or *ex nunc* (starting now) effects.

In the case in question, the Full Court stated that the values of equality and justice that would imply recognizing as valid the claims of tax payers with regard to tax effects of rules that are subsequently declared unconstitutional are in contrast to the principle of social solidarity, when it comes to establishing the future effect of judgments. Based on this reasoning and the principles of justice, legal security and social accountability inspiring the new Constitution of the Bolivarian Republic of Venezuela, the Chamber decided to grant *ex nunc* effects to the ruling issued by the Full Court of the former Supreme Court of Justice, starting from the publication of the decision. In consequence, the Chamber declared that nullity of the rule does not influence the validity and effectiveness of acts issued based on the said sole paragraph of article 59, which might have been declared final by virtue of an administrative act that has not been contested due to the decision by a court declaring it final. Therefore, the ruling estimated that tax payers' obligation to pay default interest as per article 59, part one, of the Organic Tax Code should be understood as emerging when there exist liquid or due credits; that is, nullity of article 59 of the Organic Tax Code does not impact the validity and effectiveness of acts issued based on the sole paragraph of said article 59, provided they have been declared as final.

Ruling of June 5, 2003

Case file: 03-0124
Speaker: Antonio García García
Subject: Request for constitutional relief, lodged by the President of the Medical Association of the Metropolitan District of Caracas in defense of the party he represents and the diffuse interests of all Venezuelans, against the provision contained in Article 63, number 5, of the Law on Partial Reform of Value Added

Tax imposing a Value Added Tax (VAT) corresponding to an 8 % aliquot, on all medical, dental, surgical and hospitalization services provided by private entities as from January 1, 2003, alleging that the said provision breaches Articles 83 and 84 of the Constitution of the Bolivarian Republic of Venezuela.

Decision on the Request

The request for constitutional relief filed is based on the grounds that the provision violates Articles 83 and 84 of the Constitution consecrating guarantees and the rights to health, access to health services and to a national health public system. The appellant puts forward the "alleged unfairness of the tax," on the grounds that high costs of general administration services, to which solution the provision is intended to contribute, have been provoked in this case by the State itself, because if a true and efficient health protection and health public system would exist, only a minority of the population would use the services provided by private clinics and hospitals, in which case, the tax would not represent a burden and, as such, it would be legal and fair.

A request was made to disregard the provision contained in Article 63, number 5 of the Law on Partial Reform of Value Added Tax, on the grounds that the said provision violates Articles 83 and 84 of the Constitution, because a higher number of Venezuelans would not be able to afford the high costs of private clinics and hospitals to solve their health problems.

Ruling

The Constitutional Chamber remembered that the petition for constitutional relief against a rule, like in this case, contests the specific application of the rule to a concrete legal situation; therefore, the target of the constitutional relief action is said concrete legal situation whose violation is alleged, unless this case concerns challenging a self-performing rule, because its mere enactment implies that it is effectively and mandatorily enforceable by people covered by it, i.e. payers of the value added tax; the Chamber alto stated that the ruling to be handed down, if appropriate, will have *erga omnes* effects.

The Chamber proceeded to analyze each one of the rights to health set forth in the Constitution of the Bolivarian Republic of Venezuela and concluded that it is a duty of the State to implement and maintain a universal, comprehensive and efficient social security system, as well as a national public health system which provides free, universal, comprehensive, equitable, continuous, quality and supportive health services.

In this regard, the Chamber considered that since the rule object of the petition for relief taxes private health, dental, surgical and hospitalization services, it affects a substantial part of the population having access to them, because public health services are not efficient. Therefore, the free nature of health services would be

undermined in relation to the right to profits that private health care providers derive from this activity, which cannot be demanded to maintain public burdens.

Based on its analysis, the Chamber ordered to disregard the provision of Article 64, number 5 of the law establishing the value added tax. Likewise, the Chamber pointed out that to guarantee an effective tax justice, health care, dental, surgical and hospitalization services rendered by private entities are declared exempted from value added tax, for which purpose, Article 3 of the aforementioned law is also disregarded in relation to these services.

The Chamber finally stated that individuals or legal persons that would have been subject to the tax and had paid the same cannot demand reimbursement from the National Treasury or from the entity that billed the service.

Ruling Issued by the Constitutional Chamber on August 10, 2011

Another ruling granting prospective effect to a decision is the one issued on August 10, 2011 by the Constitutional Chamber (case file 11-0283), regarding a request for change of venue filed by an individual in a trial for moral damages against a mercantile society. In this case, the Chamber held that it had jurisdiction to hear the request, and ordered the court which had the file to forward it to its offices. Once the Chamber analyzed the file, it stated that municipalities have a series of procedural privileges, none of which is extensible to firms owned by them. Furthermore, the Chamber pointed out that the Organic Law of the Attorney General's Office does not provide for extending the privileged condition of public entities to the firms mentioned above. The important element of this ruling is that the Chamber **ordered to extend its effects** "*provided it is verified that the other susceptible cases are in a situation identical to those dealt with in this ruling*." Therefore, the Chamber ordered that such cases had to be decided based on its ruling "*provided the extension of effects is appropriate*."

7. **In your jurisdiction, have Courts ever referred to circumstances (context), the use of which would be appropriate as a guide, or, on the contrary, have they recommended to refrain from using this technique (in the last case, the example presented is preventing an individual from claiming the violation of his human rights)? Has the time at and the terms under which the overruling may have effect been also established?**

While, as stated in the answer to the previous question, in Venezuela in some cases a court with constitutional jurisdiction, in fact, the Political-Administrative Chamber of the former Supreme Court of Justice (which according to the 1999 Constitution became the Supreme Tribunal of Justice) as well as the Full Court of the said Court, and presently the Constitutional Chamber of the Supreme Tribunal of Justice, has ruled giving effect to their decisions on future cases that are based

on the same situations in such a manner that they impose the obligation to issue an identical ruling in the case in question, the category of ***prospective overruling***, as per the Anglo-Saxon Law terminology, has never existed. The Venezuelan doctrine has never referred to the prospective effect of the ruling but at most it has talked about the "peculiarity" or specific characteristics of some rulings issued by administrative litigation courts.[7] In consequence, since in our system there does not exist a specific category of prospective rulings, the highest jurisdictional bodies could hardly establish rules on how to set out the content, narrative and operative part of these type of rulings.

With regard to the second question contained in question Nr. 6 above, of whether the time and terms under which an ***overruling*** may have effect have been set, it is evident that since this type of judgment does not constitute a special category and an *ad hoc* rule does not exist, hardly could the term and conditions to apply this ruling have been determined. However, having the rulings mentioned above, which have had a prospective nature, stated how the doctrine set should be applied, they have necessarily established some overall criteria that can be summarized as follows:

1. To be identified with that of the original ruling, the situation has to be based on an identical factual situation.
2. The fact that the situation is identical obliges the judge to automatically apply the solution taken in the original ruling.
3. The proceeding of the subsequent cases is reduced to verifying the existence of the situation giving rise to the original ruling; therefore, the petitioners of the request in question do not have to bear the burden of proof because it is enough for them to allege the same elements that underpinned the original ruling.

In cases in which the technique of the mandatory effect was applied, the court did not face situations different to those giving rise to the original judgment; therefore, we cannot state if judges in subsequent cases would have the power to, upon application of the original ruling doctrine, hear and decide on the new aspects they are presented with. However, we believe that logic indicates that in relation to matters that do not fit into the mandatory ruling, judges should decide based on their own criteria.

8. **What are the advantages and disadvantages of the prospective overruling, which have been identified in your jurisdiction?**

Judgments in which the prospective effect was applied set out the main advantage of using this technique, i.e. not having the inconvenience of forcing the plaintiff to go through a contradictory proceeding which, eventually, will prove said plaintiff right in the final ruling, with said ruling being based on the same motives that have repeatedly grounded identical or similar cases previously decided and declared final. Therefore, the court declares that the request is well founded.

[7]RONDÓN DE SANSÓ, Hildegard, "*Las Peculiaridades del Contencioso Administrativo*". Fundación Estudios de Derecho Administrativo (FUNEDA). Caracas, 2001.

It can be seen that this case is about the application of the principle of *procedural economy* that implies that the process has to be swift and courts have to operate in a more appropriate manner. Based on this principle, the unnecessary step should not be required, but it is replaced with proofs and evidence presented in the previous proceeding.

A further advantage that the system expects to protect is receiving an *equitable treatment*, because once the obligation of the State to protect sick citizens with the resources specifically stated has been declared, citizens suffering from the same or similar diseases should be granted the same assistance.

The argument favoring the prospective effect rests on the fact that all individual acts by the administration are not isolated and exclusive to a unique situation, but they will always be repeated in the same manner vis-à-vis different recipients. This is why the Administration dictates the so-called "*acts in series*," which is a category recognized in the typology of administrative proceedings. The necessity to appeal on a case-per-case basis with respect to situations with a similar content hinders the ability to take actions and, at the same time, entails the risk of making contradictory decisions.

It is worth stating that in those cases in which the decision dealt with precautionary measures, the ruling was provided with the prospective effect, because it was considered that these decisions have their raison d'être in their own instrumental character, in the sense that they are issued to protect the petitioner against damages that the final ruling cannot correct. This reason requires that all situations in which the same risk may exist are identical, but with the warning, as the Court did, that in the event that the precautionary measure is annulled in prejudice to the original petitioner, the same consequence would operate with respect to subsequent petitioners.

This *erga omnes* effect granted by the prospective overruling is the one used to justify other decisions which estimated that all subjects submitted to the same rule, upon strict adherence to the situations, well could be benefited, in the same sense, with the ruling establishing final and unchallengeable effects in any of the situations pondered in an isolated fashion.

A further circumstance that, to some extent, plays in favor of the application of the prospective effect is the identity between situations and the institution of the jurisdictional precedent. The prospective effect is said to strengthen the force of the precedent; therefore everything referred to the precedent both in a positive and a negative sense, is applicable to the prospective effect.

Possible disadvantages are mainly related to the unforeseeable mistakes in qualifying the assumptions of the cases, because the judge could subsume in the case setting a precedent a circumstance with some common elements, but which is not fully identifiable as typical of a situation deserving a prospective effect.

This remark corresponds to all court proceedings in which a mistake can always result from a false assessment of the facts. The problem in these cases lies in the unappealable character of rulings emerging from the constitutional judge who has the power to apply the theses under study. This means that a decision, which under no circumstance is identified with the jurisprudential thesis the effects of which have been intended to be extended into the future, can be rendered permanent.

9. **Has the argument that prospective overruling should not be used when a decision is exclusively intended to "establish a statute" been alleged in your country?**

Undoubtedly, the decision related to a statute refers to duties, rights and overall legal situations, typical of subjects belonging to an organization. Of course, in cases concerning members of the same organization, it is convenient to apply the prospective overruling, because the equality and non-discrimination principle is strengthened, as well as that of procedural economy, given the identity of the regimes. This means that the answer to whether the statutory rule duly construed in a prospective overruling may be applied to other cases of subjects covered by the same statute necessarily has to be affirmative.

The situation is different when it is believed that the ruling could be applied *ipso jure* to individuals and entities subject to other statutes. The possibility of it being applied cannot be denied a priori if the conditions that we have set out as essential for said application to occur are present. On the contrary, the answer should be negative because the mere fact that the situations from which the conflict is derived may emerge from the fact that individuals and entities are subject to a statute is not enough to justify the application of the prospective overruling. Notwithstanding, while many professional statutes have similar rules, it is possible that in the specific case the set of rules governing them is completely different.

10. **Has it been said in the system that you represent that prospective overruling transforms judges in "disguised legislators"?**

The mere fact that the precedent is the rule to be followed by judges in their "*binding*" rulings leads judges to have a power similar to that of legislators. When the precedent becomes the main source, the judge replaces the legislator in the creation of the rule.

Precedent and Constitutional Res Judicata

The constitutional *res judicata* is the effectiveness of a judicial ruling when no means of appeal allowing said ruling to be modified can be filed against it, because it has the special quality of being immutable and uncontestable. Therefore, the decision issued to safeguard the right to due process cannot be challenged or contradicted in subsequent rulings by judicial entities.

In consequence, *res judicata* implies that **facts that were object of the proceeding in which a ruling was handed down cannot be again the object of controversy.**

The modern German doctrine states that *res judicata* is the declaration of certainty contained in the mandatory and undisputable ruling that excludes a new and different ruling.

According to the Italian doctrine, *res judicata* prevents any new decision on the substance of the same litigation and not only a different one.

Res judicata only operates when the judicial ruling decides on the question put forward in the proceeding, that is, **claims presented by the parties.** Therefore, ***res judicata* does not operate with regard to formal decisions.**

Res judicata is not considered an effect but a quality of the ruling, which is materialized in the application of the ***non bis in idem*** principle, that is, in the banning to try twice the same question or the same facts.

In the constitutional sphere, rulings are issued in the exercise of the regulatory control, i.e. unconstitutionality pleas; therefore it is worth asking what the binding part of the constitutional ruling is?

Two theses have been put forward with regard to the binding nature of the constitutional ruling: the one that sustains that the binding character only lies in the content of the operative part of the ruling; or if the part related to the reasoning elements that underpin the decision or constitute the *ratio decidendi* is also binding. It is worth remembering that the Colombian case is exceptionally quoted, because Article 48 of Statutory Act 270 of the Administration of Justice of 1996 expressly sets forth as follows: "***only the operative part of the ruling*** *shall be mandatorily enforceable and shall have erga omnes effects.* ***The grounds for the decision*** *only constitute an ancillary criterion for the judicial activity and for the application of overall rules of Law*."

Unlike the Colombian case, legal rules in Bolivia, Chile, Ecuador, Peru and Venezuela governing constitutional courts and their resolutions, are silent on this matter.

Rulings of constitutional courts in both European Comparative Law and South America render *res judicata* when the said ruling determine or disregard unconstitutionality of a legal rule on grounds of substance, because the internal legal order of the State does not provide for any action that allows rulings to be challenged, thus preventing the problem to be put forward on an identical content and with them being mandatory for all State organs.

For the denial of unconstitutionality of a rule to have the effect of *res judicata*, it is necessary for the ruling of the constitutional court to have decided on all aspects that may influence the regulatory statement, eliminating other eventual grounds for unconstitutionality that were not considered in the corresponding ruling. If such overall decision has not been made, the *res judicata is relative*. A relative *res judicata* exists when the constitutional court has not taken into account in its analysis determined feasible hypotheses of unconstitutionality of the normative statement, which can be recognized through two possible ways: (a) when the same constitutional court in the ruling states that its decision deals with the elements challenged by the plaintiff, which makes it possible that new requests for unconstitutionality are filed, based on different matters that were not considered in the initial ruling; (b) when the constitutional court does not refer in the ruling to having examined the regulatory statement only form determined standpoints, but from the analysis of the basis of the ruling no element is derived that leads to reasonably consider that a new constitutional problem was pondered.

The **apparent *res judicata*** occurs if when a constitutionality or unconstitutionality decision is sustained, **rational and legal grounds of the decision** declaring one

among several regulatory instruments as constitutional **have not been established**. In this case, *res judicata* is only apparent, because it has not been effectively examined if the specific normative text is constitutional or unconstitutional vis-à-vis the Constitution. It should be borne in mind that a ruling issued by an entity with jurisdiction has to be motivated, based on current sources of Law, and consistent. No ruling or *res judicata* exist without the proper legal support of the decision.

It is worth noting that a rule in all South American systems is that *res judicata* of the ruling of the constitutional court is binding on all courts and state organs, except the very same constitutional court, which, in a future case, may review its case law or precedent and, on solid grounds (because otherwise, it would be arbitrary and equality before the law would be impaired), change its interpretation thus allowing constitutional case law to evolve and adapt to new contexts and situations. Accordingly, in subsequent litigations, unconstitutionality of a law can be declared, even though it had been previously declared constitutional. This situation also exists in Spain and Italy, among other countries, because it is possible for a law with respect to which an abstract control decision has been made can be questioned again through concrete control by invoking new circumstances or different motives.

Binding Character of Rulings of the Supreme Tribunal of Justice

We have referred before to Article 335 of the current Constitution, which consecrates the guarantee of constitutional supremacy through the Constitutional Chamber, strengthening this role by granting a binding character on all courts of the Republic, including the other Chambers of the Supreme Tribunal of Justice, to "*interpretation established . . . regarding the content or scope of constitutional rules and principles*." The power of the Constitutional Chamber is further strengthened when it is authorized to **review rulings** handed down by all other courts of the Republic (number 10, Article 336 of the Constitution). This constitutional action, which allows the Constitutional Chamber to review final rulings, both in terms of constitutional relief and control over the constitutionality of laws or legal rules, was broadened in the Organic Law of the Supreme Tribunal of Justice by allowing the Chamber to review final rulings issued by the other Chambers (number 12, Article 24, Organic Law of the Supreme Tribunal of Justice):

> to review final rulings, in which diffuse control of constitutionality of laws or other legal rules issued by the other Chambers of the Supreme Tribunal of Justice and other courts of the Republic, has been exercised.

Furthermore, the legislator was even more generous by granting the power to review "*rulings handed down by the other Chambers, which are subsumed in the cases set out in the previous number (failure to know a precedent set by the Constitutional Chamber; undue application of a constitutional rule or principle; serious interpretation mistake or non-application of a constitutional rule*

or principle)," as well as the violation of fundamental legal principles contained in the Constitution of the Republic, international treaties, pacts or agreements signed and validly ratified by the Republic or violations of constitutional rights."

In other words, to guarantee constitutional supremacy, the Constitutional Chamber is granted the ample power to review rulings issued by all other courts of the Republic, including the other Chambers of the Supreme Tribunal of Justice, based on multiple grounds that can be summarized in any violation of the constitutional order contained in internal and external rules applied. The character given to rulings handed down to decide on said actions is binding; therefore, the first question emerging is whether said character is applied to all rulings, that is, those that decide on general and abstract cases, or if their scope only refers to the resolution of concrete cases.

The Constitutional Chamber through ruling of July 19, 2001 established a distinction between *jurisdictio* and *jurisdatio*. *Jurisdictio* would consist of the decision of the Chamber on concrete cases, in which the Chamber states that from these concrete cases, individualized rules emerge, the binding nature of which "*could only be invoked based on the technique of precedent*." Therefore, *jurisdatio* would be the ruling that interprets in a general and abstract manner the Constitution with an *erga omnes* effect, "*with this being an authentic or paraconstituent interpretations*," expresses the contents constitutionally declared by the Constitution.

Literally, the Constitutional Chamber in ruling issued referring to Articles 334 and 335 of the Constitution states as follows: "*as can be seen, the Constitution of the Bolivarian Republic of Venezuela does not duplicate in these articles the competence to interpret the Constitution, but it rather consecrates two classes of constitutional interpretation, namely: individualized interpretation that is presented in the ruling as individualized rule and general or abstract interpretation provided for by Article 335, which is a true "jurisdatio" because it declares erga omnes and ex nunc, the content and scope of constitutional principles and rules the interpretation of which is requested through the corresponding extraordinary action. This jurisdatio is different to the function which controls constitutionality of laws, since this nomophylactic function, as per Kelsen, is a true negative legislation that decrees nullity of rules colliding with the Constitution; in addition, general or abstract interpretation mentioned above does not address sub-constitutional rules but the very same constitutional system.*"

In the same ruling, the Constitutional Chamber considered that the extraordinary action of constitutional interpretation is founded in Article 335 and has to be admitted, because, otherwise, said article would be redundant in relation to the provision in Article 334 *ejusdem*, which can only give rise to individualized rules, such as rulings handed down by the Constitutional Chamber in relation to constitutional relief matters.

The Chamber estimated that the difference between both types of interpretation is patent and brings about decisive legal consequences in the exercise of constitutional jurisdiction. These consequences are referred to the diverse effect of *jurisdictio* and *jurisdatio*, because the effectiveness of the individualized rule is limited to

the resolved case; whereas the general rule derived from the abstract interpretation has *erga omnes* value and constitutes, as a true *jurisdatio*, a para-constituent interpretation . . . "

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Part IV
Asian-Oceanian Jurisdictions

Chapter 15
Judicial Rulings with Prospective Effect in Australia

James Douglas, Eleanor Atkins, and Hamish Clift

Abstract This chapter discusses how the doctrine of precedent works in the Australian legal system and how the importance placed on this doctrine and the doctrine of the separation of powers prevents retroactivity of judicial decision making. The High Court of Australia has confirmed that judicial decisions are to be prospective in effect. Australia's system of legislative supremacy is discussed in the context of whether retroactive decision making has the ability to turn judges into undisguised legislators. This chapter includes relevant case law as well as an historical analysis about why Australian courts have resisted retroactivity.

The Doctrine of Precedent in Australia

The doctrine of precedent is the hallmark of the common law.[1]

The Commonwealth of Australia's legal tradition is that of the English common law but affected by a federal structure and Constitution similar to that of the United States of America. The Constitution vests federal judicial power in both Commonwealth and State courts and created the High Court of Australia as the final court of appeal for the country in all areas of the law, private and public. Its decisions determine the law, including the content of the common law of Australia, and bind courts lower in the hierarchy. The High Court is not, however, bound by its own previous decisions.

[1] Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93.

J. Douglas (✉)
The Hon Justice, Supreme Court of Queensland, 415 George St, Brisbane, QLD 4000, Australia
e-mail: Justice.JSDouglas@courts.qld.gov.au

E. Atkins
Former Associate to the Hon Justice JS Douglas, 2014

H. Clift
Former Associate to the Hon Justice JS Douglas, 2013

E. Steiner, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions*, Ius Comparatum – Global Studies in Comparative Law 3,
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The High Court of Australia has been the highest court of appeal in Australia[2] since the introduction of the *Privy Council (Appeals from the High Court) Act* 1975 (Cth). Before that legislation, appeals, with some exceptions, could also be made to the Judicial Committee of the Privy Council in London. Each State of Australia has its own statutes and system of courts. At the apex in each State is the Supreme Court of the State which normally includes a Court of Appeal which exercises the final appellate jurisdiction in the State below the High Court of Australia. There are also, normally, District or County Courts and Magistrates Courts lower in the hierarchy. Appeals can be heard at District Court or Supreme Court level. The appellate jurisdiction of the Supreme Court of a State is responsible, under the High Court, for the jurisprudence and statutory interpretation of that State.

There is also a federal system of courts below the High Court which deals with specific legislation of the Commonwealth or national government. They are the Federal and Family Courts and the Federal Circuit Court. The Federal Court and the Family Court hear appeals in a full court normally consisting of three judges. The federal territories, the Australian Capital Territory and the Northern Territory, have systems similar to the States.

The doctrine of precedent requires a court lower in the hierarchy to follow a binding decision of a higher court in that hierarchy to promote certainty in the law.

Decisions of intermediate appellate courts are binding on lower state courts of the same jurisdiction. But the relationship between intermediate appellate courts of different jurisdictions is nuanced, despite being quite settled. In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*,[3] which is the most recent statement of authority on the issue, the High Court said that[4]: "Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong." The court further reasoned that, because there existed a common law of Australia, and not a common law of each State jurisdiction, the principle remains the same for non-statutory law.

In light of this principle, the meaning of "plainly wrong" is therefore important. In *Transurban City Link Ltd v Allan*, the Full Court of the Federal Court did not think it possible nor desirable that exhaustive criteria be enumerated.[5] A decision will be plainly wrong if it fails to collect and attend to relevant legal materials or

[2] *Viro v The Queen* (1978) 141 CLR 88.

[3] (2007) 230 CLR 89.

[4] Ibid 151–152 at [135], per the Court.

[5] (1999) 95 FCR 553, 561 at [31], per the Court.

is egregiously erroneous in its reasoning.[6] The error, in order to be plainly wrong, must be "so clear as to enable a later court to say that the point is not reasonably arguable."[7]

Precedent, Retroactive Decision-Making and Declaratory Theory

The courts serve two primary functions in resolving disputes between parties: first, they are tasked with interpreting the legislation of parliaments; and secondly, they retain an inherent lawmaking function through which changes to the common law take place. The first of these roles ensures that legislation is constitutionally valid and gives meaning to statutory provisions. The courts' interpretation of legislation is important as it guides the executive arm of government in administering the law. Statutory interpretation is doubly important in the Westminster system as any constitutionally valid legislation enacted by parliament, whether at a state or federal level,[8] prevails over the common law. In Australia, however, it is for the courts to decide whether legislation is constitutionally valid.[9]

The common law can, therefore, be varied, abrogated or maintained through constitutionally valid statutory reform. Courts use legal theory to help determine the common law; one such theory is the declaratory approach. The declaratory theory entails the application of a principled approach to the deciding of novel cases. The novel case provides the opportunity to declare what the law is and always has been by reference to a body of principle.

The declaratory approach was popular with the Australian judiciary under Sir Owen Dixon, Chief Justice of the High Court of Australia from 1952 to 1964.[10] The global surge towards legal positivism reached Australian shores in the latter half of the twentieth century; there are numerous decisions from this period which reject

[6] JD Heydon, "How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?" (2009) 9 *Oxford University Commonwealth Law Journal* 1, 26.

[7] *SZEEU v Minister for Immigration & Multicultural & Indigenous Affairs* (2006) 150 FCR 214, 250 at [148] (Weinberg J).

[8] Section 51 of the Constitution vests limited powers with the Commonwealth Parliament while the States retain power to legislate over all other matters.

[9] Judicial review of the constitutional validity of legislation has been accepted as axiomatic in the Australian legal system: *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 262–263 (Fullagar J), following the approach of the United States Supreme Court in *Marbury v Madison* 5 US (1 Cranch) 137 (1803); the High Court has the power and duty to decide if legislation, whether passed by the Parliament of the Commonwealth or the legislature of a State, is in accordance with the provisions of the Commonwealth Constitution.

[10] See Sir Owen Dixon, "Concerning Judicial Method" (1956) *29 Australian Law Journal* 468, 470.

the validity of declaratory theory.[11] Sir Anthony Mason, Chief Justice of the High Court from 1987 to 1995, was one such proponent of legal positivism. Sir Anthony acknowledged that judges have regard to "policy factors and values" in determining the law.[12] Australian courts have grown to accept that policy considerations that are external to legal principles do at times inform legal decision-making.[13]

Despite this, several recent decisions highlight the continuing viability of the declaratory approach.[14] The newfound support stems from the link between precedent, retroactive decision-making and declaratory theory. Extra-judicial discussion makes clear the inter-connectedness of these concepts[15] and the view that "change in the positive law is perfectly consistent with the declaratory theory as long as that change can be seen to accord with more abstract legal principles."[16]

The association between precedent, retroactive decision-making and declaratory theory is similarly drawn in the case law:[17] "In the common law, precedential system in which Australian advocates work, the legal fiction to which I earlier referred, that what this Court decides has in effect always been the law, prevails." The connection between declaratory theory and retrospective overruling was explicitly acknowledged by Sackville J in *Torrens Aloha Pty Ltd v Citibank NA*, with whom Foster and Lehane JJ agreed[18]: "In the absence of a doctrine of prospective overruling, changes in the law effected by judicial decisions are not confined to events or transactions occurring after the date of the decision changing the law. Doubtless from an historical perspective, this owes a good deal to the declaratory theory of law . . . ". This reasoning affirms that, with a system where judicial ruling is always retroactive, as it is in Australia,[19] declaratory theory remains persuasive.

An unusual and controversial example of the application of the theory is *PGA v The Queen*[20] where the majority of the Court decided that there was no presumption

[11] See, e.g., *O'Toole v Charles David Pty Ltd (No 1)* (1991) 171 CLR 232, 267 (Brennan J); *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 650–651 (Murphy J).

[12] Sir Anthony Mason, "Legislative and Judicial Law-Making: Can We Locate an Identifiable boundary?" (2003) 24 *Adelaide Law Review* 15, 21.

[13] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 557 at [99] (Gaudron, McHugh and Gummow JJ) where the majority included public policy in their various considerations as to why the highway authorities' immunity should be abolished.

[14] See generally *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 at [73] (Gummow J); *R v MJR* (2002) 54 NSWLR 368, 375 at [46] where Mason P refers to "the still useful fiction known as the declaratory theory".

[15] A Beever, "The Declaratory Theory of Law" (2013) 33 *Oxford Journal of Legal Studies* 421, 433; *Final Report of the Constitutional Commission* (AGPS, 1988) [6.287–6.288].

[16] A Beever, op. cit., 440–441. See also Sir Owen Dixon, op. cit., 470 and Ronald Dworkin, *Law's Empire* (1986) 225, 228.

[17] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 115 at [367] (Callinan J).

[18] (1997) 72 FCR 581, 594.

[19] *Ha v New South Wales* (1997) 189 CLR 465.

[20] (2012) 245 CLR 355.

under the common law, as it applied in South Australia in 1963, of consent by a wife to sexual intercourse in marriage. A husband could be found guilty in 2012 of the rape of his then wife in 1963. Had the prosecution been brought in 1963 it may well have been decided then that the common law offence of rape did not apply within a marriage.

Jurisprudential Problems Raised by Case Law and the Rules of Precedent

The doctrine of precedent enhances continuity and substantiates the rule of law. It does this by ensuring that judges do not decide cases arbitrarily, thereby eliminating inconsistency. Nevertheless, the perceived notion that the common law does not keep pace with societal change is one of the chief difficulties of the system of precedent. In an attempt to reconcile precedent with contemporary attitudes, a court may distinguish a case on inadequate or poorly reasoned grounds. Sir Anthony Mason explains the problem[21]:

> If applied too rigidly, the doctrine of precedent produces both injustice and lack of rationality – the very flaws whose purpose it is to expel. Thus adherence to a past decision which reflects either a principle undermined by subsequent legal development or the values of a bygone era, will produce an unjust result, judged by the standards of today.

The High Court of Australia, however, is not bound by its previous decisions. Although there is "no very definite rule" as to the circumstances in which the Court will overrule a previous decision,[22] several factors have been recognised to be relevant. Those factors were considered by the Court in *John v Federal Commissioner of Taxation*[23]:

> The first was that the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration, as had been the case in *Queensland v The Commonwealth*.

An uncontrolled ability to overturn a previous decision has the potential to be misused. The potential for harm to the system through too ready a willingness to

[21] Sir Anthony Mason, "The Use and Abuse of Precedent" (1988) 4 *Australian Bar Review* 93, 94.

[22] *Attorney-General for NSW v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237, 243–244 (Dixon J).

[23] (1989) 166 CLR 417, 438–439 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) and 450–453 (Brennan J); also see *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 381–382 at [191] (Kiefel and Keane JJ).

overturn earlier decisions is illustrated by the two *Territory Senators Cases.*[24] In the first decision in 1975 the Court held by a majority of 4–3 that an Act of the Commonwealth Parliament allowing the representation of Australia's Territories in its Senate was valid. Two years later, after one of the majority judges had retired and senators had been elected for the Territories, the second case was argued on the basis that the first decision was incorrect and should be overturned. Two of the former dissentients, Gibbs and Stephen JJ, while adhering to the validity of their reasoning in the first case, decided that they should follow the principle of *stare decisis*, recognising that the principle had less application in constitutional cases, but following the earlier decision in the interests of consistency.

The legislature also has a role in adjusting outdated or wrong principles because constitutionally valid legislation can overturn a court's inconvenient expression of the common law. Nevertheless, the doctrine of precedent remains an important and successful aspect of the Australian judicial system, bearing in mind the ability of courts to distinguish previous decisions as well as the power of the High Court in particular to restate the common law.

Criticism of the Retrospective Effect of Judicial Decisions

There is a common law presumption against the retrospective application of legislation.[25] This can be displaced by express provision in the relevant Act or a countervailing interest of justice.[26] By contrast, the retrospective nature of judicial decisions is strongly supported by the High Court of Australia. After some consideration,[27] the Court has now rejected any power to overrule cases

[24] *Western Australia v The Commonwealth* (1975) 134 CLR 201 and *Queensland v The Commonwealth* (1977) 139 CLR 585.

[25] *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194 (Fullagar J).

[26] *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, 434 (Isaacs J); see also the discussion by French CJ, Crennan and Kiefel JJ in *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 133–134 at [26]–[28].

[27] *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 15 (Mason J); *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581, 594 (Sackville J); *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417, 450–451 (Brennan J); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 171 (Toohey J); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 257 (Deane J).

prospectively in *Ha v New South Wales*.[28] Accordingly criticism of retroactivity within the Australian legal system is limited.[29]

Prospective Overruling in Australia

Prospective overruling has been emphatically rejected by the High Court of Australia.[30] The most convenient way to explain the Australian position is to use the words of the High Court in *Ha v New South Wales*[31]:

> The Court was invited, if it should come to that conclusion, to overrule the franchise cases prospectively, leaving the authority of those cases unaffected for a period of twelve months. This Court has no power to overrule cases prospectively. A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law.

It is clear from the High Court's unequivocal stance that prospective overruling has no place in Australian jurisprudence; it is not appropriate for such a technique to be deployed in the exercise of judicial power. In this area Australia differs from other jurisdictions influenced by the common law such as the United States of America and Canada.[32] In England the theoretical possibility of prospective overruling has also been recognised.[33] It may also arise in the constitutional context in Ireland.

The approach adopted in Australia is one influenced by a long history where the courts have distinguished between what is appropriately the subject of federal judicial power, exercised by courts, and non-judicial power, legislative or executive,

[28] *Ha v New South Wales* (1997) 189 CLR 465, 503–504 (Brennan CJ, McHugh, Gummow & Kirby JJ), 515 (Dawson, Toohey & Gaudron JJ).

[29] For a discussion of the main arguments for and against the introduction of prospective overruling before the decision in *Ha v New South Wales* see K Mason QC (as he then was), "Prospective Overruling" (1989) 63 *Australian Law Journal* 526, 530.

[30] *Ha v New South Wales* (1997) 189 CLR 465. The decision has recently been relied on by Heydon J in *Momcilovic v The Queen* (2011) 245 CLR 1, 194; at [485] and explored in slightly more detail by Gageler J in *New South Wales v Kable* (2013) 252 CLR 118, 138 at [51]. Compare the position in the United Kingdom recognising the theoretical possibility of prospective overruling, discussed in *In re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680.

[31] *Ha v New South Wales* (1997) 189 CLR 465, 503–504 (Brennan CJ and McHugh, Gummow and Kirby JJ). The minority, Dawson, Toohey and Gaudron JJ, expressly agreed on this point at 515.

[32] K Mason QC, op. cit., 527–529.

[33] *In re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680.

typically administrative, which may be exercised by non-judicial tribunals that create rights or obligations in the course of regulating an activity.

This absolute resistance to the concept of prospective overruling in our High Court, in spite of earlier statements that contemplated the possibility of such an approach, and when one considers the more permissive approach adopted in other similar common law jurisdictions, may be thought to be overly uncompromising. Our history of carefully defining the scope of judicial power is what influences the opposition to the concept of prospective overruling the most. The constitutional independence of courts exercising federal judicial power, which include State courts, is an important feature of our jurisprudence and requires careful consideration of what precisely is covered by judicial power. The Constitution has been interpreted to prevent legislatures both Federal and State from confining the scope of that judicial power.

The focus in the passage from the decision in *Ha v New South Wales* dealing with the court's power to adjudicate *existing* rights and obligations in the exercise of judicial power, as distinct from the impermissibility of its *creation* of rights and obligations for the future, provides the explanation for the strictness of our approach. For similar reasons the High Court has always rejected attempts to ask it to provide advisory opinions. It confines itself to deciding real disputes between parties.

Even if the particular decision "changes" the pre-existing view of the law it is still a judgment deciding existing rights or liabilities of the parties. Prospective overruling in that context is seen as a frank adoption of legislative power to create rights or obligations, inconsistent with the role of the courts in our federation and, therefore, impermissible.

From a comparative point of view it illustrates the point that the structure of common law jurisdictions may be profoundly affected by the nature of the constitutional arrangements that govern their legal systems. Australia is not just a system that inherited the common law of England in each component State but a federation of those States governed by a Constitution that attempts to define carefully the powers of the respective components of the system, parliaments both State and Federal, the executive governments and the courts that decide whether power has been exercised constitutionally as well as the rights and obligations of individuals and governments under the law.

This position has limited judicial and academic discussion of the advantages and disadvantages of prospective overruling in Australia.[34] There is, unsurprisingly, no issue that prospective overruling turns judges into "undisguised legislators" because there is no possibility of prospective overruling.

[34]There is some Australian academic consideration. See, for example, A Palmer and C Sampford, "Judicial Retrospectivity in Australia" (1995) 4 *Griffith Law Review* 170; E Campbell, "The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts" (2003) 29 *Monash University Law Review* 49; and R Hinchy "Judicial Method and Advocates' Immunity in the High Court of Australia and the House of Lords" (2006) 13(1) *Murdoch University Electronic Law Journal* 187.

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Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107
Viro v The Queen (1978) 141 CLR 88
Western Australia v The Commonwealth (1975) 134 CLR 201

Chapter 16
Prospective Overruling in Singapore: A Judicial Framework for the Future?

Gary K.Y. Chan

Abstract The doctrine of prospective overruling has been applied in Singapore since the 1990s with a focus on the applicability of *nullen crimen nulla poena sine lege* embodied in the Singapore Constitution. The underlying objectives are to maintain fairness to the accused persons and to protect their legitimate expectations in criminal cases. The recent landmark decision in *Public Prosecutor v Hue An Li* has extended the applicability of the doctrine beyond criminal cases to also include civil matters. Though the general default position is that judicial pronouncements apply retrospectively and prospectively, the High Court has indicated that judges may exercise their discretion to limit the retroactive effect of such judicial pronouncements. It has developed a framework comprising a few factors for determining if prospective overruling should be invoked in a given case. The factors include the extent of the entrenchment of the existing rule or principle, the extent of change of the law, the reliance on the existing law and the level of foreseeability of the legal change. This judicial framework points the way forward for prospective overruling in Singapore and, at the same time, allows some flexibility for judicial identification and weighing of the specific factors according to the facts of the case.

Introduction

The development of the common law in Singapore has progressed steadily since her founding in 1819 and, thereafter, her independence in 1965. During this period, English common law and equity have been received into Singapore subject to local circumstances. The process of autochthonous common law development gathered significant momentum when the Singapore Court of Appeal assumed its premier position in the judicial hierarchy in 1994 following the abolition of appeals to the

G.K.Y. Chan (✉)
School of Law, Singapore Management University, 60 Stamford Road Level 4, Singapore 178900, Singapore
e-mail: garychan@smu.edu.sg

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Privy Council sitting in London.[1] The enactment of the Application of English Law Act 1994[2] ("AELA") and the issuance of the Practice Statement on Judicial Precedent in the same year served as catalysts for the indigenous development of Singapore common law. Together with the significant constitutional amendments and legislative activity in Parliament, the Singapore legal institutions and law advanced rapidly in tandem with societal changes.

Amidst the legislative buzz and the autochthonous jurisprudence that was taking shape in Singapore, an important development, in the form of the doctrine of prospective overruling, was waiting in the wings. Judicial scrutiny of the doctrine of prospective overruling is a relatively new phenomenon in Singapore dating back only to the 1990s. At that time, the interest and significance in prospective overruling was primarily fueled by criminal cases involving the life and liberty of accused persons and the constitutional principle founded on the concept of *nullen crimen nulla poena sine lege* (that one cannot be punished for doing something that is not prohibited by law). Several questions confronted the courts: when courts have decided to overrule an existing rule or principle in criminal cases, should they only apply the new rule or principle prospectively? What is the impact of the Singapore Constitution (in particular Article 11) on prospective overruling in criminal cases? Could prospective overruling also apply to an existing practice as opposed to a legal rule or principle? As we will see below, these questions were examined with certain overriding objectives in mind, namely to ensure fairness to the accused persons and to protect their legitimate expectations in criminal cases.

It was only in 2014 that the Singapore High Court in a landmark decision, *Public Prosecutor v Hue An Li*,[3] extended the doctrine to both criminal and civil cases. It also examined the arguments for and against prospective overruling and developed a general framework to ascertain the appropriate circumstances in which prospective overruling may be invoked in a given case. At the heart of the debate concerning prospective overruling is the maintenance of the rule of law, the intertwined issues of ensuring certainty (of which legitimate expectations is an important part) as well as flexibility in the law and the goals of achieving fairness and justice for the litigants.

I will begin with a brief historical background to the development of the common law in Singapore in "Historical Background to the Common Law in Singapore", followed by a discussion in "Doctrine of Stare Decisis and the Rejection of the Declaratory Theory in Singapore" on the principles of *stare decisis* and the rejection of the declaratory theory in Singapore. In "Prospective Overruling in Singapore: The Approach in *Public Prosecutor v Hue An Li*", I examine the doctrine of prospective overruling as applied in Singapore by reference to *Public Prosecutor v Hue An Li*. "Criminal Cases and Article 11 of the Constitution" focuses on the application of Article 11 of the Singapore Constitution based on the principle of *nullen crimen nulla poena sine lege* to the criminal cases decided in the 1990s whilst

[1] Judicial Committee (Repeal) Act 1994 (Act 2 of 1994).

[2] (Cap 7A, 1994 Rev Ed).

[3] [2014] 4 SLR 661.

"Constitutional Invalidation of Statutes and Prospective Overruling" discusses the relationship between the doctrine of prospective overruling and the constitutional invalidity of statutes.

Historical Background to the Common Law in Singapore

The system of *stare decisis* in Singapore cannot be fully appreciated without at least a brief historical background on the reception of English common law into Singapore. Her British colonial legacy began when Sir Thomas Stamford Raffles of the East India Company and Lieutenant-Governor of Bencoolen founded Singapore in 1819. After a period of "legal chaos" between 1819 and 1826 in which no uniform law applied to the colony (Phang 2006: 1–4), English law was received into Singapore with the promulgation of the Second Charter of Justice on 27 November 1826.[4] The case of *R v Willans*[5] is regarded to have introduced English law as of November 1826 into Singapore via the Second Charter. This general reception of English law, whether English statutes or common law as at 27 November 1826, into Singapore was subject to local conditions and circumstances (Phang 1986).

In 1878, section 5 of the Civil Law Ordinance and subsequently, the Civil Law Act[6] provided for the specific and continuous reception of English mercantile law into Singapore. If a question or issue arose in Singapore with respect to specified categories of law or with respect to mercantile law generally, the law to be administered was to be the same as that administered in England at the corresponding period subject to other provision made by any law having force in Singapore. Similar to the Second Charter, English law received under section 5 of the Civil Law Act may be modified to suit local circumstances.[7] This provision generated various problems relating to the determination of when an 'issue' has arisen,[8] the meaning of 'mercantile law', the extent to which English law was to be applied and other academic controversies.[9] What was clear is that English law continued to be received into Singapore subject to suitability and modifications.

[4]The Second Charter was issued under Letters Patent establishing the Court of Judicature at Prince of Wales' Island, Singapore and Malacca.

[5](1858) 3 Kyshe 16 per Sir Peter Benson Maxwell. This was based on an interpretation of the clause in the Charter ('to give and pass judgment and Sentence according to Justice and Right'). Strictly speaking, the case was concerned with the applicability of English law in Penang. As Singapore was part of the Straits Settlements together with Penang and Malacca, the same law should also be received into Singapore.

[6](Cap 43, 1999 Rev Ed).

[7]Section 5(3) of the Civil Law Act.

[8]*Seng Djit Hin v Nagurdas Purshotumdas & Co* [1923] AC 444; *SST Sockalingam Chettiar v Shaik Sahied bin Abdullah Bajerai* [1933] SSLR 101.

[9]E.g., Tan 1987: 293–294; Phang 1990: 20; Yeo 1994.

In 1993, the Singapore Parliament repealed section 5 of the Civil Law Act and enacted the AELA. The repeal put to rest the abovementioned difficulties ensuing from section 5 of the Civil Law Act. In its place, the AELA's role was to preserve the reception of English law, namely English common law and equity as well as specific English statutes relating to commercial law. Section 3(1) of the AELA stipulates that "the common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before the commencement of [the AELA i.e. 12 November 1993], shall continue to be part of the law of Singapore". The corollary is that, subsequent to the above cut-off date, the "common law of Singapore would be the common law as declared and developed by [Singapore] courts".[10] The enactment of the AELA, together with the 1994 Practice Statement (Judicial Precedent) which will be discussed below, provided the impetus for the autochthonous development of the common law in Singapore.

In tandem with Singapore's colonial legal history, it was not surprising that the reception of English common law was subject to the concepts of suitability and modifications which are dependent on the circumstances and conditions in Singapore.[11] Insofar as English statutes are concerned, the AELA lists 13 English commercial statutes[12] which would form part of Singapore law. Certain Imperial Acts[13] passed by the UK Parliament from the colonial era were also made part of Singapore law.

Doctrine of Stare Decisis and the Rejection of the Declaratory Theory in Singapore

Judicial power is vested in the Singapore judiciary under the Constitution.[14] This power is premised on the existence of a controversy between a State and its subjects or between two subjects and entails the court finding the facts, applying the law to the facts and determining the rights and obligations of the parties concerned.[15] The judicial grounds of decisions ensuing from the resolution of the disputes form the bedrock of case precedents.

[10] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52.

[11] Section 3(2), AELA.

[12] Mercantile Law Amendment Act 1856; Policies of Assurance Act 1867; Factors Act 1889; Partnership Act 1890; Marine Insurance Act 1906; Third Parties (Rights Against Insurers) Act 1930; Corporate Bodies' Contracts Act 1960; Misrepresentation Act 1967; Unfair Contract Terms Act 1977; Sale of Goods Act 1979; Supply of Goods and Services Act 1982; Minors' Contracts Act 1987; Carriage of Goods by Sea Act 1992. These statutes have been reprinted in local revised editions pursuant to section 9 of the AELA.

[13] Territorial Waters Jurisdiction Act 1878, the Maritime Conventions Act 1911 and the Straits Settlements and Johore Territorial Waters (Agreement) Act 1928.

[14] Article 93.

[15] *Mohammad Faizal bin Sabtu v PP* [2012] 4 SLR 947 at [27].

The doctrine of *stare decisis* or case precedents is primarily founded on respect for the judicial hierarchy, consistency and fairness of and certainty in the law (Woon 1999: 299). The Singapore judicial hierarchy places the Court of Appeal at the apex, followed by the High Court, District Court and Magistrates' Court in that order. The decisions of the Singapore Court of Appeal bind all lower courts. However, a prior High Court decision is not legally binding on the High Court.[16] The Singapore common law develops through the application of legal principles embodied in case precedents to the facts before the judge. The *ratio decidendi* of a prior court decision is binding on lower courts though the latter may legitimately refuse to follow a *ratio decidendi* in a prior precedent if the factual matrices are materially different.[17] *Obiter dicta*, on the other hand, are not binding under the doctrine of *stare decisis*. The *per incuriam* rule grants courts some leeway to refuse to follow *ratio decidendi* in limited circumstances. The lower courts cannot invoke the *per incuriam* rule against the higher court.[18] However, the Court of Appeal may invoke the *per incuriam* rule against its own prior decision.[19]

Where there are no relevant precedents that are directly on point, judges draw upon analogies to existing precedents in order to extend the law or create new law in order to resolve the dispute (Twining and Miers 2010: 349). At times, policy considerations are taken into account to create new law. Such a process is neither haphazard nor radical but is based on principled and incremental developments.[20] As remarked by the Singapore Court of Appeal in a recent decision, "It is trite to state that the common law is incremental in nature: the doctrine of stare decisis obliges judges to adjudicate with reference to decided *cases*".[21] The reality is that judges do make law with reference to precedents, legal principles, extra-legal policies and a dose of pragmatism.[22]

To the extent that it is accepted that the common law rules and principles have existed from time immemorial and are merely declared rather than created by the judges, it is not likely that judges will propound a new rule or principle that overrules a prior precedent. In this connection, judges would probably not adopt the doctrine of prospective overruling if the consequence would be to highlight the divide between the old and the new common law rule or principle as of a certain arbitrary date.

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[16] *Wong Hong Toy and another v Public Prosecutor* [1985–1986] SLR(R) 656 at [11]; *M V Balakrishnan v Public Prosecutor* [1998] 2 SLR(R) 846 at [10]; *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at [4].

[17] E.g. *Public Prosecutor v Lee Hong Hwee* [2004] 1 SLR(R) 39 at [21]–[23] (Singapore High Court decision of *PP v See Albert* [1968–1970] SLR(R) 789 distinguished on the facts).

[18] *Chiltern Park Development Pte Ltd v Ong Pang Wee and Others* [2003] SGMC 20 at [10].

[19] *Chin Seow Noi v Public Prosecutor* [1993] 3 SLR(R) 566.

[20] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 (Singapore Court of Appeal).

[21] *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 at [35].

[22] *Lau Siew Kim v Yeo Guan Chye Terence and another* [2008] 2 SLR(R) 108 at [32].

In England, the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*[23] had rejected the declaratory theory of law. It was acknowledged that the common law changed from time to time in order to keep abreast with the times.[24] In *Public Prosecutor v Manogaran s/o R Ramu*,[25] a criminal case that will be relevant to our discussion on prospective overruling below, the Singapore Court of Appeal had also doubted the viability of the declaratory theory. This view was further reinforced by the same Court in *Review Publishing Co Ltd v Lee Hsien Loong*,[26] a defamation case, in which the appellant (media defendant) argued that the *Reynolds* privilege[27] in England had always been part of the common law applicable to Singapore. The argument did not find favour with the Court of Appeal:

> Basically, the Declaratory Theory is not a principle of the common law in the same way that the doctrine of *stare decisis* and the doctrine of *res judicata* are principles of the common law. Instead, it is merely a theory or an explanation as to how the common law develops. It is a juridical method of expressing the idea that the common law has the capacity to provide the right answer (in the sense of doing justice) at any point in time *vis-à-vis* any legal issue by applying established principles (whether narrow or broad) as changing or changed social conditions require. In short, the Declaratory Theory lacks legal force, and is therefore neither a sufficient nor a satisfactory ground for contending that the *Reynolds* privilege is and has always been part of the traditional qualified privilege defence at common law.

Further, the Court was of the view that the declaratory theory is a "fiction"[28] (McLachlin 2000: 317–318) and that the theory is "inapt to explain the evolution of common law principles that are based on policy considerations which change over time".[29] It added that as *Reynolds* was influenced by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the UK Human Rights Act 1998, "the *Reynolds* privilege cannot possibly be said to have existed 'from time immemorial' ".[30]

It is fair to say that the rejection of the declaratory theory, at the very least, removes *one* obstacle to the doctrine of prospective overruling. More will be said of this below but it suffices to note at this stage that the acknowledgement that judges do make law provides some leeway for them to overrule existing rules and principles in favour of applying a new rule or principle for the future. One concern that may arise is that unelected judges, when they are engaging in prospective overruling,

[23] [1999] 2 AC 349.

[24] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [103]. See also *In re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696 (on rules of equity being changed and refined from time to time).

[25] [1996] 3 SLR(R) 390 at [68].

[26] [2010] 1 SLR 52.

[27] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 (House of Lords).

[28] [2010] 1 SLR 52 at [241].

[29] [2010] 1 SLR 52 at [243].

[30] [2010] 1 SLR 52 at [244].

appear to be acting as legislators.[31] The danger of judicial usurpation of legislative powers is recognised but the common law would be much poorer if judges are prevented from changing and developing the existing rules and principles. That being said, judicial power for the development of the common law must be exercised within proper limits. In similar vein, if prospective overruling were to be applied, its scope should be kept within justifiable parameters. On that note, it is fitting that we turn to the recent Singapore High court decision on prospective overruling.

Prospective Overruling in Singapore: The Approach in *Public Prosecutor v Hue An Li*

When a judge pronounces a change in the law, the pronouncement normally operates both retrospectively and prospectively[32] (i.e., it affects both the litigants before the court as well as potential litigants after the legal change). If pure prospective overruling were accepted as a general rule, however, the change in the law will only be applied prospectively (i.e., it will not affect the litigants before the court pronouncing on the legal change). Would this general position be desirable for the common law in Singapore? Prior to the landmark decision in *Public Prosecutor v Hue An Li*, Singapore had applied prospective overruling to two criminal cases[33] with particular regard to Article 11 of the Singapore Constitution and the principle *nullen crimen nulla poena sine lege*. Presiding over a special three-judge coram of the High Court, Sundaresh Menon CJ in *Public Prosecutor v Hue An Li*[34] surveyed the common law positions in England,[35] the United States,[36] Canada[37] and India[38]

[31] *Re Spectrum Plus Ltd (In Liquidation)* [2005] 3 WLR 58 at [28] per Lord Nicholls ("[m]aking new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges"); *Edward v Edward Estate* (1987) 39 DLR (4th) 654 (Saskatchewan Court of Appeal) at [30] per Bayda CJS.

[32] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [100].

[33] *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390*; Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842.

[34] [2014] 4 SLR 661 at [112]–[119].

[35] *Re Spectrum Plus Ltd (In Liquidation)* [2005] 3 WLR 58.

[36] *Great Northern Railway v Sunburst Oil and Refining Company* 287 US 358 (1932); *Linkletter v. Walker* [1965] 381 US 618.

[37] *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867* (1985) 19 DLR (4th) 1 (Supreme Court of Canada); but see *Edward v Edward Estate* (1987) 39 DLR (4th) 654 (Saskatchewan Court of Appeal) at [30] per Bayda CJS ("the most cogent reason for rejecting this technique is the necessity for our courts to maintain their independent, neutral and non-legislative role. The practice of giving prospective effect to law is endemic to legislatures. By deciding an existing case under the old rule but warning that future cases will be decided under a new rule now being announced, a court is really usurping the function of the legislature").

[38] *I.C. Golaknath* v. *The State of Punjab* [1967] 2 SCR 762 (Supreme Court of India).

which have endorsed and/or applied prospective overruling in some form or other. He noted that Australia[39] has rejected the doctrine whilst the position in New Zealand[40] was equivocal.

The Honourable Chief Justice examined carefully the various arguments for and against prospective overruling. First, he addressed the possible impact of the declaratory theory on the doctrine of prospective overruling. It was thought that the declaratory theory that judges do not create but merely declare the law posed an obstacle for the prospective overruling of law. If that is the case, it might be argued that the rejection of the theory should pave the way for prospective overruling to be accepted. Nevertheless, the Singapore High Court took a measured view, stating that the rejection of the declaratory theory in Singapore per se, as stated in the prior decision of *Review Publishing*, should not wholly negate the general default position in Singapore that "judicial decisions are unbound by time".[41] That is, judicial decisions should, as a general rule, continue to apply retrospectively and prospectively.

There are other factors to consider. The Chief Justice noted that if such judicial pronouncements were to only apply prospectively, there will not be any incentive for the litigants to persuade the courts to rule in their favour.[42] This is compounded by the perceived problem of inequality that, if prospective overruling were to be accepted, similarly-situated litigants after the arbitrary date of the decision pronouncing the legal change would benefit from the change but not those on the other side of the arbitrary line.[43] Nevertheless, Menon CJ recognised that the "most compelling" reason for prospective overruling is that of maintaining the rule of law.[44] The Chief Justice, citing Hayek (1944)[45] and the works of jurisprudential scholars, Raz (1977)[46] and Fuller (1964), noted that as people conduct their affairs on the basis of what they understand the law to be, a retrospective change in the law can frustrate legitimate expectations.

To reconcile the opposing arguments for and against prospective overruling, the High Court decided that whilst "judicial pronouncements are, by default, fully retroactive in nature", the Singapore appellate courts[47] have the "discretion, in exceptional circumstances, to restrict the retroactive effect of their pronounce-

[39] *Ha v New South Wales* (1997) 189 CLR 465 (High Court of Australia).

[40] *Lai v Chamberlains* [2007] 2 NZLR 7.

[41] [2014] 4 SLR 661 at [105].

[42] [2014] 4 SLR 661 at [106].

[43] [2014] 4 SLR 661 at [106] and [107].

[44] [2014] 4 SLR 661 at [108].

[45] That "government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge".

[46] That one of the principles of the Rule of Law is that all laws should be prospective, open and clear in order to guide conduct.

[47] That is, the High Court sitting in its appellate capacity and the Court of Appeal.

ments".[48] Hence, prospective overruling operates within this judicial framework only as an *exception* to the general default position. Although this was not specifically mentioned by Menon CJ, it is argued that the utilisation of prospective overruling as an *exception* ameliorates the potential problem of judicial legislation highlighted above and naturally serves as a restriction against the judicial power to only rule prospectively.

Whether the above argument is sound would also depend on the scope of the exception. The relevant question here is the appropriate circumstances in which the courts may exercise the discretion to restrict the retroactive effect of their pronouncements. In this regard, Menon CJ in *Public Prosecutor v Hue An Li*[49] outlined a framework based on four specific factors to guide judicial discretion:

(a) The extent to which the law or legal principle concerned is entrenched: The more entrenched a law or legal principle is, the greater the need for any overruling of that law or legal principle to be prospective. … …
(b) The extent of the change to the law: The greater the change to the law, the greater the need for prospective overruling …. …
(c) The extent to which the change to the law is foreseeable: The less foreseeable the change to the law, the greater the need for prospective overruling … …
(d) The extent of reliance on the law or legal principle concerned: The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling …. …

His Honour was careful to emphasise, however, that "no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted in a particular case".[50] The above framework extends to both criminal and civil cases.

The present case concerned a charge of causing death by a negligent act, an offence under s 304A(*b*) of the Penal Code.[51] The respondent was sentenced by the District Court to a fine of $10,000 and disqualified from driving for 5 years from the date of her conviction. The Public Prosecutor appealed on the ground that a custodial sentence ought to have been imposed on the respondent. The High Court allowed the appeal and varied the sentence to 4 weeks' imprisonment. There was an important prior decision which was relevant to determine the appropriate sentence before the High Court namely, *Public Prosecutor v Gan Lim Soon*.[52] *Gan Lim Soon* decided that there is a distinction between rashness and negligence; for the former, imprisonment would be warranted while for the latter, it would be sufficient in most cases to inflict a fine. Since the decision in *Gan Lim Soo*n, however, section 304A of

[48] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124].

[49] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124].

[50] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [125].

[51] (Cap 224, 2008 Rev Ed).

[52] [1993] 2 SLR(R) 67.

the Penal Code had been amended in 2008[53] such that causing death by negligence and causing death by rashness would each have its own sentencing range comprising imprisonment or fine or both.

As a result of the 2008 Penal Code amendments, the High Court in *Public Prosecutor v Hue An Li* decided that the position laid down in *Gan Lim Soon* was no longer tenable due to the bifurcation of the old s304A into two limbs in the amended s304A as mentioned above.[54] What is important for the purpose of this paper is that the High Court applied prospective overruling to its decision to depart from *Gan Lim Soon*. Menon CJ reasoned with reference to the factors outlined in the judicial framework for prospective overruling:

- the shift from a default sentence of a fine to a default sentence of a term of imprisonment is a significant change in the law;
- there was reliance on *Gan Lim Soon* in that numerous offenders would have pleaded guilty to or conducted their defences on the basis of advice that the starting point for sentencing in such cases would likely be only a fine; and
- the change in the law relating to *Gan Lim Soon* was not foreseeable.[55]

The above judicial framework for prospective overruling in *Public Prosecutor v Hue An Li* was applied in the subsequent case of *Poh Boon Kiat v Public Prosecutor*[56] which was also heard by Menon CJ. The appellant had set up and operated an online vice ring and employed five prostitutes. The appellant pleaded guilty to charges under, *inter alia*, ss 140 (procuring, receiving and harbouring a prostitute) and 146 (living on immoral earnings) of the Women's Charter.[57] The sentencing precedents had previously treated the imprisonment term for offences under ss 140(1) and 146 of the Women's Charter as discretionary. However, Menon CJ, upon examining the legislative history of the statutory provisions, held that the sentencing precedents were "incorrect"[58] and that the punishment of imprisonment under s 140 and s 146 respectively should be mandatory. Menon CJ invoked prospective overruling in this case on the grounds that the sentencing precedents have "entrenched" the proposition that the starting point in relation to the punishment of first time offenders of ss 140 and 146 without any aggravating

[53]The amended 304A reads:

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished –

(*a*) in the case of a rash act, with imprisonment for a term which may extend to 5 years, or with fine, or with both; or

(*b*) in the case of a negligent act, with imprisonment for a term which may extend to 2 years, or with fine, or with both.

[54][2014] 4 SLR 661 at [60].

[55][2014] 4 SLR 661 at [127]–[129].

[56][2014] 4 SLR 892.

[57](Cap 353, 2009 Rev Ed).

[58][2014] 4 SLR 892 at [59].

factors ought to be a fine.[59] Further, His Honour noted that the change in the starting point for the sentences constitutes a "fundamental and unforeseeable change in the law from the appellant's perspective".[60]

The reader would recall that the High Court in *Public Prosecutor v Hue An Li* referred to the judicial discretion to "*restrict the retroactive effect* of their pronouncements"[61] (instead of the discretion to only apply the pronouncements prospectively i.e., pure prospective overruling). As a preliminary question, one may legitimately inquire if the judicial framework consisting of proposed factors by the Singapore High Court might also apply to a form of limited or qualified prospective overruling (or selective prospective overruling). In this particular form of prospective overruling, the new ruling applies not only to future cases but also to the instant case; however, the old rule is applied to all cases predating the instant decision. There is no indication in *Public Prosecutor v Hue An Li* that the possibility of applying the framework to a limited form of prospective overruling in the future would be foreclosed.

Consider the scenario where all the factors show that prospective overruling ought to be invoked. We assume here that the reasonable person would not have foreseen the legal change and would have relied on it, the legal change was significant and the existing law was sufficiently entrenched. However, if it is found that the litigant in question had *not in fact relied* on the existing law due to his special knowledge obtained from particular sources of an impending legal change, and therefore he could *foresee* the legal change, could selective overruling be applied in such an instance?[62] It might be argued that it would not be contrary to the particular litigant's legitimate expectations for the change of the law to apply to him as well as prospectively.

Comparison may also be made between the factors in *Public Prosecutor v Hue An Li* and those found in other common law court decisions. The US Supreme Court's decision in *Chevron Oil Company v Gaines Ted Huson*[63] laid down three factors to be considered for determining whether prospective overruling was justified, namely: (a) the decision to be applied non-retroactively must establish a new principle of law by overruling a past decision or deciding an issue for the first time; (b) the history, purpose and effect of the rule in question must be analysed to determine if retroactive operation would further or retard its operation; and (c) the inequity imposed by retroactive application must be weighed. The House of Lords in *Re Spectrum Plus Ltd (In Liquidation)*[64] permitted some leeway for

[59] [2014] 4 SLR 892 at [113].

[60] [2014] 4 SLR 892 at [113].

[61] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124] (emphasis added).

[62] Menon CJ ([2014] 4 SLR 661 at [124]) did not specifically discuss whether the concepts of reliance and foreseeability should be objective or subjectively ascertained.

[63] (1971) 404 US 97 at 106–107. But see US Supreme Court decision of *Randall Lamont Griffith v Kentucky* (1987) 479 US 314; *James B Beam Distilling Company v Georgia* (1991) 501 US 529.

[64] [2005] 3 WLR 58.

prospective overruling to apply in circumstances where a decision on a point of law was unavoidable but the decision would have seriously unfair and disruptive consequences for past transactions or events. The majority[65] stated that the same could apply to both the state of common law as well as a statute.

It appears from the above that the judicial framework in *Public Prosecutor v Hue An Li* consists of more concrete and lower-level factors as compared to those found in the foreign decisions. These latter decisions deal with higher-level principles or goals such as the weighing of "equity" and the consequences of retroactivity (namely the "effects of retroactive operation" in *Chevron Oil Company* and "seriously unfair and disruptive consequences" for past transactions in *Re Spectrum Plus*) which tend to be described at a more general level. In this respect, it might be argued that in a typical case, the concrete and specific factors in *Public Prosecutor v Hue An Li* should provide sufficient guidance for judges applying the doctrine of prospective overruling. However, it is possible that unique factual matrices in a particular case may render the application of the factors quite challenging. Since "no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted in a particular case", judges may be justified in giving more weight to one factor over another. Nonetheless, in cases of doubt when applying the factors, judges may refer to the overarching rationales mentioned by Menon CJ based on the rule of law and legitimate expectations.

With respect to the judicial weighing of the factors, it is important to highlight that there are some overlaps and correlations amongst the four factors in the framework in *Public Prosecutor v Hue An Li* which may constraint the weighing process. First, the factor of reliance in the law and foreseeability of a change in the law appear to be overlapping. Generally, if a change in the law is not foreseeable, it would be reasonable to expect reliance on the existing rule. In such an instance, in accordance with the judicial framework, the position for prospective overruling would be enhanced. Where the change in the law is foreseeable, the question of whether it would be reasonable to continue to rely on existing rules and principles would likely depend on additional information such as the timing of the foreseeable change and whether there are viable alternative actions to be taken in the interim in order to pre-empt the effects of the impending legal change. Moreover, there is a general positive correlation between the notion of reliance and the extent of entrenchment of the existing rule or principle. The greater the depth of entrenchment of the existing rule or principle (e.g., the rule or principle is based on a series of case precedents established over a long period of time), the more reasonable it is to expect the litigants and lawyers to rely on them. In addition, there is a positive correlation between the extent of change to the law and the detriment arising from the reliance. That is, the greater the extent of the change to the law, the greater the detriment to the litigants who have relied on the existing rule or principle.

[65]Lord Nicolls, Lord Hope, Lord Walker, Lord Brown and Baronese Hale (Lord Steyn and Lord Scott dissenting). For the minority view, see *R v National Insurance Commissioners, ex p. Hudson* [1972] AC 914 at 1026 per Lord Simon of Glaisdale.

Criminal Cases and Article 11 of the Constitution

Menon CJ in *Public Prosecutor v Hue An Li* noted that "special considerations must come into play in the criminal context".[66] In criminal cases, specific reference has been made to Article 11 of the Singapore Constitution, a provision directed against retrospective criminal laws. Article 11 is a restatement of the common law principle vis-à-vis retrospective criminal laws.[67] That principle was essentially premised on the notion of fairness, namely to allow citizens to foresee the consequences of their own conduct and to have fair notice of what to avoid and to limit the discretion of law enforcers with clear and explicit standards[68] as well as to protect the reasonable and legitimate expectations of the citizens.[69] These tenets are consistent with the rationales propounded in *Public Prosecutor v Hue An Li*.

In the 1990s, the Court of Appeal in *PP v Tan Meng Khin and others*[70] could have applied the doctrine of prospective overruling when the opportunity presented itself but failed to do so. The High Court judge acquitted and discharged the accused persons as he felt bound by the prior decision of *Fo Son Hing* concerning the interpretation of a statutory provision.[71] On appeal, the Court of Appeal chose to overrule *Fo Son Hing* and ordered that the case be sent back to the Subordinate Courts (now the State Courts) and for the accused's defence to be called. It was clear that at the time of the alleged commission of the offences by the accused persons, the prosecution would fail based on the prevailing law in *Fo Son Hing*. Despite this, the Court of Appeal did not discuss the possible legal effects of the overruling of *Fo Son Hing* on the rights of the accused persons in *Tan Meng Khin* (e.g., whether the overruling was legal? Should the overruling apply to the present accused persons? When would the overruling take effect?). Instead, it was a local commentator, Seng (1996), who subsequently raised these issues in a law journal article, arguing that a judicial decision overruling prior decisions in a criminal case

[66] [2014] 4 SLR 661 at [110].

[67] *Public Prosecutor v Tan Teck Hin* [1992] 1 SLR (R) 672 at [44].

[68] *PP v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [62] (citing *Reference re ss 193 and 195.1(1)(c) of the Criminal Code* 56 CCC (3d) 65 at 86 per Lamer J). See also *Cheong Seok Leng v PP* [1988] 1 SLR(R) 530 at [59] per Chan Sek Keong JC (as he then was) on the need for publication of laws ("under our legal system, a person is at liberty to do as he wishes except that which is prohibited by law or which encroaches upon the rights of others. It is therefore only reasonable that this liberty should not be indirectly curtailed by laws and regulations unknown or inaccessible to him").

[69] *PP v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [74]. Note that Singapore has recognised a doctrine of substantive legitimate expectations as a standalone head of judicial review subject to certain safeguards: see *Chiu Teng @Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

[70] [1995] 2 SLR(R) 420.

[71] On the meaning of "offence" in s 40(3) of the Penal Code (Cap 224, Rev Ed 2008).

should only have prospective, not retrospective, effect. This is mandated by Article 11 of the Singapore Constitution which embodied the principle of *nullum crimen nulla poena sine lege*:

> (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

The word "law" in Article 11, Seng (1996) contended, would include judicial pronouncements having the force of law. In tandem with the *nullum crimen nulla poena sine lege* principle, this should also include judicial interpretations of statutory provisions that create criminal liability (Seng 1996: 10).

Shortly after *Tan Meng Khin*, the Singapore Court of Appeal was presented with another opportunity in *PP v Manogaran s/o R Ramu*[72] to apply prospective overruling in a criminal case. This case involved the offence of trafficking in a cannabis mixture under the Misuse of Drugs Act[73] ("MDA"). Section 2 of the MDA defines 'cannabis mixture' simply as meaning "any mixture of vegetable matter containing tetrahydrocannabinol and cannabinol in any quantity". The prior Court of Appeal decision in *Abdul Raman bin Yusof*[74] found that Parliament had introduced the term "cannabis mixture" into the MDA to deter the camouflaging of cannabis by mixing it in broken form with some other vegetable matter such as tobacco. The term "cannabis mixture" refers to a mixture of the cannabis plant *and* another species of plant. No other species of plant was, however, present in the "cannabis mixture" in *Manogaran*. As the trial judge in *Manogaran* was bound by *Abdul Raman*, he concluded that there was no proof of possession of cannabis mixture and acquitted the accused.

The Court of Appeal in *Manogaran* decided to depart from *Abdul Raman* based on its interpretation of the statutory provision[75] and referred to Article 11 of the Singapore Constitution and the *nullum* principle.[76] More importantly, the Court of Appeal recognised that "[w]hen judges overrule previous decisions, they always have to consider the retroactive effect of these judicial pronouncements. The slate of the past cannot just simply be wiped clean of its chalk marks" (Seng 1996: 13). It also explained why it endorsed the principle of prospective overruling in fulfilment of the aims of ensuring legitimate expectations and fairness to the accused:

> By judicial overruling of a previous decision, new law may be pronounced for the first time. . . . [I]f a person organises his affairs in accordance with an existing judicial pronouncement about the state of the law, his actions should not be impugned retrospectively by a

[72] [1996] 3 SLR(R) 390.

[73] (Cap 185, 2008 Rev Ed).

[74] [1996] 2 SLR(R) 538.

[75] [1996] 3 SLR(R) 390 at [45] and [47].

[76] [1996] 3 SLR(R) 390 at [36] (noting "the importance of ensuring certainty and coherence in the law" and that "against this, the potential injustice which may be caused by continued adherence to a mistaken decision has to be weighed").

> subsequent judicial pronouncement which changes the state of law, without his having been afforded an opportunity to reorganise his affairs. This seeks to protect his reasonable and legitimate expectations that he did not act in contravention of the law.

The Singapore courts have further extended prospective overruling to a case concerning the judicial overruling of an existing *practice*, and not merely of an existing legal rule or principle. In *Abdul Nasir bin Amer Hamsah v Public Prosecutor*,[77] the appellant was charged for kidnapping, convicted and sentenced to life imprisonment and 12 strokes of the cane. The central issue was whether a sentence of "life imprisonment" meant imprisonment for the remainder of the prisoner's natural life, or 20 years' imprisonment which was the prevailing practice in Singapore at that time. The Court of Appeal decided that "life imprisonment" meant imprisonment for the remaining natural life of the prisoner. As is consistent with *Manogaran*, the Court of Appeal in *Abdul Nasir* applied prospective overruling based on the concept of legitimate expectations in connection with the *nullum* principle.[78]

What was unique in this case is the Court's emphasis on protecting legitimate expectations "even though they did not acquire the force of a legal right"[79]:

> Lawyers, the Prison Department, police officers and other law enforcement officers have come to know and understand the practice to be so. Advice might have been dispensed on the basis of such a *practice*. This seemed to be a clear example of a legitimate expectation engendered by a *practice* of many years. Therefore, the courts ought to protect individuals who arranged their affairs according to this *expectation*, bearing in mind that we were here concerned with the fundamental matter of a person's liberty for the rest of his life.[80]

This conclusion in *Abdul Nasir* on the overruling of an existing practice (rather than a legal rule or principle) was reached notwithstanding the language in Article 11 of the Singapore Constitution that "no person shall suffer greater punishment for an offence than was prescribed by *law* at the time it was committed". However, to the extent that the *nullum* principle originated from the *common law* of which Article 11 is a restatement, and given the doctrine of protecting legitimate expectations and the liberty of the accused person, it should not be objectionable to interpret the common law principle more liberally in order to apply prospective overruling to an existing practice in such a case.

The reference point for prospective overruling to take effect, according to the Court of Appeal in *PP v Manogaran*, is the date of the delivery of the judgment itself: all acts done subsequent to the delivery of the judgment will be governed by the law in *Manogaran* whilst acts done prior to this date will be governed by

[77] [1997] 2 SLR(R) 842.

[78] [1997] 2 SLR(R) 842 at [51].

[79] [1997] 2 SLR(R) 842 at [55].

[80] [1997] 2 SLR(R) 842 at [56] (emphasis added). See also *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [125].

the law as stated in *Abdul Raman*.[81] Thus, the Court upheld the acquittal since the applicable law at the time when the accused allegedly committed the offence was as stated in *Abdul Raman*.[82] In *Abdul Nasir bin Amer Hamsah v Public Prosecutor*,[83] as discussed above, the court applied the same principle so that the judicial pronouncement as to the meaning of life imprisonment should only affect offences committed after the date of delivery of the judgment. Based on the principle of prospective overruling, the old practice of 20 years' imprisonment would therefore continue to apply to the accused person.[84]

Constitutional Invalidation of Statutes and Prospective Overruling

Article 4 of the Singapore Constitution states that it "is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".[85] It is noted, however, that the power of judicial review over the constitutional validity of statutes is not explicitly written into the Constitution. Nonetheless, it is recognised that Singapore courts have the power to conduct a review of the constitutionality of statutes.[86] To date, there has only been one case in which the Singapore High Court has struck down a statute for unconstitutionality.[87] However, there was no discussion of prospective overruling in that case. Hence, the actual effect of the constitutional invalidation of statutes on the doctrine of prospective overruling has yet to be judicially examined in Singapore.

Nevertheless, there is no reason to suggest that prospective overruling will not, in principle, apply to a case involving the constitutional invalidation of statutes. The

[81] [1996] 3 SLR(R) 390 at [86].

[82] [1996] 3 SLR(R) 390 at [88].

[83] [1997] 2 SLR(R) 842.

[84] Cited in *Public Prosecutor v Allan Tan Kei Loon* [1998] SGHC 281 (consideration of sentence for a charge under Section 304(a) of the Penal Code for culpable homicide not amounting to murder).

[85] The Court of Appeal has recently clarified that the "court's power to void laws for inconsistency with the Constitution under Art 4 *can* be interpreted to include the power to void laws which *pre-date* the Constitution": see *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [59].

[86] *Chan Hiang Leng Colin v PP* [1994] 3 SLR(R) 209 at [50]; *Marbury v Madison* 1 Cranch 137 (1802) (US Supreme Court); *Dr Bonham's case* (1610) 8 Co Rep 114.

[87] *Taw Cheng Kong v PP* [1998] 1 SLR(R) 78 per M Karthigesu JA (that section 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) violated Article 12 of the Singapore Constitution). The High Court decision was subsequently overruled by the Court of Appeal in *PP v Taw Cheng Kong* [1998] 2 SLR(R) 489.

Court of Appeal in *Public Prosecutor v Manogaran s/o R Ramu*[88] had *implicitly* recognised that prospective overruling is applicable to the constitutional invalidation of statutes, though it was on the facts a case of statutory construction. Upon an examination of the US cases of *Great Northern Rly Co v Sunburst Oil & Refining Co*[89] and *Linkletter v Walker*[90] as well as the Indian Supreme Court decision of *IC Golaknath v State of Punjab*[91] in which prospective overruling was specifically applied to the constitutional invalidation of statutes, the Court of Appeal in *Public Prosecutor v Manogaran s/o R Ramu*[92] stated that "[t]here is no compelling reason why prospective overruling must be confined only to issues arising under the Constitution".

Though the High Court in *Public Prosecutor v Hue An Li*[93] did not specifically deal with the constitutional issue, Menon CJ had referred to the Supreme Court of Canada decision of *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*[94] in which unilingual enactments of the Manitoba legislature were rendered invalid due to s 52(1) of the Constitution Act 1982. In that case, the Supreme Court of Canada noted that such a declaration of invalidity would lead to "a legal vacuum" and "undermine and offend the principle of the rule of law"[95] which does not "tolerate chaos and anarchy".[96] As such, it decided that the statutes be "deemed temporarily valid and effective" from the date of the decision till a minimum period necessary for translation, re-enactment, printing and publishing has elapsed.[97] However, it should be highlighted that the Canadian court "did not invoke the language of prospective overruling".[98]

Closer to home, apart from the Indian Supreme Court as mentioned above, the Malaysian courts have also applied prospective overruling to the constitutional invalidation of statutes. The High Court in *Public Prosecutor v Hue An Li* specifically referred to *I C Golaknath & Ors v State of Punjab & Anrs*[99] in which the Supreme Court of India held that certain land reform statutes[100]

[88] [1996] 3 SLR(R) 390.

[89] 287 US 358 (1932).

[90] 381 US 618 (1965).

[91] [1967] 2 SCR 762.

[92] [1996] 3 SLR(R) 390 at [73].

[93] *Public Prosecutor v Hue An Li* [2014] 4 SLR 661 at [124].

[94] (1985) 19 DLR (4th) 1.

[95] (1985) 19 DLR (4th) 1 at [59].

[96] (1985) 19 DLR (4th) 1 at [88].

[97] (1985) 19 DLR (4th) 1 at [114]. See also Irish cases: *Murphy v Attorney General* [1982] IR 241 (Supreme Court); and *A v Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 IR 88.

[98] [2014] 4 SLR 661 at [119] per Menon CJ.

[99] [1967] 2 SCR 762.

[100] Namely, Punjab Security of Land Tenures Act, 1953 and the Mysore Land Reforms Act, 1953.

violated fundamental rights as guaranteed by the Indian Constitution. Subba Rao CJ described the "dilemma" as follows:

> The agrarian structure of our country has been revolutionised on the basis of the said laws. Should we now give retrospectivity to our decision, it would introduce chaos and unsettle the conditions in our country. Should we hold that because of the said consequences Parliament had power to take away fundamental rights, a time might come when we would gradually and imperceptibly pass under a totalitarian rule.[101]

As property interests had been transferred and settled in reliance on them, the majority judges of the Supreme Court decided that the statutes should be struck down with prospective effect only. Subba Rao CJ in *Golaknath* laid down the parameters for prospective overruling:

(1) The doctrine of prospective over-ruling can be invoked only in matters arising under our Constitution;
(2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India;
(3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.[102]

The doctrine of prospective overruling has also been applied to constitutional invalidation of statutes and circulars in subsequent Indian cases.[103]

In *Public Prosecutor v Dato' Yap Peng*,[104] the Malaysian Supreme Court by a majority ruled that s 418A of the Criminal Procedure Code[105] was unconstitutional on the basis that it amounted to an executive and legislative incursion of judicial power contrary to Article 121 of the Federal Constitution. Section 418A was thus struck down as void. However, applying the doctrine of prospective overruling, all proceedings of convictions and acquittals which had taken place under s 418A prior to the date of the judgement in *Dato' Yap Peng* were not affected.

One conceptual issue arises from the consequences of a judicial decision that a statute is unconstitutional. Under Article 4 of the Singapore Constitution (which

[101] [1967] 2 SCR 762 at [59].

[102] [1967] 2 SCR 762 at [76].

[103] E.g. *Kailash Chand Sharma v State of Rajasthan & Ors* [2002] 3 LRI 574 at [55] (constitutional invalidity of a state government circular); *Somaiya Organics (India) Ltd v State of Uttar Pradesh and anor and other appeals* [2001] 2 LRI 799 (invalidity of Uttar Pradesh Excise Act 1910 permitting levy of excise duty in the form of vend fees); *Indira Sawhney v Union of India & Ors* [2000] 1 LRI 390 (invalidation of Kerala State Backward Classes (Reservation of Appointments or Posts in the Services under the State) Act 1995).

[104] [1987] 2 MLJ 311.

[105] (FMS, Cap 6).

is in *pari materia* with Article 13(2) of the Indian Constitution[106] and Article 4 of the Malaysia Constitution[107]), unconstitutional statutes are rendered void. How does this impact on the doctrine of prospective overruling? For Singapore, the connection between the issue of unconstitutionality of statutes and prospective overruling was discussed in a law review article entitled "Towards A Maintenance of Equality (Part 1): A Study of the Constitutionality of Maintenance Provisions that Sexually Discriminate" published in 1998. Low et al. (1998) examined the constitutionality of ss 69(1) (maintenance during marriage) and 113 (maintenance upon dissolution of marriage) of the Women's Charter. These provisions state that women may claim maintenance from their husbands and former husbands.[108] Yet, wives and former wives are not legally obliged to maintain their male counterparts.[109] The authors argued that such provisions would flout the equality and equal protection clause, namely Article 12 of the Singapore Constitution. In reality, no such attempt has been made to strike down the provisions in Singapore. The main issue here is really the putative applicability of the doctrine of prospective overruling given the assumption that the provisions are unconstitutional.

The authors took the view that prospective overruling should not be applied to the maintenance provisions should they be unconstitutional. They noted one conceptual problem with prospective overruling in the context of the unconstitutionality of statutes: "where a ruling of unconstitutionality is applied prospectively, it necessarily means that the courts are upholding an unconstitutional law, albeit only for a period of time" (Low et al. 1998: 67). This would appear to contradict the position stipulated in Article 4 of the Constitution that such unconstitutional statutes are void. Moreover, the authors noted that the provisions on maintenance are not merely procedural but involve substantive law. Where a substantive criminal law, for example, is declared unconstitutional, the "crime" is a nullity that is "immune from punishment" under the Constitution and thus cannot be protected by the doctrine of prospective overruling. Thus, they argued, if the provisions on maintenance are unconstitutional, the ruling should apply retrospectively (Low et al. 1999).

Article 11 of the Singapore Constitution should govern in a case involving the retroactivity of criminal laws. When a provision of a criminal statute prescribing the offence or the punishment has been rendered void for unconstitutionality, the language of Article 11 (that "no person shall be punished for an act or omission

[106]"The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void".

[107]"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void".

[108]But see *ANH v ANI* [2014] SGHC 184 at [11] (that maintenance supplements the division of matrimonial assets and is awarded only to even out any remaining financial inequities after division); and *BG v BF* [2007] 3 SLR(R) 233 at [74]–[75].

[109]But see recent debates and judicial statements e.g. *ADB v ADC* [2014] SGHC 76 at [10]–[11] in which Choo Han Teck J advocated abolishing the idea that maintenance is an unalloyed right of a divorced woman. See also Priscilla Goy, "Base spousal maintenance on need and not gender?" [2014] 26 Apr_ST; and Alicia Wong, "Time to allow men to claim?" [2010] 22 Mar_TODAY.

which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed") should, assuming the elements are satisfied, suffice to protect the accused person from conviction under that offence or the punishment. Since the criminal statute was void ab initio, it is clear that the accused person cannot be punished for the alleged offence or be made to suffer greater punishment under an impugned provision.

The conceptual problem due to the void statutes remains, however, for non-criminal cases. The High Court in *Public Prosecutor v Hue An Li*, which concerned an issue of statutory construction, did not deal squarely with the problem of statutes rendered void due to unconstitutionality. In Malaysia, the doctrine of prospective overruling in *Dato' Yap Peng* has been applied and/or endorsed in subsequent cases without examining the problem of void statutes under the Federal Constitution.[110] On the other hand, it is noted that the minority judges in *Golaknath* had rejected prospective overruling on the basis that it would contravene the language in Article 13(2) of the Indian Constitution on void statutes. Wanchoo J in *Golaknath* had stated that:

> In view of the provisions of Art 13(2) it would be impossible to apply the doctrine of prospective overruling in our country, particularly where a law infringes fundamental rights. Article 13(2) lays down that all laws taking away or abridging fundamental rights would be void to the extent of contravention. ... ... the prohibition contained in Article 13(2) went to the root of the State power of legislation and any law made in contravention of that provision was void ab initio....[111]

The other minority judge, Bachawat J, with reference to the impugned land reform statutes, added that:

> If they are void, they do not legally exist from their very inception ... ... To say that they were valid in the past and will be invalid in the future is to amend the Constitution. Such a naked power of amendment of the Constitution is not given to judges.[112]

As the Singapore courts have rarely struck down a statute for unconstitutionality, and the application of prospective overruling is more the exception rather than the norm, this conceptual conundrum may not have a significant impact in practice. At a conceptual level, however, with respect to non-criminal cases to which Article 11

[110]E.g. *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681 (High Court) per Gopal Sri Ram J (Securities Commission Act 1993 and the Securities Industry Act 1983 invalid for unconstitutionality; the declaration as to invalidity held to be prospective only and to include only the present case and cases registered from the date of the ruling); *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 MLJ 421 (prospective overruling applied to an invalid circular issued by the senior assistant registrar of the High Court to licensed auctioneers which circular was *ultra vires* the Auction Sales Enactment Rules). See also *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 at [48]–[49] per Abdul Malek Ahmad PCA (references to prospective overruling in *Dato' Yap Peng*).

[111][1967] 2 SCR 762 at [144].

[112][1967] 2 SCR 762 at [306].

is not applicable, Article 4 of the Singapore Constitution would, strictly speaking, override the judge-made doctrine of prospective overruling. In India, one court has argued that prospective overruling is not contrary to law as in a constitutional case, the "invalid law has not been held to be valid. All that has happened is that the declaration of invalidity of the legislation was directed to take effect from a future date".[113] This argument does not, however, adequately address the issue of statutes that are void ab initio in accordance with the constitutional supremacy clause.

Conclusion

It has been two eventful decades since the courts have applied the doctrine of prospective overruling in Singapore. In the 1990s, the doctrine of prospective overruling was applied in criminal cases with special reference to Article 11 of the Singapore Constitution which prohibited retroactive criminal laws. In 2014, in *Public Prosecutor v Hue An Li*, a judicial framework based on the general default position of retroactivity of judicial pronouncements, coupled with discretion for judges to limit such retroactive effect in exceptional circumstances, was developed for both criminal and civil cases. Thus far, the doctrine of prospective overruling has been engaged in cases where the judicial pronouncement has overruled an existing rule or principle on the interpretation of statutory provisions as well as practices. However, there have not been any cases in Singapore where prospective existing overruling has been applied to departures from a purely common law principle or where a statute has been rendered void for unconstitutionality. There is nothing, however, in the judicial framework in *Public Prosecutor v Hue An Li* that would preclude its application to the prospective overruling of precedents on purely common law issues or the constitutional invalidation of statutes, though a conceptual problem concerning the treatment of void statutes under Article 4 of the Singapore Constitution remains.

An optimist may justifiably take the view that the landmark decision in *Public Prosecutor v Hue An Li* has taken Singapore into a new era insofar as prospective overruling is concerned. From a situation where prospective overruling was confined to criminal cases and Article 11 of the Constitution, the decision now paves the way for a more nuanced examination of the general judicial framework for prospective overruling in both civil and criminal cases. The conservatives amongst us will caution that it is not possible, at this early stage, to predict with certainty how the new judicial framework for prospective overruling will fare. Nonetheless, the framework, as it stands, provides a good starting point for ascertaining whether prospective overruling should be applied to a given case. At the same time, it affords subsequent courts sufficient flexibility to identify, apply and weigh the appropriate

[113] *Somaiya Organics (India) Ltd v State of Uttar Pradesh & anor and other appeals* [2001] 2 LRI 799 at [38] (Supreme Court of India, Civil Appellate Jurisdiction).

factors according to the factual matrix at hand. It is hoped that in doing so, the judges will, individually and collectively, contribute to an even more sophisticated and refined judicial framework for the future.

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Judicial Rulings with Prospective Effect- I.B. General Legal Theory-19th Congress of the International Academia of Comparative Law-Vienna 2014

Questionnaire to National Reporters from E. Steiner, General Reporter

1. Could you give a brief description of how the precedent operates in your legal system? In particular, are there any established rules of precedent? Are they rules of practice or legal/constitutional rules?
2. What is the status of judge-made law in your legal system? Are there any theories of judicial decisions such as, or similar to, the so-called 'declaratory theory'? What is the nature of the joint operation of statutes and precedents as sources of law?
3. In your legal system, what are the jurisprudential problems raised by case law generally, and by the rules of precedent in particular, which have not be dealt with under the previous rubrics?
4. In your jurisdiction has the retrospective effect of judicial decisions been criticised? Since when? By whom? Did this lead (such in France, for example) to the setting up of working groups aimed at discussing possible limits to the retrospective effect of judicial decisions?
5. Has the technique known as 'prospective overruling' been used by the courts in your country? By which courts? On what grounds? To what degree? Was it done implicitly and/or explicitly? More generally, could you define 'prospective overruling' from the point of view of your jurisdiction and tell what situations it covers.
6. In your jurisdiction, have the courts ever indicated the circumstances/contexts (this may be under the form of guidelines) in which it might be appropriate to use or not to use this technique? Have they also stated the moment at which and the terms on which overruling should take effect?

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7. What are the advantages and disadvantages of prospective overruling that have been identified in your jurisdiction?
8. Has it ever been argued in your jurisdiction that prospective overruling should not be used when a decision turns purely on the construction of a statute?
9. In the same vein, is there any issue that prospective overruling turns judges into 'undisguised legislators'?