IN THE SUPREME COURT OF INDIA
(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. 4056-4064 OF 1999

IN THE MATTER OF :

Mineral Area Development Authority ….APPELLANT

Versus

M/s Steel Authority of India & Others …RESPONDENTS

VOLUME-II (M) - ADDITIONAL WRITTEN SUBMISSIONS

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IN THE SUPREME COURT OF INDIA

(CIVIL APPELLATE JURISDICTION)

WRIT PETITION (CIVIL) NO 512 OF 2018

IN THE MATTER OF:

M/S. Sanghi Infrastructure M. P. Ltd. …Petitioner

Versus

Union of India and Another …Respondents

NOTE ON BEHALF OF THE ATTORNEY-GENERAL FOR INDIA

I. Generally on Retrospectivity and Retroactivity

1. Across almost all jurisdiction, a retroactive law has been the target of criticism by the Courts, as also by commentators[1]. The primary factor militating against retroactive effect of any legal norm is the reliance factor on existing law. In the field of taxation, the reliance factor assumes importance in view of certainty in tax planning and financial management. This would be particularly so in the context of corporate establishments or trading entities as compared to individuals. The importance of reliance factor stated differently in the field of criminal law (see, Maru Ram vs Union of India (1981) 1 SCC 107; Sukhdev Singh v State of Haryana (2013) 2 SCC 212) will always be a reckoning. Harshness and in-equitability in impacting human transactions are related factors. Again, in the context of retroactive legislations, it is said that a tax statute may be retroactive if it does not violate the obligation of contract or divest vested rights. Factors such as arbitrariness or burdensome, convey the same aspect. We thus talk about reasonableness as a relevant guide.

[1] (See, Untermyer v Anderson 276 US 440 (1928); Nichols v Coolidge, 274 US 531 (1927); An Analysis of Retrospective Income Taxation, 17 Taxes 76 (1939); Slawson, Constitutional and Legislative Consideration in Retroactive Lawmaking, 48 Calif L Rev 216 (1960); Ballard, Retroactive Federal Taxation, 48 Harv L rev 592, 593 (1935). Williams, Retroactivity in the Federal Tax Field, U So Cal 1960 Tax Inst 79, 79-80) Also Julius Stone, Precedent and Law: Dynamics of Common Law Growth (1985).

2. What is stated generally in respect of retrospectivity of a law, deserves well to be extended in the context of declaration of law by the Court. Whether, the law is declared for the first time on an interpretation of a legislation, or a new principle of law is stated overruling an existing set of precedents, the question would be one of "adjudicative retroactivity". From the citizens' point of view, it is the impact of the law which matters. The need for extension may become more just and proper when the Court does not merely declare a law but also propounds certain new principles, or lays down new understanding, for instance as happened in the instant case of the constitutional entries in the legislative fields. See in this regard the following statement:

> *Under the umbrella both the way in which changes in the law affect situations before the change occurs and the way in which such changes affect situations which begin before, but continue after, the change occurs. And, of course, I include both changes made by legislation and changes made by judicial decisions. (Lord Rodger 'A Time for Everything under the Law: Some Reflections on Retrospectivity' (2005) 121 Law Quarterly Review 57, 59.*

3. Ever since Golaknath, Supreme Corut has grappled with this subject in different context: Woman Rao, Atam Prakash, Ramzan Khan, Indra Sawhney, and Harsha Dingra to cite a few. The balancing principle always present in many context is stated as weighing the merits and demerits of retroactive application of an overruling decision[2]

4. The distinction between law being declared invalid on the grounds of legislative competence and infringement of rights is well-settled. Different consequences flow from the distinction. As far as the subject matter of the cases at hand is concerned, they all revolve around lack of legislative competence. By bringing into reading a different perspective on the relevant entries of the Constitution, this Hon'ble Court has made it possible for the legislations in question to be suitably re-enacted. It can be stated that the question of competence of the State legislatures to deal with the subjects in questions without breaching the legislative competence principles and without entrenching into the

[2] See (Linklether vs Walker 381 4 S 618, 624-625); Chevron Oil Co. v. Huson: 404 U.S. 97 (1971)

field available for Union of India, has been propounded for the first time, and the resolutions have not been clearly foreshadowed. The consideration of the impact of the law propounded by this Hon'ble Court on many intervening events, including legislative developments in any connected or other fields of taxation, must be kept and open field. As a sequitur, it should follow that the declaration of law by this Hon'ble Court cannot be said to have an effect going back in time. The choice of dates for any backward effect would also be problematic.

5. In *"Retroactivity and the Common Law"* by *Ben Juratowitch* (Hart Publishing; 2008) it was observed that the value of certainty, in particular the ability to rely on the law, and a conception of negative liberty, have been established as rationales for a general presumption against retroactivity. Giving fair warning of legal consequences supports the fulfillment of the values of certainty and liberty and requires mention for that reason.

6. Related to the concept of fair warning is the idea of the law's role in guiding conduct. Lon Fuller was a notable adherent to this idea and expressed his objection to retroactive laws thus;

> *"Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."*

7. On the same theme, Lon Fuller referred to 'the brutal absurdity of commanding a man today to do something yesterday'.

8. In Kleinwort Benson LTD. v. Lincoln City Council, we see the following observation "*the theoretical position has been that Judges…discover and declare the law…when an earlier decision is overruled the law is not changed, its true nature is disclosed…this theoretical position is a fairytale in which no one any longer behaves… but while the underlying myth has been rejected, its progeny… the retrospective effect of change made by judicial decisions remains."*

9. In *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. [[1994] 1 AC 486., 525 (HL)]*, it was states that '*the basis of the rule' requiring the courts to presume against a retroactive effect 'is no more than simple fairness, which ought to be the basis of every legal rule'. 'To change the legal character of a person's act or omissions after the event will often be unfair'.*

II. Prospective Overruling or Prospective Application of Declaration of Law is Part of Constitutional Jurisprudence

10. Doctrine of Prospective Overruling has been recognized as part of the Constitutional cannon from the time of *Golak Nath & Ors v State of Punjab & Anr.* [(1967) 2 SCR 762] and has since been followed in *Belsund Sugar Co Ltd v. State of Bihar* [(1999) 9 SCC 620] and *Somaiya Organics (India) Ltd. & Anr. v. State of UP & Anr* [(2001) 5 SCC 519].

11. This Hon'ble Court has rightly observed in *Somaiya Organics,*

> *"According to this Court, it was a rule "of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law*."

12. However, the doctrine demands that a prospective overruling must be expressly applied. As this Hon'ble Court has held in *M A Murthy v State of Karnataka,* (2003) 7 CC 517,

> *"It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling."*

13. *India Cements* has been in operation for over three decades. The hardship if any felt by the States has also been taken care of by several *validating legislations* providing against

refund. Application of the judgment dated 24.07.2024 retrospectively or retroactively will upend numerous transactions already concluded as also affecting matters such as impossibility of passing on the burden of a tax or a levy on to a third party. `

14. To reiterate, whether the consequences of reading a statute and giving a sanction to its retrospectivity, would be so unfair, will always weigh with the Court. The several factors to be taken into account in doing so, will also be a matter for consideration. Unlike declaration of law with respect to a statute and changes in the reading of such a law by later judicial pronouncements, in the field of constitutional interpretation, it would always be a valuable principle that declaration of law by the Court should look towards the future in its application. This would be more so when the pronouncement in question is virtually a paradigm shift and a clear departure on the reading of the text of the Constitution. as was noted in American Trucking Association v. Smith: *the constitution does not change from year to year. All constitutional changes should look towards the future.*

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4056-4064 of 1999

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And

Transfer Petition (Civil) No. 613 of 2009

Hindalco Industries Limited v. State of U.P.

and

Transfer Petition (Civil) No. 626 of 2009

Kanoria Chemicals and Industries Limited v. State of U.P.

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Dated : 30.07.2024

Filed By :

ABHA JAIN

AOR for Respondent No. 3

1

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 4056-4064 of 1999
Mineral Area Development Authority v. Steel Authority of India
And
Transfer Petition (Civil) No. 613 of 2009
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and
Transfer Petition (Civil) No. 626 of 2009
Kanoria Chemicals and Industries Limited v. State of U.P.

Written Submissions of Mr. Vijay Hansaria, Sr. Advocate
on behalf of Shaktinagar Special Area Development Authority

1. This Hon'ble Court in *Kesoram Industries*[1] vide judgement dated 15.01.2004 upheld the power of the State to levy tax on mineral rights. The said proposition of law has been affirmed by this Hon'ble Court in the present case by the judgement dated 25.07.2024[2]. In para 3 of the judgement, this Hon'ble Court has noted that the State legislature exercises their power to impose tax by applying mineral value or royalty as a measure of tax pursuant to decision in *Kesoram.* It is, thus, submitted that all the parties knew about their liability to pay tax on mineral rights by the States.
2. The validity of the U.P. Special Area Development Authority Act, 1986 and the Shaktinagar Special Area Development Authority (cess on mineral rights) Rules, 1997 were upheld by the Allahabad High Court in *Ram Dhani Singh*[3] (01.03.2000) and this Hon'ble Court in *Kesoram Industries* dismissed appeal against the High Court judgement. Thus, the Act and the Rules having been

[1] *State of W.B. v. Kesoram Industries Ltd.* (2004) 10 SCC 201.
[2] *Mineral Area Development Authority v. M/s Steel Authority of India & Anr*, 2024 INSC 554.
[3] *Ram Dhani Singh v. Collector,* 2000 SCC OnLine All 214 : AIR 2001 All 5.

upheld by the High Court and this Hon'ble Court, there is no reason for the prospective applicability of judgement of this Hon'ble Court in the present case.

3. It is submitted that the principle of prospective overruling is applicable only when the judgement invalidates a legislation or introduces a new interpretation overruling its earlier decision. This principle is irrelevant when a legislation has been upheld or an earlier judicial pronouncement is affirmed. In the present case, this Hon'ble Court has merely reaffirmed the position of law declared in *Kesoram Industries* which has been holding the field for two decades since 2004.
4. *Blackstone's* famous dictum that **Court only finds law and it does not make law** has been referred with approval by this Hon'ble Court in *Golak Nath*[4]. However, it is left to the discretion of the Court to limit retroactivity and mould relief to meet the ends of justice by applying the doctrine of prospective overruling. In the said case, doctrine was applied "having regard to the history of the amendments, their impact on the social and economic affairs of our country and the chaotic situation that may be brought about by the sudden withdrawal at this stage of the amendments from the Constitution."
5. The judgement of *Golak Nath,* though overruled in *Kesavananda Bharati*[5] on the question of amending power of Parliament*,* the principle of basic structure doctrine was applied prospectively from the date of the judgement (24.04.1973)

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[4] *Golak Nath v. State of Punjab*, AIR 1967 SC 1643 : 1967 SCC OnLine SC 14 Para 49, 52, 53; followed in *ECIL v. B. Karunakar* (1993) 4 SCC 727, Para 35.

[5] *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225, Para 1344.

due to the reason that the earlier amendments[6] were already upheld by this Hon'ble Court.

6. This Hon'ble Court in *M A Murthy*[7] held that the "**Normally, the decision of this Court enunciating a principle of law is applicable to all cases** irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law."

7. This Hon'ble Court in *Patil Automation*[8] has held that the case of **prospective overruling is normally applied when it is a case of reversal of an earlier view**. It was held "This is not a case where this Court is overruling its previous decision, which was the case in the decision reported in *SBP & Co.*[9] This is also not a case where this Court is pronouncing a law under which various transactions have been affected void. It may be true that the doctrine of prospective overruling may not be confined to either of the above circumstances as such and its ambit is co-extensive with the equity of a situation whereunder on the law being pronounced it is likely to intrude into or reopen settled transactions. This is not a matter where the Court is overruling a decision of the High Court which has held the field for a long period."

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[6] Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955 and Constitution (Seventeenth Amendment) Act, 1964.
[7] *M.A. Murthy v. State of Karnataka*, (2003) 7 SCC 517, reiterated in *B A Linga Reddy v. Karnataka State Transport Authority* (2015) 4 SCC 515, Para 35.
[8] *Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd.*, (2022) 10 SCC 1, para 110.
[9] *SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618.

8. The respondent craves leave to refer to the celebrated work of *Eva Steiner*[10] titled ***'Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions.'*** In the said book, the author has said that judgements are retrospective in operation since judges adjudicate on past facts which give rise to the dispute. The question of prospective operation applies only in 3 situations:
    a. Where the Court change its ruling in respect of validity of a statute
    b. Where the Court decides on the meaning or operation of a statute and
    c. Where the Court overrules its earlier decisions.
9. It is submitted that it has been recognised internationally that retroactive application of a judicial pronouncement is the normal rule and prospective overruling is an exception to be applied based on appreciation of individual facts. *Please see* :
    a. U.S. Supreme Court decision in *Chevron Oil Co.*[11]:

> "In our cases dealing with the nonretroactivity 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, *see, e.g., Hanover Shoe*[12], or by deciding an issue of first impression whose resolution was not clearly fore-shadowed, *see, e.g., Allen*[13]. Second, it has been stressed that "we must . . .

[10] *Eva Steiner* is a 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).

[11] *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

[12] *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 496.

[13] *Allen v. State Board of Elections,* 393 U.S. 572.

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*[14]. 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 nonretroactivity."

b. Canada Supreme Court

(i) *British Columbia*[15]

"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."

(ii) *Hislop*[16]

"...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,

[14] *Linkletter v. Walker,* 381 U.S. 629.

[15] *British Columbia v. Imperial Tobacco Canada Ltd.,* 2005 SCC 49.

[16] *Canada (Attorney General) v. Hislo,* 2007 SCC 10.

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."

c. High Court of Australia in *New South Wales*[17]

"The Court was invited, if it should come to the 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."

[17] *Ha v. New South Wales,* (1997) 189 CLR 465.

10. It is submitted that there is no pleading by the writ petitioners that retrospective application of judgement would create undue hardship on them. To the contrary, if the judgement is held to be prospective, there would be serious hardship on the States' exchequer, particularly on **the mineral rich poor States**, where the source of revenue largely depends on taxes on mineral rights.
11. It is further submitted that this Hon'ble Court has consistently held in a series of cases[18] that a party who eventually fails in the final adjudication cannot take benefit of interim orders issued during the pendency of proceedings. It is the duty of the Court to put the parties in the same position as they would have been, but for the interim orders. The mining companies cannot be allowed to take advantage of any interim order, once their writ petition is finally dismissed.
12. It is thus submitted that no case for prospective overruling has been made out.

Dated : 30.07.2024 **Filed By :**

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DRAWN BY :
Kavya Jhawar, Advocate

[18] *Nava Bharat Ferro Alloys Ltd. v. Transmission Corporation of A.P. Ltd.,* (2011) 1 SCC 216 (Para 35 - 37), *State of Rajasthan v. J. K. Synthetics Ltd.,* (2011) 12 SCC 518 (Para 20 - 23), *Indian Oil Corporation Ltd. v. State of Bihar* (2018) 1 SCC 242 (Para 30 - 32), *State of U.P. v. Prem Chopra,* 2022 SCC OnLine SC 1770, (Para 24).

Ius Comparatum – Global Studies in Comparative Law

Eva Steiner

Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions

Springer

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

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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

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[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.

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[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

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[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 the temporal 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]

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[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;

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[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]

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[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]

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[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]

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[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

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[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.

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[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

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[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.