

## RETROSPECTIVITY AND THE RULE OF LAW

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# Retrospectivity and the Rule of Law

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## Preface

This book has been a long time in gestation. It arose out of interests generated in 1984 and I proposed it to Oxford University Press in 1989 after the publication of my first monograph. I expected it to be the next book project—to follow no later than my next sabbatical. The publishers have waited with more patience than an author has any right to expect and I would like to emphasize my gratitude to the editors who have been patient in the face of the many projects I have felt obliged to start and complete in the interim. While the list of activities were always acknowledged to be worthy—from starting a law school and the establishment of research centres at Melbourne, Griffith and now the United Nations University, to an array of large research projects that were central to the success of those centres—I marvel at the patience of the world's greatest academic publisher accepting yet another deferment in a series of serial delays.

There is a great irony in the length of the delays. As an undergraduate and postgraduate student, I occupied the traditionally rarefied areas of legal, ethical and political philosophy. I completed my law degree following strong advice from a philosophy mentor rather than my law lectures—reflecting, in part, the quality of education offered by law schools in the 1970s; a matter which I considered to be a lost cause until the late 1980s.<sup>1</sup> My doctorate sought to deal with the issue of whether legal theory was more or less helpful in seeking to understand law in terms of systems—a question which I sought resoundingly to resolve in the negative.<sup>2</sup> While, like most doctorates, it occupied a central element in the sorting of my ideas and the development of my thoughts which I still apply on a daily basis, it was a work of high theory seemingly removed from much of the work that has followed.

The irony is that it was the issue of retrospective law making that led to that fundamental shift—from a largely theoretical interest in jurisprudence to an application of law, ethics and other disciplines in the humanities and social science to current issues of practical concern. It was that shift that led to the range of other projects interrupting the natural process by which one monograph follows another.

This led to projects on legal education, applied ethics, corruption and integrity systems, public law, *coups d'état*, restoring the rule of law in the Asia Pacific, the ethics of intervention, and sovereignty and intervention. It also led to an invitation to start a law school (at Griffith), the establishment of a research centre in

<sup>1</sup> See *Legal Education: New Foundations*, Cavendish, London, 1998 (with Jack Goldring and Ralph Simmonds).

<sup>2</sup> I learnt many things from my supervisor, Professor Colin Tapper, but one thing he did do was to cure me from seeking to split my infinitives.

Melbourne (the Centre for Philosophy and Public Issues), and a sequence of increasingly larger research centres at Griffith (the National Institute for Law, Ethics and Public Affairs; the Australian Research Council Key Centre for Ethics, Law, Justice and Governance and the United Nations University Institute for Ethics, Governance and Law). These undertakings led to much writing and grant getting but allowed precious little time for the project that stimulated my 'applied turn'.

My first writing on the Rule of Law was a review essay of Professor Geoffrey de Q. Walker's tome on *The Rule of Law* in 1989 (Melbourne University Law Review and then Public Law). My first paper was presented at the Australian Law and Society Conference in December 1990, which led to a research project and report for the Victoria Law Foundation in 1991 and the publication of two articles with Andrew Palmer, then a Research Fellow at the Centre for Philosophy and Public Issues. It also led to an extensive seventeen-page book plan with the sequence of arguments by which I would establish the case. However, a month after I delivered that paper, I was invited to come to Queensland to become Foundation Dean of Law and I sought the first of many extensions from my patient, if increasingly less expectant, publishers.

I would like to thank those who helped with the research for the book and did the first drafts of some of the text—Andrew Palmer, Dr Tom Round, Dr Jennie Louise, Hugh Breakey, and Sophie Blencowe. While I had written an early paper and prepared an extensive seventeen-page book plan as early as 1989 setting out the sequence of arguments, many contributed to the fleshing out of those arguments and the search for legal cases and jurisprudential writings that supported and, more importantly, contradicted the positions taken and the conclusions drawn.

While acknowledging contributions, I take full responsibility for the final arguments. Nevertheless, the value that I place on their contributions mean that the text refers to 'we'—not out of quasi-regal, professorial arrogance, but out of collegial respect and appreciation.

No acknowledgement by a modern academic would be complete without the genuine recognition of the sufferance of families for the increasingly quixotic eccentricity of those who persist in thinking that the academy is a place where people should, as in this book, pursue their ideas wherever they take them. In the first monograph that I wrote, I acknowledged the forbearance of my young son who had accepted a lesser dose of paternal participation in his life because of the book I was writing; and I apologized in that Preface that it did not have as many pictures as the books he was used to. In the intervening years, I have completed many books and articles without any noticeable increase in pictorial content. Fortunately, he and his sister are no longer in need of picture books, studying philosophy themselves. To them and their long-suffering mother, I dedicate this book.

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# Defining retrospectivity

## 1.1 Introduction

The widespread feelings of hostility towards retrospective law noted in the Introduction might leave some under the misapprehension that there is a general understanding and agreement on what retrospectivity is. In fact, there is no agreed definition of retrospectivity; most definitions appear to have either serious flaws or, at least, significant limitations. Indeed, there are genuine difficulties finding such a definition.

It is not, of course, uncommon for the villainy of the cavalierly condemned to be imprecisely defined. It is easier to condemn on charges that do not have to be specified and contradicted. Ironically, such condemnation is against one of the key tenets of the 'rule of law' which retrospectivity is accused of offending. It is, of course, an irony, that those accused of retrospectivity are not always accorded the rule of law protections that the charge be defined and known in advance.<sup>1</sup>

This chapter provides a brief overview of the history of retrospectivity then turns to the attempt to define it. After evaluating the strengths and weaknesses of a number of definitions, it concludes that retrospectivity does not appear to be an all-or-nothing characteristic of laws, but rather is a matter of degree. This has significant implications for the 'absolutist' opponents of retrospectivity who seek to reject all retrospective law making.

## 1.2 A historical overview of retrospectivity

Concern about retrospective law making has a long history. The idea that there is something wrong with punishing people for conduct which they engaged in before its proscription is an ancient one, although it is often conflated with other aspects of legal unfairness. The democratic Athenian polity established by Solon and Cleisthenes was based on the ideal of *isonomia*, or 'equality of laws to all manner of persons and a certainty of being governed in accordance with known

<sup>1</sup> While a concept does not have a human right in itself, the rule makers against whom the accusation is made do—as do any whose rights the rule maker is trying to preserve.

rules'.<sup>2</sup> Greek jurists expressed disapproval of excessive changes to the laws (which are objected to on the same grounds as retrospective law). Demosthenes claimed that the Locrians were 'so strongly of the opinion that it is right . . . to preserve the institutions of their forefathers . . . that if a man wishes to propose a new law, he legislates with a halter round his neck'.<sup>3</sup>

Indeed, to the Greeks, changes to the law were essentially undesirable because they were seen as undermining the laws' moral authority. Placing their faith in the educative value of laws and *mores* rather than their deterrent power (as Machiavelli, Hobbes and Bentham did), the Greeks were suspicious of changes that diluted the antiquity of laws and hence cast doubt upon the wisdom of their ancestors. Frequent or retrospective changes were therefore undesirable for this reason, and not primarily for the reason usually assumed today (namely, that retrospective laws do not give notice to those affected by them).<sup>4</sup> As we shall see, arguments for stability and against retrospectivity are often related. Many of those who strongly condemn retrospective laws broadly conceived really want the law to stay the same—whether because they prefer the old law or the source from which it came.<sup>5</sup> While recognizing this tendency, this book will argue that there is a perfectly defensible general and individual interest in the stability of law that should be respected and taken into account by all law makers. This is related to but separate from the general and individual interest in the prospectivity of law which must likewise be respected and considered carefully. Each increases the capacity of law to guide citizens by making it possible to know in advance the laws that will be applied to their actions. Retrospectivity reduces this by changing the rules after the citizen has acted; frequent prospective legal changes reduce this by making it harder for the citizen to keep up with the rules that will be applied.<sup>6</sup>

The Roman republic and Empire clearly distinguished retrospective from other new law making. In the Roman Republic and Empire, jurists propounded the twinned maxims *nulla poena sine crimen* (no penalty without a crime) and *nulla crimen sine lega* (no crime without a law). Retrospective laws were contrary to the spirit of these ideals. Such laws were unknowable at the time of the alleged offence. This was a source of criticism that went beyond retrospective laws.

<sup>2</sup> Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 93.

<sup>3</sup> Demosthenes, 'Against Timocrates', Section 139, repr. in JH Vince (trans) *Against Meidias, Androtion, Aristocrates, Timocrates, Aristogeiton*, Loeb Classical Library No 299 (Harvard University Press, Mass., 1951) vol. 3, 463.

<sup>4</sup> Walker, p. 242. Although this reason may also have played some part in the measures they imposed to curtail new legislation.

<sup>5</sup> That more authoritative source may be, in addition to ancestors: God, Reason, the founding fathers (especially popular with literalist constitutionalists), and legislature (for those who oppose judicial law making). However, those who take 'education' and 'notice' seriously note the difficulty of communicating and explaining law to those to whom it applies.

<sup>6</sup> As we will see, these are only generalizations. Some retrospective changes will restore the law to that which the citizens thought it was when they acted and some changes to law can make it easier to understand.

According to Blackstone, the Emperor Caligula was criticized for allegedly writing laws ‘in a very small character, and hung them above high pillars the more effectually to ensnare the people’.<sup>7</sup> Interestingly enough, Caligula’s ploy indicates that even he recognized the undesirability of retrospective criminal laws!

The Romans were not, however, averse to new laws and were the first Europeans to codify law—providing an exemplar for later European states. Such codes were intended to give clear notice to the public of the laws that applied to them. In general, however, the trend over time was toward greater codification of laws (and hence, more emphasis on giving notice). Such codification did not mean that laws were necessarily reasonable or just<sup>8</sup> (let alone comprehensible). But the very fact that ancient lawmakers (Hammurabi, Moses, Solon, Justinian) took pains to codify laws indicates that written advance warning was thought desirable. It probably was not regarded as *necessary*, however, being seen more as either a gracious supererogatory act on the part of the sovereign (reflected in the commonly used reference to such codifiers as law-givers). However, it would be surprising if at least some did not see it as a wise move to make law more effective by making it more predictable and thereby making it easier for the lawgivers’ subjects to modify their behaviour in the way desired by the lawmaker.

In the Christian tradition, the concept of Natural Law produced a tension between the desirability of notice and the idea that such notice is not necessary for just punishment. In his Epistle to the Romans, Saint Paul wrote that ‘where there is no law, neither is there any transgression.’<sup>9</sup> Despite this, Gentiles who had not heard of the Ten Commandments were still thought to be accountable for violating the Natural Law that is ‘written in their hearts, their conscience also bearing witness’.<sup>10</sup> Thomas Aquinas held not only that ‘promulgation is necessary for the law to obtain its force’, but also that ‘the Natural Law is promulgated by the very fact that God instilled it into men’s minds so as to be known by them naturally’.<sup>11</sup> By such arguments they could recognize the importance of notice but claim that notice had been given.

Protestants have traditionally been more ambivalent about Natural Law<sup>12</sup> and other traditions are hostile. Islam traces its very foundation—the giving of the Qur’an to the Prophet Muhammad—to Allah’s insistence that ‘we never punish

<sup>7</sup> Sir William Blackstone, *Commentaries on the Laws of England*, 1765, repr. (University of Chicago Press, Chicago, 1979) vol. 1, 46. This, again, emphasizes the importance of notice—that the problem with retrospectivity is essentially one of notice—that it is hard to discover the text of a law that has not yet been made. However, it should also be noted that it was not impossible to read the text and it is not impossible to predict the kinds of changes that lawmakers may choose.

<sup>8</sup> Babington, p. 7.

<sup>9</sup> Romans 4.15.

<sup>10</sup> Romans 2.15.

<sup>11</sup> Aquinas, *Summa Theologica*, chapters I–II, Question 90.

<sup>12</sup> Peter J. Leithart, ‘Natural Law: A Reformed Critique’, 3 (2) *Premise*, 29 February 1996 at 4. See also C. Stephen Evans, ‘Apologetics in a New Key: Reviving Protestant Anxieties over Natural Theology’, in Mark McLeod and William Lane Craig (eds), *The Logic of Rational Theism: Exploratory Essays* (E Mellen Press, Lewiston, NY, 1990); and John Calvin, *Institutes of the Christian Religion*, Geneva, 1539, Book 2, Chapter 8, Section 1, trans. Henry Beveridge (Eerdmans, Michigan, 1989) 317. This may be partly explained by the different relationship between man and God. While

[humankind] before I have sent a messenger' (ie a prophet bringing written scriptures).<sup>13</sup> Jewish scholars have largely traditionally rejected the idea of a Natural Law discoverable by reason alone; although some (for example, Joseph Albo, 1380–1444) concede that acts such as theft and murder are *intrinsece malum*, others source even these prohibitions to divine revelation.<sup>14</sup>

The Roman maxims cited above can be seen to imply a ban on retrospective criminal laws and we saw above that even Allah reportedly bound himself to a principle of non-retrospectivity. However, firm rules against retrospective criminal laws are relatively recent in the West. In the English Courts, the presumption against retrospectivity was a canon of interpretation only rather than a ground of invalidity.<sup>15</sup> A stretched interpretation of Lord Chief Justice Coke's celebrated and controversial dictum in *Dr Bonham's Case* that the common law would 'adjudge . . . to be utterly void' any Act of Parliament that was 'impossible to be performed'<sup>16</sup> could perhaps be read as encompassing retrospectivity.<sup>17</sup> Lord Chief Justice Coke was certainly expounding some key rule of law principles—going beyond the principle that no person should be judge in their own cause (the issue in *Dr Bonham's Case*) to impossibilities and absurdities. However, it is not clear whether retrospectivity as a subject matter was in fact within his ample field of fire—or whether common law judges can ever be too precious about the retrospective law-making of others given the inevitably retrospective effect of judicial decision-making (see Chapter 5). The English *Bill of Rights 1689* included no prohibition of retrospective laws (this was probably because it was not a particular abuse that was, or could be,<sup>18</sup> committed by the Stuart kings, and also because Parliament was concerned with asserting rather than limiting its own

Catholics continued to believe that there was one earthly institution that could authoritatively (and, much later, 'infallibly') interpret God's will and God's law, Protestants believed in an individual relationship with God mediated, at best, by a local congregation or presbytery. Thus, any Protestant version of divinely inspired natural law would mean that there could be many claimed authoritative statements of Natural Law. While this was fine with a Protestant view of 'conscience' and ethics, it was bound to create difficulties for law.

<sup>13</sup> Qur'an, Sūrah 17 ('*al-Israa'*'), v15.

<sup>14</sup> J David Bleich, 'Judaism and Natural Law', in Martin P Golding, (ed), *Jewish Law and Legal Theory* (New York University Press, 1993) 94.

<sup>15</sup> For detailed discussion of the interpretation of retrospective law see DC Pearce and RS Geddes (2001) '*Statutory Interpretation in Australia*', Butterworth pp. 250–270; or (1988) 99, 180–195.

<sup>16</sup> (1610) 77 ER 638, 8 Coke's Reports 107a, 2 Brownlow's Reports 225 at 113b.

<sup>17</sup> On the basis that Parliamentary sovereignty is 'always limited by Parliament's ability to express its legislative intentions with sufficient precision and clarity'. Douglas E Edin 'Rule Britannia', 2002, available at <[http://www.utpjournals.com/product/utij/523/523\\_edlin.html](http://www.utpjournals.com/product/utij/523/523_edlin.html)>, referring to comments by Lord Hoffmann in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at 131. Also see discussion of different interpretations of Coke's comments in Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, Melbourne, 1988), 117–119; and Mark D Walters, 'Common Law, Reason, and Sovereign Will', 2003, available at <[http://www.utpjournals.com/product/utlj/531/531\\_walters.html](http://www.utpjournals.com/product/utlj/531/531_walters.html)>.

<sup>18</sup> As the *The Case of Prohibitions* (1607) 12 Co Rep 63 stripped them of the ability to make law through judicial decisions and *The Case of Proclamations* (1611) 12 Co Rep 74 stripped them of independent legislative power.

legislative supremacy).<sup>19</sup> Thus, although the common-law presumption against retrospectivity was well established, it was regarded as only a guide to ascertaining the legislature's intent, not as a ground for setting aside that intent if expressed unambiguously.

For Blackstone, the common law presumption against retrospectivity and the sovereignty of Parliament were both well established. Clearly expressed retrospective laws were valid. But for Blackstone they were clearly wrong. After citing Caligula's ploy mentioned above he wrote:

There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'.<sup>20</sup>

American lawyers fighting for independence were much influenced by Blackstone. They took on board his revulsion for retrospective criminal laws but were in revolt against the sovereignty of Parliament. Unlike the 'glorious' revolutionaries of 1688, they saw Parliament as well as King doing wrong and sought to constrain the federal legislature that they created and the colonial legislatures that they reformed.

The prohibition of retrospective laws began early, with Delaware passing a Declaration of Rights and Fundamental Rules in 1776, article 3 of which provided 'That retrospective Laws punishing Offenses committed before the Existence of such Laws, are oppressive and unjust and ought not to be made'.

Jefferson was against all retrospective laws<sup>21</sup> but the prohibitions in other states and in the Federal Constitution were, like Delaware's, confined to retrospective criminal statutes. Although Madison raised an extension of the ban beyond criminal laws during the Constitutional debates, it was not pressed when Dickinson consulted Blackstone and announced that Blackstone's definition only covered criminal cases.<sup>22</sup> This was apparently sufficient to determine the matter.<sup>23</sup>

<sup>19</sup> It should be remembered that the 1689 Bill of Rights is still a pre-enlightenment document—emphasizing the collective rights and privileges of an institution along with its members and beneficiaries, the Parliament, against the sovereign rather than the individual rights of citizens against a legislature.

<sup>20</sup> Greg Bailey *From Revolution to Reconstruction: A Biography of William Blackstone (1723–1780)*, available at <<http://odur.let.rug.nl/~usa/B/blackstone/blackstone.htm>>.

<sup>21</sup> 3 US 386 (1798) PER Chase at 391 and per Paterson J AT 396.

<sup>22</sup> Blackstone's Commentaries, Introduction, Section the First, On the Study of Law, 1765, p 46, available at <<http://www.yale.edu/lawweb/avalon/blackstone/introa.htm>>.

<sup>23</sup> For example see Joseph Story (1833) *Commentaries on the Constitution of the United States* 3: §§ 1338–39 'The general interpretation has been, and is, that the phrase applies to acts of a criminal nature only'. This commentary and others available at <<http://press-pubs.uchicago.edu/founders/>>.

Subsequently, in *Calder v. Bull*<sup>24</sup> Justices Chase and Paterson made reference to Blackstone's definition as applying to 'crimes and nothing else' in determining that the *ex post facto* clause was indeed limited to criminal laws.<sup>25</sup>

While the Constitution confined itself to banning retrospective criminal laws, it went further in also banning Bills of Attainder. Although the link between the two seem strong to some commentators who are strongly influenced by that document,<sup>26</sup> it was not apparently clear to Jefferson who apparently drafted a Bill of Attainder for the Virginia legislature that would have executed an English loyalist.<sup>27</sup> The courts refused to enforce the Bill and insisted on trying the 'attainted' under normal processes.

At the time, Bills of Attainder were still occasionally used by the British Parliament (as well as the related, if milder, procedure of 'impeachment' which the Americans retained while the British let it fall into desuetude for politicians, finding the 'no confidence' motion sufficient for removing unwanted politicians and leaving serious charges to the courts). Both measures might be defended from charges of retrospectivity on the grounds that they generally claimed breaches of law by those who were punished by attainder or dismissed by impeachment.<sup>28</sup> Jefferson's Bill alleged high treason, murder and arson—crimes that had long stood, though their application to those fighting a war, especially one in defence of the previously accepted sovereign, was as doubtful then as it was in the Hick's case cited in the introduction. The Bill of Attainder can be seen as a survival from the mediaeval origins of the 'High Court of Parliament' when law making and adjudication were not clearly distinguished and the parliament's role was to declare law rather than to make it. As such, the principal problem with Bills of Attainder is a breach of the concept of the separation of powers that emerged in the seventeenth and eighteenth centuries rather than retrospectivity as such. However, the breadth and novelty of some of the grounds that could be cited meant that Bills of Attainder were often, effectively, retrospective and can be argued to be contrary to the rule of law as generally interpreted.

The French revolutionaries followed the New World ban on retrospective criminal laws. The French *Declaration of the Rights of Man and of the Citizen* of August 1789 declared (in Article 8) that 'no one shall suffer punishment except . . . by virtue of a law passed and promulgated before the commission of the

<sup>24</sup> 3 US 386 (1798) per Chase at 391 and per Paterson J at 396.

<sup>25</sup> Greg Bailey *From Revolution to Reconstruction: A Biography of William Blackstone (1723–1780)*, available at <<http://odur.let.rug.nl/~usa/B/blackstone/blackstone.htm>>.

<sup>26</sup> For example, Geoffrey de Q Walker, *The Rule of Law*, pp. 316–322.

<sup>27</sup> For example, see Joseph Story (1833) *Commentaries on the Constitution of the United States* 3: §§ 1338–39 'The general interpretation has been, and is, that the phrase applies to acts of a criminal nature only'. This commentary and others available at <<http://press-pubs.uchicago.edu/founders/>>.

<sup>28</sup> Thomas Jefferson, 'Bill to Attaint Josiah Phillips 28 May 1778', in Julian P Boyd et al (eds), *The papers of Thomas Jefferson* (Princeton University Press, Princeton, 1950), Papers 2, pp. 189–91; available from The Founders' Constitution, University of Chicago Press, Volume 3 Article, Section 9, Clause 3 Document 4 at <[http://press-pubs.uchicago.edu/founders/documents/al\\_9\\_3s4.html](http://press-pubs.uchicago.edu/founders/documents/al_9_3s4.html)>.

offence'. Although intended as a permanent standard by which to judge the legitimacy of later statutes, the *Declaration* was not judicially enforceable against the legislature (like the 'glorious revolutionaries' the framers of the Declaration saw the problem as the King and the solution as the legislature, with the latter expected to follow its own grand declarations of principle). It is not entirely clear whether the framers of the American Constitution expected their prohibition on passing any 'Bill of Attainder' or '*ex post facto* law' to be judicially enforceable. The ability of courts to exercise judicial review to invalidate statutes was something that was only later (and retrospectively?) determined by Chief Justice Marshall in *Marbury v. Madison* in 1803.<sup>29</sup> By that time, France's constitutional experiment had been converted into a military and imperial dictatorship.

In the twentieth century, human rights charters drafted by international bodies and common-law jurisdictions have sought to limit retrospective laws. The 1948 *Universal Declaration of Human Rights* (UCHR) guarantees, in Article 11, that 'no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed'. This was subsequently amplified in the 1966 *International Covenant on Civil and Political Rights* (ICCPR). European Union nations are bound by Article 7 of the *European Convention on Human Rights and Fundamental Freedoms* 1950 (ECHR) which prohibits retrospective laws except in relation to acts deemed criminal at the time of commission according to 'general principles of law recognised by civilised nations.'

These instruments, being matters of international law, do not have direct domestic effect in all systems. But their terms have been followed in most if not all post-1945 Bills of Rights. For example, a suspicion of retrospective law is reflected in the *Canadian Charter of Rights and Freedoms* 1982, the *New Zealand Bill of Rights Act* 1990, and the UK *Human Rights Act* 1998,<sup>30</sup> with constitutional effect. Article 11 of the Canadian Constitution also requires that for a person charged with an offence to be found guilty, the act must have constituted an offence under either Canadian law, international law or have been 'criminal according to the general principles of law recognized by the community of nations' at the time it was committed. In France, the prohibition of retrospective criminal laws (except where they benefit the accused) in the Declaration of the Rights of Man and Citizen now enjoys constitutional status by virtue of being incorporated into the preamble of the current Constitution.<sup>31</sup> Article 28(I) of the Indonesian

<sup>29</sup> (1803) 5 US 137.

<sup>30</sup> It should be noted, however, that while in all three countries these prohibitions are legally enforceable, in the last resort they can still be suspended (Canada) or even repealed (NZ, UK) by a normal legislative majority.

<sup>31</sup> Letter to Isaac McPherson, 13 August, 1813, available at <<http://www.answers.com/topic/ex-post-facto-law>>.

Constitution prohibits prosecution under retroactive application of law as this is considered a human right that may not be derogated from in any circumstances. Under Article 54 of the Constitution of the Russian Federation laws instituting or increasing liability have no retroactive force. An individual will not be held liable for the commission of an offence if it was not recognized as one at the time the act was committed and retroactive effect of a law applies only where liability has been lifted or the penalty reduced. Article 20 of the Indian Constitution provides protection from conviction for violation of a law that was not an offence at the time of the commission of the act and from a penalty greater than that under the law in force at the time. The Japanese Constitution, under Article 39, protects persons from being held criminally liable for an act which was lawful at the time it was committed. Article 35 in the Bill of Rights of the Constitution of the Republic of South Africa provides protection for an accused person from conviction where an act or omission was not an offence at the time it was committed under either national or international law. The Constitution of Argentina under section 18 mandates that punishment without trial based on a law enacted before an act was committed is not permitted.

The widespread use of rules or presumptions against retrospective law, particularly in modern times, may give the impression that there exists a clear, universally accepted and philosophically sound definition of retrospectivity. This is, however, very far from being the case. There is a great deal of disagreement on how retrospectivity ought to be defined. Indeed, there is even disagreement over how the search for a definition ought to proceed: whether it is better first to identify what is bad about retrospectivity and then proceed from there to a definition, or whether it is better to settle on what retrospectivity is before trying to decide what is wrong with it?<sup>32</sup>

As this book argues that retrospectivity is not universally bad and even occasionally a positive good (performing an indispensable role in a well-ordered society under the Rule of Law), we obviously take the latter view. It is generally better to settle the definitional question before tackling the normative one. Indeed, it is hard to meaningfully say that 'X is bad' or 'X is not bad' if X is already defined by its evil character. Sometimes the vehemence of the attack on retrospectivity seems to indicate that, for some, retrospectivity amounts to whatever they dislike about laws which are taken to be retrospective.

Even in the absence of pejorative distortion, defining retrospectivity is not an easy task. While most would prefer a definition which would give both necessary and sufficient conditions for a law to be retrospective, this may be an unattainable standard in practice. Under such circumstances, a good way to proceed is by a process of reflective equilibrium; that is, moving back and forth between a proposed definition and our pre-theoretical judgements concerning particular

<sup>32</sup> Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) *Am. B. Found. Res J.* 380 at 436n.

laws. If our definition includes retrospective laws which we are not prepared to regard as such, or (conversely) excludes laws which we are convinced *are* retrospective, then the definition is, to that extent, unsatisfactory. If, on the other hand, a definition does a very good job of tracking our most confident judgements, then we may be led to revise those more marginal intuitions which are incompatible with the definition.

In the remainder of the chapter, we therefore consider several proposed definitions of retrospectivity. In Chapter 1.3 and 1.4, we examine initially plausible but fatally flawed definitions of retrospectivity: one very broad, and another very narrow. Unfortunately, we cannot, as Goldilocks found in the little bear's porridge, find a definition that is 'just right'. However, in Chapter 1.5 we arrive at a relatively satisfactory definition of a retrospective law: namely, one alters the future legal consequences of past actions or events (or, to put it another way, that at least one of the laws that are used to determine the consequences of an action was not potentially discoverable at the time the action was taken). One result of this definition is that it shows that retrospectivity is not an all-or-nothing matter, but rather a question of degree; we explore this implication in Chapter 1.6 and 1.7.

Before we proceed, however, a brief note is in order. In the literature on retrospectivity, it is common to see a number of terms—especially the words 'retroactive' and '*ex post facto*'—in addition to 'retrospective'. Sometimes these terms are used to denote different aspects of retrospectivity; at other times, they appear to be used as interchangeable labels for the same phenomenon. Additional neologisms are also sometimes introduced to mark out various aspects of retrospectivity. This profusion of distinctions and terms poses a difficulty for a discussion of retrospectivity. To adopt any particular existing usage risks distorting others' arguments, either through misinterpretation or by forcing their arguments into definitional lines they were not originally intended to fit. On the other hand, to introduce new stipulative definitions of our own would only introduce more clutter into the conceptual landscape. We have, therefore, chosen to use the word 'retrospective' generally to cover all such permutations. However, in discussing writers who regularly attempt to make the distinction, it is easier to use the 'retroactive' to refer to retrospective laws whose retrospective effect is formally and explicitly stated by indicating that an enactment is to take effect before its promulgation. Laws so expressed will often, but not necessarily, have more and greater retrospective effects than other retrospective laws.

### 1.3 The broad definition

At one extreme of definitions of retrospectivity is the broad one suggested (though perhaps no longer advocated) by Professor Dennis Pearce; according to this definition, a law is retrospective if it 'impairs an existing right or

obligation'.<sup>33</sup> A similar definition suggests that legislation is retrospective if it alters the market value of a pre-existing asset. Thus, many tax reforms in the USA during the 1980s were labelled as retrospective because they removed tax shelters without saving or preserving benefits accruing to existing investments in these shelters (that is, 'grandfathering').

The latter definition is obviously inadequate (since it would not encompass laws which do not concern or affect assets), but is not, in any case, intended as a comprehensive definition of retrospectivity. The former definition, by contrast, is quite comprehensive, covering all types of legislation. It locates the defining feature of retrospectivity in the fact that it is rights and obligations which have arisen in the past that are affected by new law.

This definition seems to be *too* comprehensive. Indeed, it might be argued that this definition would define *all* legislation as retrospective. After all, the *raison d'être* of legislation is to create new legal rights and obligations, or vary existing ones; indeed, unless a right or obligation is altered, one wonders if any legal change has been made at all. It might be argued that laws are only retrospective on this definition if they *impair* existing rights or obligations, which means that they will not be retrospective if they enhance or add to existing rights and obligations.<sup>34</sup> But this, in fact, makes the definition *more* problematic, for it implies that laws which enhance or add to existing rights and obligations *cannot* be retrospective, even if they explicitly state that such rights are deemed to have had legal force—and ought to have been respected—from the beginning of time. Some laws which are *clearly* retrospective by any common-sense judgement would not be retrospective by this definition.<sup>35</sup> Of course, this objection is easily overcome by modifying the definition: legislation would be defined as retrospective if it *altered* existing rights or obligations. But then it *is* true that this definition of retrospectivity encompasses all legislation. This renders the definition counter-intuitive and useless: it is not part of our common-sense concept of retrospectivity

<sup>33</sup> DC Pearce, *Statutory Interpretation in Australia* (2nd edn, Butterworth, Sydney, 1981) 49. This definition, however, was omitted from the 3rd edition, which may indicate that Pearce no longer accepts it.

<sup>34</sup> This deals a fatal blow to the attempted distinction between laws that enhance and impair rights. The first problem with such a distinction is that it is very rare for the rights of one person to be enhanced without the impairment of the rights of others. This does not mean that law making regarding rights is a zero-sum game, so that enhancing or adding to one right will always have to come at the expense of impairing another right. However, there are very few purely Pareto efficient laws, unless one considers that an impairment of the rights of the state can be ignored, even when such an impairment directly affects the rights of others (as taxpayers, welfare recipients and beneficiaries of government action). And it is not particularly relevant here: if all legislation necessarily involves impairing rights, then the definition will include all legislation; if it does not, then the definition is even more problematic and will have to be modified in any case.

<sup>35</sup> The alteration of rights and obligations typically devolves around allocation and alteration of property rights. However, it also applies to criminal law. The classically prospective criminal law imposes penalties on future action and warns of their future imposition. These alter (by increasing) the obligations of those who are warned and alter (by increasing) the rights of those who benefit from the deterrence effect of the threatened penalties.

that all legislation is retrospective. This means that the definition is not capable of doing the work we would want such a definition to do: namely, that of distinguishing a class of laws which has a particular feature not shared by law in general.

The only motivation for adopting this problematic and inadequate definition may, in fact, be a rhetorical one: it would enable the application of the label 'retrospective'—along with the associated stigma—to almost any piece of law making that displeases the speaker. In other words, given the prejudice against retrospectivity, the ability to brand a particular piece of legislation as retrospective is useful to those who oppose that piece of legislation. However, under this broad definition, the label 'retrospective' will not pick out a feature which distinguishes that piece of legislation from any other, so to call that legislation 'retrospective' is to object to it only on grounds which would equally be an objection to all other pieces of legislation. It is only under a narrower definition that it would be possible for retrospectivity to be particularly objectionable. Thus, those who would adopt a broad definition in order to call a law retrospective, but also attempt to retain the negative associations of retrospectivity (which would require a narrow definition), would be guilty of equivocation: that is, using the same word with different meanings in order to make the desired conclusion appear to follow.

#### 1.4 The narrow definition

We have seen that the broad definition of retrospectivity is inadequate because it labels far too much legislation as retrospective. An attempt to give a satisfactory (and narrower) definition might, therefore, proceed by focusing on what legislation we ought to *exclude* from the category of retrospectivity. Thus Fuller,<sup>36</sup> for example, claims that legislation imposing tax on past financial gains (which were non-taxable at the time they accrued) is not retrospective, because such laws always operate prospectively: that is, they tell the taxpayer how much tax to pay in the future, even when the amount is calculated on the basis of past transactions.<sup>37</sup>

<sup>36</sup> In fact, critics of retrospectivity often turn out to dislike legislation in general, preferring to rely on courts to declare common-law rights case by case. See FA Hayek, *Law, Legislation and Liberty Vol 1: Rules and Order* (Routledge and Kegan Paul, London, 1973) 97 ff; Walker, pp. 115, 182, 313, 362, 391–2.

<sup>37</sup> It is ironic that, in 1982, when the Senate was debating proposed legislation against 'bottom-of-the-harbour' tax avoidance schemes, Senator Noel Chrichton-Browne (Liberal, WA) distinguished himself as one of the few Australian parliamentarians to cite a jurisprudential philosopher by quoting Lon L Fuller's view that making retrospective rules was one of the ways *not* to make law. [Australia, *Hansard*, Senate, 1982, vol. 96, p. 2599; citing Lon L Fuller, *The Morality of Law* (Yale UP, New Haven, 1964; 1969 rev. edn), 39.] However, he missed two points about Fuller's argument. One was the argument above that none of his arguments against retrospectivity applied to tax legislation. The other was that Fuller was arguing, not that all retrospective legislation was inevitably bad, but rather that if all law were retrospective then there would be no law. Only in an ideal world (where all laws are clear, well-publicized, never-changing and fully known in advance) could laws also be, and be expected to be, completely prospective.

ALP parliamentarians made an apparently similar argument in legislative debates over 'retrospective' taxation bills. It was argued that, because tax liability does not arise until the end of the financial year, no retrospectivity is involved if the Government changes the tax rules for the *entire* period at any time before it ends.<sup>38</sup>

The proposed benchmark of what *excludes* a law from the class of retrospective laws could, therefore, be said to be that it tells people what to do in the future. And from this we can derive a principle concerning which laws *are* retrospective: if a law that tells people what to do in the future is *not* retrospective, then a retrospective law must be one that tells people *what to have done in the past*.

This definition might be thought to be problematic on grounds which are precisely the converse of the objection to the broad definition: that is, according to this definition *no* laws will qualify as retrospective. It might be objected that even the most uncontentious and obvious examples of retrospectivity—that is, retrospective criminal laws—will not qualify as retrospective according to this definition, since they merely tell the courts what to do in the future (or tell people what penalties or legal consequences will apply to them in the future). To take an extreme example, Parliament might re-introduce the death penalty for certain crimes. Since no one is liable to this penalty before he or she is convicted, it could be argued—on the narrow definition—that it would not be retrospective to execute those who committed these crimes during the period before the legislation was enacted.

In fact, this is not entirely accurate: it would still be *possible*, in principle, to make retrospective legislation. Retrospective tax legislation would tell people, not how much tax they will have to pay in future as a result of the new law, but rather how much tax they *have to have paid in the past* as a result of the new law.<sup>39</sup> Similarly, it might be thought that a law which decreed that past conduct (legal at the time) is now decreed to have been criminal would still be retrospective on this definition.

This, however, shows that while it is, in principle, possible to make retrospective legislation under this definition, no *actual* legislation would ever qualify as retrospective, for it would be pointless and absurd to make such legislation. And this means that the definition is inadequate generally, since it fails to count as retrospective many pieces of legislation which are clearly and unequivocally retrospective according to our pre-theoretical judgements.

The motivation for adopting a narrow definition such as this is likely, as with the broad definition, to be a strategic one. In Fuller's case,<sup>40</sup> it seems to have been due to a total lack of sympathy for tax avoidance which led him to an ill thought out distinction. But the cost of this was to weaken the definition so that there was no law that could be retrospective.

<sup>38</sup> Fuller, 1964, p. 59.

<sup>39</sup> For example, Shadow Treasurer Ralph Willis, *Hansard*, Australian Commonwealth, House of Representatives, 1978, vol. 109, p. 1902; Senator Peter Walsh, *Hansard*, Australian Commonwealth, Senate, 1978, vol. 77, p. 2417.

<sup>40</sup> Cf. Fuller, p. 59.

What the discussions of both the broad and narrow definitions of retrospectivity have shown is that neither definition is adequate: the broad definition includes as retrospective pieces of legislation which are clearly not retrospective according to our pre-theoretical judgements; the narrow definition excludes pieces of legislation which *are* clearly retrospective according to our pre-theoretical judgements. Such definitions are not capturing our settled common-sense judgements concerning retrospectivity. The need for equivocation in using these definitions against particular pieces of legislation also shows that they do not even do the strategic work required of them by absolutist opponents of retrospectivity.

### 1.5 Capturing what we mean by ‘retrospectivity’

We have seen that both the broad and narrow definitions of retrospectivity fail to identify or capture what it is that makes a law retrospective. Both the broad definition and the narrow definition fail to do justice to our pre-theoretical intuitions that some laws are retrospective and some are not and that it makes sense to debate the desirability of retrospectivity.

Driedger, who ends up identifying a number of ways in which a law can be retrospective, makes a more plausible proposal concerning the defining feature of retrospective laws. According to Driedger, there are two broad categories of retrospective law: firstly, *retroactive* law, which ‘operates as of a time prior to its enactment’, and secondly, *retrospective* law, which ‘operates for the future only. It is prospective, but imposes new results in respect of a past event’.<sup>41</sup> This second kind of retrospectivity is further broken down into three subclasses:

- (a) statutes that attach benevolent consequences to a prior event;
- (b) statutes that attach prejudicial consequences to a prior event;
- (c) statutes that impose a penalty on a person who is described by reference to a prior event, but the penalty is not a consequence of the event.<sup>42</sup>

As Driedger goes on to show in discussion of particular cases, this composite definition does very well in capturing our pre-theoretical judgements concerning retrospectivity. However, it must be pointed out that the distinction between *retroactivity* and *retrospectivity*, while describing a real difference in the verbal form in which retrospective law is expressed, lacks normative and practical significance. In other words, the distinction fails to mark out any difference in the actual *effects* of retrospective law, since these effects are the same for both.<sup>43</sup> Other writers have

<sup>41</sup> Elmer A. Driedger, ‘Statutes: Retroactive Retrospective Reflections’ (1978) 56 *Canadian Bar Review* 268.

<sup>42</sup> Driedger, at 271.

<sup>43</sup> Even though some legislation does state that it takes effect before the date of its promulgation, the legal consequences are not altered until that promulgation. Consider a court which is considering a case in February 2005 that concerned events which occurred in July 2003. If a retrospective Act of

noticed this essential similarity: Fisch claims that the distinction is 'analytically incoherent',<sup>44</sup> and Graetz writes that 'because all changes in law, whether nominally retroactive or nominally prospective, will have an economic impact on the value of existing assets or on existing expectations, the distinctions commonly drawn between retroactive and prospective effective dates are illusory.'<sup>45</sup>

Thus, although this distinction is made by many of those analysing retrospectivity,<sup>46</sup> it is not as important as ordinarily assumed. The separation of (broadly) retrospective laws into 'retroactive' and 'retrospective' is not due to the operation of different 'retrospectivity-making features', since the practical effects are the same. As Driedger himself notes, all such laws have one thing in common: namely, they attach 'new consequences to an event that occurred prior to its enactment'.<sup>47</sup> This, then, can be used as a general definition for *all* kinds of retrospective laws, with one caveat: because it is useful to draw attention to the fact that retrospective law may remove expected consequences as well as imposing unexpected ones, a slightly different phrasing may be preferable. We can, therefore, define retrospective laws as laws which *alter the future legal consequences of past actions and events*.

Moreover, the reason for the consequences being altered is the same in all cases. It is because the legal texts that will be applied to determine the legal consequences of an action at a hearing in the future are not the same as the texts that were discoverable at the time the action was commenced. Between the action and the hearing, a new text has been created and it is used in substitution for, or in addition to, the texts which the individual affected could have discovered at that time. The legal consequences of actions may be altered by a text which is facially prospective (but which has retrospective effect) as well as those which are retroactive.

This definition certainly captures the pre-theoretical conception of the workings of retrospective laws: the common picture of retrospectivity being that of a person performing a discrete and completely lawful action on one day, and on the next having a sanction attached to their action despite the fact that it is already in the past. It also captures those laws which are commonly regarded as paradigmatic examples of retrospective legislation. In the Australian case, these are:

- The *Taxation (Unpaid Company Tax) Assessment Act 1982* (Cth). In this case, a combination of transactions occurring in, say, 1978 had the legal effect,

Parliament covering such events occurring after January 2003 has passed through all stages and received Royal Assent but is awaiting Proclamation in the Government Gazette, the court cannot apply the new law.

<sup>44</sup> Jill E Fisch, 'Retroactivity and Legal Change: An Equilibrium Approach' (1996–1997) 110 *Harvard Law Review* 1056 at 1069.

<sup>45</sup> Michael J. Graetz, 'Retroactivity Revisited' (1984–1985) 98 *Harvard Law Review* 1820, 1822. See also Louis Kaplow, 'An Economic Analysis of Legal Transitions' (1985–1986) 99 *Harvard Law Review* 509 at 510, 518–19.

<sup>46</sup> See, for example, W David Slawson, 'Constitutional and Legislative Considerations in Retroactive Lawmaking' (1960) 48 *Cal. Law Review* 216 Section 1 216–220; Stephen R. Munzer, 'A Theory of Retroactive Legislation' (1982–1983) 61 *Texas Law Review* 425–6.

<sup>47</sup> Driedger, at 276.

when they occurred, of avoiding liability to be taxed. But after the relevant legislation was passed in 1982, the legal effect was that a new liability to pay tax had arisen.

- The *War Crimes Amendment Act 1989* (Cth). In this case, prior to the enactment of the legislation, actions performed in Eastern Europe in 1944 (for example) had no legal consequences under Australian law at the time they occurred, even when followed by emigration to Australia. But the enactment of the legislation added the legal consequence of liability for conviction and sentencing in an Australian court.

On our definition, such laws are retrospective because they attach new consequences to actions or events that have already occurred. At the time, such actions (that is, entering into the relevant transactions, committing war crimes, or emigrating to Australia having committed war crimes) did not have the legal consequences of incurring tax (in the former case) or incurring liability for prosecution in Australian courts (in the latter case). The legal consequences were created after the acts were performed or the relevant event occurred.

Many laws have partially retrospective effects. The issue is not whether those effects are retrospective but the nature and extent of those effects and the reasonableness of their imposition.

## 1.6 Applying the definition

We have seen that our proposed definition of retrospectivity seems to do a good job of capturing the ‘paradigmatic’ cases referred to above. These, however, are straightforward examples involving discrete events occurring at specifiable times. In addition, each amendment specified direct legal consequences: a liability to pay tax in one case, a criminal penalty in the other. But neither the law, nor the lives that law is intended to regulate, are always so simple. First, human life is not always episodic: some transactions extend over time, and to achieve our most treasured goals we must typically plan and carry out a series of related actions, the consequences of which may take years to unfold. This is true of most economic goals: building a business, acquiring a customer base and building our assets. The economic goals that can be gained in a day or a week (the clever trade, the quick deal, the rearranging of assets and the tax avoider’s sleight of hand) are, rightly, valued less. If this is true of our most respected economic goals, it is doubly true of our non-economic goals: building our relationships with those we love and care about, raising a family, seeing our children through to a safe and prosperous future, building an institution (for example, a law school or a research centre), pursuing a career, gaining the respect of our neighbours, ‘making a difference’ and leaving the world a better place. Similarly, the law rarely attaches legal

consequences to a unique, isolated event. Usually, a combination of events is necessary to trigger a legal liability.<sup>48</sup>

Because of this, the question of whether a law is retrospective is often difficult to answer. In the case of extended plans or courses of action, a law may be enacted after the first action or event has occurred, but before the last has been completed; or it may be unclear whether the final event which triggers the liability occurs before or after the law is enacted. Such laws may be retrospective from one point of view, but prospective from another. Indeed, even in the relatively straightforward case of the *War Crimes* amendment, both the wartime conduct and the post-war voyage to Australia are necessary to trigger legal liability. This means that if a person committed war crimes in 1944, but emigrated to Australia *after* the enactment of the legislation, this legislation is, in a crucial sense, prospective in relation to that person. Indeed, it might even be said that a war criminal resident in Australia could have left the country while the retrospective law was going through the parliamentary process.

The problem is especially common in the areas of taxation and economic regulation (many of which fall under a category known as 'transition problems', discussed below in Chapter 5). Many investments (and virtually all that are profitable) are long-term. Someone who decides to buy a bond or build a factory does this in order to achieve future profits. Such profits will be the intended result of the original investment decision (alone, or in combination with subsequent decisions) and often investors are *de facto* committed once they make the original decision. Obviously, a change in the way these profits are taxed (made after the initial decision has been made) can significantly alter the consequences of the decision. An initial decision might be made because of, and with a reasonable expectation of, certain consequences following from a course of action initiated by this decision, but such consequences may never eventuate because of an intervening change in the law. Indeed, unplanned and undesirable consequences may instead be the result. And the person may have no opportunity to avoid such consequences, because the first event in the series—the initial decision to invest—is now long past.

Consider, for example, an Australian manufacturer who builds a widget factory at a time when the tariff on imported widgets is 45 percent. If that tariff is later reduced to 10 percent, or if a change in monetary policy causes the value of the local currency to rise sharply, the manufacturer may become unable to compete with imports. The manufacturer's chance of making any profit from the factory is thus eliminated.<sup>49</sup> In an alternative scenario, where the manufacture of widgets

<sup>48</sup> Pierre Schlag, 'Normativity and the Politics of Form' (1991) 139 *University of Pennsylvania Law Review* 801 at 931.

<sup>49</sup> Something like this happened in the first three disastrous years after Britain's 1979 election. High interest rates drove up the pound, despite inflation (reaching 22 percent at one point). This caused manufacturing output to nosedive—it did not return to pre-inflation levels until 1987—and unemployment to treble.

results in environmental pollution, the widget factory may be built at a time when emission-control standards are lenient. If these standards are later tightened, the widget factory may no longer be able to operate profitably.

Such examples show not only the difficulty of individuating past actions and events (and the consequences thereof) in a way which allows us to tell when the legal effects of these are altered by a change in the law. It is not just that *retroactive* laws do not exhaust the category of retrospectivity, and that facially prospective laws can have retrospective effect. Retrospectivity is also usually contingent on the particular history and circumstances of a given policy. A statute that declared that 'from the first of January next year, no person shall drive an automotive vehicle using leaded petrol' is prospective on its face, and would also be prospective were it enacted in the Australia of 1890 (or 2100). However, if enacted by an Australian legislature in 1950 or 1990, this seemingly prospective law, in fact, has a retrospective operation, because it affects the future consequences of a past action or event (namely, that of having bought a car which uses leaded petrol).

A similar example concerns the re-introduction of tertiary fees in Australia in 1989. The Higher Education Contribution Scheme (HECS) officially applied prospectively: students were charged only for subjects that they enrolled in after the relevant legislation took effect. However, in practice, the impact of the new scheme was heavily retrospective. A student about to complete the final year of a degree, and faced with the choice of whether to pay to complete the course, faced the loss of an investment of several years' study if they chose to drop out. Arguably, even a first-year student might be 'locked in' by their choice of senior school subjects nearly three years previously.

A supporter of HECS could argue that the retrospective effect is not, in fact, as significant as suggested above, since the re-introduction of some form of student fees had been on the political agenda since 1986 when the Commonwealth Government introduced a \$250 'administration fee'. But this merely raises the question of how specific advance notice must be when given in non-legal form. When what is known is not the precise form of the statute, but only the general policy intentions of the Government, can a person be deemed to have made their plans with reasonable notice of future legislation?

There are also various kinds of retrospective effect. One such effect occurs where a facially prospective statute has retrospective operation by attaching consequences to some voluntary conduct for which a 'head start' is useful: that is, it advantages those who have already undertaken a certain form of conduct relevant to the statute. For example, when the Australian Parliament in 1983–4 amended the *Commonwealth Electoral Act 1918* to provide for registration of political parties, it included a reservation that for the first three months after the amendments took effect, only parties with at least one representative in the Commonwealth parliament could register. Parties satisfying the alternative criteria—one State or Territory parliamentarian, or 500 voters as members—had to wait until this grace period expired. Since party names were reservable on a first-come, first-served

basis, this promoted the legitimate public goal of preventing, say, a small fringe group from registering the name 'ALP', 'Liberal Party', and so on at the expense of much larger and better-established bodies publicly recognized under those titles. Nonetheless, it did have a retrospective operation.<sup>50</sup>

The above scheme effectively created a new legal right on the basis of actions that had already been completed. In so doing, it imposed limitations on the actions of others. This can happen more generally when property regimes are created or altered. The imposition of an intellectual property regime would be one example. Important legal consequences are created because of past inventions or creative works. A similar effect is created when property regimes are changed by domestic policy or international agreement. This can happen, for example, where the length of copyright is extended (as in the Australia–US Free Trade Agreement)<sup>51</sup> or when zoning changes increase the density of housing permitted on a particular area or site.

Other examples occur when activities are licensed for the first time. It is common, when doing this, to license those who are already lawfully carrying out the activities in question. This provides a benefit to those who were already carrying out those activities, but is also potentially a detriment to those who were planning to do so. However, to the extent that a license is limited in duration or scope, this may be seen as reducing the scope of the activity currently engaged in.

Discussion of retrospectivity tends to concentrate on laws which have the effect of reducing the value of past acquisitions or transactions because they are the ones that generate the greatest complaints. A law may, on its face, leave legal title to some action or property untouched, while at the same time reducing the personal or economic value of that title. Statutes imposing *de futuro* restrictions on land use or disposal (to protect, for example, the environment, or the rights of traditional indigenous owners) have been criticized for having such retrospective impact. Constitutional prohibitions against uncompensated takings (USA Fifth Amendment) or acquisition on unfair terms (Australia, Section 51) guard against this form of implied retrospectivity when combined with an element of 'attainder'—for example, if number 10 Smith Street is singled out for eminent domain while numbers 8 and 12 are left untouched, due to the exigencies of freeway construction. However, constitutional regulation of 'takings' or 'acquisitions' does not cover cases where a facially neutral government decision has the effect of lessening a title's value.

Although this problem is often discussed in economic terms, using property rights as an illustration, it is equally applicable to personal rights and liberties. It might be argued that the economic aspect of the problem is more acute because items of property (including intangible but objectively valuable things such as

<sup>50</sup> It also verged on being a 'closed class' law, saved only by the fact that it was possible—if highly unlikely—that enough MPs might change their party allegiance before the three months ended to upset the pattern estimable at the time the amendments were passed.

<sup>51</sup> See <<http://www.ilaw.com.au/public/ftaarticle.html>> 2 March 2005.

a university education) are harder to change or revise than other life plans; indeed, their very fixity and scarcity contributes to their value. A statute declaring that from 1 July next it shall be lawful for persons other than legal practitioners to undertake conveyancing of land has the effect of devaluing, to some degree, the investment that admitted barristers and solicitors have put into obtaining their law degrees, articles of clerkship, admission and practising certificates. Similarly, a decision to increase New York's quota of taxi medallions may likewise have the effect of devaluing the investment taxi drivers have made in their business.

It is not clear that this emphasis on property rights is justified. While there may be some for whom the acquisition of property is at the centre of their life plans, for most, such acquisition is a means to other ends. To be sure, it is a necessary means to many ends. However, there are many ends which the possession of property might assist but which could be threatened more directly by prospective laws. Laws against 'inter-marriage', for example, can take purely prospective form (as did the early Nazi laws and most of the South African ones), but far more effectively shatter the plans of those affected (couples planning to marry) than, say, the imposition of environmental constraints on a factory which has managed to externalize the costs of the pollution it creates for much of its life.

In many cases, retrospective effects are not the goal (or at least, the primary goal) that the legislators desired to achieve. They are, at most, side effects, and may be genuinely regretted as such. But to deny that such laws do have retrospective operation would be to appeal to something like the 'doctrine of double effect', and this seems unreasonable, since such laws do impose a new burden as a consequence of past actions or events. Although as Oliver Wendell Holmes (Jnr) once noted: even a dog can tell the difference between being tripped accidentally and being kicked deliberately; it is still not happy about either.<sup>52</sup> Thus, our definition has the advantage of allowing that a law may be retrospective even when this is not explicit in its wording. Indeed, it shows how retrospective effect can arise from the interaction of two different kinds of *prospectivity*: the prospective law and the prospective consequences of one's actions. Both the action and the law have consequences in the future only, but a prospective law can operate retrospectively by changing the prospective consequences of an earlier action.

### *Status*

Some laws do not attach legal consequences to actions and events, but to statuses. On one interpretation, such laws are not retrospective, as can be seen from the court's ruling in the case of *Re a Solicitor's Clerk*.<sup>53</sup> This case concerned provisions under the *Solicitors' Act 1941 (UK)* for the making of orders prohibiting a person from being employed by any solicitor if they had been convicted of larceny. The solicitor's clerk argued that the application of such an order to himself was

<sup>52</sup> Oliver Wendell Holmes (Jnr), *The Common Law* (Little, Brown and Company, Boston, 1881).

<sup>53</sup> [1957] 1 WLR 1219.

retrospective, since he had committed the offences prior to the statute; prohibiting his being employed by a solicitor constituted a retrospective increase in the penalty for his crime. The court held that the application of the statute did not have retrospective effect, since the new consequences did not attach to the clerk's past acts; rather, they attached to his status as a person convicted of larceny.<sup>54</sup>

A different interpretation, however, might be thought to be implied by the ruling in another case, *Bakker v. Stewart*.<sup>55</sup> This case concerned a statute which removed the court's power to release on bond persons convicted of drink-driving offences. As in the case of the solicitor's clerk, it was argued that the new statute should not be applied to those who had committed their offences prior to its enactment. In this case the court agreed, holding that the application of the new law in such cases would amount to a retrospective increase in the penalty for their offence.

Pearce and Geddes try to reconcile the two judgements by focusing on the 'interconnection between the offence and the penalty'.<sup>56</sup> Similarly, Driedger holds that a distinction can be made, relevant to these cases, between laws which attach new legal consequences to past acts or events, and laws which attach new legal consequences to characteristics that arose in the past.<sup>57</sup> According to Driedger, only the former kinds of laws count as retrospective. In the case of the solicitor's clerk, the law was not concerned with the act of larceny, but rather with the characteristic of being a person convicted of larceny. In *Bakker v. Stewart*, however, the law was concerned with the penalty for the *act* of drink driving. It was not attached to the characteristic of 'being a person convicted of drink driving offences'. (It was not proposed, for example, to impose any new consequences on people who had been convicted of drink driving—and released on bond—under the old statute.)

It seems, however, that the distinction between attaching new consequences to actions or events, and attaching new consequences to characteristics, might not always be so clear. Even in the above example of the solicitor's clerk, it might be thought that the statute, while intended only to apply to a characteristic, did effectively attach a new consequence to the act of committing larceny—namely, that of being prohibited from being employed by a solicitor. And it might be pointed out that in many cases, it would be possible to re-describe acts or events in terms of characteristics: a statute which applied to the performance of certain acts might be re-described to apply to people who had the characteristic of having performed such acts. This is especially true if we are talking of penalties, which are imposed on conviction, and might therefore be described as attaching either to the offence the person committed, or to the person's status as a person convicted of committing the offence. Therefore both such acts fall under our

<sup>54</sup> Driedger, at 270–1.      <sup>55</sup> [1980] VR 17.

<sup>56</sup> Dennis C Pearce and RS Geddes, *Statutory Interpretation in Australia* (3rd edn, Butterworths, Sydney, 1988) 182.

<sup>57</sup> Driedger, at 271.

definition of retrospectivity. This does not mean that they are necessarily acceptable or not—and if the latter whether the objection to them is based on their retrospectivity.<sup>58</sup>

### *Matters of degree*

Whether a law is retrospective is not a simple matter of timing. Rather, retrospectivity will be a matter of degree, and will depend on how the actions and events occurring before the enactment of the new law relate to those occurring afterwards. We could even devise a rough ‘metric of retrospectivity’ by asking how long in advance the average individual would need to be informed before the consequences (that is, costs and benefits) of a law would no longer be considered *new* (unexpected or unforeseen) consequences of the actions to which the law applies. For example, if the typical Australian citizen owns a car for ten years before selling it, then a law declaring that all cars must run on non-leaded petrol, effective immediately, would have a ‘retrospectivity score’ of ten years. Alternatively, we could calculate this ‘retrospectivity score’ in terms of the loss in value of a person’s leaded-petrol car once the statute is enacted. Similarly, we could equate the ‘retrospectivity score’ of a law changing the penalty for murder from life imprisonment to execution with the average time between commission of the offence and conviction/sentencing (on the first way of calculating),<sup>59</sup> or the difference between the average sentence under the old law and the average sentence under the new law (on the second way).

One problem with this, however, is that the costs (or benefits) are often speculative, particularly in the case of laws altering the value of past acquisitions or transactions. Determining the effect of a law on an individual often depends upon a counter-factual guess about the use the owner *would* otherwise have made of their property. Take, for example, a law forbidding the clearing of currently undeveloped land. If the owner of such a piece of land had intended to leave the land undeveloped as a wildlife sanctuary, then the law does not as a matter of fact attach any new consequences to their actions in acquiring the land. However, if the owner had planned to create a new subdivision and construct a bridge to connect it to other land owned on the mainland, and would not have bought it otherwise, then the law, in forbidding the building of the bridge, forecloses the

<sup>58</sup> Some rules which are clearly attached to statuses will be objectionable regardless of whether or not they are retrospective.

<sup>59</sup> Some people might object that the ‘retrospectivity score’ of such a law ought to be zero, since no one’s *legitimate* plans are disrupted. However, this is to beg the question concerning the justifiability of retrospective laws; assuming that illegitimate plans cannot have ‘retrospectivity scores’ seems to assume that the application of such a law to murderers is not retrospective because it is not objectionable. What such an objection seems to be *really* saying is that the ‘retrospectivity score’ of illegitimate plans should not be given any *weight* in determining the justifiability of the law. But if we are trying to determine, not whether the law is justifiable, but rather *how retrospective it is*, then such questions are beside the point.

intended usage of that land.<sup>60</sup> Where it was previously a consequence of acquiring or owning the land that one would have the ability to build a bridge on it, this is no longer a consequence; instead, a new consequence has followed (namely, that one's investment has decreased in value).

While a person's intentions or future plans are an objective fact—'the state of a man's mind is as much a fact as the state of his digestion'<sup>61</sup>—they are not the sort of facts that can be determined with great reliability, especially when it may be in a person's interest to claim that they did or did not have a particular intention. This means that the 'retrospectivity score' of particular laws may not be determinable in practice. However, we may be able to get around such problems by measuring the retrospectivity of a statute according to how much notice the person would have required to reduce their costs (or benefits) to zero assuming they *did* intend to realize the consequences now being altered.

The common feature of retrospective and retroactive laws is that the legal consequences of actions taken in the past are determined in the future by legal texts that have been created in the interim and hence were not discoverable at the time the action was taken. The grievance felt against retrospective legislation comes from those who expected to gain certain benefits from past acts on the basis of the law as it then stood and would have acted differently had they known that the legal texts would be changed. In some cases, expected benefits have been built into the price of assets and others have paid that price.

Such individuals have a clear interest in the texts that are applied to an action being the same texts as those that were discoverable at the time the action was taken. However, that interest is effectively in the stability of law rather than its retrospectivity. This is a legitimate interest that should always be recognized and respected. However, stability is not the only virtue of law—and there can be many good reasons to change the law—including the interests of others. The question is when an interest that should be recognized and respected should also be protected. There are many such arguments that privilege certain interests on the basis of rights, democracy and the Rule of Law. Chapter 3 will consider the major arguments that have been put forward against some or all retrospective rule making. However, the issue is not whether the law is retrospective but which interests should be respected and what degree and form of protection for those interests should be provided.

## 1.7 Threshold points—legislation

Our definition of retrospectivity may be objected to on the grounds that it entails degrees of retrospectivity; that is, it fails to classify laws straightforwardly and in

<sup>60</sup> As, for example, in the Hindmarsh Island Bridge case, Hugh Morgan, Western Mining Corporation head, in 1991, criticized a decision to protect an Aboriginal sacred site because it meant that 'ultimately, any religious nut, no matter how weird, can effectively expropriate property rights anywhere'.

<sup>61</sup> *Edgington v. Fitzmaurice* (1885) 29 ChD 459, per Bowen LJ.

a black-and-white fashion as merely 'retrospective' or 'not retrospective'. In fact, we think it is an advantage of our account that it acknowledges the shades of grey present in disputes over whether or not particular laws are retrospective. This approach neither begs any questions by ruling in or out instances of disputed laws (that is, where there is disagreement over whether or not a law is retrospective), nor attempts to wield too wide a brush by assuming that, if a law is in any way retrospective, it is not different in any relevant respects from the most absurd instances of retrospective laws.

Not everyone, however, will be comfortable with the idea of retrospectivity as a continuum concept. Such a continuum is not appealing to those who want to say that all retrospective laws are bad. However, for those who find actual cases of retrospective laws varying from wicked, to regrettable, to excusable, to necessary, it may have real appeal. As Fisch notes: seeing retrospectivity as a matter of degree 'converts the evaluation of retroactive lawmaking from a binary issue into a quantitative analysis. Rather than asking whether retroactivity is appropriate, we should ask what degree of retrospective impact is appropriate'.<sup>62</sup> Thus, the normative question concerns not the justifiability of retrospectivity, but rather the amount of retrospectivity that is justifiable. And because of this, it might be argued that there is some threshold point beyond which a law really is, for all intents and purposes, prospective. This threshold will be the point in time at which, given a law concerning the act of  $\Phi$ -ing, the application of the law to a person's  $\Phi$ -ing *at that time* ceases to be retrospective.

Surprisingly, little attention has been given to this 'threshold' question; yet, it is helpful in considering the degree to which, if any, the laws are retrospective. Depending on the time selected as the threshold, some laws that are commonly criticized as retrospective might, in fact, be (officially) entirely prospective. For example, if the date of passage through all legislative houses is given as the threshold, then a statute taking effect on that day (that is, its application to a person's  $\Phi$ -ing on that day) is not retrospective, even if it has not been signed into law by the head of state. At the other extreme, if the threshold is set as the earliest time at which the citizen can avoid any disadvantages under the statute by altering their conduct at minimal cost, then some statutes that appear prospective in form might not cease to be retrospective until months, even years later (for example, laws phasing out leaded-petrol cars or analogue mobile phones); some might *never* cease to be retrospective (for example, changes to pensions or HECS laws that stagger benefits available according to date of birth).

In trying to identify a 'prospectivity threshold', we would be trying to identify a point at which a person, in deciding to  $\Phi$ , can be taken to have enough knowledge of the content of the law to be aware of the consequences it attaches to their  $\Phi$ -ing. Applications of the law to  $\Phi$ -ing after that point in time can be taken to be prospective, since the law is not imposing any new (unplanned or unexpected)

<sup>62</sup> Fisch, at 1072–3.

consequences on past actions or events. The point determined by the legislature as the time an enactment takes effect can be taken as an attempt to stipulate such a 'prospectivity threshold'. In fact, however, there are a number of claimed times at which a person is taken to have enough knowledge of the content of a law to rebut any claim of 'retrospective effect'. And, as we will show, none are totally satisfactory: that is, none completely avoid any retrospectivity, and some have other difficulties.

Consider, then, the following alternatives for a 'prospectivity threshold' (concerning, for the sake of illustration, our law affecting  $\Phi$ -ing), in order from furthest back in time to furthest forward in time:

1. *When the law is knowable by ordinary use of conscience or right reason*
  - i. This is the earliest time claimed as the point at which the application of a law affecting  $\Phi$ -ing becomes prospective. The threshold is set at the point at which it is obvious to 'common right or reason', or can be deduced from it, that  $\Phi$ -ing is prohibited, and punishable. Clearly this does not apply to all laws: it would be difficult to deduce a system of traffic regulations, or a scale of tax rates, from the 'laws of Nature and of Nature's God'.<sup>63</sup> However, for those laws that do fall into this category, the 'prospectivity threshold' can be extended quite far back indeed. If the 'pre-statutory law' is equated with the *Tao* or *Logos* of Natural Law, it can be said to originate at the beginning of time itself. More modest claims for its origins can set it at a more recent time that is still before the defendant was charged, or even born: for example, the 'first great principles of the social compact',<sup>64</sup> the 'ordinary expectations of fellow members of society',<sup>65</sup> or 'the common law of the Commonwealth'.<sup>66</sup>
2. *When the law is embodied in some instrument exterior (and usually superior) to the legal system*
  - i. This threshold requires that there be warning by some written instrument, but one that need not be a statute (or even the Constitution) of that particular jurisdiction. For instance, in the days before slavery was abolished in the USA, it could be argued that the practice was, in fact, unconstitutional (except where the Constitution's language, construed very strictly, allowed it) because it contradicted the promises of the Declaration of

<sup>63</sup> US Declaration of Independence. However, while particular rules such as a 60 km/h speed limit or the rules for giving way on roundabouts might be too speculative to be enforceable in the absence of positive enactment, a *general* duty to drive reasonably could probably be deduced by 'exercise of right reason' from the 'natural' prohibition against endangering the lives or safety of fellow humans.

<sup>64</sup> *Calder v. Bull* (1798) 3 US 386 (Dall.).

<sup>65</sup> *Shaw v. DPP* [1962] AC 220; *R v. Elizabeth Manley* (1933) 1 KB 529.

<sup>66</sup> *R v. Kidman* (1915) CLR 425.

Independence.<sup>67</sup> Likewise, the judges in *R v. Dudley and Stephens* made use of the Bible; they held that shipwrecked sailors should have known that necessity was no justification for murder and cannibalism because (*inter alia*) of ‘that Great Example we profess to follow’. A modern, secular equivalent is the *International Covenant on Civil and Political Rights* (1966) and similar international declarations. In particular, the ICCPR, and some national Constitutions (for example, that of Germany), endorse ‘retrospective’ criminal statutes against acts that constitute a violation of international law.<sup>68</sup>

### 3. *When the intended introduction of the law is announced*

- i. This threshold locates the required notice within the particular legal system; indeed, in a stage of the legislative process itself: in other words, one is taken to have sufficient notice of the new law’s effect on  $\Phi$ -ing at the point when the intention to introduce a statute concerning  $\Phi$ -ing is announced to the legislature. This method, commonly referred to as ‘legislation by press release’, has been criticized on many grounds, and I will discuss it at greater length in Chapter 4. Whether sufficient warning is given, however, may depend on how likely it is that the legislation will actually be passed, and there are substantial differences among democracies in the extent to which all Houses of the legislature are likely to grant the executive its desired legislative package.

### 4. *When the law is introduced to the legislature (as a formal bill)*

- i. This threshold is a refinement of the previous one. If a press release, memorandum or Second Reading speech is not sufficient notice (being studded with bloated political rhetoric), then perhaps a properly drafted legal document will suffice. Thus, backdating an Act to have effect from the first time the corresponding Bill was introduced into the legislature can be defended on the grounds that at least the citizen has been informed in precise statutory language. In addition, it could be argued that the citizen can now assume that the final version will not differ so substantially from the initial Bill as to make this notice nugatory; if the legislature is so opposed to the Bill’s main thrust that it would want to amend it in any significant way, it might as well reject the Bill outright. And although minor amendments do make the final operation of the original Bill harder to predict accurately, they are unlikely to be any worse in this regard than the possibility of

<sup>67</sup> JM Balkin (ed), *What Brown v. Board of Education should have said: the nation’s top legal experts rewrite America’s landmark civil rights decision* (New York University, 2001) 130.

<sup>68</sup> However, a statute would still be required, even a retrospective one. A restored democratic government could not simply stage its own Nuremberg-style trials by executive fiat, without some kind of statutory authorization for the trial, conviction and punishment.

unexpected judicial interpretations. Clearly, however, there is still scope here for retrospective effect, even if it is relatively trivial.

5. *When the law is passed by the legislature*

- i. Another possible threshold is the time the Bill is approved by the legislature—that is, by the requisite number of legislative houses.<sup>69</sup> But the problem with this point as the threshold is that whether the date of passage (rather than assent) can be considered the time at which sufficient notice is given would have to depend on whether the Head of State is authorized, or likely, to wield their veto power so as to stop the Bill or force amendments to it. In Westminster jurisdictions, the version of the Bill that leaves the legislature is almost certain to make it onto the statute book in identical form, but this is not the case in the USA. This would mean that, say, a law that took effect on the day either the House or the Senate (whichever was later) approved it would be retrospective in the USA but not in Australia. It is not impossible for differences in substantive constitutional doctrines to vary so greatly with differences in structure, but generally it would seem better to assume consistency where possible.

6. *When the law is signed into law by the Head of State*<sup>70</sup>

- i. Virtually all liberal democratic constitutions set this at the point at which a Bill becomes law (although the Head of State's refusal to give assent is usually either politically unthinkable, as in Westminster jurisdictions, or subject to legislative override, as in America and France).<sup>71</sup> It is also the point at which a potential veto by either legislative chamber (or by Head of State) becomes *functus officio*. Even if an Act's effect is deemed backdated to an earlier time, it has no legal effect at all unless and until it reaches the point of being signed into law. This proposed threshold, therefore, has a certain intuitive appeal.
- ii. The problem, however, is that the legislature cannot dictate the time at which the Head of State signs the Bill (not down to the day, at any rate). The effective date of an Act is usually specified within the Act itself,

<sup>69</sup> In Westminster jurisdictions, the Crown or its vice-regal representative is legally defined as an element of the legislature. However, in the USA the President is not an element of Congress, which consists only of the House of Representatives and Senate. This exclusion is ironic as the US President has far greater practical influence on legislation than the British Monarch and his/her viceroys. For consistency, 'legislature' is used herein to mean only the House or Houses, excluding the Head of State, whose role is primarily executive and whose legislative powers are incidental to this.

<sup>70</sup> For brevity, 'Head of State' in this context means a President or Monarch, and includes Governors-General, Governors, Lieutenant Governors, and Administrators who represent the Head of State (and carry out functions analogous to those performed by the President or Monarch) within a particular jurisdiction. 'Assent' is used here for both republics and monarchies.

<sup>71</sup> Switzerland and the Australian Capital Territory are rare exceptions where, because there is no separate Head of State, the head of government certifies that a Bill has been enacted.

although if none is mentioned the Act will usually (by default) take effect on the day of assent, which can then be appended to the published act as a marginal note. But if the giving of notice is a concern, it seems arbitrary to leave potentially crucial transactions hanging on whether the President has time for a signing ceremony in the White House garden or whether the Governor-General's schedule at Yarralumla is full this week. Even a delay of a few days might be disruptive.

7. *When the law is promulgated in the official gazette or register*

- i. This is set under the *Commonwealth Acts Interpretation Act 1901* as the effective date for regulations and other subordinate legislative instruments.<sup>72</sup> The *Government Gazette* is published approximately every three days. Another option might be to specify the date at which copies of the Act are available from the Government Printer—or, today, on the Internet. This seems to be the most reasonable or lenient threshold: it is, if anything is, the point at which people ought to be aware of new consequences of a law. However, this threshold would have the absurd side-effect of making legal liabilities potentially depend on the vagaries of the printer, of the government's website designer, or of the postal service.
- ii. It is also possible to fix a date for commencement that is derived from, but later than, the day of assent (that is, 30 days after it is signed into law). It may be unwise for the Bill itself to specify its own commencement date in case unforeseen circumstances (for example, preparation for a massive compliance campaign as with the GST) make it impracticable, and an extension would require further legislation.

8. *At some point after the law is signed or promulgated*

- i. Some jurisdictions postpone the commencement of a statute for some substantial minimum time after it is enacted, signed and promulgated. For example, California and Switzerland both impose a 90-day delay, in order to allow for voter-initiated referendum changes. Sri Lanka has an analogous provision, in which a grace period is reserved during which any citizen may challenge a new Act's constitutionality in the Supreme Court.<sup>73</sup> Note, however, that in both cases where an intervening delay is required after promulgation, the reason is not so much to give the individual citizen notice of the obligations imposed by a valid statute, but rather to test (via referendum or judicial review) whether the statute will be valid at all.

None of these suggestions present themselves as an obvious demarcation point between retrospectivity and prospectivity: all would still allow for some retrospective

<sup>72</sup> *Acts Interpretation Act 1901* (Cth), Section 5 (Commencement of Acts); *Statutory Rules Publication Act 1903*, Section 5. See also Queensland Criminal Code, Section 22 (3).

<sup>73</sup> *Constitution of Sri Lanka* (1972), Sections 48 and 54.

effect, and some would present other problems if adopted as the marker of prospectivity. In general, however, there is obviously lesser degree of retrospectivity the further forward one moves in time. Any presumption against retrospectivity can therefore be supposed to increase in force the further back in time the effects of a piece of legislation.

### 1.8 Threshold points—judicial law making

The preceding section dealt with potential threshold points in legislation and the various landmarks along the legislative process from the first rumblings of discontent until the promulgation of the Royal Assent. When judges overrule earlier precedents, there is a high degree of retrospectivity. However, even here there are matters of degree. When a precedent is overruled, it is rare that it is a complete surprise. Whether or not courts deliberately signal likely changes, there are almost always warning signs. Unlike the legislative process, there is no single time line. However a number of signals that case law is uncertain, at risk of change and likely to be modified can be identified. Such signals could include:

1. Some academics or senior barristers are politely critical of a line of precedents.
2. Litigants seek to distinguish the line of authority.
3. Some judges consider the possibility of restricting some of the precedents (while others continue as before).
4. The precedents are distinguished regularly and some judges are 'confining it to its facts'.
5. Senior judges doubt the line of authority in *obiter*.
6. The line of authority is increasingly distinguished.
7. Lawyers before the highest court which supported the line of authority give leave to argue that it be overruled.
8. In argument, some of the judges seem to indicate that the line of authority will be overruled.
9. The authorities are overruled.

Intertwined with this legislative or judicial progression towards legal change are the series of events by which citizens carry out the plans that will eventually be affected by the change of legislative and or judicial texts—and the degree to which citizens are, or could reasonably be assumed to be, aware of the coming change. The degree to which citizens are committed to a course of action whose future legal consequences are affected by the new legislative or judicial texts will thus vary along with the growing probability of the change in text.

## 1.9 Conclusion

We have seen that retrospectivity eludes simple definition. Nor is it always an easy matter to determine if—and in what way—a law is retrospective. Retrospectivity is not always apparent from the wording of a law, and the actual retrospective effects of a facially prospective law may be difficult to measure. It is even difficult to stipulate a point at which a person's awareness of the substance of a new law can be deemed sufficient for the consequences imposed by the law to have been known and accepted. In practice, however, we can usually identify those cases where the consequences of past actions and events are sufficiently altered so as to create concern.

We have used a fairly broad definition of retrospective laws as laws which *alter the future legal consequences of past actions and events* because the legal texts that will be applied to determine the legal consequences of an action at a hearing in the future are not the same as the texts that were discoverable at the time the action was commenced. Between the action and the hearing, a new text has been created and it is used in substitution for, or in addition to, the texts which the individual affected could have discovered at that time. This allows us to focus on the kinds and extent of such altered consequences and, in later chapters, on the reasonableness of expectations that the legal consequences will not change, the notice given of a change and the reasonableness of such changes.