1. The Backdrop of Prospective Decision-Making-A Brief Introduction

The question of the temporal effects of judicial decisions needs to be considered in the context of today continuing growth in case law and increase of overruling decisions necessitated by the implementation of new policies engendered by the rapid changes in societal conditions and values. Changes in the law arising from the necessity to address current needs interfere with the intertwined principles of legal certainty and legitimate expectations emphasized today in a variety of contexts, both in national and supra-national
jurisprudence. These tensions between the unavoidable continual restatement of legal rules and the desirable stability and predictability of the law have had in recent years the effect of reopening the controversy on the unjust results caused by the retrospective application of court decisions which depart from established precedent.

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

In view of this difficulty, common and civil law jurisdiction have had to reflect in recent years on the possible introduction in their legal system of the well-established US practice of prospective overruling whereby a court has a power to announce in advance a new better rule

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1Legal certainty is a multifaceted concept which includes aspects such as the non-retroactivity of law, the protection of legitimate expectations, the fact that statutory law should be precise, clear, accessible and known in advance by citizens. The principle of legal certainty is recognised by the majority of European legal systems including the European Court of Justice (Deffrenne v. Sabena 1976) and the European Court of Human Rights (Marcks v. Belgium 1979). Academic writing on legal certainty in the context of EC and EU laws includes P. Craig, EU Administrative Law, Chapter 16 ‘Legal Certainty and Legitimate Expectations’ 2006, Oxford; J. Raitio, The Principle of Legal Certainty in EC Law 2003, Springer.
or interpretation for future cases whenever it has reached a decision that an old rule established by precedent is unsound. More specifically, prospective overruling is a device whereby an appellate court limits the effect of a new ruling to future cases only or, more commonly, to future cases plus the case before the court which presents the opportunity for the announcement of the change.  

This technique can be traced back in the American jurisprudence of the turn of the twentieth century. Early expositions of the idea in American legal writing show that writers at that time were mostly concerned with the hardship caused by the retroactivity of overruling decisions in sensitive areas such as criminal law contract and property rights. It was in Justice Cardozo’s opinion in the 1932 US Supreme Court Sunburst case where the technique of prospective overruling was presented as a distinct and legitimate method of deciding cases. In Sunburst, the question raised by the appellant was whether it was constitutionally permitted for a court (here the Supreme Court of Montana) to pronounce a new rule of law as the correct rule but nonetheless apply the old rule in deciding the case at hand. Justice Cardozo held for a unanimous court that it was not a denial of due process for a court to adhere to a precedent in an adjudicated case and simultaneously to state its intention not to adhere to this precedent in the future.  

‘We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed,

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2 The expression ‘prospective overruling’ will be used throughout the discussion in a broad meaning of prospective operation of judicial decisions, including constitutional invalidation of legislation.
4 See, R. H. Freeman, The Protection Afforded Against Retroactive Operation of an Overruling Decision, 18 Colum. L. Rev. 230, 1918.
there are cases intimating, too broadly, that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted’.

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

These questions and difficulties invite a fresh inquiry into the technique of prospective overruling – and more broadly the prospective application of judicial rulings, both in theory and judicial practice. This report owes a lot to the foreign legal reporters who have offered their precious collaboration and have provided sources and material from their home jurisdiction on the subject. These national reports were essential to realize that, whilst attempts have been made to introduce prospective effect in appropriate cases, it still remains a limited practice when it is not rejected or just ignored. This leads to the second objective of this report which is to possibly define common principles apt at generating a more systematic, and therefore ‘reassuring’, approach to prospective overruling. First, in the following part we will review models of judicial rulings with prospective effect which have been proposed in relevant legal systems.

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2. Models of Judicial Rulings with Prospective Effects

Comparative observations

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

Having said that, even in common law systems where precedents are considered to be proper

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7 Precedents being less ‘certain’ in civil law than in common law is not a new claim. See P. Roubier, *Les conflits de lois dans le temps*, Sirey, Paris, 1929, at 26; also, A. L. Goodhart, ‘Precedent in English and Continental Law’, The Law Quarterly Review, 1934, 40, at 58-59 who also argues that in common law jurisdictions there seems to be a stronger reluctance to abandon precedent. In the tradition of the common law the most important reason for following precedent is that it gives certainty in the law. ‘It is better than the law should be certain than that every judge should speculate upon improvements in it’ (quoting the Earl of Halsbury L.C. in *London Street Tramways Co v. London County Council* [1898] A. C. 375).

Today, overruling may be more detectable in civil law systems when changes of case law are decided in full chamber. A superior court may decide to sit in full, if the issues raised are considered to be of exceptional importance. See the example of the Czech Supreme Court in Z. Kuhn Czech National Report.
sources of law, the declaratory theory derived from Blackstone’s famous dictum that judges
do not create law but merely discover it had the effect to hamper the reflection about the
temporal effect of judicial decisions. And, even though the traditional declaratory approach
has not remained unchallenged in modern time, there is still a deep seated belief that courts
have only the power to grant retroactive relief, only the legislature is entrusted with the power
to fashion new laws for the future. It is clear from the foreg oing that in a system where the
declaratory theory remains persuasive and where therefore judicial rulings operate
retrospectively there is little chance for the doctrine of prospective overruling to take root.
One might be tempted to draw from these general observations the conclusion that the
diversity of approaches towards precedents has influenced the way legal systems deal with
this issue. Whereas this is to a certain extent true, it also appears that the categorizations and
distinctions made in various jurisdictions transcend the traditional division between common
and civil law systems. In fact it appears that the decision as to the backward or forward
application of judicial rulings is much dependent on the nature and factual circumstances of
the case at hand and mainly based on considerations of convenience or on sentiment of

8 W. Blackstone, Commentaries on the Laws of England (1765), vol. 1, pp. 69-70. Against the declaratory
theory see, Lord Reid, ‘The Judge as Law Maker’, (1972) 12 Journal of the Society of Public Teachers of Law,
pp. 22-29 at p. 22: ‘There was a time when it was thought almost indecent to suggest that judges make law-they
only declare it…but we do not believe in fairy tales any more’. The declaratory theory has been rejected in some
common law based legal systems such as Singapore. See the comments made on the 2010 Court of Appeal
judgment in Review Publishing Co Ltd v Lee Hsien Loong by G.K.Y.Chan, National Report for Singapore. At
the other end of the spectrum is Australia where the declaratory theory remains to this day persuasive. See
9 This is discussed further in Part 3. One of the most emphatic attacks against prospective overruling seen as a
device which ‘turns judges into undisguised legislators’ is by Lord Devlin, op cit at 11 ‘Courts in the United
States have begun to circumvent retroactivity by the device of deciding the case before them according to the
old law while declaring that in the future the new law will prevail…I do not like it. It crosses the Rubicon that
divides the judicial and the legislative powers’. See also the rejection of prospective overruling by the High
Court of Australia in Ha v New South Wales [1997] HCA 34 on the grounds that it is ‘inconsistent with judicial
power.’ and that ‘the adjudication of existing rights and obligations as distinct from the creation of rights and
obligations distinguishes the judicial power from non-judicial power.’ See further, Australian National Report
op cit. Contrast with Lord Nicholls’ opinion in National Westminster Bank plc v Spectrum Plus Ltd and others
[2005] UKHL 41 concluding (at 39) that prospective overruling can sometimes be justified as ‘a proper exercise
of judicial power’.
10 Such is the case of Australia; see Australian National Report op cit.
justice; and most of the time the outcome of a particular dispute rests on the balancing of the
diverse interests involved rather than on a rigorous application of established criteria.

**Types of judicial rulings with prospective effect**

The expression ‘judicial rulings’ in a broad meaning encompasses three types of situations:
(1) the situation where a court decides on the temporal application of a change of ruling in
respect of a validity of a statute (2) the situation where a court decides on the temporal
application of a change in respect of the meaning or operation of a statute (either in the
absence of transitional provisions in the statute itself or when their meaning is unclear) (3)
the situation where a court decides on the temporal application of a change in respect of a
judicial rule (overruling). In these three types of situations the court may announce its
decision prospectively.

There is a strong argument that in the event of a statute being silent about the temporal effect
of its provisions (2) it should be for Parliament, not judges, to remedy this defect. However,
the practice of the courts on the subject of prospective effect does not offer a neat distinction
between judicial rulings dealing with statutory law and those concerned with judge-made
law. 11 Therefore, in the following discussion the expression ‘prospective overruling’ will be
used in both instances.

The forms prospective overruling may take include, first, pure prospective overruling.12

Courts adopt prospective overruling in its ‘purest’ form when they declare that a new
precedent is confined to future cases arising from events occurring after the announcement of
the new holding; the dispute at hand being governed by the old ruling. This generally occurs
in circumstances where the immediate application of the new ruling would be particularly

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11 Cardozo himself thought there was no adequate distinction to be made between changes of rulings concerning
statutes or common law. See Cardozo, op cit at 148-149.
12 For an excellent exposition on the forms of prospective overruling, see Lord Nicholls’ opinion in National
Westminster Bank plc v. Spectrum Plus Ltd and others op cit; see also a much earlier study entitled ‘Limitation
of New Judge-Made Law to Prospective Effect Only: Prospective Overruling or Sunbursting’ by Thomas E.
harsh on the parties before the courts. In such circumstances the principle of legitimate
expectation in the continuing application of the previous case law would be particularly at
risk. This model will be typically used in cases where protection of public rights or civil
liberties is at stake. A fairly common illustration is when a court overrules a past precedent
by giving a new interpretation on statutory time limitations for a particular class of actions
with the consequence that such a change would deprive a party to a pending case from having
his case heard in court. If, as the consequence of such a ruling, the plaintiff’s action would be
time barred, the court may apply the new interpretation prospectively, therefore preventing
the plaintiff’s action to be denied as inadmissible. This has happened notably in the context of
time limit for actions for defamation. For example, in France, the Court of Cassation took
upon itself to overrule prospectively a former interpretation of a time-limitation rule
for libel in a case where a radio station (Radio France) was sued for breach of the
principle of presumption of innocence against a lawyer charged for professional
misconduct.13 Indeed, in Radio France, not applying prospective overruling would have
denied the successful lawyer defendant in the case from seeking remedy in a law court and
thus deprived her of her right to a fair trial within the meaning of article 6 § 1 of the European
Convention on Human Rights. 14 Similar trends can be observed in other jurisdictions where
an issue of time limitation or availability of review of a case is raised where the breach of a
fundamental right is involved.15

However, despite the foregoing, pure prospectivity remains an exceptional device for three
compelling reasons. One is that, if used too often, it would hamper the normal course of legal
development through case-law. In some jurisdictions the courts themselves stress this point

14 Same solution applied in similar circumstances two years later in the 2006 case of Le Provencal v. Mme
Véronique X.
15 In the Czech Republic, see judgment of 5 August 2010 relating to the statutory limitation of a defamation
claim; see also, Supreme Administrative Court, Gaudea v Czech National Bank 17 December 2007, both cited
in the Czech national Report. See also the 1986 Argentinian case of Tellez commented upon in the Argentinian
National Report.
by declaring in the text of their judgment that the appellant ‘has no vested rights’ to courts decisions remaining unchanged.\textsuperscript{16} Secondly, litigants would have no incentive to sue or appeal if they knew in advance that overruling would not improve their situation. Finally, for a court to merely announcing a new rule without applying it to the case at hand is equivalent to a \textit{mere dictum} and thus faces the objection that in so doing judges act as legislators. This objection is considered further in the next part (3).

Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. A common variation of prospective overruling is what has been termed \textit{limited pure prospectivity} or \textit{qualified prospective overruling} or \textit{selective prospectivity}, whereby a new ruling applies not only to future cases but also to the instant case (\textit{ex nunc}) but return to the old rule for all cases predating this decision including cases still open for review. A significant drawback with this model is that the new precedent does not necessarily (although it might) apply to other similar cases pending before the courts and is thus tantamount to inequality of treatment between litigants in similar position. This is not a satisfactory outcome in view that equality of application of the law is a manifestation of the principle of legal certainty as well as being a component part of the rule of law.\textsuperscript{17}

In view of the criticisms addressed to prospective overruling, a better approach to the question would be to dispose of the term ‘prospective’ and use instead the phrase 'non-retroactive overruling' as it has been done in some jurisdiction in judicial practice and academic writing. This seems to be a better description of what a court does when confronted

\textsuperscript{16} See in France, Court of Cassation, 9 October 2001, ‘l’interprétation jurisprudentielle d’une même norme à un moment donné ne peut être différente selon l’époque des fait considérés, et nul ne peut se prévaloir d’un droit acquis à une jurisprudence figée’; in Court of Cassation, 25 June 2003, ‘la sécurité juridique ne saurait consacrer un droit acquis à une jurisprudence immuable, l’évolution de la jurisprudence relevant de l’office du juge dans l’application du droit’. In Argentina, the Sanchez judgment denies the appellant ‘any vested right to court decisions being maintained throughout the stages of a law suit.’ in response to the appellant’s objection to the retrospective application of a new precedent in his case. See Argentinian National Report. Similar declarations are common in Germany. The Federal Constitutional Court held in 2004 that the fundamental right of equality before the law under article 3 (1) of the Basic Law does not grant an individual entitlement to the continuation of a line of case law that the courts no longer hold to be correct. See National German Report.

\textsuperscript{17} One of the reasons why selective prospective application was rejected in the US case of \textit{Harper v. Virginia Department of Taxation}, 509 US.86, 97 (1993).
with the temporal effect of its decision. Non-retroactivity entails acting upon the ‘backward’
application of a new principle of law in a way which fits the particulars of the situation in
dispute. Seen from this angle, it becomes apparent that the court determines itself in relation
to particular facts. Non-retroactive overruling becomes a judicial tool fashioned to mitigate
the adverse consequences of judicial changes, a proper method of deciding cases and seems
to be more consistent with what is expected from judges and therefore is most prone to
promote consensus between judicial activists and those in favor of judicial restraint. ‘Non-
retroactivity’ is examined below in more detail.

Criteria for limiting the retrospective effect of judicial rulings

When issues of prospective application arise judges tend to proceed pragmatically. Justice
and the practical administration of society prevail over formal logic. Most of the time
justification for non-retroactivity takes the form of a set of policy considerations raised by
each particular dispute they have to resolve. The principles of reliance, legal certainty,
legitimate expectations and fairness are often quoted in civil cases to justify non-retroactivity;
such is the case with fair warning and due process of law in criminal proceedings; in the area
of public law, the potential disruption in the running of public services justifies that
constitutional rulings of invalidity do not operate retrospectively.

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

‘In our cases dealing with the non-retroactivity question, we have generally considered three
separate factors. First, the decision to be applied non-retroactively must establish a new
principle of law, either by overruling clear past precedent on which litigants may have relied. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." 18

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

'The court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other member states or the Commission may even have contributed ...' 19

A further final example of proposed guidelines in respect of prospective effect is the list of recommendations made by the special working committee set up in the early 2000s by the

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

19 [2005] 2 WLR 1078, 1112, at 66; in the 1976 landmark case of *Defrenne v.Sabena* ECR 455, about the application of article 119 of the EEC treaty, the Court already conceded to alter the temporal effect of its decision in view of the possible economic consequences of attributing direct effect to the provisions of article 119. It decided that the direct effect of article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim (at 75).
French Court of Cassation. In its Report to the head of the highest court the working group suggested that, in narrowly defined circumstances, decisions of the Court of Cassation might be applied ‘non-retroactively’\textsuperscript{20} Without setting out any formal factors or criteria to be taken into account when considering whether a new ruling by the Court should apply retrospectively or not, the committee nevertheless recommended that the Court should limit the retrospective temporal effect of its ruling where there was (i) a strong motive of general public interest or (ii) a manifest disproportion between the general benefits attached to the retrospective effect of a court ruling (e.g. the fact that persons in like cases are treated equally) and the potential unfairness such a retrospective change in the law would occasion to the parties involved. The working group further recommended procedural safeguards in so far as prospective overruling could only be applied by the Court of Cassation itself which, for this purpose, should, first identify clearly and explicitly the meaning and scope of its new ruling in the case at hand and, secondly, allow each party to the case to put forward their respective arguments on whether to overrule a previous decision retrospectively or prospectively.

\textit{Constitutional declaration of invalidity}

Special difficulties have been encountered in constitutional cases where a constitutional court strikes down legislation or a longstanding program or institution as being unconstitutional.\textsuperscript{21} Such a declaration of invalidity may dramatically upset the running of public services or jeopardize the legitimate expectations of a category of citizens if they are given full retroactive effect. Two striking examples can be given to illustrate this point. One is the American case of \textit{Brown v. Board of Education} where the US Supreme Court ordered in 1955

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\textsuperscript{21} The remarks that follow are also relevant in the context of annulation of administrative decisions, where in order to avoid administrative chaos, the court may issue a declaration prospectively.
\end{footnotesize}
the dismantling of racially segregated schools in several states. Removing retroactively illegal schools under this new ruling would have affected the lives of thousands of pupils, parents, teachers and employees. 22 Similarly, in the 1985 Canadian Manitoba Language Reference case where the Supreme Court held that the Constitution required that the province of Manitoba legislation be enacted in English and in French, the Court ruling had the potential effect to invalidate all of the statute law of the province which, following the common law tradition, was only enacted in English. Thus, applying the declaration of invalidity retroactively would have left the province without laws and posed serious disruption in the legal system. 23

In order to avoid undesirable consequences in circumstances of invalidity, a first solution consists of applying the declaration of invalidity to cases in which the issue was raised and to future cases. Although here the statute is deemed not to have existed at all, the decision of invalidity will not operate retroactively. 24 However, many authors have pointed out the conceptual difficulty here. Indeed, where a ruling of unconstitutionality is applied prospectively it necessarily means that the courts are upholding an unconstitutional law, albeit only for a period of time. 25

A slightly different approach from prospective effect is the suspension of the declaration of invalidity until a certain date thereby allowing the legislature to enact valid legislation during the defined period. Suspension of the nullified provisions for a defined period entails the

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23 See L. Smith, Canadian National Report.
24 For example, in France, the 1958 Constitution, art. 62 provides that when a provision is declared unconstitutional following a challenge by a citizen in an ordinary court and its referral by the latter to the Constitutional Council (art. 61-1 of the Constitution), ‘it shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by the said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.’ [Une disposition déclarée inconstitutionnelle sur le fondement de l'article 61-1 est abrogée à compter de la publication de la décision du Conseil constitutionnel ou d'une date ultérieure fixée par cette décision. Le Conseil constitutionnel détermine les conditions et limites dans lesquelles les effets que la disposition a produits sont susceptibles d'être remis en cause].
25 See notably National Report of Singapore, a jurisdiction where the issue of prospective overruling and unconstitutionality has been widely discussed in academic writing.
maintaining of these provisions or some of them in the legal system in order to prevent a legal vacuum.\textsuperscript{26} It is interesting to note that in the European Court of Justice tax case of\textit{Banco Popolare di Cremona v Agenzia Entrate Ufficio Cremona}, Advocate General Jacob proposed a similar approach in respect of the Court’s rulings suggesting that the retrospective and prospective effect of a ruling of the Court might be subject to a temporal limitation that the ruling should not take effect until a future date, namely, when the State had had a reasonable opportunity to introduce new legislation.\textsuperscript{27}

Contrary to the prospective and suspensory approach, a more orthodox view militates in favour of invalidity \textit{ab initio (ex tunc)} each time a statute is found unconstitutional. In this respect, Irish law is of particular interest in that it highlights the particular dilemma posed to judges by unconstitutional statutes where they are faced with a choice between two unsatisfactory options, one being to declare the unconstitutional statute void \textit{ab initio} which may lead to unjust and chaotic consequences, a second option consisting of limiting the retrospective effect of the declaration of constitutional invalidity which runs counter the principle that unconstitutional law cannot be effective. Such a dilemma was apparent in two Irish leading cases \textit{Murphy v Attorney General} and \textit{A v Governor of Arbour Hill Prison} where the issues raised by voidness were considered at length.\textsuperscript{28} A way to escape such a dilemma is to adopt the approach frequently taken by the German Constitutional Court

\textsuperscript{26} See decisions of the Federal Constitutional Court of Germany cited in A. Sagan, German National Report. Another example is the Supreme Court of Canada is the Manitoba Language Reference case. See L. Smith op cit. ‘Suspensory declarations of invalidity’ are also known in Ireland. See N. Connolly op cit. In Venezuela, such constitutional rulings are referred to as ‘deferred unconstitutionality’ and ‘temporary or interim constitutionality’ See H. Rondon de Sanso, Venezuelan National Report. The power to suspend a declaration of invalidity and maintain the consequences of invalidated legislation is in some jurisdictions established by constitutional legislation itself. Such is the case of Belgium in art.8 of the 1989 Special Law on the Constitutional Court which states:…Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court’. See further S. Verstraelen and als, Belgian National Report. Suspension may also be designed in exceptional circumstances to delay for a short period the order for release of a person held unlawfully but who poses threat to himself or others in order to allow the authorities to remedy the illegality affecting the basis for the detention See for instance the Irish case of \textit{FX v Clinical Director of the Central Mental Hospital (2)} [2012] IEHC 272. N. Connolly, Irish National Report.

\textsuperscript{27} Opinion of Advocate General Jacobs, case C-475/03, 17 March 2005, at paras 72-88.

\textsuperscript{28} Both cases are examined in detail in the Irish National Report.
whereby instead of annulling the norm with immediate consequential retroactive effect a
court gives a declaration of incompatibility subject to a future date before which litigants may
not rely on the incompatibility in any claims against the State. In practice this has the same
effect as a suspension order but in theory it is more consistent with the division of law
making authority in so far as the court does not directly address or deal with the validity of
the norm. The legislature is ultimately in charge of removing the norm from the statute book.

_Murphy_ and _A_ further highlighted the problem posed by a potential, albeit limited, right to
redress for harm caused pursuant to unconstitutional legislation, especially in overpaid
taxation cases such as _Murphy_. Since a finding of unconstitutionality operates _erga omnes_ (in
relation to all), its benefit not being confined to the litigant in the case at hand, it may lead to
further abundant litigation and have ‘potential catastrophic consequences’ in the event of full
redress being granted. 29 This would not be the case with the other above-mentioned models
of declaration of invalidity since limiting a declaration of unconstitutionality to prospective
effect only has the consequence of denying a remedy.

Such difficulties in dealing with declarations of invalidity may further have adverse
consequences on the upholding of the rule of law in a legal system. Thus, it has been argued
that ‘if a finding of unconstitutionality had these devastating consequences for society in
general and the legal system in particular which the courts found themselves unable to control,
then this would inevitably impact on the practical willingness of the courts to make such a
finding of unconstitutionality’. 30

29 The expression is used by Denham CJ in Kavanagh [2012]IECCA 65
30 See Hogan J in _FX v Clinical Director of the Central Mental Hospital_ (no2) [2012]IEHC 272, para 21. See
further N. Connolly, the Irish National Report.
3. Prospective Overruling and the Nature of Adjudication

Judges as Legislators

The question of prospective application of judicial decisions is inevitably interconnected with jurisprudential issues such as the concept of law, the nature of precedent and the role of the judicial branch in the law making process. From a comparative perspective the repartition of legislative power between legislators and judges greatly vary from one legal system to another in accordance with domestic constitutional theory, existing legal rules and local practice as to the binding force of precedents, the characteristics and status of the enacted law and the wider or narrower freedom of judicial interpretation. Notwithstanding these differences, a common universal depiction of judges who decide prospectively is that they bear too much resemblance with a legislator. Such a picture clashes with the still prevalent tenet that judges find the law, they do not make it. Judges themselves are very often eager to show restraint and rarely concede that they ‘make’ law. This approach has for theoretical basis the above mentioned so-called declaratory theory whereby judges do not make or change law: they simply discover and declare the law which is throughout the same. As a result, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. Following this view any attempt to limit the retrospective effect of judicial decisions is seen as a potential violation of the principle that judges do not create rules and are primarily bound by statutes. Today the principle of separation of powers between the legislature and the judiciary prevails over the declaratory theory in the discussions surrounding judicial rulings with prospective effect. Thus, it is often argued that prospective overruling is outside the constitutional limits of the judicial function.

In National Westminster Bank plc v Spectrum Plus ltd Lord Nicholls summarised as follows the constitutionally based argument against prospective overruling:

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‘Prospective overruling robs a ruling of its essential authenticity as a judicial act. Courts exist to decide the legal consequences of past events. A court decision which takes the form of a 'pure' prospective overruling does not decide the dispute between the parties according to what the court declares is the present state of the law. With a ruling of this character the court gives a binding ruling on a point of law but then does not apply the law as thus declared to the parties to the dispute before the court. The effect of a prospective overruling of this character is that, on the disputed point of law, the court determines the rights and wrongs of the parties in accordance with an answer which it declares is no longer a correct statement of the law. Making such a ruling would not be a proper exercise of judicial power in this country. Making new law in this fashion gives a judge too much the appearance of a legislator. Legislation is a matter for Parliament, not judges’. 31

As mentioned earlier in this report, the difficulty with this view is that so long as judges are perceived are mere interpreters of the law with no normative power attached to their decisions, prospective overruling will not be considered as a proper form of judicial decision making.

The claim that judges do not create rules has been so widely challenged that it seems unnecessary and time consuming to reopen here the discussion on the subject except perhaps to say that the law making role of judges has been much more evident since the coming into force of bills of rights which have had the effect to limit the legislative competence of Parliaments around through invalidation by courts of parliamentary statutes which are found incompatible with the basic rights of the citizens. In such a context it does not seem contradictory in terms to suggest that judges do act as ‘legislators’.

31 Op cit at para 28
Further, the more we observe the workings of the judicial process today, the more it becomes obvious that judges are indeed law-makers. From this angle ‘prospectivity’ or non-retroactivity are no longer inconsistent with the judicial function.

A realist, non-formalistic examination of the judicial process reveals the following:

(1) All major legal systems recognize the power for judges to legislate between gaps. Judges fill the spaces left open by the legislature within the limits of their competence. This shows that they indubitably engage in judicial legislation even though legislative responsibility is ultimately assigned to the legislative authority.

(2) As much as statutory law, case law presents itself with elements of generality. In giving a judgment what a court does is twofold: it resolves a legal dispute and it makes a statement of law. A court decision is therefore made of elements of particularity as well as elements of universality. This general aspect of judicial rulings is particularly relevant when it comes to the temporal effects of courts judgments. In a legal system based on the premise that decided cases make law for the future, court decisions will necessarily have a prospective effect. But even in a system where precedent is not formally classified as a source of law and is merely persuasive and not binding, the prospective aspect remains a characteristic feature of the judicial process.

(3) Case law plays a major role in both common and civil law countries. To exclude case law from the concept of law not only strikes at the very roots of the common law legal systems but also it also undermines the legal systems of civil law jurisdictions where statutes are rarely applied in isolation. Without judicial intervention defining the meaning and the scope of legislative rules it would generally be very often impossible to implement statutory provisions. Taking these facts into consideration it becomes difficult to deny the status of ‘law’ to judicial rulings. From a definitional stand point
the concept of law in a substantive or material (as opposed to formal) meaning includes necessarily case law. 32

In civil law systems, the complementary nature of legislation and case law has been particularly emphasised by a French jurist, Boulanger: ‘La jurisprudence c’est la loi interprétée, modifiée, complétée’ (case law is nothing other than the interpretation, the alteration and the finishing touch of enacted legislation). 33 Boulanger further argues that precedents are ‘an integral part of the legislative text itself’. 34 Following this view, a change of case law is equivalent to an amendment to the statute itself including all temporal effects any statutory amendments traditionally enjoy. 35

(4) That judges are law makers can further be emphasized from a functional standpoint by drawing an analogy between the judicial and the legislative functions. At the turn of the 20th century, French jurist François Gény, in his seminal work on legal sources and methods of interpretation, had already shed some light on how the process of research which is imposed upon judges in finding the law is very similar to that incumbent on the legislator himself. 36 Despite the process of research in the case of a court being set in motion by some concrete situation, judges have still to consider justice and social utility before reaching their decision; these are considerations which dominate legislative activity as well. In short, judges shape their judgment of the law following the same aims as those of a legislator proposing to regulate a question. To say it differently, judicial rulings are functionally comparable to legislative rules.

32 The view that being bound by law implies being bound both by law in a formal sense and by other sources such as precedents is sustained in a number of jurisdictions. A notable example is the European Court of Human Rights which have always understood the term ‘law’ in its substantive sense, not its formal one so that to include both statutes and unwritten law such as case law. See Sunday Times v. United Kingdom, 2, EHRR 245 [1979] and Kruslin v. France, 12, EHRR 547.

33 Boulanger, J, ‘Jurisprudence’ in Repertoire de Droit Civil, 1st edition, 1953


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

(5) Finally, law making and adjudication are essentially processes in which a
reconciliation of competing interests needs to be achieved. Both in legislation and
decision making the social interests served by symmetry, certainty and equality of
treatment must be balanced against the individual interests served by equity and
fairness in particular instances. The idea that the function of law is to reconcile ‘social,
interests’ is strongly associated with the American legal scholar Roscoe Pound, a
common lawyer, who himself drew from a civil law jurist Ihering and his functional
approach to law. In his survey on social interests Pound concludes as follows:

‘Looked at functionally, the law is an attempt to satisfy, to reconcile, to
harmonize, to adjust these overlapping and often conflicting claims and
demands, either through securing them directly and immediately, or through
securing certain individual interests, or through delimitations or compromises
of individual interests, so as to give effect to the greatest total of interests or to
the interests that weigh most in our civilization, with the least sacrifice of the
scheme of interests as a whole’. 37

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

Means to an End (1913)
4. **In Pursuit of a More Systematic Approach to the Prospective Operation of Judicial Decisions**

Whatever side of the debate one is drawn on the subject of the temporal effects of judicial decisions, retrospective decision-making will continue to produce difficult seemingly inequitable cases especially in the current context of an increasingly litigious society. Unless efforts are made to formulate a more rational analytical structure to overcome these difficulties they will likely persist and intensify. There are two possible ways of achieving some degree of coherence with regards to the temporal effect of judicial rulings. One is to provide a workable framework determined by drawing a neater distinction between retroactivity, prospective effect and immediate application of a new ruling; the other is based on the subject matter of the case under review.

**The Search for a workable framework**

Is there an overarching formula capable of rationalizing the temporal effect of judicial decisions? Can one advise a method using abstract tenets and definitions? Where to draw the line between what is supposed to be permitted and not? Is it possible to arrive at a coherent and generally accepted approach to the retroactive or prospective application of new judicial rulings when there is no general acceptation of judges as law-makers or a clear definition of the proper allocation of lawmaking authority? These are teasing questions both practical and theoretical in nature; but they have the advantage of drawing attention to a need for some meaningful rationalized solution to prospective application in the domain of judicial decisions.

Before exploring possible leads for a workable framework, it may be appropriate to articulate a number of essential preliminary requisites which might promote a more consensual view on the subject and serve as a basis for further systematization:
1- Overruling should generally remain limited (even though one cannot forbid courts to exercise the privilege of overruling their own decision with a view to improving the law). Social interest dictates that law shall be uniform and impartial. Adherence to precedent promotes these two imperatives.

2- Hardship involved in the retrospective effect of judicial decisions is inevitable. Only when such hardship is felt to be too great or to be unnecessary should retrospective operation been withheld. Judicial rulings with prospective effect should therefore be limited to cases of exceptional difficulty.

3- In any event, retrospectively depriving people of vested legal rights is unjust. Although this principle has been established with regards to enacted law it should also apply to judge-made law since fairness is also part of the judicial decision and in view of the fact that enacted law and case law are both ‘law’. It follows that, unless there are particularly compelling reasons to do so, courts are not able to re-open or re-decide cases which have been definitely determined under the old rule. In these circumstances the rights of the parties have been fixed by the final judgment under the res judicata principle.

4- The retrospective effect of judicial rulings can only be limited by courts of final appeal. To paraphrase Cardozo ‘we will not help out the man who has trusted to the judgment of some inferior court. In this case, the chance of miscalculation is felt to be a fair risk of the game of life….he knows that he has taken a chance, which caution

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38 In the US see Section 73 (2) of the Restatement (Second) of Judgments and 60 (b) of the Federal Rules of Civil Procedure, parties may collaterally challenge and be granted relief from a final judgment where there had been a substantial change in the law following an initial otherwise closed litigation. See American National Report.

39 Public policy also dictates that there be an end to litigation. Besides the concern for finality, unlimited retroactivity of judicial rulings would produce chaos in the legal system.
often might have avoided. The judgment of a court of final appeal is felt to stand upon a different basis’. 40

Having laid down these preconditions one can now move on to identifying a set of transitory rules and principles that may be applied to changes in judge made law. Here they may be again two ways to proceed.

(1) One is to focus on the nature of the new change. When the change of ruling was predictable it should be applied to the instant case and to future cases; on the contrary, where it was sudden, pure prospective overruling is to be considered. In the same vein, where the court offers a new interpretation of an otherwise precise and clear statutory provision or established judicial rule it should be applied to the case at hand; when the change relates to an open texture provision or amounts to a reversal of a settled case law prospective overruling seems justified. The underlying rationale of these distinctions is that the more creative an interpretation, the more likely temporal disruptions will be felt.

(2) An alternative way to achieve some structure is to categorize the legal situation which is in dispute. In his authoritative lasting study on inter-temporal conflicts of law the French jurist Roubier establishes a system revolving around the notion of ‘situations juridiques’ where what matters is (i) to what extent the backward or forward application of a new rule will affect the legal situation which, for that purpose, needs to be classified (ii) at what stage of its development is the relevant situation juridique when the new law comes into force – fully extinguished or still alive in its modes of creation or in its effects . In his work, Roubier does not directly address the temporal effect of judicial decisions, relying on the traditional civilian model of adjudication according to which ‘there could not be questions of conflicts in

40 Cardozo, op cit at 147-148.
time between successive judicial rulings’. However, Roubier does not exclude either the possibility of tackling the temporal conflicts between judgments.\textsuperscript{41}

Taking into account what has been said earlier in this report on judge made-law, one can draw inspiration from Roubier’s scheme and adapt it to the present context of judicial rulings. Roubier’s temporal system is tripartite and distinguishes between retroactive effect of the new law / immediate effect of the new law/and survival of the old law. The core of his analysis lies in the sharp distinction made between ‘retroactivity’ and ‘immediate effect’, two temporal effects which are according to him very often mixed up in practice. According to Roubier it is only the retroactive effect of a new law which is problematic. Retroactivity strictly refers to fully extinguished situations (\textit{faits accomplis-facta praeterita}) which cannot be touched upon by the new law. By contrast, the ‘immediate effect’ which is the application of the new law to a present situation which is still alive (\textit{facta pendentia}) should always be promoted to become the common way of regulating inter-temporal conflicts of law.\textsuperscript{42}

\textit{Degrees in prospective effect according to category of cases}

Here a topical approach to the subject is adopted, distinguishing between different types of cases. This approach rests on the assumption that different areas of law involve different set of considerations and thus necessitates a tailor-made solution in terms of prospective or retrospective operation of judicial overruling decisions.

\textit{Criminal law cases}

In criminal cases non-retroactive application of the new ruling should prevail. Indeed, the principle \textit{nullum crimen, nulla poenae sine lege} calls for an application of the new principle established by the courts only to acts done subsequent to the delivery of the judgment. In the

\textsuperscript{41} Roubier, \textit{Le Droit Transitoire}, op cit at 24-25.
\textsuperscript{42} Roubier, at 172-177.
area of criminal law there should be identical limits that constrain new legislation and change in judicial interpretation. As much as retroactive criminal legislation is not permitted, new criminal precedent should not retroactively apply to actions that took place prior to the judicial decision announcing the new rule. As a result, a court may not through new interpretation of a statute criminalize actions that were legal when committed or aggravate a crime by bringing it into a more severe category than it was in when it was committed or by adding new penalties or extending sentences. Acts done prior to a change of case law should remain governed by former precedent, except when the new ruling introduces more lenient criminal law such as lower penalties and punishments (retroactivity in mitius).\textsuperscript{43} This is why courts should apply criminal interpretations imposing greater liabilities or penalties only prospectively. It would otherwise be utterly unconstitutional to subject people to punishment for conduct which they would not know was criminal under existing law for this would deprive a defendant of the right of fair warning, a right upheld in jurisdictions abiding by the rule of law.\textsuperscript{44} However, despite strong criticism, there have been instances where courts have interpreted criminal provisions to reach acts that were lawful when committed. But this has generally occurred when the new judicial expansion of criminal liability concerned a judicial previous interpretation that presupposed a measure of evolution and whose amendment was predictable.\textsuperscript{45}

\textsuperscript{43} Also, concern for retroactivity is less acute when judicial decisions narrow the scope of criminal behaviour. However, retroactivity should not operate when defendant’s convictions have become final under prior precedent. Amnesty laws can however provide relief in such cases. The way courts deal with changes in criminal procedure is also problematic. To avoid the reversal of final criminal convictions of persons who have been incarcerated following rules that have become illegal under new constitutional rulings (e.g absence of counsel at a specific stage of the proceedings), with the resulting disruption in the running of the administration of justice (high number of potential petitioners), courts tend to hold the new rules non retroactive to convictions that have become final prior to the new ruling. Some have pointed out the inequity of this kind of “selective prospectivity” on those defendants who were unfortunate to have their conviction finalised when the new rule was announced. For further discussion in the context of the American legal system and jurisprudence, see American National Report.

\textsuperscript{44} This would perhaps be a more sensitive issue in legal systems were there is an entrenched bill of rights or a written Constitution

\textsuperscript{45} As an illustration, see the American Supreme Court judgment in Rogers v. Tennessee 532 US 451 [2001]
Civil law cases

Full retroactivity of a judicial ruling may cause particular hardship in civil law situations where there is a high degree of parties’ reliance on the prior state of the law. This is particularly true of such fields of law as contract and property where parties may have not only paid particular attention to existing rules at the time of their dealings but also sought legal advice on certain aspects of their transactions before making any formal engagement or promise. Here the new principle is announced for future cases but does not apply in the case at hand. All transactions entered into or events occurring before that date continue to be governed by the law as it was before the court gave its ruling (re ‘survival of the old law under Roubier’s system)

Tax Cases

Far reaching consequences may flow from the retrospective effect of rulings in tax matters which justifies in certain circumstances the use of prospective overruling. When a tax has been found unconstitutional petitioners are seeking refund for improperly assessed taxes during a period of time. In view of the large number of people concerned, such claims, which undertakings could not have foreseen, might seriously affect the financial situation of such undertakings and even drive some of them to bankruptcy and should be dealt with prospectively only.

5. Alternative Methods for Dealing with Prospective overruling - Conclusions

In recent years many jurisdictions have retreated in part from prospective overruling after having introduced it in their judicial practice. Such is the case in France and Germany, the Court of Justice in Luxembourg; and, even in the United States where the practice was pioneered its application has, with time, become very selective and limited.
In England too there are to this day recurrent hesitations as to the issue of whether prospective overruling should be introduced to the law. Meanwhile the device has been rejected in Australia and is ignored in Greece and Italy.

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

*Is prospective overruling a necessary device?*

It can be argued that today judges have limited time and resources to accomplish their task. In such circumstances why should they waste their time in announcing how they will decide in the future? This is a seemingly fair argument considering that overruling decisions are generally foreseeable. They are not the result of mere coincidence even when changes occur through what is perceived as a ‘sudden’ decision. Significant changes in case law can be gradually detected through the incremental evolution of case law on a particular issue. French scholar F. Zenati further argues that, since judicial decisions are by their own nature foreseeable being a mere reflection of the evolving social order, as a result, there is no need for restricting the retrospective effect of a judgment. For Zenati, any wise litigant aware of social changes is expected to predict what the case law on a particular issue will be in the future and makes his own arrangements in anticipation.

‘Si une loi rétroactive peut être jugée insupportable parce qu’elle impose arbitrairement un ordre nouveau qui n’existent pas à l’état latent dans la société, ce grief ne peut pas être adressé à la jurisprudence qui est au contraire le reflet de l’ordre social. Autrement dit, la jurisprudence, contrairement à la loi, est toujours prévisible ; il suffit de vivre avec son temps pour appréhender le sentiment du droit qui prévaut et qui ne manquera pas à terme d’être consacré par les juges. Ce pressentiment peut permettre aux sujets de droit d’organiser leurs
In the same vein, there are a series of factors which may indicate in advance that the case law of an appellate court is going to change: the so-called ‘phenomenon of resistance’ by the lower courts, the new binding jurisprudence of a supra-national court, the criticisms voiced by legal commentators against the view taken by a court on a particular issue, all are enough of a signal that the law is about to change. More generally courts should, when possible, engage in a process of giving fair warning to potential litigants when dramatic changes in the case law are about to take place. This will allow members of the public to choose their conduct in an informed manner.

The announcement made by a court that it will apply a new and different rule in future situations may also be presented as *obiter* when in fact what the court does is prospectively overruling. Such was the case in *Hedley Byrne v Heller Partners* [1964] A.C. 465 where the then House of Lords stated a new principle of liability for negligent misrepresentation, but where the defendant, who came within the general description, was not held liable. The *Hedley Byrne* technique is prospective overruling in disguise. A naked use of prospective overruling is therefore unnecessary.  

*Should the issue of temporal effect of judicial decisions left to the legislature?*

This has been the subject of controversy between common law judges. The view that power to give decisions with prospective effect should be the subject matter of parliamentary

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47 W. Friedmann, ‘Limits of Judicial Law-making and Prospective Overruling, 29 Modern Law review, 1966, p.593 at p. 605 quoted by M. Zander, The Law-Making Process, Cambridge, 2004, p. 400. However, some forms of implicit overruling may be controversial. The marital rape judgment in *PGA v The Queen* delivered by the High Court of Australia in 2012 offers a good, albeit unusual, illustration of the adverse consequences of a judicial declaration that a common law rule had already been implicitly overruled at the time when the alleged offence took place.
enactment was defended by a distinguished judge of the House of Lords, Lord Simon in *Jones v. Secretary of State for Social Services*, a case where Lord Reid made his famous statement that the power to overrule previous decisions (granted by the 1966 Practice statement on precedent in the House of Lords) \(^{48}\) ought to be exercised sparingly.\(^{49}\)

According to Lord Simon:

‘To proceed by Act of Parliament would obviate any suspicion of endeavouring to upset one-sidedly the constitutional balance between executive, legislature and judiciary.’\(^{50}\)

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

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

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\(^{48}\) *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234

\(^{49}\) [1972] AC 944, 966.

\(^{50}\) Op cit at 1026.
court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution.

One can see from these two excerpts of two eminent judges’ opinions that the answer to the issues raised in this report lies primarily in what one considers to be the ‘business’ of the judge.

Cardozo used to say that when it comes to the judicial process ‘there are few rules; there are chiefly standards and degree’. 51 If within each jurisdiction legal actors cannot agree on a formal systematic set of rules apt at regulating the prospective and/or non-retroactive application of judicial rulings, perhaps the way to proceed can be taken from Cardozo’s wise words which echoes are truly endless.


51 Cardozo, op cit at 161.