

THE RETROSPECTIVITY OF JUDICIAL DECISIONS AND THE LEGALITY OF GOVERNMENTAL ACTS

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Agents of government may have acted in reliance on powers conferred by legislation which has later been declared by a court to be ultra vires or inoperative. Or else they may have acted in reliance on a judicial interpretation of legislation which has subsequently been held to be erroneous. In either case the agent of government may possibly incur a civil liability for the action it took, and which was found to have been unauthorised. The article examines ways and means by which courts in a number of jurisdictions have sought to temper the retroactive effect of their rulings on what the controlling law was at the relevant time in the past.

I INTRODUCTION

In *Kleinwort Benson Ltd v Lincoln City Council*¹ Lord Browne-Wilkinson observed that:

the theoretical position has been that judges do not make or change law; they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed; its true nature is disclosed, having existed in that form all along. This theoretical position is ... a fairy tale in which no one any longer believes ... But while the underlying myth has been rejected, its progeny - the retrospective effect of a change made by judicial decision - remains.²

The change made by a judicial decision may be in relation to some rule or principle of common law; it may be in relation to the interpretation of legislation or a constitutional instrument. In some cases the change will have been brought about by the overruling of prior judicial decisions. In some cases the change will consist of an extension or modification of prior law.

Particular problems can arise when a court adjudges the action of an agent or agency of government to be invalid or illegal and in so doing the court applies, retrospectively, a version of the law which is different from the law understood by the governmental agent at the time it acted. The case could be one in which action has been taken in reliance on a statute and in which the court decides that the statute is unconstitutional or does not authorise the action which was taken. The statute could be one under which considerable sums of money have been

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¹ [1998] 3 WLR 1095.

² Ibid 1100. See also *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [1998] 4 All ER 993, 1002 (Lord Woolf MR). The declaratory theory was discussed in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095, 1117-9 (Lord Goff of Chieveley) and in *Giannarelli v Wraith* (1988) 165 CLR 543, 584-6 (Brennan J).

collected from taxpayers. It could be one authorising detention of persons in custody or affecting the period of time during which persons may lawfully be detained in custody.³ It could be one authorising seizure and destruction of private property. One consequence of retrospective invalidation of governmental acts may be that substantial civil liabilities are incurred.

The first part of this article deals with the general principle that governmental acts which are adjudged to be *ultra vires* are invalid from the outset and the extent to which that principle is moderated by the exercise of judicial discretions in the award of remedies. The article goes on to consider the extent to which the retrospectivity doctrine has been and may be moderated by the principle of estoppel by *res judicata* and by the law regarding civil liabilities. There follows an examination of various techniques which some courts have adopted in order to limit the temporal operation of their judgments, among them the technique of prospective overruling.

II RETROSPECTIVE INVALIDATION OF GOVERNMENTAL ACTS

When a court pronounces a governmental act or decision to be invalid, the act or decision is generally treated as void *ab initio*.⁴ The act or decision will be so treated even though until the court's judgment it was presumed to be valid. Indeed many judges have taken the view that actions taken in purported exercise of governmental powers remain good in law unless and until they are 'declared to be invalid by a court of competent jurisdiction'.⁵ This view is no doubt prompted by an appreciation that there can be genuine dispute about the validity of governmental acts and decisions. Those affected by these actions are counselled by the courts not to take the law into their own hands by ignoring or defying governmental acts or decisions which they believed to be invalid.

³ See *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2000] 3 WLR 843.

⁴ Governmental acts which are adjudged *void ab initio* are contrasted with those which are voidable in the sense that they are valid until set aside by a court of competent jurisdiction as from the date of the court's judgment. Acts within jurisdiction which involve an error of law have traditionally been regarded as voidable rather than *void ab initio*. The void/voidable distinction when applied to governmental acts has been criticised by a number of judges and with the virtual elimination of the distinction between jurisdictional and non-jurisdictional errors, it is one of little legal significance. See *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 365-6 (Lord Diplock); *London and Clydesdale Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189-90 (Lord Hailsham LC); *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1, 4 (Cooke J); cf *Returned and Services League of Australia (Victoria Branch) Inc (Pascoe Vale Sub-branch) v Liquor Licensing Commission* Vic CA 15 April 1999 (BC 9902013). See further Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) Chapter 11; Paul Craig, *Administrative Law* (4th ed, 1999) Chapter 20; Michael Taggart, 'Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (1986) 53; HWR Wade and Christopher Forsyth, *Administrative Law* (8th ed, 2000) 294-312; Christopher Forsyth, 'The Metaphysics of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (1998) 141.

⁵ *R v Balfour; Ex parte Parkes Rural Distributions Pty Ltd* (1987) 76 ALR 256, 263-4 (Wilcox J); *McIntosh v Minister for Health* (1987) 17 FCR 463, 466 (Davies J); *Martin v Ryan* [1990] 2 NZLR 209; *Boddington v British Transport Police* [1999] 2 AC 143.

The governmental actions which are adjudged by courts to be invalid range from legislative acts to acts or decisions taken or made in relation to particular individuals. Many people are likely to have been affected by legislation which has been treated as operative law for some time, for example legislation which has imposed taxation. A judicial ruling that a governmental decision in relation to a particular individual is invalid may suggest that decisions made in relation to other individuals in like cases were invalid, for example because a relevant statutory provision has been misinterpreted.

Principles of estoppel per *res judicata* will often preclude relitigation of cases which were decided with reference to law which in some later case has been found not to be the true law, or no law at all.⁶ Those who have not previously come to court to contest the validity of some governmental act affecting them may be precluded from contesting the validity of that act because of statutory limitations on the time within which judicial proceedings must be instituted. The time limits for institution of judicial review proceedings are relatively short, though in some cases courts have been accorded a discretionary power to extend the time.⁷

Statutes of limitation will seldom, however, preclude the institution of judicial proceedings to contest the validity of legislation when those proceedings are by way of a challenge to a recent decision made in exercise of powers conferred by the legislation. The legislation could have been enacted many years before and not previously been the subject of challenge. Take, for example, *R v Kirby; Ex parte Boilermakers' Society of Australia*⁸ ('*Boilermakers' case*'), a leading constitutional case on the separation of powers doctrine implicit in the Judicature Chapter of the federal Constitution - Chapter III. In this case the High Court held that the Constitution prohibits the enactment of federal legislation which invests judicial and non-judicial powers in the one institution, even though the members of that institution are accorded the same security of tenure which is assured to judges of all federal courts by s 72 of the Constitution. The High Court held that the investiture of arbitral and judicial powers in the Commonwealth Court of Conciliation and Arbitration was unconstitutional. Its decision was sustained on appeal to the Judicial Committee of the Privy Council.⁹

The federal legislation adjudged to be unconstitutional in the *Boilermakers' case* had been on the statute books for some thirty years.¹⁰ In the meantime there had been several suits before the High Court, arising under the legislation, in which no party had chosen to challenge the validity of the legislation. The litigation had rather been to contest the validity of action pursuant to the legislation. In *Boilermakers* counsel for the Commonwealth argued that the prior litigation had indicated that the High Court had accepted the constitutionality of the legislation

⁶ See Enid Campbell, 'Relitigation in Government Cases: A Study of the Use of Private Law Principles in Public Law Litigation' (1994) 20 *Monash University Law Review* 21.

⁷ See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 11.

⁸ (1956) 94 CLR 254.

⁹ *Attorney-General (Commonwealth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

¹⁰ *Commonwealth Conciliation and Arbitration Act 1904* (Cth), as amended in 1926.

then under challenge. The High Court rejected this argument, and in so doing made observations about the Court's role in adjudicating issues about the meaning and effect of the federal Constitution. These observations are worth quoting at length, for they are ones which have informed subsequent High Court jurisprudence regarding the Court's role in enforcement of the Constitution.

The prior cases to which counsel for the Commonwealth had alluded, the majority said:

and perhaps other examples exist, do no doubt add weight to the general considerations arising from lapse of time, the neglect or avoidance of the question in previous cases and the very evident desirability of leaving undisturbed assumptions that have been accepted as to the validity of the provisions in question. At the same time, the Court is not entitled to place very great reliance upon the fact that, in the cases before it where occasion might have been made to raise the question for argument and decision, this was not done by any member of the Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly. Undesirable as it is that doubtful questions of validity should go by default, the fact is that the Court usually acts upon the presumption of validity until the law is specifically challenged.¹¹

The judges went on to say that:

If, as is the case here, the principle or the particular application of principle that is in question has not been settled by the authority of a judicial decision in which it has been raised, considered and dealt with, the judges must give effect to the Constitution according to the interpretation which on proper consideration they are satisfied that it bears. But in arriving at a conclusion they are not only entitled, but ought, to attach weight to such matters as are dealt with in the foregoing discussion, treating them as considerations which should influence their judgment upon the meaning and application of the Constitution. Such matters as judicial dicta, common assumptions tacitly made and acted upon, and the fact that legislation has passed unchallenged for a considerable period of time, may be regarded as raising a presumption which should prevail until the judicial mind reaches a clear conviction that consistently with the Constitution the validity of the provisions impugned cannot be sustained. But they cannot be regarded as doing more.¹²

The *Boilermakers' case* came to the High Court in exercise of its original jurisdiction under s 75(v) of the federal Constitution, the provision which endows the Court with jurisdiction in matters '[i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. These remedies are all discretionary remedies of a kind which superior courts of supervisory jurisdiction may award on an application for review of governmental

¹¹ (1956) 94 CLR 254, 295. See also Henry Burmester, 'The Presumption of Constitutionality' (1983) 13 *Federal Law Review* 277.

¹² (1956) 94 CLR 254, 296.

acts. (Certiorari and declaratory judgments need to be added to this list of available remedies.)

On an application for judicial review a court may decline to grant remedy even when it is satisfied that the act or decision under review is unauthorised or unlawful. Remedy may, for example, be denied because the applicant no longer has an active interest in the matter,¹³ or because the respondent has already rectified the error,¹⁴ or because the applicant has failed to pursue an adequate alternative remedy.¹⁵ If the applicant has sought an order to compel the performance of a public duty, remedy may be denied because the court is satisfied that it is impossible for the respondent to perform the duty.¹⁶ If the applicant's complaint is that the person who made the decision under review was not a person who was authorised to make the decision, the court may refuse remedy on the ground that the person or body which has the requisite authority would necessarily have made the same decision, and that decision would have been legally unassailable.¹⁷

If upon judicial review a court decides that a remedy should be granted it has a facility to determine the date from which its order should operate. That facility is generally accorded by rules of court.¹⁸ But even in the absence of such rules, the law governing the award of discretionary remedies allows courts some flexibility in determining the date from which their formal orders should operate. Entry of an order in the nature of mandamus or a prohibitory order may, for example, be deferred for a specified time so as to give the respondent an opportunity to rectify the defect.¹⁹ The operation of purely declaratory orders may also be postponed to enable remediable defects to be cured.²⁰

The court could, for example, stipulate that its order will have retroactive effect if the respondent has not taken certain corrective action by a specified date.

In determining whether the operative date of a court order to set aside an

¹³ See *R v Aston University Senate; Ex parte Roffey* [1969] 2 QB 538; *Perder Investments Pty Ltd v Elmer* (1991) 31 FCR 201.

¹⁴ See *R v Commissioner of the Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118.

¹⁵ See Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000), 579-80, 601, 643-9, 885-91, 933-5 (Aronson and Dyer); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10. See also Enid Campbell, 'Judicial Review and Appeals as Alternative Remedies' (1983) 9 *Monash University Law Review* 14.

¹⁶ See Aronson and Dyer, above n 15, 672.

¹⁷ *R v Monopolies and Mergers Commission; Ex parte Argyll Group Plc* [1986] 1 WLR 763, 774-5. Decisions by persons who have no authority to decide may sometimes be accorded validity under the de facto officer doctrine: see Enid Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5.

¹⁸ See, eg, *High Court Rules* O 43 r 3; *Federal Court of Australia Rules* O 35 r 3 and the following State and Territory Supreme Court rules: ACT O 42 rr 3 and 4; NSW Part 40, r 3; NT r 59.02; Qld O 44 rr 2 and 3; SA r 84.02; Tas O 44 rr 4 and 5; Vic r 59.02; WA O 42 r 2. See *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(1)(a). There are equivalent provisions in the *Administrative Decisions (Judicial Review) Act 1989* (ACT) and *Judicial Review Act 1991* (Qld).

¹⁹ *R v Hereford Corporation; Ex parte Harrower* [1970] 3 All ER 460 (mandamus); *R v Greater London Council; Ex parte Blackburn* [1976] 1 WLR 550 (prohibition); *R v Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380, 402-3 (Lord Denning MR), 418 (Salmon LJ).

²⁰ *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] QB 815, 841-2.

administrative decision should be the date of that decision or a later date, the court may have regard to whether the applicant may have a claim to damages or restitution of money paid before the court's judgment. A case in point is *Wattmaster Alco Pty Ltd v Button*.²¹ It concerned the exercise of the Federal Court's discretion under s 16(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to quash or set aside an administrative decision with effect from the date of the Court's order 'or from such earlier or later date as the Court specifies'.

The applicant in this case had sought review of a declaration made by the Minister, Senator Button, in purported exercise of a power conferred by the *Customs Tariff (Anti Dumping) Act 1975* (Cth). If valid this declaration would have imposed on importers of certain goods a liability to pay customs duty at a special rate. The applicant was such an importer. The company contested the validity of the Minister's declaration. At first instance Pincus J concluded that the declaration was invalid on the ground that in making it, the Minister had failed to take into account considerations he was bound to take into account. Pincus J set aside the Minister's declaration, but only from the date of the Court's order. The appeal to the Full Court was against this non retroactive order, for had it been allowed to stand, the applicant's claim to recover customs duties already paid by it, under protest, would have been prejudiced. The Full Court reversed the order made by Pincus J. In its opinion, justice required that the Minister's declaration be set aside as from the date on which it was made.

In deciding as it did the Full Court had regard to prior judicial decisions in which courts had discussed the distinction between governmental acts which are void and those which are merely voidable by court order. It endorsed the proposition that,

[a] decision made in purported exercise of a statutory discretion, but which is affected by a relevant irregularity, will normally be treated as valid until successfully impugned by an appropriate plaintiff; but once the decision is held to be bad in law it will be treated as invalid - at least in so far as substantive rights are concerned - as from the date upon which it was made.²²

The Full Court also noted the different ways in which the validity of the ministerial declaration might have been raised for judicial determination, and the absence in some such proceedings of any judicial discretion to invalidate from a date later than that of the administrative decision under review. The Court instanced proceedings for an injunction to restrain the Collector of Customs from demanding payment of the dumping duty payable under the ministerial declaration, and actions for recovery of moneys already paid by importers.²³ It should be said, however, that under the law as it then stood there would have been some doubts about the ability of the importers to recover the moneys they had

²¹ (1986) 70 ALR 330.

²² *Ibid* 335.

²³ *Ibid*.

already paid pursuant to demands made on them under the invalid ministerial declaration.²⁴

Another consideration in this case was that there were importers other than the applicant who had paid money under the Minister's declaration. Assuming that the court's judgment bound only the applicant and the respondent, the Collector of Customs could, in theory, have continued to exact payments from the other importers. If they wished to contest the validity of the Minister's declaration, they would have had to institute separate judicial proceedings, and in each case the court would have had to decide when its order to quash should take effect. The Minister and his agents could, of course, be expected to respect the court's decision and treat it as applicable to the other importers. But fairness to all concerned required that the order to set aside be effective from the date on which the ministerial declaration had been made.

In *R v Panel on Take-Overs and Mergers; Ex parte Datafin Plc*,²⁵ the English Court of Appeal recognised that there can be circumstances in which it is entirely appropriate for a court to make declaratory orders that do not invalidate the acts which are the subject of judicial review but which, as it were, declare what course of action should be adopted in the future. *Datafin Plc* had sought judicial review of a decision by the Panel to dismiss its complaint that another company's take-over bid was in breach of the City Code on Take-overs and Mergers. Counsel for the Panel had argued that the Panel's decisions were not subject to judicial review, partly on the ground that if they were, the financial market would be dislocated while review proceedings were pending. 'The nature of the rulings of the takeover panel', it was contended, 'are particularly required to have speed and certainty: they may be given in the middle of a bid, and they clearly may affect the operation of the market, and even short-term dislocation could be very harmful'.²⁶

The Court of Appeal considered that decisions of the Panel were judicially reviewable and could be quashed. But in exercising its discretion regarding remedies a court could properly have regard to 'the special needs of the financial markets for speed on the part of decision-makers and for being able to rely upon those decisions as a sure basis for dealing in the market'.²⁷ Having regard to these considerations, Sir John Donaldson MR said:

I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at

²⁴ The Full Court referred to *Mason v New South Wales* (1959) 102 CLR 108; *Cam and Sons Pty Ltd v Ramsay* (1960) 104 CLR 247; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137. For a review of the law enunciated in these and other cases see K Mason, 'Money Claims By and Against the State' in PD Finn (ed), *Essays in Law and Government*, vol 2: *The Citizen and the State in the Courts* (1996) 101.

²⁵ [1987] QB 815. See also Clive Lewis, 'Retrospective and Prospective Rulings in Administrative Law' [1988] *Public Law* 78.

²⁶ [1987] QB 815, 839.

²⁷ *Ibid* 840.

all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules.²⁸

The discretionary character of the remedies available on applications for judicial review allows courts some scope for modification of the retrospective effect of their decisions and with it the retrospectivity of pronouncements on questions of validity. But when the validity of governmental acts is challenged collaterally there will be little if any scope for the exercise of judicial discretion. Take for example a case in which a plaintiff has sued a local authority for trespass to land, the alleged trespass consisting of entry by employees of the local authority upon the plaintiff's land and demolition of a building. The local authority's defence is that the acts were done by statutory authority. The plaintiff's reply is that the statute upon which the defendant relies does not, by its terms, authorise what was done and even if it does the defendants had acted in breach of the plaintiff's right to procedural fairness or in breach of statutory procedural requirements. In this hypothetical case, the central issue for judicial determination would be whether at the time of the alleged trespass the defendant did or did not have statutory authority to do what was done; and the court could not avoid deciding on the issue.

It is possible that the case would be one in which there were no prior judicial rulings on the relevant statutory provisions or provisions like them. But it is also possible that the defendant acted in reliance on a prior judicial ruling on the meaning and effect of the relevant statutory provisions, and perhaps also with attention to a prior judicial ruling on what it needed to do to satisfy procedural requirements. Should the court in the present case give judgment in favour of the plaintiff and do so on the basis that the prior judicial interpretation of the statute was wrong, or on the basis that the procedural requirements are more exacting than those indicated by prior judicial decisions, the defendant could well protest that it was not right or just that it be inflicted with a liability to pay compensation for something which, when it was done, was done with due attention to the law as it had been expounded by the judges.

The next part of the article examines the extent to which problems of this kind may be accommodated by rules to do with the incidence of civil liabilities to pay compensation or to make restitution of money or property. It also deals with the effect of the *res judicata* principle.

III CONSEQUENCES OF RETROSPECTIVE INVALIDATION

Retrospective invalidation of a governmental act or decision does not mean that the act or decision can have had no legal effect whatsoever. In *Boddington v British Transport Police*,²⁹ Lord Browne-Wilkinson stated that he was,

²⁸ Ibid 842.

²⁹ [1999] 2 AC 143.

far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity.³⁰

People may, for example, have been arrested by law enforcement officers on suspicion that they were committing or had committed a criminal offence. The offence may have been created by legislation which was assumed to be valid, but was subsequently adjudged to be invalid. Some of those who were arrested may have been convicted of the offence without the validity of the legislation having been challenged either at trial or on appeal. Those convicted may have been sentenced to imprisonment or ordered to pay monetary penalties. They may have served the sentence of imprisonment or have paid the monetary penalties. Persons may have been arrested or their property searched pursuant to a warrant which has subsequently been adjudged invalid. A person's property may have been seized pursuant to legislation which has subsequently been held by a court not to have authorised the seizure. In the meantime the property may have been sold to an innocent third party. A legal system may deal with such cases in several ways.

Consider first the case where a court's judgment has been based on legislation which in later unrelated litigation has been held to be invalid. Whilst it is possible for the judgment in the first case to be set aside on appeal, until so set aside the judgment stands. It does so because of principles of *res judicata*. If the judgment is not set aside, perhaps because the time for appeal has expired, it is regarded as valid and final. This principle was applied by the New South Wales Court of Criminal Appeal in *R v Unger*.³¹

Unger had been convicted in June 1974 of breach of a regulation. He was bound over by the District Court to be of good behaviour and fined \$2,000. In March 1976, the regulation in question was adjudged ultra vires. In September 1976, Unger applied for extension of time to appeal against his conviction, but the Court of Criminal Appeal dismissed the application. Street CJ, with whom Begg and Ash JJ agreed, observed that

[t]here is no difference in principle between a subsequent judicial decision which has the effect of exposing a prior misconception in relation to a principle of law which was wrongly regarded as well founded at the time of the trial, and a subsequent judicial decision exposing the invalidity of regulations that were wrongly treated as valid at the time of the trial. The trial having been concluded and the time for appeal having gone by, the general principle is that the matter is regarded as at an end. It is to be borne in mind that the effect of a conviction in a criminal court, no less than a verdict and

³⁰ Ibid 164 (Browne-Wilkinson). Lord Steyn was alert to the same difficulties: 170-1. See also *Calvin v Carr* [1980] AC 474, 589-90.

³¹ [1977] 2 NSWLR 990.

judgment in a civil court, is to merge in that conviction or judgment, as the case may be, all of the material upon which it proceeded.³²

The Chief Justice went on to defend the concept of merger. The concept is, he reasoned:

no blind, arbitrary proposition. It is founded deeply in the fabric of the philosophy of the common law. Although in pure theory the overruling or modification by judicial decision of previous conceptions of legal principle does no more than correct a departure from the timeless perfection of the law, the plain fact is that legal principle is constantly evolving and being moulded in the light of the changing and developing social context. Recognizing this, there has always been an unwillingness to permit the re-opening of past decisions. Indeed the process of appeal, either civil or criminal, is a comparatively recent and statutory concept - it finds no basis in the common law itself. This finality of decision in each individual case leaves the courts free to permit a judicial flexibility in the development of principle in later cases, free from inhibition lest such development may set at large disputes that have previously been resolved. The concept of merger in judgment, both in the civil and in the criminal field, ... equally with the doctrine of *res judicata*, serves this requirement of flexibility for potential development of the law.³³

In New South Wales, there was no statutory provision under which Unger's conviction, or the penalty imposed upon him, could have been set aside otherwise than on appeal. The case considered by a Full Court of Tasmania's Supreme Court in *Smith v Brooks*³⁴ was somewhat different.

In July 1986, Smith had been convicted before a magistrate and special penalties were imposed on him. But in October 1986, the regulation on special penalties had been adjudged by the Tasmanian Supreme Court to be *ultra vires*.³⁵ The magistrate then invoked a statutory power to amend penalties when they had been imposed contrary to law. The Director of Public Prosecutions sought judicial review of the magistrate's decision to amend the order as to penalties. At first instance Nettlefold J upheld the contention that the special penalties imposed by the magistrate were not contrary to law, because at the time they had been imposed the relevant regulation was presumptively valid. On Smith's appeal to a Full Court, the Court accepted that the magistrate's order of July 1986 was valid if there had been no avenue for correction of this order, the penalties imposed would have been recoverable from the offender. But here there was a statutory power to correct the magistrate's order in light of the subsequent court ruling that the regulation upon which the magistrate had relied was invalid. There was indeed a duty to exercise this power, once the regulation had been pronounced to be invalid.³⁶

³² Ibid 995.

³³ Ibid 995-6.

³⁴ [1988] Tas R 92.

³⁵ *Munday v Cole* [1986] Tas R 160.

³⁶ [1988] Tas R 92, 101 and 105.

If a court's judgment is treated as valid, notwithstanding that it is based on legislation which is later held to be invalid, it should follow that officers of court and others who are responsible for executing a court's judgment, or consequential orders, should incur no legal liability for their acts. The common law accords them such protection.³⁷ Statutes often protect those who execute warrants for arrest and search warrants, according to the terms of the warrant, even when the warrants are later held to be invalid.³⁸

But what is the position where a police officer or someone else has exercised a power to arrest without warrant, and the offence for which a person has been arrested is later adjudged by a court to be no offence in that it was created by legislation which is ultra vires?

It was a case of this kind which arose for decision in *Percy v Hall*.³⁹ Here police officers had, without warrant, arrested persons on some 150 occasions. Those arrested had been removed from the vicinity of a military communications installation. They were alleged to have infringed by-laws. They were later acquitted of the criminal charges against them. The Director of Public Prosecutions appealed against the acquittals but without success, for the Divisional Court held the relevant by-laws invalid for uncertainty. The police officers who had made the arrests were then sued for wrongful arrest and false imprisonment. The defendant police pleaded lawful justification on the basis of their reasonable belief that the plaintiffs had been committing an offence. On trial of preliminary issues it was held that this defence was available notwithstanding that the by-laws were invalid. On appeal the Court of Appeal concluded that the by-laws were valid. But it also held that even if the by-laws had been invalid, the plea of lawful justification would have been good. At the time the arrests had been made, Simon Brown LJ reasoned, the

by laws were apparently valid; they were in law to be presumed to be valid; in the public interest, moreover, they needed to be enforced. It seems to me one thing to accept ... that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have the conviction set aside; quite another to hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constable's duty into what must later be found actionably tortious conduct ... I see no sound policy reason for making innocent constables liable in law, even though such liability would be underwritten by public funds.⁴⁰

³⁷ *Mayor and Alderman of City of London v Cox* (1867) LR 2 HL 239, 263, 269; *Sirros v Moore* [1975] QB 118.

³⁸ See *Justices Protection Act 1750* (24 Geo II c 44); *Police Service Act 1990* (NSW) s 215; *Police Administration Act 1978* (NT) ss 161-3; *Criminal Code 1899* (Qld) ss 251, 253; *Police Act 1998* (SA) s 65; *Criminal Code 1924* (Tas) ss 22, 23, 25; *Police Regulation Act 1958* (Vic) s 124; *Criminal Code 1913* (WA) ss 227-8; *Police Act 1892* (WA) s 138; *Australian Federal Police Act 1979* (Cth) s 64B. When a court declares a search warrant to be invalid, it may order that goods seized in execution of the warrant be returned: *Optical Prescription Spectacle Makers Pty Ltd v Withers* (1987) 13 FCR 594; *Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387.

³⁹ [1996] 4 All ER 523.

⁴⁰ *Ibid* 541-2.

Peter Gibson and Schiemann LJ agreed with this analysis.⁴¹

The case presented by *R v Governor of Brockhill Prison; Ex parte Evans (No 2) ('Evans')*,⁴² was a little different from that which had been presented in *Percy v Hall*, and a differently constituted Court of Appeal, by a majority, concluded that the difference was a significant one. The circumstances of the case of Evans were as follows.

In January 1996, Michelle Evans had been convicted of four criminal offences and had been sentenced to terms of imprisonment which were ordered to be served concurrently. Her total term of imprisonment was two years. But there were statutory provisions which entitled her to be released from prison before the end of the two years. Relying on these provisions, and on several decisions of the Divisional Court in which the provisions had been interpreted, the Governor of Brockhill Prison determined that Evans was due for release on 18 November 1996. On 4 September 1996, the Divisional Court, in a case involving another prisoner, overruled its previous decisions.⁴³ According to the Court's revised interpretation of the statutory provisions, it was apparent that the Governor had miscalculated the date on which Evans was due for release. On 6 September 1996, Evans instituted proceedings for judicial review of the Governor's determination in her case and on 15 November 1996 the Divisional Court decided that she should have been released on 17 September 1996.⁴⁴ Evans was released immediately from custody.

In her application for judicial review Evans had included a claim for damages for false imprisonment. The Divisional Court adjourned the hearing of this claim, though its decision on the application for judicial review had established that she had been detained in custody for 59 days beyond the date on which she was entitled to be released. On 10 June 1997, Collins J dismissed the action for damages against the prison Governor. In anticipation of the prospect that his decision might be reversed on appeal, he assessed the damages which would have been payable to Evans had her action succeeded to be £2,000. Collins J decided as he did on the basis that, at the time the Governor determined the date on which Evans was due for release, the Governor was acting in accordance with the Divisional Court's interpretation of the relevant statutory provisions and was bound by that interpretation. It seemed to Collins J that, at the relevant time, the Governor 'would have had no lawful justification for doing anything else' than calculate the term of imprisonment to be served in accordance with the law as it had been interpreted by the Divisional Court.⁴⁵

Michelle Evans appealed to the Court of Appeal against the decision of Collins J. On 19 June 1998, her appeal was allowed by a majority of that Court (Lord Woolf MR and Judge LJ, Roch LJ dissenting). She was awarded £5,000 damages. The House of Lords subsequently granted leave to the Governor – essentially the

⁴¹ *Ibid* 544 (Peter Gibson LJ), 545 (Schiemann LJ).

⁴² [1998] 4 All ER 993.

⁴³ *R v Secretary of State for the Home Department; Ex parte Naughton* [1997] 1 All ER 426.

⁴⁴ *R v Governor of Brockhill Prison; Ex parte Evans (No 1)* [1997] QB 443.

⁴⁵ *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [1998] 4 All ER 993, 1002.

government – to appeal against the Court of Appeal's decision. The House of Lords later dismissed the appeal.

In the course of their reasons for judgment in the case of *Evans*, Lord Woolf MR and Judge LJ emphasised that their judgment in favour of *Evans* did not signify a finding of fault on the part of the Governor.⁴⁶ Rather, their concern was with whether the elements of the tort of false imprisonment had been established. In their opinion they had, and the Governor's imprisonment of *Evans* after the date on which she was entitled to be released could not be said to be legally justified simply because the Governor had, at the relevant time, acted in reliance on judicial interpretations of the relevant statutory provisions. The subsequent judicial overruling of those interpretations had to be accorded retrospective effect. That overruling decision had shown that the Governor had misapplied the law. His innocent mistake of the law was no defence. There was, apparently, no statutory provision upon which the Governor might rely to protect him against the personal liability sought to be fixed upon him.

Neither Lord Woolf MR nor Judge LJ queried the correctness of the Court of Appeal's decision in *Percy v Hall*.⁴⁷ Lord Woolf MR stated that he agreed with the decision in that case;⁴⁸ Judge LJ considered that the decision had not been overruled by the House of Lords in *Boddington v British Transport Police*.⁴⁹ Both judges, however, thought that there is a difference between a case where law enforcement officers have arrested persons for offences created by legislation which is subsequently held by judicial decision to be invalid, and a case in which a person has been arrested, or detained in custody, in purported exercise of a valid statutory power which has subsequently been held by a court of law not to authorise the arrest or detention of which a plaintiff complains.

The soundness of the distinction between legislation which is *ultra vires* and action in excess of valid legislative powers is questionable. It may be right for courts to counsel law enforcement officers, and others who are charged with responsibility for the administration of legislation, to act on the basis that the relevant legislation is *intra vires* until and unless it has been pronounced by a court of competent jurisdiction to be *ultra vires*. But if courts claim, as they do, authority to pronounce on the meaning and effect of legislation they acknowledge to be *intra vires*, their expectation must surely be that those responsible for the administration of the legislation will act in accordance with current judicial interpretations of the legislation. An official who acts in defiance of current judicial interpretations of relevant legislation might, in some situations, be subject to disciplinary proceedings on account of that defiance, which proceedings might have terminated well before the court judgment which overruled the prior judicial interpretations and which vindicated the official's personal interpretation of the legislation.

In the course of his reasons for judgment in the case of *Evans*, Lord Woolf MR

⁴⁶ *Ibid* 997 (Lord Woolf MR), 1021 (Judge LJ).

⁴⁷ [1996] 4 All ER 523.

⁴⁸ [1998] 4 All ER 993, 1001.

⁴⁹ *Ibid* 1020.

stated that, in his opinion, the principle about retrospective operation of judicial decisions which declare the law must be applied without discrimination between those whose interests are served by application of that principle and those whose interests are not so served. To make this point, his Lordship postulated a hypothetical case in which a prison Governor has held a prisoner in custody for a period in excess of that authorised by statute, as judicially interpreted. A subsequent judicial decision might, his Lordship postulated, have shown that the Governor's interpretation of the relevant statute law had been correct. His Lordship thought that the liability of the Governor in both these situations should be determined in accordance with the law subsequently declared by judicial decision.⁵⁰

Judge LJ adverted to liabilities which might possibly have been incurred had Michelle Evans escaped from Brockhill Prison before the date for her release, as determined by the Governor, but after the date on which she was entitled to be released, that date having been established by a subsequent judicial decision. Escape by a prisoner from lawful custody was a criminal offence, and reasonable suspicion that a person has escaped from such custody activates powers of arrest and detention. Judge LJ confessed that the main difficulty he had had with the case of Evans was

whether the governor should be in any less strong a position to meet a claim for false imprisonment than the constables in *Percy v Hall* who unlawfully arrested citizens on the basis of by laws which were subsequently declared to be invalid. He would have been in dereliction of his duties as governor if he had allowed Michelle Evans to leave prison before 15 November 1996. If she had escaped from custody on, say on 10 October, as a prisoner unlawfully at large she would have been liable to arrest by police officers. If she had taken proceedings for false imprisonment against them after 15 November (by which date she would have established that she had not been unlawfully at large at all) they would perhaps have sought to rely on *Percy v Hall* to avoid liability.⁵¹

Roch LJ, in dissent, agreed that the decision of the Divisional Court that Evans had been detained after the date on which she should have been released operated retrospectively. There was no doubt that Evans had been falsely imprisoned for a period. But the question was whether the imprisonment was justified. Roch LJ drew an analogy between the present case and prior cases in which gaolers had been held to have been justified in detaining persons in custody pursuant to a warrant, notwithstanding that the warrant was invalid.⁵² Here the gaoler had a warrant to detain Evans in prison for two years, though by statute he was obliged to release her when she had served half her sentence. In determining when she

⁵⁰ Ibid 1003.

⁵¹ Ibid 1021.

⁵² Ibid 1011-12: Roch LJ cited *Olliet v Bessey* (1679) T Jones Rep 214 (84 ER 1223); *Greaves v Keane* (1879) 4 Ex D 73; *Henderson v Preston* (1888) 21 QBD 362; Ibid 1001: Lord Woolf MR thought these cases 'are only authority for the proposition that a warrant "good on its face" can be relied upon a gaoler until set aside and are no more than illustrations of the fact that until an order of a court is set aside it justifies detention so the imprisonment is not tortious'. On appeal, the House of Lords agreed with Lord Woolf's interpretation of these cases.

had served that term the Governor was simply 'applying the relevant statutory provisions as interpreted by the courts'.⁵³ It was, moreover his duty to do so. His detention of Evans was therefore justified.

The House of Lords dismissed the appeal against the decision of the Court of Appeal because, in its opinion, it is no defence to an action for false imprisonment that the defendant acted in accordance with a judicial interpretation of the law which has later been held to be incorrect.⁵⁴ The tort of false imprisonment, the Lords stressed, is one of strict liability. The Lords nevertheless accepted that a defendant to an action for false imprisonment has a good defence if he or she has acted in obedience to a court order or a warrant which is valid on its face.⁵⁵

In deciding as they did in the case of Evans the Lords adverted to the importance of the individual interest which is protected by the imposition of liability for false imprisonment. Some of them also referred to the obligations to protect that interest which the United Kingdom had assumed under art 5 of the European Convention for the Protection of Human Rights.⁵⁶ And although the action by Evans had been brought against the Governor, rather than the Crown, the Lords had no doubt that the damages awarded against him would be paid by the government.⁵⁷

The circumstances of the case before the House of Lords did not require it to consider whether it is a defence to an action for false imprisonment that the defendant acted pursuant to legislation which has subsequently been held by a court to be invalid. Indeed, some of the Lords stated that they reserved their position on this issue.⁵⁸ The decision in Evans therefore provides no guidance on the kind of case presented by *Percy v Hall*.⁵⁹

As has been mentioned earlier, the claim of Michelle Evans for damages, though joined to her application for judicial review, was, by court order, separated from it and was tried after her application for judicial review had succeeded and she had, in consequence, been released from custody. The question of whether the prison Governor was to be held liable for false imprisonment was clearly a separable issue. His liability to pay damages had to be determined by reference to principles of tort law, rather than by reference to the principles to be applied in determining the validity of the Governor's decision regarding the date on which

⁵³ Ibid 1014.

⁵⁴ [2001] 2 AC 19. There were no dissenting speeches. Lord Steyn referred (at 29) to the decision of the New South Wales Court of Appeal in *Correll v Corrective Services Commission of New South Wales* (1988) 13 NSWLR 714. This was a case in which the Court sustained a prisoners' claim of damages for false imprisonment 'on the ground that his entitlement to remission had been calculated to his detriment in accordance with a decision which had subsequently been overruled'.

⁵⁵ Ibid 34-5, 38-9, 43-4, 46.

⁵⁶ Ibid 27, 29, 37-9, 46-7.

⁵⁷ Ibid 26.

⁵⁸ Ibid 27 (Lord Browne-Wilkinson), 35 (Lord Hope).

⁵⁹ [1996] 4 All ER 523. In *Boddington v British Transport Police* [1999] 2 AC 143, Lords Browne-Wilkinson and Steyn made reference to *Percy v Hall* but neither of them expressed a view of the correctness of the opinion of the Court of Appeal.

Evans was entitled to be released from custody.

When, upon a direct challenge of the validity of some governmental act, a court is asked to do no more than rule on the validity of the act, the court may not be attentive to the possible consequences of a ruling by it that the challenged act was invalid, and invalid ab initio. The case of *Chief Constable of North Wales Police v Evans*⁶⁰ was exceptional in that regard. It was a case in which the House of Lords had concerns about the consequences of a mere declaration that the dismissal of a probationary police constable was void, on the ground that he had been denied his right to natural justice.⁶¹ If the dismissal was void, had Evans 'been a constable in the police force in North Wales in the intervening four years and what ... [had] happened to 10 months of uncompleted probationary service?'⁶² Had Evans acquired pension rights? Was he entitled to back pay? Evans had not sought damages, though the Lord's considered that had they been sought, they could be substantial. What Evan wanted was reinstatement. But an order of that nature 'might border on usurpation of the powers of the chief constable'.⁶³ In the end the Lords decided that the only order it could properly make was a declaration that, by reason of his unlawful dismissal, Evans

had thereby become entitled to the same rights and remedies, not including reinstatement, as he would have had if [the chief constable] had lawfully dispensed with his services under [police regulations].⁶⁴

Retrospective invalidation of governmental acts may have far reaching consequences when those acts have resulted in collection by agencies of government, pursuant to tax legislation, of vast sums of money and expenditure of the moneys collected. For a long time those who had paid taxes which were later found to have been unauthorised were often debarred from recovering the moneys they had paid. This was because of the general rule of law, of judicial making, that moneys paid under mistake of law were not recoverable. There were some exceptions to this general rule but they did not extend to the case where a person had paid simply under threat of court proceedings.⁶⁵

In recent years the House of Lords has substantially reformed the common law in this regard. In *Woolwich Building Society v Inland Revenue Commissioners*,⁶⁶ it ruled that taxes paid under unauthorised subordinate legislation are normally recoverable. The decision in *Kleinwort Benson Ltd v Lincoln City Council*⁶⁷ went further and effectively abrogated the old principle, established by court decisions, that moneys paid under mistake of law are generally irrecoverable. Now the general rule is, according to the Lords, that moneys paid by mistake are recoverable if their retention would unjustly enrich the payee. For the purposes

⁶⁰ [1982] 1 WLR 1155.

⁶¹ A forced resignation was treated as equivalent to dismissal.

⁶² [1982] 1 WLR 1155, 1163 (Lord Hailsham LC).

⁶³ *Ibid* 1176 (Lord Brightman).

⁶⁴ *Ibid*.

⁶⁵ See K Mason, 'Money Claims By and Against the State' in PD Finn (ed), *Essays on Law and Government*, vol 2: *The Citizen and the State in the Courts* (1996) 101.

⁶⁶ [1993] AC 70. The High Court of Australia has yet to decide whether to follow *Woolwich*.

⁶⁷ [1998] 3 WLR 1095.

of this article it is not necessary to discuss the refinements of the doctrine of unjust enrichment or to consider in any detail the defences which may be available when a party seeks restitution of moneys paid.⁶⁸ It is, however, relevant to note the particular problems which can arise when the injustice factor, which prima facie founds a claim for restitution of moneys, is invalid or unlawful action on the part of an agency of government.

The illegality could stem from legislation which, subsequent to the payment of the money sought to be recovered, is adjudged to be ultra vires. In Australia, that legislation may be adjudged invalid on constitutional grounds.⁶⁹ In some cases claims for recovery may be barred by statutes of limitation. But statutes of limitation which impose relatively short periods of time within which actions for recovery of moneys from government must be instituted are themselves vulnerable to challenge on constitutional grounds.⁷⁰ In some cases the defect in the legislation under which moneys have been paid may be cured by further legislation which is expressed to have retrospective effect. That expedient may be adopted when the defect is simply one of failure to conform with controlling procedural requirements, for example a provision that laws imposing taxation shall deal only with that subject.⁷¹ If the legislation adjudged unconstitutional is Australian State legislation and it is held invalid because it imposes duties of excise contrary to s 90 of the federal Constitution, the federal Parliament may be able to use its exclusive power to impose taxes of that kind to adopt as its own the State legislation adjudged invalid, again with retrospective effect.

It was in light of the possibility that the High Court might adjudge invalid the State legislation under challenge in *Ha v New South Wales*⁷² ('*Ha*') that the federal government prepared a draft of Commonwealth statutory measures which it would present for enactment by the federal Parliament should the constitutional challenge succeed, which it did, by a majority of 4:3. The legislative measures were ones designed to ensure that the invalid State measures were converted, retrospectively, into federal legislative measures, but ones which would secure to the States a right to retain the revenues they had derived from their unconstitutional taxing measures, which revenues they would have expended over a period of years.⁷³

The State legislation which the High Court adjudged to be invalid in *Ha*⁷⁴ was

⁶⁸ The cases and literature are surveyed in Tania Voon, 'Restitution from Government: Woolwich and its Necessary Boundaries' (1998) 9 *Public Law Review* 15.

⁶⁹ Sections 51(ii), 92, 99 and 114 of the Australian federal Constitution restrict the taxing powers of the federal Parliament. The taxing powers of the State Parliaments are limited by the federal Constitution ss 90, 92, 114 and 117.

⁷⁰ On the constitutionality of statutes which limit the time for recovery of moneys from governments see Enid Campbell, 'Unconstitutionality and its Consequences' in G Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 120-5; Mason, above n 65, 132-3.

⁷¹ Eg federal Constitution s 55. On the constitutionality of legislation to rectify legislation enacted contrary to s 55 see *Mutual Pools and Staff Pty Ltd v Commonwealth (No 2)* (1994) 179 CLR 155. (1997) 189 CLR 465.

⁷² *Franchise Fees Windfall Tax (Collection) Act 1997 (Cth)*; *Franchise Fees Windfall Tax (Imposition) Act 1997 (Cth)*; *Franchise Fees Windfall Tax (Consequential Amendments) Act 1997 (Cth)*.

⁷³ (1997) 189 CLR 465.

legislation of a kind which had been on the State statute books for many years. It was legislation which had been enacted in reliance on a series of decisions of the High Court on the meaning of s 90 of the federal Constitution - the section which gives the federal Parliament an exclusive power to enact legislation which imposes taxes by way of customs and excise duties.⁷⁵ Judicial interpretations of s 90 had suggested to the governments of the States that there were ways and means by which the Parliaments of the States could enact statutes which were calculated to produce substantial revenues, available for expenditure by State governments, but without violation of s 90 of the federal Constitution. The decision of the majority in *Ha* showed that assumptions on the part of successive State governments, based on prior decisions of the High Court, had been misplaced. The Court was not, however, required in the case of *Ha* to rule on the liability of the States to refund the moneys paid to them. That issue might, however, have arisen for determination in subsequent cases in which persons sought recovery of the moneys paid by them to the State.

Claims for recovery of moneys paid to governmental authorities may be made not only when those payments have been made under taxation legislation which has been adjudged by a court to be invalid. They may also be made when the payments have been made pursuant to an agreement with a governmental authority, and a court has later held that the governmental agency had no authority to enter into such an agreement.

The liability of several government councils to repay moneys received by them, pursuant to agreements entered into by them which were later to be adjudged to be ultra vires, was the central issue in *Kleinwort Benson Ltd v Lincoln City Council*.⁷⁶ Between 1982 and 1985 the plaintiff, a banker, had entered into what were called interest swap agreements with local government councils.⁷⁷ Under the agreements, sums totalling £811,208 were paid by the plaintiff bank to the councils. Following a decision by the House of Lords in 1991 that these agreements were beyond the statutory powers of the councils,⁷⁸ the bank instituted court proceedings to recover the money paid by it. At first instance it obtained a summary judgment in its favour which established its right to recover almost half of the money paid by it. There remained, however, a contest over the bank's entitlement to recover the balance. This represented sums paid outside the six-year limitation period prescribed by the *Limitation Act 1980* (UK).⁷⁹ The relevant provision in this Act stated that the limitation period did not begin to run until the plaintiff had 'discovered the ... mistake ... or could with reasonable diligence have discovered it'.

⁷⁵ The prior cases were discussed in *Ha*.

⁷⁶ [1998] 3 WLR 1095. For a commentary see JM Finnis, 'The Fairy Tale's Moral' (1999) 115 *Law Quarterly Review* 170.

⁷⁷ On the nature of the agreements see [1998] 3 WLR 1095, 1106.

⁷⁸ *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1. The Divisional Court had held the agreements to be ultra vires, but the Court of Appeal had held them to be *intra vires*: [1990] 2 QB 697, 707, 762.

⁷⁹ Section 32(1)(c).

While all five Law Lords in the case agreed that there should be no absolute bar to recovery of moneys paid under mistake of law, only three of them⁸⁰ considered that the payments made by the bank had been made under such a mistake, that being that the relevant agreements with the councils were valid and binding. The mistake had been disclosed by the decision of the House of Lords in 1991, but it was not discoverable until that decision. Lord Browne-Wilkinson and Lord Lloyd of Berwick were, however, of the view that the payments which the bank had made following the Court of Appeal's decision in February 1990 that the interest swap agreements were valid⁸¹ could not be regarded as having been made under mistake of law. Those payments had been made 'on the basis that the then binding Court of Appeal decision stated the law, which it did not'. The fact that the law was later changed retrospectively by the House of Lords' reversal of the Court of Appeal's decision 'cannot', Lord Browne-Wilkinson said, 'alter the state of the payer's mind at the time of payment'.⁸² The payer's state of mind at the time of payment was a critical element in establishment of the claim for recovery.

The cases considered in this part of the article illustrate the kinds of problems which have to be resolved by courts, and sometimes by legislatures, once a court has adjudged some governmental act to be invalid. The problems are mainly to do with the liabilities of those responsible for the invalid acts, or more commonly the liabilities of governmental officials who are charged with execution of the laws. Questions of liability usually fall to be determined by courts according to principles of common law regarding particular civil wrongs, though the relevant principles may sometimes be affected by statute law. In shaping the common law principles on liability, judges may be sensitive to a need for the legal system to accommodate the claims of individuals for compensation for injuries done to them in consequence of governmental action found to be invalid. But judges may be equally sensitive to the claims of agents of government to be protected against liabilities to compensate or make restitution, and particularly in those cases where the action alleged to attract liability was taken in fulfilment of what, at the time, were thought to be valid legal requirements.

Agencies of government may understandably be disconcerted by a legal system in which the judicial branch of government on the one hand strongly urges officers of the executive branch to act in accordance with the 'superior orders' of the legislative branch and judicial interpretations of those orders, but which on the other hand fixes liabilities on the agents of the executive branch when the judges subsequently alter the 'superior orders', and do so retrospectively.

The next part of this article examines some of the techniques which have been adopted by some courts to deal with the problems which are presented when the doctrine that judicial decisions declaratory of law have retrospective effect is

⁸⁰ Lord Goff of Chieveley, Lord Hoffman and Lord Hope of Craighead.

⁸¹ [1990] 2 QB 697.

⁸² [1998] 3 WLR 1095, 1100. The differences of opinion in *Kleinwort* were mentioned in *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2000] 3 WLR 843, 856-7 (Lord Hope); 862, 867 (Lord Hobhouse). Lord Hobhouse thought that the ratio of the majority in *Kleinwort* reconfirmed the principle that judicial decisions are declaratory of the law (Ibid 862).

applied to actions of agencies of government. It also gives further consideration to the question of when it may be appropriate for a court to hold that although some governmental act is invalid, the court's order should not operate retroactively, but rather should operate from the date of judgment or a later date.

IV RETROSPECTIVITY RECONSIDERED

In *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*,⁸³ the Court of Appeal decided that in determining the legality of the action of the Governor, it should apply the law as it had recently been enunciated by the Divisional Court, even though that law was different from that which had been enunciated by that court in prior cases. In other words, the overruling decision of the Divisional Court should be applied retrospectively. If the principle of retrospectivity was 'to be undermined or weakened', said Lord Woolf MR, 'this should be left to the legislature or possibly the House of Lords'.⁸⁴ Lord Woolf went on to observe that '[t]he imminence of the arrival within our domestic law of the European Convention on Human Rights [had given] added urgency [to] the need for an examination of our present approach to the retrospectivity of judicial decisions'.⁸⁵

In the earlier case of *Percy v Hall*,⁸⁶ Schiemann LJ had expressed much the same view in relation to the retrospectivity of judicial rulings on the validity of legislation. The question of retrospectivity of such rulings might, he said, 'well grow to be of greater importance in' the United Kingdom by virtue of its membership 'of the European Union and the possibility ... that even provisions in Acts of Parliament can be declared illegal because of a conflict with Community law'.⁸⁷ Schiemann LJ noted, but did not explore in any detail, the jurisprudence of the European Court of Justice in relation to the temporal operation of its rulings.⁸⁸

Lord Woolf's remarks could be interpreted as an invitation to the House of Lords to reconsider the retrospectivity doctrine, particularly in relation to judicial rulings which have involved overruling of prior judicial decisions. Should the House of Lords accept that invitation it would, no doubt, have regard to the jurisprudence of the European Court of Justice, to the practice of prospective overruling which for a time was adopted by the United States Supreme Court, and to other techniques which may be available to courts to modify the effects of the retrospectivity doctrine.

A Prospective Overruling

There are several senses in which a judicial ruling on the state of the law may be said to have been overruled prospectively. The overruling decision will be given

⁸³ [1998] 4 All ER 993.

⁸⁴ Ibid 1002.

⁸⁵ Ibid 1004.

⁸⁶ [1997] QB 924.

⁸⁷ Ibid 951.

⁸⁸ Ibid 952.

purely prospective effect when the court applies the 'old law' but proclaims that the 'new law' is to be deemed the operative law as from the date of judgment. But equally a decision may be described as having been overruled prospectively when the court applies the 'new law' to the case before it and declares that this law will be applied in other pending litigation, but will not be applied in proceedings instituted after the court's judgment if those proceedings relate to events which occurred before the judgment.⁸⁹

Beginning with the case of *Linkletter v Walker*⁹⁰ ('*Linkletter's case*') in 1965 the United States Supreme Court developed principles according to which it sought to limit the retroactive effects of those of its decisions on constitutional issues in which it overruled prior interpretations of the United States Constitution. *Linkletter's case* and several cases which followed⁹¹ were ones in which prisoners sought habeas corpus to secure their release from prison on the basis of reinterpretations of the Constitution post final judgment in their cases. Their argument was, essentially, that the most recent interpretation of the Constitution demonstrated that the prisoners had been wrongfully convicted. In *Linkletter's case*, the Supreme Court took the view that there was nothing in the Constitution which prevented it from circumscribing the retrospective effects of its overruling decisions. The Court identified factors which should be considered in exercise of that judicial discretion.

In 1971, in *Chevron Oil Co v Huson*,⁹² a non-criminal case, the Supreme Court elaborated on the circumstances which would justify limitation, by judicial fiat, of a judicial ruling on the state of the law. An essential condition was that the ruling 'must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed'.⁹³ If this condition was satisfied, the court would then have to 'weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation', and also 'weigh the inequity imposed by retroactive operation'.⁹⁴

Application of such principles was bound to lead to differences of opinion on when and when not it was appropriate to overrule prospectively. Some Justices of the Supreme Court consistently opposed a practice of prospective overruling⁹⁵ and by 1993 a majority of the Court repudiated the practice entirely.⁹⁶ Indeed they disclaimed any authority to limit the retrospective operation of decisions on constitutional issues otherwise than by application of the doctrine of *res judicata*,

⁸⁹ On prospective overruling see Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985) 186-93; K Mason, 'Prospective Overruling' (1989) 63 *Australian Law Journal* 526; Mason, above n 65, 125-7; Campbell, above n 70, 99-106.

⁹⁰ 381 US 618 (1965).

⁹¹ See *Griffith v Kentucky*, 479 US 314 (1987); *Teague v Lane*, 489 US 288 (1989).

⁹² 404 US 97 (1971).

⁹³ *Ibid* 106-7.

⁹⁴ *Ibid*.

⁹⁵ See Campbell, above n 70, 101-5.

⁹⁶ *Harper v Virginia Department of Taxation*, 509 US 86 (1993).

statutes of limitation and laws relating to particular judicial remedies.⁹⁷

Until *Ha*,⁹⁸ Australia's High Court had not had occasion to state what its position would be were it to be invited to overrule decisions prospectively, though there had been a few cases which suggested that there could be situations in which renovations in the law would be applied only in the future.⁹⁹ In *Ha*, counsel for New South Wales, whose legislation was under challenge, submitted that if the High Court should hold the legislation unconstitutional it should postpone the operation of its declaratory order for 12 months.¹⁰⁰ Counsel referred the Court to some of the American cases on prospective overruling but not to the most recent pronouncement of the Supreme Court.¹⁰¹ Counsel for the Commonwealth, which opposed the State's submission, did however draw the Court's attention to this pronouncement.¹⁰²

By a majority of 4:3, the Court held the State's legislation to be unconstitutional in that it violated s 90 of the federal Constitution.¹⁰³ The majority did not find it necessary to overrule prior decisions on which the States had relied in framing their current legislation; the legislation which had been upheld in the prior cases was regarded as somewhat different.¹⁰⁴ All seven members of the Court, however, emphatically disclaimed authority to overrule prospectively.¹⁰⁵ Their position was stated in the joint opinion of Brennan CJ, McHugh, Gummow and Kirby JJ as follows:

This Court has no power to overrule cases prospectively. A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from the non judicial

⁹⁷ See CJ Antieu and WJ Rich, *Modern Constitutional Law*, (2nd ed, 1997) vol 3, § 50.07; Mark R Brown, 'The Decline of Constitutional Prospectivity: New Life for Owen?' (1994) 79 *Iowa Law Review* 273; TA Dondlinger, 'Retroactivity and the Remedies of Chevron Oil after Harper v Virginia Department of Taxation' (1993-4) 47 *Tax Lawyer* 455; RJ Sweeney, 'Harper v Virginia Department of Taxation' (1994) 39 *New York Law School Law Review* 833.

⁹⁸ (1997) 189 CLR 465.

⁹⁹ See *Bropho v Western Australia* (1990) 171 CLR 1 (on the presumption that the Crown is not bound by statutes); *McKinney v The Queen* (1991) 171 CLR 468 (future practice in criminal trials regarding the need for corroboration of confessions). See also *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 257 (Deane J). There was mention of United States practice in *Peters v Attorney-General* (NSW) (1988) 16 NSWLR 24, 38-9 (McHugh JA); *Savass v R* (1991) 55 A Crim R 241, 289-90 (Kirby P).

¹⁰⁰ (1997) 189 CLR 465, 475-6.

¹⁰¹ The cases cited were *Chevron Oil v Huson*, 404 US 97 (1971); *American Trucking Organisation v Smith*, 496 US 167 (1990) and *James B Beam Distillery Co v Georgia*, 501 US 529 (1991).

¹⁰² (1997) 189 CLR 465, 482-3.

¹⁰³ The majority were Brennan CJ and McHugh, Gummow and Kirby JJ; the minority were Dawson, Toohey and Gaudron JJ.

¹⁰⁴ *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177. On the other hand the majority held that *Phillip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399 had been wrongly decided. On the circumstances in which the High Court considers that it is open to it to overrule its prior decisions see *Commonwealth v Hospitals Contribution Fund of Australia* (1982) 150 CLR 49, 56-8; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438-9; *Street v Queensland Bar Association* (1989) 168 CLR 461, 489.

¹⁰⁵ (1997) 189 CLR 465, 503-4, 515.

power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations. If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law.¹⁰⁶

The Court added that 'this would be especially so where', as in the present case, 'non-compliance with a properly impugned statute exposes a person to criminal prosecution'.¹⁰⁷ The criminal prosecution to which Ha and others in like cases had been exposed was for non-compliance with the State legislation alleged to be invalid on constitutional grounds.

While the Court's opinion on the question of prospective overruling was delivered in the context of constitutional litigation, it can be taken to have expressed the Court's view regarding any case in which a prior decision is overruled. It can also be read as a signal to other Australian courts that they also should eschew prospective overruling. While the majority did not accede to the request that the operation of the judgment be postponed for a year, they did not consider whether the Court has power to adopt such a course. Apparently the Court was not referred to Canadian precedents for adoption of that expedient, even when no prior decision has been overruled.

B The Canadian Expedient

Canadian courts have so far not approved a practice of prospective overruling.¹⁰⁸ But the Canadian Supreme Court has considered it appropriate in some cases to postpone the operation of judgments which declare governmental acts to be invalid on constitutional grounds, for example on the ground that legislation or other governmental action contravenes the Canadian Charter of Rights and Freedoms.¹⁰⁹ By adopting this course the Court has, as it were, accorded temporary validity to the acts declared unconstitutional.

The Supreme Court has indicated that it will be prepared to suspend, temporarily, declarations that legislation is invalid so as to give legislatures opportunity to bring their legislation into line with constitutional obligations, but only if:

- A. striking down the legislation without enacting something in its place would pose a danger to the public;
- B. striking down the legislation without enacting something in its place would threaten the rule of law; or
- C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without

¹⁰⁶ Ibid 503-4.

¹⁰⁷ Ibid 504.

¹⁰⁸ *Edward v Edward Estate* (1987) 39 DLR 4th 654, 660-4 (Sask CA); *Fleming v Hannah* (1994) 1 Nfld and PEIR 30 (Nfld CA).

¹⁰⁹ The cases are discussed in PW Hogg, *Constitutional Law of Canada* (3rd ed, looseleaf) § 55.1, § 55.3.

thereby benefiting the individual whose rights have been violated.¹¹⁰

The first two of these conditions were clearly satisfied in *Re Manitoba Language Rights*.¹¹¹ There a declaration of invalidity with immediate effect would have annulled all of the statutes of Manitoba enacted after a certain date because they had not been published in French as well as English as the constitution of the Province required.¹¹²

C A European Approach to Retrospectivity

As has been mentioned earlier, in *Percy v Hall*¹¹³ Schiemann LJ made reference to the jurisprudence developed by the European Court of Justice in relation to the retrospective operation of its rulings, as if to suggest that it should at least be considered by the House of Lords at some time in the near future.¹¹⁴

The European Court is one of the central institutions of what is now called the European Union, formerly the European Economic Community (EEC). It was brought into being by the *Treaty establishing the European Economic Community ('Treaty of Rome')* to which the United Kingdom is a party. Under this instrument the Court has authority to rule on the validity of acts of the institutions of the Union, for example regulations made by the European Commission.¹¹⁵ It is also given authority to make rulings on whether acts of the states which are members of the Union are compatible with provisions of the Treaty or of other laws of the Union which are directly applicable to the member states.¹¹⁶ Legislation of a member state which is ruled to be incompatible with European law may sometimes antedate entry of the state into the Union.

The European Court generally treats its rulings as having retrospective effect, but it has also claimed authority to limit the retrospective effect of its rulings by imposing limits on their temporal operation.¹¹⁷ Such limitations may be imposed in the interests of legal certainty and to preserve acquired rights. The conditions which must be satisfied before the Court is prepared to impose a temporal limitation are twofold. The first is that a state or other party must show a reasonable belief that a provision of Union law was either not directly effective or did not apply to the case in question. The second condition is that it must be shown that, unless the temporal operation of the ruling is limited, severe harm will be done to the interests of those who have relied in good faith on a previous understanding of Union law.

¹¹⁰ *Schachter v Canada* [1992] 2 SCR 679, 719 (Lamer CJ).

¹¹¹ [1985] 1 SCR 721.

¹¹² See also *R v Mercure* [1988] 1 SCR 234; *Paquette v Canada* [1990] 2 SCR 1103.

¹¹³ [1997] QB 924.

¹¹⁴ *Ibid* 952.

¹¹⁵ *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11, art 174 (entered into force 1 January 1958) (*'Treaty of Rome'*).

¹¹⁶ *Treaty Establishing the European Economic Community*, opened for signature 25 March 1957, 298 UNTS 11, art 177 (entered into force 1 January 1958).

¹¹⁷ See M Brearly and M Hoskins, *Remedies in European Community Law* (1994) 133-4, 200-2; Clive Lewis, *Remedies and the Enforcement of European Community Law* (1996) 25-8; *R v Secretary of State; Ex parte Richardson* [1995] ECR I - 3407.

The European Court will not impose a temporal limitation unless a party has requested that it should do so. If it accedes to such a request, it may, for example, decide that legislation of a member state is to be regarded as 'invalid', not from the date on which it was enacted but from a later date prior to the Court's ruling. The Court may postpone the operation of its ruling that regulations contravene Union law so as to give time for new regulations to be made.¹¹⁸ In one case the Court annulled the budget of an institution of the Union, but only from the date of its judgment.¹¹⁹ Another course the Court may adopt is to rule that its declaration of invalidity shall operate only in relation to the parties in the case before it and those who have already commenced proceedings in national courts before the Court's adjudication. That course was adopted by the Court in 1976 in the leading case of *Defrenne v Sabena*.¹²⁰

This was a case concerning *Treaty of Rome* art 119, a provision designed to ensure that females and males receive equal pay for work of equal value. There was contest over whether art 119 had direct effect in member states. The European Court held that it did. But some member states, including the United Kingdom, protested that their legal arrangements had for some time not positively prohibited discrimination of the kind prohibited by art 119 and that if the Court's ruling were accorded full retrospective effect, the economic effects could be crippling. Employers could be confronted with a multiplicity of claims by employees or former employees for 'back pay'. The Court acknowledged the concerns of the protesting states and ruled that art 119 could not be relied upon to support claims for payment in respect of periods of employment prior to the Court's ruling except in relation to 'workers who have already brought legal proceedings or made an equivalent claim'.¹²¹

The European Court of Human Rights followed the example set in *Defrenne v Sabena* in the case of *Marckx*.¹²² In *Marckx* it was held that Belgian law which discriminated between legitimate and illegitimate children in matters such as rights of inheritance violated the European Convention on Human Rights. But the Court concluded that 'the principle of legal certainty, which is necessarily inherent in the law of the Convention as in Community law, dispenses the Belgian State from re-opening legal action or situations that antedate the delivery of the present judgment'.¹²³

The measures adopted by the European courts to delimit the temporal operation

¹¹⁸ *Commission of the European Communities v Council of the European Communities* [1973] ECR 575 [15]; *Commission v Council* [1982] ECR 3329, [39]; *European Parliament v Council* [1992] ECR I - 4593, [22] - [24]. See also the Canadian case of *Sinclair v Quebec* [1992] 1 SCR 579.

¹¹⁹ *Council v European Parliament* [1986] ECR 2155, [48].

¹²⁰ [1976] ECR 455. For comments on the case see D Wyatt, 'Prospective Effect of a Holding of Direct Applicability' (1976) 1 *European Law Review* 399; W Van Gerven, 'Contribution de l'Arret Defrenne au D'Éveloppement de Droit Communautaire' (1977) 13 *Cahiers de Droit European* 131; T Koopmans, 'Retrospectivity Revised' (1980) 39 *Cambridge Law Journal* 287.

¹²¹ [1976] ECR 455, 481. *Defrenne v Sabena* was applied by Ireland's Supreme Court in 1980 in *Murphy v Attorney-General* [1982] Ir R 241 but this decision has been criticised: see John M Kelly, *The Irish Constitution* (3rd ed, 1994 by Gerrard Hogan and Gerry Whyte), 480-5.

¹²² (1979) 31 Eur Court HR (SerA).

¹²³ *Ibid* 26.

of their rulings have been applauded by some commentators but have been criticised by others.¹²⁴ The criticisms have been much along the lines of those directed to the practice of prospective overruling by national courts. The European case law does, however, indicate that the European courts regard retrospectivity as the norm and that they expect parties before them to demonstrate very good reasons why the retrospective effect of their rulings should be limited by judicial edict.

D Retrospectivity Reconsidered in the United Kingdom

In 1966, the House of Lords issued a practice statement in which it announced that it no longer regarded itself as bound by its prior decisions and that it would be prepared to overrule such decisions if it thought them to be wrong.¹²⁵ The statement adverted to considerations that would be taken into account in determining whether prior decisions should be overruled. An implicit assumption was that overruling decisions would have retrospective effect.

Some of the Law Lords were later to express support of prospective overruling,¹²⁶ though in no case to date has the House of Lords had occasion to pronounce finally on the legitimacy of that technique or of other techniques for limiting the temporal effects of judicial decisions. Some members of the English Court of Appeal clearly wish the House of Lords to pronounce on this large question and do so with attention to the United Kingdom's position as a member of the European Union and as a party to the European Convention for the Protection of Human Rights.¹²⁷ Should the House of Lords find it necessary to grapple with the question its attention will, no doubt, be drawn to relevant jurisprudence of other nations within the common law world.

In *Percy v Hall*,¹²⁸ Schiemann LJ canvassed the pros and cons of the retrospectivity doctrine so far as it is applied to judicial decisions on the validity of legislative acts. Schiemann LJ suggested that the theory that legislation is abrogated retrospectively once a court has declared it invalid signifies that the legislation

should never have been made and therefore one must proceed as though it had never been made. To do otherwise will in effect legalise the illegal and the courts are not in the business to do that. Moreover, once the courts start to give

¹²⁴ See Trevor C Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *Law Quarterly Review* 95, 97; cf Anthony Arnutt, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 *Law Quarterly Review* 411, 413-4.

¹²⁵ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

¹²⁶ See *Jones v Secretary of State for Social Services; Ex parte Hudson* [1972] AC 944, 1026-7 (Lord Simon of Glaisdale); *Milangos v George Frank (Textiles) Ltd* [1976] AC 443, 490 (Lord Simon of Glaisdale); *Morgans v Launchbury* [1973] AC 127, 137 (Lord Wilberforce); *Aries Tankers Corporation v Total Transport Ltd* [1977] 1 WLR 185, 190 (Lord Wilberforce); 194 (Lord Simon of Glaisdale); cf *Kleinwort Benson Ltd v Lincoln City Council* [1998] 3 WLR 1095, 1119 (Lord Goff of Chieveley); Lord Mackay of Clashfern, 'Can Judges Change the Law?' [1987] *Proceedings of the British Academy* 285; *Prudential Assurance v London Residuary Body* [1992] 3 All ER 504, 512.

¹²⁷ See *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [1998] 4 All ER 993, 1002, 1004 (Lord Woolf MR); *Percy v Hall* [1997] QB 924, 951 (Schiemann LJ).

¹²⁸ [1997] QB 924.

some effect to illegal legislation, there will be less incentive for the legislator to refrain from such illegality.¹²⁹

The problem with this uncompromising solution, Schiemann LJ went on to say,

is that it will often be the case that, between the making of the enactment in question and the declaration of its invalidity, many people will have regulated their lives on the assumption that the enactment was lawful. Society cannot function if all legislation has first to be tested in court for legality. In practice, money will have been spent, taxes collected, businesses and property bought and sold and people arrested and perhaps imprisoned on the basis that what appears to be the law is the law.¹³⁰

As Schiemann LJ recognised, these problems are accentuated in legal systems in which legislative enactments are susceptible to challenge before courts on constitutional grounds.¹³¹ Shifts in judicial interpretation of the controlling constitution may mean that enactments which at the time of their making could reasonably be assumed to be *intra vires* may, at some later date, become vulnerable to challenge on constitutional grounds. Shifts in judicial interpretation of the controlling constitution may be ones which have involved discovery within the constitution of implied constraints upon governmental powers.¹³²

In *Boddington v British Transport Police*,¹³³ the House of Lords gave no hint that it might be prepared to undertake the re-examination of the retrospectivity doctrine which had been urged by Lord Woolf and Schiemann LJ. Indeed the Lords' decision in that case, that the validity of subordinate legislation may be challenged in criminal proceedings and on procedural as well as substantive grounds, reinforced the doctrine. Lord Slynn of Hadley made passing reference to European jurisprudence and to the problems which the doctrine can present,¹³⁴ but he did not express a view on how those problems might be resolved.

In *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*,¹³⁵ some of the Lords of Appeal commented on a submission by the Solicitor-General (Dr Ross Cranston) that there be introduced into English law,

a principle of non-retrospectivity ... so that a [judicial] decision which declines to follow or overrules a previous decision or changes a widely held assumption as to what the law is should not be regarded as declaratory or as affecting anything which happened before the later decision ('the no-retrospectivity principle').¹³⁶

The Lords' decision in the case lends no support for such a principle, though

¹²⁹ Ibid 951.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² For example, in Australia the implied freedom of political communication which was not discerned by the High Court until as late as 1992.

¹³³ [1999] 2 AC 143.

¹³⁴ Ibid 165.

¹³⁵ [2001] 2 AC 19.

¹³⁶ Ibid 42-3 (Lord Hobhouse).

Lords Browne-Wilkinson and Steyn made it clear that they reserved their position on the merits of prospective overruling.¹³⁷ Lord Slynn conceded that 'there may be situations in which it would be desirable, and in no way unjust that the effect of judicial rulings be prospective or limited to certain claimants'.¹³⁸ He did not, however, elaborate on what these situations might be.

Lord Hobhouse wrote at greater length in answer to the Solicitor-General's submission and in support of what he termed 'the "declaratory" theory of common law judgments'.¹³⁹ He acknowledged that, by their judgments, courts are able to re-shape the common law. But in his view, judgments provide no more than evidence of what the law prohibits or requires.¹⁴⁰ He considered it,

a denial of the constitutional role of the courts for courts to say that the party challenging the status quo is right, that ... [a] previous decision is over-ruled, but that the decision will not affect the parties and only apply subsequently. They would be declining to exercise their constitutional role and adopting a legislature role deciding what the law shall be for others in the future.¹⁴¹

Lord Hobhouse did, however, recognise that decisions changing the practice and procedure of courts should be treated as prospective in their operation in that they are quasi-legislative in character.¹⁴² Lord Hope agreed.¹⁴³ Lord Hobhouse also suggested that exceptions to the retroactivity principle might be made through the law of remedies.¹⁴⁴

The *Human Rights Act 1998* (UK) may be construed as a direction to the courts that they should not attempt to modify the retrospectivity doctrine. The Act does not entrench the European Convention for the Protection of Human Rights in the sense that courts can refuse to apply legislation which they adjudge to be incompatible with Convention rights.¹⁴⁵ Section 3 of the Act obliges courts to construe legislation 'so far as it is possible to do so' in conformity with these rights, and when they find this impossible they are required to make a declaration of incompatibility under s 4. But it is made clear that the issue of such a declaration does not affect the validity, continuing operation or enforcement of the legislation in question. The declaration does no more than activate a ministerial power to amend the legislation to remove the incompatibility.¹⁴⁶

On the other hand, s 6 of the Act makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right', unless there is

¹³⁷ *Ibid* 27, 29.

¹³⁸ *Ibid* 26.

¹³⁹ *Ibid* 48.

¹⁴⁰ *Ibid* 45, 47-8.

¹⁴¹ *Ibid* 48.

¹⁴² *Ibid*.

¹⁴³ *Ibid* 36-7.

¹⁴⁴ *Ibid* 48.

¹⁴⁵ Under s 2 of the *European Communities Act 1972* (UK), as judicially interpreted, courts cannot apply domestic legislation which is incompatible with EEC law, even if it has been enacted after the 1972 Act: see *R v Secretary of State for Transport; Ex parte Factortame (No 2)* [1991] 1 AC 603; *R v Secretary of State for Employment; Ex parte Equal Opportunities Commission* [1995] 1 AC 1.

¹⁴⁶ *Human Rights Act 1998* (UK) s10.

legislation under which it 'could not have acted differently'. Sections 7 and 8 allow legal proceedings to be brought in respect of such violations and for courts to grant such relief or remedy, or make such orders, within their jurisdiction as they consider 'just and appropriate'. These provisions have the effect of imposing direct liabilities on public authorities. The term 'public authority' is defined to include courts and tribunals.

Courts will clearly have some discretion in relation to the remedies which may be awarded for violation of Convention rights. In exercise of that discretion courts may well take account of the circumstance that at the time a public authority acted there was genuine doubt about whether its action was or was not in violation of the Convention or was action which appeared to be authorised or required by domestic legislation. Some of the acts which are made unlawful by s 6 of the *Human Rights Act 1998* (UK) may already be unlawful under domestic law, and it may well be that claims for remedy under this Act are joined with common law claims. Certainly the courts of the United Kingdom will need to grapple with a number of hard issues concerning the relationship between the domestic laws on civil liabilities and the new statutory law.¹⁴⁷

The remedial provision of the *Human Rights Act 1998* (UK) will undoubtedly enable courts to subject public authorities to a liability to pay compensation for violation of Convention rights notwithstanding that under the prior law they could not be fixed with any such liability.¹⁴⁸ Under the prior law conduct in violation of Convention rights may not have been unlawful. Even if the conduct was, prima facie, unlawful the wrongdoer may have been exempt from liability because of a common law immunity from suit or because of a statutory protection clause. Under the prior law the wrongdoer may have been personally liable to pay damages but the public authority in whose service he or she was employed may not have been held vicariously liable inasmuch as the wrong was done in purported exercise of an independent discretion.

The potential impact of the *Human Rights Act 1998* (UK) on the domestic law of the United Kingdom may be illustrated by the case of *R v Governor of Brockhill Prison, Ex parte Evans (No 2)*.¹⁴⁹ Let us suppose that the detention of Michelle Evans in prison for 59 days beyond the date on which she was entitled to be released was in breach of art 5 of the European Convention. Had the remedial provisions of the *Human Rights Act 1998* (UK) been in operation, they would have provided Evans with a sure foothold for a claim against the Crown for compensation, notwithstanding that at common law the Crown may not have been vicariously liable for the Governor's false imprisonment of Evans. Even if the common law claim against the Governor had not succeeded, because he had a good defence, a claim for compensation under the *Human Rights Act 1998* (UK) might have been upheld.

¹⁴⁷ In *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [1998] 4 All ER 993, 1004, Lord Woolf had regard to art 5 of the European Convention.

¹⁴⁸ New Zealand's Bill of Rights has been interpreted as enabling liabilities to compensate to be imposed directly on the Crown: see *Simpson v Attorney-General* [1994] 3 NZLR 667 ('Baigent's case').

¹⁴⁹ [1998] 4 All ER 993.

It is, of course, possible that the Crown might have resisted the claim for compensation under the *Human Rights Act 1998* (UK) on the ground that, in acting as he did, the Governor of the prison was acting in accordance with statutory requirements, as then interpreted by the Divisional Court. But were the retrospectivity doctrine to be applied, the Crown's defence would have to be rejected, for the later reinterpretation of the relevant statutory provisions would have shown that the Governor's action was not in strict obedience to Parliament's commands.

**E Section 16(1)(a) of the Administrative Decisions
(Judicial Review) Act 1977 (Cth)**

This provision, as has been mentioned earlier, allows the Federal Court to specify the date from which an order to set aside an administrative decision should take effect. In *Wattmaster Alco Pty Ltd v Button*,¹⁵⁰ a Full Court of the Federal Court did not deny that the court could have ruled that its order to set a ministerial determination should take effect only from the date of the court's order. But in the circumstances of the case the court considered it appropriate that its order should take effect from the date of the Minister's determination. Had the court ruled that the determination be set aside from the date of the court's order, the applicant would not have been able to recover money it had already paid (under protest) under the determination held to be invalid.

There have been later cases in which the Federal Court has considered it appropriate to postpone the operation of an order to set aside an administrative decision so as to allow the respondent time to take corrective action. In *Styles v Secretary, Department of Foreign Affairs and Trade*,¹⁵¹ the applicant sought review of a decision to appoint another person to a position in the Commonwealth public service. The appointment was held to be invalid. The operation of court's order was postponed for a period of a little over eight months. This was to allow the department to make appropriate arrangements in respect of the person who had been appointed to the position and who occupied it for some time. By postponing the operation of its order the court was obviously concerned that the interests of an innocent third party should be protected.

The circumstances of *Western Australia v Minister for Aboriginal and Torres Strait Islander Affairs*¹⁵² were somewhat different. There a ministerial determination made under the *Aboriginal and Torres Strait Islander Heritage Protection 1984* (Cth) was successfully challenged on the ground that it had been made contrary to requirements of procedural fairness. The operation of the court's order to set aside the determination was postponed for a period of time. This was to allow the Minister to make a fresh determination and, in the meantime, to ensure that the successful applicants for review would not act contrary to the Minister's initial determination to place restrictions on the uses which might be made of land which the State had leased to land developers. The

¹⁵⁰ (1986) 70 ALR 330.

¹⁵¹ (1988) 84 ALR 408.

¹⁵² (1995) 37 ALD 633.

Federal Court did not find it necessary to consider what the position would have been had the applicants been prosecuted for breach of the Minister's determination and they had pleaded in their defence that the determination was invalid *ab initio*.

*Project Blue Sky Inc v Australian Broadcasting Authority*¹⁵³ was another case in which it was thought appropriate to postpone the operation of an order to set aside an administrative decision so as to give the respondent time to take corrective action. The judge at first instance, Davies J, had made a declaration that a program standard set by the respondent was invalid but, on 26 August 1996 he made a further order that 'unless the Standard is revoked or varied in accordance with law by the Respondent on or before 31 December 1996, the Standard is set aside with effect from 31 December 1996'.

The ruling by Davies J that the standard was invalid was reversed by a Full Court of the Federal Court.¹⁵⁴ On appeal a majority of the High Court affirmed the Full Federal Court's decision.¹⁵⁵ They were nevertheless of the view that the standard had not been made lawfully.¹⁵⁶ This, presumably, meant that it was not open to the Australian Broadcasting Authority to take steps to enforce the standard, for example by cancelling a licence on the ground that the licensee had not observed the standard.¹⁵⁷

The discretion conferred by s 16(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to make the operative date of a quashing order later than the date on which the administrative decision was made should probably not be exercised in those cases where such an order would affect the civil liabilities of the respondent, for example a liability to pay damages for false imprisonment. Thus if persons have been detained in custody pursuant to deportation orders held to be invalid, those orders should be set aside from the date they were made. Indeed, in such cases the court may also declare that detention in custody was unlawful.¹⁵⁸

In none of the cases considered in this section of the article was the respondent's civil liability, if any, directly in issue. Under s 16 of the *Administrative Decisions*

¹⁵³ Unreported, Federal Court, Davies J, 26 August 1996.

¹⁵⁴ *Australian Broadcasting Authority v Project Blue Sky Inc* (1996) 71 FCR 465.

¹⁵⁵ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

¹⁵⁶ *Ibid* 393.

¹⁵⁷ Under s 7(1) of sch 2 of the *Broadcasting Services Act 1992* (Cth) one of the conditions of a commercial television broadcasting licence is that a licensee comply with the program standards determined by the Authority. Under s 139(1) of the Act, breach of licence conditions is an offence.

¹⁵⁸ This course was adopted by the High Court in *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637. The effect of the declaration (made under s 16(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)), it was said, would 'be to resolve finally, as between the appellants and the Minister, the question whether the appellants' detention in custody during the relevant period was unlawful' (at 645). The declaration would not, however, 'conclude as against the Minister the question of the Minister's responsibility for that unlawful detention'. In particular it would not conclude the question of the vicarious liability of the Minister. This was a question raised in proceedings pending in the Supreme Court of New South Wales. In *Minister for Immigration, Local Government and Ethnic Affairs v Taveli* (1990) 94 ALR 177, the Federal Court set aside a deportation order as from the date it was made, but some of the judges suggested that the court's discretion to set aside an administrative decision *ab initio* should not be used simply to impose a liability for false imprisonment.

(*Judicial Review*) Act 1977 (Cth) there is no power to award damages. In none of the cases did the court's decision to set aside an administrative determination involve an overruling of a prior judicial decision upon which the respondent may have relied. Were such a case to arise the fact that the respondent had acted in reliance on the prior judicial decision could, no doubt, be taken into account by the court in deciding when its order to quash should take effect.

In exercising the discretion conferred by s 16(1)(c), the Federal Court appears not to have considered it relevant to inquire whether the error made by the respondent went to jurisdiction or was a non-jurisdictional error of law. The reason is, presumably, that the extended grounds for judicial review under s 5 of the Act have obliterated the distinction between those forms of error and with it the old distinction between decisions, which are void *ab initio* and those which are voidable in the sense of being valid up to the time they are set aside by a court and then only for the future. In deciding how to exercise its discretion under s 16(1)(a) the Court is, however, entitled to have regard to the nature of the respondent's error, including whether it is capable of being corrected by the respondent.

The Federal Court appears not to have had occasion to consider whether it would be proper for it to postpone the operation of an order made under s 16(1)(c) when the reason why an administrative decision is held invalid is that it was made under legislation which is *ultra vires*. The legislation could have been held *ultra vires* on constitutional grounds or, if it is subordinate legislation, because it was not authorised by the enabling statute. In such a case there would be nothing the administrative decision maker could do to rectify the error. The Court's position would probably be that it had no alternative but to set aside the administrative decision as from the time it was made.

F Statutory Modification of the Retroactivity Principle

In *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*,¹⁵⁹ reference was made to the statutory modifications of the retroactivity principle which had been effected by the statutes enacted by the United Kingdom Parliament to devolve certain legislative powers on parliamentary institutions in Scotland, Wales and Northern Ireland. Lord Hope described these modifications as follows:

A statutory power to remove or limit the retrospective effect of decisions as to whether legislation is within the legislative competence of the Scottish Parliament and to suspend their effect to allow the defect to be corrected has been given to courts and tribunals by section 102 of the Scotland Act 1998. Similar powers are to be found in section 110 of the Government of Wales Act 1998, [and] in section 81 of the Northern Ireland Act 1998.¹⁶⁰

¹⁵⁹ [2001] 2 AC 19.

¹⁶⁰ *Ibid* 36. Lord Hope also referred to a comparable provision in the Constitution of the Republic of South Africa.

But, His Lordship went on to say, '[n]o such power is currently recognised by the common law'.¹⁶¹

Statutory powers of the kind described by Lord Hope are not enjoyed by Australian courts and, having regard to the observations which were made by the High Court in the case of *Ha*,¹⁶² it is doubtful whether powers of that nature could be given to them. Were such powers to be given to the High Court and other federal courts, the High Court might well take the view that the legislation contravened Chapter III of the Federal Constitution in that the powers conferred were incompatible with the exercise of the judicial powers of the Commonwealth. Since the High Court has held that the Constitution prevents State parliaments from enacting legislation to give State courts powers which are incompatible with the exercise by them of judicial powers of the Commonwealth,¹⁶³ there could even be doubts about the constitutionality of State legislation which modifies the retrospectivity principle in the ways authorised by the United Kingdom statutes referred to above. These doubts could arise even if the State legislation related only to decisions of State courts on the validity of State legislation under the State's Constitution or the validity of State subordinate legislation.

If, under Australia's constitutional arrangements, it is not open to parliaments to modify the retrospectivity principle in the way the United Kingdom Parliament has done, the constitutional constraints must operate not only in relation to judicial decisions on the validity of legislation, but also in relation to judicial decisions on the validity of executive acts. It is, however, unlikely that the High Court would regard these constitutional constraints as ones which deny to courts a facility to modify the retroactive effect of judicial decisions by exercise of discretion in the award of remedies, including a discretion regarding the date on which a court order is operative. There has certainly been no suggestion that s 16(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is unconstitutional, though constitutional considerations may be thought relevant in determining how the discretion which the provision allows should be exercised.

V Conclusions

When the doctrine that judicial decisions operate retrospectively is applied to a judicial ruling that a governmental act is invalid, the logical result might seem to be that the act is to be treated as 'invalid from the outset for all purposes and that no lawful consequences can flow from it'.¹⁶⁴ But as Lord Slynn of Hadley observed in *Boddington v British Transport Police*:¹⁶⁵

¹⁶¹ *Ibid.* Lord Hope cited *R v National Insurance Commissioner; Ex parte Hudson* [1972] AC 944, 1015 (Lord Diplock), 1026-27 (Lord Simon); and *Launchbury v Margans* [1973] AC 127, 137 (Lord Wilberforce). Lord Hope remarked that, 'The working assumption is that where previous authorities are overruled, decisions to that effect operate respectively'.

¹⁶² (1997) 189 CLR 465.

¹⁶³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

¹⁶⁴ *Boddington v British Transport Police* [1999] 2 AC 143, 165 (Lord Slynn).

¹⁶⁵ *Ibid.*

courts have had to grapple with the problem of reconciling the logical result with the reality that much may have been done on the basis that ... [the act of government] was valid. The unscrambling may produce more serious difficulties than the invalidity.

Some courts have sought to moderate the retrospectivity doctrine by imposing temporal limits on the operation of their judgments. The Supreme Court of the United States and Australia's High Court have, however, denied themselves authority to limit the temporal operation of their judgments by the technique of prospective overruling, even when it is of the selective variety. Prospective overruling, they have said, is incompatible with the exercise of judicial power.

The decision of the High Court in *Ha*¹⁶⁶ also seems to indicate that if the court holds legislation to be unconstitutional, the legislation must be treated as void ab initio and the court will not postpone the operation of its judgment to a date in the future. The High Court has not, however, clearly rejected the possibility that, like the Supreme Court of Canada, it may in some circumstances postpone the operation of its judgment.

Australian courts are able to adopt a more flexible approach when determining the validity of administrative action, at least when review is sought on an application for a prerogative writ or like order rather than by way of a collateral challenge. In some circumstances judicial remedy may be denied with the practical result that invalid action is validated. Courts may also limit the temporal operation of their orders. Instead of ordering that an administrative decision be set aside from the date on which it was made, a court may order that the decision be set aside as from the date of judgment or from a later date. A court may also decide to postpone the operation of an order to set aside ab initio.

To an extent courts may be able to deal with some of the problems which stem from retrospective invalidation of governmental acts by means of principles of common law regarding the incidence of liabilities to pay damages or to make restitution of money or property. In *Percy v Hall*,¹⁶⁷ it was said that the police officers would not incur liability for persons they suspected of having committed a criminal offence notwithstanding that at a later date the legislation which created the offence was held to be invalid. In contrast, in *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*,¹⁶⁸ a majority of the English Court of Appeal, and subsequently the House of Lords, considered it no defence to an action for false imprisonment that the defendant Governor had acted as he did in reliance on, and in compliance with, the then current judicial interpretation of the relevant statute. A subsequent overruling of that interpretation was treated as representing the law in force as from the time the statute was enacted.

When a court has adjudged some governmental act to be invalid or unlawful, and its ruling has retroactive effect, it may be open to a legislature to counteract the

¹⁶⁶ (1997) 189 CLR 465.

¹⁶⁷ [1977] QB 924, 950.

¹⁶⁸ [1999] 2 AC 19.

court's ruling or to contain the consequences of the ruling. The legislation may be declared to operate retroactively. In Australia, however, the capacity of legislatures to enact such legislation is subject to constitutional constraints. These constraints will operate primarily when legislation has been adjudged invalid on constitutional grounds. The circumstances in which a legislature has a capacity to enact legislation to cure defects in the legislation adjudged invalid, and to do so retroactively, are limited. There are also circumstances in which a legislature has no or little capacity to enact legislation to counteract a judicial ruling because of the constitutional limitations on its legislative powers. Australia's High Court has certainly made it clear that legislatures cannot use their legislative powers to enact legislation which affects the liabilities of agents of government to pay compensation, or make restitution of moneys or property, and does so to the extent of effectively debarring persons from obtaining any remedy for action taken pursuant to the legislation held to be invalid on constitutional grounds.¹⁶⁹

A question yet to be decided by the High Court is whether, for the purposes of determining a person's civil liability, a distinction can and should be made between acting in reliance on legislation which is presumed to be valid, but which is later held to be invalid, and, on the other hand, acting in reliance on judicial interpretation of valid legislation which are later overruled. If police officers do not incur any civil liability for arresting persons pursuant to legislation which is later held invalid, why, it may be asked, should not the same protection against liability for false imprisonment be afforded to those who, like the Governor of Brockhill Prison in the case of Michelle Evans, ruled in accordance with prevailing judicial interpretations of the relevant legislation, and the validity of the legislation could not be questioned? The actors in both such cases could be said to have acted when they did in accordance with what was presumptively the law in force at the time. A judicial determination that legislation (whether primary or secondary) is ultra vires will usually mean that the legislation was invalid ab initio. Judicial overrulings of prior judicial decisions on the meaning and effect of valid legislation will normally be treated as representing the law as from the time the legislation was made.

¹⁶⁹ It may, however, be open to a legislature to enact legislation to relieve individuals from personal liability for actions they have taken pursuant to the statute which was subsequently adjudged to be unconstitutional, so long as the protective legislation makes it clear that any liabilities are being borne by the government. On statutory protection clauses generally see Susan Kneebone, *Tort Liability of Public Authorities* (1998) 244-59.

But there is no necessary connection between the principles applied in determining whether governmental acts are ultra vires and the principles to be applied in determining civil liabilities to pay compensation or make restitution. As Dr Christopher Forsyth pointed out in an essay, a passage in which was quoted with approval by Lord Steyn in *Boddington v British Transport Police*,¹⁷⁰ invalid governmental acts

clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends on the powers of the second actor. The crucial issue to be determined is whether the second actor has power to act validly notwithstanding the invalidity of the first act.¹⁷¹

That analysis, I suggest, indicates a need to separate the principles which are applied by courts in determination of the validity of governmental acts, by reference to the principles of public law, from the principles to be applied by courts in determination of claims for damages or restitution of moneys or property.

¹⁷⁰ [1999] 2 AC 143, 172.

¹⁷¹ C Forsyth, 'The Metaphysic of Nullity, Conceptual Reasoning and the Rule of Law' in C Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Card: Essays in Honour of Sir William Wade QC* (1998) 141, 159.