Principles of Public Law

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RETROSPECTIVITY

22.1 Introduction

Lon Fuller lists eight principles of what he terms the 'principles of legality', or the requirements for the rule of law. These are the requirements of generality, promulgation, non-retroactivity, clarity, non-contradiction, possibility of compliance, constancy through time and congruence between official action and declared rule (*The Morality of Law*, 1969, Yale: Yale UP). 'Non-retroactivity' – or non-retrospectivity, as it will be referred to in this chapter – is an important requirement of the rule of law since individuals cannot be expected to abide by the laws of a democratic society unless they are in a position to know what those laws are. Above all, the rule of law demands non-retroactivity in the criminal sphere; in other words, laws should not be passed to criminalise past activities which were innocent at the time they were carried out. The principle of non-retrospectivity is closely linked with that other pillar of the rule of law, legal certainty. The certainty principle condemns the enactment of excessively vague laws that delegate to administrators the power to deal arbitrarily with the citizen, particularly in criminal law. In Nazi Germany, for example, people could be prosecuted for 'acts deserving of punishment according to the healthy instincts of race' and, in the Soviet Union, criminal charges could be brought under the Soviet Criminal Code which prohibited all 'socially dangerous acts'. In a sense, the rule against retrospectivity is a sub-set of the requirement of legal certainty, since you cannot know what your liability under the law is until that law has been properly formulated.

But why have these rules in place at all? Fuller's thesis is that law, to be good law, has to work. Laws passed now to control past conduct are an absurdity and therefore unworkable. They offend against another rule of law criterion: possibility of compliance. Joseph Raz stated that an important aspect of the rule of law is that laws properly passed by Parliament must be capable of guiding one's conduct so that one can plan one's life. Laws should, therefore, be prospective,, rather than retrospective and they should be relatively stable. These views have also been espoused on the political right by FA von Hayek:

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the rule of law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced *beforehand* – rules which make it possible to foresee with clear certainty how the authority will use its coercive power in given circumstances,

> and to plan one's individual affairs on the basis of this knowledge [quoted in Harris, JW, *Legal Philosophies,* 2nd edn, 1997, London: Butterworths, Chapter 11].

The repugnancy of retroactive laws to a democracy has been clearly demonstrated in the difficult business of prosecuting 'crimes' committed by agents for the State in countries of the former Communist bloc. In East Germany, for example, under the Honecker Government, the shooting of fugitives by border guards was not an offence, since these actions were authorised by a special 'border law'. After reunification, German courts, including the Constitutional Court, held border guards criminally liable on a complex construction of 'natural' and West German law. The issue has also arisen in relation to war crimes. Germany has attempted to get round the problem of prosecuting Nazi war criminals by declaring that their acts had been illegal in pre-Nazi law and by stating that the 'laws' of the Nazi regime that legitimised their action were invalid. The Nuremberg Trials which took place in post-war Germany from 1945–46, where representatives of the victorious Allied powers prosecuted Nazi leaders for war crimes, were themselves criticised for violating the principles of *nulla poena sine lege* – no punishment without breach of the law. The American jurist Judith Shklar argues that, in these trials, the pretence of legalism was a mere sham, since there were no pre-existing rules (Shklar, JN, *Legalism, Law, Morals and Political Trials*, 1974, Harvard: Harvard UP). The application of international rules of war to the defendants did partly answer the criticism of retrospectivity – since those rules were prevailing at the time of commission – and theoretically, at least, prosecutions of agents of the Allied powers were still possible in Allied national courts.

The European Convention on Human Rights (ECHR), as we will see, allows for the retrospective application of criminal liability where justified by international law, and also allows for the retrospective reach of criminal liability to acts which were 'criminal according to the general principles of law recognised by civilised nations' (Art 7(2)). Apart from this exception, the prohibition on criminal retrospectivity is non-derogable. Although there is no prohibition in the ECHR on retrospectivity outside the criminal sphere, the requirement of legal certainty underlies its provisions – meaning, in effect, that all law, particularly measures which impinge upon basic freedoms, be certain and predictable. Legal certainty is also one of the general principles of European Community law developed through the case law of the European Court of Justice. Although it is not specified anywhere in the EC Treaty, it is applied in relation to regulations and directives (see above, 7.6) by the European Court of Justice and by national courts to domestic laws enacted to implement Community law.

The UK prides itself on respecting the principles of the rule of law, non-retrospectivity being one of its components. In the following sections, we will

consider to what extent the rule against retrospectivity is in fact respected in this country.

22.2 Retrospective civil measures

Common law

Every day, judges settle disputes by reaching decisions on novel issues which retrospectively determine the rights and obligations of the parties before them. In theory, this offends against principles of non-retroactivity and certainty discussed above. However, the argument here – advanced by Fuller, amongst others – is that rule of law problems do not arise here so much because in private adjudication the function of settling disputes prevails over the function of governing conduct. While Acts of Parliament set out in certain terms what we should or should not do, most rules of the common law apply only at the point of contact with a court: judge made precedents do not, on the whole, govern our behaviour. An individual publishing a libellous article about another individual runs the risk of being sued for defamation. If the judge or jury decide against the publisher, that risk is realised. But the court has not changed the law retrospectively to make him liable when he would not otherwise have been.

There are, of course, landmark decisions making whole sections of the public liable for common law wrongs where no liability had existed before, and there are decisions removing previously existing liability. An example of this may be found in the development of the case law concerning the liability of local authorities for economic loss in building defects. In *Anns v Merton LBC* (1978), the House of Lords ruled that local authorities could be held answerable in negligence for their administration of building regulations even though there had been no clear precedent for imposing a duty of care in previous similar circumstances. The result of *Anns* was that, for the next 13 years, building inspectors imposed unnecessarily strict requirements on the sinking of foundations for buildings, in order to avoid liability, thereby increasing the financial burden on members of the community. Then, in 1991, the House of Lords overruled *Anns*, in *Murphy v Brentwood BC* (1991). By distinguishing the two cases (inadequate foundations in *Anns* were held to constitute damage to property, whereas inadequate foundations in *Murphy* were held to give rise to economic loss only), the Lords radically altered the scope of tortious liability, with retrospective effect in the sense that all acts or omissions committed before the decision, but not yet adjudicated upon, were covered. On the whole, however, the effect of these decisions is prospective. The unfairness, so far as it exists, is on the losing party to the litigation.

Statute law

Statute law presents more intractable difficulties to the rule against retrospectivity. Parliament is supreme. In areas not involving Community law, Parliament can pass any law it pleases, including Acts which may have retrospective operation. Nevertheless, successive governments have been persuaded of the importance of observing the requirements of the rule of law and retrospective legislation rarely survives its passage through Parliament. One notable occasion in 1965 involved the government introducing a Bill to reverse the decision of the House of Lords in *Burmah Oil v Lord Advocate* (1965). Here, it was decided that a large industrial company was entitled to compensation for damage done by virtue of the prerogative powers of the Crown to its oil installations during the Second World War. Whilst this was a perfectly justifiable decision to reach on the facts, it became a focus for controversy since most people who had been deprived of their property under the statutory powers of the Crown were denied compensation under a 'battle damage' exception. In response to public pressure, Parliament passed the War Damage Act 1965, overruling the precedent set in *Burmah Oil* and effectively disentitling the successful applicant in that case from its award. It is an interesting indication of the approach of the Upper House to issues touching on the rule of law that the Bill nearly met its end in the Lords (see the acrimonious debate recorded in *Hansard* HL Deb Vol 266).

Although the ECHR does not contain a specific prohibition on retrospectivity outside the scope of criminal measures, the European Court of Human Rights has, on a number of occasions, considered claims that retrospective measures by the State have interfered with the applicants' property rights or fair trial rights. In *Stran Greek Refineries Andreadis v Greece* (1995), the applicants complained that national legislation which cancelled an arbitration award made in their favour was a breach of their rights to a fair trial under Art 6(1). The arbitration proceedings related to the termination of a contract entered into with the Greek State while it was under a dictatorship; the same contract was terminated after the restoration of democracy. The State appealed against the arbitration award but, when the courts successively upheld it, the government passed legislation declaring the arbitration award void and unenforceable and invalidating any relevant court proceedings continuing at the time of the enactment of the new law. The European Court of Human Rights held that there had, indeed, been a violation of Art 6(1), stipulating that:

> The principle of the rule of law and the notion of fair trial enshrined in Art 6 preclude any interference by the legislature and the administration of justice designed to influence the judicial determination of the dispute.

The Court is not always prepared to strike down the retrospective extinguishing of claims, either on fair trial or right to property grounds. One area in which both national courts and the European Court of Human Rights

are prepared to tolerate retrospectivity is tax legislation. Taxation involves a complicated game of cat and mouse between the Inland Revenue and companies whose teams of accountants and lawyers dedicate their careers to finding loopholes through which their clients may legally avoid revenue obligations. In 1990, the Woolwich Building Society successfully challenged the legality of tax regulations, obtaining a declaration from the House of Lords that the 1986 Regulations were *ultra vires* the enabling Finance Act 1970 (*R v Inland Revenue Comrs ex p Woolwich Equitable Building Society* (1990)). They then obtained restitution of approximately £100 million. The Government was faced with the prospect of paying similar sums to other building societies bringing actions on the same ground, so, admitting it had no defence to these actions, it introduced retrospective legislation in 1991 to stifle such claims. The Woolwich itself was excluded from the scope of the retrospection. The other building societies took their cases to the European Court of Human Rights, alleging breach of their right to property under Art 1 of Protocol 1 of the ECHR, and breach of their right of access to court under Art 6 (*National & Provincial Building Society and Others v UK* (1998)).

The Court doubted that the restitutionary legal claims at issue amounted to 'possessions' within the meaning of the First Protocol, but, assuming that they did, it ruled that the interference with property was justified, having regard to signatory States' wide discretion in the tax field and to the public interest considerations at stake. As to the claim under Art 6, the court acknowledged:

> ... the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection.

However, the Court took the view that the tax sector was an area where recourse to retrospective legislation was widespread and, therefore, the applicants must have appreciated the likelihood of the government placing the 1986 Regulations on a secure legal footing. Accordingly, the Court found that the applicant societies could not justifiably complain that they were denied a right of access to a court for a judicial determination on their rights.

This judgment was handed down shortly before the enactment of the Human Rights Act 1998. The position taken by the European Court of Human Rights on retrospectivity in the field of tax law in this case will signal to the Government that, in the field of tax legislation, at least, measures with retrospective effect are likely to survive any challenge under the incorporated Convention; provided, of course, that the tax authorities are able to establish that there is a genuine public interest behind these measures.

Community law

It was pointed out above that changes in common law and statute may interfere with vested interests. Established rights and liabilities may also be disturbed by developments in Community law. Here, issues of retrospectivity arise because national courts are obliged to interpret national law in conformity with Community law, even when the national law was passed before the relevant Directive was published (see above, 7.9.3). In other words, Community law creates retrospective rights and obligations which appear to infringe the principles of legal certainty and non-retroactivity. The European Court of Justice dealt with this anomaly in Case C-106/89 *Marleasing SA v La Comercial Internacionale de Alimientacion SA* (1990), saying that, if the effect of pro-Community interpretation is to create retrospective civil penalties, such as rendering contracts null and void, the interpretative obligation would not apply. In *Marleasing* itself, the Court of Justice held that no penalties were at stake, either civil or criminal. The applicant was seeking to rely on provisions of Spanish law to obtain a declaration that the contracts which set up the defendant company were null and void. However, these particular contracts were not void under the relevant (non-implemented) Community Directive. The Court of Justice ruled that national law should be construed in accordance with the directive, thereby leaving the applicant without the remedy it obviously understood would be available when it entered the contract with the respondent company.

The Court of Justice has drawn a certain amount of criticism for this disregard of the significance of legal certainty and non-retroactivity in national law, particularly where the temporal effects of its rulings are concerned. The difficulty is that, once the Court of Justice has ruled on a particular fundamental right, such as the requirement under Art 141 that men and women are entitled to equal pay for equal work, an innumerable number of parties wake up to the fact that they may have a similar claims, with the result that businesses are faced with an indeterminate number of claims against them stretching back over many years, even decades. The Court of Justice did predict this problem in its first ruling on this particular issue, Case C-43/75 *Defrenne v Sabena* (1979), where they ruled that, in the light of the 'important considerations of legal certainty', the decision about the direct effective of Treaty rights should apply prospectively only. A number of cases followed where the Court occasionally followed the line it took in *Defrenne* but, more often, took the position that a Court of Justice ruling was retrospective as well as prospective. Furthermore, in Cases C-6 and 9/90 *Francovich v Italy* (1991), where the Court imposed financial liability for signatory States for non-implementation of directives, there was no question of deploying the *Defrenne* tactic of 'prospective overruling', despite the serious financial consequences this would have for State enterprises. To make matters worse for the losing party, in Case C-271/91 *Marshall v South West Hampshire Area Health Authority (No 2)* (1993), the Court of Justice's preliminary ruling had the effect of

invalidating a statutory limitation on awards in sex discrimination cases, preventing governments from imposing a ceiling on the amounts of compensation available in certain types of action. This means that anyone who has been dismissed by a State organ in violation of a right protected by EC law has a limitless claim, a fact which did not escape the attention of women who had been dismissed from the army on grounds of pregnancy (a clear breach of EC law: see below, 26.2.2). Carol Harlow observes that:

> ... by 1994, 3,918 claims had been disposed of and £6 million paid out in compensation; rising to £55 million by 1996 – no mean sum even in the perspective of a Welfare State budget! It is not wholly irrelevant that the affair attracted a great deal of unfavourable publicity; war veterans' organisations reminded the public that young women who had chosen to rear a family, and many of whom had found new employment, were receiving much greater sums in damages than the pensions awarded to seriously incapacitated war victims or their widows [Harlow, C, '*Francovich* and the problem of the disobedient State' (1996) 2 ELJ 199, p 216].

22.3 Retrospective criminal measures

The power of Parliament to pass retrospective criminal measures may be assessed in the light of the judgment in the *Case of Proclamations*, which decided, as early as 1611, that the monarch no longer had the authority to make new offences (see above, 3.6.1). Although there is nothing to stop the Government introducing Bills into Parliament which create new offences, it encounters particular difficulties when such offences create retrospective liability. In 1991, a Bill making it possible to prosecute individuals for crimes committed during the Second World War was rejected twice by the Lords with Lord Shawcross maintaining that 'even if there was the slightest evidence that the electorate as a whole were in favour of this Bill, it would still be our duty to vote against it if we believe that it is wrong' (HL Deb Vol 528 col 643). The view of the House was that such a retrospective measure offended against the principle of the rule of law. The Government, however, was determined to get it through and they did this by invoking the Parliament Acts 1911 and 1949 (see above, 6.5.1). In fact, there has only been one trial for offences under the War Crimes Act 1991, resulting in Anthony Sawoniuk being given two life sentences for the murder of three Jewish people in Belarus during the 1940s (see Ganz, G, 'The War Crimes Act 1991 – why no constitutional crisis?' (1992) 55 MLR 91).

Article 7 of the ECHR

The ECHR contains a specific prohibition on retrospective criminal measures. Article 7(1) of the ECHR provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Article 7(2) provides an exception for 'the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations'. The War Crimes Act comes within the exception in Art 7(2). However, there are some measures in national law which have been challenged in the European Court of Human Rights before Art 7 was incorporated by the Human Rights Act 1998. In 1991, the criminal offence of rape did not cover forced sexual intercourse within marriage. In that year, the House of Lords responded to overwhelming pressure to remove this outdated exemption in *R v R* (1991). As a result, a number of convictions were founded on the new offence of rape in marriage. Some of those convicted applied to the European Court of Human Rights on the basis that they had been made criminally liable for acts which were innocent at the time they had been committed. In *SW v UK*; *C v UK* (1995), the Court rejected this argument, saying that the applicants must have anticipated the necessary evolution of the law on marital rape and that it was reasonably foreseeable that they would be prosecuted. The Commission has also stated that Art 7 does not require a restrictive reading of the criminal law:

> It is not objectionable that existing elements of the offence are clarified and adapted to new circumstances which can reasonably be brought under the original concept of the offence [*Application No 8710/79* (1982)].

The rule against retrospectivity is not limited to common or statute law: it applies to 'soft law' as well. A recent judicial review case decided that 'soft law', such as ministerial announcements of policy in Parliament, should comply with principles of legal certainty. In *R v Secretary of State for the Home Department ex p Pierson* (1997), the applicant, a prisoner serving a life sentence, complained that the penal element of his life sentence had been retrospectively increased. The Home Secretary relied on a policy statement made in Parliament in 1993 that he would reserve to himself the power to increase the penal element of life sentences. The House of Lords, however, held that the Home Secretary was, in effect, acting as a sentencing judge and, therefore, should be bound by the principle of law that a lawful sentence pronounced by a judge may not retrospectively be increased:

> The critical factor is that a general power to increase tariffs duly fixed is in disharmony with the deep rooted principle of not retrospectively increasing lawfully pronounced sentences. What Parliament did not know in 1991 was that in 1993 a new Home Secretary would assert a general power to increase the punishment of prisoners convicted of murder whenever he considered it

> right to do so. It would be wrong to assume that Parliament would have been prepared to give the Home Secretary such an unprecedented power, alien to the principles of our law.

Article 7 of the ECHR also prohibits the imposition of greater criminal penalties than would have been imposed at the time the offence was committed. On the strength of this, a convicted drugs dealer won compensation from the European Court of Human Rights when he complained that a confiscation order made under the Drug Trafficking Offences Act 1986 had been applied retrospectively in his case (*Welch v UK* (1995)). The Act had been passed since W's conviction and permitted the Government to assume that all property passing through an offender's hands during the previous six years was the fruit of drug trafficking, unless proved otherwise. Under the Act, the courts had considerable leeway in exercising their discretion to make a confiscation order. In finding that there had been a violation of Art 7 in imposing the order, the European Court of Human Rights said:

> ... whatever the characterisation of the measure of confiscation, the fact remains that the applicant faced a more far reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offence for which he was convicted.

The outcry which followed national press coverage of this case did some damage – albeit temporarily – to the perceived legitimacy of the European Court of Human Rights, although the punitive nature of the Act was clearly within the scope of Art 7. The Act's sweeping assumption that all money in the possession of a convicted trafficker was to be considered the proceeds of crime and the possibility of imprisonment in default of compliance with the confiscation order constituted serious penalties which should not have been retrospectively imposed.

European Community law

The principle of non-retrospectivity of criminal liability also forms one of the general principles of Community law: Case C-63/83 *R v Kirk* (1984). National provisions prohibiting fishing within a 12 mile zone off the English coast had come into force to fill a gap between Community rules in this area. The effect of this was that Captain Kirk was prosecuted under a national law which was retrospectively authorised by a Council Regulation. He claimed that his right to be protected against retrospective penal laws under Art 7 of the ECHR had been violated, and that this, like other provisions of the ECHR, was one of the general principles of law observed by the European Court of Justice in assessing the legality of Community and national measures. The Court of Justice upheld this argument.

In Case C-80/86 *Officier van Jusititie v Kolpinghuis Nijmegen* (1987), a retailer of mineral water was charged with selling mineral waters which did not

accord with the requirements of a 1980 Council Directive on Marketing of Mineral Waters. The directive had not yet been implemented, but the Dutch authorities were seeking to rely on it for the prosecution. The Court of Justice held that the general obligation on courts of Member States to interpret national law in accordance with EC law, even where the directive was not yet implemented, could not extend to the imposition or aggravation of criminal liability on the part of individual citizens:

> ... a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

22.4 Assessment

In general, successive UK governments have respected the rule of law requirement that laws, particularly in the area of criminal law, should be prospective. Although the War Crimes Act of 1991 has been criticised as departing from that principle, it is covered by the exception under Art 7(2) of the ECHR.

The issue of retrospectivity of Community law is, as it has been pointed out, a controversial one. The fact remains, however, that the imposition of liability by the Court of Justice is for obligations under Community law that have existed since the passing into force of the particular EC Treaty provision or Directive. True retrospectivity involves the imposition of legal liability after the action in question has been performed; so, in a sense, the retrospectivity problems created by Francovich and ensuing case law are procedural only. Criticisms such as those voiced by Harlow (see above, 22.2) could be met, not by the disapplication of *Francovich* liability (see above, 7.9.4), but by recognition by the Court of Justice of national limitation provisions which prevent dated claims for compensation being made.

RETROSPECTIVITY

The prohibition on retrospectivity is an important requirement of the rule of law, closely linked with another requirement, that laws be certain and accessible. You cannot know your liability under the law until that law has been properly formulated. Equally, individuals should not be subject to liability under the law for acts which gave rise to no liability at the time they were performed.

Retrospective civil measures

Judges may reach decisions which impose retrospective liability without offending the rule of law because they are fulfilling their function of settling disputes, rather than passing laws which govern conduct. The rulings generally do not extend beyond the private parties in court.

Civil claims are regarded as property under the ECHR and, therefore, Art 1 of the First Protocol, which requires States not to interfere with individuals' peaceful enjoyment of their possessions, prevents the retrospective extinguishing of civil claims – except in the field of taxation, where a wide margin of discretion is accorded to the legislature to cover tax loopholes retrospectively.

Community law creates retrospective rights and obligations which appear to infringe the rule against non-retroactivity although, in truth, the doctrine of supremacy of Community law means that Community obligations exist since the passing into force of the relevant EC Treaty provision or Directive, even if these have not been implemented into domestic law. State liability in Community law for damages may, therefore, be imposed retrospectively.

Retrospective criminal measures

Article 7 of the ECHR prohibits the imposition of retrospective criminal liability and the retrospective increasing of penalties.

The War Crimes Act, which imposes retrospective liability for war crimes, comes within the exception to Art 7 for actions which were criminal under international law principles at the time they were committed.

Article 7 does not prohibit the development of the criminal law to adapt to the morals of the times: people convicted of intra-marital rape could not complain that they had been subject to retrospective criminal liability, since

they should have known at the time that the law would evolve to criminalise their acts.

Community law prohibits the imposition of criminal liability or the aggravation of penalties even if these measures are passed in order to ensure compliance with Community Directives.