Ius Gentium: Comparative Perspectives on Law and Justice 18

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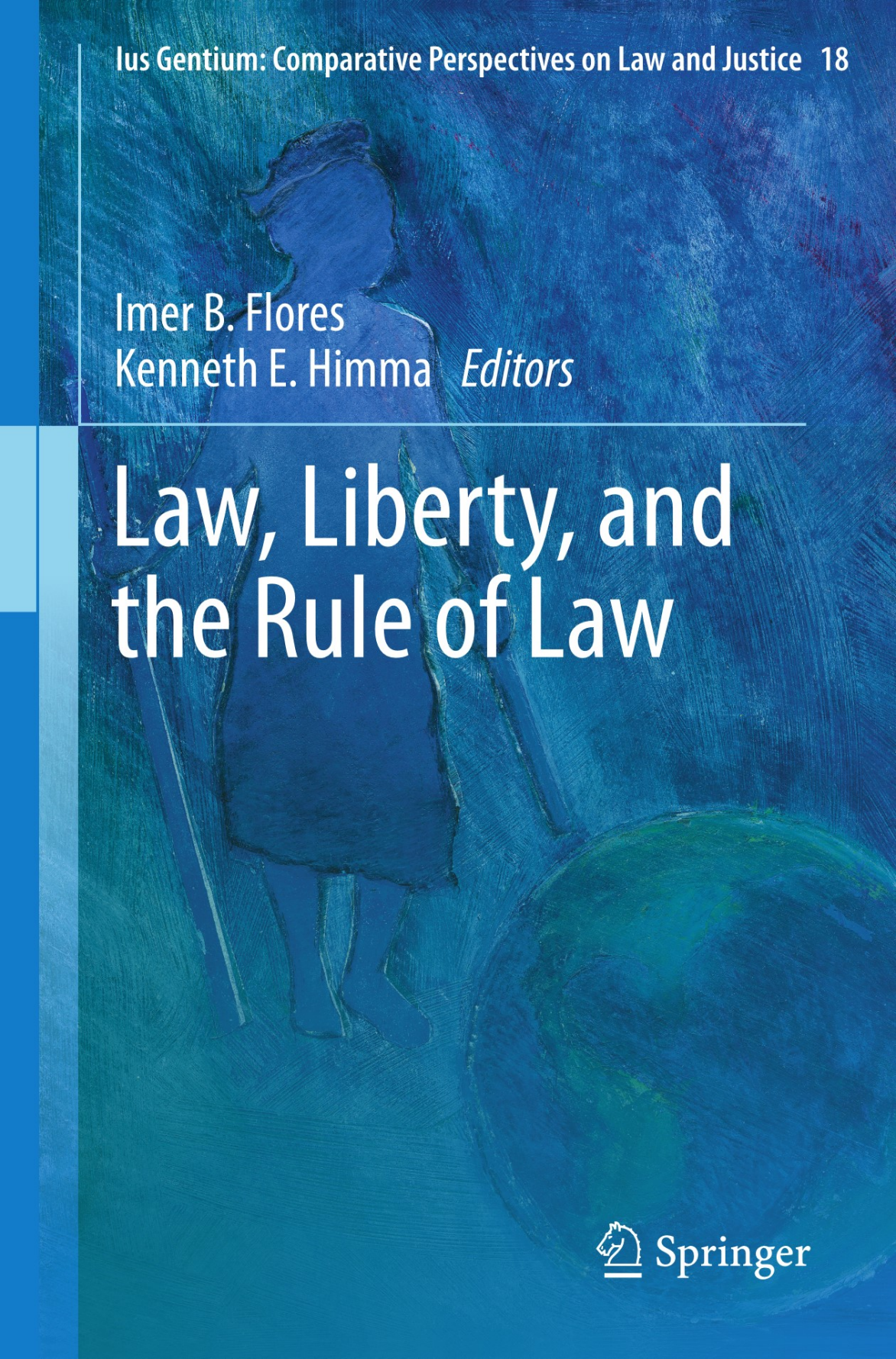
Law, Liberty, and the Rule of Law



Springer

Chapter 11
Retroactive Application of Laws and the Rule of Law

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11.1 Introduction

I will try and make one main claim in this paper: issues of retroactivity have to be dealt within a two stage process, one dealing with a formal test of retroactivity and a second one that involves issues of justification. The reason for this is that when analyzing problems of retroactive application of laws, I think confusion is prone to occur when these sorts of problems are concentrated entirely on issues of justification, *i.e*. when dealing with these sorts of issues we tend to go directly into a justification process, so my idea is that a clearer understanding of the problem of retroactivity might be advanced and more analytical headway can be obtained if the problem is divided into these two stages.

Section 11.2 of the paper deals with the first stage of the process and develops a possible formal test for retroactivity, the formal test is a consequence of adopting

* I have acquired many debts in the various stages of writing this paper, but would specially like to thank Brian Bix and Michael Giudice for detailed comments, discussions and corrections. Thanks are also due to Enrique Cáceres, Keith Culver, Julie Dickson, Imer Flores, Iwao Hirose, Rodrigo Ortiz Totoricaguena, Joseph Raz, Yanara Suenaga, René G. de la Vega, Wil Waluchow, and Benjamin Zipursky. Earlier drafts of the paper were presented at several conferences, but my special gratitude is for audiences at the Jurisprudence Discussion Workshop at the Legal Research Institute at UNAM, Mexico City (Mexico); the Department of Philosophy at York University, Toronto, Ontario (Canada); and the Department of Philosophy at McMaster University, Hamilton, Ontario (Canada). Of course all remaining errors are entirely my fault. I also benefited from leave and thanks are due to UNAM and the Faculty of Law at University of California at Los Angeles (USA) and Mark Greenberg for providing me with an ideal atmosphere to work on my research. The idea of writing on retroactivity problems first came to mind while commenting on a then recent Mexican Supreme Court decision, *vid*. Vega Gómez (2006).

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I.B. Flores and K.E. Himma (eds.), *Law, Liberty, and the Rule of Law*,
Ius Gentium: Comparative Perspectives on Law and Justice 18,
DOI 10.1007/978-94-007-4743-2_11,

Raz's idea of a formal conception of the "rule of law", I think that issues of retroactivity are best seen within this framework. At one point while developing the ideas for a formal conception of the "rule of law", Raz states that: "A law is either retroactive or not" (1979, 215). I will try and flesh out this idea due to the fact that I think this demands a formal test – a yes or no answer for retroactivity problems. Section 11.3 of the paper explains the second stage of the process and tries to argue in favor of the two stage process main claim; Sect. 11.4 deals with some objections to the main points put forward; and finally, Sect. 11.5 presents a conclusion.

Before beginning I must clarify that I will only deal with issues strictly related to retroactivity in legislation, *i.e.* I will not deal with issues of retroactivity in adjudication,[1] but hope that this focus on retroactive legislation will help explain issues on retroactive judge-made law. I should also add that I make an interchangeable use of *a retroactive law* and *a retroactive application of a law*, the main point of the paper is to know when we have a retroactive law, I use retroactive application of a law because my background in testing these claims is a judge trying to answer these questions in a concrete case of application of legislation.

11.2 Formal Conception of the Rule of Law and First Stage in the Process

First I will develop some basic ideas around this formal conception and its relation to retroactive application of laws and highlight the importance of law's capability to guide the behavior of its subjects: As Raz states, the formal conception of the rule of law is not the rule of the good law (1979, 211), we must not confuse this formal conception with an idea that thinks that complying with the rule of law entails that the law in question is good law, *i.e.* that the rule of law promotes morally sound directives and helps maintain a democratic system. Or that the concepts of rule of law and the promotion of human rights entail each other. The formal conception of the rule of law warns us that this is not necessarily the case, this formal conception does not say much regarding the attributes that have to be met by the people who make the law or the kinds of laws that they will promulgate. Let me quote a passage from Raz's essay on the rule of law and its virtue (1979, 211):

> A non-democratic legal system, based on the denial of rights, on extensive property, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies. This does not mean that it will be better than those western democracies. It will be an immeasurable worse legal system, but it will excel in one respect: in its conformity to the rule of law.

[1] I should also add that at this moment I will not deal with how this basic framework corresponds with legal decisions within a comparative perspective, *i.e.* in civil and common law traditions.

It is important not to over exaggerate this passage: the formal conception of the rule of law by itself does not necessarily entail the rule of good law, we have a better understanding of the notion of the rule of law if we do not conflate it with issues of moral importance, conflating these latter issues calls for a "complete social philosophy" as Raz says (1979, 211). So what is the core idea underlying this formal conception if not the notion of good and democratic law if the rule of law is to be followed? The idea is this: law must be capable of guiding the behavior of its subjects (1979, 214), digging a bit deeper and having in mind other elements of Raz's theory of law we can say that authorities attempt to have a mediating role between subjects and right reasons that they are supposed to correctly follow (1986, specially Chapter 3). Authorities' directives claim to guide our actions and claim to determine those right reasons (or in fact determine the right reasons if we are talking of legitimate authorities). The point to keep in mind here is that this mediating role authorities play and the directives issued by the authority claim to guide our conduct and this makes sense only if the law has the capability of guiding the behavior of its subjects.

This is the basic intuition – as Raz calls it – from which the doctrine of the rule of law derives, and from this basic intuition several principles are derived from it, the one which concerns us is the one that states that one cannot be guided by a retroactive law (1979, 214), why? The answer is pretty much straightforward in this formal conception of the rule of law: because we have to know beforehand what an authoritative directive requires from us to be able to be guided by it,[2] it would be odd for an authority to demand conformity to a directive that I had no prior knowledge of its existence and content, unless some kind of fortune telling capacity is expected from me, which of course is not the case.

So the question I want to turn to is the following: how do we determine when we have a retroactive application of a law according to this formal conception? How can we answer this question considering the basic intuition from which the doctrine of the rule of law derives? *i.e*. that law must be capable of guiding the behavior of its subjects. Let me turn to a minimum test I have in mind in order to answer the question of retroactivity, one that emphasizes law's guidance function, and counterfactual tests.

I think much of the issues on retroactivity implicitly or explicitly deal with counterfactual tests, and one way that might help us to get a straightforward answer to the issue of retroactivity and make sense of Raz's statement that "either a law is retroactive or not" can be by using counterfactuals, this way we can start envisioning a yes or no answer regarding retroactive application of laws.

[2] The other seven principles are: laws should be relatively stable; the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the implementation of the other principles; the courts should be easily accessible, and the discretion of the crime-preventing agencies should not be allowed to pervert the law.

Let us imagine a straightforward case of retroactivity, for example as Fuller says, an easy case of a statute which purports to make criminal an act that was perfectly legal when it was committed (Fuller 1964, 59). The case we can think of is a statute enacted in 2010 that prohibited and made it a crime to smoke inside a car with the presence of children. Orlando is and was a heavy smoker and in 2008 he smoked several times inside his car and in the presence of his children. With the new 2010 statute he is being called into court for his behavior and actions that took place in 2008. This is a case of retroactive application of the law due to the fact that the new statute was enacted after Orlando's acts of smoking in the car with his children, an act that was perfectly legal at that time.

To get a straightforward answer to this straightforward case of retroactivity a counterfactual test might apply. The counterfactual test would ask: "If Orlando had known that this statute was going to be enacted, *would* he have acted differently"? If the counterfactual test yields a *yes* answer we have a retroactive application of a law, if it yields a *no* answer, we do not have a case of retroactivity.

What are the features of this counterfactual. *First*, are we to ask this counterfactual in relation to Orlando or the person involved in the possible retroactive application of the law? Let us consider this first possibility: This is one way to deal with the issue and consider the intentions of the person under the possible application of a retroactive law, *v.gr.* ask what Orlando's intentions would have been had he known that this statute was going to be enacted. But as straightforward as this possibility might be in getting a good answer, in this analysis of retroactivity we have to consider two main issues. First, if I were to ask the person involved, *i.e*. Orlando, would you have acted differently? the answer most certainly will be *yes*, I would have done a different thing, considering that this way he might just get out of problems regarding the new law that prohibits smoking in the car in the presence of children, so we have to stay away from this quite obvious reply; and secondly and most importantly, I think we have to employ a more abstract question and person regarding this counterfactual, because in a concrete adjudication case in court if we were to ask the person involved or every person involved in the possible retroactive application of the law this would ensue an indeterminate answer regarding the law. This last point makes us aware of another important requirement of the law, *i.e*. law's generality trait and precisely because of this we need to look for a test and a person who encompasses many cases, therefore the test for our counterfactual has to be asked regarding a hypothetical person, and ask this hypothetical person if she would have acted differently considering the new statute that has been enacted.[3]

And *secondly*, what are the conditions that have to be met by this hypothetical person: one possibility is to ask just about anyone who may or may not have an

[3] The idea of using counterfactuals regarding hypothetical persons was brought to my attention by Andrei Marmor's book (2005, especially Chapter 2). I should add that Marmor considers this possibility in a different context, *i.e*. regarding legal and other types of interpretation.

important consideration for what the law instructs. Consider the possibility of asking a person who has no respect for the law whatsoever, respect in the sense of guiding his conduct according to law's directives. From this point of view it would be impossible to come to a conclusion about what the law demands, this person does not consider the law in any action guiding way, so if this person is asked why did you do this? The answer can't be for example: at that time it was the law that I could smoke inside the car in front of my children, this person just does not care, and does not take any of the law's standards as guiding her conduct. So we must also move away from this point of view and consider the point of view of the person who *does* consider law's directives as giving her reasons to guide her conduct. If I were to ask this person: Why did you do that? We can assume that an answer would be: at that time the law did not prohibit smoking in the same car in the presence of children.

The conclusion is that we must disregard asking this counterfactual to the person or persons actually involved in the possible retroactive application of the law and we must also eliminate asking this question from the perspective of the person not interested in law's directives as action guiding. For this formal test to have some plausibility we should consider the internal point of view, the person who uses expressions as the ones stated by Hart: expressions such as: "It is the law that…", expressions of "…ordinary men living under a legal system, when they identify a given rule of the system" (Hart 1961, 99).

Therefore, the counterfactual test I am trying to advance asks the following: If X had known that this statute was going to be enacted, X *would* have acted differently. In this case X is a hypothetical person who adopts the internal point of view and considers law's directives as action guiding.

Let us consider our counterfactual regarding the example of a statute enacted in 2010 that prohibited and made it a crime to smoke inside a car in the presence of children. As we considered before, Orlando is and was a heavy smoker and in 2008 smoked several times in his car and in the presence of his children. With the new 2010 statute he is being called into court for his behavior and actions that took place in 2008. In the counterfactual: If X had known that this statute was going to be enacted, *would* X have acted differently? We then ask this from the internal point of view and if the counterfactual test yields a *yes* answer then we have a retroactive application of the law. The answer in this imagined case is *yes*, a person who considers laws directives as action guiding *would* have acted differently in this scenario, she would have acted differently because she – supposedly and contrary to fact – knows that smoking inside the car in the presence of children is a crime punished by law.

At this point I would like to address a couple of important objections on why this test might prove to be too simple of a test.

The *first* and very important objection leveled at this idea is that with this formal test*: every change in the law would count as a retroactive application of the law*, this is *why* it is too simple of a test and probably an otiose test at the end because this seems counter to most changes, amendments, reforms, etcetera that

take place in the law. Fuller has this very idea in mind when he states the following (1964, 60):

> Laws of all kinds, and not merely tax laws, enter into men's calculations and decisions. A man may decide to study for a particular profession, to get married, to limit or increase the size of his family, to make a final disposition of his estate- all with reference to an existing body of law, which includes not only tax laws, but the laws of property and contract, and perhaps, even, election laws which bring about a particular distribution of political power. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our laws would be ossified forever.

This point is a crucial one. Of course the idea of the formal test cannot go against a basic and important point regarding our legal systems, *i.e.* the existence of secondary rules of change that solve the problem of a static quality of a pre-legal system (Hart 1961, 93). We have these secondary rules that allow changes in the law and also allow for the elimination of unneeded statutes and modifications and amendments called upon by our legal system. The objection that I think Fuller and others have in mind is that for every action I take there cannot be a freeze-frame of the law valid at that time. This is true and I agree, but the question employed in the objection is too broad of a question to ask: what exactly does *changes in the law mean*? Our formal test and the counterfactual are not trying to rule out every change in the law, it deals with changes in the law regarding a specific action that the law is trying to regulate *ex post facto*. The directives instruct us to ϕ or not to ϕ, regarding *this* is that we have to analyze the question of "changes in the law" leveled by the objection. It is not the case that retroactive problems have to deal with everything that has a consequence regarding ϕ-ing. With the formal test and the counterfactual we are not ruling out future events of enacted statutes, just ex post facto consequences that it purports to have, this is what retroactivity is all about, changes in the law to regulate future behavior is inevitable and is not to be confused with cases of retroactivity.

A *second* and also very important objection claims that all retroactive cases analyzed with our counterfactual test will yield a yes answer. I want to resist this conclusion with two scenarios. One is when we have indeterminate cases of legal questions:[4] sometimes the law might not provide a definite answer for the counterfactual test, in these cases the counterfactual test does not make sense due to the fact that in the counterfactual: If X had known that this statute was going to be enacted, he would have acted differently, we cannot make sense of what the law demands, even if we ask this from the internal point of view. In other words, we cannot make sense of our antecedent in the conditional because we have unsettled law that has to be developed and settled via adjudication at the court level.[5]

And a second scenario where the counterfactual would not necessarily yield a yes answer becomes apparent if we consider the case where there is a change in the law via a statute, but this statute is more beneficial to the person, in these cases it is possible that a no answer would be the result of the counterfactual. For example and to use a special

[4] This is an important point made by Hurley regarding retroactivity questions (*vid*. 1990).

[5] I am still trying to avoid the issues and questions raised by problems of retroactivity in adjudication.

tax case, consider an action that took place in 2000, that action –let us say a monetary transaction– was taxed with a 15% amount, there is a new statute in 2010 where that same action is being taxed with a 10% amount, if the new statute is being considered in our counterfactual it would yield a no answer, i.e., in the question: *If X had known that this statute was going to be enacted, would he have acted differently?,* not necessarily, in this case he would have acted the same, he would have made the same monetary transaction, due to the fact that the new statute is even more beneficial to his action. This is what I make of legal systems that do not consider ex post facto changes in the law that are more beneficial to the persons as retroactive applications of a law.

To return to the issue of: Is this formal test too simple? I consider that indeed this is a simple test, but it is a simple test that constitutes just one part of the issue of retroactivity, a second important test is still pending. But it is not too simple of a test because it encompasses all changes in the law and neither because the formal test and counterfactual will *always* yield a yes answer.

This is the more modest claim that I want to make in this paper, why? Because I am aware that these kinds of counterfactuals have their own difficult and intricate issues and I don't think I am capable of sorting these out at the moment, but I do want to make two points here: one, that independently of the fact that these kinds of counterfactuals have their own problems in philosophy, I think legal reasoning engages in these tests in everyday adjudication problems, *v.gr.* when a court is trying to interpret a statute or constitutional provision it is not uncommon that they ask themselves a counterfactual test, something like the following: if the framers had known about these unexpected future problems, what would have they decided on this case at hand.[6] I do not think these tests are entirely ignored by judges and it seems to appeal to common practice in the law. And second: maybe further issues have to be figured out in order to come to a definite answer *re*: this kind of counterfactual test, but we do need some test that has to yield a yes or no answer to the issue of retroactivity. This is why this claim is a modest one.

If the idea of a formal test has some plausibility, and I am correct to assume that we need a yes or no answer regarding these cases of retroactive application of laws, then we can summarize the possibilities that we so far have in analyzing retroactive application of laws: (1) retroactive, if the counterfactual yields a yes answer, (2) not retroactive, if the counterfactual yields a no answer, and (3) it is neither retroactive nor not retroactive, these are cases of indeterminacy or uncertainty in the law.

11.3 Second Stage

Now to return to my main claim: The two stage process in dealing with problems of retroactivity I am trying to advance puts at a second stage the reasoning and justification of the case at hand, by justification and reasoning I mean reasoning that

[6] On counterfactual tests as a legal interpretation technique, *vid*. Alexander (1995), Marmor (2005), and doubts raised by Stoljar (2001, 447–65).

involves issues of legal, moral and political concerns, reasoning that will definitely decide if a retroactive application of a law is justified on certain moral and political grounds, or maybe that a retroactive application of a law is not justified according to a constitutional provision that explicitly states that retroactive application of laws is prohibited. But the point is this: these issues of justification can be handled better if we first determine if we have a case of retroactive application of a law, why? (1) on many occasions if these issues of retroactivity are analyzed going straightforwardly into a justification process, the issue of whether we have a case of retroactivity or not gets confused with the reasons we have for applying or not applying a law retroactively, and (2) we can have a clearer view of what kind of reasons I need to put forward in order to justify certain case if prior to that I have a clear knowledge if it is either retroactive or not considering the formal test that would yield a yes or no answer.

And I do think that we need a yes or no answer to this question, issues of retroactivity viewed within a formal conception of the rule of law enable us to have a clearer picture of the whole problem, and helps us consider retroactivity within these two important stages.

The benefits of the two stage process analysis of retroactivity can be highlighted if we consider another of Fuller's interesting insights on retroactivity mentioned in a discussion regarding a tax law first enacted in 1963 imposing a tax on financial gains realized in 1960 at a time when such gains were not yet subject to tax. Such a statute – according to Fuller – "may be grossly unjust, but it cannot be said that it is, strictly speaking, retroactive" (1964, 59).

We should add that Fuller's argument also states: "To be sure, it bases the amount of the tax on something that happened in the past. But the only act it requires of its addressee is a very simple one, namely, that he pays the tax demanded. This requirement operates prospectively. We do not, in other words, enact tax laws today that order a man to have paid taxes yesterday, though we may pass today a tax law that determines the levy to be imposed on the basis of events occurring in the past" (1964, 59).

Of course Fuller is right in the sense that the requirement operates prospectively and of course the tax law does not order a man to have paid taxes yesterday. But the problem with Fuller's insight is his notion of strictly speaking not retroactive. If we have a category of "strictly speaking not retroactive", we also need another one that labels the problem as broadly speaking not retroactive, and so forth. This is precisely what my analysis wants to avoid, while at the same time contribute to sharpen the boundary of these important concepts. We can avoid this problem if in this tax example we ask whether there is an impairment of law's capability to guide behavior and the answer is yes, if the man had known about this latter statute he would have acted differently, considering most importantly his gains he rightly acquired before the statute.

What I think is happening with Fuller's point is that indeed many legal systems consider tax laws not subject to a retroactive application scrutiny and this is why they consider them not retroactive applications of the law. But with the ideas

here advanced we have to come to the conclusion that in this tax law example we *do* have a retroactive application of the law according to our counterfactual test, but maybe this retroactive application of the law is justified on political, economical and moral grounds. This is what I am trying to argue, we consider many cases of retroactive application of laws justified so we go on and say something like Fuller: "strictly speaking this is not retroactive", when indeed it is retroactive and maybe justifiably so, but it is retroactive and adding "not strictly retroactive", I insist, does not help.[7]

Someone sympathetic to Fuller's account might conclude that the idea I have regarding a formal test and a justification stage process will consider many cases of application of laws retroactive, when in practice these are not seen as retroactive. This is true, but it shows not a weakness with my account but a strength: If the formal test and justification process yields many cases as retroactive we are better off, this places the burden of justification to the legislature, courts and administrative bodies, they are the ones that have to come up with important moral and political reasons to justify a retroactive application of a law, this is a task *they* are called to perform. My point is that going straight to the conclusion that an application of a statute is not retroactive law is hiding many of these important justification discussions, it settles the debate without having a debate about the justification of a retroactive law. My counterfactual test addresses the moral and political issues of justification clearly instead of hiding, as Hart said, "the true nature of the problems with which we are faced" (1983, 77).[8]

With this in mind and the two stage process properly explained we now have more possibilities in analyzing retroactive application of laws: (1) retroactive if the counterfactual yields a yes answer, but justified, (2) retroactive if the counterfactual yields a yes answer and not justified, (3) not retroactive, if the counterfactual yields a no answer, and (4) it is neither retroactive nor not retroactive, these are cases of indeterminacy or uncertainty in the law.

11.4 Possible Objections

Maybe I am getting things completely wrong here and I am arriving to a false conclusion. It just might be that drawing on a formal conception of the rule of law, using counterfactuals and relying on law's guidance function to properly address retroactivity issues might suggest that law's guidance function is being overstated and that retroactive issues have to be seen as a matter of degree and not as I suggested a problem that beforehand needs to yield a yes or no answer. This is what is

[7] Fuller goes on to consider various responses to his argument regarding the tax law, but in the end he unfortunately cuts the dialogue short and leaves the issue unresolved (*vid*. 1964, 61).

[8] Thanks again to Mike Giudice for helping me state this idea more clearly.

suggested by Charles Sampford in a thorough and detailed analysis of *Retroactivity and the Rule of Law* (2006, 9 and 81).[9]

Sampford argues that the guidance function argument "is neither overwhelming nor unequivocal. Reliance weighs against retroactivity in many cases, but it (or the principles underlying it) actually justifies retroactive legislation in others. This has important consequences for the traditional concepts of the rule of law and even suggests a complete *reconceptualization* of the ideal." (2006, 7) And Sampford argues for this relying heavily on the formal conception of the rule of law. Even if I am tempted to say right from the start that Sampford's arguments are confusing the two stage process of retroactivity and that he is going directly to the justification process, I think his ideas regarding the guidance function of law need to be addressed.

Let us first assume that Sampford and I have the same idea in mind when talking about law's guidance function. Sampford develops two lines of arguments to claim that law's guidance function is being overstated. *First* is the idea that the use of retroactive law may be an important source of guidance, for example, the use of retroactive laws can guide people in cases of loopholes or mistakes made by the legislature, the use of retroactive law guide people by providing a warning to citizens not to rely on existing law and that taking advantage of these loopholes and unintended effects of the legislature is probably going to be penalized through retroactive law. Sampford argues (2006, 81):

> Retrospective laws which close "loopholes" and "unexpected interpretations and consequences" reinforce the guidance of primary laws. Thus the retroactive law does not itself provide guidance but assists other laws to provide guidance. "Prospective retrospectivity" (that is, clear guidelines for retrospective rule making can generate an expectation that retroactive law will be applied in the future to prevent actions) is extremely important for this purpose.

But is this right? First of all how can retroactive law provide guidance in the sense of signaling a warning to citizens not to rely too closely on the details of existing law, because the question then is: why do we have law at all? Obviously people reasonably guide their conduct or accept the consequences of their actions based on what the law provides, not on what the law *could* provide.

[9] Sampford suggests using the term retrospectivity and then goes on to define it as: "retrospective laws are laws which alter the future legal consequences of past actions and events" (2006, 22). I am not sure what to make of various ideas here, especially the idea of "alter future legal consequences", but then he goes on to say that the common picture of retrospectivity is that of a person performing a discrete and completely lawful action on one day, and on the next having a sanction attached to their action despite the fact that it is already in the past. If this is what he means by retrospectivity, then we agree and my use of retroactivity instead of retrospectivity to address his ideas does not have any impact on the arguments made. I will only use retrospective when quoting his ideas literally. But I acknowledge that there is room for much conceptual work to be done regarding types of retroactivity or retrospectivity, this paper is an attempt to clarify *some* of the problems. I became aware of Sampford's book after some of these ideas were developed, this is why I am considering them at the end of the article and as a possible objection, a possible objection due to the fact that as will become apparent Sampford's conclusions are radically different from mine.

Sampford argues among other things that retroactive law provides a warning to citizens not to rely too closely on the details of existing law *especially in cases of mistakes made by the legislature and effects that laws have and that were not intended by these legislative bodies*. But I think mistakes made by legislative bodies and unforeseen effects is not an all uncommon consequence of legislative practice, remember H.L.A. Hart's powerful insight regarding the handicaps that permeate the activity of regulating conduct in advance, *i.e.* a relative indeterminacy of aim and a relative ignorance of fact in which "possible combination of circumstances which the future may bring" are impossible to be foreseen by the legislator (1961, 125), the legislator will legislate having one or two specific problems in mind and will try and regulate those specific actions, but once the law has been enacted you never know what other facts may arise and then questions of whether those facts apply to the statute or not is where interpretation and creativity play an important role, trying to minimize the need for interpretation and creativity in adjudication was an assignment that formalism tried to accomplish but with little success (1961, 126 *et seq*.).

One other comment that must be mentioned regarding Sampford's first line of argument against the guidance function is the following: Sampford argues for "'Prospective retrospectivity' (that is, clear guidelines for retrospective rule making can generate an expectation that retroactive law will be applied in the future to prevent actions) and its importance for this purpose" (2006, 81), but if we have clear guidelines regarding the use of retroactive legislation and how and when it must be used then I do not think that we are talking of a retroactive law at all, if citizens are aware of when and how these kind of laws will be enacted then notice of the law is met and I do not see how we can still label the problem as one of retroactive laws.

Concerning this last comment Sampford might reply that what these clear guidelines for "prospective retrospectivity" do is signal a warning that a law *might* be enacted and promulgated, not that it specifically determines how and when these kinds of laws will be enacted. At one point he puts the point this way: "the use of retrospective laws – or the knowledge that they might be used – can itself provide guidance of a useful and socially desirable sort" (2006, 82). Sampford continues arguing that with these kinds of retrospective laws "those who have been warned that the rule might be changed between action and adjudication take a risk in so acting and they cannot complain if the risk materializes" (2006, 252). But this is even more problematic. Imagine an action guiding directive that says: "I *might* issue this directive", in this case when I ask this authority should I ϕ or not ϕ, the response is: "I might ask you to ϕ and I might ask you not to ϕ. What kind of an authority is this? I am not sure what is Sampford's idea of an authority, but this is not a good example of an authority, even less so a good example of the authority of law.

Aside from the above arguments and most importantly, this notion of "prospective retrospectivity" might advance an all encompassing concept of non-retroactivity, if a legal system clearly states when and how a retroactive law may be enacted then no laws will count as retroactive because the citizen has the opportunity to guide their behavior according to these general guidelines of "prospective retrospectivity", and this seems to go to the other extreme, with general guidelines on retroactive law then we do not have a retroactive law at all.

A *second* line of argument explored by Sampford to claim that law's guidance function is being overstated is one that argues that not all laws, *i.e.* each and every law needs to have as an objective to guide behavior – or be capable of guiding behavior – there are several types of laws that serve several purposes, but guiding behavior is not one of them (2006, 83). Sampford says that we can think of various examples of non-normative laws that do not have this purpose of guidance. For example, a law which mandate that violently psychotic people be locked away, or that sick people can be quarantined. Sampford states (2006, 86):

> In each case, there is no guidance to the individual involved. If an individual is contagious or psychotic to the relevant extent, there is nothing they can actively do, on the basis of the law's guidance, to avoid incarceration. Yet we would not say that laws against incarceration of psychotic or contagious individuals are, to that extent, not laws – or not justifiable laws. They serve a public welfare agenda. So, it is false that laws must always serve as a guide to behavior.

Regarding this second line of argument, a couple of considerations may be put forward: First of all we agree that law's guidance function does not entail that each and every law has to be capable of providing guidance,[10] but while these examples of non-normative laws *may* prove an important point regarding law's guidance function and the nature of law, the point does not tell us much regarding the problem of retroactivity, because the issue here is not to find a law that is not capable of providing guidance, these laws will rarely be considered as retroactive, the key issue is to find examples of laws that purport to guide the behavior of it subjects and are still not considered as a retroactive application of law.

I mentioned before that it was important to assume that in this discussion Sampford and I have the very same idea in mind when talking about law's guidance function, *i.e.* law as issuing reasons that purport to guide our conduct and purport to make a practical difference in our deliberations on what we should do, I think this is the best way to understand Sampford's claims about overstating the guidance function though these claims do not succeed.

Unfortunately it is not at all clear what Sampford has in mind with the notion of guidance function, at one point he states that the guidance function relies not on the content of the law, but on intentions and principles behind the law (2006, 262–3), he thinks that law's guidance function is better understood within the domain of the integrity of what the law represents to ordinary citizens, due to the fact that citizens accept the laws that govern them because they think laws are morally justified by morally worthy principles and goals (2006, 263).

[10] Regarding Sampford's claim, I am putting aside the fact that he states that the claim that all laws must be capable of guiding behavior is a "normative claim" and attributes this to Raz and offers this counterargument against it. First of all this is not what is claimed by a proponent of law's guidance function, it is not a claim regarding *all* laws, *i.e*. each and every law, and secondly, those who consider the law's guidance function important to explain in a rendering of law's nature do not necessarily hold this from a normative stance. *Vid*. Sampford's claim (2006, 82–3). Jules Coleman also attributed to some proponents of legal positivism the claim that each and every law must make a practical difference, *vid*. Coleman (2001, 143).

This second way of understanding law's guidance function that at some points is suggested by Sampford makes his support of the formal conception of the rule of law a futile one, this implies not only a difference in understanding the rule of law, but a totally different standpoint in topics such as the content of the law. If this second way of understanding law's guidance is the correct one to appreciate Stampford's claims then we need to discuss many questions prior to the issue of retroactivity, questions such as: how is it possible to be guided by intentions and principles "behind" the law? (2006, 262–3) and do citizens really morally justify the law that guide their conduct? And then ask what happens with citizens that do not morally justify the law? Obviously these questions go beyond the scope of this paper. In this discussion on retroactivity I just want to place serious doubts on Stampford's objective of balancing a defense of a formal conception of the rule of law with these latter claims on how to understand law's guidance function.

11.5 Conclusion

In any case and to return to our main issue of retroactivity and the rule of law, I argued that a formal conception of the rule of law helps us understand the issues raised by retroactive application of the law, this entails that we explain the notion of retroactivity as demanding also a formal test that yields a yes or no answer, then continue to a second stage of justification where moral and political arguments can be advance to justify a retroactive application of a law. Another way to put my main claim is that much analytical headway can be obtained if retroactivity is analyzed in this two stage process way.

Sampford suggests one way of going about this, but his *reconceptualization* of the ideal of the rule of law suggests not only a reconceptualization of the formal notion of the rule of law – which he tries to defend – but also a reconceptualization of many other issues entailed by this formal conception. I tried to advance one way of fleshing out a notion of retroactivity within the confines of a formal conception of the rule of law.

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I.B. Flores and K.E. Himma (eds.), *Law, Liberty, and the Rule of Law*,
Ius Gentium: Comparative Perspectives on Law and Justice 18,
DOI 10.1007/978-94-007-4743-2,

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