

PROSPECTIVE OVERRULING UNRAVELLED

Allard Law Faculty Colloquium

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OVERVIEW



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1. Thesis overview: prospective overruling is bad doctrine and policy.
2. Concepts: what is and isn't prospective overruling?
3. Six policy rationales for prospective overruling doctrine ... unravelled.



Further proposals

11. In addition, the Government is considering further reforms which build on the analysis in the Report, and on some of the options the Panel suggested but on which they did not make definite recommendations. The Government thinks there is merit in exploring the following areas to see whether practical measures could address some of the issues identified in the Report:
 - a. legislating to clarify the effect of statutory ouster clauses
 - b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis
 - c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only
 - d. legislating for suspended quashing orders to be presumed or required

THESIS



1. Judges have a dual role: deciding cases + determining the law.
2. Retrospectivity is an inherent constraint on the judicial method.
3. Prospective overruling (i.e. non-retroactive judicial law-making) is unprincipled.
4. Prospective overruling is also bad policy.

What is prospective overruling?

- Relevant when:
 - Announcing a new judge-made rule
 - Overruling a prior precedent
 - Quashing a statute/regulation
- “**Pure**” prospective overruling
or
- “**Selective**” prospective overruling
- *e.g. abolishing advocates’ immunity*

What isn’t prospective overruling?

- × Distinguishing or not following precedent
- × Obiter dicta
- × Distinguishing new rule
- × Suspended declaration of invalidity
- Prospective overruling is exceptional

Prospective overruling is (said to be) necessary to preserve the social interest in:

- (a) a **stable** legal order;
- (b) protection of justified **reliance and expectation** interests;
- (c) the **efficiency** of judicial institutions;
- (d) the **dignity** and good repute of judicial institutions;
- (e) the **efficiency** of administrative or legislative action; and
- (f) the **equality** of treatment for like cases.

— J. Stone, *Social Dimensions of Law and Justice* (Stanford University Press, 1966) 661;
J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985) 189.

(a) STABILITY



Claim:

- Overruling/quashing destabilises the law.
- Prospective overruling eases the transition to the new rule.
- Retrospective judicial law-making violates the rule of law!?

Rebuttal:

- Overruling is a *response* to instability.
- Prospective overruling ignores law's dynamism. Law is often "in flux".
- Retrospectivity is justified to determine what the law was in uncertain cases.
- Judging does not violate the rule of law!

(b) RELIANCE & EXPECTATION



Claim:

- Judicially changing law only for the future preserves peoples' reliance on "old law".

Rebuttal:

- *Actual* or *constructive* reliance?
- *Whose* reliance? Defendants, parties, third parties, courts, society generally?
- *When* do we assess reliance?

(c) JUDICIAL EFFICIENCY



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Claim:

- Judges can make law without worrying about disrupting past arrangements.
- Prospective overruling facilitates positive judicial activism.

Rebuttal:

- Who benefits from this judicial activism?
- Are judges hearing all perspectives?
- Do we want more judge-made law?
- Retrospectivity has *constraining* effect!

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(d) JUDICIAL DIGNITY



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Claim:

- Judges should be honest about their law-making power and not hide behind fictions. They needn't make law retrospectively.

Rebuttal:

- Judges should be honest about their law-making power and not fall back on simplistic solutions to hard problems.

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(e) GOVERNMENTAL EFFICIENCY



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Claim:

- Retrospective judicial law-making can drain treasuries, derail administrative actions, and disrupt the legislative agenda.
- Prospective overruling protects the Crown.

Rebuttal:

- Does the Crown *need* special treatment?
- Why should the burden fall on claimants?
- Administrability and floodgates arguments are overwrought.
- Exceptional cases can be curtailed by (exceptional) retroactive legislation.

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(f) EQUALITY



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Claim:

- Prospective overruling treats *temporally* like cases alike.

Rebuttal:

- Prospective overruling treats like cases differently simply based on when filed.
- We already have doctrines of limitation, *res judicata*, etc, to ensure finality in law.

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Prospective overruling doctrine:

exacerbates instability in the law,
undermines the reliance and expectation interests of successful parties to litigation,
draws arbitrary and unequal distinctions among people subject to the jurisdiction of the courts,
is inefficient and unnecessary, and
facilitates judicial activism.

