Chapter 17
Specific Types of Application

17.1 Retrospective and retroactive provisions

17.1.1 Where do they arise?

Most commonly:

- in relation to transitional and savings provisions, where new provisions need to apply retrospectively to deal with past matters, for example:
  - to apply new conditions to a licence previously granted
  - to apply a new procedure to an outstanding case or matter
- where validation is required for some previously unlawful state of affairs.

17.1.2 Rules and presumptions against retrospectivity

Most constitutions contain basic rules making illegal the operation of a law which would:

- make an act or omission a criminal offence if it was not so at the time of its commission or
- make a person liable to a criminal penalty greater than that which existed at the time of the offence.

Apart from these situations, courts will make the following presumptions **unless clear words are used to rebut them**:

- that Parliament does not, without good reason, intend to alter the legal basis on which people have entered into lawful activities
- that statutes do not intend to change the law from some prior date so as to cause the rights of people to be different from what they were conceived to be when they were acquired or exercised
- in consequence of the above, prior cases are to be treated as not subject to the new law.

17.1.3 What is the difference between 'retrospective' and 'retroactive'?

Retrospective provisions, in the literal meaning of the word, **look back** to past events in order to apply the law **from the time the provisions come into force**.

Thus a provision which increases the time allowed for appeals to be lodged, and which applies not only to future cases **but also to cases already instituted** at the time the law comes into force is, in relation to the latter class of cases, **retrospective**.

Retroactive provisions, again in the literal meaning of the word, **act back** in the past, **by changing the law** not only from the present but also notionally **as it applied in a past time**.

Thus a provision which validates marriages solemnised in a particular district or place by a person subsequently discovered not to have been authorised to conduct marriage ceremonies, is **retroactive** in that it changes the legal consequences of the marriage **in the past** as well as the future.

17.1.4 When are retroactive provisions likely to be needed?

- To confer a backdated benefit generally or on a specific section of society

  > The provisions of this Act relating to increases in the salaries of constitutional officers are to be regarded as having come into force on 1 January 20...

- To bring in provisions backdated to the date when public notice was given of the proposals. This would be typically in the case of the enactment of a Finance Bill, whose provisions will have been given legal effect by a Provisional Collection of Taxes Order as from the date of the publication of **the Bill** (see chapter 20)

  > The provisions of this Act relating to rates of duty and tax in Part III are to be regarded as having come into force on [*the date of publication of the Finance Bill*].

- To validate some technical or unintended irregularity in legislation

  > A local authority constituted by order under section 10 of the Local Government Act is to be regarded as having been validly constituted from the date of publication of the relevant order despite the fact that the proportion of appointed councillors exceeds that laid down in section 13 of that Act.

- To remove legal disabilities from individuals which have arisen by previous operation of law

  > A marriage performed in Utopia according to the rites of the ... Church within the two years before registration of that church under the Marriage Act on ... is to be regarded as having been valid from the date of the ceremony.

  > Section 12(2)(d) of the Stock Exchange Act is deleted, and the minimum period specified in that provision for a member of the Stock Exchange Board to have served as a member of the Stock Exchange before appointment to the Board is to be regarded as having never applied.

However, the rule of law requires that there is the strictest supervision by the Attorney-General of the use of these provisions. In general, they should not be used to validate irregularities that were deliberate or known to the parties at the time they occurred.

For political reasons Indemnity Acts are sometimes passed to indemnify persons from the consequences of alleged criminal behaviour in the past. Normally, these are not true retroactive statutes in that they do not purport to change the law in the past (i.e. to make the past conduct lawful), but merely operate to prevent the usual consequences of that conduct (i.e. a criminal trial) from taking place.

17.1.5 When are retrospective provisions likely to be needed?

- (As with retroactive provisions) to confer a benefit generally or on a specific section of society

> From the commencement of this Act a person who has been sentenced to a period of imprisonment of more than six months and not more than one year is no longer to be regarded as disqualified for election as a member of the Council if at least three years have elapsed since completion of the sentence.

- To make available new legal rights or remedies, or a reduction in existing duties or obligations, in addition to those acquired under the former law

> A person previously granted a maintenance order in the Divorce Registry may as from 1 January 20.. apply to the Magistrate's Court for variation of that order.

> A person who is the holder of a driving licence and is under the age of 70 is from the date of commencement of this Act no longer required to renew that licence unless the conditions specified in subsection (2) apply.

- To require a new procedure to be followed by those involved in some matter (even though it impinges on, or restricts, the rights or expectations of parties)

> A person claiming to have been granted an exemption under the principal Act in proceedings against him or her for contravention of a licence must, as from the commencement of this Act, produce documentary evidence of that fact before the court in the form required by subsection (2), whether the proceedings were instituted before or after the commencement of this Act.

> A person who is licensed to practice as a chiropractor or osteopath must, after six months from the commencement of this Act, as a condition of renewal of the licence provide evidence to the Licensing Board of the attainment of [*prescribed skills*].

In each of the foregoing examples, it can be seen that the new provision looks back (either wholly or partly) to a situation that has arisen before it came into force. Unlike in the case of **retroactive** provisions, however, they do not purport to change the law as from a time past, but apply only from the date the new provisions come into force.

17.1.6 Retrospective and prospective provisions

However, a statute is not retrospective merely because it refers to matters in existence when the new legislation comes into force. Thus:

- Legislation introducing a new licensing regime for second-hand dealers who are already in business is not retrospective, as it is merely regulating **prospectively** a present state of affairs.
- Similarly, a new law that imposes tax burdens on existing property owners for the coming year operates only **prospectively.**

17.2 Extra-territorial legislation

17.2.1 General legislative competence

A sovereign legislature has the power to make laws for the peace, order and good government over the area over which it has authority. As has already been seen in Chapter 12, this area is:

- the land mass and the internal waters;
- the territorial waters and the seabed beneath; and
- the airspace over both of the above.

However, some extensions to this area of jurisdiction, for example with regard to national ships, were recognised at common law (under the Admiralty jurisdiction of the courts).

By international agreement, states commonly claim further limited jurisdiction (regarding, for example, fishing and mineral rights) over part of the sea and the seabed outside the territorial waters (the 'Exclusive Economic Zone').

It follows that similar jurisdiction will be recognised in international law as held by other sovereign states. There is thus a **presumption** that laws made in one state do not extend to have effect abroad, that is, **against extra-territorial operation**.

17.2.2 Extra-territorial competence

Under the common law, **criminal** conduct outside a state's area of authority was quite simply without legal significance. There is no doubt that statute law can reverse this effect, but, in the absence of international agreement, the claim to exercise jurisdiction abroad is subject to legal and practical problems:

- the rules of sovereignty of states will normally nullify its effect in so far as it purports to apply to foreign nationals abroad
- any such law will be subject to practical difficulties in bringing persons affected by it within the jurisdiction.

Nevertheless it has been done, in respect of a state's own subjects, for many years. An early example is section 9 of the Offences Against the Person Act 1861 (UK):

> Where … murder … [is] committed on land out of the United Kingdom … every offence committed by any subject of Her Majesty … *shall amount to the offence of murder* … [and] may be … tried … in any court … in England … in all respects as if such offence had been actually committed in that country.

Note the device used in the italicised words to give legal significance to a situation that would otherwise strictly speaking not have any.

The common law recognises that certain **civil** matters have to be dealt with according to a particular foreign law (e.g. the law governing immovable property where the property is situated, or the validity of a marriage contracted outside the jurisdiction). This is of course the realm of private international law.

17.2.3 Where is extra-territoriality claimed in practice?

To control the activities of persons on national transport outside the jurisdiction

Although jurisdiction is recognised by the common law in respect of things done on the high seas, in practice it is claimed by statute, both with respect to the sea (both on ships and on artificial installations such as oil rigs), and in the air outside the airspace of the jurisdiction. An example from a Merchant Shipping Act might be:

> Where a person commits an offence under this Act:
> (a) if the person is a Utopian citizen and commits the offence:
>   (i) on board a Utopian ship on the high seas;
>   (ii) in a foreign port; or
>   (iii) on board a foreign ship to which he or she does not belong [*e.g. as a member of the crew*]
> (b) if the person is not a Utopian citizen and commits the offence on board a Utopian ship on the high seas,
>
> and he or she is present in Utopia, a Utopian court has jurisdiction to try the offence as if it had been committed in Utopia.

To control the activities of nationals, or their property, outside the jurisdiction

Jurisdiction over those working directly for the state outside the jurisdiction (e.g. diplomats, or armed forces) abroad is claimed by statute as a matter of course. Other cases where it might be claimed in respect of nationals relate to certain serious crimes and to taxation.

> This Act has effect in relation to a citizen of Utopia outside as well as inside Utopia, and where the citizen commits the offence outside Utopia he or she may be dealt with in respect of that offence as if it had been committed in Utopia.

The rationale for such a claim is often that it is to try to ensure that persons subject to legislation in the state cannot evade it by moving themselves or their property outside it, in order to commit offences there. Typically, offences concerned would be very serious ones such as murder, or those which might have a direct effect on the home jurisdiction (e.g. official corruption, currency offences, customs offences, evasion of tax, assisting illegal immigration) without necessarily affecting the jurisdiction in which the activity takes place.

To control foreign nationals outside the jurisdiction

It is here that the greatest possibility of a clash with other systems of law is likely to occur. Extra-territorial legislation would be most likely to apply to those foreign nationals operating abroad who are involved in crimes that specifically affect the home jurisdiction, such as the smuggling from abroad of goods or persons (**if** those offenders can be brought within the jurisdiction).

Otherwise, legislation is likely to be able to be applied only to individuals who are only temporarily abroad and have domicile or habitual residence within the jurisdiction, or to foreign companies who trade within the jurisdiction but whose major assets are outside.

However, there is also a growing body of international conventions and agreements under which jurisdiction is claimed over, *inter alia*, the activities of foreign nationals abroad (e.g. with regard to off-shore installations, air piracy, trafficking in endangered species of animal). Under these conventions, etc. States parties to them undertake to enact legislation expressly to take jurisdiction over (amongst others) foreign nationals.

For example:

> This Act extends to:
> (a) all offences under section 4 (*air piracy, etc.*) taking place outside Utopia, whether or not in or over a foreign country; and
> (b) to all persons irrespective of their nationality or citizenship.

As with the examples above, further provisions would be required to formally give the court's jurisdiction 'as though the offence had been committed within the jurisdiction'.

17.3 Binding the government

The common law rule is that a statute does not bind the Government (sometimes alternatively referred to as "the Crown" or "the Republic") unless it is expressed to do so or unless it appears that it must do so by necessary implication. Sometimes this rule has been enshrined in Interpretation Acts. A few Commonwealth jurisdictions have in fact reversed the rule by statute (some Canadian Provinces) or by judicial decision (India).

Thus, if the common law rule applies, it would be incorrect and confusing to purport to exempt institutions that are part of Government:

> **4.** The prohibition on tinted windows in motor vehicles in section 3 does not apply to:
> (a) a rear or side window of an ambulance or motor vehicle designed to be used solely for the purpose of securely transporting prisoners, or valuable articles;
> (b) a motor vehicle belonging to a Government department, the police or the armed forces.

In most jurisdictions, the rule simply would not apply to vehicles stated in paragraph (b) without the need to so state.

In practice steps are taken to expressly bind the Government for liability in tort (delict) by its employees where it operates as an employer of persons, and in such areas as public holidays, road traffic and occupier's liability. The Corporate Manslaughter and Corporate Homicide Act 2007 of the UK is an example of where a political decision was taken to bind institutions of the Crown in legislation that creates a complex duty of care on the part of bodies of persons.