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The pursuit of clarity, precision and unambiguity in drafting retrospective legislation

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Dedication

To my mum and dad, brothers and sisters- for being such a caring, loving and wonderful family, you've always been there for me, I owe you a lot.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background

Time is an essential element in drafting and interpretation of legislation.[1] However, despite huge commentary about retrospective statutes filling pages of law reviews, very little has been written on retrospectivity from the drafting point of view.[2] If the scholarship looks at retrospectivity at all, it does so in the context of analysing final statutory instruments other than the drafting angle. According to Lord Rodger of Earlsferry, law-users rarely think of time in the routine application of the law.[3] Thus, it is until something strikes the attention of the user that the time issue becomes visible everywhere. Jan G. Raitos held almost the same view when he noted that "whenever a new law affects either past legal relationships or decisions made in reliance to a prior law, the question of retrospectivity becomes significant."[4]

The complexity of retrospectivity lies in diverging views from legal writers regarding the definition and validity of retrospective laws. Whereas some legal professionals including lawyers have criticized retrospective laws, others have expressed the need for retrospective law-making. Reconciling these two extreme ends remains the most challenging task for the current and future legal fraternity. However, harmonization of the arguments in favour or against retrospectivity is not the prime concern in this work. The major objective of this work is to determine whether a legislative enactment which alters the law on a particular subject should be allowed to affect a factual situation that arose before its enactment. If so, what are the conditions for such an enactment to operate retrospectively?

Under the doctrine of parliamentary sovereignty, legislatures have the power to make any law including retrospective laws. Evidence from judicial precedence also indicates that there is no

[1] L. Clapinski, 'Retrospectivity in the Drafting and Interpretation of Legislation' in C. Stefanou and H. Xanthaki (ed.), *Drafting Legislation: A Modern Approach*, (Ashgate 2008) 91.
[2] D. A. Marcello, 'The Ethics and Politics of Legislative Drafting' (1996) 70 Tul. L. Rev. 2437; E. L. Rubin, 'Legislative Methodology: Some Lessons from the Truth-in-Lending Act' (1991) 80 Geo. L.J. 233, 242-81; R. A. Katzmann, *Courts and Congress*, (Washington DC: Brookings Institution Press, 1997) 65-66.
[3] L. Rodger of Earlsferry, 'A Time for Everything Ender The Law: Some Reflections on Retrospectivity' (2005) 121 Law Quarterly Review 59.
[4] J. G. Raitos, 'Legislative Retroactivity' (1997) 52 Wash. U. J. Urb. & Contemp. L. 81.

absolute prohibition of retrospective law-making. However, judicial precedence reveals a failure of the judiciary to establish concrete criteria for determining validity of retrospective legislation. In some instances, courts have based on constitutional prohibition of *ex post facto*[5] laws to strike down retrospective criminal statutes whereas in other cases, courts have ascribed to retrospective operation of criminal statutes. Even in civil legislation where the *ex post facto* principle is not relevant, courts have sustained some retrospective statutes and denied others. This implies that courts have failed to develop concrete criteria for permissibility of retrospective statutes. The only judicial test to determine permissibility or impermissibility of retrospective statutes is to appreciate their degree of fairness or unfairness. This criterion was expressed by Stoughton L. J., in *Secretary of State for Services,* when he observed:

> "The true principle is that Parliament is presumed not to have intended to alter law applicable to past events and transactions in a manner which is unfair to those who are concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a manner of degree. The greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."[6]

Although Stoughton emphasised that courts consider the fairness of retrospective statutes in determining their permissibility, he introduced another important condition- express retrospective intent, for permissibility of retrospective laws. In fact it can be argued that express retrospective intent is a pre-requisite for validity of retrospective statutes. Most retrospective laws which were struck down by courts lacked express retrospective intent. Where courts fail to discern express retrospective intent, they apply the presumption against retrospectivity.[7] On the other hand, statutes in which retrospective intent is clearly expressed are permitted to operate retrospectively. Elizabeth Edinger stressed this argument by observing that "the presumption against retrospectivity is rebutted by express intention that an enactment will affect the pre-enactment conduct."[8] Thus, it can be admitted that expression of retrospective intent is an important factor for validity and effectiveness of retrospective legislation.

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[5] N.J. Singer and J. D. Shambie Singer, *Statutes and Statutory Construction*, (7th edn, Thomson West, 2009) 386.
[6] *Secretary of State for Services v. Tunnicliffe* [1991] 1 All ER 712, 724 (Stoughton L.J.).
[7] *Bowen v. City of New York* [1988] 488 U.S 208.
[8] E. Edinger, 'Retrospectivity in law' (1995) 29 U. Brit. Colum. L. R. 11; R. Greenblatt, 'Judicial Limitations on Retroactive Civil Legislation' (1956) 51 N.W U. L. Rev. 553.

That said, it should be noted that expression of retrospective intent is in the first place, a responsibility of the legislative drafter. As a technician of law, the drafter should ensure that a draft law is capable of achieving the intended purpose,[9] which in our case, is the retrospective operation. Where the law fails to achieve this purpose, it is a failure of the drafter to give effect to the legislative policy. In *Whipple v Houser,* Justice Linde described the role of legislative drafters in insuring quality of retrospective statutes in the following words:

> "The question of the so-called 'retroactive' and 'retrospective' effect of a new law is not, or should not be, a question of adjudication. Its answer should not be sought in precedents. 'Retroactivity' is in the first instance a problem of legislative draftmanship. When it becomes a problem, the problem is a failure of drafting, probably reflecting in turn a failure to give adequate attention to the policy choices involved."[10]

Linde's observation is pertinent not only in terms of quality of retrospective statutes, but also in terms of their validity and effectiveness. Whenever the drafter fails to clearly express the retrospective intent in a statute intended to affect pre-enactment events, courts will invalidate the statute hence making it ineffective. To express the retrospective intent, the drafter has clarity, precision and unambiguity as the principal tools.

1.2 Hypothesis and Objective

The hypothesis of this thesis is that clarity, precision and unambiguity are the essential tools for expressing retrospective intent, which is a pre-requisite for quality and validity of retrospective legislation. The main objective of this work is to show that retrospective laws are valid, if the retrospective intent is expressed in clear, precise and unambiguous words within the statute.

[9] P. Ziegler, 'Information Collection Techniques for the Evaluation of the Legislative Process' (1988) Stat. Law Rev. 166.
[10] [1981] 291 Or. 475, 632 P.2d 782, 488-89; R. Rose, 'Time Element in Legislation' in Stefanou & Xanthaki (Eds.), *Manual in Legislative Drafting*, (2005) 109.

1.3 Scope and Methodology

The term retrospectivity is used broadly to describe any legislation or decision affecting pre-enacting conduct. It encompasses statutes affecting the pre-enactment events, administrative regulations or decisions which look back in time and judicial decisions that overturn prior decisions. All these areas cannot be covered in this limited piece of work. Thus, the emphasis in this work will be put on retrospectivity of statutes at the drafting stage. Although it may be referred to generally, retrospective delegated legislation is outside the scope of this work.

To prove the above hypothesis, particular attention will be directed towards the importance of clarity, precision and unambiguity in attaining quality and validity of retrospective legislation. Renowned writers, legal experts and commissions have published books, articles and reports in support of clarity, precision and unambiguity as effective tools for quality in legislation.[11] Courts have also taken significant decisions in respect to retrospective application of statutes. Use of arguments forwarded by these legal and judicial experts will help to establish that these three tools hold true in drafting retrospective legislation.

1.4 Structure

This work comprises of Five Chapters. Chapter one forms the general introduction in which a brief background of the topic is described. In this chapter the hypothesis, objective, scope and methodology are also stated.

Chapter 2 describes and discusses major concepts used in this work. Concepts such as Retrospectivity, presumption against retrospectivity, doctrine of Parliamentary sovereignty, Clarity, Precision, Unumbiguity, Plain language and Gender-Neutral language are briefly described.

[11]R. Dickerson, *The Fundamentals of Legal Drafting*, (Boston, Mass. : Little, Brown for the American Bar Association, 1965) 73-97; R. Dickerson (edn), *Materials on Legal Drafting*, (St. Paul, Minn. : West, 1981) 277; H. Schaffer, 'Evaluation and Assessment of Legal Effects Procedures: Towards a more Rational and Responsible Lawmaking Process' (2001) 22 Stat L. Rev. 132; D. Greenberg, 'The Techniques of Gender-Neutral Drafting' in Stefanou and Xanthaki (edn), (n 1) 63–76; P. Butt and R. Castle, *Modern Legal Language: A Guide to Using Clear Language*, (2nd edn CUP, Cambridge 2006) 177- 178; H. Xanthaki, *Clarity, Precision and Ambiguity* (Lecture notes Legislative Drafting 2012) <http://studyonline.sas.ac.uk/view.php?id=17> accessed 27 June 2012.

Chapter 3 analyses common arguments against retrospectivity. Arguments such as: retrospective laws are not ‘laws at all’, are undemocratic, are against the rule of law, are unjust, and that retrospective laws defeat Reasonable Expectations are analyzed with the purpose of indicating the Flaws, weaknesses and limitations within these arguments. The chapter concludes that because of their flaws, none of these arguments constitute a basis for absolute prohibition of retrospective law-making.

Chapter 4 discusses the role of clarity, precision and unambiguity in attaining quality and validity of retrospective legislation. This chapter is divided into three sections, each discussing the role of a specific element in validating retrospective legislation. Emphasis is put on showing that the three elements are essential in expressing retrospective intent, which is a pre-requisite for quality and validity of retrospective statutes. The chapter also argues that plain language and Gender-Neutral drafting are true tools for achieving clarity, precision and unambiguity in retrospective drafting.

Chapter 5 draws a conclusion by indicating that clarity, precision and unambiguity really holds true in drafting retrospective legislation. Other findings and recommendations are also mentioned in this chapter.

CHAPTER 2

BRIEF DESCRIPTION AND DISCUSSION OF CONCEPTS

2.1 Retrospectivity

The term retrospectivity is understood and defined differently in the legal literature. This is partly because there is no consensus between legal professionals on what makes a law retrospective or not. Some argue that even the so-called prospective laws are to some extent retrospective since they affect arrangements of those who relied on existing laws to predict their future activities. In an attempt to define retrospectivity, legal authorities were divided. Some preferred to define retrospectivity in its broad sense while others adopted a narrow definition.

2.1.1 Broad definition

One of the broad definitions of retrospectivity was suggested by Professor Dennis Charles Pearce. According to this definition a rule is described as retrospective if it "impairs an existing right or obligation."[12] A similar definition considers law as retrospective, if it alters the value of a pre-existing asset.[13] On the basis of the latter definition, many of the tax laws in the United States during the 1980s were branded retrospective due to the fact that they failed to "grandfather" existing investments in shelters.[14] However, this definition is inadequate because it does not encompass statutes which do not affect assets. On the contrary, Pearce's definition is slightly comprehensive since it clarifies that it is the rights and obligations which arose in the pre-enactment period that are affected by the new law. But this definition is also criticised on the ground that the word 'impair' makes it difficult to determine a law as retrospective or not. If a law is retrospective only when it impairs existing rights or obligations, then a law that enhances or adds to the existing rights or obligations will not be considered retrospective even if it explicitly states that such rights or obligations are deemed to have legal force in the pre-enactment period. This implies that the broad definition is

[12] D. C. Pearce, *Statutory Interpretation in Australia*, (2nd edn, Butterworths, Sydney, 1981) 149.
[13] A. Palmer and C. Stamford, 'Retrospective Legislation in Australia: Looking Back at the 1980s' (1993-1994) 22 Fed. L. Rev. 229.
[14] C. Stamford, *Retrospectivity and the Rule of Law*, (Oxford University Press, 2006) 18.

unhelpful. It does not tell us the exact constitutive elements of retrospective laws. The weaknesses in the broad definition prompted legal experts to search for a narrow and more accurate definition of retrospectivity.

2.1.2 Narrow definition

In search for accurate definition of retrospectivity, Elmer A. Driedger distinguished between retroactive and retrospective statutes. He did so, basing on the literal meaning of the words 'retroactive' and 'retrospective'. He stated that retroactive means "acting in the past" while retrospective means "looking to the past."[15] He therefore concluded that a retroactive statute operates as to a time prior to its enactment whereas a retrospective statute operates for the future, but imposes new results in respect to a past event.[16] Using examples, Jean Paul Salembien applied Diedger's classification to distinguish retroactive laws from retrospective laws and it really worked well.[17] In light of this classification, Ruth Sullivan noted that "statutes which attach benevolent consequences to prior event; those that attach prejudicial consequences to a prior event; and those that impose a penalty on a person who is described by reference to a prior event-where the penalty is not a consequence of the event, are all retrospective."[18]

Although Drieger's distinction between retroactive and retrospective statutes is helpful for the purpose of understanding retrospectivity, it lacks normative and practical significance. In the words of Professor Helen Xanthaki, "the distinction between retroactive and retrospective statutes is subtle."[19] The distinction fails to mark out any tangible difference between the two types of statutes since their effects remain the same. Other legal writers also noticed this handicap. For instance, Jill E. Fisch claims that the distinction is analytically incoherent.[20] Driedger himself acknowledges his weakness by noting that "all such laws have one thing in

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[15] E. A. Driedger, 'Statutes: Retroactive Retrospective Reflections' (1978) 56 Canadian Bar Reviews 268; D. C. Pearce and R. S. Geddes, *Statutory Interpretation in Australia*, (3rd edn, Sydney: Butterworths, 1988) 181.
[16] Driedger (n 15) 271.
[17] J. P. Salembier, 'Understanding Retroactivity: When the Past Just Ain't What It Used to Be' (2003) 33 Hong Kong L.J. 105.
[18] R. Sullivan, *Driedger on the Construction of Statues*, (3rd edn, Toronto: Butterworths, 1994) 514.
[19] H. Xanthaki, *Time in Legislation,* (Lecture notes: Legislative Drafting 2012) <http://studyonline.sas.ac.uk/view.php?id=17> accessed 27 June 2012.
[20] J. E. Fitch, 'Retroactivity and legal change: an equilibrium Approach' (1996-1997) 110 Harv. L. Rev. 1056, 1069.

common: namely they attach new consequences to an event that occurred prior to its enactment."[21]

The above discussion indicates that there is no settled definition of retrospectivity. Each of the proposed definitions has its own weaknesses. However, it should be underlined that Driegder's classification has influenced judicial construction of retrospective legislation. In significant decisions, courts, have sustained retrospective statutes that operated for the future, but which affected past events,[22] and largely denied retrospective statutes that operated in the past on past events.[23] This implies that the drafter should keep such classification in mind whenever he or she undertakes to draft a retrospective law.

2.2 Clarity, Precision and Unambiguity

By definition, clarity refers to the state or quality of being easily perceived and understood.[24] Clarity is also defined as clearness or lucidity as to perception or understanding; freedom from indistinctness or ambiguity.[25] For Henry Thring, clarity or clearness depends on the proper selection of words, on their arrangement and on the construction of sentences.[26] In legal writing, clarity requires use of plain language. Plain language enhances understanding and transparency of legislation.[27] Peter Butt and Richard Castle recommend that "legal documents should be written in modern, standard English as currently used and understood."[28] In legislative drafting, clarity makes legislation easier for the reader to understand what is being said.[29]

On the other hand, precision is defined as the exactness of expression or detail.[30] Precision is traditionally viewed as the main goal of common law drafters who make the greatest effort to

[21] Driedger (n 15) 276.
[22] *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, [1990] 494 U.S. 827.
[23] *Giles v. Adobe Royalty, Inc.*, [1984] 684 P.2d 406,412-13.
[24] C. Soanes (ed.), *Compact Oxford English Dictionary* (2nd edn OUP, Oxford, 2003) 193.
[25] The Dictionary Reference <http://dictionary.reference.com/browse/clarity> accessed 3 July 2012.
[26] H. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents*, (John Murray, London 1902) 61.
[27] H. Xanthaki, "On Transferability of Legislative Solutions: The Functionality Test" in Stefanou and Xanthaki (n 1) 9.
[28] P Butt and R Castle (n 11) 167.
[29] R. Dormer, 'Parliamentary Counsel at the Law Commission of the United Kingdom', (Lecture 6 November, 2009) 1.
[30] Soanes (n 24) 890.

"say all, to define all": to leave nothing to the imagination: never to presume upon the reader's intelligence.[31] In legislative drafting, precision requires choosing correct words and maintaining their grammatical sense. This avoids uncertainty in the meaning of words or sentences, which in turn affects construction of statutes. In United Kingdom, this point was succinctly expressed by Lord Bridge of Harwich as follows:

> "The courts' traditional approach to construction, giving primacy to the ordinary, grammatical meaning of statutory language, is reflected in the parliamentary draftsman's technique of using language with the at most precision to express the legislative intent of his political masters and it remains the golden rule of constructions that a statute means exactly what it says and does not mean what it does not say."[32]

Bridge's assertion indicates that courts are primarily concerned with statutory words before resorting to other cannons of construction. Thus, whenever, a court seeks to understand the legislative intent, the first thing it does is to read the law. The court proceeds to other methods of construction, only if the wording of the law does not permit to understand the legislative intent. The drafter should therefore ensure precision in expressing the legislative intent, so as to minimize the possibility of applying other methods of construction which at times may disfavour realisation of the legislator's objective.

Unambiguity refers to words or phrases without ambiguity.[33] In other words, Unambiguity simply means that the words of a statute are clear, explicit and unequivocal. Where words have more than one meaning or can be interpreted in more than one way, the statute is said to be ambiguous.[34] Ambiguity can relate to meaning of a word (semantic ambiguity), for example "residence"[35] or phrase (syntactic ambiguity) for example "light truck".[36] Ambiguity differs from vagueness in a sense that whereas ambiguity refers to equivocation, vagueness concerns the degree to which language is uncertain in its respective applications to a number of particulars.[37] It should be observed that legislatures sometimes choose vagueness, so as to

[31] L-P Pigeon, *Drafting and Interpreting Legislation*, (Toronto-Calgary-Vancouver: Carswell, 1988) 7.
[32] *Associated Newspapers Ltd v. Wilson* [1995] 2 WLR 354 at 362 HL.
[33] Soanes (24) 1251.
[34] J Evans, *Statutory Interpretation: Problems of Communication*, (OUP, Oxford, 1988) 73; F. A. R. Bennion, *Bennion on Statutory Interpretation: A Code*, (5th edn, LexisNexis, London, 2008) 444–56.
[35] R. Dickerson, 'Diseases of Legislative Language' (1964)1 Harv. J. on Legis. 7.
[36] Xanthaki (n 11).
[37] R. Dickerson, *Legal Drafting in Plain Language*, (3rd edn, Scarborough, Ont.: Carswell, 1995) 20.

allow administrative authorities fill gaps, but they rarely choose to be ambiguous.[38] Therefore, drafters are required to avoid ambiguity in draft laws because it creates difficulties in construction of statutes.

2.3 Plain Language and Gender-Neutral drafting

Plain language is an extremely difficult concept to understand because it means different things to different people and is generally a relative word. Plain language discussions invite question such as 'plain to whom'? When should drafters be satisfied with plain language in their drafts? Etc. Robert D. Eagleson describes plain language in the following words:

> "Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence structure. It is not baby talk, nor is it a simplified version of the English language."[39]

According to J. C. Redish:

> "Plain English means writing that is straightforward, that reads as if it were spoken. It means writing that is unadorned with archaic, multi-syllabic words and majestic turns of phrase that even educated readers cannot understand. Plain English is clear, direct, and simple; but good plain English has both clarity and grace." [40]

From the above definitions, it is noticed that the terms "Plain English" and "Plain Language" are used interchangeably. However, despite their interchangeable use, the two words are different. Plain language is a broader term which encompasses format, design, layout as well as the 'plainness' of the individual words used in the legislation. It also includes languages other than English. On the other hand, Plain English refers to clear English, as used and understood in English-speaking jurisdictions. For the purpose of this work we prefer plain language because it appears conclusive and appealing to both legal writers and readers. Plain language serves as the drafter's tool to achieve clarity in expressing legislative intent.

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[38] J.F. Burrows and R.I. Carter, *Statute Law in New Zealand*, (LexisNexis, Wellington, 2009) 174.
[39] R. D. Eagleson, *Writing in Plain English*, (Commonwealth of Australia, 1990) 4.
[40] J.C. Redish, 'The Plain English Movement', in S. Greenbaum, *The English Language Today* (Pergamon Press, 1985) 126.

Gender-neutral language refers to "language which includes both sexes and treats women and men equally."[41] It is also called non-sexist, non-gender-specific, or inclusive language.[42] Gender-neutral language avoids using male terms to represent women.[43] It is a language that uses a variety of techniques including repetition of the relevant noun, omission of redundant or superfluous phrases, reorganisation of words or phrases from the active to the passive voice etc, provided it does not create ambiguity.[44] Gender-neutral drafting is said to have gained momentum when legal professionals, experts and policymakers recognized that drafting in 'masculine' contributes to perpetuation of a society in which men and women see women as lesser beings.[45] Proponents of Gender-neutral drafting argue that the use of masculine nouns and pronouns implies that personality is really a male attribute, and hence women are seen as human sub-species.[46] Certainly, gender-neutral drafting is currently recognized as an accepted standard in legislative drafting, in most jurisdictions including; Australia, Canada and New Zealand,[47] and of recent in United Kingdom.[48]

2.4 Presumption against Retrospectivity

Generally, there is a presumption at the common law that statutes should not have a retrospective effect. This presumption was articulated by Willies J in *Phillips v Eyre* in the following words:

> "Retrospective laws are, no doubt, prima facie a questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature."[49]

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[41] K. Kabba, 'Gender-neutral language: an essential language tool to serve precision, clarity and unambiguity' (2011) 37 (3) *Commonwealth Law Bulletin* 429.
[42] H. Xanthaki, 'Gender- Neutral Language' (Lecture notes, Legislative Drafting, 2012) http://studyonline.sas.ac.uk/course/view/php?id-17 accessed 7 June 2012.
[43] S. Petersson, 'Gender-neutral Drafting: Recent Commonwealth Developments' (1999) 20 (1) Stat L. Rev. 53.
[44] Greenberg (n 11) 67–75.
[45] Petersson (n 43) 47.
[46] Commentary, 'Avoidance of Sexiest Language in Legislation' (1985) 11 *Commonwealth Law Bulletin* 590.
[47] Petersson 53.
[48] Gender-neutral drafting was announced in a written ministerial statement made by the leader of the House of Commons in 2007.
[49] [1870] LR 6 QB 1 [23] (Willies L.J).

Principally, the presumption against retroactivity is of statutory interpretation. In other words, the presumption does not seek to restrict the will of the Parliament but seeks to determine what the Parliament intended. Thus, the legislature's usual intention is ascribed to, unless some reason for doing otherwise is shown.[50] The presumption applies not only to situations in which new offences are created, but also when the applicable penalty is altered and no contrary intention appears in the statute.[51] But there is no such presumption in relation criminal procedural laws.[52] Even in non-procedural laws the presumption against retrospectivity is not absolute. On several occasions statutes were given retrospective effect, even if they apparently seemed undesirable.[53] As Willies observed, the presumption is rebutted by express intention of the legislature.[54] Greg Taylor summed it up all by saying that "the Parliament needs only say the word and the presumption is rebutted."[55]

2.5 The Doctrine of Parliamentary Sovereignty

The Doctrine of Parliamentary Sovereignty or Supremacy is a well established doctrine in most legal systems and especially in the English legal system. Albert Venn Dicey described the concept of parliamentary sovereignty in the following words:

> "The principle of Parliamentary sovereignty means neither more or less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."[56]

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[50] *J Arnold v. Neilsen* (1976) 9 ALR 191; *Samuels v. Songaila* (1977) 16 SASR 397; *Daire v. Stokes* (1982) 32 SASR 402, 405, 409; *R v. Owen* (1996) 66 SASR 251; D.C. Pearce, *Statutory Interpretation in Australia*, (4th edn, Butterworths, 1996) 23.

[51] G. Taylor, 'Retrospective Criminal Punishment under the German and Australian Constitutions' (2000) 23 U.N.S.W.L.J. 201.

[52] *Rodway v. R* (1990) 169 CLR 515, 519; *Nicholas v. R* (1998)193CLR 173, 198,203,212,278.

[53] P. A. Côté, *The Interpretation of Legislation in Canada* (3rd edn, Toronto: Carswell, 2000) 124; L. Zines, *High Court and the Constitution*, (4th edn, Butterworths 1997) 211.

[54] Willies (n 49).

[55] Taylor (n 51)

[56] A. V. Dicey, *Introduction to the study of the Law of the Constitution*, (5th edn, Indianapolis: Liberty Fund 1982) 38.

Henry William Rawson Wade held the same view when he remarked that "Holding an Act of the Parliament void is to blaspheme against the Doctrine of Parliamentary Sovereignty."[57]

The judiciary also recognises the doctrine of Parliamentary Sovereignty. For instance, in *Manuel*, Sir Robert Megarry V C observed that "once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity."[58] Lord Simon of Glaisdale held the same view in *Docker's* case.[59] Under the doctrine of Parliamentary Sovereignty, the Parliament is empowered to validly enact any kind of law including retrospective laws.[60] This Parliamentary power was confirmed in *Savannah R.III School District*,[61] where Missouri Supreme Court sustained a seemingly unconstitutional retrospective law by asserting that the legislature may waive the right of school districts at will. This confirms that legislatures are legally empowered to enact retrospective laws.

However, despite the Parliament's power to enact retrospective laws, critics of retrospective law-making have raised several arguments against retrospective laws. To some extent, the criticisms are sensible but they are nonetheless unconvincing to absolutely prohibit retrospective law-making. The following chapter considers the common arguments against retrospectivity and shows how these arguments are not solid enough to rule out retrospective law-making.

[57] H.W.R Wade, 'Sovereignty—revolution or evolution?' (1996) 112 Law Quarterly Review 568-575.
[58] *Manuel v. A-G* [1982] 3 All ER 786, 793.
[59] *Dockers' Labour Club v. Race Relations Board* [1974] 3 All ER 592, 600.
[60] Dicey (n 56).
[61] 1950 S.W. 2d 854 [Mo 1997).

CHAPTER 3

LIMITATION AND WEAKNESS OF ARGUMENTS AGAINST RETROSPECTIVE LAW-MAKING

Because retrospective statutes necessarily affect the pre-enactment behaviour, many arguments have been raised to deny, and if possible, to discourage legislatures from enacting retrospective statutes. Opponents of retrospective laws argue that such laws are undemocratic; against the rule of law, defeat reasonable expectations and that they are unjust. Some even take the extreme end to say that retrospective laws are 'not laws at all'. The purpose of this chapter is to show that these arguments have flaws, weaknesses and limitations. A thorough examination of the flaws within these arguments indicates that despite their criticisms, retrospective laws are justified.

3.1 Retrospective laws are 'not laws at all'

Perhaps the most extreme criticism of retrospective laws is that they are 'not laws at all'. In other words, this argument advances an idea that retrospective enactments do not fall under the power to make laws, which in most jurisdictions, is constitutionally granted to the legislature.[62] More than two decades ago, Geoffrey de Q Walker claimed:

> "... a retrospective enactment does not fall within any accepted definition of "law", whether in antiquity or in modern times... it may be an Act, or something cognate to a bill of Attainder or a bill or pains and penalties, or it may be accorded the force of law, but a law it is not."[63]

Probably this might be the first formal assertion denying the legal character and validity of retrospective legislation. However, the claim that retrospective enactments do not fall under the accepted definitions of law is not convincing. The only citation Walker makes for this sweeping assertion is a twenty-page section on the definition of 'law' in Julius Stone's book entitled "Legal System and Lawyers' reasoning."[64] Interestingly, a critical analysis of Stone's surveys on a number of proposed definitions of law indicates that none of these definitions

[62] Stamford (n 14) 65.
[63] G. de Q Walker, *Rule of Law: Foundation of Constitutional Democracy,* (University Press Melbourne, 1988) 322.
[64] J. Stone, *Legal System and Lawyers' Reasoning,* (Stanford University Press, California, 1968) 165-185.

rules out the possibility of having retrospective laws. Stone himself pointed out that "any proposed set of requirements cannot serve as more than an outline, or index, or table of contents for an explication of those matters which require to be discussed for an understanding of 'law', hence it cannot serve as a touchstone of whether a particular norm is a legal norm under a particular legal order."[65] These words indicate that Stone's survey of definitions of law does not support the argument that retrospective laws are not laws at all. In fact, by asserting that 'any proposed set of requirements cannot serve as a touchstone for determining whether a particular norm is a legal norm under a particular legal order', Stone accepted that for a norm to become a law, it depends on the legal system in which it operates. Thus, there is no element in Stone's definition of law justifying that retrospective laws are not laws. If Walker's argument is to remain strong, it should be based somewhere else but not on Stone's definition of law

Another theory of law which might be thought to support Walker's claim is the one advanced by Lord Lon Fuller. Fuller includes the making of retrospective laws among the "eight ways of failing to make law."[66] In advancing his theory, Fuller writes that "In the attempt to... [one of which is] the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change."[67] David Lyons interprets Fuller as saying that "laws are followable, and therefore, to the extent that a law is not followable, it does not count as law."[68] According to Andrew Palmer and Charles Stamford, in a legal utopia, where each of the eight desiderata described by Fuller can be achieved, no law would ever be retrospective, and among other things, the law would be perfectly clear, known to every citizen, and never changing.[69] However, the dual observed that these goals are not achievable in the real world.[70]

Fuller himself accepted the failure to fully achieve the desiderata results by observing that "situations can arise in which granting retrospective effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality."[71] Thus, Fuller does not claim that retrospective laws are not laws at all; nor does he deny that there is a place in a

[65] *Ibid*, 183.
[66] L. L. Fuller, *The morality of law*, (Rev. Ed, Yale University Press, 1969) 35.
[67] *Ibid.*, 38-39
[68] D. Lyons, *Ethics and the rule of law* (Cambridge University Press, 1984) 76.
[69] Palmer and Stamford (n 13) 225.
[70] *Ibid.*
[71] Fuller (n 66) 53.

legal system for the operation of retrospective laws. Therefore, to argue that retrospective laws are not laws at all, would be to underestimate situations where legal problems can only be solved by retrospective operation of the law.

3.2 Retrospective laws are Undemocratic

It is not uncommon for legal experts to say that it is "undemocratic" for Parliament to pass retrospective laws. In other words, proponents of the undemocratic theory claim that legislatures which make retrospective laws are exceeding their proper authority. The reasoning behind this conception is that in democratic societies, Parliaments are elected for specific term(s) and thus, must legitimately enact laws within the term(s) for which they are elected. According to Julian N. Eule, "Each election furnishes the electorate with an opportunity to provide new direction for its representatives. This process would be reduced to an exercise in futility were the newly elected representatives bound by the policy choice of a prior generation of voters."[72] Certainly, Eule advocates for legislative enactments which only prescribe for the future so as not to frustrate the actions of the previous Parliament. If this is true, then legislatures in democratic societies would have no power to enact retrospective laws. However, this is far from reality. Sometimes retrospective laws (such as curative laws)[73] are necessary to ratify prior actions of government officials who acted without the requisite authority.[74] Eule himself does not deny the possibility enacting retrospective laws. To this point, he observes that "at some junction, a prohibition against retroactive law-making becomes entrenching. When this point is reached, the scope of the authority delegated by the people to their representatives clearly comprehends... the power to legislate retroactively."[75] This implies that the undemocratic argument is not solid enough to bar the parliament from enacting retrospective laws.

Another instance in which retrospective law-making is arguably permissible in a democratic society, but which was not raised by Eule, is where the popular opinion has initially supported the enactment of retrospective laws. Taking a real example, the Australian Hawke

[72] J. N. Eule, 'Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity' (1987) American Bar Foundation Research Journal 440-5< http://0-www.heinonline.org.catalogue.ulrls.lon.ac.uk > accessed 7 August 2012.
[73] Stamford (n 14) 104.
[74] *United States v. Heinszen* & Co., [1907] 206 U.S. 370.
[75] Eule (n 72) 443.

Labour Government of 1983 was elected on the promise to use retrospective legislation against bottom-of-the-Harbour schemes. During a press conference held in April 1983, John Dawkins, the first Finance Minister of Hawke Government confirmed the passing of retrospective legislation in the following words:

> "I now affirm that the Government will, as necessary, employ retrospective legislation to ensure that tax sought to be avoided under any blatant tax avoidance scheme that comes to light during our term of office will be collected, irrespective of when the scheme was entered into."[76]

Under such circumstances, it becomes clear that retrospective law-making is permitted in democratic societies provided the electorate are in support of such laws. Thus, an absolute denial of retrospective laws basing on democratic point of view is unwarranted and cannot strongly be advanced to rule out retrospective laws in democratic societies.

Furthermore, it is also argued that retrospective law-making is permissible if enacted by the parliament of a democratically elected government where the previous government was non-democratic.[77] Usually, non-democratic governments stay in power until the advent of democratic governments. Therefore, it is believed that democratically elected parliaments should be empowered to retrospectively alter the laws passed by non-democratic governments. In such a case, retrospective law-making is deemed justified under the context of correcting the evils of non-democratic governments. However, retrospective law-making based on the fact that the prior government was non-democratic should be decided after thorough analysis of the quality of existing laws. Sometimes a government can come into power without democratic elections, but it passes high quality and implementable laws. In such a case a retrospective change of the law basing on the mere fact the law was passed under the rule of a non-democratic government may jeopardise proper functioning of the legal system.

[76] J. Dawkins, 'Retrospective Legislation against Tax Avoidance', (28 April 1983), Press Release: reprinted in (1983) 17 Taxation in Australia 1006-7.
[77] Stamford (14) 72.

3.3 Retrospective laws violate the Rule of law

The ideal of the rule of law is often unclear and can take on any features of law which the writer finds attractive. However, this should not allow us to ignore some of the key ideas it incorporates. One such idea is that decisions about the use of state power should be made in advance for the guidance of officials and citizens. In the view reflected by courts, "it manifestly shocks one's sense of justice that an act, legal at the time of its occurrence, should be made unlawful by some new enactment."[78] The essence of having laws in advance is that if the citizens know what rules will be applied to their behaviour, they can better plan and conduct their affairs. Joseph Raz views this goal as the need to achieve effectiveness of the law.[79] If citizens plan their activity with full knowledge of what they are obliged or prohibited, then they are making the law effective. On the contrary, if law is incapable of providing guidance in advance, it is unlikely to achieve its purpose. In Fuller's words, "a retrospective law puts all laws under the threat of retrospective change."[80]

Generally, the argument that retrospective laws violate the Rule of law is grounded on the person's capacity to adapt behaviour to new rules. Those who criticize retrospective laws believe that law is solely intended to guide behaviour. However, it should be understood that not all laws are primarily concerned with guiding behaviour. Some laws are intended to protect citizens against individual's bad behaviours, rather than guiding such behaviours. For instance, one of the prime purposes of the new rule in *Re a Solicitor's Clerk* [81] was to protect the public from the dangers of dishonest clerks. This goal would best be served by applying the new rule to all dishonest clerks.[82] In other words, the rule was not intended to guide the clerk's behaviour but to protect the public against the evils of clerks who were previously convicted of larceny. Had it been that the purpose of the new rule was to guide behaviour, this goal would probably not have been served by this law. Therefore the argument that retrospective laws do not guide behaviour is limited by the fact that retrospective laws are not only concerned with guiding behaviour but also to resolve other legal issues such as protection of the society against harmful behaviours.

[78] *Young v. Adams* [1898] AC 469, 474; *Bourke v. Nutt* [1894]1 1 QB 725, 737.
[79] J. Raz, *The Concept of a Legal System: an introduction to the theory of legal* system (2nd edn, Clarendon Press: Oxford, 1980) 145.
[80] Fuller (n 66) 39.
[81] [1957] 1 WLR 1219.
[82] Driedger (n 15) 270.

Under the rule of law argument it is said that retrospective laws do not provided advance warning. This is partly true because retrospective laws do not alert people that the law is going to change. However, this does not mean that retrospective laws do not provide warning at all. Retrospective laws provide warning in more less the same way as does the common law. The common law provides warning in the sense of telling citizen that "Be careful! Do not try to rely too much on existing detail, especially where it has effects that were probably unknown to, and unintended by, the legislature."[83] In the same way, retrospective laws warn individuals to plan their activities with care and knowledge that the existing law may change. In private business, individuals are advised to anticipate and protect themselves against future changes in the government policy, as they do in the private market.[84] One of the policy changes might be retrospective change of the law. This is common in taxation laws where change is predictable on the basis of underlying legal principles.[85] Therefore, argument that retrospective laws do not provide advance warning is weakened by its failure to recognize that citizens are warned to always anticipate change in government policy, including retrospective change of the law.

3.4 Retrospective laws defeat Reasonable Expectations

Another seemingly strong argument against retrospective laws is that such laws defeat citizens' expectations formed in reliance on the existing law. A stable framework of rules allows citizens to plan their affairs or to make what John Rawls refers to as "plans of life".[86] Looking at it from the citizen's point of view, it is evident that really retrospective laws defeat expectations of those who made their arrangements under the guidance of an existing law. It is argued that such persons reasonably relied upon the expectation that the law to be applied to their actions would be the same law that was in force at the time they did the relevant actions, and hence to change the law would be to frustrate such a reasonable reliance.[87]

Although this argument is recognized as a strong argument, it has serious weaknesses. The first weakness is that it does not make any distinction between those expectations that merit protection and those that do not merit protection. Stephen R. Munzer suggests that only those

[83] Stamford (14) 82.
[84] L. Kaplow, 'An Economic Analysis of Legal Transitions' (1986) 99 Harv. L. Rev. 509, 598-602.
[85] R. Goode, 'Disappointment Expectations and Tax Reform' (1987)40 National Tax Journal 159-160.
[86] J. Rawls, *A Theory of Justice*, (Harvard University Press, Massachusetts, 1973) 407-416.
[87] N. J. McIntyre, 'Transition Rules: Learning to live with Tax Reform' (Tax Notes 7, 1976) 8-9.

expectations which are both "rational and legitimate have a strong claim for protection."[88] He defines a person's expectation as rational, if the probability assigned by that person to the expected event, roughly corresponds to the actual probability that it will occur.[89] Applying the rationality test to retrospectivity, it is observed that if persons start with the assumption that no retrospective laws will ever be enacted, when they are actually enacted, then their expectations will not meet the rational test. Palmer and Stamford observed that retrospective laws are necessary in specific circumstances and to ignore this possibility is more wishful thinking than rational expectation.[90] Unfortunately those who claim that retrospective laws defeat reasonable expectations, do so generally. Rationality of an expectation must be based on all available information, including the attitudes of legislators. According to Munzer, "it is necessary that individuals pay some regard to the expectations of those who have drafted and enacted the legislation in order to meet certain objectives. Citizens should be wary of cases where their expectations are different from those of the legislature. They should not expect the words and meanings of legal texts to remain unaltered, but rather to adopt a sense towards mutually expected institutional responses."[91]

On the other hand, an expectation is legitimate if it is supported, first, by the underlying justifications of the law inducing it, and second, by the fundamental principles embedded in the legal system.[92] In other words, an expectation is not only legitimate because the action upon which it is based was antecedent to the enactment of the law, but also because it considers what is acceptable or unacceptable in the legal system. Thus, an expectation based on exploitation of a loophole in an existing tax law is not legitimate even if the transaction on which is based was made in the pre-enactment period. Such an expectation fails the rationality and legitimacy tests because it does not take into account the expectations of officials that the intended revenue will be collected, or the likelihood that they may seek to have the loophole retrospectively closed once it is discovered.[93] Even if it could be accepted that rational and legitimate expectations should be protected, this should not always be the case. It must be noted that the ability to plan and benefit from a stable and relatively predictable legal environment is not easily achievable. Thus, it is sometimes desirable to discourage the reliance factor by leaving open the option of retrospective legislation. This

[88] S. R. Munzer, 'A Theory of Retroactive Legislation' (1982) 61 (3) Texas L. Rev. 425, 433.
[89] *Ibid.*, 430.
[90] Palmer and Stamford (n 13) 30.
[91] Munzer (n 88) 429.
[92] *Ibid*, 432.
[93] Palmer and Stamford (n 90).

was the view envisaged by Senator Gareth Evans while debating the anti-Curran legislation. He made his remarks in the following words:

> "Of course it will create uncertainty to have the possibility of these schemes being struck down after the event. That, after all, is the very objective - to operate as a deterrent to the future marketing of these schemes and not just a way of collecting lost revenue in the past ... The starting point in this kind of argument is the proposition that uncertainty in law is not itself an unmitigated evil. Its role in the frontline in the war against tax avoidance schemes is such an eminently noble purpose and one which justifies the operation of fully retrospective tax avoidance laws."[94]

In light of the above, it becomes clear that the expectations argument is not strong enough to ban retrospective law-making. Circumstances may arise where retrospective law-making becomes the only solution for proper functioning of the government. When such a point is reached, retrospective law-making becomes necessary.

3.5 Retrospective laws are Unjust

A claim of injustice is often raised by those affected by retrospective legislation. Although this claim is essentially based on the argument that retrospective legislation defeats reasonable expectations, it is often couched in the language of justice that retrospective laws are 'unjust' or 'unfair'. For example, David Lyons remarked that "it is generally considered unjust to penalize a person for failing to follow a law it is impossible to follow. Fairness requires that a person have fair warning- the opportunity to know what is expected of her and to decide what to do in light of that knowledge."[95] Woozley held a similar view when he observed that "while it is difficult to say what the claim of unfairness means, it is easier to say why it is unfair to hart a man in this way, viz., because a man ought to (be able to) know what the rule or the game are by which he is bound before he is expected to playing it; and he cannot know this if they have not been made up yet."[96]

Interestingly, those objecting to retrospective statutes under the injustice claim are essentially making a claim for procedural justice. However, it should be noted that procedural justice is

[94] Sen Deb 1979, Vol 82, 619-620.
[95] Lyons (n 68) 75.
[96] A. D. Woozley, 'What Is Wrong with Retrospective Law?' (1968) 18 (70) The Philosophical Quarterly 41.

not the only form of justice known to the law. Some laws, especially taxation laws, attempt to deal with distributive justice, remedial justice, or attempt to provide the necessary financial base for equality of opportunity and social *minima*.[97] This view was succinctly conceived by Isaacs J. in *Hudson* case, when he remarked that "What may seem unjust when regarded from the stand-point of one person affected, may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect; justice may be overwhelmingly on the other side."[98]

Distributive justice might be seen as served by distributing the burden of tax through a progressive system or even via a "flat" tax, in which the effective marginal rates of those on lower incomes were equal for all.[99] In the view of John Howard, it might be regarded as part of distributive justice to provide certain services to the community or to reduce the overall rate of taxation.[100] Ronald Dworkin defends retrospective tax legislation by asserting that "if they did not pay last year that is a good reason to pay more next year."[101] Munzer reiterates the need for retrospective laws under the distributive justice, when he remarked that "if a given distribution is unjust, a prospective change may confirm or even aggravate the mal-distribution. Since the general social and economic function of retroactive laws is to rearrange the social effects of earlier laws, retroactive legislation is at least a possible means to advance utility and to rectify or prevent injustice."[102] From such an understanding, it is observed that the claim of injustice is not solid enough to invalidate retrospective legislation.

A thorough analysis of the arguments against retrospective legislation indicates that none of these arguments constitute a solid basis to rule out retrospective law-making. Retrospective law-making is necessary to close loopholes in existing law, validating actions of the executive and remedying other issues in the legal system. However, it should be noted that a law does not simply operate retrospectively. For a law to operate retrospectively there should be an indication of the retrospective intent in the legislative text. A law cannot be permitted to operate retrospectively unless the drafter has clearly expressed its retrospective intent. To

[97] Rawls (n 86) 60.
[98] *George Hudson Limited v. Australian Timber Workers' Union* [1923] 32 CLR 413, 434.
[99] C. Stamford, 'Taking Rates Seriously: Effective Reductions as the Thirteenth Labour of Hercules?' (1991) 9 Law in Context 92.
[100] J. Howard, 'Second Reading Speech on the Income Tax Assessment Amendment Bill 1978' H. Reps. Deb 1978, Vol. 108, 1244.
[101] R. Dworkin, *Taking Rights Seriously*, (Duckworth, London, 1987) 84.
[102] Munzer (n 88) 450.

express the retrospective intent the drafter has to employ clarity, precision and unambiguity. The following chapter analyses the role of these legislative quality tools in attaining quality and validity of retrospective legislation.

CHAPTER 4

CLARITY, PRECISION AND UNAMBIGUITY AS TOOLS FOR QUALITY AND VALIDITY OF RETROSPECTIVE LEGISLATION

Generally, drafting retrospective statutes is not much different from drafting other legislative enactments, including those that are intended to operate prospectively. Thornton's five stages of the drafting process should be respected in retrospective drafting.[103] Other rules of legal writing such as draft in present tense, use short sentences, draft in singular, prefer active voice to passive voice… should also be highly observed.[104] The only particularity with retrospective statutes relates to their temporal operation. Whereas prospective laws affect only future events, retrospective laws affect the pre-enactment events. This explains why judicial attitude to retrospective legislation is restrictive. Whenever the drafter fails to clearly express retrospective intent, courts strictly apply the presumption that the legislator did not intend to affect the pre-enactment conduct.[105] Thus, in order to rebut this presumption, the drafter has to ensure that the retrospective intent is clearly, precisely and unambiguously expressed. The following sections examine the role of these legislative quality elements in expressing the retrospective intent, which is a pre-requisite for quality and validity of retrospective legislation.

3.1 Clarity as a tool for quality and validity of Retrospective Legislation

Legislative drafting as a form of written communication benefits from fundamental tools for effective written communication.[106] Clarity is one of the fundamental tools for effective written communication necessary for legislative quality. To serve as an effective tool, clarity requires use of understandable language.[107] Like in drafting other legal documents, clarity is required in drafting retrospective legislation. The drafter should use clear and understandable language in expressing the retrospective intent, if the law has to operate retrospectively. When retrospective intent is clearly expressed, courts usually ascribe to retrospective

[103] G.C. Thornton, *Legislative Drafting*, (4th edn, Butterworths, London, Dublin Edinburg, 1996) 128-141.
[104] *Ibid*, 54.
[105] E. J. Verlie, 'Retrospective Legislation in Illinois' (1920-1921) 3 U. Ill. L. Bull. 33.
[106] R. Penman, 'Plain English: Wrong Solution to an Important Problem' (1992) 19 (3) Australian Journal of Communication 1, 2; D. Kelly, *Essays on Legislative Drafting*, (Adelaide Law Review Association, 1988) 411; E. Tanner, 'Legislate to Communicate: Trends in Commonwealth Legislation' (2002) 24 Sydney L. Rev. 592.
[107] F. V. Nourse and S. J. Schacter, 'Politics of Legislative Drafting: A Congressional Case Study' (2002) 77 N.Y.U. L. Rev. 594.

operation of retrospective laws. This was evidenced in the application of section 58 of the Finance Act 2008 in United Kingdom. By stipulating that the amendments made by subsection (1) to (3) are "treated as always having had effect",[108] section 58 changed the pre-enactment arrangements, not just for the future, but also for the past. In an attempt to challenge retrospectivity of section 58, Robert Huitson (claimant) sought judicial review on the ground that the retrospective effect was incompatible with his fundamental right to peaceful enjoyment of 'possessions' as guaranteed by article 1 of the First Protocol to the European Convention of Human Rights. However, since the retrospective intent was clearly expressed, the court of Appeal ascribed to the retrospective operation of the section 58 without any problem.[109] The court upheld that section 58 was necessary to close down tax avoidance arrangements, by amending the definition of "partner" to include any person entitled to a share of income of the firm, and thus, had to apply retrospectively to catch arrangements entered into before the legislation was enacted.[110]

Clarity also requires that legislation be readily comprehensible to its addressees.[111] This view reiterates an idea that drafters should communicate the law in a language which the law-users are able to understand. Although Aitkens did not make it clear that the requirement of using comprehensible language applies to retrospective legislation, it should be emphasized that clear and understandable language is highly required in drafting retrospective legislation. Use of unclear language in retrospective legislation leads to difficulties in construction and as a result, affects its quality and validity. Whenever the drafter uses unclear or ambiguous language in retrospective statutes, courts fail to discern the retrospective intent and as a consequence the law is rendered impermissible. This was the case for section 127 (i) of the Comprehensive Environment Response Compensation and Liability Act (CERCLA) 1980. Paragraph (i) of section 127 provides that "the exemptions provided in this section shall not affect any concluded judicial or administrative action or any pending judicial action initiated by the United States prior to enactment of this section."[112] The Act was not only intended to apply in United States but also in other state parties to CERCLA. However, the wording of section 127 (i) was unclear as to whether this section could apply retrospectively to pending judicial actions filed by parties other than the United States. This prompted the District Court

[108] Finance Act 2008, s 58.
[109] *Huitson, R (on the application of) v. Revenue and Customs* [2011] EWCA Civ 893, [2011] All ER (D) 225.
[110] *Ibid.*
[111] J. K. Aitkens, Piesse, *The Element of Drafting*, (Sydney: Law Book Co, 1995) 2.
[112] Comprehensive Environment Response Compensation and Liability Act 1980, s 127 (i) <http://www.epa.gov/superfund/policy/remedy/pdfs/cercla.pdf > accessed 18 August 2012.

for the Eastern District of California to deny retrospective operation of section 127. The court upheld that section 127 (i) did not contain "express command" or "unambiguous directive" as to its temporal reach.[113] This indicates how unclear language affects retrospective operation of statutes. Had the drafter clearly expressed the intention to apply CERCLA retrospectively in other state parties, the Californian District Court would have ascribed to its retrospective operation. Although it was not raised in this judgment, it can be added that even if by necessary implication CERCLA could apply retrospectively, the use of "shall" in section 127 (i) could have undermined its retrospective operation. This is because courts usually take "shall" to mean that a prospective construction is contemplated.[114]

The role of clarity in attaining quality and validity of retrospective legislation is further observed in Civil Liability Legislation Amendment Act 2008 of New South Wales (Australia). This Act was an amendment to the Civil Liability Legislation Act 2002. Section 15 of the amending Act orders for payment of damages out of money held in trust for victims of offender. However, Parliament intended to award damages retrospectively. To enable such retrospectivity, schedule 1 provides that "section 15 extends to civil liability arising, and to proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement."[115] On a thorough analysis, it is observed that the statute is clear in as far as the retrospective intent is concerned. The statutory language enables the reader to understand that the law introduces liability in the pre-enactment period, except where a judgement has already been made. During our research, we were unable to find any claim filed to challenge retrospectivity of this Act. Whereas it is difficult to draw an inference from absence of litigation, one can at least admit that absence of litigation suggests clarity in expressing the retrospective intent of the Act, and hence its validity.

The above laws and related decisions justify that clarity is very essential in retrospective legislation. It helps the drafter to express retrospective intent which is necessary to rebut the presumption against retrospectivity. As Lindley L.J. observed, "it is a fundamental rule of English law that no statutes shall be construed so as to have retrospective operation, unless its

[113] *Landgraf v. USI Film Products* [1994] 511 U.S. 244.
[114] *Henry v. Ashcroft* 175 F. Supp. 2d 688 (S.D. N.Y. 2001) cited in N. J. Singer and J. D. Shambie Singer (n 5) 440.
[115] Civil Liability Legislation Amendment Act 2008, Schedule 1 part 11.

language is such as plainly to require such a construction."[116] Lord Radcliffe in *Attorney General for Canada v Hallett & Carry Ltd* also held the same view by observing that "there are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention."[117] In the view of both justices, courts will permit retrospective operation of statutes only if words of the statute clearly express such intent. This view was confirmed in *Roe*, where the court noted that "although the statute imposing an obligation to support a child born out of wedlock was intended to operate in a period preceding its effective date, the statutory language did not make it clear that retrospectivity was intended."[118] This clearly shows that unless the words of retrospective statute are clear in terms of retrospective intent, Courts will loathe against their retrospective operation. Thus, drafters should ensure quality and validity of retrospective legislation by using clear language in expressing retrospective intent.

3.2 Precision as a tool for quality and validity of Retrospective Legislation

Another important tool for quality and validity of retrospective legislation is precision. In retrospective legislation, precision serves as the drafter's tool for eradicating uncertainty in expressing retrospective intent. Failure to ensure precision in retrospective statutes leads to impermissibility of their retrospective operation or division among judges in taking decision. This was the case in applying the Human Rights Act 1998 in United Kingdom. Section 22(4) stipulates that "Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise; that subsection does not apply to an act taking place before the coming into force of that section."[119] However, this section was criticised for imprecision (uncertainty) in determining application of section 7(1) (b). Whereas paragraph (b) of subsection (1) could be construed to mean that a retrospective operation is contemplated owing to the words "whenever the act took place", the last part of the same paragraph emphasises that subsection (1) does not apply to an act that took place before its entry into force. It was due to this uncertainty that their Lordships in *Lambert* [120] and *Kansal* [121] failed to reach an agreement.

[116] *Lauri v. Renad* [1892] 3 Ch. 402, 421(Lindley L.J.)
[117] [1952] A.C 427, 449.
[118] *Department of Revenue v. Roe* [1991] 31 Mass. App. Cit. 924, 577 N. E. 2d 323.
[119] Human Rights Act 1998, s 22(4).
[120] *Lambert, R v.* [2001] UKHL 37; [2001] 3 WLR 206.

One side of the jury was in favour of a retrospective construction while another side argued that the wording of section 22(4) does not permit such construction. This indicates that the drafter's failure to precisely express retrospective intent affects the quality and validity of retrospective legislation.

Precision in expressing the retrospective intent minimises claims filed in order to challenge retrospectivity of laws. This is observed in the Police (Detention and Bail) Act 2011 in United Kingdom. This Act is an amendment to the Police and Criminal Evidence Act 1984 ("PACE"). The 1984 Act was uncertain in regard to the duration for which police could grant bail. As a result of this uncertainty, in *Hookway,*[122] the High Court granted acquittal to suspected murderer Paul Hookway. Although uncertainty in the 1984 Act did not concern its retrospective application, the High Court decision had retrospective effect and consequently a large number of persons detained under the 1984 Act could base on the precedence set by *Hookway* to claim damages for unlawful detention. Thus, the government was worried that this could give rise to thousands of claims for damages leading to huge loss on the part of the government. As a response, the government retrospectively amended the PACE. The amendment entitled "Police (Detention and Bail) Act 2011" received royal assent on 12 July 2011. To ensure precision in expressing the retrospective intent of the new Act, section 1(3) provides that the amendments made to PACE "are deemed always to have had effect".[123] To date, there is no known case filed to challenge retrospectivity of this new Act. Probably it can be predicted that the Act is of recent and this is why there is no case filed to challenge its retrospectivity. However, with this precision in expressing the retrospective intent, it can be argued that any attempt to challenge this law may not solidly stand to impede its retrospective operation. The Act is sufficiently precise for the reader and particularly the court to understand that the law is intended to operate retrospectively. In line with I.M.L Turnbull, it can be said that the Police (Detention and Bail) Act 2011 is precise enough to "resist any attack by those who try to twist the meaning of its words to suit their own ends."[124]

Precision also serves as an effective tool when the parliament wants to introduce retrospective liability without affecting the prescribed penalty. This is common in

[121] *Kansal, R v.* [2001] UKHL 62.
[122] *R (Chief Constable of Greater Manchester) v. Salford Magistrates' Court and Paul Hookway* [2011] EWHC 1578.
[123] Police (Detention and Bail) Act 2011, s 1(3).
[124] I.M.L Turnbull, 'Clear Legislative Drafting: New Approaches in Australia' (1990) 11 Stat. L. Rev. 165.

jurisdictions where the constitution prohibits subjection to harsh punishments compared to the punishments that were in existence at the time of the offence. Usually, Courts base on this constitutional prohibition of *ex post facto* laws to strike down criminal laws which retrospectively impose severe punishments. To ensure that their laws are not struck down, Parliaments sometimes introduce retrospective liability without changing the existing penalty. This was the position taken by Pakistan's Parliament in enacting Pakistan's Anti-Terrorism Act 1997. Section 38 of the Act provides that "where a person has committed an offence before the commencement of this Act which if committed after the date on which this Act comes into force would constitute a terrorist act there under, he shall be tried under this Act but shall be liable to punishment as authorized by law at the time the offence was committed."[125] According to this section, it is precisely clear that persons suspected of terrorist acts will be tried even if these acts were committed before 1997. However, if convicted they should receive punishment equal to that that was provided at the time of committing the act(s). In the course of our research, we did not find any case filed to challenge retrospectivity of this Act. However, judicial precedence in Pakistan indicates that courts ascribe to retrospective operation of statutes, if the retrospective intent is express or if by necessary intendment it is clear that the law should apply retrospectively.[126] Therefore, it is our opinion that even if a case is filed to challenge retrospectivity of this law, there is little chance that the claimant can convince the court to invalidate this Act.

Precision in relation to the time (in past) from which retrospective statutes produce effects is an important factor for their validity and effectiveness. This is because courts normally consider the backward reach of retrospective statutes to determine their reasonableness and permissibility. Where retrospective statutes go very far in past, courts usually become reluctant to apply them. This was the case in *brushaber,*[127] where the court invalidated a statute which imposed a tax on income earned between the adoption of an amendment (decision to amend) and the passage of the income tax Act (enactment) simply because it reached far in the past. On contrary, in *Reinecke,*[128] the court sustained a retrospective statute that imposed income tax on incomes earned in the year of its passage. This reminds drafters that they should precisely indicate the time from which retrospective statutes produce effects,

[125] Pakistan's Anti-Terrorism Act 1997, s 38 < http://www.ma-law.org.pk/pdflaw/> accessed 15 August 2012.
[126] *Baluch* PLD [1968] S.C. 119.
[127] *Brushaber v. Union Pac. R. Co.,* [1916] 240 U.S. 1, 36, 2926.
[128] *Reinecke v. Smith,* [1933] 1 C.B. 256, 289 U.S. 172, 53, 47.

and where possible, a retrospective law should not reach far in the past because the further it goes the more it is likely to be struck down by courts.

3.3 Unambiguity as a tool for quality and validity of Retrospective Legislation

Whenever a statutory word or phrase is liable to more than one meaning or more than one interpretation, the problem of ambiguity becomes significant. Courts fail to discern the exact meaning inferred to the word or phrase by parliament and this affects validity and effectiveness of the law.[129] Retrospective legislation, like any other form of legislation, can be ineffective because of ambiguity of words or phrases. This was evidenced in enforcing the British Columbia Labour Relations Code 1993. The Code regulates behaviours of employers and employees during authorized lockout or strike. According to section 68(1) (a) of the Code, employers were prohibited from using services of a person hired or engaged after the earlier of the date on which the notice to commence collective bargaining is given and the date on which bargaining begins."[130]

The Code came into force on January 18, 1993, at a time when the employees of the North Shore Taxi (1966) LTD (Employer) were on strike. By then, the North Shore Taxi LTD had already hired replacement workers. On January 20 1993, the Teamsters Local Union, representing the striking employees, filed a case with the British Columbia Labour Relations Board demanding retrospective application of section 68 with the aim of dismissing the hired replacement workers. In fact, section 68 was intended to protect striking employees against loss of jobs as a result of the lockout or strike. However, ambiguity in this section made them (employees) lose the case. During hearing, the Board observed that section 68 (1)(a) was ambiguous since it does not allow the reader to understand if it applies either to replacement workers hired on the date of lockout or to those who were workers at the time of lockout.[131] The Board justified its observations by quoting Driedger's example that "where a statute applies to a "person who was employed on January 1, 1970", it is impossible to tell from those words alone whether the person described is one who took employment that day (event)

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[129] Dickerson (n 35).
[130] Labour Relations Code 1993, s. 68 (1) (a) < http://www.lrb.bc.ca/guidelines/B74$93.pdf > accessed 17 August 2012.
[131] *North Shore Taxi (1966) Ltd., (the "employer") v. Teamsters Local Union No.213 (the "Union")* [1993] BCLRB N° B8/93, 18 < http://www.lrb.bc.ca/guidelines/B8$93.pdf> accessed 17 August 2012.

or one who on that day was an employee (status)."[132] Based on this example, the Board found out that the language used in section 68 could be construed in either way. The Board remarked that if the legislature intended retrospective application of the Code, it would have clearly expressed this intention as it did in Section 17 of the Labour Code Amendment Act of 1984. Because the Code did not either "expressly or by necessary implication" make section 68 retrospective, the Board concluded that section 68(1) (a) could not be applied to revoke replacement workers who were hired prior to the proclamation of the Code.[133] This decision confirms that ambiguity affects the quality and validity of retrospective statutes. If the drafter had used unambiguous language to express the retrospective intent of section 68(1) (a), the Board could have ascribed to its retrospective operation. However, since the language could not permit such a construction, the Board decided not to apply section 68 (1) (a) retrospectively.

Legal authorities have warned against ambiguous words or phrases in legislative drafting. For instance Dickerson pointed out that the word "Residence" is ambiguous since it can refer to the place where a person has his or her abode for an extended period, or to the place that the law considers to be his or her permanent home, whether or not it is his or her place of abode.[134] Equally, Xanthaki advised against phrases such as "solid wall or fence" because such phrases submit to more than one interpretation. For instance, in the above example, the word 'solid' can be taken to modify only the 'wall', in which case those persons who destroyed or damaged walls that are not solid are not affected by the statute. The word solid may also be interpreted as modifying both "wall and fence" and in this case the provision is not applicable to persons who destroyed fences, which are not solid in the sense of "without holes."[135] Although both authors were not directly concerned with retrospective statutes, it is believed that ambiguity resulting from such words or phrases equally affects the quality and validity of retrospective legislation. Therefore, it is necessary for drafters to choose unambiguous words[136] whenever they under take to draft retrospective legislation.

[132] *Ibid.*
[133] *Ibid.*
[134] Dickerson (35) 6.
[135] Xanthaki (n 11).
[136] Dworkin (n 101) 241.

3.4 Plain Language and Gender-Neutral Drafting as tools for Clarity, Precision and Unambiguity in Retrospective Legislation

Plain language and gender neutral language are viewed as true tools for achieving clarity, precision and unambiguity in drafting retrospective statutes. The nature of language used in a retrospective statute determines the degree of its comprehensibility. On the other hand, non-sexist or gender-neutral language enhances precision in respect to the addressees of the law. The following subsections explore the contribution of each of these two elements in achieving clarity, precision and unambiguity in retrospective legislation.

3.4.1 Plain Language as a tool for Clarity, Precision and Unambiguity

Drafters are required to use plain language in drafting legal documents.[137] In other words, the statutory language has to be as plain as possible to enhance comprehensibility. That said, it should be noted that the pursuit of plain language does not bind drafters to using specific words. The drafter is free to choose words and their arrangement in the bill provided the legislative text is plainly understandable. According to Elmer Driedger, "the drafter has freedom to use the fullest extent everything language permits and he must not be shackled by artificial rules and forms, and further, laws should be written in modern language and not in ancient, archaic or obsolete terms or forms."[138] Butts and Castle held the same view when they observed that "Legal document should be written in modem Standard English, that is, Standard English as currently used and understood."[139] Other legal writers also concurred.[140] Although plain language is advocated for generally, it should be emphasized that plain language is necessary in retrospective statutes. One of the roles of plain language in legislative drafting is to ensure that the will of the parliament prevails.[141] Prevalence of the will of parliament is the drafter's prime objective in drafting retrospective legislation. Use of

[137] Aitkens (111).
[138] E. A. Driedger, *A Manual of Instructions for Legislative Drafting and Legal Writing*, Book 1-6 (Canada: Department of Justice, 1970-1979) 4.
[139] P. Butt & R. Castle (n 11) 167.
[140] R. Coode, 'on Legislative Expression' (1952) 321 reprinted in E. A. Driedger, *The Composition of Legislation; Forms and Precedents*, (Ottawa: Dept. of Justice, 1976) 376; R. Thomas, *Plain Words for Consumers*: the language and layout of consumer contracts: the case for a plain language law, (Natural Consumer Council, 1984) 47; D. Mellinkoff, *The Language of the Law*, (Boston, Mass.: Little Brown, 1963) 44.
[141] J. Kennan, "The importance of Plain English in drafting" in David St L. Kelly (edn), *Essays on legislative drafting* in Honour of J Q Ewens, (Adelaide Law Review Association, 1988) 75.

unclear or ambiguous language in retrospective statutes puts retrospective statutes at the risk of invalidity, as it was the case for Haryana General Sales Tax Act 1973.

Following its formation in 1966, the Haryana State effected an amendment to the Punjab General Sales Tax Act of 1948, by Ordinance No. 2 of 1971. The Ordinance omitted the definition of "dealer" which existed in the 1948 Act. Later, the Haryana State converted the Ordinance into an Act (Haryana General Sales Tax Act, 1973). The 1973 Act broadly re-defined 'dealer' but also omitted the phrase- "that are actually delivered for the purpose of consumption" in the definition of "dealer".[142] The 1973 Act was given a retrospective effect starting from 7th September, 1955.[143] The Messrs- Birla Cotton spinning and Weaving Mills Ltd., dealt in raw cotton which they bought and exported before processing it into final consumable goods. So they had exploited the loophole to avoid tax since the creation of Haryana state. When new Act came into force with retrospective effect, Messrs claimed that since they do not "deliver for the purpose of consumption", they could not be considered 'dealer' under section 2(c) and as a result could not suffer the burdens arising from the retrospective operation of the law. The case was filed with Punjab-Haryana High Court. In its proceedings, the court upheld that parliament was competent and fully entitled to amend the definition of "dealer" in the General Sales Tax Act (1973) retrospectively. But the court was not able to determine whether section 2(c) could apply to petitioners, who did not deliver for consumption. In its decision, the court denied retrospective operation of section 2 (c) and opined that in view of the definition of "dealer", it has to be found out whether the petitioner was a dealer or not, and would be liable to pay tax only if considered to be "dealer" as defined in section 2(d) of the Punjab General Sales Tax Act, 1948.[144]

A perusal of this judgment shows that simple omission of the words "delivered for the purpose of consumption" resulted into ambiguity in the language used in section 2(c) of the Haryana General Sales Tax Act 1973, which prompted the court to invalidate the law. Had it been that the words 'delivered for the purpose of consumption' were plainly inserted in the 1973 Act, the court could have ascribed to its retrospective operation.

[142] Haryana General Sales Tax Act 1973, s 2(c) < http://www.haryanatax.com/Sales_Tax/Act_Repealed.pdf> accessed 14 August 2012.
[143] *Ibid*, s 6(5).
[144] *Birla Cotton Spinning And Weaving v. The State of Haryana and Anr*. [1978] 43 STC 158 P H.

3.4.2 Gender-Neutral Drafting as a tool for Clarity, Precision and Unambiguity

Although legal professionals advocate for gender-neutral drafting without specific reference to retrospective legislation, it has to be underlined that gender-neutral drafting is equally an essential tool for clarity, precision and unambiguity in retrospective legislation. This is more so, where a retrospective statute has general application. In such a case, gender-neutral language enables the drafter to communicate the law without creating uncertainties as to whether it applies to males only or females only or both. Whenever the addressee of the law is unsure whether the law applies to him or her, the quality and validity of such a law becomes questionable. The law may be challenged in courts of law and be struck down due to imprecision regarding its addressees. One of the ways in which drafters fail to ensure gender-neutral drafting is the use of pronouns. This is observed in the Illinois Marriage and Dissolution of Marriage Act 2000. Section 601 (b) of this Act provides that "A child custody proceeding is commenced in the Court: (1) by a parent, by filing a petition: (i) for dissolution of marriage or legal separation or declaration of invalidity of marriage; or (ii) for custody of the child, in the county in which he is permanently resident or found; (2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents ..."[145] The Act is retrospective since it stipulates that "This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered."[146]

On a critical analysis, it is observed that the Act promotes masculine rule. Use of pronouns "he" or "his" in section 601 gives an impression that only male children are legible for custody while female children have no right to custody. The logical understanding is that "he" or "his" stands for males while "she" or "her" represents females. Thus, in the event a person petitions for custody of a female child on the basis of section 601, any interested party can challenge this petition on the ground that the section does not apply to custodian of female children. It could be difficult for the court to conclude that the "he" used in paragraph (1) or "his" used in paragraph (2) includes female children. Thus, despite clear expression of the retrospective intent in section 801 (b), the Illinois Marriage and Dissolution of Marriage Act may still be invalidated due to sexist language.

[145] 750 ILCS 5, 2000, s 601 (b) <http://www.ilga.gov/legislation/> accessed 18 August 2012
[146] *Ibid*, s 801 (b).

Several other provisions of this Act were also criticized for using pronouns. In this regard, Michael L. Closen and Joan E. Maloney observed that the "The Illinois Marriage and Dissolution Marriage Act uses primarily gender-neutral pronouns in plural references to the couple seeking a licence, male pronouns when speaking of one of the parties in an individual capacity, and female gender pronouns only when discussing custody of children. Sometimes the intention of the legislature would almost seem to prefer homosexual relationship because of the pronoun usage."[147] This implies that the authors observed ambiguity in the Act. In his response, Schweikart observed that such ambiguity could have been resolved by avoiding pronouns.[148] It should also be noted that although gender-neutral drafting can be achieved by using pronouns in their plural form, such a drafting technique violates general rule that legal documents should be drafted in singular. It is preferable to repeat nouns instead of using pronouns in their plural form. From such analysis, it can be asserted that gender-neutral drafting is an important tool for achieving clarity, precision and unambiguity in retrospective legislation. Where sexist language is used, as demonstrated by the above Illinois Act, a retrospective statute fails to achieve the intended objective hence becoming inefficient.

[147] M. L. Closen and J. E. Maloney, 'The Health Care Surrogate Act in Illinois: Another reflection on Domestic Parties' Rights' (1995) 19 S. ILL. U. L.J. 479, 499.
[148] D. Schweikart, 'Gender Neutral Pronoun Redefined' (1998-1999) 20 (1) Women's Rights Law Rep. 6.

CHAPTER 5

CONCLUSION

In the course of this work, two things have apparently been observed. Firstly, retrospective law-making is practiced and widely accepted in everyday business of law-making. Secondly, an attitude of absolute opposition to retrospectivity is unwarranted. A thorough analysis of the arguments against retrospective laws indicates that these arguments are full of flaws, weaknesses and limitation. In fact, to some extent the arguments against retrospectivity can as well be used to defend retrospective law-making. For instance, the argument that retrospectivity defeats reasonable expectations would equally imply that retrospectivity is justified where an expectation is unreasonable. However, it should be advised that criminal retrospective legislation be kept to very rare cases. This is because criminal retrospective laws take away some of the important human rights, which in some jurisdictions, can go as far as taking right to life. Stamford recognised the need to restrict enactment of retrospective criminal legislation by observing that even where a fine is imposed; such a fine has a different quality compared to damages awarded in other forms of law.[149]

This work again reiterated the complexity in understanding and defining retrospectivity. A perusal in the proposed definitions reveals that the attempt to define retrospectivity saw legal authorities divided into those favouring broad definition and those in support of narrow definition. However, none of the definitions has proved comprehensive to satisfy individual perception of retrospectivity. The broad definition is criticized for failure to distinguish those statutes which are facially retrospective but which do not impair existing rights whereas the narrow definition is blamed on the ground that the distinction between retrospectivity and retroactivity is artificial since both laws affect past events. Probably, it would be advised that future researchers in the field of retrospectivity adopt Raitos' classification of retrospective laws as either "primary" or "secondary".[150] According to this classification, a law operates with secondary retroactivity if it affects the legality of past action in the future whereas a law operating with primary retroactivity alters the legal consequences of past action from a time in the past.[151] In such a way, retrospectivity remains a single term whose effects differ

[149] Stamford (14) 255.
[150] Raitos (n 4) 87.
[151] *Ibid.*

depending on the time from which a statute affects past events. Courts have always upheld such reasoning in sustaining or declining retrospective statutes.

Throughout this work, it has been observed that clarity; precision and unambiguity are true tools for quality and validity of retrospective legislation. One of the drafter's main goals is to ensure that the causes for statutory interpretation are kept minimal.[152] In retrospective legislation, clear expression of retrospective intent reduces judicial scrutiny of retrospective laws. In order to achieve express retrospective intent, the drafter has clarity, precision and unambiguity as the only appropriate tools. These elements enable the drafter to express the retrospective intent, which in turn limits the presumption against retrospectivity. That said, it should be underlined that legal experts held different views with regard to the hierarchy between clarity, precision and unambiguity. For instance, Thornton observed that "The purposes of legislation are most likely to be achieved by the draftsman who is ardently concerned to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood by affected parties, is best satisfied by writing with simplicity and precision ... A law which is drafted in precise but not simple terms may on account of its incomprehensibility, fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and the complexity is a definite step along the way to obscurity."[153] In brief, Thornton said that simplicity of the law should be the prime objective of the drafter, and hence where a drafter is confronted with choice between precision and simplicity, the latter should prevail. However, Thornton's view was declined by the judiciary. In Australia, for example, the Victorian Supreme Court was critical of an Act of the Victorian Parliament on the grounds that precision had been sacrificed in the interests of simple language. In denying the prevalence of simplicity over precision, the Court made the following remarks:

> "No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should

[152] E. Majambere, "Clarity, precision and unambiguity: aspects for effective legislative drafting" (2011) 37 (3) Commonwealth Law Bulletin 425 < http://dx.doi.org/10.1080/03050718.2011.595140> accessed on 5 July 2012.
[153] Thornton (n 103) 49.

be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by the Parliament. The courts cannot be legislators."[154]

Other legal professionals also disagreed with Thornton. In the view expressed by the Renton Report, it was pointed out that "The draftsman must never be forced to sacrifice certainty for simplicity, since the result may be to frustrate the legislative intention. An unfortunate subject may be driven to litigation because the meaning of an Act was obscure which could, by the use of a few extra words, have been made plain. The courts may hold, or a Government department be driven to conclude, that the Act which was intended to mean one thing does not mean that thing, but something else."[155]

Such disagreement between legal professionals justifies that there is no hierarchy between clarity, precision and unambiguity in legislative drafting. This holds true in drafting retrospective legislation. Whenever the drafter is asked to draft a retrospective law, he or she has to make sure that the matter is handled in a very creative manner. It is up to the drafter to develop a critical mind in analyzing the matter and to be cautious in deciding the best tool that can enable to achieve the desired objective. It should be acknowledged that like in other forms of legislation,[156] retrospective statutes can be criminal, in which case clarity become more required, or may relate to rules of evidence, in which case precision become more necessary. It should be submitted that so long as the retrospective intent is clearly expressed, it does not matter which one prevails among clarity, precision or unambiguity.

This work has also proved that to achieve clarity, precision and unambiguity in retrospective drafting, the drafter has plain language and gender-neutral language as essential tools. In retrospective drafting, plain language not only ensures that the will of the parliament prevails, but also enables the drafter to choose appropriate words and phrases in expressing the retrospective intent. This is very important in ensuring validity and effectiveness of retrospective legislation. Gender-neutral language on the other hand enables the drafter to eradicate the problem of determining whether a retrospective law applies to males only, females only or to both. The examples given indicate that a failure to ensure gender-neutral drafting affects clarity, precision and unambiguity of retrospective legislation. Moreover, it

[154] *R v. O'Connor* 1[1987] VR 496 <http://0-login.westlaw.co.uk.catalogue.ulrls.lon.ac.uk > accessed 17 August 2012.
[155] Commonwealth Law Report (20) para. 11.5.
[156] Xanthaki (n 27) 11.

has been submitted that the drafter should never fear to repeat the noun as many times as necessary if that serves to achieve clarity, precision or unambiguity.[157] Although critics of gender-neutral drafting say that it defeats simplicity,[158] this argument is weakened by the fact that the drafter's goal is to achieve effectiveness rather than simplicity.[159] Thus, where pronouns lead to ambiguity (hinders effectiveness), the drafter is free to repeat the noun until the provision is reasonably clear, precise and unambiguous. In this context Russell suggested that "if any conceivable ambiguity is caused by the use of a pronoun, 'he', 'him' or 'his', the noun to which it refers should be repeated."[160]

In brief, it can be concluded that unless the drafter is capable of using clear, precise and unambiguous language in a retrospective statute, the statute can never be expected to achieve the intended purpose. As observed throughout this work, courts often sustain retrospective legislation in which the retrospective intent is expressed in clear, precise and unambiguous words. Conversely, where the retrospective intent is ambiguously or imprecisely declared, retrospective statutes were found to be of poor quality and rendered invalid. This implies that the drafter should always make sure that the retrospective intent is plainly expressed, if retrospective statutes are to stand unchallenged in the courts of law.

Finally, it is pertinent to highlight that this work has not discussed retrospectivity of delegated legislation. Although a study of retrospective delegated legislation was deemed to be outside the scope of this research, future researchers may take an interest the validity of retrospective delegated legislation. Although the effects and criticisms are likely to remain more less the same as in primary retrospective legislation, validity of retrospective delegated legislation may be questionable. Should the parliament delegate the power to legislate retrospectively? Future researchers may wish to investigate more into this virgin area of law and possibly come up with interesting findings.

[157] A. Russell, *Legislative Drafting and Forms*, (4th edn Butterworth & Co Publishers Ltd, London 1938) 103.
[158] D.T. Kobil, 'Do the Paperwork or Die: Clemency, Ohio Style?' (1991) 52 (3) Ohio State L. J. 664–5; W. R. LaFave and A.W. Scott, *Criminal Law*, (West Publishing Company, (St Paul, MN 1986) preface; Thornton (103) 60; Schweikart (n 148) 7–8.
[159] Kabba (n 41) 432.
[160] Russell (n 157).

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